IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 346 OF 2023
WITH
INTERIM APPLICATION NO. 145 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO. 346 OF 2023

Maharashtra State Road Development Corpn. Ltd.	…	Petitioner/Applicant
vs.		
Plus BKSP Toll Limited	…	Respondent

AND
INTERIM APPLICATION NO. 3165 OF 2023
IN
COMMERCIAL EXECUTION APPLICATION (LODGING) NO. 21036 OF 2023

PLUS BKSP Toll Limited	…	Applicant
vs.		
Maharashtra State Road Development Corpn. Ltd.	…	Respondent

Mr. Aspi Chinoy, Senior Advocate, a/w. Mr. Kirti G. Munshi, Mr. J. Kapadia, Mr. Tapan Agrawal, Ms. Drishti Gupta and Mr. Keshav K. Tripathi, i/b. Little & Co. for petitioner in CARBP/346/2023, applicant in IA/145/2024 and respondent in IA/3165/2023 & COMEXL/21036 of 2023.

Mr. Darius Khambatta, Senior Advocate, a/w. Mr. Zal Andhyarujina, Senior Advocate, Mr. Prithvi Sidhu, Mr. Yakshay Chheda and Ms. Ishani Khanwilkar, i/b. SSB Legal and Advisory for respondent in CARBP/346/2023 & IA/145/2024.

Mr. Darius Khambatta, Senior Advocate, a/w. Mr. Prithvi Sidhu and Mr. Yakshay Chheda, i/b. SSB Legal and Advisory for applicant in IA/3165/2023 & COMEXL/21036 of 2023.

CORAM : MANISH PITALE, J.
DATE : 05th FEBRUARY, 2024

P.C. :

. These proceedings have arisen from arbitral award dated 20.10.2020. While the petition filed by the Maharashtra State Road Development Corporation Limited (hereinafter referred to as MSRDC) challenges the said arbitral award and the interim application filed therein seeks stay of the said award, the respondent PLUS BKSP Toll Limited (hereinafter referred to as PLUS BKSP) has filed the execution application in respect of the said award and by the interim application filed therein, the said PLUS BKSP is seeking specific directions against MSRDC.

2. The rival parties have raised various contentions in support of their respective stands, in the context of the said arbitral award dated 20.10.2020 and they have also made submissions in respect of an earlier award passed by the said tribunal, termed as an interim award dated 25.04.2017. It is only after the sequence of the events leading up to the filing of the present proceedings is appreciated, that the rival contentions can be considered.

3. MSRDC is a corporation established and fully owned by the Government of Maharashtra. PLUS BKSP is a special purpose vehicle of Plus Expressway Beherad (Malaysia) and Concept Management and Construction Private Limited. In July 2005, MSRDC invited bids for four-laning, improvement and maintenance of Bhiwandi-Kalyan-Shil Phata highway on a Build-Operate-Transfer basis. The bid offered by the consortium of Plus Expressway Beherad (Malaysia) and Concept Management and Construction Private Limited, was accepted and the total project cost, as per the bid, was

Rs.121.16 crores. The consortium members formed the aforesaid special purpose vehicle i.e. PLUS BKSP.

4. On 25.08.2006, a Concession Agreement was executed, in pursuance of the aforesaid bid being accepted. The construction was to be completed within 18 months i.e. by 24.02.2008 and toll was to be collected. Subsequently, MSRDC granted extension for completion of construction up to 28.02.2009. On 22.06.2009, MSRDC issued provisional completion certificate, indicating a list of defects to be rectified and subsequently, the Government of Maharashtra issued a notification for collection of toll from 22.08.2009 to 28.04.2013. PLUS BKSP did collect the toll for the aforesaid period.

5. But, disputes arose between the parties, in the backdrop of the Commissioner of Police, Thane prohibiting the entry of heavy vehicles into Kalyan from 11.05.2009. PLUS BKSP also complained to MSRDC about buses of Navi Mumbai Municipal Transport (NMMT) and Kalyan Dombivali Municipal Transport (KDMT), refusing to pay toll.

6. PLUS BKSP also claimed that it had suffered damages and losses of about Rs.161 crores, due to alleged default and delay in handing over of the site. On 19.03.2013, PLUS BKSP issued two termination notices to MSRDC under clauses 29.8 and 32.4 of the Concession Agreement. On 28.04.2013, the period under the Concession Agreement ended. In the backdrop of the disputes arising between the parties, on 01.07.2015, PLUS BKSP invoked arbitration and claimed termination payment, as per the clauses under the Concession Agreement, to the tune of Rs. 495 crores, alternatively claiming damages of Rs.469 crores and additionally, it claimed a sum of Rs.112 crores

as re-imbursement for additional direct cost and loss of toll revenue, further claiming Rs.174 crores toward loss of business opportunity.

7. The arbitral proceedings were undertaken before the arbitral tribunal, consisting of three arbitrators. The hearing before the arbitral tribunal was concluded on 04.02.2017. On 26.04.2017, MSRDC received a photocopy of an interim award dated 25.04.2017. The arbitral tribunal held that non-payment of toll by buses of NMMT and KDMT, which are Government agencies, amounted to expropriation of rights of the Concessionaire, under clause 29.4(ii) of the Concession Agreement and that the same constituted a political *force majeure* event, giving a right to PLUS BKSP to invoke clause 29.8 of the Concession Agreement to terminate the contract. It was further held that MSRDC had defaulted in its obligation by failing to make the project site available to PLUS BKSP and hence, it was entitled to terminate the Concession Agreement under clause 32.4.1(i) of the Concession Agreement. But, the award had to be termed as an interim award because the arbitral tribunal deferred hearing and decision on issues relating to quantum to a second phase of arbitration. The arbitral tribunal indicated that a detailed procedural order would be issued, pertaining to such second phase of arbitration relating to the issue of quantum.

8. Aggrieved by the said award, MSRDC filed Arbitration Petition No.371 of 2017 before this Court. On 10.07.2017, the arbitral tribunal issued directions for scheduling the second phase of arbitration. PLUS BKSP filed its written submissions on the issue of quantum and stated that no further pleadings or evidence was necessary in the matter. MSRDC filed an application before the arbitral tribunal for terminating the proceedings under Section 32 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). The arbitral tribunal rejected the said application on 28.09.2017.

9. In the meanwhile, a learned Single Judge of this Court, on 02.12.2017, granted stay to the first or interim award of the arbitral tribunal dated 25.04.2017. As a consequence, the arbitral tribunal cancelled the dates scheduled for the second phase of arbitration relating to quantum.

10. PLUS BKSP filed Special Leave Petition (Civil) No. 32807-32808 of 2018 before the Supreme Court to challenge the aforesaid order granting stay of the said award. On 07.12.2018, the Supreme Court directed that further proceedings before the arbitral tribunal could continue during the pendency of special leave petition. Consequently, the arbitral tribunal conducted hearings for the second phase.

11. On 19.08.2020, when the special leave petition was listed for hearing, the Supreme Court directed that the petition filed by MSRDC, under Section 34 of the Arbitration Act, to challenge the interim award, should be disposed of within three months and that the arbitral award, in pursuance of second phase of arbitration, be delivered to the Supreme Court in a sealed cover within three months. On 20.10.2020, the subsequent award was passed by the arbitral tribunal and it was delivered to the Supreme Court in a sealed cover. This award is the subject matter of the present proceedings.

12. On 19.04.2021, the learned Single Judge of this Court passed judgment and order disposing of the aforementioned petition bearing Arbitration Petition No.371 of 2017, challenging the first/interim award of the arbitral tribunal. The learned Single Judge of this Court set aside the said award, insofar as termination under clause 32.4.1 was concerned, but upheld the termination of the Concession Agreement under clause 29.8

thereof, pertaining to the political *force majeure* event. The first/interim award was also set aside, insofar as it permitted the parties to file fresh pleadings and to lead further evidence in the second phase of arbitration.

13. Both the parties i.e. MSRDC as well as PLUS BKSP filed appeals under Section 37 of the Arbitration Act, to challenge the said judgment and order of the learned Single Judge of this Court. In the meanwhile, on 03.05.2021, PLUS BKSP approached the Supreme Court for releasing the second award. On 16.07.2021, the Supreme Court directed the registry to release the second award, so that further recourse could be taken by either or both parties under the provisions of the Arbitration Act. MSRDC received copy of the second award with the remark 'not a certified copy'. As per the second award dated 20.10.2020, MSRDC was directed to pay principal amount of Rs.4,59,80,21,040 alongwith interest thereon, aggregating to Rs.10,00,84,68,582. On 24.12.2021, MSRDC filed the present petition under Section 34 of the Arbitration Act. Thereafter, on 01.08.2023, PLUS BKSP filed the aforesaid commercial execution application for execution of the second award. It is relevant to note that a clarificatory order was also passed by the arbitral tribunal, after issuing the second award and hence, the petition filed by MSRDC under Section 34 of the Arbitration Act, as well as the commercial execution application filed by PLUS BKSP, pertain to the second award as well as the clarificatory order issued by the arbitral tribunal. On 15.09.2023, MSRDC filed an application under Section 36 of the Arbitration Act, seeking stay of the operation and execution of the second award.

14. As noted hereinabove, while MSRDC is pressing for stay of the second award alongwith the clarificatory order, PLUS BKSP is pressing for execution

thereof.

15. Mr. Aspi Chinoy, learned senior counsel appearing for MSRDC submitted that a strong *prima facie* case is made out in favour of MSRDC on the basis of the material available on record and that unless this Court grants stay of the impugned second award, the petitioner-MSRDC would suffer grave and irreparable loss, thereby showing that the balance of convenience is also in favour of MSRDC. According to the learned senior counsel appearing for MSRDC, the second award is completely vitiated and hence, an unconditional stay ought to be granted in favour of MSRDC.

16. The learned senior counsel appearing for MSRDC raised three issues to demonstrate that there is a strong *prima facie* case in favour of the petitioner-MSRDC.

17. Firstly, it was submitted that even till date, a signed copy of the second award, as contemplated under Section 31(5) of the Arbitration Act, has not been delivered to MSRDC by the arbitral tribunal. It is submitted that the copy received by MSRDC is only a photocopy with remark 'not a certified copy'. On this basis, it is submitted that the time for making an application or filing the petition under Section 34 of the Arbitration Act, has not even been triggered. In this context, reference is made to Section 36(1) of the Arbitration Act, to contend that any application for enforcement or execution of the second award, as if it were a decree of the Court, could be filed only after the time period expires for filing such an application/petition under Section 34 of the Arbitration Act. On this basis, it is submitted that the execution application itself is not maintainable at this stage.

18. Secondly, it was contended that the very continuation of the second phase of arbitration by the arbitral tribunal, is wholly illegal, particularly in the light of the emphatic findings given by the learned Single Judge of this Court, in the judgment and order dated 19.04.2021, whereby the interim award of the tribunal was set aside on the ground that it permitted the parties to file fresh pleadings and lead further evidence in the second stage of arbitration. It was submitted that a proper appreciation of the findings rendered in the said judgment and order, would show that the second phase of arbitration could not have continued at all, thereby indicating that the second award cannot be sustained in the eyes of law.

19. Thirdly, it was contended that a perusal of the second award would show that findings have been rendered on merits, in the teeth of the clauses of the Concession Agreement, and as such the second award is rendered perverse. It was further submitted that even the counter-claim of MSRDC was rejected in a casual manner, again in the teeth of the specific clauses of the Concession Agreement. On this basis, it was submitted that even on merits, the petitioner-MSRDC has a very strong case, thereby indicating that an unconditional stay ought to be granted.

20. While elaborating on the first contention raised on behalf of MSRDC, the learned senior counsel for the petitioner relied upon the judgment of the Supreme Court in the case of *State of Maharashtra vs. ARK Builders Private Limited* [**(2011) 4 SCC 616**]. It was contended that a proper reading of the said judgment would show that the time period for filing application/petition under Section 34 of the Arbitration Act, would stand triggered, when a signed copy of the award was delivered to MSRDC. It was submitted that in the present case, admittedly, no signed copy of the award has been delivered

even till date. Even if the peculiar facts of the present case were to be considered, either the tribunal should have delivered a signed copy, after the Supreme Court had disposed of the special leave petition, or the registry of the Supreme Court ought to have sent a certified copy. This was not done, despite the direction issued by the Supreme Court in its order dated 16.07.2021. It was submitted that the judgments relied upon on behalf of PLUS BKSP, are distinguishable and that in any case, the clear position of law laid down by the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*) is in favour of the petitioner-MSRDC.

21. On the second contention raised on behalf of MSRDC, the learned senior counsel submitted that the judgment of the learned Single Judge of this Court dated 19.04.2021, unequivocally holds that the arbitral proceedings could not have been bifurcated into two phases. It was also held that second phase for ascertaining quantum, could not have been undertaken by the arbitral tribunal, thereby demonstrating that the entire second phase of the arbitral proceedings was stillborn, thereby completely vitiating the second award, which is the subject matter of the present petition filed under Section 34 of the Arbitration Act. Much emphasis was placed on finding given at paragraph No.116(iv) of the said judgment and order of the learned Single Judge of this Court. On this basis, it was submitted that the second award cannot be executed and that its effect deserves to be unconditionally stayed.

22. As regards the third contention pertaining to the merits of the award, it was submitted that although Section 34 of the Arbitration Act, provides for limited grounds for interference with an arbitral award, in the present case,

on the face of the impugned award, it can be shown that perverse findings have been rendered by the arbitral tribunal. It was submitted that the arbitral tribunal rendered findings in the teeth of the clauses of the Concession Agreement, thereby demonstrating that it was rendered patently illegal. It was submitted that such a finding can be rendered, even without re-appreciating the evidence on record. In this context, the learned senior counsel appearing for MSRDC referred to letter dated 24.12.2010 sent by PLUS BKSP, informing MSRDC, *inter alia*, that capital had to be infused through irrevocable guarantee of promoters as additional equity support. But subsequently, PLUS BKSP stated the said amount was covered under the head of debt. It was alleged that the statutory auditor's certificate on which PLUS BKSP placed reliance, was forged and fabricated. A further submission was made that the tribunal completely misconstrued the relevant clauses of the Concession Agreement, to reach a finding that 'equity support' was a vestigial term and simply relied upon the balance sheets of PLUS BKSP to reach findings against MSRDC. In the process, an amount of more than Rs.200 crores was wrongly foisted on MSRDC in the impugned award.

23. It was further submitted that when, in the interim/first award, the arbitral tribunal had reached a conclusion that the quantum could not be ascertained on the basis of the material available on record, in the impugned second award, the tribunal proceeded in a diametrically opposite direction to reach the finding of quantum without any material brought on record. This, according to the learned senior counsel for MSRDC, further indicated perversity and patent illegality of the impugned award.

24. It was further submitted that on the aspect of counter-claim, the tribunal went completely astray, as the entire discussion was reduced to a

few paragraphs and it proceeded on the basis that since the termination of the agreement was held to be valid, there could be no claims made by MSRDC, in respect of breaches of the Concession Agreement, after the termination of the same on 28.04.2013. The counter claim was erroneously held to be hit by limitation. On this basis, it was submitted that even on merits, the petitioner has a strong *prima facie* case, as the entire second award is vitiated, thereby indicating that this Court ought to grant unconditional stay of the impugned second award.

25. On the other hand, Mr. Darius Khambatta, learned senior counsel appearing for PLUS BKSP submitted that the contentions raised on behalf of MSRDC under the aforesaid three heads were all unsustainable and hence, the prayer for stay ought to be rejected and the entire amount as per the arbitral award, ought to be deposited in this Court.

26. On the question of failure of delivery of signed copy of the award, under Section 31(5) of the Arbitration Act and in that context, the effect of Section 36 thereof, it was submitted that in the peculiar facts of the present case, the contention cannot be accepted. It was submitted that the petitioner-MSRDC, in its petition under Section 34 of the Arbitration Act, has clearly stated that copy of the second award was received on 21.08.2021 and that copy of the additional award was received on 30.10.2021. It was the case of PLUS BKSP that having made such statements in paragraph No.65 of the petition, MSRDC cannot be permitted to turn around and claim that the time for preferring the application/petition for setting aside the arbitral award in the present case, had not even been triggered, thereby indicating that the application for execution, could not have been filed.

27. It was submitted that the petitioner-MSRDC was deliberately interpreting the judgment of the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*), in a most pedantic manner and in a manner of speaking, the blame was being placed on the Supreme Court. It was submitted that the impugned second award was deposited with the Supreme Court, as per the orders passed in the special leave petition and it was kept in a sealed cover, till the Supreme Court proceeded to pass the order on 16.07.2021, to release the second award. This, obviously, required the parties to apply to the registry of the Supreme Court for certified copy of the second award. The petitioner-MSRDC cannot be permitted to take advantage of its own fault in not even applying for a certified copy and then to claim that the copy of the award was not 'delivered' to it, as per Section 31(5) of the Arbitration Act. Reference was made to the judgment of Delhi High Court in the case of *Continental Telepower Industries Limited vs. Union of India and others* (**2009 SCC OnLine Del 1859**), judgment of Calcutta High Court in the case of *National Agricultural Cooperative Marketing Federation of India Limited vs. R. Piyarelall Import & Export Limited* (**2015 SCC OnLine Cal 7198**) and judgment of this Court in the case of *Rahul vs. Akola Janata Commercial Co-operative Bank Limited* (**2023 SCC OnLine Bom 814**). It was held in the said judgements that the purpose of Section 31(5) of the Arbitration Act is to ensure that the parties are aware about the contents of the award, so that they can raise appropriate grounds of challenge, if they choose to challenge the arbitral award. On this basis, it was submitted that the pedantic approach sought to be canvassed on behalf of the petitioner-MSRDC, deserves to be rejected.

28. As regards the second contention raised on behalf of MSRDC, the learned senior counsel appearing for PLUS BKSP referred to the judgment and order passed by the learned Single Judge of this Court on 19.04.2021, concerning the first/interim award. It was submitted that a proper reading of the said judgment would show that the finding at paragraph No.116(iv) was rendered on the basis that the tribunal could not have called for fresh pleadings and further evidence for determining quantum. It was submitted that this Court took into consideration the fact that evidence was led by the parties on all issues and therefore, the tribunal could not have called for further evidence in the matter. Therefore, the first/interim arbitral award was set aside, insofar as it permitted fresh pleadings and further evidence in the second phase. It was submitted that as a matter of fact, neither new pleadings were added, nor was further evidence led, when the tribunal considered the question of quantum, by giving sufficient opportunity to the parties to present their respective cases. On this basis, it was submitted that MSRDC cannot claim that the second phase of arbitration was stillborn and that on this ground alone, the impugned second award deserved to be set aside.

29. As regards contention raised on merits, it was submitted that at this stage itself, this Court cannot reach any conclusion. It was submitted that the findings rendered by the arbitral tribunal were based on appreciation of evidence and there was no question of clauses of the Concession Agreement being misconstrued. Even if another view on appreciation of evidence was possible, as per settled law, this Court could not interfere with the impugned second award. In any case, it was submitted that the said aspects can be gone into, only at the stage of final hearing and no *prima facie* case for grant of interim relief, can be claimed, on the basis of the aforesaid submission on

the merits of the matter. It was submitted that the question as to whether it was equity that was infused by the promoters or the matter could pertain to debt due, was also an aspect requiring in-depth analysis, which, at this stage, cannot be gone into, for holding that a *prima facie* case has been made out by MSRDC. Similar contentions were raised on the question as to the manner in which the tribunal had discussed the aspect of counter claim.

30. It was submitted that the petitioner-MSRDC cannot claim that the entire award stood vitiated because of the aforesaid factors and since the petitioner-MSRDC miserably failed to make out a *prima facie* case in its favour, there was no question of granting stay, much less an unconditional stay. On this basis, it was submitted that the petitioner-MSRDC ought to deposit the amount pertaining to the entire arbitral tribunal award in this Court within a stipulated period of time.

31. This Court has considered the rival submissions in the light of the material placed on record, in order to examine as to whether the petitioner-MSRDC can successfully pray for stay of the impugned second arbitral award. The aforementioned three contentions raised on behalf of MSRDC have to be considered in the light of the material available on record and the judgments brought to the notice of this Court.

32. This Court is aware that the said contentions have to be considered and analyzed only to reach *prima facie* conclusions, pending decision on the petition filed under Section 34 of the Arbitration Act.

33. The first contention pertains to Section 31(5) read with Section 36 of the Arbitration Act. MSRDC has boldly claimed that the execution

application itself is not maintainable, for the reason that the same could be filed only after expiry of the time available for filing the application/petition to challenge the impugned second award, under Section 34 of the Arbitration Act. This Court will have to examine as to whether it can be said that *prima facie*, the time for making such an application/petition under Section 34 of the Arbitration Act, has not even been triggered, in the facts and circumstances of the present case.

34. There can be no doubt about the fact that in the present case, peculiar facts and circumstances have given rise to a controversy, as to whether the requirement of Section 31(5) of the Arbitration Act, was satisfied. In ordinary circumstances, after the arbitral award is made, the arbitral tribunal would arrange for delivery of signed copy of the award to each party. In the present case, this Court had granted stay to further proceedings before the arbitral tribunal during the pendency of challenge to the first/interim award. In the special leave petition challenging the said order, the Supreme Court directed that the arbitral tribunal would continue with the proceedings/hearings in the second phase. Subsequently, the Supreme Court directed that the impugned second award be deposited in a sealed cover with the registry of the Supreme Court. Therefore, after the arbitral award was made, the signed copy thereof remained in a sealed cover with the registry of the Supreme Court. Subsequently, the Supreme Court passed the order on dated 16.07.2021, taking note of the operative portion of the judgment and order dated 19.04.2021, passed by the learned Single Judge of this Court. The Supreme Court also took note of the fact that in the second phase of arbitration, no fresh pleadings and no further evidence was led. Thereupon, the Supreme Court directed the second award be handed over to both the parties, so that further recourse could be taken by either or

both of them, under the provisions of the Arbitration Act.

35. This Court is of the opinion that the aforesaid direction issued by the Supreme Court required the party interested in challenging the second award, to immediately move the registry of the Supreme Court for issuing a certified copy of the award, which was lying in a sealed cover, as per earlier directions issued by the Supreme Court. The respondent-PLUS BKSP, in fact, applied for a certified copy, which was indeed delivered to it. Even at the stage of arguments, the petitioner-MSRDC could not emphatically point out as to whether it had applied for such a certified copy. The learned senior counsel appearing for MSRDC, on instructions, submitted that there was a receipt, indicating application for certified copy made on behalf of MSRDC. There is nothing to indicate that the petitioner-MSRDC made any efforts to collect the certified copy of the second award, pursuant to the application said to have been made to the registry of the Supreme Court.

36. It is significant to note that petitioner-MSRDC filed the instant petition under Section 34 of the Arbitration Act, to challenge the second award and in the context of limitation, stated in paragraph No.65 of the petition as follows:

> "(65) The Petitioner submits that a copy of the Second Award was received by email from the Respondent on 21/08/2021. The Respondent filed an application under Section 33 and a photocopy of the Additional Award was received by the Petitioner from the Presiding Arbitrator on 30/10/2021. By an Order dated 23/09/2021 passed by the Supreme Court of India in Miscellaneous Application No.665 of 2021 in *Suo Moto* Writ Petition (Civil) No.3 of 2020, inter alia held that
>
> "...*In cases where the limitation would have expired during the period between 15/3/2020 till 2/10/2021,*

> *notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 3/10/2021* "
>
> Therefore, in the present case, the last date for filing the present petition is 01/01/2022 i.e. 90 days from 03/10/2021. The present Petition has been filed on 24/12/2021 and is therefore within the statutory period prescribed under the Arbitration Act."

37. This Court is of the opinion that in such circumstances, *prima facie*, it cannot lie in the mouth of the petitioner-MSRDC to claim that requirement of Section 31(5) of the Arbitration Act, was not satisfied because a signed copy of the award was not 'delivered' to it. MSRDC cannot be heard to say that while it made no efforts to obtain certified copy of the second arbitral award, immediately after the order dated 16.07.2021 was passed by the Supreme Court or even till date, the time for filing the petition under section 34 of the Arbitration Act was not triggered and hence the execution application is not maintainable. The judgment of the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*), cannot be read in such a manner, for the reason that in the said judgment, the Supreme Court was concerned with a question of limitation and with regard to the manner in which the period of limitation was to be calculated.

38. It was in that context that the Supreme Court commented upon the purport of the word 'delivered' in Section 31(5) of the Arbitration Act. It is relevant to note that even if the judgment of Delhi High Court in the case of **Continental Telepower Industries Limited vs. Union of India and others** (*supra*) was rendered prior to the judgment of the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*),

the aforementioned judgments of the Calcutta High Court and this Court were delivered after the judgment of the Supreme Court. In fact, both the judgments of Calcutta High Court and this Court referred to the said judgment of the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*) and thereupon, rendered findings to the effect that a signed copy would not mean an ink signed copy and that a photocopy of the signed copy received by the party, would satisfy the requirement of Section 31(5) of the Arbitration Act. In fact, judgment of Calcutta High Court in the case of **National Agricultural Cooperative Marketing Federation of India Limited vs. R. Piyarelall Import & Export Limited** (*supra*), specifically referred to the advancement in technology regarding computer prints, photocopies, etc. and the fact that the Court cannot be oblivious of such developments, while interpreting Section 31(5) of the Arbitration Act.

39. This Court, in the case of **Rahul vs. Akola Janata Commercial Co-operative Bank Limited** (*supra*), after the taking into account the judgment of the Supreme Court in the case of **State of Maharashtra and others vs. ARK Builders Private Limited** (*supra*), held that the purpose of Section 31(5) of the Arbitration Act, when it requires delivery of the signed copy of the award to the party, is to make the party aware about the nature, effect and import of the award, so that the party can take a decision to challenge the award and to raise appropriate grounds, while instituting a proceeding under Section 34 of the Arbitration Act.

40. In the peculiar facts and circumstances of the present case, the petitioner-MSRDC conceded in the above-quoted paragraph No.65 of the petition filed under Section 34 of the Arbitration Act, that it indeed received

photocopies of both, the second arbitral award and the subsequent additional award. Hence, it cannot lie in the mouth of the petitioner to claim that the requirement of Section 31(5) of the Arbitration Act, was not satisfied and on that basis further claim that the time for making the application/petition under Section 34 of the Arbitration Act, was not even triggered. The aforesaid contention cannot be accepted and it can certainly not be the basis to claim any *prima facie* case in favour of the petitioner.

41. As regards the second contention about the second phase of arbitration being stillborn, particularly in the light of the finding rendered by the learned Single Judge of this Court in paragraph No.116(iv) of the judgment and order dated 19.04.2021, a perusal of the relevant portion of the said judgment and order, becomes necessary. A reading of paragraph No.107 onwards of the said judgment and order shows that this Court frowned upon the observation made by the arbitral tribunal in the first/interim award that quantum could be determined after fresh pleadings and further evidence was brought on record. It was found that the procedural orders passed earlier by the arbitral tribunal, did not warrant such two-stage procedure and the findings rendered in the said judgment, indicate that the parties could not be permitted to either add fresh pleadings or lead further evidence on the aspect of quantum. The finding at paragraph No.116(iv) shows that the aforesaid part of the first/interim award to the extent that it permitted fresh pleadings and further evidence, was set aside. A perusal of the second award shows that the aspect of quantum was decided without introduction of fresh pleadings or leading further evidence. In fact, similar arguments were raised on behalf of the petitioner-MSRDC, while pursuing its application under Section 32 of the Arbitration Act for termination of the arbitral proceedings.

42. In the minutes of meeting/order dated 28.09.2017, the tribunal recorded that MSRDC was insisting that the tribunal did not have any authority or jurisdiction to hold any oral hearings or proceed further in the matter. The tribunal found that even MSRDC admitted that no fresh pleadings or evidence had been placed on record and therefore, there was no impediment in conducting further hearings on the question of quantum, on the basis of the material already on record. The tribunal further found that the contention raised on behalf of the MSRDC appears to be based on a stray sentence in paragraph No.86 of the first/interim award and that the insistence on not continuing with further hearings, was baseless. In fact, in the said order, the tribunal fixed the dates of hearing for the second stage, specifically recording that no witnesses were to be examined and the issues were to be heard on the basis of the material already on record.

43. In this light, when the observations made in the first/interim award are taken into consideration, it becomes clear that MSRDC cannot claim that hearing in the second phase, could not have been conducted at all by the tribunal and that on this sole ground, the impugned second award deserves to be unconditionally stayed. It is significant to note that in paragraph No.107 of the judgment and order dated 19.04.2021 of the learned Single Judge of this Court, it was recorded that there could not have been any objection to further hearing, if the tribunal were to hear further arguments on the question of quantum, without any fresh pleadings or further evidence. It is significant that the Supreme Court permitted further hearings before the tribunal on the aspect of quantum. Thus, the respondent-PLUS BKSP is justified in contending that the aforementioned contention raised on behalf of MSRDC, to seek unconditional stay to the impugned second award,

cannot be accepted. Accordingly, the said contention raised by MSRDC is rejected.

44. On the merits of the matter, the endeavour of the petitioner-MSRDC is to demonstrate that findings rendered by the tribunal, even at the *prima facie* stage, can be demonstrated to be perverse and such findings have been rendered in the teeth of the clauses of the Concession Agreement.

45. The thrust of the submission on behalf of MSRDC is that while finance was infused from the promoters and the documentary material on record clearly indicated that the same was nothing but additional equity support, at the time of raising claims the respondent-PLUS BKSP showed the said amount was under the head of debt. This was alleged to be completely in the teeth of the relevant clauses of the Concession Agreement. Any such liability foisted on petitioner-MSRDC on a complete misreading of the clauses of the Concession Agreement, would clearly not be sustainable.

46. This Court has considered the aforesaid submission, particularly in the light of the findings rendered by the tribunal in the impugned second award, on this aspect of the matter. At this stage, reference to and appreciation of the impugned second award, can be limited to examining the question as to whether the petitioner-MSRDC has made out a strong *prima facie* case for granting unconditional stay of the impugned second award. The petitioner obviously has to satisfy a very high threshold, for the reason that even the challenge in the main petition under Section 34 of the Arbitration Act, can succeed only if the Court concludes that the findings rendered by the arbitral tribunal cannot be said to be even a possible view in the matter. Merely because another finding is possible on the very same material, the Court,

under Section 34 of the Arbitration Act, cannot interfere with the findings of the arbitral tribunal, so long as the tribunal has considered all the relevant material, including the clauses of the subject agreement. If the interpretation placed by the tribunal is a possible view in the matter, the Court would not be able to interfere under Section 34 of the Arbitration Act. At this stage, for an unconditional stay of the impugned second award, the petitioner has to satisfy this Court that the findings are, on the face of it, perverse and in the teeth of the Concession Agreement or in complete ignorance of relevant clauses thereof.

47. In that light, this Court has perused the discussion and findings rendered by the arbitral tribunal from paragraph Nos.64 to 169 of the impugned second arbitral award. The tribunal has referred to the rival submissions, with reference to the material on record. The relevant clauses of the Concession Agreement, particularly clauses 28, 29 and 32 have been referred to and relevant portions thereof have been reproduced in the impugned second award. Apart from this, the tribunal has also referred to clause 9 of the Concession Agreement and in that context, the auditor's certificate relied upon by the respondent-PLUS BKSP. The auditor was chosen from a list maintained by the petitioner-MSRDC itself. The balance sheets and other documents were regularly shared by PLUS BKSP with MSRDC and at no point of time did the MSRDC raise any objection about the recording of amounts under debt due and equity in such documents. The amount of Rs.192 crores infused with PLUS BKSP, has been considered in the impugned second award and detailed reasoning is given as to why it is treated under the head of debt and not equity support. The tribunal was also alive to the fact that although equity support was stated to be having a meaning as described in clause 23.3 of the Concession Agreement, no such

clause existed, for the reason that after clause 23.2, the agreement contained clause 24.

48. The petitioner-MSRDC had executed the Concession Agreement, being fully conscious of the clauses of the Concession Agreement and having considered all such factors, the arbitral tribunal reached findings in favour of PLUS BKSP. On that basis, the tribunal applied the agreed formula under the Concession Agreement for calculating termination payment. The first/interim award already held in favour of PLUS BKSP, as regards termination due to political *force majeure* and therefore, the applicable formula, in such a situation, was applied to reach the figure to be paid by MSRDC under the head of 'termination payment'.

49. This Court is of the opinion that MSRDC cannot contend that the tribunal was totally ignorant of the relevant clauses of the Concession Agreement, while rendering such findings on the aspect of termination payment. A particular interpretation was given by the tribunal, after considering the language of the relevant clauses and after applying the same to the documentary material on record. The rival submissions were also considered in detail, while rendering such findings. At this stage, for this Court to hold that unconditional stay to the impugned second award deserves to be granted, it will have to be held that the conclusion rendered by the tribunal on the said aspect of the matter, is an impossible view and that the findings are in the teeth of the relevant clauses of the Concession Agreement. This Court is unable to reach such a finding, as the petitioner-MSRDC has failed to make out a strong *prima facie* case to satisfy such a high threshold at the interim stage, in order to justify its prayer for granting unconditional stay to the impugned second award.

50. On the aspect of counter-claim, this Court has perused clause 33 pertaining to divestment of rights and interests, particularly the sub-clauses of clause 33.2. When the said clauses are appreciated in the light of the nature of counter-claims raised by MSRDC, it cannot be said that the tribunal committed a grave error in linking the counter-claim with the date of termination of the agreement i.e. 28.04.2013, in the context of limitation. The petitioner-MSRDC may well be entitled to demonstrate at the stage of final hearing, when the contentions of the rival parties are considered in detail that the tribunal erred on the said aspect of the matter. But, at this stage, MSRDC has failed to make out a strong *prima facie* case to demonstrate that on this ground, the entire arbitral award could be said to be vitiated, to claim unconditional stay, while the petition is pending under Section 34 of the Arbitration Act.

51. In the absence of the petitioner-MSRDC being able to demonstrate a strong *prima facie* case, its prayer for unconditional stay in the interim application, deserves to be rejected. At this stage, it would be appropriate to refer to Section 36(3) of the Arbitration Act, which empowers the Court to stay the arbitral award, subject to conditions, by recording reasons in writing. The proviso thereof specifically lays down that while considering an application for grant of stay, in the case of an arbitral award for payment of money, due regard shall be given to the provisions of the Code of Civil Procedure, 1908, for grant of stay of money decree. A money decree is to be stayed on deposit of the decretal amount, particularly in such cases arising out of commercial contracts. The further proviso states that unconditional stay of such an award can be granted if the Court is *prima facie* satisfied that either the arbitration agreement, on the basis of which the award is rendered

or the award itself is induced by fraud or corruption. It is not even the case of the petitioner-MSRDC that either the agreement or the award was induced or affected by fraud or corruption and therefore, there is no ground made out for granting unconditional stay of the impugned arbitral award.

52. In the execution application, the respondent-PLUS BKSP has filed an interim application, seeking various directions, but the first prayer is for a direction to the petitioner-MSRDC to deposit the entire awarded amount. Hence, both the applications i.e. Interim Application No.145 of 2024 in Commercial Arbitration Petition No.346 of 2023 and Interim Application No.3165 of 2023 in Commercial Execution Application (Lodging) No.21036 of 2023, can be disposed of by this order.

53. For the reasons recorded hereinabove, the prayer made in Interim Application No.145 of 2024 in Commercial Arbitration Petition No.346 of 2023, is rejected. The petitioner-MSRDC is directed to deposit the entire awarded amount with the Prothonotary and Senior Master of this Court within eight weeks from today. Subject to such deposit within the stipulated period of time, the effect and operation of the impugned second award dated 20.10.2020 shall remain stayed during the pendency of Commercial Arbitration Petition No.346 of 2023. The deposited amount shall be invested as per standard practice. In the light of the directions given hereinabove, Interim Application No.145 of 2024 in Commercial Arbitration Petition No.346 of 2023 and Interim Application No.3165 of 2023 in Commercial Execution Application (Lodging) No.21036 of 2023, stand disposed of.

54. If the petitioner-MSRDC fails to deposit the said amount within the stipulated period of time, Interim Application No.3165 of 2023 in

Commercial Execution Application (Lodging) No.21036 of 2023, shall stand revived.

55. Commercial Arbitration Petition No.346 of 2023 and Commercial Execution Application (Lodging) No.21036 of 2023, shall now be listed in due course. In the meanwhile, the parties shall complete the pleadings and also place on record compilation of documents for the assistance of this Court, within a period of six weeks from today.

(MANISH PITALE, J.)

PRIYA KAMBLI Digitally signed by PRIYA KAMBLI Date: 2024.02.05 14:24:12 +0530 ***Priya Kambli***