IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1601 OF 2015

Municipal Corporation of Greater Mumbai ….Petitioner

Vs.

M/s. DO-IT Computer JV ….Respondent

Ms. Rajani Iyer, senior advocate a/w. Mr. Sandeep Patil and Mr. Ravi Sirsikar i/b. U.H. Deshpande and Co. for the petitioner.
Mr. Aspi Chinoy, senior advocate a/w. Mr. Simil Purohit and Mr. Suraj Iyer i/b. Ganesh & Co. for the respondent.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 24th NOVEMBER, 2016
PRONOUNCED ON : 5th DECEMBER, 2016

P.C.

1 For the ease of understanding and convenience, the petitioner herein is referred to as BMC and the respondent herein is referred to as Contractor.

2 BMC has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996, as amended (the said act) impuging an award dated 14th May, 2015 passed by the Sole Arbitrator – Mr. Justice S.M. Jhunjhunuwala (retired).

3 On or about 14th February, 2006, BMC invited tenders for the work of design, supply, installation, commissioning, operation and maintenance of "Mechanized Refuse Transfer Station" (MRTS) at the Mahalaxmi site, to deal with Municipal waste, on "Built Own and Operate"

(BOO) basis for a period of 10 years. The Contractor's bid was accepted and work order dated 9th November, 2006 came to be issued by BMC to the Contractor.

4 Disputes arose between the parties and the Contractor filed Writ Petition No.3396 of 2013 in this court. By an order dated 26th June, 2014, this court, by consent of the parties, constituted the Arbitral Tribunal of the Sole Arbitrator to adjudicate and decide the disputes between the parties. 4th July, 2015 is the date the Arbitrator entered into reference.

5 The Contractor filed its statement of claim and BMC filed its statement of defence. The Contractor also filed two compilations of documents followed by an additional compilation of documents. This additional compilation of documents contained documents that the Contractor obtained by applying to BMC under Right to Information Act, 2005 (RTI). BMC did not file any compilation of documents. All the documents filed by the Contractor were, by consent of the parties, taken on record as admitted in evidence as both the parties informed the Tribunal that they did not intend to lead any oral evidence. The Arbitrator heard the counsel for the Contractor to which the counsel for BMC replied followed by rejoinder from the counsel for the Contractor. I have stated this background because one of the ground of challenge is that the Arbitrator could not have relied upon the internal documents of BMC that the

Contractor obtained under RTI to come to his conclusion in his award. This ground, it does not appear to have been taken before the Ld. Arbitrator.

6 By consent of the parties, the following issues were settled :

> “(i) Whether the claimant proves that there is a delay of 25 months for commencement of the contract work for reasons attributable to the respondent and if yes, whether the claimant is entitled for the claim of idle period?
>
> (ii) Whether the claimant proves that it is entitled for revision of rate of per MT as claimed and if so, at what rate?
>
> (iii) Whether the claimant proves that they are entitled for rates as stipulated under the Tender document?
>
> (iv) Whether the claimant proves that during the delayed period, it was entitled to 5% linear escalation rate and if yes, whether the claimant proves that the same is applicable for use of JCB also?
>
> (v) Whether the claimant proves that the use of JCB post the commencement of MRTS was necessary at the instance of the respondent?
>
> (vi) Whether the claimant proves that it had to use private weight bridges as there was no adequate facility available for vehicles for weighment at dumping yard for commencement of the MRTS at the dumping yard?
>
> (vii) Whether the claimant proves that it is entitled for interest and if so, at what rate?
>
> (viii) Whether the respondent proves that the delay occasioned due to the work was not attributable to the respondent?
>
> (ix) Whether the respondent proves that the claimant failed to comply with tender requirements in so far as the same are concerned with regard to hopper designs/installation?
>
> (x) What award?”

7 Ms. Iyer, learned senior counsel for BMC at the outset stated that BMC have no grievance with the conclusions of the Arbitrator with

regard to issue no.6 above and BMC was accepting to pay the sum of Rs.15,24,470/- with interest @ 15% p.a. from 4th July, 2014 till payment/realisation, whichever is earlier.

8 The clauses which are relevant for this dispute are clause nos.10 and 11 of the tender documents which read as under :

> *"**10. Mobilization Period :***
>
> *After award of contract, the contractor shall be provided a mobilization period of maximum 6 months from the date of issue of the letter of acceptance for making necessary financial arrangements for purchase of the new machine. The contractor is required to submit the purchase order copy of transfer station equipment on the manufacturer along with the advance payment to the manufacturer for the same within one month of the issue of the letter of acceptance. This period of mobilization is to be strictly adhering to and the contract period does not include this mobilization period.*
>
> *However, the tenderer shall make appropriate provision for receiving garbage at the RTS and transporting the same to designated land fill sites/processing plants, using JCBs and dumper vehicles, during the transition stage (pre-installation period) immediately after the issue of letter of acceptance and switch over the units one-by-one including provision of hook-lift vehicles, till commissioning of all the units at the RTS.*
>
> ***11. Contract Period :***
>
> *The contract period will start as soon as the letter of acceptance is issued to the successful tenderer. The contract period will be ten years, which includes mobilization period of six months for installation, trial, tests and commissioning of RTS."*

The word "includes" in clause 11 has been corrected to "excludes". This is not disputed.

9 BMC was responsible for providing the services of collection, transportation and disposal of Municipal Solid Waste in the area of Greater

Mumbai in accordance with the provisions of the Municipal Solid Waste Rules, 2000. To meet with this responsibility, BMC had invited bids for the tender mentioned above and the Contractor had bid and was awarded the contract for the work of design, supply, installation, commissioning, operation and maintenance of “Mechanized Refuse Transfer Station” (MRTS) at the Mahalaxmi site on BOO basis for a period of 10 years. Prior to this tender, BMC was manually transferring solid waste from the Refuse Transfer Station at Mahalxmi, Mumbai. The refuse used to be brought in manually and loaded into dumpers with the use of JCB and transported to the disposal site.

10 In order to mechanize the entire operation and bring about increased efficiency with environmental safeguard, the subject tender was floated. As per the mechanized process the solid waste was to be compacted and loaded into containers that were to be hitched to hook lift vehicles and the compacted waste was transported to the dumping site. The leaches and/or effluent extracted during the compaction was to be treated as per the environmental rules and disposed accordingly. The tender envisaged BMC to have refuse transported in smaller vehicles to the MRTS, have the same weighed and dumped into hoppers. The Contractor was to compact the waste so dumped through a compactor which pushed the waste into containers by means of hydraulic ramming, after the

container is filled in full, the same was to be lifted by hook lift vehicles and transported to the landfill site/processing plants. Before these hook lift vehicles exited the MRTS, the vehicles were to be weighed at the weigh bridge near the exit.

11 Some of the salient terms and conditions of the tender are as under :

> (a) peak hour factor was a very important factor while designing the refuse transfer station and that no vehicles bringing the refuse into MRTS shall be kept waiting for more than 3 minutes (which included bringing the vehicle on weigh bridge, recording the weight, moving the same to the ramp, unloading into container) since any delay beyond three minutes would result in traffic jam outside MRTS;
>
> (b) minimum two vehicles should unload the refuse simultaneously into each hopper during peak hour and bearing this fact in mind, BMC had accordingly made the tender conditions and the technical requirements of the machineries;
>
> (c) the number of unloading per unit would be two pieces per unit;
>
> (d) the height of the existing ramp was 4.8 mtrs. and;
>
> (e) the Contractor was required to carry out all the works including labour, material, tools, plant, equipment and transport for setting up three transfer station having a capacity of 750 MT and provide for container handling units, provide a hopper and feeder of 40 Cu. Mtrs. each (thereby allowing simultaneous unloading of two containers), acquire 20 containers, 15 hook lift vehicles and other equipments more particularly stated in the tender documents.

BMC was required to provide for electricity, supply and water connection at the site and the Contractor was to pay for the electricity and water consumption at site. The Contractor was to be compensated at the rate quoted in the tender and the Contractor was to be paid for a minimum quantity of 600 MT per day and/or on actuals, whichever was higher. Though the requirement was to set up three compactors, only two were to be in operation and the third was to remain on standby in the event of failure or maintenance of the other compactors. Since the contract was on BOO basis, at the end of the contract period, the Contractor was to take back the machineries, equipments and vehicles.

12 As provided in clause nos.10 and 11 of the tender, the mobilization period was of six months which was to commence from the date of issue of letter of acceptance. BMC had accepted the bid of the Contractor and in acceptance thereof had issued work order dated 9th November, 2006. While issuing this work order, as compared to what was stated in clause 10, i.e., "six months from the date of issue of letter of acceptance", in the work order BMC had stated "mobilization period : 6 months from the date of placing of work order and handing over of Mahalaxmi Refuse Transfer Station site". The Contractor by its letter dated 2nd January, 2007 immediately protested to BMC that the attempted modification in the mobilization period by adding the words "and handling

over of Mahalaxmi Refuse Transfer Station site" was not acceptable to the Contractor.

13 The Ld. Arbitrator has held that the mobilization period of six months commenced on 9th November, 2006 when BMC issued the work order and ended on 8th May, 2007. To arrive at this conclusion, the Ld. Arbitrator not only has considered the tender documents but has also relied upon a letter dated 22nd March, 2007 from BMC to the Contractor where the opening paragraphs read as under :-

> *"A Work Order under No.Ch.E./SWM/14920 dated 9/11/06 is placed with you with a mobilization period of six months after placement of order. Inspite of repeated reminders and communications, you have not complied the following for fulfillment of contractual obligation even though 4.5 months period is over. The mobilization period will be expiring on 8/5/07."*

14 I am in agreement with the Ld. Arbitrator. The Ld. Arbitrator has come to the conclusion as stated in the award relying on the documents which were filed and admitted by the parties including the documents that the Contractor obtained from BMC under the provisions of RTI Act.

15 Ms. Iyer, learned senior counsel for BMC submitted that the Ld. Arbitrator could not have relied upon internal documents of BMC which the Contractor has obtained under RTI Act. This submission of Ms. Iyer cannot be accepted because it was not even raised before the

Ld. Arbitrator. On the contrary as recorded in the award, BMC and the Contractor informed the Arbitrator that they do not wish to lead oral evidence and the Arbitrator could go ahead after hearing the parties on the basis of the documents filed. After hearing the parties, the Ld. Arbitrator ordered and directed BMC (a) to pay a sum of Rs.7,28,20,350/- towards idle period charges together with interest at the rate of 15% p.a. from 4th July, 2014 till payment/realisation; (b) to pay a sum of Rs.73,76,589/- towards 5% linear escalation for the work of removal of refuse by JCBs and dumper operation for the period 9th May, 2007 to 17th June, 2009 with interest at the rate of 15% p.a. from 4th July, 2014 till payment/realisation; (c) to pay a sum of Rs.15,24,470/- towards refund of weighment charges (with which BMC has no grievance); (d) to revise the per tonne contractual rate from Rs.153/- to Rs.260/- with linear escalation of 5% every year and directed BMC to pay for the period 18th June, 2009 to 8th May, 2017 at the rate of Rs.286/- per MT with linear escalation of 5% every year; and (e) cost in the sum of Rs.15,10,000/-.

16 The disputes arose between the parties because even though the mobilization period expired on 8th May, 2007 BMC admittedly did not make available the entire site for the MRTS which was finally handed over on or about September, 2009. It is the case of the Contractor that as the mobilization period expired on 8th May, 2007, from 9th May, 2007 until

September, 2009, the equipments and machineries which the Contractor had procured and set up for the compaction work under the contract remained idle. The Contractor has claimed idle charges for this period with 5% linear escalation.

17 In the meanwhile BMC had issued notice to start work on 12th February, 2007 and handed over partial possession of the site. On 1st September, 2007 possession of Mahalaxmi site was given but since the storm water drain work was completed only some time in November, 2009 BMC could not hand over the full site to make the equipments operational. During this period from 8th May, 2007 until September, 2009, as required under clause 10 of the contract, the Contractor was receiving garbage at the site and transporting the same to designated land fill site, processing plants, using JCBs and dumper vehicles. As per the contract the Contractor had accepted to do this only for a period of six months from the date of issuance of work order but admittedly the Contractor was compelled to carry on this activity for a period of 25 months. Obviously the Contractor was paid a separate amount of Rs.180/- per MT for this. The Contractor has also claimed 5% linear increase on this rate of Rs.180/- because the general conditions of the contract provided "rate for first year shall be escalated maximum by 5% p.a. from second year onwards to accommodate price inflation". A further problem that came up was because

of the difference in the height of ramp as projected by BMC and the actual height. As mentioned earlier, the tender documents indicated the height of the ramp to be 4.80 mtrs. and also specified for supply, erection and commissioning of three hoppers of 40 Cu. Mtrs. each and that out of three stationary compactors two were to be operational and one was required to be kept as standby.

18 It was the case of the Contractor that only after the site was handed over it was found that the height of the ramp was only 3.50 mtrs. and not 4.80 mtrs. as mentioned in the tender documents and in view thereof, the Contractor could not construct/erect three hoppers of 40 Cu. Mtrs each to accommodate unloading of two vehicles into each hopper but could only erect three hoppers of 25 Cu. Mtrs. each. This, according to the Contractor resulted in unloading only a single vehicle at a time into each hopper causing traffic jams within and outside the MRTS site. It is the case of the Contractor that in order to clear the backlog and to meet with traffic jam, the Contractor was compelled to operate the third compaction unit (which was to be on standby) so that atleast three vehicles could be unloaded at a time. According to the Contractor since the usage of the third compaction unit resulted in the Contractor investing more funds towards capital investment for purchase of heavy load vehicles, containers and additional five hook lift vehicles as also appointing additional operation

and maintenance personnel and incur extra energy and other costs, the Contractor has become entitled to be compensated suitably by BMC in this regard.

19 According to the Contractor, with the consent of BMC, the Contractor was compelled to incur said additional capital investments and other costs. The counsel for the Contractor relied upon internal memos and documents of BMC to buttress their stand. Under this head, the Arbitrator has revised the rate of Rs.153 per MT for first year based on a 10 year contract period and operation of only two compactors at a time relying upon an internal document of BMC and arriving at the rate of Rs.260 per MT. According to BMC the Arbitrator has effectively re-written the contract and hence the award should be struck down.

20 As the removal of the waste by using JCBs and dumpers continued for 25 months as against originally envisaged six months for which the Contractor was paid Rs.180 per MT, the Arbitrator has also allowed 5% linear increase after the first year. According to BMC the Arbitrator could not have done this because the contract does not provide for such increase.

21 Ms. Iyer submitted that the award is against public policy because (a) as far as idle time, the Arbitrator has directed the Contractor to

pay twice, (b) the contract does not provide for 5% linear increase as far as the waste disposal using JCBs and dumpers and (c) by increasing the rate, the Arbitrator has re-written the entire contract and hence the award is perverse and requires to be struck down.

22 Per contra, Mr. Chinoy, learned senior counsel for the Contractor submitted that the Arbitrator was justified in his conclusions. The Arbitrator was correct in considering all the documents including the internal documents of BMC which were obtained by the Contractor under the RTI Act and filed in the arbitration proceedings without BMC raising any objection and BMC not having raised any objection they cannot raise that for the first time in their challenge to the award. Mr. Chinoy further submitted that there was no double payments as submitted by Ms. Iyer because the tender provided a rate of Rs.180 per MT for the waste disposal using JCBs and dumpers to be carried out during the mobilization period but as the site was not given until 18th June, 2009 and the machineries and compactors remained idle. Mr. Chinoy submitted that since the contract provided that whether one ton of wastage is given or 600 MT per day was given or more than 600 MT per day was given, the amount payable was on the basis of minimum 600 MT per day and therefore, the Arbitrator was correct in awarding both the rates and there was no double payment.

23 To a query raised by this court as to why for the 25 months when the equipments were idling the Contractor has not incurred any electricity or water charges and why that amount was not reduced from the rate awarded, Mr. Chinoy submitted and rightly so that the contract provided that the Contractor will be paid for minimum 600 MT per day whatever be the quantity if it is up to 600 MT and for more than 600 MT it was on actuals. Mr. Chinoy also submitted that the contract does not provided for any adjustment and it has also been accepted as payable by BMC because in the minutes of the meeting held on 25th February, 2009 where the rate analysis was done for the usage of the three hoppers, they have included electricity and water bill amount to arrive at the per ton rate payable to the Contractor.

24 The Apex Court in the matter of ***Associate Builders vs. Delhi Development Authority***[1] has held that none of the grounds contained in Section 34 (2) (a) deal with the merits of the decision rendered by an arbitral award and it is only when arbitral award is in conflict with the public policy of India as per Section 34 (2) (b) (ii), that the merits of an arbitral award are to be looked into under certain specified circumstances. The Apex Court has gone ahead to explain what would be the heads of public policy of India with their sub heads as under :

1. (2015) 3 SCC 49

"I. Fundamental Policy of Indian Law : (i) Compliance with statutes and judicial precedents; (ii) Need for judicial approach; (iii) Natural Justice compliance; (iv) Wednesbury reasonableness;

II. Interest of India;

III. Justice or Morality; and

IV. Patent Illegality : (i) Contravention of substantive law of India; (ii) Contravention of A & C Act, 1996; (iii) Contravention of the terms of the contract."

It will be useful to quote certain parts of the above judgment, viz., paragraphs 17, 19, 27, 33, 36, 40, 42 which are as under :

*"**17**. It will be seen that none of the grounds contained in sub- clause 2 (a) deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.*

…….

***19**. When it came to construing the expression "the public policy of India" contained in Section 34 (2) (b) (ii) of the Arbitration Act, 1996, this Court in ONGC v. Saw Pipes, 2003 (5) SCC 705, held-*

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void. ....

....

Fundamental Policy of Indian Law

***27**. Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

....

***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 score[1]. 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 & 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 reappreciating 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."

Justice

***36**. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said* *to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".*

……

Patent Illegality

***40**. We now come to the fourth head of public policy namely, patent illegality. It must be remembered that under the explanation to section 34 (2) (b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Lord Justice Denning in R v. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw., 1952 1 All ER 122 at page 130:*

……………………………………

***42**. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads -*

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India,-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.- (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to

> *the transaction."*
>
> *This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.*

25 Let us consider whether the award is against public policy and requires to be set aside.

26 The Arbitrator has proceeded and rightly so, on the basis that the mobilization period of six months commenced on 9th November, 2006 and ended on 8th May, 2007 and the contract period started from 9th June, 2007. The Arbitrator has arrived at this conclusion on the basis that clause 10 read with clause 11 of the tender documents provided that the six months period of mobilization will start as soon as the letter of acceptance to be issued to the successful bidder. The work order being a letter of acceptance is dated 9th November, 2006. Though in the work order there was an attempt to extend the commencement of mobilization period by adding the words “the period of handing over of Mahalaxmi Refuse Transfer Station site”, the Contractor promptly by their letter dated 2nd January, 2007 objected to this unilateral change. BMC also by their letter dated 22nd March, 2007 addressed to the Contractor admitted and

confirmed that the mobilization period of six months ended on 8th May, 2007.

27 Therefore, in my view, the Arbitrator was justified in accepting and proceeding on the basis that the mobilization period commenced on 9th November, 2006 and ended on 8th May, 2007. The Arbitrator, thereafter has proceeded to consider all the documents which were received in evidence by consent of the parties including the documents filed by the Contractor received from BMC under RTI Act to arrive at his conclusions. Though Ms. Iyer submitted that these were internal documents and the Arbitrator could not have relied on these documents, the counsel was unable to show any law as to why this was not permissible. Though these are internal documents, these documents show that BMC had admitted that there was delay due to reasons attributable to BMC. BMC also internally agreed that the Contractor has to be compensated. BMC also having received the demand from the Contractor, had internal meetings and called upon the Finance Department to even work out as to how much the Contractor should be compensated. When these documents were filed by the Contractor, BMC never protested to the Ld. Arbitrator. The Ld. Arbitrator infact has recorded that BMC has not relied on any documents other than those which have been relied upon by the Contractor and BMC has not filed any documents alongwith the statement of defence.

Therefore, in my view, the Ld. Arbitrator was justified in considering those documents as well, in arriving at his conclusions.

28 As regards the submissions made by the counsel for BMC that during the idle period of 25 months from 9th May, 2007 to 17th June, 2009 where the Ld. Arbitrator has awarded a sum of Rs.7,28,20,350/- and BMC has paid to the Contractor for the same garbage at the rate of Rs.180 per MT for the use of JCBs and dumpers, if had to pay idle charges, it would amount to making payment twice, the same is not tenable. As per the tender terms the Contractor was to be paid as per the contract which commenced on 9th May, 2007 which has been accepted by BMC in its internal note dated 4th November, 2009 which is at volume I, page 166. At page 167 it is recorded as under :

> *"Hence it is proposed to make the payment of 600 MT per day to the contractor from 9.5.2007 to 6.9.2009 @ Rs.153/- per MT with 5% linear escalation every year which is as per the tender condition. (Scope of work pg.-68 & 69 & specific instructions clause 11 pg.0-63) Copy attached at pg.-c19-c21."*

29 It is also stated in the said note that the delay of 25 months was due to reasons for which the Contractor is not responsible and BMC has admitted that the delay was due to reasons attributable to BMC. In the light thereof, the contract having commenced on 9th May, 2007, BMC was bound to compensate the Contractor, the Contractor having expended

moneys to acquire equipments already incurred expenses.

30 The contention that the Contractor would be getting paid twice for the same garbage is also not correct because the contract itself envisaged two parallel procedures for transportation of garbage, i.e., one by JCBs and dumpers during the mobilization period and the other, after the commencement of contract period at MRTS, through modern machineries. Both the procedures are parallel and not inter linked with each other. Had the Contractor not used the JCBs, BMC would have had to spend moneys for transporting the same garbage through other Contractors. The tender documents provided that the Contractor is to be compensated for the use of MRTS for a minimum quantity of 600 MT per day. Thus, even if BMC would not have given any garbage to the Contractor, BMC would have still been liable to pay to the Contractor for the minimum quantity of 600 MT per day. The transportation of garbage by JCBs and dumpers is a separate aspect of the contract. BMC was liable to pay for the use of JCBs and dumpers initially for the mobilization period. Having called upon the Contractor to use JCBs and dumpers beyond the mobilization period, BMC cannot deny the legitimate claim made by the Contractor.

31 The contract as stated above was for a period of 10 years on BOO basis and after 10 years, the Contractor was to take away their men

and machineries. If the contention of BMC is to be accepted, then the contract period would automatically stand reduced by 25 months, i.e., 7 years and 11 months. The entire money expended by the Contractor could not be recovered even as per the terms of the contract.

Therefore, this contention of the BMC cannot be accepted. The Ld. Arbitrator has considered all these points and more particularly the internal note of BMC dated 4th November, 2009 in awarding and has come to the conclusion that the Contractor is entitled for idle charges.

32 Another topic of discord between the parties is that during the course of installation of machinery and equipment, the Contractor found that the ramp height was only 3.50 mtrs. as against 4.80 mtrs. as provided in the tender documents. According to the Contractor since the height of the ramp was as much as four feet less than what was indicated in the tender documents, they could not install hoppers of 40 Cu. Mtrs. and had to install hoppers of 25 Cu. Mtrs. Consequently this also resulted in only one truck being unloaded at a time into each hopper instead of two as envisaged.

33 In view of the difference in the actual ramp height at site compared to what was mentioned in the tender documents and as only one dumper each could be unloaded into each hopper, it was causing huge traffic backlog. The Contractor it seems had even offered to increase the

height of the ramp at additional cost which was not permitted by BMC but to avoid traffic backlog, indisputably at the instance of BMC the Contractor was compelled to start the third compaction unit though it was not envisaged in the contract. The third one was always to be kept on standby to be used during the maintenance or one of the operating units breaking down. It is the case of the Contractor that the expenses of operating the standby compaction unit was not part of the calculations under the tender and hence the Contractor was entitled to additional sums.

34 Infact BMC was aware of the size of the hoppers and had approved all the reduction in the size of the hoppers. In the note dated 25th November, 2009 it is admitted by BMC as under :

> *"As per the contact, Do-It-Computer JV has to install three compaction units with hopper of capacity 40 Cu.M. out of which 1 unit was standby. The Contractors has submitted their hopper design of 40 Cu.M. with arrangement of unloading of 2 nos. trucks at a time on the height of ramp based on 4.80 meter. The ramp height mentioned in the tender was 4.80 Mtr., the actual height available at the site was 3.5 mtrs. Hence the contractors could not install 40 Cu.M. capacity hoppers due to space constraint and they have installed 3X25 Cu.M. capacity hoppers of 6mm thick M.S. Plate with the provision of one truck unloading at a time. As a result there is heavy queue of the vehicles up to Saat-Rasta at peak hour. Hence to avoid inconvenience to the public, the contractor are required to operate all the three compaction units and are incurring excessive cost by the way of staff, diesel, electrical, depreciation cost. Due to provision of unloading of one Truck/TDP instead of two, only one TDP is unload at a time in the compaction unit which is insufficient and time consuming for the compaction unit to take the peak hour load of 225 M.T. during the peak hour, i.e., 8.00 a.m. to 10.00 a.m. as mentioned in the tender. The contractor's grievances appears to be genuine. It is further to be stated that contractors are required to operate all the three compaction units without any standby. A.M.C. (City) has also given approval for making the payment for utilization of standby compaction unit. Keeping three nos. of compaction unit with hopper capacity of 25 Cu.M. in working condition for 365 days considering 10 years period,*

the revised rates are analyzed and worked out to Rs.208/- per M.T."

35 The rate analysis for 3X25 Cu. Mtrs. hoppers with three compaction units also has been worked out by BMC and the analysis is also part of the record. BMC has accepted that the rate of Rs.153 per MT quoted by the Contractor has to be revised to Rs.208 per MT. The Ld. Arbitrator has accepted the analysis of BMC. While fixing the revised rate, the Ld. Arbitrator has accepted the rate of Rs.208/- indicated by BMC but since this Rs.208/- was calculated on the basis of 750 MT whereas the correct parameter of garbage is 600 MT, the Ld. Arbitrator has reworked the figures and arrived at Rs.260 per MT for the first year with 5% linear escalation thereon every year.

I do not see any reason why this finding of the Ld. Arbitrator should be interfered with.

36 The next bone of contention was the demand for 5% linear escalation for post mobilization period for operations carried out using JCBs and dumpers. According to the Contractor, in terms of the tender, the Contractor was required to use JCBs and dumpers only for the mobilization period after which, the JCBs and dumpers were not required and/or the use of JCBs and dumpers would not arise. Admittedly the Contractor was compelled to use the JCBs and dumpers upto September, 2009 whereas as per the tender documents the cut off for removing the waste using JCBs

and dumpers was 8th May, 2007. Undisputedly the Contractor, at the request of BMC carried out the operations using JCBs and dumpers for a period of 25 months. The Contractor asked for 5% linear escalation even on this rate of Rs.180 per MT.

37 Ms. Iyer, learned senior counsel for BMC submitted that there is no specific provision in the contract allowing the claim of 5% linear escalation for use of JCBs and dumpers post mobilization period and that the contract provides payment of Rs.180 per MT during the mobilization period and 5% linear escalation was to be applied only on the operations carried out from the MRTS site with the use of the compactor units. Ms. Iyer also submitted that no work from MRTS using compactor units was done for 25 months and hence the question of applying 5% linear escalation for this 25 months period every year cannot and did not arise. The document "highlights of the tender", which is part of the tender documents provides that rate of first year shall be escalated maximum by 5% from second year onwards to accommodate price inflation. The tender documents does not indicate that it is reflected for the use of MRTS site only. No such qualification exists in the contract. Admittedly the delay in commencing activities at MRTS was for the reasons not attributable to the Contractor but BMC.

38 In my view also that would not be a reason to dis-entitle the Contractor from claiming linear escalation of 5% on the rate per MT for operations carried out using JCBs. One must keep in mind that the 5% linear escalation was provided for in the contract to accommodate price inflation. The rate of Rs.180 per MT was indicated only because the mobilization period was supposed to be only for six months. The Chief Engineer of BMC in his report dated 16th January, 2010 has accepted this factual aspect and has observed that it is fair and reasonable to consider 5% annual rate linear escalation for JCBs and dumpers operation as well. The relevant portion of the report reads as under :

> *"As stated at Sr. No.1, due justification is already offered for the delay in completion of the project. The JCB dumper transportation @ Rs.180/- per M.T. was considered for the initial 6 months mobilization period only. However, it was required to be continued for further period of more than 2 years for reasons stated at Pg. N.3. The payment for the period beyond 6 months was made originally @ Rs.153/- per M.T. only which was restored to Rs.180/- per M.T. after obtaining AMC (City)'s sanction at Pg.T.44 (In file no.3).*
>
> *Reg. CA(F)'s comment on allowing the 5% escalation, it may be pointed out that it was not possible to foresee the period of JCB dumper operation and therefore, not possible to obtain such sanction which is not proposed on the same lines as per the tender clause in the D.L. to M.S. as the said activity is operated more than one year.*
>
> *The nature of operation, cost inflation factors etc. are very much the same with JCB dumper operation as with MRTS operation through compaction unit and hook-lift vehicles. Secondly, it being a BOO contract, the tender terms and conditions must be adhered to strictly from employer side (MCGM) which is not fulfilled in respect of JCB dumper operation of 6 months as per tender. Therefore, it is fair and reasonable to consider 5% annual rate linear escalation for JCB dumper operation.*
>
> *After commissioning of MRTS from 18.06.2009 the work of removal of refuse by deploying JCB dumper at Lovegrove transfer station was simultaneously in operation."*

39 Therefore, the Ld. Arbitrator was justified in granting the 5% linear escalation for the work of removal of refuse by JCBs and dumper operations.

40 What remains is only the interest component and no submissions were made by the counsel for BMC. Similarly for the cost awarded.

41 It should remembered as mentioned in *Associate Builders* (Supra) this court is not acting as a court of appeal. The views taken by the Ld. Arbitrator on the facts has passed the muster of the Ld. Arbitrator, who is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Once it is found that the Ld. Arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. Moreover, as mentioned above, I am in concurrence with the conclusions of the Ld. Arbitrator and also his analysis.

42 In the circumstances, the petition is dismissed with no order as to cost.

(K.R. SHRIRAM, J.)