

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.05.2018

+ **O.M.P. (COMM) 9/2016 & IA No. 645/2016**

RAIL LAND DEVELOPMENT AUTHORITY Petitioner

versus

YANTTI BUILDCON PVT LTD Respondent

AND

+ **O.M.P. 226/2015**

RAIL LAND DEVELOPMENT AUTHORITY Petitioner

versus

YANTTI BUILDCON PVT. LTD. Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Amarendra Sharan, Sr. Advocate with Mr Shaurya Sahay and Mr Kumar Abhishek.

For the Respondent: Mr Arvind K. Nigam, Sr. Advocate with Mr Ashok Aggarwal, Mr Hrishikesh Baruah, Mr Mikhil Sharda, Ms Snigdha Sharma and Mr Mukesh Kumar.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner, Rail Land Development Authority (hereafter 'the RLDA') has filed the present petitions under Section 34 of the

Arbitration and Conciliation Act, 1996 (hereafter 'the Act'). In OMP (Comm) 9/2016, RLDA impugns the arbitral award dated 31.10.2015 (hereafter 'the final award') and in OMP 226/2015, RLDA impugns the interim award dated 13.02.2015 (hereafter 'the interim award') made by the Tribunal constituted of three Arbitrators, namely, Mr S. K. Malik, Mr R. D. Mirza and Mr K. K. Madan (Presiding) (hereafter 'the Arbitral Tribunal'). The interim award and the final award are, hereafter, collectively referred to as the impugned awards.

2. The impugned awards were rendered in the context of the disputes that have arisen between RLDA and Yantti Buildcon Pvt. Ltd. (hereafter 'Yantti') in connection with the Development Agreement dated 03.03.2010 (hereafter 'the Development Agreement'). The parties had entered into the Development Agreement for commercially exploiting a plot of land admeasuring 10128.12 sq. mtr. belonging to the Indian Railways, located near the City Railway Station, Bangalore (hereafter 'the said land'). In terms of the Development Agreement, Yantti was to develop a hotel and commercial complex on the said land and further operate and maintain the same for the specified period. In addition, Yantti was to develop and handover ten new Type-II quarters on an alternative piece of Railway land. The said land was leased to Yantti for a period of thirty years.

3. RLDA terminated the Development Agreement due to failure on the part of Yantti to complete the project within the specified time and also invoked the performance bank guarantee furnished by Yantti. By the interim award, the Arbitral Tribunal has set aside RLDA's letter

dated 08.01.2014 terminating the Development Agreement and has further directed RLDA to refund the amount received by RLDA by invoking the performance bank guarantee. The Arbitral Tribunal also directed RLDA to hand over possession of the said land to Yantti so as to enable it to carry out the development work.

4. By the final award, the Arbitral Tribunal has awarded an aggregate sum of ₹96.77 crores in favour of Yantti. The said sum comprises of (i) a sum of ₹48.01 crores in favour of Yantti on account of loss of the lease period albeit with an option to RLDA to extend the lease in respect of the land in question for a further period of five years in lieu of payment of damages; (ii) a sum of ₹36.87 crores on account of escalation in the cost of execution of the project and idle charges; and (iii) ₹11.88 crores on account of loss due to non availability of construction depth at the said land. The Arbitral Tribunal has also awarded interest at the rate of 15% per annum from the date of the final award to the date of actual payment if the awarded amount is not paid within a period of three months from the date of the final award.

5. The impugned awards are premised on the Arbitral Tribunal's conclusion that the project had been delayed for reasons attributable to RLDA. The Arbitral Tribunal has also accepted Yantti's claim that RLDA had misrepresented that at least 4.5 mtrs. depth would be available for construction of a basement and Yantti had founded its offer on the said misrepresentation. Since the said construction depth is not available and construction of a basement is not possible, the Arbitral Tribunal awarded a sum of ₹11.88 crores as damages. This

has been computed on account of the difference between the estimated lease rental that would have been realized for space in the basement and the lease rental that would be realizable for other floors.

6. RLDA claims that the impugned awards are perverse and contrary to law and, thus, are liable to be set aside.

Factual background

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

8. RLDA has been constituted by the Central Government in exercise of powers under Section 4 of the Railways Act, 1989, with the object of undertaking development of vacant land of Railways on its behalf. The objective being to generate revenue through non-tariff measures and optimise the utilization of Railway property.

9. RLDA invited Requests for Qualification (RFQ) from eligible entities for Development of the said land. Seventeen bidders submitted their RFQ and were qualified. On 18.05.2009, a pre Request for Proposal (RFP) meeting was held and was attended by seventeen bidders. However, neither Yantti nor its holding company, Akruti City Limited (hereafter 'Akruti') attended the same.

10. On 14.09.2009, RLDA issued the Request for Proposal (RFP) for grant of lease and development of the said land – the plot of land admeasuring 10128.12 sq. mtr. belonging to the Indian Railways, located near the City Railway Station, Bangalore. On 01.10.2009, a

pre-bid meeting was held, which was also attended by Akruti. Thereafter, on 21.10.2009, Akruti submitted its financial bid offering a lease premium of ₹27.90 crores for lease of the said land. This was based on the premise that an FAR of 225 would be available. Akruti agreed that if the FAR was increased, the lease premium would be increased proportionately. The said bid was accepted and on 30.11.2009, RLDA issued a letter of acceptance (LOA) awarding the contract to Akruti and the lease premium for the said land was fixed at ₹27.90 crores.

11. In terms of the RFP, Akruti incorporated a Special Purpose Vehicle (SPV), namely, Yantti, and the Development Agreement was executed between RLDA and Yantti. Thereafter, on 01.10.2010, both the parties executed a lease agreement. In terms of the RFP, the lease premium could be paid in four installments. The first installment of 30% of the bid amount was to be paid prior to the execution of the Development Agreement; the second installment for 25% of the bid amount was payable within a period of 12 months from the date of the first installment; the third installment for 25% of the lease premium was to be paid within a period of 24 months from the due date of the first installment; and the remaining fourth installment of 20% of the lease premium was to be paid within a period of 36 months from the date of the first installment.

12. On 27.01.2010, Yantti paid 30% of the bid amount being ₹8,37,00,000/- and also furnished bank guarantees for the remaining three installments of the lease premium. Thereafter, Yantti paid the

second installment of the lease premium of ₹6,97,50,000/- on 01.06.2011 along with interest of ₹31,98,945/- for the delayed period.

13. On 03.02.2012, Yantti invoked the dispute resolution clause and raised the following claims:-

- “i. Rs. 11,88,59,961/- towards alleged non-availability of depth;
- ii. Rs. 14,54,786/- towards delay in handing over the site;
- iii. Rs.1,95,00,000/- towards change in raft foundation of structure;
- iv. Extend period lost on account of alleged delay obtaining Khata and additional time spent on redesigning.”

Thus, in aggregate, Yantti raised a total claims of about ₹13,98,14,747/- for resolution through conciliation.

14. Yantti did not pay the third instalment of the lease premium.

15. The disputes raised by Yantti could not be resolved amicably.

Arbitral & Other proceedings

16. On 23.05.2012, Yantti approached the City Civil Court, Bangalore for stay of the bank guarantees. By an order dated 10.08.2012, the City Civil Court, Bangalore passed a final order restraining encashment of the bank guarantees. RLDA appealed against the said order before the Karnataka High Court.

17. In the meanwhile, the Arbitral Tribunal was constituted and held its preliminary hearing on 08.09.2012.

18. On 09.10.2012, Yantti filed a Statement of Claim, claiming a sum of ₹72,13,78,096/- which was significantly higher than the claims preferred in the conciliation proceedings. RLDA filed a reply to the Statement of Claims and also preferred a counter claim for a sum of ₹12,56,000/-. The pleadings were complete by 27.02.2013 with RLDA filing a rejoinder to its counter claim. The admission and denial of documents was completed prior to that on 07.01.2013.

19. Thereafter, Yantti filed an application for production of additional documents as well as an application dated 09.03.2013 for admitting additional documents.

20. At a hearing held on 16.03.2013, the Arbitral Tribunal noted that RLDA had denied some of the documents for which evidence was required to be led. Yantti had also filed an application for production of two witnesses and the Arbitral Tribunal directed that affidavit of the said witnesses be filed. The Tribunal also struck the issues to be decided.

21. On 08.04.2013, Yantti filed an application (the first amendment application) under Section 23(3) of the Act seeking to raise a supplementary claim of ₹62,50,954/- on account of Bangalore Metro Rail Corporation Limited (hereafter 'BMRCL') taking over 966.44 sq. mtrs. of the said land in terms of Clause 4.1.18 (c) of the Development Agreement. On 08.04.2013, Yantti filed yet another application (the

second amendment application) under Section 23(3) of the Act raising supplementary claims, amounting to ₹15,37,17,034/-, with regard to escalation of costs.

22. RLDA contested the above application dated 08.04.2013 stating that the claims were inflated and beyond the scope of arbitration. However, the Arbitral Tribunal allowed the said applications by an order dated 31.05.2013; RLDA was also permitted to file a Statement of Defence to the amended Statement of Claims by 25.06.2013 and Yantti was permitted to file a rejoinder by 10.07.2013.

23. In the meanwhile, Yantti filed an affidavit of one of the witnesses on 10.04.2013. RLDA also filed a statement of admission/denial in respect of the additional documents filed by Yantti. The Arbitral Tribunal directed Yantti to commence final arguments on the next date of hearing, which was scheduled on 19.07.2013.

24. Yantti commenced final arguments on 20.07.2013. The Arbitral Tribunal considered the additional suggested issues and decided that the same will be considered as additional claims.

25. On the next date of proceedings before the Arbitral Tribunal – 13.09.2013 – Yantti continued with the final arguments. The Arbitral Tribunal also directed Yantti to quantify the amounts relating to additional claims and scheduled further hearings on 4.10.2013 and 5.10.2013. At the said hearings, Yantti continued with presenting the

final arguments relating to its claims, which remained inconclusive. Further hearing were scheduled on 29.11.2013 onwards.

26. On 18.10.2013, RLDA issued a notice under Article 9.3 of the Development Agreement calling upon Yantti to cure the default of not completing the project within a period of three years and four months of signing of the Development Agreement, which expired on 02.07.2013.

27. On 20.11.2013, Yantti filed an application under Section 17 of the Act seeking an order restraining RLDA from taking any action in terms of the above notice of termination.

28. At the hearings held before the Arbitral Tribunal on 29.11.2013 and 30.11.2013, Yantti concluded its oral submissions on the Statement of Claims. It also presented its application under section 17 of the Act. At the said hearing (held on 30.11.2013), the Arbitral Tribunal passed an order directing status quo regarding termination of the Development Agreement be maintained.

29. RLDA filed an appeal under Section 37 of the Act against the said order before this Court (ARB. A. 2/2014) and on 03.01.2014, this Court passed an order staying the order dated 30.11.2013 passed by the Arbitral Tribunal on the ground that the dispute regarding termination of the Development Agreement was not before the Arbitral Tribunal.

30. Thereafter, on 08.01.2014, RLDA terminated the Development Agreement on account of failure on the part of Yantti to complete the project within the stipulated period. Yantti approached the City Civil Court, Bangalore for seeking an injunction restraining RLDA to take any consequential steps after termination of the Development Agreement. The said application was dismissed by the City Civil Court on 17.01.2014. This order was challenged before the Karnataka High Court and, by an order dated 06.02.2014, the High Court restrained RLDA from changing the nature of the property in question.

31. At this stage, Yantti filed another application (the third amendment application) dated 08.05.2014 under Section 23(3) of the Act seeking amendment of its Statement of Claim to seek refund of the amount recovered by RLDA by invocation of the bank guarantee and also impugning the termination of the Development Agreement. On 05.09.2014, Yantti filed another application (the fourth amendment application) under Section 23(3) of the Act for seeking amendment of its claim to seek further amount of ₹1,81,65,719/- as loss for keeping the bank guarantee alive.

32. By an order dated 05.09.2014, the Arbitral Tribunal allowed the applications dated 08.05.2014 filed by the Yantii under Section 23(3) of the Act. Thereafter, on 17.10.2014, RLDA filed an application under Section 16 of the Act for challenging the jurisdiction of the Arbitral Tribunal to entertain the application dated 08.05.2014 under Section 23(3) of the Act. The said application was also summarily dismissed by the Arbitral Tribunal on 18.10.2014.

33. On 29.11.2014, Yantti filed an application seeking an interim award with respect to termination of the Development Agreement. The said application was allowed and on 13.02.2015, the Arbitral Tribunal passed the interim award (which is impugned in the present petition) setting aside the letter dated 08.01.2014 terminating the Development Agreement and further directing RLDA to hand over possession of the said land to the Yantti.

34. RLDA challenged the interim award under Section 34 of the Act (OMP No. 226/2015) and, by an order dated 20.03.2015, this Court stayed the interim award.

35. On 21.03.2015, the Arbitral Tribunal concluded the hearings and reserved the matter for final award. The final award was rendered on 31.10.2015.

36. As indicated above, by way of the final award, the Tribunal has awarded an aggregate sum of ₹96.77 Crores in favour of Yantti.

Grounds of Challenge

37. RLDA assails the impugned awards on several grounds including (a) that it is contrary to the provisions of the Specific Relief Act, 1963 as the Development Agreement was determinable and, therefore, the Arbitral Tribunal could not have directed the same to be specifically performed; (b) that the dispute relating to termination of the agreement was not referred to the Arbitral Tribunal and, therefore, it had no jurisdiction to entertain any such claim. RLDA also claims

that the said dispute was an excepted matter; (c) that no representation as to available depth for construction was made by RLDA and any finding to this effect is contrary to the record as well as the express terms of the Development Agreement; (d) that there was no delay on the part of RLDA and the onus to secure all permissions was on Yantti and, thus, the impugned awards are unsustainable; (e) that the computation of the damages awarded is perverse and wholly contrary to law; and (f) that the impugned awards are vitiated on account of procedural irregularities in the conduct of the arbitral proceedings.

Reasons and Conclusion

38. The submissions made by the parties are considered while discussing the relevant claims awarded by the Arbitral Tribunal.

(i) Re: Award of ₹11,88,59,961/- on account of loss due to non-availability of depth of clear 4.5 meters at site.

39. The Arbitral Tribunal awarded a sum of ₹11,88,59,961/- as damages on account of non-availability of depth of 4.5 meters at site. The Arbitral Tribunal accepted Yantti's contention that RLDA had made a representation that a minimum depth of 4.5 meters below ground level would be available for construction of a basement. RLDA disputed that any such representation had been made. It also submitted that the findings of the Arbitral Tribunal in this regard are perverse and contrary to the express provisions of the Development Agreement.

40. Concededly, the request for qualification (RFQ) issued on 30.01.2008, expressly provided that "*construction will be allowed on*

the site subject to certain restriction on the depth of foundation and type of foundation to maintain the structural safety of the metro tunnels”. The prospective bidders were also informed that the boundary conditions would be specified by BMRCL, based on geotechnical investigation and would be informed to the interested bidders at the RFP stage.

41. Clause 5.2 of the RFQ is relevant and reads as under:-

“5.2 Proposed Metro Line alignment

It has been ascertained during the site survey that the underground section of the Bangalore metro rail system, currently under implementation, will pass directly under the site. While this means that the site will have excellent access by metro after commissioning, also there would be certain restrictions on depth of construction along the strip of land on the metro line alignment. The total width of the metro line shall be approximately 30 m. Please refer Figure 4 to understand the alignment of metro rail passing below the site.

It is envisaged that, construction will be allowed on the site subject to certain restriction on the depth of foundation and type of foundation to maintain the structural safety of the metro tunnels. These boundary conditions shall be specified by BMRCL based on the geotechnical investigation at the site and shall be intimated to the interested bidders at the RFP stage. It is also envisaged that the developer will be allowed to exploit the permissible FAR as per the development control regulations. The Developer shall have to abide by the requisite guidelines laid down by BMRCL and obtain the necessary clearances from them.”

42. Concededly, the RFP document did not include any representation that a minimum depth of 4.5 meters would be available at site. Thereafter, a pre-bid meeting was held on 01.10.2009. The Minutes of the said meeting were communicated to all bidders including Yanti and were also uploaded on the website of RLDA. Yanti claims that at the said meeting, a clarification was issued by RLDA that a minimum depth of 4.5 meters for construction would be available although the same is not reflected in the minutes. However, Yanti/Akruti neither objected to the minutes of the pre-bid meeting nor sought a specific response to any query relating to the available depth at site. It is also relevant to mention that on 19.10.2009, Hemant Kumar Gulati, one of the directors of Yanti sent an e-mail seeking further clarifications with regard to two issues; (i) hoardings at site; and (ii) the lease renewal at the option of the lessee. Admittedly, no communication was sent by Yanti/Akruti seeking any conformation or raising any query regarding the available depth at site.

43. Akruti submitted its bid on 21.10.2009. The opening paragraph of the said bid reads as under:-

“Having examined the bidding documents (RFQ & RFP), including Addenda, Clarifications/Reply to Pre-Bid queries and your requirements incorporated in the minutes of pre-bid meeting held on 1.10.2009, we the undersigned, offer to provide the facilities under the above named contract in full conformity with the said bidding documents.”

44. Akruti also confirmed that its offer was based on FAR of 225 of the said land measuring 10128 sq. meter and indicated that if further FAR was available, an additional payment would be made to RLDA on *pro rata* basis. It is apparent from the above that the bid also did not contain any reference to the alleged representation relating to the depth at site. On the contrary, it expressly indicated that Akruti had examined the bidding documents; reply to the pre-bid queries; and the requirements incorporated in the minutes of the pre-bid meeting held on 01.10.2009. At this stage also, neither Akruti nor Yantti raised any concern that the minutes of the pre-bid meeting did not incorporate the representations as to the available depth at site.

45. Apparently, a meeting had been held between RLDA, BMRCL and DMRC which indicated that clear minimum depth of about 4.5 meters (+ 6 meters raft above the tunnel crown) is available at the lowest point of the plot along with the alignment. A copy of the minutes of the said meeting held on 11.11.2008 was sent by Fax to Yantti on 24.02.2010 after Akruti's bid had been accepted and after it had deposited 30% of the bid amount as per RFP.

46. The parties entered into the Development Agreement on 03.03.2010. Admittedly, the Development Agreement also contains no representation as to the available depth at site. However, paragraph 2.71 of the Development Agreement contains provisions as to acceptance of the site and reads as under:-

“2.7 Acceptance of the Site

2.7.1 For the purposes of this Agreement, the Developer shall be deemed to have:

- a. inspected the Site in its entirety and its surroundings;
- b. satisfied itself as to the nature of the climatic, hydrological and general physical conditions of the Site, the nature of the ground and subsoil, the form and nature of the Assets permitted to be developed at the Site, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement.
- c. Satisfied itself as to the means of communication with, access to and accommodation at the Site, it may require or as may be otherwise necessary for the performance of its obligations under this Agreement;
- d. Obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect its rights and obligations hereunder and its other rights and obligations under or pursuant to this Agreement.

2.7.2 The Developer expressly acknowledges that it shall have no recourse against RLDA in the event of any mistake made or misapprehension harbored by the Developer in relation to any of the foregoing provisions of this Article 2.7.3 and RLDA hereby expressly disclaims any liability in respect thereof.

2.7.3 The developer acknowledges that prior to the execution of this Agreement, it has, after a complete and careful examination, made an independent evaluation of the site as a whole and has determined the nature and extent of the difficulties, inputs, costs, time, resources, risks

and hazards that are likely to arise or may be faced by it in the course of the performance of its obligations under this Agreement. The Developer further acknowledges that it shall have no recourse against RLDA if it is, at a later date, found that the Site is deficient in any manner whatsoever (hereinafter referred to as the “Deficient”). If a Deficiency is found, the Developer acknowledges and agrees that it shall, as its own cost, take all appropriate measures to remedy the same in order to undertake the Project.”

47. Article 3 of the Development Agreement indicates the representations and warranties made by the parties. Para 3.1 contains the representation and warranties made by RLDA and none of the said representations provide any assurance as to the construction depth available as site.

48. The Instructions to Bidders also contains a Disclaimer clause which reads as under:-

“DISCLAIMER

The information contained in this Request for Proposal (hereafter referred to as “RFP”) document or subsequently provided to the bidders, whether verbally or in documentary form by or on behalf of the Rail Land Development Authority (RLDA), their employees or any of its agencies/consultants/advisors, is provided to the bidder(s) on the terms and conditions set out in this RFP document and all other terms and conditions subject to which such information is provided.

The purpose of this RFP document is to provide the bidders with information to assist the formulation of

their Financial Proposal. This RFP document does not purport to contain all the information for all the persons, and it is not possible for RLDA, their employees or any of its agencies/consultants/advisors to consider the business/investment objectives, financial situation and particular needs of each bidder who reads or uses this RFP document. Each Bidder should conduct its own investigations and analysis, and should check the accuracy, reliability and completeness of the information in this RFP document and where necessary obtain independent advice from appropriate sources. RLDA, their employees or any of its agencies/consultants/advisors make no representation or warranty and shall incur no liability under any law, statute, rule or regulation as to the accuracy, reliability or completeness of the RFP document.

RLDA may in its own discretion, but without being under any obligation to do so, update, amend or supplement the information in this RFP document.”

49. In the aforesaid circumstances, it is difficult to accept that there was any ambiguity as to any representation, which required the Arbitral Tribunal to examine other surrounding circumstances. Undisputedly, neither the RFQ nor the RFP, including the Instructions to Bidders, nor the minutes of the pre-bid meeting include any representation as to the available depth of 4.5 meters. Thus, apart from the oral assertion made by Yantti that such a representation had been made on behalf of RLDA at a pre-bid meeting held on 01.10.2009 – which is contrary to the minutes of the said meeting – there was no material on record that indicates that any such representation had been made. Plainly, Yantti’s assertion that any oral representation had been made at the pre-bid meeting held on 01.10.2009 cannot be accepted, as

it is contrary to the minutes that were, admittedly, communicated to all the prospective bidders. And, no protest in this regard was raised at the material time, either by Yantti or by any other qualified bidders.

50. The Arbitral Tribunal proceeded on the basis that the available depth below the ground was an important factor for commercial development and, therefore, the possibility that it could not have been raised in the pre-bid meeting is extremely remote. Plainly, the said reasoning is speculative and in any event cannot possibly lead to the conclusion that any affirmative representation as to the available depth was made by RLDA.

51. The minutes of the meeting held between BMRCL, DMRC, and RLDA on 11.11.2008 could not, obviously, be considered as a representation made to Yantti for several reasons: First of all, the said meeting did not include Yantti or any other bidder; Secondly, it is not disputed that these minutes were not communicated to Yantti/Akruti prior to Akruti/Yantti submitting its bid. And, most importantly, merely because the participants of the meeting held on 11.11.2008 (RLDA, BMRCL and DMRC) had discussed the available depth at site and recorded the same in the minutes does not in any manner lead to the conclusion that the same was a representation held out by RLDA.

52. The Arbitral Tribunal has referred to Clause 4.1.18 of the Development Agreement and concluded that the said Clause also “gave an impression that a basement was possible should the

developer so desired". Clause 4.1.18 of the Development Agreement reads as under:-

"4.1.18 The Developer shall obtain all requisite clearances of plan and design for proposed development from BMRCL as per the following conditions agreed between BMRCL and RLDA before applying for sanctions from concerned municipal/local authorities or before commencement of any construction activity on the Site. While preparing the plan and design for proposed development, the Developer shall ensure the following conditions:

- a. Foundation level of the commercial structure (including basement if any) would be restricted upto 6mts above the crown of the tunnel.
- b. Building foundation pressure should not exceed 30 ton per square meter.
- c. A small portion of land at the corner of the plot is available to be used temporarily for road diversion by BMRCL.

RLDA would assist on best effort basis in obtaining clearance from BMRCL with respect to the plan/design of proposed building."

53. It is apparent from the plain reading of the above quoted clause that the conclusion drawn by the Arbitral Tribunal is wholly unsustainable. The said clause cannot be read to hold out a representation that it is possible to construct a basement at the site.

54. There are certain communications on record, which indicate that RLDA was endeavouring to assist Yantti to resolve the issue of available depth with other authorities; however, those communications cannot be read to mean that any representation had been held out by

RLDA. Even if it is accepted that RLDA also understood that a construction depth of 4.5 mtrs would be available, that cannot lead to a conclusion that it had made any such representation. Yantti had prepared minutes of the meeting held on 17.05.2010, wherein it had recorded that RLDA had conveyed to it that between 5 to 6 meters depth would be available to Yantti and the said minutes were not denied. Admittedly, RLDA had not responded to the e-mail containing the said minutes but had subsequently responded to the follow up letters sent by Yantti following the communication of the said minutes, clearly denying that any such representation – as claimed by Yantti – was made. The relevant extract of the letter dated 28.07.2010 sent by RLDA is set out below:-

“Please refer to clause No. 4.1.18 of the Development Agreement (draft of which was part of the RFP document), wherein conditions in respect of BMRCL to be ensured by the Developer have been specified. There is no change in any of these conditions since the RFP stage. It has been claimed by you at para 2 of your letter referred above that RLDA had confirmed to bidders the availability of 5-6 meters clear depth during pre-bid meeting. Please refer the reply to the Pre-Bid queries sent to you vide letter no. RLDA/2008/ Project/RFP/Bangalore dt. 05.10.2009, there is no reference to availability of clear depth in the reply. Hence, your statements is not correct and denied.

The minutes of the meeting held between RLDA and BMRCL on 11.11.2008 as referred by you at para-2 of your letter, is a mutual record of proceeding between RLDA and BMRCL and this has nothing to do with the RFP or your bid. It is a fact that you have

obtained copy of this minutes port-bid from RLDA on your request for facilitating approval of plans from BMRCL. Hence any connection to this minute with your bid in response to RFP is without any basis. RLDA had not undertaken any detailed survey of the site or planning for buildings above the tunnel. Hence, we cannot comment on your understanding of making a basement above the restricted zone of the tunnel. Further, your bid did not contain any such condition or your understanding of constructing basement above the tunnels.”

55. Mr Nigam, learned Senior Counsel appearing for Yantti had contended that the Arbitral Tribunal had, after appreciating all circumstances, returned a finding of fact that RLDA had made the representation that a minimum depth of 4.5. meters would be available for construction of a basement and such findings of fact were not subject to judicial review under Section 34 of the Act. This Court is unable to accept the aforesaid contention as the finding of the Arbitral Tribunal that RLDA had made any representation as to the available depth at site, is contrary to the clear terms of the RFP and the Development Agreement which embodies the contract between the parties. It was not open for the Arbitral Tribunal to ignore the terms of the Development Agreement.

56. It is well settled that a court will not interfere with the findings of fact returned by the Arbitral Tribunal in proceedings under Section 34 of the Act. However, if such findings are based on no material or the material on the basis of which such findings are returned cannot lead to such conclusions, an interference under Section 34 would

surely be warranted. In this case, the decision of the Arbitral Tribunal that any assurance as to the minimum construction depth had been held out by the RLDA runs contrary to the terms of the RFP and the Development Agreement. Further, the material relied upon by the Arbitral Tribunal to arrive at such conclusion could not support any such inference. It is also necessary to bear in mind that the sum awarded by the Arbitral Tribunal is in the nature of damages and unless it is established that the RLDA has breached the terms of the contract, no such damages could be awarded.

57. There is yet another aspect of the matter which requires to be mentioned. The RFP documents and the Development Agreement expressly provided that an FAR of 225 would be available for construction at site. There is no dispute that the said FAR was available to Yantti. Thus, the floor space as represented under the Development Agreement could be constructed by Yantti. Yantti has premised its claim on the basis that the rental available for space for the basement is higher than the rental available for space on any other floor and has claimed the difference as a loss suffered by it. It is important to note that Yantti has not constructed any building on the site as yet. It has been awarded the claim on the basis that if Yantti had constructed a basement, it would have been able to lease the same out at a rate higher than the rental available on other floors and has, therefore, suffered a loss for which it must be compensated in present. It is, at once, clear that the aforesaid reasoning is flawed as it is based on a hypothetical loss that would occur to Yantti once it has

constructed the building and is not able to realise the proposed revenue. This Court is of the view that the award made against this claim is fundamentally flawed and cannot be sustained.

(ii) *Re: Award of ₹ 48,01,01,310/- on account of loss of lease rental for a period of five years occasioned by delay on the part of RLDA*

58. The Arbitral Tribunal has held that RLDA was responsible for delaying the project by a period of five years and this has resulted in the loss of lease rent of a sum of ₹48.01 crores. This amount has been awarded in favour of Yantti.

59. There are two issues with regard to the award rendered in respect of this claim, which are required to be considered; the first, whether any such delay was attributable to RLDA; and second, whether any such measure of damages – possible lease rental of a completed building – could be adopted for making the award.

60. Taking up the second issue first, it is apparent that the said award is perverse and fails the *Wednesbury* test of reasonableness. Yantti had offered a lease premium of ₹27.90 crores for a period of thirty years and a part of the same was paid. The construction of complex which was to be built has not commenced. Clearly, in these circumstances, no reasonable person could possibly hold that ₹48.01 crore was payable as damages for loss of lease rental of a building that has not been constructed. It is also interesting to note that while computing this figure, no allowance of any sort has been made for the cost of construction or the investment to be made for earning the said

lease rental. Surely, Yantti would be required to make substantial investment for construction of the building before it could earn any such rental. Such investment would also have a financial cost. Yantti had claimed that it had estimated that it was required to construct 5,59,779 sq ft at the rate of ₹1946 per sq ft for construction of the building. Thus, according to Yantti, it was required to invest a sum of ₹108,93,29,934/-. Even if it is assumed that such investment would have a finance cost at the rate of 8% p.a. (which is also the rate assumed by Yantti to calculate the Net Present Value), the cost of such investment would be over ₹8.74 crores per annum and over ₹43.7 crores for five years. Thus, while the Arbitral Tribunal has considered the loss of revenue on account of alleged delay, it has failed to consider the cost for earning the said revenue. Thus, whilst the revenue has been considered, the saving in finance cost has been ignored. Instead of computing the profit (net revenue) that could have been available to the petitioner for a period of five years, the Arbitral Tribunal awarded the entire lease rental as loss of profit. It is difficult to accept the possible lease rental of a building that is yet to be constructed as a measure of loss suffered for the delay, if any.

61. On a pointed query as to this obvious flaw in computation of the damages, Mr Nigam did not make any attempt to justify the same. He, however, stated that the Arbitral Tribunal had provided an alternative option for RLDA to extend the lease period. He submitted that although the Tribunal had qualified the damages on account of delay at ₹48.01 crores, it had also provided an option to RLDA to extend the

lease period for a further period of five years in lieu of payment of such damages. This Court is not impressed by this contention. Plainly, if the quantification of damages is *ex facie* perverse, the fact that the Arbitral Tribunal has provided an alternative to the same would not in any manner detract from the fact that the award is *ex facie* flawed.

62. The next aspect of the matter is whether any delay can be attributable to RLDA. The reasons for the delay considered by the Arbitral Tribunal are (i) loss of 12 months in finalizing the concept plan due to non-availability of construction depth; (ii) Delay in obtaining “*Khata*” from the Municipal Authorities – Bruhath Bangalore Mahanagar Palika (BBMP) (which according to Yanti is a period of 12 months) from 18.04.2011 to 20.04.2012; (iii) Change in land use (which Yanti claims to be four months from 01.06.2012 to 18.09.2012); (iv) Delay in exchange of land between BBMP and Railways; (v) The delay on account of termination of the contract by RLDA.

63. Insofar as the delay attributable to RLDA on account of non-availability of construction depth is concerned, this Court has already noted that there was no assurance held out by RLDA that a minimum of 4.5 meters of construction depth would be available and, therefore, the question of attributing any delay to RLDA on that account does not arise.

64. Insofar as the delay with regard to the issue of *Khata* is concerned, there is some controversy in this regard. RLDA claims that

Yantti had, by a letter dated 06.05.2010, informed RLDA that no *Khata* certificate is required and only a declaration was needed. This declaration was furnished by RLDA on 14.05.2010. However, RLDA does not dispute that by a letter dated 18.04.2011, BBMP had asked for the *Khata*. This was communicated by Yantti to RLDA on 27.04.2011. Admittedly, the *Khata* was subsequently provided to Yantti on 22.10.2011. RLDA claims that in addition to raising the issue of requirement of *Khata*, BBMP had also raised five other issues in its letter dated 18.04.2011, which were to be fulfilled by the Yantti and the same had not been done. And, therefore, even if it is accepted that there was a delay on account of furnishing of a *Khata*, the said delay was only about six months and even that delay did not result in any effective delay as the Yantti was also required to fulfil other conditions, which it had not done.

65. This Court is of the view that no interference with the findings of the Arbitral Tribunal that there was a delay on the part of RLDA on account of *Khata* is warranted, as there is sufficient material on record for the Arbitral Tribunal to have drawn this conclusion. This Court is not called upon to act as an appellate court to re-appreciate and re-examine the evidence. Since, it cannot be stated that finding of the Arbitral Tribunal in this regard is perverse or based on no material, the same would not be amenable to judicial review under Section 34 of the Act. Having stated the above, it is necessary to observe that the Arbitral Tribunal does not appear to have quantified the amount of delay attributable to RLDA on account of non-submission of *Khata*.

Indisputably, Yantti had sought for the said document on 27.04.2011 and this issue was resolved by 22.10.2011 and BBMP by its communication dated 22.10.2011 informed RLDA that *Khata* was numbered as 95/26. Thus, the delay on account of *Khata* can at best be quantified at about six months.

66. The Arbitral Tribunal has also held RLDA responsible for further delay upto 26.03.2012 on account of the demand raised by BBMP that the property tax demand raised by IOC be settled. Even if this is accepted, the delay attributable to RLDA could at the maximum be for a further period of five months. However, RLDA cannot be held responsible for any further delay on any of the other grounds.

67. The issue that there was any delay is attributable to RLDA on account of exchange of land between BMRCL and Railways is unmerited. Admittedly, Yantti was responsible for obtaining the permissions necessary for the development of the project.

68. Clauses 11 and 18 of the Instruction to Bidders, Clause 4A.3.3 of the RFP and Clauses 2.5.2 and 2.11 of the Development Agreement are relevant and their extracts are set out below:-

Instructions to Bidders

“11. The NOC/Clearance for the commercial development at the Site from Government of Karnataka has been obtained vide letter No. UDD 224 MNJ 2008 dated 24.08.2009. The Developer shall, at its own risk and expense, arrange to design, obtain requisite approvals, finance, construct and develop the plot of land for the

purposes as set out in this agreement and as may be permissible under the applicable planning and municipal laws within a maximum period of 2 years and 6 months (30 months) from the date of execution of Development Agreement or Handing-over Date whichever is later. It will be the Developer's responsibility to follow the building byelaws and take all other necessary approvals from competent authorities (including Bangalore Metro Rail Corporation Ltd. (BMRCL), environmental clearances, permissions for cutting trees, etc. wherever required). Any charges for obtaining such approvals from the competent authorities shall be paid by the Developer to local authority(ies). RLDA will facilitate the Developers in dialogue/obtaining such permissions from local authority on best effort basis.

* * * * *

18. The Bidder will be deemed to have visited the Site and inspected the same to acquaint itself about the existing and prevailing conditions before submitting his bid . The Site will be leased by RLDA on an “as is where is” basis and no claim whatsoever, in respect of the site conditions will be admissible from the bidder/ Selected bidder.

Request for Proposal

XXXXX XXXXX XXXXX XXXXX

- 4.A.3.3 The Developer shall, at its cost and expense, be responsible for obtaining and maintaining all Applicable Permits which are required by Applicable Law to undertake the Redevelopment Project.

Development Agreement

XXXXX XXXXX XXXXX XXXXX

2.5.2 Subject to and in accordance with the provisions of this Agreement, the Grant hereby granted shall oblige or entitle (as the case may be) the Developer to the following:

XXXX XXXX XXXX

- b) Obtain & procure all requisite Applicable Permits for the development of the Site, and implementation of the Project including plans for construction of building/s and other structure/s thereon for such uses and purposes as described herein;

XXXX XXXX XXXX

- i) Bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Developer under this Agreement.

XXXX XXXX XXXX

2.11 Deemed Knowledge and Disclaimer

Subject to the provisions of this Agreement, the Developer shall be fully and exclusively responsible for, and shall bear the financial, technical, commercial, legal and other risks in relation to the development of the Assets regardless of whatever risks, contingencies, circumstances and/or hazards may be encountered (foreseen or not foreseen) and notwithstanding any charge(s) in any of such risks, contingencies, circumstances and/or hazards on exceptional grounds or otherwise and whether foreseen or not foreseen and the Developer shall not have any right whether express or implied to bring any claim against, or to recover any compensation or other amount from RLDA in respect of

the Project other than for those matters in respect of which express provision is made in this Agreement.”

69. Although, the Arbitral Tribunal had held that in exchange of land as per the MOU entered into between BMRCL and the Railways within time would not have afforded any chance to BMRCL to delay its approval, it is not disputed that such exchange is not a condition precedent for grant of any sanction relating to the project. Admittedly, Yantii had obtained an unconditional sanction from BMRCL on 17.12.2014 without linking the same to any obligation on the part of the Railways to surrender any land. Therefore, this reason did not afford the Arbitral Tribunal any ground to hold that the said delay was attributable to RLDA. Clearly, RLDA could not be held responsible for any demands that may have been made by BMRCL. Thus, even on merits, the findings of the Arbitral Tribunal that the delay of five years in commencement of the project was attributable to RLDA, is not sustainable.

(iii) Re: Award of ₹36.87 crores in respect of escalation and idle charges

70. Yantti had claimed a sum of ₹78,32,98,415/- as escalation and idle charges. This claim was premised on Yantti's claim that RLDA was solely responsible for the delay in commencement of the construction. Yantti claimed that it had submitted its offer considering the cost of construction to be ₹1946/- per square ft. and it proposed to construct 25,59,779 sq. ft. of floor area. According to Yantti, the cost of construction had increased by ₹546 per square ft. as on 30.09.2012

and this would result in increase in the cost of construction to the extent of ₹30,57,77,806/- till 30.09.2012. In addition, Yantti also claimed that its expenditure on idle establishment for the period October 2010 to September 2012 was ₹1,61,57,000/-. This amount was computed on the basis that the expenses on idle establishment was ₹5,35,000/- per month. Yantti revised the aforesaid claims and claimed a further sum of ₹7,33,62,975/- as escalation for the period 01.10.2012 to 31.03.2013 and a further sum of ₹29,34,51,744/- for the period 01.04.2013 to 31.03.2015. Similarly, the claim for the idle establishment charges was also increased by a further sum of ₹35,31,000/- for the period 01.10.2012 to 31.03.2013 and ₹1,41,24,000/- for the period 01.04.2013 to 31.03.2015. In all, Yantti claimed a sum of ₹74,59,55,415/- on account of escalation and ₹3,73,43,000/- on account of idle establishment. Thus, claiming a sum of ₹78.33 crores in aggregate.

71. Apart from contesting the assumption that RLDA was responsible for the delay in commencement of construction, RLDA also contested the aforesaid claim as being contrary to Clause 2.11 of the Development Agreement.

72. The Arbitral Tribunal found that Clause 2.11 of the Development Agreement did not exempt RLDA from compensating Yantti for loss suffered on account of its breach. The Arbitral Tribunal further held that since RLDA was responsible for the delay, it was also liable to compensate Yantti for the escalation in the cost of construction. The Arbitral Tribunal found that construction cost index

published by CPWD had increased about 44% between October 2010 to June 2015, and accordingly, held that Yantti was entitled to increase in such construction cost in the same proportion. The Arbitral Tribunal accepted Yantti's claim that it had submitted its bid on the basis that the construction cost was ₹1,946 per square feet and thus, in view of inflation, Yantti would be entitled to further amount of ₹856 per sq. ft. for a total construction area of 5,59,779 square feet. The said amount was computed at ₹47,91,70,824/- (5,59,779 x 856). The aforesaid amount was adjusted by decrease in the FAR from 325 to 299, thus, reducing the amount of ₹44,08,37,158/-. This amount was further reduced by the additional amount of lease premium that would be payable by Yantti for the increase in FAR – which worked out to ₹9,17,60,000/-. Thus, the final amount payable by RLDA was computed at ₹34,90,77,158/-.

73. With regard to idle charges, the Arbitral Tribunal held that a sum of ₹5 lacs per month (as against ₹5,88,500/- demanded by Yantti) was justified. However, the Arbitral Tribunal felt that the said amount was payable only till termination of the Development Agreement on 08.01.2014 and, accordingly, awarded a sum of ₹1,96,25,000/- on account of idle charges.

74. This Court is unable to sustain the aforesaid award principally for two reasons; first, that escalation charges is premised on the basis that RLDA was solely responsible for the delay and was in breach of the Development Agreement. As discussed above, the said assumption is not correct and, therefore, no such claim could have been awarded

to Yantti. Second, that the said claim is based on mere assumption and it is difficult to accept that the same constitutes a fair value of damages. As noticed above, Yantti had not constructed the building and even according to Yantti, no construction had been raised above ground level. In this view, contemplating escalation in the costs that Yantti would suffer, once Yantti commences raising construction and, therefore, must be compensated in present, is flawed. Admittedly, no such damages were suffered by Yantti as on the date of making the claim or the date of the impugned award. The impugned award does not indicate any material on the basis of which a sum of ₹5 lacs per month could be awarded as idle charges. The only statement made in the impugned award is that *“AT feels that an amount of Rs. 5 lacs per month (against ₹ 5,88,500/- demanded by the Claimant) is justified....”*.

75. The other claims made by Yantti (other than interest) were rejected and, therefore, it is not necessary to consider the same. Insofar as the award of interest is concerned, the Arbitral Tribunal had awarded future interest at the rate of 15% per annum from the date of the award till the date of payment if the said payment was not made within a period of three months from the date of the award.

(iv) Re: challenge on the ground of procedural irregularity

76. Before concluding, it would also be necessary to consider the contentions that the final award was vitiated on account of procedural irregularity and that the interim award setting aside the termination of

the Development Agreement is beyond the jurisdiction of the Arbitral Tribunal.

77. This Court also finds merit in the contention that there was irregularity in the procedure adopted by the Arbitral Tribunal. In its first procedural hearing held on 08.09.2012, the Arbitral Tribunal had set down the procedure for conduct of the arbitral proceedings. The relevant extract of the said procedural order reads as under:-

“3. The AT, thereafter, discussed with the parties the procedure and the sequence of Arbitration proceedings as under:

- (i) Explanation and presentation of **claims** by claimants duly supported by documentary evidence.
- (ii) Expl. and presentation of pleadings in defense along counter claim(s) by the respondents duly supported by documentary evidence.
- (iii) Rejoinder by the Claimants along with documentary evidence, if any.
- (iv) Admitting each other's exhibits and documents for consideration of the Arbitrators.
- (v) Production of witnesses, if desired, shall be permitted only on written request of the parties, who will furnish a list of the same.
- (vi) Examination and cross exam of witnesses, if desired, by the parties.

(vii) Arguments by claimants and respondents followed by submission of written arguments.

(viii) Making and publication of award.”

78. The Arbitral Tribunal had also set down the timeline for submission of the statement of claims, statement of defence, counter claims, admission and denial of statements.

79. Yantti filed its Statement of Claims on 09.10.2012 and RLDA submitted its Statement of Defence and Counter Claim on 23.11.2012. Yantti filed its rejoinder to the Statement of Defence on 22.12.2012. Yantti filed its admission/denial of documents on 31.12.2012 and RLDA filed its Statement of admission and denial on 07.01.2013. RLDA filed its rejoinder to the Statement of Defence to their counter claims on 27.02.2013.

80. At a hearing held on 16.03.2013 (the third hearing), the Arbitral Tribunal noticed that while Yantti had admitted all documents, RLDA had denied some of their documents *“for which evidence has to be produced to prove their existence by claimants.”*

81. The Arbitral Tribunal framed issues and also directed Yantti to file the affidavit of witnesses within a period of three weeks with an advance copy to RLDA. On the next date of hearing, that is, on 26.04.2013, the Arbitral Tribunal noted that Yantti had filed notarised affidavit of one of their witness on 10.04.2013. However, no directions regarding cross-examination of the witness were issued. Yantti sought to produce further documents and RLDA also filed

another statement of admission and denial on 10.04.2013 disputing some of the additional documents relied upon by Yantti. The record of the proceedings does not indicate that any witness had been produced for cross-examination. But, on 31.05.2013 (the fifth hearing), the Arbitral Tribunal commenced hearing final arguments on behalf of Yantti.

82. Mr Nigam had argued that Mr Hemant Gulati who had filed an affidavit was present at the hearing and, therefore, RLDA had full opportunity to cross-examine him. However, this Court is not persuaded to accept the aforesaid contention. At the material time, Mr Hemant Gulati was a Director of Yantti and had attended most of the hearings. However, that does not mean that he had offered himself for cross-examination as the record of the proceedings does not indicate so. His presence at almost all of the hearings was not as a witness but as the representative of Yantti. At a hearing held on 16.05.2017/17.05.2014 – that is, almost a year after the final arguments had commenced – it was submitted on Yantti's behalf that their witness may be cross-examined if necessary and this was recorded in the record of proceedings held on 16.05.2017 and 17.05.2017. These were the 20th and 21st hearing held by the Arbitral Tribunal. However, this does not indicate that the Arbitral Tribunal had called upon RLDA to cross-examine the said witness. It is also relevant to note that Yantti had completed its arguments in the opening on most of the issues on 30.11.2013 (the 13th hearing) and the matter was thereafter listed for oral submissions on behalf of RLDA.

83. The minutes of the hearing held on 29.11.2014 & 30.11.2014 records that Yantti had submitted the affidavit dated 10.04.2013 and at the hearing held on 16.05.2014 and 17.05.2017 had submitted that the witness be cross examined but since RLDA had not cross examined the witness, “the evidence in the affidavit stands”. RLDA objected to the said minutes as, according to it, no opportunity to cross examine Yantti’s witness was provided to it. After conclusion of the oral submission, the Arbitral Tribunal sent an e-mail on 13.03.2015 providing RLDA an opportunity to cross examine Yantti’s witness. As is apparent, there is some controversy whether RLDA was given an opportunity to cross-examine the witness before conclusion of final arguments. However, it is not necessary to enter that controversy, as it is apparent that the Arbitral Tribunal had not followed the procedure which it had set down in the first hearing.

84. In addition to above, the Arbitral Tribunal had allowed several applications moved by Yantti for amendment of its claims. All of the said applications were objected to by RLDA. However, none of the orders allowing the said applications indicate any reasons for allowing the same. On 08.04.2013, Yantti filed two applications under Section 23(3) of the Act: one application pertained to raising a supplementary claim of ₹62,50,954/- in regard to the 9,66.44 sq. meters of site which was reduced from the total site, and the second application related to supplementary claims amounting to ₹15,37,17,034/-. RLDA had objected to these applications. But, the Arbitral Tribunal allowed the same by simply recording that it had decided to allow the two

applications. No reasons whatsoever were indicated for rejecting RLDA's objection to these applications. However, the Arbitral Tribunal did provide an opportunity to RLDA to object to the amended Statement of Claims. However, this procedure was also not followed in respect of the subsequent applications filed by Yantti.

85. Yantti filed another application under Section 23(3) of the Act on 08.05.2014 seeking to challenge the termination of the Development Agreement. After the pleadings regarding this application were completed, oral submissions were heard by the Arbitral Tribunal. Thereafter, on 05.09.2014, the Arbitral Tribunal allowed the same once again without assigning any reason or dealing with any of the objections raised by RLDA. Interestingly, RLDA was also not provided any opportunity to file a response to the amended Statement of Claim. RLDA filed another application dated 17.10.2014 under Section 16 of the Act challenging the jurisdiction of the Arbitral Tribunal to entertain the application under Section 23(3) of the Act, *inter alia*, on the ground that no such dispute had been referred to the Arbitral Tribunal as per the procedure provided under the Development Agreement. This application was also rejected without any assigning any reason by simply stating as under:-

“As the AT has already allowed the above application (application dated 08.05.2014 under Section 23(3) of the Act) as recorded in proceedings dated 05.09.2014, the present application of the Respondents is rejected by the AT”.

86. Since, RLDA was not given any opportunity to file an amended Statement of Defence, it filed an application for seeking amendment of its reply to the application under Section 23(3) of the Act which was allowed.

87. It is difficult for this Court to countenance the manner in which the Arbitral Tribunal has proceeded.

(v) Re: challenge to jurisdiction of the Arbitral Tribunal to consider the dispute regarding termination of the Development Agreement.

88. The next question to be addressed is whether the interim award passed by the Arbitral Tribunal setting aside the termination letter dated 08.01.2014 is without jurisdiction. Admittedly, the said dispute was raised before the Arbitral Tribunal by Yantti filing an application under Section 23(3) of the Act. RLDA had objected to the jurisdiction of the Arbitral Tribunal to consider this claim, as the said dispute had not been referred to arbitration in accordance with Article 12 of the Development Agreement. In addition, RLDA had contested the claim on merits as well.

89. RLDA issued a notice dated 18.10.2013 indicating its intention to terminate the Development Agreement on account of the failure on the part of Yantti to achieve the project completion date which, in terms of Clause 9.1, amounted to Developer Event of Default.

90. Yantti had responded to the said notice and had also filed an application under Section 17 of the Act, *inter alia*, seeking an order restraining RLDA to proceed further to terminate the Development Agreement. Although the Arbitral Tribunal had passed an order on 30.11.2013 directing RLDA to maintain *status quo*, the said order was stayed by this Court (by an order dated 03.01.2014 passed in **Arb. A. 2/2014** captioned **Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd.**).

91. Before proceeding further, it would be relevant to refer to Clause 12.3 and 12.4 of the Development Agreement, which are set out below:-

“12.3 Conciliation

In the event of any Dispute between the Parties, either Party may call upon Vice-Chairman, RLDA and the Developer for amicable settlement, and upon such reference, the said persons shall meet no later than 10 (ten) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 10 (ten) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Article 12.2.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Article 12.4.

12.4 Arbitration

12.4.1 Any Dispute which is not resolved amicably by conciliation, as provided in Article 12.3, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Article 12.4.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The governing law of the arbitration shall be the laws of India. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

12.4.2 A notice of the intent (“Notice of Intent”) to refer the dispute to arbitration may be given by one Party “Claimant”) to the other Party (the “Respondent”). There shall be a Board of three arbitrators. The Claimant and Respondent shall be entitled to appoint one arbitrator each and the third arbitrator shall be appointed by the two arbitrators so selected, and in the even of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

Provided that if an arbitration proceedings have already begun under the Lease Deed, then the Dispute under this Agreement shall be referred to the Arbitrators conducting the arbitration proceedings under the Lease Deed.

12.4.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Article XII shall be final and binding on the Parties as from the date it is

made, and the Developer and RLDA agree and undertake to carry out such Award without delay.

12.4.4 The Developer and RLDA agree that an Award may be enforced against the Developer and/or RLDA, as the case may be, and their respective assets wherever situated.

12.4.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

12.4.6 This Article XII shall survive the termination or expiry of this Agreement.”

92. A plain reading of Clause 12.3 Development Agreement indicates that in the event of any Dispute between the Parties, either Party may call upon the Vice-Chairman, RLDA and the Developer for an amicable settlement. Clause 12.4.1 of the Development Agreement expressly provides that any dispute which is not resolved amicably by Conciliation as provided in Article 12.3 would be finally decided by reference to arbitration. In terms of Clause 12.4.2 of the Development Agreement, a party intending to refer the disputes to arbitration is required to give a Notice of Intent to do so. Concededly, in the aforesaid case, the said procedure was not followed and Yanti placed the dispute before the Arbitral Tribunal by filing an application under Section 23(3) of the Act. Admittedly, the dispute with regard to termination of the Development Agreement was not referred to arbitration and thus, plainly, the Arbitral Tribunal had no jurisdiction to entertain such dispute. In the event Yanti desired to refer the disputes to arbitration, it was necessary for Yanti to have followed the

procedure as agreed in the Development Agreement. This objection was taken by RLDA by way of an application under Section 16 of the Act, which was summarily rejected without assigning any reasons. Although, in the interim award, the Arbitral Tribunal had noticed the rival contentions of the parties in this respect, the Arbitral Tribunal has not returned any finding regarding the same.

93. Yantti had relied on the decision in the case of ***State of Goa v Parveen Enterprises: (2012) 12 SCC 581*** in support of the contention that an additional claim can be introduced by amending the Statement of Claims under section 23(3) of the Act. Indisputably, an additional claim can be made by amending the Statement of Claims, in case the arbitration clause provides for reference of the all disputes to arbitration. However, in the present case, the arbitration clause expressly restricts the reference to only that dispute *which is not resolved amicably by conciliation, as provided in Article 12.3*. Thus, it was necessary for Yantti to have called upon the designated officers to resolve the same (dispute) amicably before taking steps for referring the same to arbitration.

94. In view of the conclusion that the said dispute was outside the scope of the disputes referred to arbitration, it is not necessary to examine the Arbitral Tribunal's conclusion in this regard. However, for the sake of the completeness, it would be apposite to consider the same.

95. RLDA had also resisted Yantti's claim for setting aside the letter of termination, essentially, on three grounds; (i) the matter of

termination of the Development Agreement was an excepted matter covered under clause 4.5.1 of the Development Agreement; (ii) that monetary damages are adequate remedy and, therefore, the relief as prayed for is barred by Section 14 and 41 of the Specific Relief Act, 1963; and (iii) that the termination was in terms of the Development Agreement. The Arbitral Tribunal had rejected the aforesaid contentions.

96. The contention that the dispute regarding termination of the Development Agreement is an excepted matter is unmerited. Yantti had challenged the legality of termination as it claimed that the delay in completion of the works was attributable to RLDA. In terms of clause 4.5.1 of the Development Agreement, the question whether extension for time for completion of the project ought to be granted on account of unforeseen circumstances beyond the control of the developer, is a matter to be decided by RLDA and its decision in that regard was agreed to be final and binding. However, the said clause did not preclude Yantti from challenging the termination of the Development Agreement as wrongful.

97. The Arbitral Tribunal rejected RLDA's contention that the relief as prayed for is barred by under Section 14 and 41 of the Specific Relief Act as it found that compensation in money would not be an adequate remedy. This Court is not persuaded to accept that the said decision is patently illegal or warrants any interference under Section 34 of the Act.

98. At this stage, it is relevant to notice the reasons indicated by the Arbitral Tribunal to set aside the termination of the Development Agreement. The Arbitral Tribunal was of the view that Yantti had spent a large amount and, therefore, termination of the Development Agreement would be a case of undue enrichment by RLDA. The Arbitral Tribunal further held that even though a provision existed for termination of the contract for delay in completion of the project, there was no justification to terminate the contract from the point of equity and natural justice. In addition, the Arbitral Tribunal held that termination was illegal, based on the ratio of the decision of the Supreme Court in *Hind Construction Contractors vs State of Maharashtra: 1979(2) SCC 70*, as the time was not the essence of the contract. This Court finds it difficult to accept the aforesaid conclusion. The Development Agreement contained specific provisions with regard to termination of the contract. Clause 9.1 provides for circumstances which could be considered as ‘Developer Event of Default’. Such circumstances, which also include failure of the developer to achieve the project completion date in accordance with Clause 4.4., entitled RLDA to terminate the Development Agreement. The relevant extract of Clause 9.1 is set out below:-

“9.1 Developer Event of Default

On the occurrence of any of the following events or circumstances, either during the License Rights Period and/or the period after the Grant Effective Date, and the Developer having failed to cure or rectify such defaults within a period of sixty (60) days from the date of occurrence of such event for circumstances (herein the ‘Cure Period’), the

Developer shall be considered in default of this Agreement (herein the “Developer Event of Default”), providing RLDA the right to terminate this Agreement, unless the default has occurred solely as a result of any breach of this Agreement by RLDA or due to Force Majeure. The Developer Event of Default, referred to hereinabove, shall include:

- | | | |
|------|--|------|
| XXXX | XXXX | XXXX |
| (l) | failure of the Developer to achieve the Project Completion Date in accordance with Article 4.4 hereto, | |
| XXXX | XXXX | XXXX |
| (p) | the Developer has failed to fulfill any obligation, for which Termination has been specified in this Agreement.” | |

99. Clause 9.3 provides for procedure of termination. Admittedly, Yantti had failed to achieve the project completion date in accordance with Article 4.4 and, therefore, RLDA was well within its right to terminate the Development Agreement by giving a 60 days prior notice. Reliance on the decisions in the case of *Hind Construction Contractors (supra)* or *Arosan Enterprises Ltd. vs Union of India and Anorther: 1999(9) SCC 449* may not be apposite as the terms of the contracts, considered in those cases, did not contain a specific clause listing out the defaults, which entitled the non defaulting party to terminate the contract.

100. The Arbitral Tribunal also held that the delay in completion of the project was not attributable to Yantti and further held that, even if

it was so, the termination of the Development Agreement would not be permissible.

101. The above conclusion is erroneous. In the present case, the contract specifically provided for the Developer's Event of Default and for a Cure period of 60 days. And, it was specifically agreed that RLDA would have the right to terminate the Development Agreement if the delay was not solely attributable to RLDA or to force majeure conditions.

102. In view of this Court's conclusion that delay is not solely attributable to RLDA, the interim award cannot be sustained as it is contrary to the terms of the Development Agreement.

103. In view of the above, the petitions are allowed, the interim award and the final award are set aside. All pending applications are also disposed of. The parties are left to bear their own costs.

MAY 02, 2018
RK/MK/pkv

VIBHU BAKHRU, J