

*Kavita S. J.*

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 502 OF 2021

Prema V. Shetty & Ors.,

...Petitioners

*Versus*

Saraswat Co-operative Bank Ltd.,

...Respondent

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Mr. Mutahhar Khan a/w Mr. Pranav Nair i/b Parinam Law Associates,  
Advocates for Petitioners.

Mr. Rahul Narichania, Senior Advocate a/w Ms. Shyamali Gadre a/w  
Ms. Harshita Bhanushali i/b Little & Co., Advocates for Respondent.

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CORAM : R.I. CHAGLA, J.

JUDGMENT RESERVED ON : 28TH JULY, 2023.

JUDGMENT PRONOUNCED ON : 26TH SEPTEMBER, 2023.

JUDGMENT :

1. By this Commercial Arbitration Petition, the  
Petitioners/Original Claimants are seeking the setting aside of a  
portion of impugned Award dated 20<sup>th</sup> September, 2019 passed by  
the Arbitrator to the extent that it did not award damages for the  
entire unexpired lock-in period under the Lease Deed dated 23<sup>rd</sup>  
April, 2016.

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2. The brief background of the facts is necessary:

The Original Lessor and the Respondent herein as Lessee entered into Lease Deed dated 23<sup>rd</sup> April, 2016 for five years from 1<sup>st</sup> April, 2016 till 31<sup>st</sup> March, 2021 to use and occupy the premises situated at Ramanjaneya 203-A, Lamington Road, Grant Road (E), Mumbai – 400 007 (“subject property”). On 12<sup>th</sup> May, 2016, the Respondent was handed over the subject property. There were disputes between the Respondent and Original Lessor with regard to the subject property and there being repairs required. For the purpose of this Petition it is relevant to consider the disputes which arose between the Respondent and the Petitioners (the heirs of the Original Lessor who passed away sometime on 1st March, 2017) which has given rise to the Arbitral proceedings and which culminated in the Arbitral Award dated 20<sup>th</sup> September, 2019 passed by the Sole Arbitrator.

3. The Petitioners have claimed that the Respondent without permission of the Original Lessor carried out several internal and external alterations to the subject property, causing leakages and were creating constant impediments in the work being carried out by the Petitioners. The Respondent in turn claimed that it had not

carried out any alterations and therefore, refused to pay remaining 50% share of the repair costs.

4. The Respondent addressed a letter dated 12<sup>th</sup> April, 2017 specifying that it would be terminating the Lease Deed w.e.f. 1<sup>st</sup> July, 2017. The reason being that it was not safe for the Respondent to continue to remain in possession of the subject property.

5. The Petitioners have in response addressed a letter dated 22<sup>nd</sup> June, 2017 denying the allegations of the Respondent and claimed an amount of Rs.1,62,34,454/- being the compensation towards the remainder of the lock-in period under the said Lease Deed and Rs.69,14,304/- being property taxes claimed to be outstanding and payable by the Respondent since 1<sup>st</sup> April, 2004 and Rs.25,92,716/- being the amount due as License Fee unilaterally deducted by the Respondent for the 2<sup>nd</sup> Floor of the subject property for the period from 1<sup>st</sup> August, 2016 to 30<sup>th</sup> June, 2017.

6. The Petitioners have thereafter filed an Application under Section 11 of the Arbitration and Conciliation Act, 1996 on 25<sup>th</sup> January, 2018 and the matter was referred to Arbitration.

7. An Award dated 20<sup>th</sup> September, 2019 (“impugned Award”)

came to be passed by the Sole Arbitrator.

8. The Petitioners have challenged a portion of the impugned Award viz. the grant of compensation only for the period of three months and not for the entire lock-in period which was from 26<sup>th</sup> October, 2017 upto 31<sup>st</sup> March, 2019.

9. Mr. Muttahar Khan, learned Counsel appearing for the Petitioners has submitted that the learned Arbitrator has by incorrect invocation of law committed a patent illegality in the portion of the Award granting compensation for only three months of the lock-in period. He has submitted that despite there being no issue raised insofar as mitigation of damage is concerned, the learned Arbitrator has proceeded to determine this issue and placed the onus of proving that adequate steps were taken to mitigate loss caused due to termination of the said Lease Deed during the lock-in period on the Petitioners.

10. Mr. Khan has further submitted that the Award is based on material outside the record of the arbitral proceedings (material behind the back of the parties) which is also a facet of patent illegality. He has submitted that the learned Arbitrator has committed

a breach of the principles of natural justice recognized under Section 18 of the Arbitration and Conciliation Act, 1996 by passing the Award on compensation for only three months of the lock-in period without inviting arguments on mitigation and / or considering the authorities on onus of proof for mitigation of damages which are on the Respondent and not on the Petitioners.

11. Mr Khan has submitted that the findings of the learned Arbitrator proceed on the basis that the onus to prove adequate steps were taken to mitigate the loss caused due to illegal termination of the Lease Deed was on the Petitioners. He has submitted that the correct position of law is that while mitigation of loss is a rule to be considered while assessing damages, the onus to prove that means existed to mitigate damages is on the Defendant. Only when the Defendant discharges this burden, the onus might shift on the Plaintiff to show that, for certain reasons, he could not avail of those means.

12. Mr. Khan has referred to various authorities in support of his contention that the onus to prove that means existed to mitigate damages is on the Defendants, which are as follows:

(i) *Bombay High Court in K.G. Hiranandani Vs. Bharat Barrel & Drum Mfg. Co. Pvt. Ltd.* <sup>1</sup>

(ii) *Full Bench of the Kerala High Court in Arya Autherjanam Vs. Kerala State Electricity Board* <sup>2</sup>

(iii) *Division Bench of the Delhi High Court in MMTC Ltd. Vs. M/s H.J. Baker & Bros., Inc.* <sup>3</sup>

(iv) *Division Bench of the Bombay High Court in Rainbow Ace Shipping S.A. Panama Vs. Lufeng Shipping Co. Ltd.* <sup>4</sup>

(v) *Division Bench of the Karnataka High Court in Goetze (India) Ltd., & Anr., Vs. H.R. Thimappa Gowda* <sup>5</sup>

(vi) *Delhi High Court in S.M. Murray Vs. M/s Fenner India Ltd.* <sup>6</sup>

13. Mr. Khan has submitted that the aforementioned decisions have not been considered by the learned Arbitrator who has proceeded on the basis of entirely incorrect and misconceived position of law.

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<sup>1</sup> [AIR 1969 Bom 373 @ paras 3-7, Pgs. 4-10]

<sup>2</sup> [AIR 1996 Ker 309 @ Paras 17-21, Pgs. 6-8]

<sup>3</sup> [2009 SCC Online Del 2143 @ paras 8-20, Pgs. 3-9]

<sup>4</sup> [(2020) 2 Bom CR 135 @ paras 22-28, Pgs. 11-14]

<sup>5</sup> [ILR 2016 Kar 1057 @ paras 13-18, Pgs. 1073-1077]

<sup>6</sup> [ILR 1988 Del 619 @ paras 18-27, Pgs.628-633]

14. Mr. Khan has submitted that the learned Arbitrator could not in ignorance of binding precedents of this Court, place reliance on decisions of other High Courts specially when there is a conflict between this Court and other High Courts on the issue of onus to mitigate damages. He has placed reliance upon the decision of this Court on *Enercon GmbH Vs. Yogesh Mehra*<sup>7</sup> in support of this contention.

15. Mr. Khan has submitted that incorrect invocation of law is a facet of patent illegality and is a ground for setting aside an Award under Section 34 of the Arbitration and Conciliation Act. He has placed reliance upon the decision of this Court in *Union of India Vs. Recon, Mumbai*<sup>8</sup> which followed the judgment of the Supreme Court of India in *SsangYong Engg. & Construction Co.Ltd. Vs. NHAI*<sup>9</sup>.

16. Mr. Khan has made submissions on the Award being passed on material beyond the record / taken behind back of the parties. He has submitted that the decision in the impugned Award in respect of Issue No.1 and 3, travels beyond the submissions of the parties which were put forth before the learned Arbitrator. He has referred to the

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<sup>7</sup> [2017 SCC Online Bom1744 @ paras 45-50, Pgs.15-21]

<sup>8</sup> [2020 (6) MhLJ 5095 @ paras 15(f), (g), Pgs. 517-518]

<sup>9</sup> [(2019) 15 SCC 131 @ para 37, Pg. 170]

Petitioners' submissions recorded in the impugned Award at Paragraph 15-16, 34-36 and Respondent's submission at Paragraph 17-35, pages 36-41 in this context. He has submitted that the learned Arbitrator has recorded findings which do not find mention in the submissions recorded in the impugned Award. In particular he has relied upon the finding of the learned Arbitrator in paragraph 77 which is as under :

*“It would be difficult to immediately find a third party to give out the said premises on lease or leave and license basis”. “It would have, on a reasonable basis, taken sometime to appoint brokers, etc., negotiate, finalise and enter into an agreement and give out the said premises to a third party.”*

17. He has submitted that these findings of fact would typically be found in evidence led by parties and then subject to cross examination, which in the present case finds no place.

18. Mr. Khan has submitted that an Award containing findings based on material not put forth by the parties is a finding based on no evidence and therefore is said to suffer from patent illegality and

liable to be set aside.

19. Mr. Khan has submitted that the learned Arbitrator has unilaterally relied on material, factors and aspects put forth by neither of the parties and hence, the parties have had no opportunity to comment. He has accordingly submitted that the impugned Award is in violation of the principles of natural justice which is a ground for setting aside the impugned Award. He has placed reliance upon the decisions of the Supreme Court in *Recon (supra)* and *Ssang Yong (supra)* in this context.

20. Mr. Khan has submitted that the factors taken into consideration by the learned Arbitrator while computing the compensation for unexpired / balance period of lock-in is contrary to the legal position that once it is held that the termination within a lock-in period by a licensee is illegal, no further proof of loss is required and an order ought to be made directing payment of the rent / license fee for the balance duration of the lock-in. He has placed reliance upon the decision of this Court in *India Bulls Properties Pvt. Ltd. Vs. Treasure World Developers Pvt. Ltd.*<sup>10</sup>. He has submitted that this decision was carried in appeal before the

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<sup>10</sup> [(2014) 4 Bom CR 76 @ paras 59-65, Pgs. 19-21]

Division Bench and while admitting the appeal, by an order dated 15<sup>th</sup> July, 2014, the Division Bench observed that it was of the prima facie view “...that the licensee was liable to pay the entire license fees, maintenance charges and car parking fees for the entire unexpired lock-in”. He has referred to the order of the Division Bench dated 15<sup>th</sup> July, 2014 passed in Appeal No.179 of 2014 at Paragraph 14 in this context.

21. Mr. Khan has further submitted that the Delhi High Court in **DAG Pvt. Ltd. Vs. Ravi Shankar Institute for Music and Performing Arts**<sup>11</sup> has followed the decision of this Court in **India Bulls Properties (supra)**.

22. Mr. Khan has submitted that during the arguments Mr. Narichania, learned Senior Counsel for the Respondent had contended that there are no grounds specifically pleaded in the present Petition which supports the case of the Petitioners. This contention is misconceived as there are adequate grounds pleaded in the present Petition. He has referred to the grounds A, B, D, E and K of the Petition which are in context of breach of natural justice, illegal invocation of law/patent illegality and grounds A, C, J and K which

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<sup>11</sup> [2023 SCC OnLine Del 3293]

are on the award considering material outside the record. He has submitted that it is a settled position in law that pleadings ought to be liberally construed and that a pedantic approach ought not to be adopted to defeat justice. It is open to this Court to ascertain the substance of the pleadings and that undue emphasis ought not be placed on the form of pleadings. He has placed reliance on the decision of the Supreme Court in **Ram Sarup Gupta Vs. Bishun Narian Inter College & Ors.**<sup>12</sup> in this context. He has accordingly submitted that the present Petition be allowed and the impugned Award be set aside.

23. Mr. Narichania, learned Senior Counsel appearing for the Respondent has submitted that inspite of there being no specific issue regarding mitigation, it is the duty of the Arbitrator to consider the doctrine of mitigation of loss and that he cannot overlook the same. He has placed reliance upon the decision of this Court in **Shah Jagshi Jethabai Vs. J.N. Construction**<sup>13</sup> passed by the learned Single Judge of this Court in this context. He has accordingly submitted that the Arbitrator was bound to decide the issue of mitigation of loss even if the defence was not taken.

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<sup>12</sup> [(1987) 2 SCC 555]

<sup>13</sup> Judgment dated 6th February, 2012

24. Mr. Narichania has submitted that it is the duty of the Claimants to plead and prove mitigation of loss. He has in this context placed reliance on the following decisions :

*a. Manju Bagai Vs. Magpie Retail Ltd.* <sup>14</sup>

*b. Tower Vision India Vs. Procall Pvt. Ltd.* <sup>15</sup>

*c. Pannalal Jugatmal Vs. State of M.P.* <sup>16</sup>

*d. Auto Craft Engineers Vs. Akshar Automobiles* <sup>17</sup>

25. Mr. Narichania has submitted that the Claimants have led evidence to prove mitigation of loss which has been referred to at Paragraph 73 of the Arbitration Award viz. that the Claimants were unable to lease said premises to any third party despite several attempts. Further, the Petitioners in grounds G, F and I of the present Petition have categorically asserted that it had led evidence. Although, there is an observation by the learned Arbitrator in Paragraph 73 of the Arbitral Award that there has been no cross examination of the Claimants' witness on the aspect of mitigation, the Arbitral Tribunal has found it obligatory to consider the evidence of

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<sup>14</sup> (2010) 175 DLT 212 [Para 13 and 14]

<sup>15</sup> (2014) 183 Company Case 364 [Para 12 and 13 (iii)]

<sup>16</sup> AIR 1963 MP 242 [Para 15]

<sup>17</sup> 2016 SCC OnLine Bom 5185 [Para 63, 64, 65 and 66]

the Claimants and take into account this factor whilst granting or rejecting the claim for compensation.

26. Mr. Narichania has submitted that a Court whilst considering a Section 34 of the Petition cannot reappreciate or reappraise the evidence before the Arbitrator. The learned Arbitrator having taken a view that the evidence produced by the Claimants was not satisfactory, no interference is called for. In this context, he has relied upon the decision of this Court in **Jagannath Parmeshwar Mills Vs. Agility Logistics**<sup>18</sup>. He has further relied upon the decision of the Supreme Court in ***Ssangyong Engg. (supra)*** [Para 24, Internal Page 160].

27. Mr. Narichania has submitted that since the Claimants have failed to discharge the onus of proof ; no onus of proof shifts on the Respondent to prove that the Claimants failed to mitigate their losses.

28. Mr. Narichania has submitted that the Court in a Section 34 Petition is only required to ascertain whether the view of the learned Arbitrator is a possible view (even if it does not agree with that

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<sup>18</sup> 2022 (5) AIR Bom R 18 [Para 22, Internal Page 7]

view). He has submitted that the Courts having taken conflicting views as has been noted in the decision of the ***Kerala High Court in Arya Autherjanam (supra)*** which has been relied upon by the Petitioners and in particular, Paragraph 21 thereof. Given the fact that there are no Supreme Court Judgments on the onus of proving mitigation of damages, the view taken by the learned Arbitrator cannot be said to be bad, if he has followed one set of views. He has submitted that this Court in a recent judgment in ***Auto Craft Engineers (supra)***, has held that the duty of mitigation of loss is on the Claimants.

29. Mr. Narichania has submitted that no grounds which can be taken under Section 34 of the Arbitration Act have been taken in the present Petition. In absence of any valid ground taken under Section 34 of the Act, the plea cannot be entertained. In this context, he has relied upon the decision of this Court in ***Oil and Natural Gas Vs. Connex Services SA***<sup>19</sup> ; ***Patel Engineers Vs. Konkan Railways***<sup>20</sup> and ***Thonikkundam Bhagwati Mills Vs. Reena Ravindra Khona & Ors.***<sup>21</sup>. He has submitted that the Claimant having led evidence on

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<sup>19</sup> 2003 SCC Online Bom 287 at Paragraph 6 and 7

<sup>20</sup> 2009 SCC OnLine 657 at Paragraph 15, 16 and 17

<sup>21</sup> 2007 SCC OnLine Bom 448 at Paragraph 9 and 10

mitigation, it must be taken that the Claimants were aware that it had a duty to prove that it taken steps to mitigate its losses.

30. Mr. Narichania has submitted that the portion of the impugned Award which has granted compensation of an amount of Rs.19,10,834.10 for the period from 1<sup>st</sup> November, 2017 to 31<sup>st</sup> January, 2018, being a three month period, cannot be challenged by the Petitioners in view of the compensation having been granted. The finding of the learned Arbitrator on mitigation viz. considering the fact that the said property is substantial large comprising of entire building of ground plus two floors admeasuring more than 3000 sq. ft., it would difficult to immediately find a third party to give out the said premises on lease or Leave & License basis is a possible view and cannot be interfered with by this Court in a Petition under Section 34 of the Arbitration Act. He has accordingly submitted that there is no merit in the Petition and hence, the Petition deserves dismissal.

31. Having considered the rival submissions, in my view the learned Arbitrator was justified in deciding the issue of mitigation of loss even when the defence had not been taken. The Claimants / Petitioners had in fact led evidence of its witness CW 1 (Mr. Sunil Shetty) to the effect that the Claimants were unable to lease the said

property to any third party, despite several attempts. Although, there was no cross examination of the Claimants' Witness on this aspect, the learned Arbitrator has justified in taking the evidence into account whilst considering the claim of compensation.

32. The decision relied upon on behalf of the Respondent viz. ***Shah Jagshi Jethabai (supra)*** has held that the Court / Arbitrator in determining compensation payable to the Claimants cannot overlook the doctrine of mitigation of loss. Thus, in my view, the learned Arbitrator was obligated to consider mitigation of loss particularly in view of the Claimants having it raised in evidence.

33. The learned Arbitrator for the purpose of considering on whom the duty to prove mitigation of loss lies has relied upon various decisions reproduced in Paragraph 74, 75 and 76 of the Arbitral Award. Further, I find from the decisions relied upon both on behalf of the Petitioners and Respondent that there are conflicting views taken with regard to the onus of proof of mitigation of loss. This has also been noted in the decision of Kerala High Court in ***Arya Autherjanam (supra)*** relied upon behalf of the Petitioners. There is a decision of this Court in ***Auto Craft Engineers (supra)*** which has been relied upon on behalf of the Respondent, wherein this Court has

in Paragraph 63, 64 and 66 held as under :

*“63. Insofar as the claim for compensation awarded by the learned arbitrator in the impugned award for locking period is concerned, a perusal of the record clearly indicates that in the statement of claim the respondent had not pleaded about the steps, if any, taken in mitigating the loss during the said locking period. It was also not pleaded by the respondent in the statement of claim that during the said locking period, the suit premises were lying vacant or that the said premises could be given on leave and license by the respondent only after the expiry of locking period. The Supreme Court in case of Murlidhar Chiranjilal (supra) has held that a person who claims damages, a duty is imposed on such party to take reasonable steps to mitigate the loss consequent on the breach and if such steps are not taken, it debars him from claiming any part of damages which is due to his negligent to take such steps to mitigate the loss.*

*64. In my view, since the respondent failed to take any steps to mitigate the alleged loss suffered by the respondent even*

*during the said locking period, the respondent could not have been awarded the said claim for compensation without such pleading and proof. In my view, the learned arbitrator could not have allowed the respondent to lead evidence beyond the pleadings filed by the respondent. The impugned award is liable to be set aside on this ground also.*

65. ....

66. *The Delhi High Court in case of Tower Vision India Private Limited (supra) has considered the similar issue in case of locking period in a leave and license agreement and has held that if the licensor has not taken a reasonable steps to minimize the loss, he is not entitled to claim any compensation during the locking period. In my view, the judgment of the Delhi High Court in case of Tower Vision India Private Limited (supra) applies to the facts of this case. I am in respectful agreement with the views expressed by the Delhi High Court in the said judgment.”*

34. In the said decision, this Court has held that in the facts of

that case, the Claimant had failed to take steps to mitigate the alleged loss suffered even during the lock-in period and hence, the Claimant could not have been awarded the claim for compensation without such pleading and proof. This Court had noted the decision of the Delhi High Court in ***Tower Vision India (supra)*** which had considered a similar case of claim of compensation during the lock-in period in a Leave & License Agreement and held that if the licensor has not taken reasonable steps to minimize the loss, the Claimant is not entitled to the claim of compensation during the lock-in period. This Court has expressed its agreement with the view taken by the Delhi High Court in the said decision.

35. Thus, in my view, considering that this Court has already taken a view that the duty is on the Claimants to plead and prove mitigation of loss, the learned Arbitrator cannot be faulted in adopting such a view.

36. It is well settled that this Court exercising jurisdiction under Section 34 of the Arbitration Act cannot re-appreciate and / or reappraise the evidence before the Arbitrator. The Claimants have led evidence which has been reproduced in Paragraph 73 of the Arbitral Award viz. that they were unable to lease the said premises

to any third party despite several attempts. The learned Arbitrator has considered such evidence and has in fact held that considering that situation involves a substantially large property comprising of entire building of ground plus two floors measuring more than 3000 sq. ft., It would be difficult to immediately find a third party to give out the said premises on lease or Leave & License basis. It would have, on reasonable basis, taken some time to appoint brokers etc., negotiate, finalize and entered into an agreement and give out the said premises to a third party. After so holding the learned Arbitrator has granted, the Claimants compensation equivalent to three months rent aggregating to the awarded amount of Rs.19,10,834.10 and rejected compensation for the remaining period of lock-in. The view taken by the learned Arbitrator based on the evidence led by the Claimant is in my view a possible view and hence, cannot be interfered with in a Petition under Section 34 of the Arbitration Act.

37. The decision of the Supreme Court in *SsangYong Engg. (supra)* has referred to an earlier decision in *P.R. Shah Shares & Stock Brokers (P) Ltd. Vs. BHH Securities (P) Ltd.*,<sup>22</sup>, wherein the Supreme Court has held that the Court does not sit in appeal over the

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22 (2012) 1 SCC 594

Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An Award can be challenged only under the grounds mentioned in Section 34(2) of the Arbitration Act. In absence of any ground under Section 34(2) of the Arbitration Act it is not possible to re-examine the facts to find whether a different decision can be arrived at.

38. In the present case, I do not find any valid ground of challenge to the Arbitral Award having been taken in the present Petition under Section 34 of the Arbitration and Conciliation Act. Further, it has been held by the Supreme Court in *Oil and Natural Gas (supra)*; *Patel Engineers (supra)*; *Thonikkundam Bhagwati (supra)* that where no ground has been taken in Section 34, the plea cannot be entertained.

39. I do not find any merit in the contentions on behalf of the Petitioners that there has been violation of the principles of natural justice in view of the learned Arbitrator not granting an opportunity to the parties to place either the correct legal position or deal with the factors and aspects taken into consideration by the learned Arbitrator.

40. I find that the learned Arbitrator had a duty to consider the aspect of mitigation of damages and has taken a possible view based on the authorities relied upon and evidence led on behalf of the Claimant and such possible view cannot be interfered with by this Court under Section 34 of the Arbitration and Conciliation Act. This particularly considering that there are decisions of this Court which support the view taken by the learned Arbitrator as aforementioned. The Claimants had invited such a finding on mitigation of damages by leading evidence of their witness on this issue. Thus, the learned Arbitrator was duly bound whilst determining compensation payable to the Claimants to decide the issue of mitigation of loss, even where defence was not taken.

41. Thus, in my view, the learned Arbitrator cannot be faulted in the findings on compensation payable to the Claimants during the lock-in period and particularly considering that this is a finding of fact which this Court will not interfere in a Petition under Section 34 of the Arbitration Act.

42. I further do not find any illegal invocation of law and / or patent illegality as contended on behalf of the Petitioners. Thus, considering that the Petitioners have not been able to raise any valid

ground of challenge under Section 34 of the Arbitration Act, the relief sought for in the Petition cannot be granted.

43. Accordingly, the Commercial Arbitration Petition is disposed of.

44. There shall be no orders as to costs.

**[R.I. CHAGLA, J.]**