IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

ARBITRATION APPEAL (ST) NO.5602 OF 2017
WITH
CIVIL APPLICATION NO.5 OF 2017
IN
ARBITRATION APPEAL (ST) NO.5602 OF 2017
…

Maharashtra Cricket Association
Through Mr. Riyaz Bagban ....Appellant/Applicant
V/S
Shapoorji Pallonji And Co. Pvt. Ltd. ....Respondent
…

Mr.Vineet B.Naik,Sr.Advocate i/by Sukand Ravindra Kulkarni for the Appellant/Applicant.
Mr.Ravi Kadam,Sr.Adv a/w Shailesh Mendon a/w Mr.Omkar Bade i/by Desai & Diwanji, for the Respondent.
…

CORAM : A.A. SAYED, J.
RESERVED ON : 3 MAY 2017
PRONOUNCED ON : 10 JULY 2017

JUDGMENT:

The Appellant has filed this Appeal under section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “Arbitration Act”) challenging the order dated 20 January 2017 passed by the District Judge, Pune, in an Application filed by the Respondent under section 9 of the Arbitration Act. By the impugned order the District Judge allowed the

Application and directed the Appellant to deposit an amount of Rs.172,32,26,873/- in any nationalized bank in the account of joint names of the parties within one month from the date of the order. For the sake of convenience of reference, the Appellant shall be referred to as MCA and the Respondent as SPCL.

2. A tender notice was published by MCA for construction of an International Cricket Stadium at Gahunje, Pune, in September 2009. SPCL participated in the tender and succeeded in the bid and a tender document was executed between the parties. A work order was issued to SPCL. A contract Agreement was executed between the parties on 1 February 2010. The consideration for the construction work was fixed at Rupees 193 crores exclusive of 4.12% service tax.

3. Clause 2 of the Agreement and clause 1.1.2(a) of Volume I of the Tender Documents stipulate that the Tender Documents shall form part of the contract. Under the Tender Documents the Project Manager was required to be appointed by MCA. The material portion of Clause 6 of the Agreement which sets out particulars of some clauses of Volume I of the Tender Documents is extracted hereunder:

Clause No.	***General Conditions of Contract***	***Particulars***
2.1	*Date of Commencement*	*07 December 2009 or within 15 days of issue of the Work Order*
2.2	*Date of Completion*	*06 April 2011*
2.6.0	*Amount of Penalty/Liquidated Damages The Contractor is bound to complete the work as per the approved program. In the event of the Contractor failing to complete the work as per approved program, the Contractor shall be liable to pay penalty.*	*0.5% of Contract value per week of delay. Limited to maximum 10% of Contract Value.*
2.8.0	*Defects Liability Period*	*18 months from the date of issue of completion certificate under clause 2.8.0*
3.4.6.	*Time of Payment* *a) Period of honoring Running Account Bill Amount*	*7% of approved Running Account Bill amount to be paid as under:* *(i) 55% of approved R A Bill amount within 10 days of submission by the Project Manager*

	b) Deferred Payment Scheme	*(ii) Balance 15% of the approved R A Bill amount within 28 days of submission by the Project Manager* *Balance 30% of approved R A Bill in 3 annual installments starting from October 2012*
9.3.0	*Security Deposit, Retention Money* *The Contractor shall deposit an amount equal to 5% of the Contract Price as Security Deposit and Retention Money.* *i) Security Deposit at the starting of project in form of BG* *ii) Retention Money to be deducted at prorate percentage basis from every approved RA Bill.*	*5% of Contract value collected as under* *i) Security Deposit 2.5% of Contract Value in form of BG* *ii) Retention Money 2.5% of Contract Value shall be deducted at rate of 2.75% of the value of approved running account bill starting from 1st RA Bill till 5% of contract value is made up.*
9.3.2	*Performance security* *10% of Contract Value in form of BG till completion of Contract i.e. defects liability period.*	*10% of Contract value in form of BG.*

4. Clause 2.7.2 of Vol-I of the Tender Document provided for certification of completion of work. It reads as follows:

> *"2.7.2 Certification of Completion of Work*
> *When the whole of the Works have been substantially completed and have satisfactorily passed any final test that may be prescribed by the Contract, the Contractor may give a notice to that effect to the PM accompanied by an undertaking to finish any outstanding work during the Defect Liability Period. Such notice and undertaking shall be in writing and shall be deemed to be a request by the Contractor for the PM to issue a Certificate of Completion in respect of the Works. The PM shall, within twenty one days of the date of delivery of such notice either issue to the Contractor, with a copy to the Employer, <u>a Certificate of Completion stating the date on which, in his opinion, the works were substantially completed</u> in accordance with the Contract or give instructions in writing to the Contractor specifying all the work which, in the Architect's/PM's opinion, requires to be done by the Contractor before the issue of such Completion Certificate. The Architect/PM shall also notify the Contractor of any defects in the Works affecting substantial completion that may appear after such instructions and before completion of the works specified therein. The Contractor shall be entitled to receive such Certificate of Completion within twenty-one days of completion to the satisfaction of the Employer through PM of the works so specified and making good any defects so notified. Completion Certificate will be issued by the Employer."*
>
> *(emphasis supplied)*

5. Clause 4.7.2 of Volume-I of the Tender Documents provides for resolution of disputes by arbitration. Clauses 4.7.2.1 and 4.7.2.8 read as follows:

“4.7.2.1 All disputes and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of contract shall be referred to and settled by the PM who shall state his decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the PM with respect to any of the special risk (clause no. 2.5) shall be final and without appeal. But if either the Employer or the Contractor be dissatisfied with decision of the PM on a matter, question or dispute of any kind (except any of the special risk) or as to the withholding by the PM of any certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may, within 28 days after receiving notice of such decision, give a written notice to the other party through the PM requiring that matters in dispute be arbitarted upon. Such written notice shall be referred to arbitration under the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force. Such arbitration shall be conducted by three arbitrators, one each for the Employer and the Contractor, i.e. parties to the dispute who in turn shall jointly nominate a third arbitrator before the arbitration. Arbitrators shall be experienced and knowledgeable persons in the field of construction and development of first class real estate projects.

4.7.2.8. The Employer and the Contractor hereby shall also agree that arbitration under this clause shall be a condition precedent any right under the contract. The provisions of this *clause shall survive the expiry or sooner termination of his Contract."*

6. In terms of the clause 6 of the Agreement, SPCL on 17 December 2009 (i) issued a bank guarantee in favour of the MCA for an amount of Rs.4,82,50,000/- i.e. 2.5% of the Contract Price as Security Deposit, and (ii) issued a bank guarantee in favour of MCA for an amount of Rs.19,30,00,000, i.e. 10% of the Contract Price as Performance Guarantee.

7. The Project Manager, in terms of Clause 2.7.2, issued a Virtual Completion Certificate inter alia recording that the Stadium had been virtually completed on 31 October 2012 excluding the work mentioned in Annexure "A" thereto, which SPCL was liable to complete in the Defect Liability period i.e. starting 1 November 2012 to 30 April 2014.

8. SPCL thereafter vide its letter dated 1 March 2013 addressed to MCA submitted its final Bill dated 1 March 2013 for an amount of Rs.234,10,41,961/-. The Project Manager however certified and approved the final Bill for an amount of Rs.225 crores. MCA vide its letter dated 16 May 2013 recorded that the Project Manager has approved the final Bill for an amount of Rs.225 crores against the SPCL's claim of

Rs.234,10,41,961/- and that MCA would not be in a position to consider any further increase on any account whatsoever. Thereafter, correspondence was exchanged and meetings took place between the parties in respect of the outstanding dues of SPCL. On 2 July 2013 MCA addressed a letter to the SPCL interalia confirming that the final Bill has been forwarded to its accounts department for further action and recorded that the Project Manager has recommended that an amount of Rs.3,31,13,745/- be withheld from final Bill amount on account of certain works which have been not executed by SPCL. On 3 January 2014, MCA paid SPCL an amount of Rs.10 crores towards the outstanding dues. After series of discussions held between the parties and several reminders addressed by the SPCL to MCA, on 2 September 2014, SPCL was paid an amount of Rs.20 crores. On 8 January 2015, MCA vide its email dated 8 January 2015 informed SPCL that it is unable to make payment as the same is subject to funding from the BCCI (Board of Cricket Association of India) which has been unable to release funding as it could not hold its annual general meeting as the same 'has been stopped by the Supreme Court'.

9 According to SPCL, MCA had paid a total amount of Rs.150,43,31,986/- towards the RA Bills and final Bill and MCA had

unlawfully withheld payment and failed to clear the outstanding amount. SPCL eventually filed the Application under section 9 of the Arbitration Act setting out particulars of claim in the following terms:

"PARTICULARS OF CLAIM UPDATED TILL 31ST MARCH 2016

Sr.No	Head	Amount (in Rs.)
1.	Amount towards final Bill amount	16,18,80,699
2.	Amount towards 3 installments of deferred payment	67,40,00,000
3.	Compounded Interest at the rate of (SBI PLR+1)% per annum on the deferred payments (50%) from date of certification to 31st March 2016	74,17,23,795
4.	Compounded Interest at the rate of 1.5% per month calculated on outstanding delayed RA Bill payments (70%) from the date of becoming due till 31st March 2016	14,56,22,379
	Total	172,32,26,873

together with further interest at the rate of 18% per annum on Rs.172,32,26,873/- from the date of filing of the Application till payment thereof. SPCL has averred in the Application that looking to the conduct of MCA for the last about three years there was strong possibility that if an Award in arbitration proceedings (proposed) is passed, it would be very difficult to enforce it and there was strong possibility of the assets and funds being dissipated or being transferred or diverted making the

Award unenforceable. SPCL has interalia prayed in the Application that MCA be directed to deposit a sum of Rs.1,72,32,26,873/- with a bank account to be opened in the joint name of the parties and for withdrawal of the admitted amounts and in the alternative furnish Bank Guarantee.

10 An Affidavit-in-Reply was filed by the MCA to the Application of the SPCL. The case of the MCA in the Affidavit-in-Reply was interalia as follows - under the contract documents, in case of any dispute between the parties, the same is required to be referred to and settled by the Project Manager and it was therefore incumbent on the SPCL to first approach the Project Manager. The work of construction of the Stadium was to be completed by April 2011, however, SPCL could not complete it in time. The completion of the project in the stipulated period was essence of the contract. Upon completion of the project and work of the stadium, MCA was to get an amount of Rs. 207.95 crores towards naming rights from Sahara Adventure Sports Limited. However, the receipt of the said amount got delayed for about three years because of the delay in completion of the project and by the time the said project was completed, Sahara Group came in trouble as financial restraints were put by the Supreme Court of India on the business activities of Sahara and Mr. Subroto Roy was arrested and put in custody of Tihar

Jail. Therefore, MCA could not get the said amount of Rs.207.95 crores. MCA have raised a dispute regarding recovery of the said amount and damages, and arbitration proceedings in respect of the same are pending. MCA was unable to pay the final Bill amount to SPCL only due to the delay caused by the SPCL in completing the work. Though SPCL claims to have completed the work on 31 October 2012, the Virtual Completion Certificate given by the Project Manager records in the last line that the Contractor has accepted to complete the balance listed work by 15 December 2012 and as such the work was not completed on 31 October 2012 as alleged by the SPCL. Despite various reminders from MCA to rectify the defects, SPCL took a stand that the defect would be rectified only after receipt of payment and thereby committed breach of the Agreement. MCA went in deep financial crises, only because of the delay caused by SPCL in completing the work in time. On 6 March 2011, SPCL sought extension from MCA. Extension was eventually granted till 31 August 2011. However, SPCL failed and neglected to complete the work even till 31 August 2011 and the work was continued and delayed even thereafter for more than one and a half years. SPCL cannot claim any amount along with compound interest, as a matter of right. MCA has availed loan and an amount of Rs.107.96 crores from the consortium of Banks viz. Karnataka Bank, Bank of Maharashtra and Bank of Baroda.

The loan has been rescheduled by the Banks and the properties belonging to MCA are mortgaged with the said financial institutions for the purposes of repayment of the loan amounts. It is the Arbitrator who would be seized of the matter and can consider the triable issues and disputes between the parties properly even at the prima facie stage and if it found necessary, can grant interim measures. MCA has always shown readiness and willingness to pay the amounts actually due and payable to SPCL, and has indeed paid a portion of the same. The prayer for Bank Guarantee also cannot be granted, since MCA has repeatedly brought it to the notice of SPCL that it is facing financial constraints and difficulties, as a result of which MCA is not in a position to make a payment of the amount actually due and payable to SPCL.

11 After hearing the parties, the District Court passed the impugned order as stated in paragraph 1 above. Hence, this Appeal by MCA.

12 Learned Senior Counsel on behalf of MCA made the following submissions:

(i) Clause 4.7.2.1 of the Contract provides for the dispute to be referred to the Project Manager and therefore SPCL could not have approached the Court under section 9 without first approaching the Project Manager.

(ii) There was a delay in completion of the project and time was the essence of the Contract. The project was to be completed by 6 April 2011. Though extension was granted upto 31 August 2011, the same was subject to conditions as stipulated in the letter dated 30 April 2011. The project was not completed even on 31 October 2012 as claimed SPCL. Because of the delay, MCA has suffered substantial losses. These losses as set out in the claim made by MCA to the Project Manager, aggregate to Rs 81,50,12,000/-.

(iii) It is expressly mentioned in the Virtual Completion Certificate that SPCL is required to complete the balance listed work by 15 December 2012. Therefore the Virtual Completion Certificate was not the final Completion Certificate. Clause 2.8 of the Contract provides for a defect liability period of 18 months from the date of completion of the construction work. MCA had handed over a list of incomplete works and defects in the work, however, the defects were not rectified and the works were still incomplete. Clause 2.8.7 of the Contract provides that the Contract would not be considered as complete until the defect liability certificate is signed by MCA stating that the date on which SPCL has performed his obligation to complete the work and remedied the defects therein to MCA's satisfaction.

(iv) MCA has paid more than Rs 162 crores to SPCL towards the project. The District Court had merely accepted the amount of Rs.172,32,26,873/- as claimed by SPCL and there was a dispute as regards the quantum of the amount and the amount was required to be crystallized by the Project Manager. The interest component itself claimed by SPCL is about 90 crores.

(v) MCA was in financial difficulty and the amount of Rs.207.95 crores which Sahara Adventure Sports Limited was to pay to MCA towards the naming rights of the stadium was not paid due to the arrest of Shri Subroto Roy and the matter is pending before the Supreme Court.

(vi) MCA is a public charitable trust and registered under the Act of 1950 and hence under section 80 of the Act of 1950 the jurisdiction of civil court is specifically barred.

(vii) In view of the law laid down by the Supreme Court in **Adhunik Steels Ltd vs. Orissa Manganese and Minerals (P) Ltd,** (2007) 7 SCC 125, which has been followed by the Division Bench of this Court in **Nimbus Communications Ltd vs. BCCI,** 2013 (1) MhLJ 39, the District

Court could not have directed deposit of the amount claimed by SPCL. In the aforesaid cases it has been held that the power of the Court under section 9 to grant injunction cannot be exercised independently of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of Specific Relief Act, 1963. It has been further held that the power under Rule 5 of Order 38 of CPC is conditioned by two requirements, the first being in regard to the conduct of the defendant, in that, he is about to alienate the property or to remove it from the jurisdiction of the court and second, the intention of the defendant to obstruct or delay the execution of a decree that maybe passed against him.

(viii) The impugned order is required to be set aside.

13 Learned Senior Counsel for SPCL on the other hand made the following submissions:

(i) The order passed by the District Court is in the nature of an interim order and this Court in Appeal ought not to interfere in the discretion exercised by the District Court;

(ii) The District Court had proceeded on the basis of the virtual admission of the dues of SPCL and the liability was clearly admitted by MCA. The admission is reflected in the letters dated 16 May 2013 and 22 March 2014 of MCA after the Virtual Completion Certificate was issued by the Project Manager and the final Bill submitted by SPCL.

(iii) The construction work of the stadium was completed on 31 October 2012 and admittedly many IPL cricket matches have also been held thereafter in the stadium. The Project Manager accepted a sum of Rs.225 crores as against the final Bill of Rs 234,10,41,961/- and had issued the Virtual Completion Certificate and recommended that only a sum of Rs 3,31,13,745/- was to be withheld from the final Bill amount. There was nothing more left for him to decide. There was therefore no question of approaching the Project Manager.

(iv) Even Order 39 Rule 10 of CPC postulates that when the liability is admitted, directions for deposit of the amount can be made at the interlocutory stage.

(v) The claim of damages made by the MCA was belated and was an afterthought. It was made after admitting the dues of SPCL. Prior to filing of the Application, MCA had not raised any objection regarding the alleged delay.

(vi) In any event the claim for damages does not give rise to any debt until the liability is adjudicated and damages assessed as held in the Supreme Court in **Union of India vs. Raman Iron Foundry,** (1974) 2 SCC 231.

(vii) The Division Bench of this Court in **Deccan Chronicle Holdings Limited vs L&T Finance Limited,** MANU/MH/1331/2013, has held that the Court in deciding an Application under section 9, while bearing in mind the fundamental principles underlying the provisions of CPC, would have the discretion to mould the relief in appropriate cases.

(viii) Most of the properties of MCA appear to have been mortgaged and it was in financial difficulty. The conduct of MCA in raising false and belated claim for damages reflects its intention to delay and obstruct payment of the outstanding dues and assets are likely to be dissipated. The District Court had rightly directed deposit of the amount in a joint account.

(ix) No interference is warranted in the impugned order.

14 I have considered the rival contentions canvassed by the learned Senior Counsel for the parties. I have also perused the material on record and judgments cited across the bar.

15 At the outset it is necessary to state that there is no dispute that the Project Manager, Dongre Associates, appointed by MCA in terms of clause 2.7.2 of Volume I of the Tender Documents, has issued a Virtual Completion Certificate (un-dated). It would be apposite to reproduce the said Virtual Completion Certificate. It reads as under:

"DONGRE ASSOCIATES
PROJECT MANAGERS
QUANTITY SURVEYORS

VIRTUAL COMPLETION CERTIFICATE

To,
M/s. Shapoorji Pallonji and Co. Ltd.
SP Infocity – Incubator No. 4,
Pune Saswad Road,
Fursungi, Pune – 412 308.
Maharashtra. India.

Date of Commencement of Project : 28th November 2009
Date of Completion of Project : 31st October 2012

Dear Sir,

This is to certify that the following works viz.

Name of Work: Construction of International Cricket stadium at Gahunje, Pune (Phase I)

Work Order No. MHCA/STADIUM/2009-10 dated 26th November 2009 for Contract amount 193 Crore.

which was carried out by you is in the opinion of the undersigned is virtually completed confirming to Tender clause no. 2.7.0 (Volume I Rev R1 Conditions of Contract) in every respect on the 31st of October 2012 in accordance with the terms of the Contract agreement excluding work mentioned in attached list (Annexture A) which should be completed in Defect Liability Period and you are required to confirm to the provisions of Defect Liability Period in accordance with the terms of Contract and mentioned in attached (Annexture A) and under th provisions of the Contract for a period of 18 months starting from the 1st November 2012 to the 30th April 2014.

Contractor has accepted to complete balance listed work by 15th December 2012

Thanking You,

For Dongre Associates

(A.B. Dongre)

Encl. Annexure A"

16 The Virtual Completion Certificate thus states that the works were virtually completed by SPCL in terms of clause 2.7.0 and the "date of completion of the project" was recorded as 31 October 2012. The said Certificate also lists the work in Annexure `A' which were required to be completed by SPCL in the Defect Liability Period and records that SPCL

has accepted to complete the work by 15 December 2012. SPCL thereafter submitted its final Bill dated 1 March 2013 of Rs.234,10,41,961/-. On 16 May 2013, MCA addressed a letter to SPCL recording that the Project Manager had approved the final Bill of Rs.225 crores, excluding service tax and that the Committee of MCA has accepted the final Bill of Rs.225 crores against SPCL's claim of Rs.234.10 crores, as recommended by the Project Manager. The said letter dated 16 May 2013 is reproduced hereunder:

"Date: 16th May 2013

Shapoorji Pallonji & Co. ltd.
SP Center, 41/44 Minoo Desai Marg
Colaba, Mumbai – 400 005

Reference: Your submission in this regard from time to time and the various meetings and discussions on the subject with the MCA Committees and the recommendation of our Project Managers.

Subject: Amount of final Bill

Dear Sirs,

With Reference to contract agreement dated 01 Feb 2010 between Maharashtra Cricket Association and Shapoorji Pallonji & Co. Ltd for construction of International Cricket Stadium at Gahunje, Pune for a contract price of Rs. 193/- crores exclusive of 4.12% service tax, we refer to the above and your representations made to us regarding *extra times and as well as certain delays that have occurred from our side for payment.*

The said work was completed on 31st Oct 2012.

You have submitted final Bill dated 01 Mar 2013 for an amount of Rs. 2,84,10,41,961/- (Rupees two hundred and thirty four crores ten lacs forty one thousand nine hundred and sixty one only).

The Project Manager, M/s Dongre Associates, have approved the final Bill for an amount of Rs. 225 core (Rupess Two hundred twenty five core only) excluding service tax.

After considering all the issues relating to the same, and after considering the recommendations of the project managers M/s Dongre Associates, the <u>Committee of the MCA hereby informs you that the recommendations of the project manager as to the value of the final Bill is accepted for payment at a final figure of Rs. 225 crores against your claim of 234.10 crores.</u>

This is a final figure and the MCA will be in no position to consider any further increases on any account whatsoever and we request you to kindly issue us your confirmation on the above figures as a final figure at your earliest.

Thanking You

Yours faithfully

Sd/-

For ***MAHARASHTRA CRICKET ASSOCIATION***
SUDHAKAR SHANBHAG
Hon. Secretary" *(emphasis supplied)*

17 The aforesaid letter dated 16 May 2013 thus clearly records that the Committee of MCA accepted the recommendations of the Project

Manager as to value of the final Bill for payment at the final figure of Rs.225 crores against the claim of SPCL of Rs.234.10 crores. The letter further records that MCA would not be in a position to consider any further increases and requested SPCL to send their confirmation of the said final figure.

18 On 2 July 2013, MCA vide their letter addressed to SPCL, forwarded the list of incomplete work and defects in the works to SPCL at the time of issuance of the final Bill i.e. 1 March 2013. Perusal of the letter shows that most of the balance work related to submission of warrantee documentation. Significantly, MCA confirmed by this letter that towards "Incomplete Work And Snag List", the Project Manager had recommended MCA to withhold Rs.3,31,13,745/- from the final Bill. The withholding of the amount of Rs.3.31 crores from the final Bill amount as recommended by the Project Manager is reiterated in the email dated 11 July 2013 sent by MCA to SPCL.

19 On 22 March 2014, MCA addressed a letter to SPCL which reads as follows:

"Date 22 March 2014

The Project Manager
Shapoorji Pallonji & Co. Ltd.
SP Centre, 41/44 Minoo Desai Marg,
Colaba, Mumbai – 400 005.

Sub: Outstanding dues of stadium project.

Dear Sir,

We refer to the above subject and regret that there has been a substantial delay in the clearance of your dues.

This as you are aware was due to the fact that our naming rights sponsor for the stadium Sahara India Parivar has defaulted in their payments due to us long ago for over Rs.120 crores.

We have terminated the agreement with Sahara for non-payment and the matter is subjudice.

We have also approached all our bankers for reschedulement/fresh funding which all our three participating banks have now agreed to fund.

In the meantime we have also lined up potential new sponsors.

We have made a recent payment of Rs.10 crores to you on account.

With the above measures we are confident of clearing all dues in a phased manner.

Your letter for considering payment of interest at bank rates on the overdues was considered in the meeting of the managing committee held on the 22nd of March 2014, and the committee has decided that your request for payment of interest will be considered favorably and MCA shall pay the same.

The exact details of the dues and the aging of the same bill wise will however have to be gone into detail including giving due consideration of the fact that an additional advance, over and above the contract terms of Rs.25 crores was given to M/s. Sandip during the construction phase to expedite the work, which as you are aware was delayed beyond the completion date.

To conclude, the MCA will pay you interest on the overdues at a simple rate of interest to be decided mutually and the details and ageing of the dues being worked out.

Thanking you,
Yours faithfully,
For Maharashtra Cricket Association
sd/-
Ajay Shirke
President"

(emphasis supplied)

20 The aforesaid documents would clearly demonstrate: (i) that the Project Manager had issued the Virtual Completion Certificate and the date of virtual completion of the Project was recorded as 31 October 2012; (ii) that the Committee of MCA had accepted the value of the final Bill for payment at the final figure of Rs.225 crores against the claim of SPCL Rs.234.10 crores; (iii) that the Project Manager had recommended to withhold only a sum of Rs.3,31,13,745/- towards the final Bill amount; (iv) that MCA had agreed to clear all the dues of SPCL and as a matter of fact the Managing Committee in its meeting held on 22 March 2014 decided that MCA would make payment with simple interest on the overdue amount at a rate to be mutually decided.

21 Thus, it can hardly be disputed that MCA has admitted its liability to the extent of Rs.225 crores minus the amount which was already paid towards the RA Bills and final Bill, and further amount of Rs.3,31,13,745/- which was to be withheld as recommended by the Project Manager. Not only that but MCA had also agreed to pay simple interest on the overdue amount at a rate which was to be mutually decided. In these circumstances, I have no hesitation in holding that the claim of SPCL is virtually an admitted claim and the District Court had rightly held so. Prima facie, in view of default of MCA in making further payments which were admittedly overdue, SPCL cannot be faulted in not carrying out the minuscule work which the Project Manager had listed at Annexure 'A" of the VCC for which the Project Manager recommended to MCA to withhold an amount of Rs.3,31,13,745/- from the final Bill, which works were ultimately carried out by MCA. It is pertinent to note that prior to filing of the claim, MCA had not raised any grievance regarding alleged delay in completion of the construction work by SPCL. Thus, the claim lodged before the Project Manager by MCA vide its letter dated 28 May 2016 claiming damages of (i) Rs.19.30 crores as liquidated damages on the contract, (ii) Rs.12.20 crores as costs for remedying alleged defects, and (iii) Rs.50 crores as general damages (without any particulars), was only an afterthought and merely to delay and obstruct SPCL's claim. In

any event, as rightly contended by learned Senior Counsel for SPCL, the claim for alleged damages does not give rise to a debt until the liability is adjudicated and damage assessed by decree or order of the Court or other adjudicating authority as held in the case of **Union of India vs. Raman Iron Foundry** (supra).

22 MCA has not at any time protested or objected to the Virtual Completion Certificate issued by the Project Manager. As a matter of fact, they have accepted the Virtual Completion Certificate. In these circumstances, there is no merit in the contention of MCA that in terms of clause 4.7.2.1, the dispute is required to be referred to the Project Manager by SPCL before approaching the Court under section 9 of the Act. The contention on behalf of MCA that it being a Charitable Trust under section 80 of the Bombay Public Trust Act, 1950 the jurisdiction of the Civil Court is specifically barred, is merely stated to be rejected. It is an admitted position that MCA has availed loan of an amount of Rs.107.96 crores from consortium of Banks and some of the properties of MCA are mortgaged with financial Institutions. It is noticed that at one stage, as recorded in the letter dated 22-03-2014 of MCA (reproduced above), MCA had approached its Bankers for fresh fundings which the Banks had agreed. The said letter further recorded that MCA was

confident that all the dues would be cleared in a phased manner. However, there appears to be a change of stance thereafter. Considering the aforesaid facts and looking at the conduct of MCA in having agreed to clear the dues of SPCL and thereafter raising belated claim for damages only reflects the intention of MCA to delay and obstruct the payments due to SPCL. In these circumstances, the apprehension as averred by SPCL in their Application that there is a strong possibility of the assets and funds being dissipated or being transferred or diverted by MCA before Award is passed in the arbitration proceedings (proposed) cannot be said to be unfounded. The interest of SPCL is required to be protected till the disputes are adjudicated in arbitration. It may be stated here that though this Court suggested the parties may nominate an Arbitrator by consent so that arbitration proceedings can commence and the disputes are adjudicated, however that suggestion did not eventuate. The Court is informed that section 11 Petition has been filed in this Court seeking appointment of Arbitrators.

23 Learned Senior Counsel for the SPCL has rightly drawn support from Rule 10 of Order XXXIX of the Code of Civil Procedure, 1908, which provides for deposit even at interlocutory stage. It reads as under:

> ***"10. Deposit of money, etc., in Court.-*** *Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court."*

24 Considering the facts and circumstances of the case and particularly in view of the admission of liability by MCA as discussed earlier and having regard to the provisions of Order 39 Rule 10, the District Court cannot be said to have travelled outside the parameters of the Code of Civil Procedure including the provisions of Order 38 Rule 5, I do not think that the District Court has committed any error in requiring MCA to deposit the amount in a joint account in the names of the parties. Having said that, I am inclined to grant an opportunity to MCA to furnish a Bank Guarantee in lieu of deposit, if the same is furnished within a stipulated period. It is noticed that in the `Particulars of Claim' in the Application, SPCL has claimed 'compound interest' aggregating to Rs.89 crores. It appears that the District Court has merely accepted the amount stated in the `Particulars of Claim' as a matter of course. The quantum of amount as directed by the District Court, in my view, needs to be modified.

25 Taking an overall view of the matter, in my opinion, ends of justice would be met by modifying the directions issued in the impugned order of the District Court in the following terms:

i) The figure of Rs.172,32,26,873/- shall stand substituted by the figure of Rs.150 crores.

ii) MCA would have an option to furnish Bank Guarantee of a nationalized Bank of the aforesaid amount of Rs.150 crores in favour and to the satisfaction of the Registrar of this Court in lieu of deposit of the said amount of Rs.150 crores with a nationalized Bank, as directed by the District Court, if such Bank Guarantee is furnished within a period of six weeks from today. The Bank Guarantee shall be initially cover a period of two years and shall be kept alive till the matter is referred to an Arbitral Tribunal and conclusion of the arbitral proceedings and for a period of two months thereafter. In the event, the Bank Guarantee is not furnished within the stipulated period, the direction to deposit the amount of Rs.150 crores would operate.

26 The Arbitration Appeal is disposed of in the above terms. There shall be no order as to costs. It is clarified that the observations in this

judgment shall not influence the Arbitral Tribunal as and when the disputes are referred to arbitration and the Arbitral Tribunal would be at liberty to issue appropriate directions as regard the Bank Guarantee or deposit if such directions are complied with by MCA.

27 In view of the disposal of the Arbitration Appeal, nothing survives in the Civil Application and the same to stand disposed of.

(A.A. Sayed, J.)