

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.04.2018

+ **O.M.P. (COMM) 72/2018 & IA No. 2120/2018**

RAIL LAND DEVELOPMENT AUTHORITY Petitioner

Versus

**PARSVNATH DEVELOPERS LIMITED
& ANR.**

... Respondents

Advocates who appeared in this case:

For the Petitioner	:Mr Amarendra Sharan, Sr. Advocate with Mr Amit Kumar and Mr Shaurya Sahay.
For the Respondents	:Mr Rajiv Nayar, Sr. Advocate, Mr Ciccu Mukhopadhyaya, Sr. Advocate with Mr Vijay Nair, Mr Saurav Agarwal, Mr Shubham Paliwal, Mr Kapil Rustagi, Mr Rahul Malhotra, Mr Deeptanshu Jain, Mr Sushal Tiwari and Ms Rashmi Gogoi.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Rail Land Development Authority (hereafter 'RLDA') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 25.11.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal (hereafter 'the Arbitral Tribunal') constituted by three arbitrators, namely, Sh R.C. Lahoti, (Presiding), Sh S.S. Nijjar and Sh Vikramajit Sen, former Judges of the Supreme Court of India.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Development Agreement dated 31.05.2013 (hereafter 'the Agreement').

3. There is no dispute that the Agreement was terminated. The only controversy involved in the arbitration proceedings was whether the Agreement stood terminated on account of non-achievement of Financial Close on 15.06.2015 or whether the same was terminated on account of Payment Default on behalf of the Developer.

4. Whilst, the respondents contend that the Agreement was deemed to have been terminated on account of non-achievement of Financial Close, RLDA claims that it had terminated the Agreement with effect from 23.02.2015, by a letter dated 06.08.2015, on account of non-payment of lease premium within the specified time.

5. Briefly stated, the relevant facts necessary to address the controversy are as under:-

5.1 RLDA was constituted by the Central Government under Section 4A of the Railways Act, 1989 and came into existence on 01.11.2006 with the object of undertaking development of vacant railway land on behalf of the Railways to generate revenue through non-tariff measures.

5.2 On or about 18.10.2010, RLDA invited tenders for commercial development of a parcel of land measuring 15.27 hectares, located at

Sarai Rohilla, Kishan Ganj, Delhi (hereafter 'the Project'). The Project also envisaged re-development of a Railway Colony existing over land measuring 4.37 hectares. Pursuant to the aforesaid invitation, respondent no.1 (hereafter 'PDL') submitted its bid on 26.11.2010. PDL's bid of ₹1651,51,00,000/- (Rupees One Thousand Six Hundred Fifty-One Core and Fifty-One Lakh only) was the highest and, therefore, PDL was declared the successful bidder. RLDA issued a Letter of Acceptance (LoA) dated 26.11.2010 in favour of PDL.

5.3 Thereafter, PDL incorporated respondent no.2 as a Special Purpose Vehicle (SPV), for execution of the Project. PDL furnished a Performance Bank Guarantee in the sum of ₹82,57,55,000/- (Rupees Eighty Two Crore Fifty Seven Lakh Fifty Five Thousand only) for due performance of the Project on 30.05.2013. Thereafter, the parties entered into the Agreement (Development Agreement) on 31.05.2013. At the time of signing of the Agreement, PDL had paid payment amounting to approximately ₹750,00,00,000/- (Rupees Seven Hundred Fifty Crore only) to RLDA.

5.4 In terms of the Agreement, the lease premium could be paid in six installments (Four installments of 20% of the lease premium and balance two installments of 10% of the lease premium). The first installment was required to be paid within a period of 90 days from the issuance of LoA; the second installment was to be paid within a period of eighteen months of the first installment; and the third installment was payable within thirty months of the first installment. Similarly, the fourth, fifth and sixth installments were payable within

forty-eight months, fifty four months and sixty months from the due date of payment of the first installment.

5.5 The respondents had, prior to signing of the Agreement, paid an aggregate sum of ₹665,80,27,505/- (Rupees Six Hundred Sixty Five Crores Eighty Lakhs Twenty Seven Thousand Five Hundred & Five Only) towards the first and the second installment of the lease premium along with interest thereon. Thereafter, on 22.08.2013, a further sum of ₹478,93,79,000/- (Rupees Four Hundred Seventy Eight Cores Ninety Three Lakhs Seventy Nine Thousand only) was paid to RLDA towards the third installment of the lease premium. The said amount also included a sum of ₹148,63,59,000/- towards interest at the rate of 15% per annum in terms of Article 9.2 of the Agreement. In addition, a further sum of ₹21,91,79,408/- (Rupees Twenty One Crores Ninety One Lakhs Seventy Nine Thousand Four Hundred and Eight only) was also paid towards shortfall in the payment of the second installment of the lease premium.

5.6 There is no dispute that as on 22.08.2013, the respondents had deposited a sum of ₹1166,65,85,913/- (Rupees One Thousand One Hundred Sixty Six Crores Sixty Five Lakhs Eighty Five Thousand Nine Hundred Thirteen only) which comprised of ₹990,90,60,000/- (Rupees Nine Hundred Ninety Crores, Ninety Lakhs Sixty Thousand) towards the principal amount of the lease premium and ₹175,75,25,913/- (Rupees One Hundred Seventy Five Crores Seventy Five Lakhs Twenty Five Thousand Nine Hundred & Thirteen) towards interest for the delays in payment of the first, second and third

installments.

5.7 As on date of the execution of the Agreement, certain disputes had arisen between the parties and the same were referred to arbitration (the First Arbitration). The respondents alleged that RLDA was responsible for significant delays in execution of the Project and consequently they were entitled to reliefs for extension of time as well as for damages.

5.8 The fourth installment of the lease premium was due on 22.02.2015 but the same was not paid by respondent no.2.

5.9 Clause 4.1 of the Agreement expressly provided that the rights and obligations of the parties under the Agreement would be subject to satisfaction of the conditions precedent as specified in Clause 4.1.2 of the Agreement. This included achievement of Financial Close in terms of Article 7 of the Agreement, within the period of two hundred and forty days of the date of signing of the Agreement. Admittedly, the Financial Close was not achieved and RLDA had granted extensions from time to time for the said purpose. The details of such extensions granted are as under:-

“a. On 12 February 2014, (pursuant to a request of 24 January 2014) the RLDA granted an extension for 120 days.

b. On 27 May 2014, (pursuant to a request of 15 May 2014) extension was granted upto 26 July 2014.

c. On 25 July 2014, (pursuant to a request of 15 July 2014) extension was granted upto 25 October 2014.

d. On 7 November 2014, (pursuant to a request of 10 October 2014) extension was granted upto 25 November 2014.

e. On 26 November 2014, (pursuant to a request of 17 November 2014), extension was granted upto 25 February 2015.

f. On 15 June 2015 extension was granted from 26 February 2015 to 25 May 2015 and further from 26 May 2015 to 15 June 2015.”

5.10 By a letter dated 22.05.2015, respondent no. 2 requested RLDA for extension of time for paying the remaining installments of the lease premium. It further stated that in the event its request for extension of time for payment of installments of the lease premium was not accepted or declined for any reason or not responded to before 15th June, 2015, the said letter may be taken as intimation of deemed termination of the Agreement in terms of Article 7.2.2 of the Agreement. RLDA did not respond to the said letter.

5.11 Thereafter, by a letter dated 20.06.2015, respondent no. 2 called upon RLDA to refund the amounts paid to RLDA after retention of the contractually permitted sums – an amount equivalent to the Performance Bank Guarantee of ₹82,57,55,000/- and 15% of the first installment of the lease premium amounting to ₹49,54,53,000/-. Since the respondents did not receive any response from RLDA, the respondents invoked the disputes resolution Clause under the Agreement. The respondents also filed a petition under Section 9 of the Act, *inter alia*, seeking an order restraining RLDA from invoking

the Performance Bank Guarantee. By an order dated 03.08.2015, this Court restrained the invocation of the Performance Bank Guarantee in question.

5.12 Thereafter, by a letter dated 06.08.2015, RLDA terminated the Agreement retrospectively with effect from 23.02.2015 on the ground that the respondents had defaulted in payment of the lease premium till 22.06.2015. RLDA also claimed that the same constituted an Event of Default under Clause 9.4.1 of the Agreement and RLDA was entitled to forfeit the entire payment made by the respondents till date. Thereafter, the respondents invoked the arbitration clause and an Arbitral Tribunal was constituted. The said arbitral proceedings culminated in the passing of the impugned award.

6. The Arbitral Tribunal accepted the contention of the respondents that the Agreement was deemed to be terminated under Article 4.2 and 7.2.1 of the Agreement consequent upon the failure of the respondents to achieve the Financial Close on or before 15.06.2015.

7. RLDA's claim that the Agreement was terminated with effect from 23.02.2015 was rejected, as the Arbitral Tribunal found that the retrospective termination of the Agreement was against the basic principles of interpretation of commercial contracts as well as logic. The Arbitral Tribunal also held that RLDA could not be heard to claim that it had a right to terminate the Agreement before lapse of one hundred and twenty days cure period. RLDA's contention, that the

provision of deemed termination on account of delay in achieving Financial Close, had been waived by the parties by their conduct, was rejected.

8. The Arbitral Tribunal concluded that the Agreement stood terminated with effect from 15.06.2015 due to non-achievement of Financial Close by the respondents. In view of the above, the Arbitral Tribunal held that RLDA's claim for forfeiting the entire amount of ₹1166,65,85,913/- (Rupees One Thousand One Hundred Sixty Six Crores Sixty Five Lakhs Eight Five Thousands Nine Hundred Thirteen) as liquidated damages was not sustainable. The Arbitral Tribunal also held that such claim of liquidated damages could not be allowed without substantiating the actual damages suffered or likely to be suffered by it, and RLDA was required to satisfy the requirement of Section 74 of the Indian Contract Act, 1872 for securing any award of liquidated damages in its favour. The Arbitral Tribunal also referred to the decision of the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority & Anr.*: (2015) 4 SCC 136 in this regard.

9. The Arbitral Tribunal held that RLDA was entitled, in terms of Article 7.2.2., to deduct the amount equivalent to the Performance Bank Guarantee of ₹82,57,55,000/- and 15% of the first installment of the lease premium amounting to ₹49,54,53,000/- but was required to refund the balance. Accordingly, the Arbitral Tribunal awarded a sum of ₹1034,53,77,913/- along with interest at the rate of 4% per annum payable from 16.06.2015.

Submissions

10. Mr Amarendra Sharan, the learned Senior Counsel appearing for RLDA assailed the award, essentially, on four fronts. First, he submitted that the Arbitral Tribunal erred in not appreciating that RLDA had consistently granted *ex post facto* extensions for achieving the Financial Close and, therefore, the provision for deemed termination on account of failure to achieve Financial Close within the specified time stood waived by the conduct of the parties. He earnestly contended that if the decision of the Arbitral Tribunal was carried to its logical end, the Agreement would have stood terminated on expiry of two hundred and forty days of its execution (i.e. by 25.05.2014). He stated that the fact that extensions were granted subsequent to that date clearly indicated that the provisions of deemed termination on account of failure to achieve Financial Close were no longer operative.

11. Second, he submitted that the Arbitral Tribunal had erred in not appreciating that the Agreement stood terminated immediately on the failure of the respondents to pay the fourth installment, that is, on 23.02.2015. He submitted that the Arbitral Tribunal erred in holding that the termination could be effective only after the period of one hundred and twenty days (the Cure Period) had expired, since respondent no.2 had clearly stated that it would not be paying the fourth installment of the lease premium within the time specified including the Cure Period.

12. Third, he submitted that the Arbitral Tribunal had grossly erred

in holding that the execution of the Substitution Agreement and the Escrow Agreement in terms of Article 4.1.2(b) of the Agreement was a part and parcel of the Financial Close. He submitted that this finding returned in paragraph 23 of the impugned award was a patent error.

13. Fourth, he submitted that the Arbitral Tribunal had erred in awarding interest on the amount awarded, as the same was expressly prohibited under Clause 29.8.5 of the Agreement.

Reasons and Conclusions

14. As is apparent from the above, the principal controversy relates to whether the Agreement is deemed to be terminated on 15.06.2015 in terms of Article 4.1 read with Article 7.2.2 on account of failure on the part of the respondents to achieve Financial Close.

15. Before proceeding further, it would be necessary to refer to Clause 4.1 and Clause 7.1 of the Agreement. The relevant clauses under the said Articles are quoted below:-

“4.1 Conditions Precedent

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

4.1.2 The Conditions Precedent required to be satisfied by the Developer on or prior to two hundred and forty (240) days from the Effective Date (herein

the 'Appointed date') shall be deemed to have been fulfilled when the Developer shall have:

- a. executed and procured execution of the Substitution Agreement and the Escrow Agreement;
- b. appointed a Project Manager to supervise and be overall in charge of all construction activities being undertaken by the Developer at the Development Site during the construction period and also be the site representative of the Developer for Interaction with the authorised representative of RLDA;
- c. achieved the Financial Close in terms of Article VII and delivered to RLDA, 2 (two) true copies each of the Financing Agreement, the Financial Package and the Financial Model, duly attested by a director of the Developer, along with 2 (two) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Lenders;
- d. delivered to RLDA a legal opinion from the legal counsel of the Developer with respect to the legal capacity of the Developer to enter into this Development Agreement and the enforceability of provisions thereof.

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

4.1.3	xxxx	xxxx	xxxx
4.1.4	xxxx	xxxx	xxxx

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

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

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

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

XXXXX XXXXXXXX XXXXXX XXXXXXXX

7.1. Financial Close

7.1.1. The Developer hereby agrees and undertakes that it shall achieve Financial Close within 240 (two hundred and forty) days from the

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

16. There is no ambiguity in the provisions of the Agreement. There is also no dispute that the respondents had not achieved the Financial Close within the period specified. RLDA had granted extension of time for achievement of Financial Close from time to time. The same was finally granted till 15.06.2015 by a letter dated 15.06.2015. No further extensions were sought by the respondents and none was granted by RLDA. Thus, undisputedly, in terms of the Agreement, the Agreement was deemed to have been terminated on 15.06.2015. The point in issue is whether the said provision was waived by the parties by their conduct as was emphatically argued by Mr Sharan. The Arbitral Tribunal has rejected the said contention as the Arbitral Tribunal found that the extensions were granted in terms of Article 7.1.1 of the Agreement, which expressly provided for grant of extension of the period for Financial Close. The said extensions were

at the sole discretion of RLDA and it exercised such discretion from time to time. Thus, the contention that any term had been waived because *ex post facto* extensions were granted, was not accepted by the Arbitral Tribunal. The relevant extract of the impugned award is set below:-

“22. We do not find merit in the said argument raised by the Respondent as the extensions of time for achieving Financial Close were granted by the Respondent in terms of and subject to Article 7.1.1. The Development Agreement provides for ‘extensions of period of Financial Close’ to the Claimant, though at the ‘sole discretion’ of the Respondent. Thus, the extensions were in terms of the Development Agreement, not over and above it. The question of waiver could only be of any significance had the development Agreement provided for a strict regime for achieving Financial Close. The said deduction finds further strength from Article 7.2.1 of the Development Agreement which clearly provides for deemed termination in case the Financial Close was not achieved within the period ‘*set forth in Article 7.1.1*’. It is reiterated that Article 7.1.1 provides for extension of time though subject to terms.”

17. This Court finds no infirmity with the aforesaid decision. It is also relevant to observe that it is not Mr Sharan’s contention that the parties had waived the requirement of Financial Close. He merely contends that failure to do so would not amount to deemed termination. It is difficult to appreciate this contention; whilst RLDA is insisting that the condition of Financial Close is mandatory, the consequences provided for the same – that is, deemed termination of the Agreement – are contended to have been waived.

18. The contention, that the Agreement could not be deemed to have been terminated because extensions of time were granted on several occasions after the initial period of two hundred and forty days from the effective date had expired and, therefore, it must be construed that the parties had waived the consequences of deemed termination on failure to achieve Financial Close, is also unpersuasive. This is so because there is no dispute that the extensions to achieve Financial Close were applied for and granted upto 15.06.2015; thereafter, no such extension beyond 15.06.2015 had been applied for or granted by RLDA.

19. In the above context, it is also relevant to refer to Clause 32.2 of the Agreement, which expressly provides that there would be no waiver of any provision of the Agreement unless the same is in writing and signed by the parties. Clause 32.2 of the Agreement is set out below:-

“32.2 Amendments

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

20. Admittedly, there is no Agreement in writing which records waiver of the provision relating to deemed termination of the Agreement in terms of Article 4.1.1 and 7.2.2. of the Agreement.

Consequently, in terms of Clause 32.2 of the Agreement, no such waiver, if at all, could be effective.

21. The contention, that the Agreement stood terminated with effect from 23.02.2015 on account of failure on the part of the respondents to pay the fourth installment of the lease premium, is also unmerited. At this stage, it would be relevant to refer to Clause 9.4 and Clause 29.3.2 of the Agreement. The relevant extract of the said clauses are set out below:-

“9.4 Default in payment of the Consideration

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

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

However, in case the Developer opts for submission of the bank guarantee in terms of Clause 9.5.1, on the occurrence of the Payment Default in respect of

payment of any Subsequent Installment(s), RLDA shall Invoke the respective bank guarantee for the Installment without any notice to the Developer.”

29.3.2 Without prejudice to anything to the contrary as contained in this Development Agreement, upon the failure of the Developer to rectify a Payment Default as required under Clause 9.4.2, RLDA shall have the right to terminate this Development Agreement directly by issuance of a Termination Notice.

Provided that in case of termination of the Development Agreement under this Clause 29.3.2, RLDA shall not be required to issue any prior notice expressing its intention to terminate the Development Agreement and calling upon him to cure or rectify the Payment Default and the Developer hereby expressly waives his right, if any, to challenge to same on the ground of non-issuance of prior Notice of Intention to terminate in case of termination of this Development Agreement on the ground of Payment Default.”

22. It is apparent from the plain language of Clause 9.4.2 that in the event there is a payment default, the respondents are entitled to rectify the same within a period of one hundred and twenty days. Thus, this Court finds no infirmity with the decision of the Arbitral Tribunal in concluding that the Agreement could not be terminated by RLDA prior to the expiry of the cure period of one hundred and twenty days as specified in Clause 9.4.2 of the Agreement.

23. The contention, that the cure period would not be relevant since the respondents had committed a repudiatory breach of the Agreement by clearly declaring that it would not be paying the fourth installment

within the time specified, is unmerited. In its letter dated 22.05.2015, the respondents had plainly requested for an extension of time for making further payments and indicated that if such extensions could not be granted, the said letter be construed as an intimation of deemed termination of the Agreement.

24. More importantly, Clause 29.3.2 of the Agreement does not oblige RLDA to terminate the Agreement in the event of a payment default but merely enables RLDA to do so. In terms of Clause 29.3.2 of the Agreement, RLDA has a right to terminate the Agreement by issuance of a termination notice. It is obvious that such termination would only take effect once RLDA exercises its right. It is clearly not open for RLDA to terminate the Agreement with retrospective effect. Admittedly, RLDA exercised its right to terminate the Agreement on 06.08.2015 and, thus, the question of the said termination taking effect prior to the said date does not arise.

25. The third ground urged on behalf of RLDA – that is, that the impugned award is liable to be set aside on the ground that the Arbitral Tribunal has committed a patent error in recording that Substitution Agreement and Escrow Agreement are a part of the financial clause – is also unpersuasive. First of the all, the finding in paragraph 23 of the impugned award is not the central dispute between the parties. This is so because there is no dispute that the respondents had not achieved Financial Close. Further, there is also no dispute that the Substitution Agreement and the Escrow Agreement can be executed only once the agreements between the lenders have been

finalized. Mr Sharan also could not dispute the fact that the question of execution of Escrow Agreement or a Substitution Agreement could not arise in absence of a conclusive arrangement being entered with the lenders. Thus, this Court also finds no merit in the aforesaid contention as advanced on behalf of RLDA.

26. The only remaining question to be addressed is with regard to the award of interest at the rate of 4% per annum. It was contended on behalf of RLDA that Clause 29.8.5 of the Agreement was the operative Clause proscribing the respondents from recovering any interest on the amounts payable by RLDA to the respondents. There is no dispute that if an Agreement between the parties prohibits award of any interest, the Arbitral Tribunal would be bound by the same as held by the Supreme Court in *Union of India v. M/s Ambica Construction: (2016) 6 SCC 36*. However, the question whether a particular clause of an Agreement proscribes award of interest is a matter of interpretation of the Agreement, which lies squarely within the jurisdiction of an Arbitral Tribunal. In the present case, the Arbitral Tribunal had concluded that Clause 29.8.5 of the Agreement would not be applicable as there was no transfer and the question of any transfer deed did not arise.

27. At this stage, it would be necessary to refer to Clause 29.8.3, 29.8.4 and 29.8.5 which are set out below:-

“29.8.3 Termination due to RLDA Event of Default

In the event of Termination of this Development

Agreement on account of a RLDA Event of Default, RLDA shall be obliged to:

- (i) acquire and takeover the unencumbered possession and control of the Site Parcel(s), Assets, Facilities and Project Utilities and thereafter making a payment of an amount equivalent to the cost of construction of the Redevelopment Assets, Redevelopment Project Utilities, Assets, Facilities and Project Utilities, as determined by an Independent valuer, mutually appointed for the said purpose; and
- (ii) return the amount equal to the difference of the Lease Premium paid by the Developer till the Transfer Date and the amount of Distributions withdrawn by the Developer till the Transfer Date, provided that the Lease Premium paid by the Developer till the Transfer Date is more than the Distributions withdrawn by the Developer till the Transfer Date; and
- (iii) return the Performance Bank Guarantee furnished by the Successful Bidder/Developer to RLDA.

It is hereby clarified that RLDA Event of Default shall be during the period from the Effective Date till the last Site Parcel has been handed over to the Developer as per the approved phasing plan.

29.8.4 For Railways' Operational use, if RLDA takes back the Site along with the Assets, Facilities and Project Utilities, as per the provisions of Article 28.3, due compensation would be payable to the Developer, as detailed in clause 29.8.3.

29.8.5 For avoidance of doubt it is clarified that any payments due to the Developer from RLDA would be made to the Developer within twelve (12) months of the Transfer Date and the same shall not, in any manner whatsoever, till the period of actual payment attract any interest thereon and shall be net of any outstanding amount recoverable from the Developer under this Development

Agreement or the Lease Deed(s), or any person claiming through and under it, in whatever nature & form.”

28. It is clear from the above that Clause 29.8.5 of the Agreement cannot be read in isolation and must be read in the context of the preceding Clauses. Clause 29.8.3 too provides for an obligation for RLDA to return the lease premium paid by the developer till the Transfer Date. Clause 29.8.4 of the Agreement provides for RLDA to pay compensation for the assets and facilities taken over by RLDA. Clause 29.8.5 of the Agreement obliges RLDA to make payments to the developer within 12 months of the Transfer Date. The expression “Transfer Date” has been defined in Clause 1.1.107 which reads as under:-

“1.1.107 “Transfer Date” shall mean the date on which the Developer transfers possession of the Assets, Facilities and Project Utilities to RLDA, or its nominee in terms of vesting provisions mentioned in Article XXX and, which shall be the date of termination as per the relevant Termination Notice issued by RLDA or the Developer, as the case may be, or the date of expiry of this Development Agreement.”

29. It is apparent that the said provision would be applicable only once the Developer transfers assets, facilities and project utility to RLDA. This would only arise once the Developer is vested with the assets. In the present case, since RLDA has not executed the lease in favour of RLDA, there is no question of there being any Transfer Date. Mr Sharan also did not dispute that there was no question of a

Transfer Date in the present case.

30. There is also much merit in the contention advanced on behalf of the respondents that such restrictive covenants must be construed strictly.

31. The Arbitral Tribunal had held that since, there is no transfer, the question of the said Clause being applicable does not arise. It is also well settled that the Courts would not interfere with the decision of the Arbitral Tribunal which fall within its jurisdiction unless the same is found to be patently illegal, perverse or unreasonable so as to fail the *Wednesbury test*, that is, no sensible person could have arrived at such a conclusion. Clearly, the conclusion of the Arbitral Tribunal does not fall within the aforesaid exception.

32. It is also well settled that the interpretation of a contract falls squarely within the jurisdiction of an Arbitral Tribunal and even if the same is erroneous, no interference would be called for. (See: *Mcdermott International Inc. v. Burn Standard Co. Ltd and Ors: (2006) 11 SCC 181*).

33. In view of the above, this Court finds no infirmity with the impugned award. The petition is dismissed with costs quantified at ₹50,000/-. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 03, 2018/pkv