

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 13.09.2022

+ **FAO(OS)(COMM) 166/2022 & CM No.29693/2022****INDIA POWER CORPORATION LIMITED** Appellant

versus

EASTERN COALFIELDS LIMITED Respondent**Advocates who appeared in this case:**

For the Appellant : Mr Anirban Bhattacharya and Mr Rajeev Chowdhary, Advocates.

For the Respondent : Mr Anupam Lal Das, Senior Advocate with Mr Anirudh Singh and Mr Parijat Kishore, Advocates.

CORAM**HON'BLE MR JUSTICE VIBHU BAKHRU****HON'BLE MR JUSTICE AMIT MAHAJAN****JUDGMENT****VIBHU BAKHRU, J**

1. India Power Corporation Limited (hereinafter '**IPCL**') has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act (hereinafter '**the A&C Act**') impugning a judgement dated 02.03.2022 (hereinafter '**the impugned judgement**') passed by the learned Single Judge, whereby IPCL's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 15.02.2021 (hereinafter '**the impugned award**'), was rejected

**FACTUAL CONTEXT:**

2. IPCL claims that it is engaged in the business of supply and distribution of electricity since the year 1990. It, *inter alia*, operated two generating power stations – one at Chinakuri and the other at Dishergarh. The electricity generated was supplied to various coal mines of the respondent – Eastern Coal Fields Ltd. (hereinafter ‘ECL’). ECL is a wholly owned subsidiary of Coal India Ltd. and is engaged in producing coal.

3. On 30.03.1987, IPCL (then known as Dishergarh Power Supply Company Ltd.) entered into an agreement (hereinafter ‘**the Agreement**’) with ECL for construction, erection and successful commissioning of a 2x10 MW Thermal Power Plant at Chinakuri Mining Complex (hereinafter ‘**the Power Plant**’). Subsequently, on 31.03.1993, the parties entered into a lease deed (hereinafter ‘**the Lease Deed**’) for lease of the Power Plant along with land, buildings and quarters, plant and machinery (hereinafter ‘**the Leased Assets**’) for a period of twenty years commencing from 01.04.1991.

4. IPCL leased the Power Plant for carrying on of its business of generating electricity for consideration. The parties agreed that IPCL could enhance the capacity of the Power Plant by commissioning an additional plant of 1x10 MW capacity at its own cost. ECL agreed to pay the Written Down Value (hereinafter ‘**WDV**’) of the Power Plant after expiry of the Lease Deed and on taking over the said plant. There



is no dispute that after the execution of the Lease Deed, IPCL commissioned an additional power plant of 1x10 MW capacity.

5. ECL supplied coal to IPCL through a linkage system from 1991 to 2010. The entire electricity generated by IPCL from the two power stations – one at Chinakuri and the other at Dishergarh – was supplied to the coal mines of ECL. Prior to expiry of the Lease Deed, IPCL, by a letter dated 17.08.2010, sought extension of the same for a period of twenty years. ECL did not accede to the said request, however, by a letter dated 15.03.2011, it agreed to extend the lease for a period of one year. ECL also informed IPCL that it would invite fresh tenders in respect of the Power Plant.

6. Disputes have arisen between the parties in respect of the Agreement as well as the Lease Deed. IPCL claimed that ECL had failed to supply coal, and consequently, the Power Plant remained idle from the month of November 2011.

7. ECL issued notice dated 16.01.2012 bearing No.ECL/GM(E&M)/Chinakuri TPS/4438 for replacing the existing 3x10 MW stoker fired boilers by 3x10 MW fluidized bed combustion boilers; and, for leasing the Power Plant for a period of twenty years on ‘as is where is basis’. IPCL took exception to the said notice inviting tenders and claimed that no such tenders could be invited by ECL without paying the WDV of the equipment installed and commissioned by IPCL. IPCL quantified the WDV as on 31.01.2012 at ₹24.9682 crores.



8. The pleadings indicate that there was exchange of letters between the parties in regard to IPCL's claim and ECL's demand for handing over the Power Plant and Leased Assets, in terms of the Lease Deed. IPCL did not hand over the possession of the Power Plant on termination of the Lease Deed. According to IPCL, it would be obliged to do so only on payment of the WDV in terms of Clause III(a) of the Lease Deed. IPCL filed a writ petition before the Calcutta High Court seeking certain directions. IPCL also claimed interim relief regarding taking over of the Power Plant without payment of the WDV, as claimed. By an order dated 19.03.2013, the Calcutta High Court was of the view that the disputes between the parties were required to be resolved through arbitration and, in accordance with the Arbitration Clause under the Lease Deed.

9. IPCL appealed against the said decision [W.P. No.20948(W) of 2012 captioned *DPSC Ltd. & Anr. v. Eastern Coalfields Ltd. & Ors.*]. By an order dated 19.03.2014, the said appeal was dismissed by the Division Bench of the Calcutta High Court. IPCL filed a Special Leave Petition before the Supreme Court against the aforesaid order. Thereafter, by an order dated 17.10.2014, the Supreme Court appointed the learned Sole Arbitrator to adjudicate the said disputes between the parties.

ARBITRATION:

10. Before the Arbitral Tribunal, IPCL filed a Statement of Claims seeking various reliefs. It sought a declaration that it was entitled to



renewal of the Lease Deed for a further period of twenty years along with sum of ₹25.81 crores for additional expenditure incurred by it due to failure on the part of ECL to renew the Lease Deed. In the alternative, IPCL sought an award for a sum of ₹24,72,56,000/- as the WDV of the assets along with ₹25.81 crores for additional expenditure incurred by it as on 31.12.2014. Additionally, IPCL claimed interest at the rate of 18% per annum on the aforesaid amount from 01.04.2012 until the date of payment.

11. ECL contested the claims and also raised counter-claims. ECL claimed that it was entitled to rent for the months of July – September 2010; April 2011; and, October 2011 – March, 2012 [aggregating ten months]. ECL quantified the unpaid rent for the said period at ₹3,21,70,837/-. In addition, ECL also claimed further rent for a period of forty-seven months [April 2012 to February 2016]. ECL's claim for rent, as articulated in its counter-claims, is set out below:

- “iii. That the Claimant used to operate two Power Plants, namely Dishergarh Power Station (*hereinafter referred to as “DPS”*) was solely owned by the India Power Corporation Ltd. (*hereinafter referred to as “IPCL”*) and Chinakuri Power Station (*hereinafter referred to as “CPS”*) was constructed pursuant to the agreement, whereby the Respondents appointed Dishergarh Power Supply Company Limited (*IPCL formerly known as “DPSCL”*) for supervision and management of the project for construction, erection & successful commissioning of the Thermal Power Station upto the date of successful conclusion of trial



run operation. It is pertinent to note that the said station was constructed at the cost of Respondent, estimating to Rs. 50 Crores (approximately).

1. RENT DUE:-.

- i. That According the lease agreement, clause 1 (a) of the Agreement:

“The lessee to pay the rent of rupees 14,58,333 (rupees fourteen lakh fifty eight thousand and three hundred thirty three only) per month from the first day of April 1991 upto the 31st day of August 1991 and thereafter 29,16,667 (rupees twenty nine lakh sixteen thousand and six hundred sixty seven only) per month on the days and in the manner aforesaid without any delay, default, deduction or abatement or any increase on any account irrespective whether the station is in operation or not or is under repairs, or maintenance, or replacements for any period whatsoever.”

That it is most respectfully submitted that the Claimant has not paid the lease rent for the following months within lease period:

- Lease rent for the period : July-September’2010;
- April’2011; Oct’2011-March’2012 (10 Months)

Rs. 3,21,70,837/-

- ii. As per Clause III (a) of the Agreement, the Claimant was required to handover the possession of the property after the expiry of the Lease Deed (*i.e. on 31.03.2012, after the extension of one year*), which the Claimant



has not done, till date. In view of the above the Respondent legitimately claims to seek the monthly rent due from the Claimant. It may be again justified by “*Opportunity Loss*”, i.e if the Claimants had handed over the plant on expiry of the lease; the Respondents would have executed a fresh lease agreement and would have gain rent for next 20 years.

- April, 2012 – February, 2016 (47 Months)

Rs. 15,45,15,684/-

Total: Rs. 18,66,86,521/-

Interest upto February, 2016 Rs.
7,45,07,803/-

Grand Total: Rs. 26,11,94,324/-

The lease amount of Rs. 29,16,667/-, as fixed and agreed under the agreement would have undergone enhancement. The Respondents would be entitled to an escalated rent, if the Respondents would have renewed this agreement after 2012. Therefore, the Respondents would also be entitled to claim the additional amount for “*loss of opportunity*” on account of lease rent.”

12. ECL also made some other claims including a claim for ₹57.32 crores, on account of excess tariff charged by IPCL along with interest; a sum of ₹2,49,56,138.95/-, on account of supplementary coal bills; a sum of ₹305.38 crores towards compensation; and, a sum of ₹39,18,76,046/- as advance against the security deposit for power bills. The said claims, however, are not relevant for the purpose of the present appeal.



13. By the impugned award, the Arbitral Tribunal allowed IPCL's claim for the WDV of the Power Plant as well as ECL's claim for rent. The operative part of the impugned award reads as under:

“162. In view of the aforesaid conclusions the following Award is made:

- (a) The Respondent shall pay to the Claimant a sum of Rs.24.7256 Crores as WDV.
- (b) The aforesaid amount shall be paid with interest @ 9% with effect from 06.10.2016 till payment of the amount.
- (c) The Claimant shall pay to the Respondent a sum of Rs.18,66,86,521/-.
- (d) The aforesaid amount shall be paid with interest @ 9% with effect from 06.10.2016 till payment of the amount.
- (e) All other Claims and Counter-Claims are hereby dismissed.”

SECTION 34 OF THE A&C ACT:

14. Both the parties filed their respective petitions under Section 34 of the A&C Act for partly setting aside the impugned award. ECL filed its petition (being *OMP (COMM) 328/2021* captioned “*Eastern Coalfields Limited v. India Power Corporation Limited*”) assailing the impugned award to the limited extent that the Arbitral Tribunal had not permitted ECL to amend its counter-claims to include the claim for damages for the amount required to bring the Power Plant to an operational state. Further, ECL also challenged the decision of the Arbitral Tribunal to award a sum of ₹24,72,56,000/-, as the WDV of the equipment installed and commission by IPCL.



15. The Arbitral Tribunal had rejected ECL's application to amend its counter-claims to further include a claim for damages on account of the expenditure to bring the Power Plant in an operational state, as barred by delay and laches. ECL had also filed an application before the Supreme Court for appointment of an arbitrator to adjudicate further disputes including the additional claims sought to be raised by way of an amendment to the counter-claims. However, the Supreme Court, by an order dated 15.03.2022, rejected the said application (being **MA No. 20972/2021 in Civil Appeal No. 9847/2014** captioned "**India Power Corporation Limited v. Eastern Coalfields Limited**").

16. The learned Single Judge did not find any ground to interfere with the impugned award insofar as IPCL's claim for the WDV of the plant and machinery is concerned. Accordingly, by an order dated 29.10.2021, the learned Single Judge rejected ECL's petition under Section 34 of the A&C Act. ECL had challenged the said order dated 29.10.2021 passed by the learned Single Judge before this Court [**FAO(OS)(COMM) 143/2022** captioned "**Eastern Coalfields Limited v. India Power Corporation Limited**"). The said appeal was dismissed by this Court by an order dated 06.07.2022.

17. The present case arises out of IPCL's petition under Section 34 of the A&C Act [being OMP (COMM) no. 83/2022 captioned **India Power Corporation Ltd. v. Eastern Coalfields Ltd.**].

18. IPCL assailed the impugned award, essentially, on two fronts. First, it claimed that the Arbitral Tribunal's rejection of its claim of



₹25.81 crores is patently illegal as the Arbitral Tribunal's reasoning that the claim was not supported by any pleadings or evidence, is contrary to the record.

19. Second, it submitted that the impugned award for the rent due to ECL after expiry of the Lease Deed is based on an incorrect finding that IPCL was in wrongful possession of the Leased Assets. IPCL claims that it was entitled to withhold possession of the Power Plant until the WDV was determined. Additionally, it stated that in terms of Clause I(a) of the Lease Deed, ECL was not entitled to claim any rent due for the period after expiry of the Lease Deed on 31.03.2012. It is contended that ECL's claim for unauthorised and wrongful occupation of the Power Plant by IPCL after expiry of the Lease Deed had no nexus with the rent payable in terms of the Lease Deed.

20. The learned Single Judge found that the Power Plant had stopped operating since the month of November 2011 and IPCL's claim of ₹25.81 crores to maintain the Power Plant, which was shut for the aforesaid period was "*inconceivable and frivolous*". The learned Single judge observed that IPCL was a "*rank trespasser*", and could not justify maintaining the Power Plant, which IPCL was bound to surrender in the first place. Further, the learned Single Judge held that the alleged expenditure for maintaining the Power Plant, which was not in operation, could not be justified. In this view, the Arbitral Tribunal's decision to reject IPCL's claim amounting to ₹25.81 crores on account of additional expenditure for maintaining and operating the Power Plant, could not be interfered with.



21. The learned Single Judge further held that since the Arbitral Tribunal had found that IPCL was in illegal occupation of the premises, IPCL was liable to pay compensation as a tenant holding over. The learned Single Judge also found that IPCL had not relied on any material to prove that the actual market rate of rent of the premises had fallen down considerably during the period of illegal occupation of the Power Plant and thus, the Arbitral Tribunal could not be faulted for awarding compensation on the basis of the last paid rent.

22. The relevant extract of the impugned judgement is set out below:

“17. It must also be noted that Mr. Bhattacharya has also focused on other observations made in paragraph no. 147 to highlight the contradictions. Those observations relating to the pleadings and evidence should not be read in isolation, and rather, be appreciated by reading the entire Award. The reasoning for the same is found under paragraph no. 125 of the Award, as extracted above. Concededly, the Plant in question had stopped operating since November, 2011. IPCL’s claim that it incurred an expense of Rs. 25.81 O.M.P. (COMM) 83/2022 Page 11 of 15 Crores to maintain a Plant – which has been shut down since November, 2011 – is thus, inconceivable and frivolous. The learned Arbitrator has held that IPCL had no right to remain in possession of the Plant after expiry of the Lease Deed. IPCL ought to have vacated and handed over the possession thereof to ECL. A “rank trespasser” cannot justify maintaining a Plant – which it, under law, was bound to surrender, in the first place. That apart, the alleged expenditure for maintaining a Plant, which was idle and not in operation, cannot be justified. The Court, therefore, does not find any



merit in the contention urged by IPCL on this ground.

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20. The award of compensation to ECL is for the period IPCL continued to be in illegal occupation of the Plant premises. The learned Arbitrator has given a categorical finding that IPCL was in illegal occupation of the premises. If IPCL had no legal right to remain in possession and it failed to surrender the same, inevitability it becomes liable to pay compensation, as it was a tenant in holding over. Now, assuming that IPCL did not lead any evidence to prove damages, the question that arises is whether the learned Arbitrator could have awarded damages – which are not more than the O.M.P. (COMM) 83/2022 Page 15 of 15 contractual rate agreed between the parties. There are various precedents of this Court, as well as the Supreme Court, which take judicial notice of increase of rent – by applying the provisions of Sections 114 and 57 of the Evidence Act, 1872.5 IPCL has not shown any material to demonstrate that the actual market rate of rent of the premises had fallen down considerably during the period of illegal occupation of the Plant premises. In absence of such material, the learned Arbitrator cannot be faulted for awarding compensation on the basis of the last paid rent – which under ordinary circumstances, increases at 15% per annum, that too without interest. Thus, even if IPCL failed to lead any evidence to prove the mesne profits, the Award, on the basis of contractual stipulation – calls for no interference. The observations of the learned Arbitrator in denying the ‘opportunity lost’ to ECL, does not in any manner contradict the Award on the basis of last paid rent. The learned Arbitrator has given a specific conclusion that IPCL was not



justified in withholding rent and this being a finding of fact, on the basis of coherent reasoning of the learned Arbitrator as found in the Award, the Court does not see any ground to interfere on this count as well.”

23. The Arbitral Tribunal had rejected IPCL’s claim for the reason that it was not supported by any pleadings or evidence. Further, the Arbitral Tribunal had also observed that no submissions were made by IPCL, in support of the said claim.

24. The learned Single Judge held that there was no reason to disbelieve the observations made by the Arbitral Tribunal. The learned Single Judge, thus, did not accept that IPCL had rested its claim of ₹25.81 crores on account of the additional expenses incurred by it during the period 31.03.2012 till 06.10.2016.

IPCL’S APPEAL UNDER SECTION 37 OF THE A&C ACT:

25. IPCL’s challenge to the impugned award and the impugned order is two- fold. First, it is contended that the Arbitral Tribunal had failed to consider IPCL’s claim for additional expenses amounting to ₹25.81 crores. The said claim had been rejected on the ground that there were no pleadings or evidence in respect of the said claim. Further, no submissions were advanced in support of the said claim.

26. Mr Bhattacharya, learned counsel appearing on behalf of IPCL, contended that the said reasoning was palpably erroneous. He referred to paragraph no. 42 of the Statement of Claims and submitted that IPCL had specifically pleaded that it had incurred “*additional expenditure in*



excess of “Rs.25.81 crores as on 31st December 2014 on account of overhead and maintenance expenditure coupled with costs towards payment of salary, statutory dues payment made on VRS scheme formulated by IPCL and cost disallowance on fixed cost on diverse heads.”

27. He also referred to the affidavit of one of the witnesses (Mr. Subrata), who had testified on behalf of M/s De & Bose, Chartered Accountants and contended that the said affidavit also evidenced the additional expenditure claimed by IPCL. He further submitted that the written submissions were also filed, including in respect of the claim for additional expenses. Therefore, there was no question as to the Arbitral Tribunal rejecting the claim on the ground that it was not pleaded or not pressed.

28. He further submitted that it was not open for the learned Single Judge to reject the said claim on merits as the Court could not modify the award. He referred to the decision of the Supreme Court in **NHAI v. M. Hakeem and Anr.: (2021) 9 SCC 1**, in support of his contention. He also referred to the decision of a Single Bench of this Court in **Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Limited and Ors.: 2019 SCC OnLine Del 8350** and contended that it was not open for a party to supply any reason for non-consideration of a claim, which was otherwise not reflected in the arbitral award.

29. Second, he submitted that the impugned award in respect of the award of rent was, *ex facie*, inconsistent. He submitted that the Arbitral



Tribunal had accepted IPCL's contention that possession of the Leased Assets was to be handed over simultaneously with the determination of the WDV, which was not done. Notwithstanding the aforesaid finding, the Arbitral Tribunal had awarded mesne profits/rent for the period that IPCL had rightly withheld the possession of the Leased Assets. He submitted that the finding to that extent was inconsistent.

30. Lastly, he contended that even if it is accepted that IPCL was in unauthorised occupation of the Leased Assets, the Arbitral Tribunal could not award any amount unless ECL established the damages suffered by it. He referred to the decision of the Supreme Court in ***Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.: (2005) 1 SCC 705*** and on the strength of the said decision, contended that measure of damages for unauthorised occupation of premises cannot be tagged to the rate of rent payable to the lessor.

REASONS AND CONCLUSION:

31. The first and foremost question to be addressed is whether the impugned award, to the extent it rejects IPCL's claim for ₹25.81 crores on account of overhead and maintenance expenditure, is manifestly erroneous. It is relevant to refer to paragraph no. 147 of the impugned award, in terms of which the said claim was rejected. The same is reproduced below:

“147. It may be noticed at this stage that the Claimant also seeks a direction to the Respondent to pay a sum of Rs.25.81 crores on account of expenses incurred by the Claimant in maintaining the



Chinakuri Power Station from 31.03.2012 till the possession was taken on 06.10.2016. This claim is liable to be rejected as it is not supported by any pleadings or evidence. Furthermore, no submissions were made in support of this Claim either at the stage of the Oral Submissions or in the Written Submissions. The Claim is hereby rejected.”

32. It is apparent from the above that IPCL’s claim was rejected for three reasons: (a) it was not supported by pleadings; (b) it was not supported by evidence; and (c) no submissions, either oral or written, were made in this regard. Concededly, none of the aforesaid three reasons are correct.

33. Mr. Anupam Lal Das, learned senior counsel appearing for ECL, had contended that the IPCL’s claim was, *ex facie*, untenable in view of the finding of the Arbitral Tribunal that IPCL was in unauthorised possession/occupation of the Leased Assets. He had submitted that a person, who is in unauthorised occupation or possession of the premises, cannot prefer any claim for expenses incurred in maintenance of the premises. He, however, did not contest that the Statement of Claims did contain rudimentary pleadings in respect of the said claim. IPCL had also furnished evidence by way of an affidavit affirmed by one Mr. Subrata on behalf of M/s DE & Bose, Chartered Accountants, in support of its claim. Mr. Das had contended that the said pleadings or evidence were wholly insufficient for accepting IPCL’s claim for additional expenditure.



34. The said contention is not unsubstantial. However, that is not the reason stated in the impugned award for rejection of the said claim. It is also not disputed that the written submissions filed on behalf of IPCL also includes submissions in respect of the claim for ₹25.81 crores on account of additional expenditure. However, there is some controversy whether any oral submissions were made in regard to the said claim. The impugned award indicates that the counsels appearing for the parties were not in agreement in this regard.

35. The learned Single Judge, thus, proceeded on the basis of the observation that no oral submissions were made by IPCL in regard to the claim for additional expenses, before the Arbitral Tribunal. In addition, the learned Single Judge had also found that IPCL's claim for incurring expenditure of a sum of ₹25.81 crores to maintain the Power Plant was "*inconceivable and frivolous*", in view of the Arbitral Tribunal's finding that IPCL was a rank trespasser.

36. There is no cavil with the proposition that it is necessary that an arbitral award be read in a meaningful manner. In cases where there are gaps in reasoning in an arbitral award, it is apposite for the court to fill in the gaps by referring to pleadings and documents. In ***Dyna Technologies (P.) Ltd. v. Crompton Greaves Ltd.: (2019) 20 SCC 1***, the Supreme Court had observed as under:

“35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to



an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”

37. The above passage is instructive. However, in the present case, the Arbitral Tribunal had articulated the reasons for rejecting the claim for expenditure incurred by IPCL for maintenance of the Leased Assets. Plainly, the reasons that there were no pleadings or evidence, or submissions advanced on behalf of IPCL, are erroneous. There is a controversy whether any oral submissions were advanced on behalf of IPCL in regard to the said claim. However, the Arbitral Tribunal has not rejected the claim only on the ground that no oral submissions were advanced in regard to the said claim; the Arbitral Tribunal had rejected



the claim on the ground that there are no pleadings, no evidence and no written submissions in this regard. This is not sustainable. It is not open for this Court to ignore this reasoning and supplant it by drawing an inference from the observations made by the Arbitral Tribunal in regard to another claim.

38. The learned Single Judge had reasoned that the claim made by IPCL is sustainable in view of the Arbitral Tribunal's finding that IPCL was a rank trespasser after the Lease Deed had expired. Clearly, if this is the reasoning of the Arbitral Tribunal for rejecting the claim for additional expenses incurred during the period after expiry of the Lease Deed, no interference by this Court would be permissible. However, as noted above, this is not the reason for which IPCL's claim was rejected.

39. As observed earlier, the contention that the pleadings and evidence are insufficient for allowing IPCL's claim for additional expenditure, is not unsubstantial. But that is not the reason for rejection of the claim. It is necessary to bear in mind that this Court does not have the jurisdiction to adjudicate the disputes between the parties; the disputes are required to be adjudicated by the forum chosen by the parties – in arbitration. The question whether IPCL's claims have any merit or are frivolous is required to be determined by the Arbitral Tribunal. This Court cannot supplant its view in place of that of the Arbitral Tribunal or supply additional reasons for supporting the same. This is not a case where there is any gap in the reasoning, which the Court may fill by referring to the pleadings and material placed before the Arbitral Tribunal. This is a case where the Arbitral Tribunal has, in



no uncertain terms, set out its reasons for rejecting the claim made by IPCL for additional expenditure.

40. Having stated the above, it is apparent that IPCL's claim for additional expenditure is premised on the basis that it was entitled to withhold possession of the Leased Assets till the WDV of the said assets was determined or paid. IPCL's contention is founded on Clause III (a) of the Lease Deed

41. This Court had pointedly asked Mr. Bhattacharya whether IPCL could draw any effective relief if the impugned award, in respect of its claim for additional expenses, is set aside and the finding of the Arbitral Tribunal that IPCL was a rank trespasser after expiry of the leased period is not disturbed. He had fairly responded in the negative.

42. IPCL's challenge to the finding that it was in unauthorised occupation/possession of the Leased Assets is premised on the basis that it is inconsistent with the finding regarding IPCL's right to withhold possession of the Leased Assets till the WDV was determined and paid. These findings were rendered in the context of ECL's claim for rent for the Leased Assets.

43. In view of the above, the principal question to be addressed is whether there is any irreconcilable inconsistency in the impugned award with regard to the respondent's claim for rent, that renders the impugned award impeachable under Section 34 of the A&C Act.



44. It was IPCL's contention before the Arbitral Tribunal that it was entitled to withhold possession of the Leased Assets till ECL paid the WDV. It had also filed a writ petition claiming the WDV of the Leased Assets. Before the Arbitral Tribunal, IPCL filed an application under Section 17 of the A&C Act. The said application was disposed of by an order dated 11.05.2015. The relevant extract of the said order reads as under:

“On this application Mr. Das has brought to my notice the prayer clause. A perusal of the prayer clause makes it clear that the direction is sought to the Respondent to take possession of Chinakuri Plant upon securing a sum of Rs. 24.7256 crores, representing the written down value of the plant, machinery and assets installed by the Claimant at the aforesaid plant as on 31.03.2012. Mr. Das has submitted that the application deserves outright dismissal, as the Respondent is a Government undertaking and will be always in a position to satisfy any award made by the Tribunal, which would become final and binding. On the other hand Learned counsel for the Claimant Mr. Ghosh has submitted that the Respondent has deliberately not taken possession of plant and machinery for over three years. Plant has been lying closed and unutilized. The Claimant has incurred huge losses as a result thereof. The claim made by the Claimant is about Rs. 535 crores. Therefore, the claim for a bank guarantee in a sum of Rs. 24.7256 crores is limited only to the written down value of the plant in relation to the increased capacity.

I have considered the submissions made by the learned counsel for the parties. Even though the Respondent is a Government company, I am of the considered opinion that an Order directing delivery of possession of the plant cannot be made



unconditionally. Furthermore, in my opinion it would not be onerous to direct the Respondent to furnish the bank guarantee as prayed. I hereby direct the following:

a. That the bank guarantee of a nationalized bank in the sum of Rs. 24.7256 crores be furnished in favour of the Claimant on or before 2nd June 2015 and the said bank guarantee shall be kept with the Sole Arbitrator till further Orders.

b. The Claimant will hand over the possession of the plant together with all requisite documents on furnishing proof of the bank guarantee having been deposited with the Sole Arbitrator.”

45. Thus, at the interim stage, the Arbitral Tribunal had directed that possession of the Leased Assets be handed over to ECL on furnishing a bank guarantee for an amount of ₹24,72,56,000/-. ECL furnished the bank guarantee dated 19.05.2015 for a sum of ₹24,72,56,000/-, in terms of the said order. Notwithstanding the same, IPCL did not deliver the possession of the Leased Assets till 06.10.2016.

46. Mr. Bhattacharya, readily conceded that the impugned award, to the extent it awards rent for the period prior to the expiry of the Lease Deed, that is, for a period of ten months (July to September 2010; April 2011; and October 2011 to March 2012), is not amenable to challenge. He also accepts that since IPCL did not handover possession of the Leased Assets, despite the orders passed by the Arbitral Tribunal, IPCL could not dispute ECL's entitlement to compensation for the period commencing from 25.05.2015 (the date on which the bank guarantee dated 19.05.2015 was deposited with the Arbitral Tribunal) to 06.10.2016 (being the date on which possession was handed over). He



confined the controversy to the award of rent for the period commencing from 31.03.2012 till 25.05.2015.

47. As noticed above, IPCL's case that it was entitled to continue in possession of the Leased Assets till the amount of WDV was determined and paid, is founded on Clause III(a) of the Lease Deed. The said clause is relevant and reads as under:

“(a) At the expiration or sooner determination of the demise, the lessee shall yield up and deliver upon the lessor peaceful possession of the station in good running condition without claiming any compensation value thereof but lessor shall pay the lessee the written down value of additions and alterations of the building) station or additional machinery that may be brought by the lessee at the station. On such determination the scheduled station shall rest in and be the absolute property of the Lessor.”

(emphasis added)

48. It is apparent from a plain reading of the aforesaid clause that on determination of the Lease Deed, IPCL was obliged to deliver peaceful possession of the Power Plant (scheduled station) in good running condition. ECL was obliged to pay the WDV of additions and alterations of the building, station or any additional machinery brought by IPCL at the station. The aforesaid clause also clearly indicates that on determination of the lease, 'the scheduled station' would rest in and be the absolute property of ECL. There is no stipulation that possession would be handed over simultaneously with ECL determining or paying the WDV



49. According to IPCL, the expression “*such determination*” as used in the last sentence of Clause III(a) of the Lease Deed refers to the determination of the WDV of the plant and machinery. This is an erroneous reading of Clause III(a) of the Lease Deed. IPCL’s interpretation of the said clause is not supported by its plain language. The opening sentence of Clause III(a) of the Lease Deed refers to “*determination of the demise*”. The word ‘determination’ is not used thereafter in Clause III(a) of the Lease Deed except in the last sentence and prefixed by the word ‘such’. It is apparent that the expression “*such determination*” refers to “*determination of the demise*” as mentioned in the opening sentence of Clause III(a) of the Lease Deed.

50. It is apparent that the Arbitral Tribunal had also made certain observations, which proceeded on an erroneous basis that Clause III(a) of the Lease Deed referred to determination of the WDV. IPCL relies upon such observations in support of its contention that the same are inconsistent with the finding that IPCL was in unauthorised occupation of the Leased Assets after expiry of the Lease Deed. The relevant paragraphs of the impugned award relied upon by IPCL are set out below:

“138. A perusal of the same would show that at expiry of the lease or any time earlier in case of termination of the lease, the Lessee is bound to deliver peaceful possession of the Plant “in good running condition without claiming any compensation value” to the Lessor. There are however, reciprocal obligations on the Respondent to pay to the Lessor “written down value of the additions and alterations of the building, station or additional machinery that may be



brought by the Lessee at the station.” Much need not be said on this and the Respondent at the stage of arguments as also of the written submissions accepted that the written down value as indicated in this clause has to be paid to the Claimant. The Clause further provides that “On such determination the scheduled station shall rest in and be the absolute property of the Lessor.” Therefore, it appears that delivery of possession could only be given once the quantum of the WOV has been determined, which has been accepted by both the parties. It has come in evidence that the amount of WDV though determined by the Claimant was not accepted by the Respondent on the ground that the same had not been proved by documentary evidence.

140. It appears from the record that the Respondent deposited the necessary Bank Guarantee dated 19.05.2015 with the Tribunal on 25.05.2015. However, the possession of the plant was delivered by the Claimant on 06.10.2016 i.e. almost a year after the order passed by the Tribunal directing delivery of the possession.

145. The next submission made by the Claimant is that possession could only be given on determination of the WDV as provided in Clause III (a) of the lease deed. Undoubtedly, the Clause indicates that the possession is to be given simultaneously to the determination of the WDV. However, as noticed earlier the Respondent was adamant that the claim for WDV had to be supported by the invoices relating to the installation of the Plant and Machinery. The Committee appointed by the Respondent had calculated quantum of WDV at Rs 6,81,66,320.18/- Since there was no agreement on the quantum of WDV between the parties, the Claimant in spite of the orders passed by the Tribunal on 11.05.2015 did not deliver possession till 06.10.2016.

146. I am of the opinion that the Claimant was not justified in withholding the payment of rent. As noticed earlier the WDV as claimed was secured by the Respondent by providing the Bank Guarantee in the amount of



Rs24.7256 Crores. Therefore, even if it accepted that the possession was to be given on determination of the WDV, the Claimant was required to handover the possession of the Plant in terms of the order passed by the Tribunal on 11.05.2015. At the same time, it appears that the Respondent was not justified in seeking further proof of the amount claimed as WDV by the Claimant, as the Claim was supported by the report of Chartered accountants. It is held that the Claimant is entitled to receive a sum of Rs. 24.7256 Crores as WDV.

(emphasis added)

51. It does appear that the Arbitral Tribunal had accepted (although erroneously) that Clause III(a) of the Lease Deed indicated that possession was required to be handed over simultaneously with the determination of WDV. However, these observations are not dispositive of the controversy.

52. The Arbitral Tribunal had framed several issues for adjudication including the issue whether IPCL was a rank trespasser in ECL's property after expiry of the Lease Deed on 01.04.2012 (framed as Issue no.3). The said issue was considered along with two other issues framed by the Arbitral Tribunal (being Issue no.1 and Issue no.2). Issue no.6 related to the question whether IPCL was entitled to WDV for 1x10 MW plant valued by IPCL at ₹24.72 crores. In addition, the Arbitral Tribunal had also framed another issue (Issue no.10) regarding the quantum of compensation, if any, payable to ECL for failure on the part of IPCL to handover the premises in question.



53. The Arbitral Tribunal had framed several issues. For the purposes of the present appeal, Issue nos. 3, 4, 5, 6 and 10 are relevant. The said issues are set out below:

“(3) Whether the Claimant is a rank trespasser in the property of the Respondent after the expiry of the lease by efflux of time i.e. w.e.f. 01.04.2012 till date? (OPR)

(4) Whether the Respondent is entitled to rent for the period July-September, 2010 and April, 2011 to March, 2012 (10 month) as per Clause 1(a) of lease deed 31.03.1993? (OPR)

(5) Whether the Respondent has defaulted in performance of its obligations and whether the Claimant is entitled to damages and suspension of rent on this account? (OPC)

(6) Whether the Claimant is entitled to the written down value for 1 X 10 MW valued by the Claimant at Rs. 24.72 Crores for the additions made to the Plant? (OPC)

(10) What is the quantum of compensation, if any, that the Respondent is entitled to for the Claimant having failed to handover the premises in question In view of the Claim of the Respondent that the lease has expired? (OPR)”

54. The Arbitral Tribunal found that ECL had denied IPCL’s request for extension of the Lease Deed for a period of another twenty years but had agreed to extend the same for a period of one year. IPCL had accepted the said offer. In this context, the Arbitral Tribunal held that *“the Lessee had no legal right to remain in possession after expiry of the lease of efflux of time. Therefore, the conclusion is inevitable that*



the lessee was illegally “holding over” and therefore was a rank trespasser”.

55. Insofar as Issue no.4 is concerned, the same is related to ECL’s rent for the period of ten months prior to the termination of the lease (July to September 2010; April 2011; and October 2011 to March 2012). The Arbitral Tribunal found that IPCL had not paid the rent and in terms of Clause I (a) of the Lease Deed, it was liable to pay the rent as stipulated. In regard to the period from 01.04.2012 till February 2016, the Arbitral Tribunal observed that IPCL was in unauthorised possession of the Power Plant. IPCL had resisted ECL’s counter-claim for rent/compensation, *inter alia*, on the ground that the Power Plant had remained idle as ECL had failed to supply the requisite quantum of coal and thereafter, stopped the supply altogether. The Arbitral Tribunal found that there was no pre-condition in Clause I (a) of the Lease Deed with regard to supply of coal; IPCL was in possession of the Power Plant and it could procure coal from the open market and was thus, not dependent on coal being supplied by ECL.

56. IPCL’s contention that it was to deliver possession on payment of the WDV was also rejected. The Arbitral Tribunal held that “*there was no just cause for the Claimant to remain in possession of the Plant*”. Paragraph no. 132 of the impugned award is relevant and is set out below:

“132. The Claimant has resisted the Counter-Claim on the ground that the Claimant was helpless as the plant had been lying idle because the Respondent, firstly, failed to



supply the requisite quality of Coal and secondly, stopped the supply of Coal entirely. I do not find any merit in this submission. There is no pre-condition in Clause I (a) of the Lease Deed with regard to either the quality/quantity of coal to be supplied to the Claimant operating the plant. Furthermore, the Claimant was always at liberty to procure coal from the open market. It was not dependent on the coal being supplied by the Respondent. It is a matter of record that the lease came to an end by efflux of time on 31.03.2012. Admittedly the possession was not handed over to the Respondent till 06.10.2016. It was submitted that the Claimant was to deliver possession on payment of WDV by the Respondent. This submission is without any merit as the claim for the WDV was fully secured by the Bank Guarantee No. BG-2015-16/02 dated 19.05.2015 in the sum of Rs.24,72,56,000/-, furnished by the Respondent. It is not disputed that the Bank Guarantee has been periodically renewed. Therefore, there was no just cause for the Claimant to remain in possession of the Plant. Consequently, the Counter-Claim is allowed. It is held that the Respondent is entitled to rent at the rate as provided in Clause I (a) of the lease deed for the period April, 2012 to February, 2016 (47 months). The Respondent has calculated the amount due as Rs.15,45,15,684/-. The Respondent has also claimed interest upto February, 2016 in the sum of Rs.7,45,07,803/-. It appears that the interest has been calculated at the rate of 18% per annum. There is no provision in the lease deed for payment of interest on delayed payment of rent. Therefore, the question whether the interest can be awarded on this account shall be considered at the time of making the final award.”

57. There is no ambiguity that the counter-claim for payment of rent was allowed by the Arbitral Tribunal in terms of paragraph no. 132 of the impugned award, as quoted above. It is also relevant to refer to the Arbitral Tribunal’s decision in regard to Issue no.10. The same is



articulated in paragraph no. 151 of the impugned award that reads as under:

“151. In view of the relief granted under Issue No.4, no further relief can be granted to the Respondent as compensation for the Claimant being in unauthorised occupation of the Plant till 06.10.2016. With effect from April, 2012, the Respondent was entitled to receive “*mesne profits*” from the Claimant till possession was delivered. Under issue no.4, I have concluded that the Respondent is entitled to the amount equivalent to the rent that would have been payable by the Claimant, had it been in lawful possession of the Plant. This finding was given, after taking into consideration the tug of war between the parties with regard to payment of the WDV. It was being claimed by the Respondent that it was entitled to possession as the lease has expired by efflux of time on 31.03.2012, after one year extension. On the other hand, Claimant was insisting that WDV had to be paid simultaneously, if not prior, to the delivery of possession. There was dispute also with regard to the quantum of WDV to be paid. The Respondent had calculated the quantum of WDV on the basis of the Report submitted by its four member Committee. On the other hand, the Claimant had also quantified the WDV. The gap between the two was so huge, as to make it very difficult for the two parties to accept either of the amounts. Whatever be the reasons, the Claimant was in unauthorised possession of the Plant with effect from 31.03.2012. Thus the direction in Issue no 4 to pay compensation equal to the amount of rent. No further relief can be granted under this issue.”

58. A plain reading of paragraph no. 151 of the impugned award leaves no room for doubt as to the Arbitral Tribunal’s decision to allow the counter-claim for payment of rent for the period 31.03.2012 to 06.10.2016, in favour of ECL.



59. It is material to note that the observations relied upon by IPCL (made in paragraph nos. 138, 140, 145 and 146 of the impugned award and as quoted above) were made in the context of Issue no.6 – whether IPCL was entitled to the WDV for 1x10 MW plant valued by IPCL at ₹24.72 crores. The said observations were not made in the context of deciding ECL's counter-claim for rent for the period after expiry of the Lease Deed.

60. It is clear from the above that although there is no inconsistency or ambiguity in the decision of the Arbitral Tribunal regarding its conclusion that ECL is entitled to rent for the period after expiry of the Lease Deed; there are certain inconsistent observations made [on an interpretation of Clause III(a) of the Lease Deed] while considering the IPCL's claim for the WDV of the additions made by it.

61. This Court is of the view that the said observations, which appear to accept IPCL's contention regarding interpretation of Clause III(a) of the Lease Deed, are insufficient to dislodge or cloud the unambiguous conclusion of the Arbitral Tribunal to accept ECL's counter-claim for payment of rent. This is, essentially, for three reasons. First, that the observations were not made in the context of a decision to be rendered in respect of ECL's claim for rent but were made in the context of IPCL's claim for the WDV. Second, the observations are couched not in definite findings but in tentative terms. And third, that notwithstanding the aforesaid observations, there is no ambiguity that ECL's claim for rent was accepted by the Arbitral Tribunal, as is



apparent from the reasoning as encapsulated in paragraph no. 132 of the impugned award (and as quoted hereinbefore).

62. The Arbitral Tribunal had reasoned that since IPCL was in possession of the Leased Assets, it was liable to pay the rent for the same. The Arbitral Tribunal had, in unambiguous terms, decided that ECL was entitled to the amount equivalent to the rent that would have been payable by the claimant (IPCL), had it been in lawful possession of the plant and the said finding was given “*after taking into consideration the tug of war between the parties with regard to payment of the WDV*”. (See: Paragraph no. 151 of the impugned award as quoted hereinbefore). Thus, the Arbitral Tribunal was cognizant of the tension between ECL’s claim for rent and IPCL’s claim that it was entitled to withhold possession of the Leased Assets till the WDV was determined. The Arbitral Tribunal had considered both the rival stands to be merited to some extent but had resolved the conundrum (described as “*tug of war*”), in favour of ECL.

63. Clause III(a) of the Lease Deed expressly provides that the Power Plant (scheduled station) would vest with ECL on determination of the lease. There is no ambiguity in Clause III(a) of the Lease Deed. The import of the said clause is clear, that the Leased Assets (station) would vest with ECL on determination of the Lease Deed. As stated above, reading the expression “*such determination*” as referring to the determination of the WDV is contrary to the plain language of Clause III(a) of the Lease Deed. Plainly, the observations of the Arbitral Tribunal relied upon by IPCL, are manifestly erroneous. However, in



any event, the decision of the Arbitral Tribunal to accept ECL's counter-claim for rent cannot be assailed on the basis of the said observations. Thus, the Arbitral Tribunal's decision that IPCL was in unauthorized possession/occupation of the Leased Assets cannot be interfered with.

64. The last question to be determined is whether the Arbitral Tribunal has erred in awarding mesne profits computed on the basis of the rent that would have been payable by IPCL, had it continued in the lawful possession of the Leased Assets. The contention that ECL had failed to establish the quantum of mesne profits, is unsubstantial. The reliance placed by Mr Bhattacharya on the decision of the Supreme Court in *Atma Ram Properties (P.) Ltd. v. Federal Motors (P.) Ltd.* (*supra*), is misplaced.

65. In that case, the respondent was a tenant in a commercial premise in a prime location in Delhi (Connaught Circus) on a monthly rent of ₹371.90 per month. The tenancy had commenced in the year 1944. The provisions of Delhi Rent Control Act, 1958 were applicable and therefore, the rent paid was significantly lower than the market rent. The Additional Rent Controller of Delhi had directed eviction of the respondent. However, the said order was stayed by the Rent Control Tribunal subject to the condition that the respondent deposited ₹15,000/- per month in Court. The respondent challenged the said condition imposed by the Rent Control Tribunal in a petition filed before this Court under Article 227 of the Constitution of India. The respondent (tenant) contended that it could not be called upon to deposit



any amount in excess of the rent payable. The said contention was accepted and the condition of deposit of ₹15,000/- per month, as imposed by the Rent Control Tribunal, was stayed. The landlord appealed to Supreme Court. The Supreme Court allowed the said appeal and set aside the order of this Court.

66. The Supreme Court referred to its earlier decision in ***Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr.:*** (1999) 2 SCC 325, wherein it had held that it is necessary for a court to pass orders so that “*reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property*”. Paragraph no. 18 of the said decision is relevant and is set out below:

“18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. [(1999) 2 SCC 325]* this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the



market rent is paid by a person who is holding over the property.”

67. The decision in *Atma Ram Properties (P.) Ltd. v. Federal Motors (P.) Ltd.* (*supra*) clarifies that a court must ensure that the landlord is granted mesne profits equivalent to market rent and the same cannot be pegged to the amount payable under the Rent Control Act, 1958 (which is lower than the market rent) after the decree of eviction has been passed. This decision is not an authority for the proposition that the amount paid by the tenant as rent cannot be awarded as mesne profits for the period he is holding over.

68. In view of our decision that the impugned award, to the extent it holds that IPCL was in unlawful occupation of the Leased Assets, cannot be interfered with, the present appeal is liable to be dismissed. This is keeping in view the statement made on behalf of IPCL that no effective purpose would be served in interfering with the impugned award to the extent the Arbitral Tribunal rejected IPCL’s claim for additional expenses, if the finding of the Arbitral Tribunal that IPCL was in unauthorized possession of the Leased Assets, is sustained.

69. The appeal is, accordingly, dismissed. All pending applications are disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 13, 2022

gsr/RK