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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMM ARBITRATION PETITION NO. 1019 OF 2019**

RELIABLE SPACES PVT LTD

Reliable House, Hanuman Silk Mill

Compound, Opp Huma Mall

Kanjurmarg (West), Mumbai 400 078

... **PETITIONER**

~ VERSUS ~

EVONIK INDIA PVT LTD

Krislon House, Saki Vihar Road, Saki Naka

Andheri (East), Mumbai 400 072

... **RESPONDENT**

APPEARANCES

FOR THE PETITIONER:
“RELIABLE”

Mr Navroz Seervai, Senior Advocate,
with Ms Gulnar Mistry, Mr
Dhirendra Sinha, Mr Saket Mone,
Mr Subit Chakrabarty, Mr
Abhishek Salian, & Mr Vishesh
Karla, i/b Vidhi Partners

FOR THE RESPONDENT:
“EVONIK”

Mr Dinesh Purandare,
with Mr Shyam Kapadia, Mr
Gaurav Shah & Ms Jigisha
Vadodaria, i/b Negandhi Shah &
Himayatullah.

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CORAM : **G.S. Patel, J.**
JUDGMENT RESERVED ON : **14th October 2020**
JUDGMENT PRONOUNCED ON : **19th October 2020**
JUDGMENT:

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A. INTRODUCTION

1. I heard counsel on 13th and 14th October 2020 by video-conferencing on this Petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging an arbitral award dated 8th May 2019 made by a sole arbitrator, Mr Cyrus Ardeshir, an advocate of our Court.

2. Of necessity, and especially in view of the Supreme Court decision in *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India (NHAI)*,¹ the scope of the challenge is limited. Conscious of this, Mr Seervai for the Petitioner limited his grounds of challenge to a single ground of ‘patent illegality’; and, specifically, perversity as a dimension of patent illegality.² Following the *Ssangyong* enunciation, he divides this ground into two components. *First*, that the learned Sole Arbitrator’s interpretation of specific contractual provisions and, in particular, a force majeure clause, is so thoroughly implausible as to be perverse and therefore constitutes patent illegality. *Second*, that the arbitrator ignored vital evidence before him and this, too, constitutes perversity and vitiates the Award as being patently illegal. Mr Purandare for the Respondent defended the Award.

3. A summary background may be useful. The Petitioner (“**Reliable**”) is a lessee from the Maharashtra Industrial

1 (2019) 15 SCC 131.

2 In saying this, I have adopted my reasoning in *Union of India v Recon*, Arbitration Petition (L) No 1293 of 2019, decided on 13th February 2020.

Development Corporation (“**MIDC**”) of some property in Airoli, Navi Mumbai. On this, there stands a building known as Liberty Tower. It has several units. In August 2014 Reliable gave three of these units in Liberty Tower to the Respondent (“**Evonik**”) on lease. Evonik proposed to use these premises for its specialty chemicals business. It placed an interest-free refundable security deposit of Rs.1,90,01,100 with Reliable. The term was nine years, and the first five of these were a lock-in. Evonik was to pay a little over Rs 30 lakhs a month from 1st January 2015 or completion of fit-out works, whichever was earlier. As is usual, Reliable had to obtain MIDC permission. This is one area of dispute. Equally, Evonik needed a license (“consent to establish”) from the Maharashtra Pollution Control Board (“**MPCB**”), and that permission depended on MIDC permission. Evonik says Reliable ought to have obtained the MIDC permission before-hand or ‘immediately’ on signing on the contract or, at any rate, before 1st January 2015. Without it, Evonik could not get MPCB permission, and without that permission, the premises were useless to it. Reliable contends that it never knew about MIDC approval being needed urgently or any time-line; that it was informed of this very late; and that there is evidence to show that MIDC approval used to come in well after the event, sometimes even after the lease or leave and license term was over. The Agreement itself had no deadline for obtaining MIDC approval. There is also an issue about Reliable not paying its property tax dues to the Navi Mumbai Municipal Corporation (“**NMMC**”), and whose no-dues certificate, too, was needed by the MPCB. Evonik says time ran out on it: on the one hand, Reliable neither procured the MIDC permission nor did it pay the dues and, on the other, Evonik faced the prospect of having to pay a huge amount per month for premises it could not use from

January 2015. In February 2015, Evonik invoked the force majeure provision of the Agreement and terminated. This is the clause that is to be interpreted. According to Evonik, correctly read, if, for no fault of its own, it could not carry on its business *from these premises*, that constituted a sufficient cause to invoke the force majeure clause. Reliable contends otherwise. It says the force majeure clause is in two parts and is to be read with a recital that defines ‘business’. If the premises did not exist (earthquake, fire, etc.) or were rendered useless, undoubtedly the force majeure provision would apply. But the second part, Reliable says, had nothing at all to do with the premises and operated only if Evonik was prohibited from doing its specialty chemical business altogether. In other words, the first part was premises-specific; and the second was Evonik-business-specific. Since Evonik could do business anywhere else, the second part did not apply. So even if it could not use *these* premises, it had to keep paying the monthly fee or rental of Rs. 30 lakhs, at least for the lock-in period of five years. In arbitration, Evonik claimed a return of its refundable deposit but not damages or costs. Mr Ardeshir found entirely for Evonik on the interpretation of the force majeure clause, which Mr Seervai assails as being a perverse interpretation and a wholesale rewriting of the contract. He also says Mr Ardeshir did not even consider the ‘evidence’ of late approvals by MIDC.

4. Having considered the rival submissions and the material on record, I am unable to accept Mr Seervai’s submissions. To the contrary, it seems to me Mr Purandare is correct in saying that had the learned Sole Arbitrator adopted the interpretation Mr Seervai commends before me (and which Ms Mistry placed before the arbitrator), that would have amounted to facial perversity and patent

illegality. As to the evidence which Mr Seervai says the arbitrator ignored, given the testimony before him, perhaps it is best he did — again, I will come to this later in this judgment. But worse yet, on a fair reading of that very documentary material, it is almost certainly against Mr Seervai rather than in his favour. For the documentary evidence shows no delay on MIDC's part, and Reliable led no other evidence — though it could and should have — of that delay. On this evidentiary part, I have been asked to look at the documentary and oral evidence. I have done so, because there is no law, in my understanding of it, that I cannot. The law does not permit me to *re-appreciate* it, a very different thing from saying one cannot even look at it.

5. Consequently, finding no merit in the Petition, I have dismissed it. This being a matter covered by the Commercial Courts Act, I have had to make an order of costs.

B. CHRONOLOGY

6. First, a brief chronology of events. Reliable Spaces Pvt Ltd is the lessor from MIDC of Plot No 10 in the Kalwa Industrial Area at Village Airoli in Navi Mumbai, District Thane. This is within the jurisdiction of the NMMC. Where I need to distinguish between the two entities in this judgment, I refer to them as “Reliable Spaces” and “Reliable Infomatics”; otherwise, where the distinction is immaterial, “Reliable” refers to the Petitioner. Reliable Spaces has a building on this plot called Liberty Tower, part of what is called the

Reliable IT Park. It has several units. Reliable Spaces routinely lets these out to various entities for commercial use. In April 2014, this Court allowed Reliable Spaces to be amalgamated into Reliable Infomatics Park Pvt Ltd. This has some bearing on what follows.

7. In mid-August 2014, Evonik showed an interest in leasing a fairly large portion of just under 41,000 sq ft built-up area³ in Liberty Tower. This was identified as Unit No 702 on the seventh floor and Unit Nos 801 and 802 on the eighth floor of Liberty Tower (“**the Demised Premises**”).⁴

8. On 19th August 2014, Reliable Infomatics (not Reliable Spaces) wrote to MIDC apparently seeking its approval to the proposed sub-letting.⁵ The letter does not seem to have included any fee or charge payable to MIDC, and there is an endorsement on it saying that Reliable Infomatics was ‘formerly known as’ Reliable Spaces. MIDC replied to Reliable Infomatics the very next day, 20th August 2014, and asked for a copy of the ‘registered’ leave and license Agreement between Reliable *Spaces* and Evonik.⁶ This letter clearly says that MIDC’s current lessee and plot holder was Reliable Spaces (i.e., not Reliable Infomatics). It also asked for some other documents.⁷

3 40,637 sq ft built up area, said to be equivalent to 63,337 sq ft ‘chargeable area’ including a terrace of 1048 sq ft. Compilation, *p.* 132, PDF *p.* 156.

4 With 63 reserved car parking slots. Lease, Cl. 1(b), Compilation, *p.* 135, PDF *p.* 159.

5 Compilation, *p.* 169, PDF *p.* 194.

6 In this matter, parties seem to have used ‘lease’ and ‘leave and license’ as freely interchangeable.

7 Compilation, *p.* 170, PDF *p.* 195.

9. Later negotiations — about which there is some evidence from Evonik as we shall presently see — culminated in the execution on 28th August 2014 of an Agreement of Lease (“**the Agreement**”; “**the Lease**”; “**the Lease Deed**”).⁸ This was not executed by Reliable Spaces, the MIDC lessee and plot-holder, but by Reliable Infomatics, presumably on the strength of the amalgamation (to which there is a reference in the Lease Deed). It is probably best to set out the broad terms of the Agreement immediately. I will return to a more detailed consideration of the provisions that are in dispute a little later.

10. There is no dispute that the lease was for nine years, of which the first five were a lock-in, during which Evonik could not terminate the Lease.⁹ The monthly lease rent was fixed at Rs. 31,66,850/-,¹⁰ to commence from the earlier of the completion of fit-out works or 1st January 2015.¹¹ The lease rent was to escalate by 15% over the previous year every 36 months.¹² Within three months of the date of the Lease Deed, Reliable was to complete some works on the Demised Premises, including 100% power back-up, completion of a glass façade (apparently never done) and other items specified in Annexure C to the Lease Deed.¹³ This was the ‘Handover Date’, and Evonik was

8 Compilation, *pp.* 126–168, PDF *pp.* 150–193.

9 Lease, Recital I, Compilation *p.* 134, PDF *p.* 158, read with Cl. 2, *pp.* 136–137, PDF *pp.* 159–160.

10 Lease, Cl. 4(a)(i), Compilation *p.* 138, PDF *p.* 162.

11 Lease, Cl. 3(b), Compilation *p.* 137, PDF *p.* 161, read with Cl. 4(a)(i), *p.* 138, PDF *p.* 162.

12 Lease, Cl. 4(f), Compilation *p.* 140, PDF *p.* 164.

13 Lease, Cl. 3(a), Compilation *p.* 137, PDF *p.* 161, read with Annexure “C”, Compilation *p.* 164, PDF *p.* 189.

allowed to start fit-out works from this date, and to try and complete those works on or before 31st December 2014. Reliable was to deliver to Evonik a bare shell of the Demised Premises but with these additional works (power back-up, glass façade and other Annexure ‘C’ items). Clause 3(d) said that property tax (payable to NMMC, obviously) *and MIDC sub-letting charges* were included in the stipulated lease rent.¹⁴ The second component, MIDC charges, will prove to be of significance to an assessment of Mr Seervai’s submissions. An amount equivalent to six months of lease rent, (admittedly Rs.1,90,01,100/-) was required as a refundable interest-free security deposit, payable on execution of the Lease Deed.¹⁵ It was refundable on return of the Demised Premises. Clause 6(b) said that Reliable would obtain the MIDC sub-letting permission after registration of the Agreement.¹⁶ It confirmed that there were no outstanding payments for taxes except the NMMC property tax dues.¹⁷ If Reliable did not pay these dues, then Evonik was to ‘inform’ Reliable; and if Reliable did not pay and clear these dues within 90 days, then Evonik had the option to make that payment and deduct the amount from lease rent.¹⁸ Evonik was to pay the entire stamp duty;¹⁹ that it did so is undisputed. Clause 11 has the provisions for termination, including force majeure events, and which I must deal with in greater detail.²⁰ Clause 19 had the dispute resolution and

14 Lease, Compilation *p.* 139, PDF *p.* 163.

15 Lease, Cl 5(a), Compilation, *p.* 141, PDF *p.* 165.

16 Lease, Compilation, *p.* 142, PDF *p.* 166.

17 Lease, Cl. 6(i), Compilation *p.* 143, PDF *p.* 167.

18 Lease, Cl. 9(c), Compilation, *p.* 147, PDF *p.* 171.

19 Lease, Cl. 17, Compilation *p.* 155, PDF *p.* 179.

20 Lease, Compilation, *pp.* 151–152, PDF *pp.* 175–176.

jurisdiction provisions:²¹ first, mediation and, if that failed, arbitration with courts in Thane being conferred with jurisdiction.²²

11. On 9th September 2014, Evonik wrote to Reliable asking for an update on the MIDC approval and the NMMC no-dues certificate.²³ A month later, Evonik applied to the MPCB for a consent-to-establish. On 7th September 2014, MPCB asked Evonik for additional documents and information, including the MIDC approval.²⁴ Evonik immediately forwarded this to Reliable by email, saying it was needed in seven days and pointing out that Evonik could begin work (meaning, evidently, fit-outs) only after the MIDC approval was obtained.²⁵ Reliable claims that this was ‘the first time’ it learned or was put to notice that the MIDC approval was required with such urgency or on such a time-line. The Agreement itself contained no date by which MIDC approval was to be obtained. It maintains that MIDC approvals routinely came in after a very great delay. I will consider this submission a little later. On 11th November 2014, Evonik emailed Reliable again setting out what it needed to begin operations. This included, among other things, the MIDC approval.²⁶ On 10th December 2014, Evonik emailed Reliable again with a copy of the ‘gist of discussions’ between the parties.²⁷ On 9th January 2015, Evonik wrote to Reliable yet again, saying it had not yet received

21 Compilation, *p.* 156, PDF *p.* 181.

22 Cl. 19(b) appears to be incomplete, but there is no controversy about this.

23 Compilation, *p.* 188, PDF *p.* 213.

24 Compilation, *p.* 189-A, PDF *p.* 215.

25 Compilation, *p.* 189, PDF *p.* 214.

26 Compilation, *p.* 190–191, PDF *p.* 216–217.

27 Compilation, *p.* 192, PDF *p.* 218.

MPCB clearance or consent-to-establish pending the MIDC sub-letting approval. Now Evonik also pointed out that there was no update, despite previous assurances, regarding the property tax dues and NMMC no-dues certificate.²⁸ The parties met. On 27th January 2015, Evonik wrote to Reliable summarizing their discussions. Evonik contended that its work had been put on hold due to non-receipt of the licenses; that Reliable had agreed to secure the MIDC approval by 30th January 2015; and, as regards property tax, that it had been decided that personnel from both sides would go to NMMC to make the necessary representation.²⁹

12. I note that in a List of Dates filed with the soft copies and which Mr Seervai took me through, there is a statement that between October and December 2014, Reliable ‘coordinated with’ Evonik ‘and pursued the application for MIDC approval’. I note this because although this is stated, there is no evidence of it whatsoever.

13. On 9th February 2015, Evonik terminated the Lease Agreement³⁰ invoking the force majeure clause, of which more shortly. Evonik said it had been assured of immediate MIDC approval, and on the strength of this representation, it executed the Lease Agreement. It also pointed out that the property tax dues had not been cleared or, at any rate, Reliable had not produced the no-dues certificate from NMMC. Evonik needed both for MPCB approval or consent-to-establish. More than five months had passed

28 Compilation, *p.* 196, PDF *p.* 222.

29 Compilation, *p.* 193, PDF *p.* 219.

30 Compilation, *p.* 203–205, PDF *pp.* 229–231.

without compliance. It was not possible to get MPCB approval without these documents. It, therefore, gave Reliable a 90-day notice of termination saying an event of force majeure had occurred. It also demanded a refund of the security deposit.

14. Reliable replied on 13th February 2015.³¹ This is interesting, for Reliable accepted that it had to obtain various permissions, including from MIDC (erroneously typed at MPCP) and NMMC to enable Evonik (erroneously: “us”) to “*commence or carry on business from the said Premises*”. These words, from Reliable itself, are important in view of Mr Seervai’s submissions on contractual interpretation. Reliable went on to say that there was a ‘restructuring’ of its group companies and this required Reliable to comply with additional formalities with MIDC to get the sub-letting permission; i.e., accepting that not only was this Reliable’s responsibility, but there was a delay as well. It explained that it had yet to effect a change in Reliable Infomatic’s name (Evonik’s lessor in the Lease Deed) to Reliable Spaces (the name on MIDC’s records as its lessee and the plot-holder). This, Reliable said, would take another seven days and MIDC permission would follow in another 45 days. It maintained that it was nonetheless entitled to receive the monthly lease rent from January 2015. It offered Evonik assistance if Evonik wanted to continue with the Agreement and assured its cooperation. But it disputed the termination ground and said there was no question of Evonik terminating the Agreement during the lock-in period of five years.

31 Compilation, pp. 206–208, PDF pp. 232–234.

15. This correspondence continued for the next couple of months. On 29th May 2015, Reliable wrote to Evonik saying it had obtained MIDC approval but had withdrawn it.³² The actual permission was never produced, nor was any document from Reliable (in any avatar) to MIDC seeking permission. The so-called withdrawal application was also not put in evidence. There was some other dispute about possession, but that does not much matter in this case.

16. Litigation began the next year when Evonik filed Company Petition No 289 of 2016 against Reliable in this Court (presumably on the ground that its security deposit had not been refunded). Then parallel litigations were launched in the Thane District Court, where Reliable filed a Special Civil Suit in 2017. Evonik filed a summary suit in 2018. On 13th June 2018, parties arrived at Consent Terms in the Company Petition in the High Court. Mr Ardeshir was appointed the sole arbitrator. All three litigations were disposed of with the civil suit and summary suit also being referred to his arbitration.³³

17. In arbitration, both sides led evidence, both oral and documentary. Mr Ardeshir heard Counsel for the two parties, evidently at some great length. He made and published his Award on 8th May 2019.³⁴ He held for Evonik and directed Reliable to pay an amount of Rs 3,10,56,33/- with further interest at 18% pa on the principal sum of Rs.1,92,01,100/- (the refundable security deposit) from 16th July 2018 until the date of the Award; and post-Award

32 Compilation, *p.* 219–220, PDF *p.* 245–246.

33 Compilation, *pp.* 1–3, PDF *pp.* 2–4.

34 Vol 05, Exhibit “A” to the Petition.

interest on the principal amount at 11% per annum. He also awarded Rs 21,33,254/- in costs to Evonik. The Award has detailed reasons, and I will consider these when I turn to the assault Mr Seervai mounts on them.

18. But first to a more detailed examination of some provisions of the Lease Deed.

C. THE CONTENTIOUS PROVISIONS OF THE LEASE DEED

19. The following recitals in the Lease Deed are important:

E. The Lessor has represented that it has made an Application to Maharashtra Industrial Development Corporation (“MIDC”) vide its letter dated 19/08/2014 seeking permission from MIDC to grant all the necessary approval/permission to the Lessor for subletting the Demised Premises in favour of the Lessee and the MIDC vide its letter dated 20/08/2014 has raised certain requirement before granting such permission from Lessor. **The Lessor has further represented that the Lessor shall make necessary application/obtain and procure necessary permission from MIDC for subletting the Demised Premises in favour of the Lessee immediately upon registration of this Agreement.**

F. The Lessor has represented that on 6th August 2014, it has made a requisite application to MIDC for effecting a change in name of *Reliable Spaces Private Limited to Reliable Infomatics Private Limited*, pursuant to the above

amalgamation, from Reliable Spaces Pvt Ltd to Reliable Informatics Park Private Limited. However, the same has not, so far been modified in the records of MIDC.

G. The Lessor has further declared, assured and undertaken to Lessee that Lessor is under process to make similar applications to the Bank, all the relevant municipal, government and statutory authorities including Navi Mumbai Municipal Corporation, MSEDCL etc. and will ensure that the requisite change of name from Reliable Spaces Pvt Ltd to Reliable Informatics Parks Pvt Ltd is carried out in their records.

J. The Lessee has, requested the Lessor to allow to use and occupy the Demised Premises strictly on a Leasehold basis as stipulated under this Agreement without in any way creating any other right, title or interest, in favour of the Lessee for carrying on the business of speciality chemicals including but not limited to sales and marketing of speciality chemicals and running R&D technical service and testing laboratories pertaining to such products (“Business”).

6. REPRESENTATIONS OF THE LESSOR

6(b) The Lessor shall post-registration of this Agreement shall procure and obtain the necessary permission for subletting the Demised Premises in favour of the Lessee from MIDC.

6(i) The Lessor agrees and confirms that there are no outstanding payments for taxes, charges required to be made to any authorities or any person in respect of the plot and/or the said Building save and except payment of property tax to NMMC.

9. EXTENT OF LESSOR'S LIABILITY

9(c) Notwithstanding what is stated herein, if the Lessor fails in making payment of property taxes, charges, penalties or any other amounts whatever payable by the Lessor in respect of the Plot and/or the said Building and/or the Demised Premises to any authority or otherwise, the Lessee shall inform the Lessor in writing to make payment for the same. **In event if the Lessor fails to make payment to the concerned authorities within 90 days of the written intimation by the Lessee, the Lessee shall have the option at its sole discretion to make payment on behalf of the Lessor and to appropriate the amounts so paid towards the Lease Rent payable to the Lessor in respect of the Demised Premises.**

11. TERMINATION

This Agreement be terminated under all or any of the following circumstances, namely:

- (a) The validity of this Agreement will come to an end and the Agreement will expire ipso facto by efflux of time at the end of the Lease Period;
- (b) On happening of the Breach;
- (c) By mutual consent of the Parties;
- (d) Upon the occurrence of any of the force majeure events like fire, accident, riots, flood, earthquake, storm, terrorist activities, war, Act of God, or due to any other cause beyond the control of and not on account of act, deed or omission attributable to the Lessee, **which results in destruction or damage of the Demised Premises and/or the said Building and/or the said Demised Premises or any part thereof becomes uninhabited/unusable and/or closure of business of the Lessee in the Demised Premises, it shall be**

declared an event of force majeure event of force majeure. It is clarified that a force majeure event will be declared as such only if such as event affects the physical condition of the Demised Premises resulting in the Lessee being unable to use or have access to the Demised Premises. In such event of force majeure, the Lessee shall not be responsible to pay the Lease Rent. The Lessee shall give to Lessor a period of 3 (Three) months from the date of such event to restore/ rehabilitate the Demised Premises or part thereof in a way to enable to Lessee to commence its business in the event the Lessor is unable to restore rehabilitate the Demised Premises or part thereof, the Lessee shall have the opinion to forthwith terminate this Agreement, notwithstanding the Lock in Period without requiring the lease Rent to be paid for the balance unexpired period of Lock in Period. **It is further clarified that if the Lessee is not able to obtain renew any sanctions, permissions, licenses, approvals etc. from the competent regulatory authorities which are necessary for the Lessee to *carry its business*, for any reasons whatsoever, and/or if any decision, circular legislation is passed which leads to the closure of the Business of the Lessee or is not conducive or prohibitive for the Lessee to carry its business, the same shall be declared as an event of Force Majeure.** In such event, the Lessee shall inform the Lessor of the same in writing and this Agreement shall stand terminated after giving the Lessor 90 days' notice in writing. Neither any shall be held responsible for any force majeure event and any damages caused due to such force majeure event.

After expiry of the lock in period, Lessee can terminate/ cancel this Agreement by giving 3 (Three) months advance written notice of its intention to terminate the Agreement.

(Emphasis added throughout)

D. CONTENTIONS BEFORE THE ARBITRATOR, EVIDENCE & AWARD

I Submissions before the Arbitrator

20. Reliable made the following submissions before Mr Ardeshir:

- a.* Reliable did not know before 9th October 2014 that Evonik needed MIDC approval to the sub-letting to get MPCB permission;
- b.* Reliable had in fact applied for MIDC permission on 20th August 2014;
- c.* The mention in Recital “E” of ‘immediate’ MIDC permission was unworkable and unrealistic, as MIDC routinely gave permission to sub-letting much after the event, sometimes even after the sub-letting was over;
- d.* No time was fixed in the Agreement to obtain MIDC approval;
- e.* Recital J defined ‘Business’ as being Evonik’s specialty chemical business carried on from the Demised Premises. The force majeure was in two parts. The first part dealt with the destruction of the Demised Premises, and it was no one’s case that this part applied. This part spoke of Demised Premises, not business. The second

part spoke of business, and this expression is not the one defined in Recital J as being linked to the Demised Premises. Therefore, the second part of the force majeure clause applied only if Evonik was stopped from doing business altogether from anywhere at all. That was not Evonik's case. It had merely not obtained MPCB permission to do its specialty chemical business *from the Demised Premises*, not generally, and hence the second part of the force majeure clause would not apply.

- f.* There was evidence to show that MIDC routinely gave permissions in a very delayed fashion.
- g.* The property tax dues to the NMMC was not enough reason for termination. If there were dues, then Evonik had to give 90 days' "notice", and if Reliable did not cure the defect in that time, Evonik had the option to make that payment and deduct the amount from the lease rental.

21. Evonik contested every one of these formulations. According to it, Reliable's attempt to parse the definition of 'Business' was plainly incorrect. The Business was Evonik's specialty chemical business, not its business *in the premises*, for that made no sense at all. Consequently, if Evonik could not — for no fault of its own — get MPCB permission to do business in these premises, the second part of the force majeure clause had to apply. It could not be expected to pay over Rs 33 lakhs per month during the lock-in period (or any part of it) without having use of the Demised Premises; that was clearly inequitable and could not ever have been the contractual intent. It did

not get the MPCB permission only on account of Reliable's twin defaults in not getting the MIDC no-objection to the sub-letting and the NMMC no-dues certificate. It was not bound to pay off NMMC; that was only an option available to it; it did not need to give notice, but only had to inform Reliable that this payment was due. There was no evidence to show that Reliable had applied for MIDC approval and it had undoubtedly not obtained a non-dues certificate from NMMC. Evonik was, it said, entitled to terminate on the second part of the force majeure clause, as worded in the contract.

II Evidence

22. Before Mr Ardeshir, each side led the evidence of one witness. Evonik's witness was one Venkatesh Parasuram, a person who had handled the negotiations and correspondence and was personally familiar with the events. Reliable's witness was one Brian Fernandez. He produced some correspondence between Reliable and MIDC.

III Award

23. Mr Ardeshir found for Evonik. To summarize his decision, Mr Ardeshir held that Reliable's interpretations of Recital (J) and Clause 11(d) were both incorrect and contrary to the conduct of the parties and surrounding circumstances. Even if no specific date or time was fixed for Reliable to obtain the MIDC permission for sub-letting, this had to be done in some reasonable time; and, given that the outer limit for Evonik to start paying lease rentals was 1st January 2015, Reliable

was bound to obtain the MIDC permission by that date. If it did not do so — and if it could take an indefinite amount of time — it meant that Evonik would have to continue paying a huge amount each month in lease rental without being able to use the Demised Premises at all. There was, he found, no dispute that the MIDC permission was needed for Evonik to get its MPCB license. As to the NMMC dues, Mr Ardeshir found Reliable to be in default despite Evonik bringing to its attention the pendency of these property tax dues. Once he arrived at this conclusion, Mr Ardeshir awarded the return of the security deposit with interest from the date of termination (9th February 2015) until 15th July 2018; further interest on the principal amount of Rs 1,92,01,100/- at 18% per annum from 16th July 2018 until the date of the Award; and additional interest on the principal amount at 11% per annum until payment or realization.

24. Evonik paid Rs 2 lakhs towards the fit-out costs. It made no claim for this, nor for a return of the stamp duty paid on the Agreement (Rs 43,05,600).³⁵ It also made no claim for damages.

E. RIVAL SUBMISSIONS AND FINDINGS

25. Mr Seervai lays siege to this Award. He maintains the arguments that were canvassed before Mr Ardeshir. He goes on to say that Mr Ardeshir wholly misread the contract, inserted words in the force majeure that are not to be found there, and thus travelled beyond his remit and virtually rewrote the contract. His submissions

35 Compilation, *p.* 129, PDF *p.* 153.

fall in two broad heads. *First*, as I noted at the beginning, on interpretation; and, *second*, that Mr Ardeshir ignored vital evidence that was before him.

I “Business” and the Force Majeure Clause invoked for termination

26. Mr Seervai reads Recital J to mean that Evonik’s “Business” as defined in that Recital is to do its business of specialty chemicals, sales, marketing, etc. *by using and occupying the Demised Premises on lease without creating any other right, title or interest.* Therefore, according to him, “Business” means Evonik’s business of specialty chemicals including sales, marketing etc. by using and occupying the Demised Premises. No other business is contemplated.

27. Now the second part of the force majeure clause 11(d) runs like this:

It is further clarified that if the Lessee is not able to obtain renew any sanctions, permissions, licenses, approvals etc. from the competent regulatory authorities which are necessary for the Lessee to *carry [on] its business*, for any reasons whatsoever, and/or if any decision, circular legislation is passed which leads to the closure of the Business of the Lessee or is not conducive or prohibitive for the Lessee to carry its business, the same shall be declared as an event of Force Majeure.

The clause does not say “carry on its business from the demised premises”, nor does it use the word business with a capital B. Hence, this is not a reference to the Recital J definition of ‘Business’, i.e.,

specialty chemicals business being done from the Demised Premises. The reference here is to Evonik's business generally. That is to say, this provision applies only if Evonik suffered an overall closure of its business operations. It did not apply if, and only if, Evonik could not do business from the Demised Premises but could continue its business elsewhere.

28. To my mind, this is plainly incorrect. For one thing, no clause and no contract can be read so utterly divorced from its context. This Agreement was only about leasing or letting of *premises*. It was not a joint venture or an agreement to do 'business' together. Reliable had no connection at all with Evonik's specialty chemical business at all. Reliable was only letting premises to Evonik. Mr Seervai's formulation suggests that somehow this second part found place in the force majeure clause bereft of all context and linked to Evonik's overall business. His submission that at several places business is used in conjunction with Demised Premises and when it is not so used it must be given its 'plain meaning' of Evonik's overall business seems to me to be a gross over-simplification. It does not answer the question of context, for one thing. Second, it does not address the manner in which parties went about this, for there is not the slightest doubt that Reliable knew that Evonik needed the MIDC no-objection to the sub-letting — leaving aside for a moment *when* that was to be obtained — and, in fact, offered to get it, but only sought more time. This is clear from its emails where it accepts that it had yet to get the name change effected both with the company records and with MIDC, and that MIDC permission would follow within 45 days. Further, clause 11(d) contains two 'clarifications'. The first tells us of physical destruction of the premises such that Evonik is unable to use

them or access them. The second ‘clarification’ is the one with which we are concerned, and I see no way to legitimately divorce this from the premises themselves as Mr Seervai seeks to do.

29. Indeed, it seems to me that Mr Purandare’s reading of Recital J is entirely correct:

J. The Lessee has requested the Lessor to allow to use and occupy the Demised Premises ... for carrying on the business of speciality chemicals including but not limited to sales and marketing of speciality chemicals and running R&D technical service and testing laboratories pertaining to such products (“Business”).

In other words, the “Business” defined in this clause was Evonik’s business of specialty chemicals etc. It would make no sense, he says, and I think he is right, to say that Evonik’s ‘Business’ was to do what it otherwise does but to confine it to doing that business *in these premises*. Once this is established, he argues, then the second part of the force majeure clause falls into place and harmonizes itself completely. In other words, if Evonik could not do its business of specialty chemicals from these premises for want of permissions, etc., then the force majeure clause would apply, even if Evonik could continue to do its business elsewhere. There was no question of this clause applying only if there was a global or overall shutdown of Evonik’s business (generally speaking). Mr Seervai’s formulation creates an inconsistency where there is none; it is an entirely self-serving and convenient formulation.

30. That it most certainly is. To my question as to what Mr Seervai’s formulation portended for Evonik and whether it would

have to keep paying this rental for five years, the answer was to say, what of it? For that was the bargain the parties struck. This is less than convincing. It is not even remotely compelling. In Mr Seervai's telling of it, Evonik committed to paying Rs 33 lakhs per month for five years whether or not it could use the premises. This is more bloodletting than sub-letting.

31. But I do not have to test the rightness or wrongness of either of these views. That is not my remit. I only have to see if Mr Seervai is correct in saying that Mr Ardeshir's view was so thoroughly implausible and irrational that no reasonable person could have ever come to the conclusion he did; or, in other words, that his interpretation was perverse, yielding a patent illegality.

32. This argument fails. Mr Ardeshir's view is not just eminently plausible and possible. In my considered opinion, it is the only possible view that can be taken in a situation like this and on this material. Indeed, had Mr Ardeshir accepted what is now Mr Seervai's formulation, that would have been perverse and patently illegal.

II Evidence of Delayed MIDC Approvals

33. The next submission is fact-based. Mr Seervai argues that there was no factual basis for the force majeure invocation. The contract fixed no time limit for obtaining the MIDC permission. Indeed, it said it was to be got after the execution of the lease. Reliable did have some issues to sort out after the amalgamation order, but it

was addressing those and had, in fact, said it would be done in seven days of its reply of 13th February 2015, and MIDC permission would be obtained 45 days thereafter. Further, Reliable had ‘sought’ MIDC permission as early as 19th August 2014, even before the Agreement was signed. Indeed, it had obtained permission by May 2015 but had cancelled it, and had told Evonik so by its letter of 29th May 2015. Mr Ardeshir overlooked all this, he says.

34. More importantly, Mr Seervai says, there are four letters produced by Reliable in evidence that Mr Ardeshir wholly ignored. These are MIDC’s letters of 30th September 2016,³⁶ 4th May 2017,³⁷ 14th May 2018³⁸ and 10th October 2018.³⁹ According to him, these show that MIDC routinely gave permissions very late, often well after leases had expired. The first of these, for instance, is dated 30th September 2016 and accords approval to leases to 11 entities, all of which ended in 2016. Later documents show the same pattern, though in some cases the permissions came mid-way through a lease.

35. There are several problems with this. First, on the face of it, the documents do not say what Mr Seervai says they say. MIDC’s letter of 30th September 2016, for instance, refers to Reliable’s letter of 21st September 2016, just a few days earlier, by which it paid an amount of Rs.81,10,700 — evidently the MIDC charges or premium — for the 11 leases in question. Therefore, the MIDC permission came within a mere nine days of Reliable seeking it. Ms Mistry in

36. Compilation, *pp.* 263–264, PDF *pp.* 290–291.

37. Compilation, *pp.* 265–266, PDF *pp.* 292–293.

38. Compilation, *p.* 267, PDF *p.* 294.

39. Compilation, *pp.* 268–269, PDF *pp.* 295–296.

rejoinder asked me to note the previous correspondence of 2015 referred to by date in the subject line of this MIDC letter. But that is impossible because those earlier letters were from Reliable and were never placed on record. None of the preceding correspondence was, though it could and should have been, and certainly was within both Reliable's reach and knowledge. The next MIDC letter shows permission being received within a mere six days of Reliable applying and paying the charges. The third letter shows approval received in less than a month. Only the fourth letter shows a delay of about two months. This is no evidence at all of any permissions being obtained many months and even years later, as Mr Seervai contends.

36. It does not end at that. These documents were produced by Reliable's witness Fernandez, who admitted in cross-examination that he knew nothing of the correctness of their contents. Indeed, he knew nothing of the transactions of payments either.⁴⁰ Mr Purandare had objected to the marking of the document. Mr Ardeshir allowed them in evidence but subject to proof of contents, and quite rightly. Reliable never proved the contents. It needed a witness who could depose to those contents. It led no such evidence. More importantly, it made no attempt to summon MIDC, which could have answered directly the question of whether it took many months and even years to grant permissions; and, notably, when Reliable actually sought permission for the Evonik lease, when it paid MIDC charges and its premium, when — if ever — MIDC gave that permission, and when — if ever — Reliable 'withdrew' its application.

40 Compilation, Cross-examination of RW1 Fernandez, *pp.* 272–273, PDF *pp.* 300–301.

37. This pattern of not leading the best evidence, and inviting the arbitrator to proceed on rank surmise and conjecture continues. Mr Seervai insists that Reliable had applied for permission. Apart from the 19th August 2014 letter, there is no document to show this. That letter is not a permission application, because Reliable had yet to sort out its amalgamation and name changes inconsistencies. When Reliable wrote to Evonik on 29th May 2015 saying it had obtained actual MIDC approval but had returned it, one would have expected this to have been put in evidence. It never was. Ms Mistry in rejoinder candidly admitted that no MIDC permission for this lease was on record; Reliable's cancellation or return of it was also not in evidence, and no attempt was made to summon MIDC or to produce the other antecedent documents referred to in its four letters mentioned earlier. There is, in short, no evidence of Reliable ever having sought or obtained MIDC approval.

38. Again, it is not my remit to re-appreciate the evidence. I am only addressing Mr Seervai's argument that Mr Ardeshir ignored vital evidence that was before him. Mr Ardeshir can hardly be pilloried for not seeing this evidence. There was nothing to see. Had he done so, and done so in the manner Mr Seervai commends, he would have most egregiously erred.

III Time-Limit for Reliable Obtaining MIDC Approvals

39. Mr Ardeshir could not, Mr Seervai goes on, have fixed a time limit within which Reliable had to obtain MIDC approval. This submission rejects itself. The Agreement says 'immediately', but let

us leave that aside. Let us also ignore CW1 Parasuram's evidence that MIDC approval was a pre-condition. Certainly, MIDC seems to have insisted, from as early as 20th August 2014, on having a 'registered' document before it to accord approval.⁴¹ Reliable says it never knew that MIDC approval was required for MPCB permission until Evonik's letter of 9th October 2014. It ties this with the so-called evidence of MIDC's letters which, Reliable says, shows delayed clearances. This argument is nonsensical. MPCB's requirements are no State secret. It is also logical that a pollution control board will need a head lessor's permission before it grants consent-to-establish because that consent is required for every premises in which it is proposed to do any business that needs MPCB clearance. In any case, this is mostly immaterial, because between October and December 2014, Reliable had enough time to get the MIDC approval — and, as we have seen, those approvals were generally reasonably quick. That MIDC had charges for sub-letting is set out in Clause 3(d) of the Agreement itself — the monthly lease rental includes those charges. Therefore, all that Reliable had to do was to make an application in the correct name with the necessary charges and premium, and MIDC approval would follow. It did nothing of the kind. It also did not, contemporaneously, contend that it did not have to get this permission early; instead, it promised to do this within 45 days of sorting out its name change issues. There is no evidence that it ever

41 I confess I do not understand how any authority can ask for this. Either this means that the approval is an idle formality — in which case Reliable ought to have been able to get it within a few days — or it is simply unthinking. A 'registered' document means one on which stamp duty is paid and which is then registered. What if, after registration, approval is refused? What if a party has been put in possession on registration? Of course, had MIDC been summoned — and only Reliable could be expected to do that — we might have had some proper *evidence*.

did this. Now it is settled that where no time is fixed for performance of a contractual obligation, the law requires performance within a reasonable time. Mr Seervai's argument that this can stretch to some galactically distant time is unacceptable. What, in these circumstances, would be a 'reasonable' time? The Agreement provides an answer: 1st January 2015, for that was the trigger date by which Evonik had to start paying monthly lease rentals. Therefore, by that date, it had to have MPCB consent-to-establish; and therefore, well before that date, it needed MIDC approval. Such a view was not impermissible. It was not implausible. To the contrary, it was an eminently reasonable view; and, more, it was an eminently *just* and *equitable* view. Reliable's stand would have resulted in it enjoying a vast income — some form of unjust enrichment — only on account of its own delinquencies.

IV NMMC Property Tax Dues

40. As to the NMMC property tax no-dues certificate, and Mr Seervai's complaint that Evonik never gave it notice, perhaps the less said, the better. The clause in question, Cl. 9(c), quoted in the Petition itself, does not require a 'notice'. It requires Evonik to inform Reliable in writing. There is an email by which Evonik did this. That is enough — and again, I am not to test the sufficiency of the evidence, nor to re-appreciate it. Reliable gives no reason at all for not paying NMMC dues. To argue that Evonik should have paid them is absurd. Evonik was proposing to lease three units in Liberty Tower. Reliable owns the whole building. Its property tax dues pertain to the entire property. Evonik could hardly have been expected to pay the tax dues for the

entire tower and then deduct from monthly rentals. There is such a thing as financial planning, and I cannot imagine that Reliable is so utterly a stranger to it that it can seriously make an argument that runs like this: “I owe an authority a large amount in property tax. You are my tenant. It is for you to give me ‘notice’ that I am in arrears of property tax — though I am perfectly well aware of it. If I do not pay it in 90 days of your ‘notice’, you must pay the full amount due from me and deduct it from the rental.” This was and is a thoroughly untenable argument.

V Refund of Security Deposit

41. Mr Seervai’s final argument was that even if the force majeure termination was to be accepted, Mr Ardeshir ought not to have ordered a refund of the security deposit. But that is contrary to the Agreement itself. The security deposit was always refundable without interest. It was refundable on termination. Evonik did not seek interest from the date of the deposit, but only from the date of termination, when that refund should have been made. Once the termination was found to be good, then the order of deposit and interest after the date of termination had to be ordered. That is what Mr Ardeshir did, and quite rightly. The approach Mr Seervai canvasses, had Mr Ardeshir adopted it, would have been utterly perverse and wholly outside the Agreement.

VI Equitable Considerations

42. Above all, there is the inherent unjustness of Reliable's argument, as Mr Purandare points out. The expectation was, he says, that Evonik would continue paying lease rentals to Reliable, without Evonik ever having use of the premises — simply because Reliable could not and did not get the permissions necessary for Evonik to get its MPCB approval. Further, he adds, on termination Reliable was put to no discernible loss; it had the premises, and it could give them out to another party. It has in fact done so.

43. On balance, Mr Ardeshir's Award is studied, balanced, well-reasoned, moderate and disciplined. It is the order that would have been made had this been a suit before this Court. Far from being assailed, it is to be applauded for its just and fair approach.

F. FINAL ORDER

44. Being entirely without merit, the Petition fails and is dismissed.

G. COSTS

45. The Commercial Courts, Commercial Division & Commercial Appellate Division Of High Courts Act, 2015 ("**the Commercial Courts Act**") applies to this Petition. The Schedule, and the corresponding amendment to the Code of Civil Procedure, 1908,

requires in Section 35(2) that costs be awarded against the unsuccessful party to the successful party. If not, reasons are to be recorded in writing. Given the preceding discussion, I can think of no conceivable reason not to award costs. The explanation says I must have regard inter alia to the legal fees and expenses incurred in awarding costs. In other words, costs must be reasonable, yet realistic. Mr Purandare has a statement of costs ready. These are the costs that relate only to this Petition. At Rs 7,35,500/-, they seem reasonable.

46. Section 35(3) sets out the circumstances to be borne in mind, including the conduct of the parties, and whether the claim is frivolous (which this Petition most certainly is). Section 35(4)(g) allows interest on costs.

47. There will, therefore, be an order of costs against the Petitioner and in favour of the Respondent in the amount of Rs. 7,35,500/-, with interest at 12% per annum from the date of this order until payment or realization.

(G.S. PATEL, J.)