

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.10.2016

+ **O.M.P. (COMM.) 372/2016 & IA No.9484/2016**

RAIL LAND DEVELOPMENT AUTHORITY

..... Petitioner

versus

BHAGWATI RAIL INFRA PVT. LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Amit Kumar and Mr Shaurya Sahay.

For the Respondent : Mr Arunav Patnaik and Ms Bhabna Das.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner, Rail Land Development Authority (hereinafter 'RLDA'), has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') for setting aside the award dated 30.04.2016 (hereafter 'the impugned award') passed by the Arbitral Tribunal (hereafter 'the Tribunal') constituted by Mr. Chander Parkash, Mr. M.R. Garg and Mr. S.P. Mehta (presiding). By the impugned award, the Tribunal has adjudicated the disputes raised by Bhagwati Rail Infra Pvt. Ltd (hereinafter 'BRIPL') – a company incorporated under the Companies Act, 1956 – in respect of a Development Agreement dated 06.02.2013 entered into between the parties for development of a Multifunctional Complex (MFC) over Railway's land at Jhansi railway station.

2. RLDA is a statutory authority set-up to undertake development of vacant lands of the Railways for commercial use on behalf of the Ministry of Railways (hereinafter 'Ministry') to generate revenue through non-tariff measures. In the month of October, 2010, RLDA had invited bids by way of a Request For Proposal (RFP) document issued for development of MFC over the Railway's land at Jhansi Railway Station. Clause 18 of RFP provided that land area of the site for development of MFC shall be leased to the successful bidder for 45 years. The successful bidder was to be selected on the basis of the highest offer for upfront premium and subsequent annual lease rent. Further, the successful bidder was required to sign the Development Agreement and Lease Deed before the site was handed over to it. The RFP contained a schedule of payment of lease premium including a clause that the agreement shall be signed only after the selected bidder had paid the entire lease premium or paid the first installment of lease premium and furnished bank guarantees for subsequent installments.

3. BRIPL offered an upfront premium of ₹7,83,00,000/- and an annual lease rent of ₹50,00,000/- per year. BRIPL's bid was accepted and accordingly, RLDA issued a Letter of Acceptance (LOA) dated 20.01.2011 confirming its acceptance of the above offer.

4. After receiving the LOA, BRIPL deposited a sum of ₹2,34,90,000/- on 02.04.2011 as the first installment towards lease premium. According to the payment terms, the second and third installments were to be paid on 02.04.2013 and 02.04.2014 respectively.

5. On 27.05.2011, BRIPL submitted a Performance Bank Guarantee (PBG) and five Bank Guarantees (BGs) issued by the Bank of India for securing the payment of the second and third installments. However BRIPL did not furnish any BG for securing the payment of interest as it planned to market the site and generate funds in the interest free period of one year - that is, from 02.04.2011 to 02.04.2012 - and to pay both the second and the third installments within the said period to avoid paying interest on the same.

6. Despite paying a part of the upfront premium and securing RLDA for the balance installments, RLDA failed to execute the Development Agreement and hand over the site to BRIPL. By its letters dated 07.09.2011, 14.09.2011, 19.09.2011 and 10.10.2011, BRIPL pointed out to RLDA that because of RLDA's failure to do the needful, it was losing out on the interest free period available and therefore, requested RLDA to execute the Development Agreement and Lease Deed and handover the MFC site, free of encumbrances.

7. On 11.10.2011, RLDA issued a communication to BRIPL stating its inability to proceed with the execution of the Development Agreement as it had received an advisory from the Ministry on 30.03.2011, which *inter alia* stated that “*handing over the possession of land in all cases (including cases where developers have been fixed, but the possession of land has not been made and the signing of the Lease Agreement has not been made over) the signing of the Development Agreement thereof is to be undertaken by the RLDA only after the approval of the Cabinet for leasing of the land for the same has been received and communicated to the RLDA.*”

8. Even while the aforesaid embargo was continuing, RLDA by its letter dated 28.03.2012, directed BRIPL to pay the second and third installments of lease premium by 01.04.2012 to avoid invocation of the BGs furnished by it. BRIPL objected to the same and by its letter dated 30.03.2012 requested for the return of the BGs assuring that they shall be re-submitted after RLDA gets a clearance from the Ministry to go ahead with the project. In response thereto, RLDA dropped its request for payment of the second and third installments and released the BGs to BRIPL.

9. Thereafter on 02.08.2012, a Press Release was issued from the Prime Minister's Office, which lifted the requirement of a Cabinet approval for transfer of lands, etc. This was communicated by RLDA to BRIPL by its letter dated 24.08.2012, which was received by BRIPL on 03.09.2012.

10. After receipt of the aforesaid communication, BRIPL requested RLDA to adjust the timelines for payment of the first, second, and third installments and also to grant one year interest free period, as per the original terms of RFP. BRIPL reasoned that it had made its offer for paying the premiums on the basis of the terms of the RFP and on an assumption that it would have a period of one year to generate funds from marketing the project, thus, enabling it to pay the second and third installments of premium without payment of interest. However, RLDA declined to adjust this period of 1½ years and kept the dates for payment of the first, second and third installments as per the original schedule.

11. On getting clearance from the Ministry, RLDA asked BRIPL to submit the BGs for the second and third installments along with BGs for interest. BRIPL informed RLDA by its letter dated 11.09.2012 that it was prepared to re-submit the BGs for only the principal amount and requested RLDA to change the timelines to provide for one year interest free period for paying the second and third installments; but, this was not acceptable to RLDA and by a communication dated 30.10.2012 RLDA called upon BRIPL to furnish the BGs within two weeks failing which it would cancel the LOA and the same would be followed by termination of Contract and forfeiture of the bid security.

12. Thereafter, on 21.12.2012, BRIPL gave a notice to RLDA of a dispute under Article 27(3) of RFP document and asked for conciliation of the said disputes. BRIPL also requested that the period from 27.06.2011 till completion of the required documentation be treated as null & void and the benefit of interest free period be appropriately extended. This requested was not acceded to and RLDA issued another letter dated 10.01.2013 again advising BRIPL that if the BGs - including BG for interest - were not submitted by 22.01.2013, it would cancel the LOA followed by termination of Contract and encashment of PBG.

13. In view of the above, BRIPL re-submitted the BGs towards second and third installments along with BGs for interest but the same were furnished under objection.

14. After receiving the BGs, the Development Agreement was executed on 06.02.2013 - without changing the timelines as requested by BRIPL –

followed by the execution of the Lease Deed on 25.02.2013. The site in question was handed over to BRIPL on the same date, that is, 25.02.2013.

15. Although, BRIPL had submitted the BGs, it pursued with its claims and again wrote to RLDA on 27.02.2013 and 11.03.2013 seeking resolution of the disputes with respect to the interest free period and other financial losses. On 21.03.2013, a Conciliation Committee was formed by RLDA for resolving the disputes, however, the conciliation proceedings failed.

16. Pending commencement of the conciliation proceedings, RLDA threatened invocation of the BGs for second and third installments of premium. This led BRIPL to move this Court by way of a petition under section 9 of the Act - OMP no. 277/2013 - seeking an order restraining encashment of the BGs; and, by an order dated 18.03.2013, the said petition was allowed.

17. As per the terms of the Development Agreement, the development plans (hereafter 'plans') were to be submitted to the Nodal Officer of RLDA for its approval within two months of the execution of Development Agreement. The Development Agreement also provided that the plans submitted should be approved within one month of the date of submission; that is, by 08.04.2013 since BRIPL had submitted the plans on 08.03.2013. Initially certain deficiencies in the plans were conveyed by RLDA to BRIPL and it is stated that the same were rectified. Thereafter further deficiencies were pointed out from time to time and it is stated that the same were rectified as well but RLDA continued to raise further issues regarding the plans; consequently, BRIPL approached RLDA for

conciliation to resolve the dispute of approval of plans. As the disputes remained unresolved, BRIPL approached this Court by another petition under section 9 of the Act (OMP no. 772/2013) for resolving the dispute of timelines and approval of the plans.

18. In the meantime, BRIPL invoked the arbitration clause on 08.01.2013, which was followed by reminders sent on 22.07.2013 and 14.08.2013. BRIPL's request for arbitration was accepted by RLDA and the Tribunal was constituted on 19.11.2013.

19. This Court vide separate orders dated 27.11.2013 transferred OMP Nos. 277/2013 and 772/2013, to the Tribunal by directing that the same be treated as applications under Section 17 of the Act and the order restraining encashment of BGs was ordered to continue to operate pending disposal of the applications.

20. The Tribunal held its first meeting on 17.12.2013, however, before it could proceed further, RLDA terminated the Development Agreement on 30.12.2013 whereupon, BRIPL filed another petition under section 9 of the Act in this Court - OMP no. 23/2014- wherein by an order dated 06.01.2014, this Court directed BRIPL to deposit the amount of second installment with RLDA in three installments by 31.03.2014 and further directed that BRIPL will not be dispossessed of the site till further orders of the Tribunal in this regard. By the same order, OMP no. 23/2014 was also directed to be treated as an application under Section 17 of the Act.

21. The Tribunal vide order dated 04.03.2014 stayed the termination of the Development Agreement pending disposal of the main issue before it.

RLDA appealed against the order of stay before a Division Bench of this Court which was dismissed by an order dated 16.04.2014.

22. Thereafter, by an order dated 05.05.2014, the Tribunal confirmed the stay on the invocation of BGs till the final disposal of the main case before it on the condition that BRIPL keep the BGs alive during the said period. On 19.06.2014, the Tribunal passed an order for suspension of timelines till the final disposal of the case. It was also directed that plans should be approved immediately as per the timelines already set, that is, BRIPL to submit the plans within 15 days- as approved by the Arbitral Tribunal - and the same be approved within a period of 15 days thereafter.

23. The Plans were accordingly submitted and after a number of sittings with RLDA, as per the order of the Tribunal, the final plans were submitted on 21.08.2014.

24. RLDA challenged the aforesaid decision of the Tribunal before this Court which was dismissed by an order dated 04.02.2015. RLDA carried the matter to the Supreme Court by way of a Special Leave Petition which was also dismissed by an order dated 03.07.2015.

25. As RLDA was not approving the plans, BRIPL submitted new plans on 24.12.2014 and the same were approved on 20.07.2015, that is, after a gap of seven months. Despite such approval, the construction of MFC could not progress as the plans were approved with certain riders, imposing certain conditions due to which BRIPL could not raise the necessary finances and also could not market the MFC to generate funds. The Tribunal set aside those riders by its order dated 17.08.2015.

26. Before the Tribunal, BRIPL had *inter alia* prayed as under :-

“(a) grant the benefit of the 1 year interest free period under the RFP and Development Agreement to the Claimant from the date on which the Claimant is permitted to commence development activities on the site, and accordingly extend timelines for payments under the contract;

(b) exclude the delay on the part of the Respondent in handing over an encumbrance free site and the time taken by the Respondent to approve the development plan of the Claimant, from the timelines for construction under the contract;

(c) exclude the delay by the Respondent in executing the lease Deed and handing over an encumbrance free site as well as the time taken by the Respondent in approving the development plan, from the lease period of 45 years and extend the same accordingly;

(d) direct the Respondent to approve the development plan of the Claimant and to allow the Claimant to commence the Construction of the MFC in accordance with the said plan, and subsequently, permit the Claimant to develop Phase-II of the MFC;

e) quash the notice of termination dated 30.12.2013 issued by the Respondent;”

27. After examining the relevant facts and circumstances and after considering the rival contentions, the Tribunal held that RLDA has failed to discharge its obligations under the contract by delaying the execution of the Development Agreement and the Lease Deed; by delaying the handing over of the MFC site; and by delaying approval of the plans. The contention of RLDA that the Development Agreement was signed by BRIPL with open

eyes without any element of fraud or coercion on the part of RLDA and thus the BRIPL was bound by the same was found to be unsustainable. The Tribunal found such stand to be contrary to the Contract conditions and other documents, which clearly provided that any delays caused by RLDA would be suitably adjusted. The clause referred by the Tribunal to arrive at the aforesaid conclusion is set out below :-

“The Developer shall be obliged to complete the Project latest by the Guaranteed Date of Project Completion and shall obtain Project Completion Certificate. Upon occurrence of a RLDA Event of Default or Force Majeure Event, which substantially prevents the Developer from achieving the Project Completion Date by the Guaranteed Date of Project Completion (subject to the Developer having complied with all its obligations set forth herein), the Developer shall be entitled to a day by day, extension equivalent to the time taken by the' RLDA to complete its obligations hereunder.”

The Tribunal held that a delay of 02 years and 04 months was attributed to RLDA and accordingly, revised the timelines qua the dates for payment of installments, interest free period, payment of lease rent and the dates for the construction period.

28. The Tribunal also directed RLDA to pay a sum of ₹1,23,37,799/- within two months of the date of impugned award, and further directed that the amount awarded would carry a simple interest of 15% p.a, from two months of the date of the award till the date of payment of the amount.

29. Further, the Tribunal also found the action of RLDA in terminating the agreement as impermissible and, accordingly, set aside the letter terminating the Development Agreement.

Submissions

30. Mr Amit Kumar, the learned counsel appearing for RLDA contended that the impugned award was liable to be set aside as it had merely reiterated the earlier orders passed under Section 17 of the Act, being order dated 04.03.2014, staying the termination of the DA; order dated 05.05.2014, staying the encashment of the BGs; order dated 19.06.2014 regarding suspension of time lines for payment of installments; order dated 21.10.2014 regarding setbacks and built up area and orders dated 25.05.2015 and 17.08.2015 regarding approval of development plans. He contended that the impugned award was thus unreasoned and was liable to be set aside on the said ground alone. Mr Kumar contended that the impugned award was contrary to the express terms of the Development Agreement as the dates on which the second and third installments were to be paid for the upfront lease premiums were specified in the Development Agreement and the Tribunal had no jurisdiction to extend the timelines. He contended that it was not disputed that the installments had not been paid on the dates so specified and the Tribunal did not have any jurisdiction to go beyond the terms of the Development Agreement. He earnestly contended that extension of the timelines specified under the Development Agreement amounted to re-writing the contract which is beyond the jurisdiction of the Tribunal.

31. Mr Kumar further contended that the impugned award was contrary to the Specific Relief Act, 1963 as it effectively directed specific performance of the Development Agreement, which was a determinable contract. He referred to the decision of the Supreme Court in **Indian Oil**

Corporation Ltd. v. Amritsar Gas Service and Ors.: (1991) 1 SCC 533 in support of his contention that an Arbitrator could not grant specific performance of a determinable contract.

32. The learned counsel appearing for BRIPL countered the submissions made on behalf of RLDA. He submitted that the contentions advanced by Mr Kumar had been considered in detail by the Tribunal and the impugned award was neither perverse nor patently illegal and thus was not amenable to judicial review. He contended that Mr Kumar was seeking to re-agitate the matter before this Court and the same was impermissible. He further advanced contentions in support of the impugned award.

Reasoning and Conclusion

33. At the outset, it is necessary to state that the scope of interference to any arbitral proceedings is highly restricted. Section 5 of the Act enacts a *non obstante* provision and expressly provides that notwithstanding any other provisions of law no judicial authority shall intervene in matters governed by Part-I of the Act except where so provided in Part-I of the Act. By virtue of Section 34 of the Act, a recourse to this Court is available for setting aside the Arbitral Award *albeit* on the limited grounds as specified under Section 34(2) of the Act. There is no controversy that the Tribunal was duly constituted and its decision is within the scope of the disputes referred to it. It is RLDA's case that the impugned award is liable to be set aside under section 34(2)(b)(ii) of the Act; that is, the impugned award is in conflict with the public policy of India. It is further urged that the impugned award suffers from patent illegality.

34. Before proceeding further to examine the rival contentions, it would also be necessary to refer to the explanations to Section 34(2)(b)(ii) of the Act, which were inserted by virtue of the Arbitration and Conciliation (Amendment) Act 2015. The said explanations read as under:

"Explanation 1.-- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian Law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

35. Prior to 23.10.2015 - the Arbitration and Conciliation (Amendment) Act 2015 coming into force-the explanation to section 34(2)(b)(ii) read as under:

"Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

36. Section 34(2A) of the Act-as introduced by virtue of the Arbitration and Conciliation (Amendment) Act 2015 - also clarifies that arbitral award may be set aside if the Court finds that the award is vitiated by patent

illegality. However, the proviso to sub-Section 34(2A) of the Act further restricts the scope of Section 34(2A) of the Act by providing that an award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence.

37. It is the case of RLDA that the impugned award suffers from patent illegality as the relief granted according to RLDA by the Tribunal is in the nature of directing specific performance of a contract, which by its nature is determinable. It was earnestly contended that even if the Tribunal found that the termination of the Development Agreement was illegal, it could have awarded damages but it was not within its jurisdiction to set aside the letter of termination and direct the performance of the Development Agreement.

38. The Tribunal had considered the aforesaid contention and by an order dated 04.03.2014 (pursuant to hearing held on 27.02.2014 and 04.03.2014) came to a conclusion that the Development Agreement involved transfer of rights in the immovable property for a period of 45 years and thus the said contract fell within the scope of the Explanation to Section 10 as well as Section 14(3) of the Specific Relief Act, 1963. The aforesaid conclusion of the Tribunal that the contract in question entails transfer of rights in immovable property cannot be disputed. The contract in question entails construction of building on a plot of land and further entails BRIPL acquiring interest in the said property. In the aforesaid context, the conclusion of the Tribunal that damages do not provide an adequate remedy and the case is covered within the Explanation to Section 10 of the Specific Relief Act, 1963 is certainly a plausible view and would

not be amenable to judicial review. In the circumstances, it is difficult to accept that the impugned award suffers from patent illegality inasmuch as the Tribunal has directed the performance of the Development Agreement. Thus no interference in the impugned award is warranted even if the statutory amendments as introduced by Arbitration and Conciliation (Amendment) Act 2015 are ignored.

39. It is also noteworthy that BRIPL had taken further steps and entered into agreements with third parties intending to sub-lease a part of the MFC. BRIPL has already commenced construction of the building and is significantly committed to the performance of the Development Agreement.

40. It was contended on behalf of RLDA that since the installments had not been paid on or before the due dates as specified in the Development Agreement, RLDA was entitled to terminate the Development Agreement and the Tribunal's decision in not holding the same amounted to re-writing the contract. In my view, the aforesaid contention also cannot be accepted as it completely ignores the context of the entire dispute agitated before the Tribunal. The only reason stated by RLDA for termination of the contract was non-payment of the installments of the upfront lease premiums on or before the specified dates. The question whether the amounts were payable on the dates as specified was the principal dispute before the Tribunal. BRIPL had furnished the BGs for payment of the installments but it claimed that the same were not payable on the dates specified in the Development Agreement in view of the delays caused by the RLDA. This Court, *prima facie*, found merit in BRIPL's contention as is apparent from

the fact that this Court had stayed the encashment of the bank guarantees (in OMP no. 277/2013). As stated earlier, the issue whether the timeframe for payment of installments ought to be extended on account of delays was the subject matter of dispute between the parties. Having failed to persuade this Court to encash the BGs, RLDA took the next step of terminating the Development Agreement for the same reason for which it was seeking encashment of the BGs, namely, for non-payment of second and third installments. It is in the aforesaid context, that the Tribunal held that there was no question of termination of the Development Agreement for non-payment of second and third installments, which were anyway secured by way of BGs. It is further relevant to note that the dispute was also raised before this Court in a petition under Section 9 of the Act (OMP no. 23/2014) and in that proceedings, BRIPL agreed to pay the second installment in the sum as specified in the order dated 06.01.2014. Indisputably, the said payment was paid by BRIPL.

41. The Tribunal also noted that although the Development Agreement specified the dates for payment of second and third installments, BRIPL had prior to the execution of the Development Agreement had protested about the said dates and on 21.12.2012 had already given a notice of disputes under Article 27(3) of the RFP. Further BRIPL had not given up the disputes while executing the Development Agreement and had objected at the relevant time. Even after entering into the Development Agreement, BRIPL continued to protest and agitate the dispute as to the payment schedule. In the aforesaid context, the Tribunal proceeded on the basis that the timelines as specified in the Development Agreement were subject to

the resolution of disputes. It also cannot be ignored that BRIPL's bid had been accepted by RLDA and BRIPL had already paid the first installment on 02.04.2011. In the aforesaid context, it is difficult to accept that the impugned award is in conflict with the public policy of India or in contravention of the fundamental policy of Indian law or is patently illegal.

42. RLDA's contention that the Tribunal has rewritten the contract by extending the timeline and, thus, the impugned award is liable to be set aside, is also not persuasive. As explained by the Tribunal, it has not rewritten the contract but only extended the timelines by way of providing remedy on account of delays caused by RLDA. The Tribunal has addressed the disputes by providing a pragmatic manner for implementation of the contract in question. The Tribunal as a matter of fact found that there were delays on the part of RLDA. And, thus, the extension of timelines is the only methodology to provide a remedy for the said delays. Undoubtedly, quantifying damages on account of delays would also have been one method of providing relief but in the given circumstances where the Tribunal found that RFP itself provided that timelines could be adjusted in certain circumstances contention that the impugned award is outside the scope of the agreement between parties cannot be readily accepted. I am unable to accept that the aforesaid approach is in conflict with the public policy of India or is contravention of the fundamental policy of Indian law.

43. The Tribunal found that there had been delays on the part of RLDA and in my view such findings are supported with cogent reasons. It is well settled that a court while considering a petition under section 34 of the Act

does not act as an appellate court to re-evaluate the evidences or the merits of the decision. As long as the approach of the arbitral tribunal is not capricious and its findings are not perverse, any interference with an arbitral award would not be warranted. A court will not supplant its views over the view of the arbitral tribunal. In my view, the aforesaid findings of the Tribunal cannot be stated to be perverse and therefore, the same are not amenable to review under Section 34 of the Act.

44. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:

“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 score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

45. Lastly, it was contended that the Tribunal had grossly erred in deciding the controversy regarding the plans as the same were contrary to local building bye-laws. It is seen that the disputes regarding plans were also subject matter of orders dated 19.06.2014 and 21.10.2014 passed by the Tribunal. The aforesaid orders were subject matter of appeals preferred

by RLDA under Section 37 of the Act (being Arb. A nos. 28/2014 and 36/2014). This Court after considering RLDA's contention, disposed of the aforesaid appeals by an order dated 04.02.2015. It is seen from the said order, that the Court had examined the issue on merits and held as under:-

“20. As far as Arb. A. No. 28 of 2014 is concerned, the grievance of the RLDA is that the AT failed to appreciate that the BRIPL had not submitted the development plans as per the DA. Consequently according to RLDA, the AT erred in holding that the setbacks proposed by the BRIPL were in order. As per the plan submitted by BRIPL, the set back at the rear of the building was 1.95 m and 2.45 m in the front whereas the local bye laws mandated 6 m set back both in the front and 3 m set back on the remaining sides of the building of a height up to 10.5 meters. It is further submitted that the AT also erred in holding that the area of atrium which had to be deducted to arrive at the built up area within the meaning of permissible built up area. This was contrary to the local bye laws which did not permit provision of atrium in buildings having less than 4,000 sq.m. area. It has been pointed out that BRIPL was permitted to construct only 2400 sq.m. built up area.

21. BRIPL is also aggrieved by the interim order dated 19th June 2014 of the AT and its reiteration by the subsequent order dated 21st October 2014 to the extent that it holds that in addition to the undisputed items of the carpet area, balconies and passage, the items of staircases, corridors all in the main building (excluding the basement) are to be considered part of the built up area. The contention of the BRIPL is that in terms of the DA the “other areas” can also be let out to third parties on licence basis to generate short term revenues. Going by the impugned order of the AT, there would be no “other areas” at all and this would take away from BRIPL the option of revenue generation. BRIPL relied on the dissenting note of third Member, Mr. M.R. Garg who has held that the other area ‘section 1.1.65’ is to be deducted from the total construction area to arrive at the build up area.

22. One issue that has arisen in both appeals is whether the local bye laws apply and to what extent. As noted by the AT in its order dated 21st October 2014, the Jhansi Development Authority had itself confirmed that the local bye laws need not apply to Railway operational buildings. Section 1.1.10 of the DA defines 'Built up area' as under:

“Built up area is the total constructed area under roof on a given piece of land which shall include carpet area, thickness of walls, balconies, staircases, corridors, passages, but shall not include area under basement if the basement is solely intended for parking use and areas for provision of electrical and mechanical building services such as lifts, generator, air conditioning plant, power sub-station.”

23. Section 1.1.65 of the DA defines “other area” as under:

“Other area” shall mean and include the basement, terrace, common space (both covered and open), atrium, corridors (both covered and open), drive way, outer facade, inner walls, elevator doors, stair cases, green areas, car parking spaces, tatum poles, signage area, etc. and also any other open or covered spaces within the site which is not covered in the definition of Built up area.”

24. It was contended by BRIPL that “staircases, corridors and walls” were appearing in both the definitions. The AT noted Section 1.2.13 of the DA which states that the rule of interpretation which requires that an agreement be interpreted against the person or party drafting it shall have no application in the case of the DA. The AT has analysed the two questions and come to the conclusion that it is possible to have staircases, corridors and walls even in the 'other area'. The definition of 'built up' area in Section 1.1.10 was unambiguous and consistent with the trade practice whereby staircases, corridors and thickness of walls were also considered as part of built

up/super area. The AT went by Section 28 (3) of the Act which stipulates that the AT should decided in terms of the contract and “take into account the usage of the trade applicable to the transaction.” It was accordingly concluded that the built up area for the purposes of Section 6.2 of the DA was to be calculated on the basis of the Section 1.1.10 of the DA. Lifts and atrium were to be excluded from the built up area as they were not specifically included in the definition of the ‘built up area’. However undisputed items like the carpet area, balconies, passage, items of staircases, corridors and thickness of walls in the main building (excluding the basement) were to be considered as part of the ‘built up’ area.

25. The Court is unable to find any error in the above analysis of the clauses of the contract by the AT or its reasoning and conclusion on the issues of built up area and other area.

26. On the issue of set-backs, the Court finds that these were based on practical considerations. The AT invited the Architect of BRIPL to give its expert opinion in the matter. It was on that basis that the running of timelines under Clause 7 of the agreement was directed to remain suspended. The AT concluded that the set outs proposed by BRIPL were in order.

27. The Court finds that again the AT has adopted a reasonable approach after inviting the views of the experts on the issue of set-backs. The AT has also found that the local bye laws were not applicable to Railways operational buildings. If the set-backs were to be in terms of local bye laws, it would reduce the width of the building considerably. Moreover, the Development Authority in Jhansi by a letter dated 31st May 2013 addressed to BRIPL confirmed that the local bye laws did not apply to Railways operational buildings. Therefore, the AT found it desirable to have a minimum practicable set back in the front and rear of the building. However for the sides of the building, the set-backs could be more than the minimum shown in the local bye laws. The AT passed the impugned order to the above

effect on 19th June 2014 since that approach was accepted by both parties.

28. On the issue of set-backs again this Court does not find any grounds made out for interference. The Court also does not find any error in the impugned order to the extent that the timelines in Clause 7 have been suspended. Considering that the entire project has been delayed and the technical issues are being worked out by the AT in hearings, the AT was in the best position to take a call on this aspect as well.

29. The only part that now remains to be considered is whether the decision of the AT that local bye laws for construction of buildings would be followed “as applicable to commercial complex.” It is seen that the AT has consistently held in the order dated 19th June 2014 and the subsequent order dated 21st October 2014 that the local bye laws need not apply to Railway operational buildings. It is observed in the order dated 19th June 2014 that local bye laws for construction of buildings as applicable to commercial complex would be followed, has to be understood in the context of ensuring that the best practice in this regard is followed. Wherever the local bye laws provide a higher and better standard in terms of safety requirements, then such standards would be followed.”

46. As is apparent from the above, this court had examined the controversy on merits and found that no interference was called for. In any view, it cannot be disputed that the Tribunal’s view is a plausible view and thus, cannot be stated to be perverse or in conflict with the public policy of India.

47. Before concluding, it is relevant to observe that the foundation of dispute resolution by arbitration, is the acceptance by the parties concerned

that they would be bound by the decision of the forum of their choice. In the present case, the parties have already approached this court on more than three occasions, albeit, at an interim stage. The entire purpose of referring the disputes to arbitrators would be frustrated if the parties are permitted to re-agitate their disputes in courts.

48. In view of the above, I find no reason to interfere with the impugned award. The petition is, accordingly, dismissed. Pending application is also disposed of.

OCTOBER 24, 2016
MK

VIBHU BAKHRU, J

