



\$~J

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 07.10.2024

Judgment pronounced on: 28.03.2025

+

O.M.P.(EFA)(COMM.) 15/2019

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES &
ANR.Decree Holders

Through: Ms. Aishani Das, Ms.
Balapraghatha, Advs.

versus

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED
(INDIA)Judgement Debtor

Through: Mr. Anirudh Bakhru, Ms. Shruti
Arora, Ms. Tarini Khurana, Ms.
Vijay Laxmi, Advs.

+

O.M.P.(I) (COMM.) 375/2020

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES &
ANR.Petitioners

Through: Ms. Aishani Das, Ms.
Balapraghatha, Advs.

versus

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED
(INDIA)Respondent

Through: Mr. Anirudh Bakhru, Ms. Shruti
Arora, Ms. Tarini Khurana, Ms.
Vijay Laxmi, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

O.M.P.(EFA)(COMM.) 15/2019



1. This is a petition filed under section 47 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “**1996 Act**”) seeking enforcement and execution of the Arbitral Award dated 22.08.2016 passed by the learned Arbitral Tribunal (“**AT**”) in ICC Case no. 19997/TO and Partial Award on costs of jurisdictional challenge dated 15.12.2015 passed in ICC Case no. 19997/TO.
2. The parties to the arbitration were Construcciones Y Auxiliar De Ferrocarriles (“**Petitioner no. 1**”), CAF India Private Limited (“**Petitioner no. 2**”) and Delhi Airport Metro Express Private Limited (“**Respondent**”). The arbitral proceedings were conducted under the aegis of the International Chamber of Commerce with its seat being in London.

FACTUAL BACKGROUND

3. Petitioner no. 1 is a company registered under the laws of Spain, having its registered office at Jose Miguel Iturrioz 26, Beasain, Guipuzcoa, Spain and is involved in the business of manufacturing railways vehicles, equipment and buses. Petitioner no. 1 has supplied railway rolling stock to a number of major urban transit operators around the world.
4. Petitioner no. 2 is a wholly owned subsidiary of the petitioner no. 1, registered under the Indian laws having its registered offices at 113-116, 1st Floor, Block A, Naurang House, 21 Kasturba Gandhi Marg 110001 New Delhi India.
5. Respondent is a company incorporated under the Companies Act, 1956, having its registered office at Commercial Tower, A-Wing,



Radisson Blue Plaza, National Highway - 8, Mahipalpur, New Delhi – 110037. The respondent was incorporated and promoted as a Special Purpose Vehicle of Reliance Infrastructure Limited ("**Rlnfra**") for the sole purpose of building, commissioning and operating the Delhi Airport Metro Express Line Project ("**project**"). Rlnfra holds 99.5 percent share in the respondent.

6. In 2007, the Delhi Metro Rail Corporation invited bids for financing, design, procurement, installation and operation of the project. The petitioner no. 1 and Rlnfra formed a consortium and jointly submitted a bid, with Rlnfra being the lead partner. Consequently, in the year 2008, the Delhi Metro Rail Corporation issued a Letter of Acceptance in favor of the consortium, addressed to Rlnfra. The Letter of Acceptance required Rlnfra to incorporate a special purpose vehicle ("**SPV**") for the running of the project. Thereafter, Rlnfra incorporated the respondent as the SPV to undertake the project.
7. The petitioner no. 1 and the respondent entered into two agreements i.e. (i.) Rolling Stock Supply Contract ("**Supply Agreement**") and (ii.) Maintenance Services Agreement ("**MSA**"), both dated 30.06.2008. The dispute resolution clause of the Supply Agreement is Article 22 and the same reads as under:

“22.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.



22.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris (“ICC”). The arbitration tribunal shall consist of three arbitrators.

One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Spain and shall be appointed by the ICC in accordance with the “Rules of ICC as Appointing Authority in UNCITRAL or Ad hoc Arbitration Proceedings”.

22.3 The seat of the arbitration shall be London and the language of the arbitration shall be English.

22.4 Continuation of performance:

Pending final resolution of any dispute, the parties shall continue to perform their respective obligations hereunder.

22.5 Governing obligations hereunder:

21.5.1 This contract shall be governed by and construed in accordance with the laws of India.

22.6 Survival

22.6.1 It is expressly stated herein that the provisions of this Article 22 shall survive termination or expiry of this Contract.”



8. The dispute resolution clause of the MSA is Article 14 and the same reads as under:

“14.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.

14.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The arbitration tribunal shall consist of three arbitrators.

One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Spain, and shall be appointed by the ICC in accordance with the "Rules of ICC as Appointing Authority in UNCITRAL or Ad hoc Arbitration Proceedings".

14.3 The arbitration shall take place in London and the language of the arbitration shall be English.

14.4 The Parties expressly exclude the application of Part I of the Indian Arbitration and Conciliation Act, 1996.

14.5 Continuation of performance:

Pending final resolution of any dispute, the Parties



shall continue to perform their respective obligations hereunder.

14.6 Governing Law & Jurisdiction:

14.6.1 This Contract shall be governed by and construed in accordance with the laws of India.

14.7 Survival

14.7.1 It is expressly stated herein that the provisions of this Article 14 shall survive termination or expiry of this Contract.”

9. On 20.08.2008, the petitioner no. 1 furnished a Performance Bank Guarantee amounting to €9,262,295 in favor of the respondent, in accordance with Clause 7.3 of the Supply Contract. On 17.05.2010, the petitioner no. 1, through an agreement, assigned its rights and obligations under the MSA to its wholly owned subsidiary, i.e. petitioner no. 2.
10. The dispute between the parties arose on account of the quality of the rolling stock supplied by the petitioner no. 1 under the Supply Contract and the invoices raised by petitioner no. 2 under the MSA, which is stated to be violative of the Indian foreign exchange rules. Further, the dispute also arose on account of the other obligations of the parties under the Supply Contract and the MSA.

ARBITRAL PROCEEDINGS

11. The petitioners filed a request for Arbitration dated 21.01.2014, with the Secretariat of the International chamber of Commerce in relation to their respective claims under the Supply Agreement and



the MSA. The respondent submitted an answer to the request for arbitration on 28.04.2014, inter alia, challenging the jurisdiction of the AT to hear the claims in the arbitration. On 19.06.2014, the AT was constituted. The respondent challenged the jurisdiction of the AT on the ground that by way of assignment agreement, the MSA was executed only between two Indian companies and the disputes arising from it are also between two Indian companies and must therefore, be governed by the laws in India.

- 12.** On 02.12.2015, the AT passed the partial award, wherein the objections raised by the respondent with respect to the jurisdiction and maintainability of the arbitration proceedings were rejected. The partial award ruled as follows:

“Therefore, the Arbitral Tribunal hereby makes the following Award:

- Dismissing Respondent’s jurisdictional objection herein: and*
- Finding that the Arbitral Tribunal has jurisdiction to hear the claims made by Claimant under both the Rolling Stock Supply Contract and the Maintenance Services Agreement in this arbitration.”*

- 13.** The AT thereafter, gave a partial award on costs of jurisdictional challenge dated 15.12.2015 in favor of the petitioners whereby the AT awarded a sum of £80,000. The operative portion of the Partial Award on costs of jurisdictional challenge dated 15.12.2015 reads



as under:

“61. Therefore, the Arbitral Tribunal hereby makes the Award:

- Finding that it has the power to award the costs requested by Claimants at this stage of this proceedings;*
- Ordering Respondent to pay Claimants £80,000 in respect of Claimants' reasonable legal costs and other costs for the jurisdictional phase of this arbitration;*
- Ordering Respondent to pay Claimants post-award simple interest at 3% per annum from the date of this Partial Award until full payment of the sum found due in this Partial Award.”*

- 14.** Pursuantly, the AT continued with the Arbitral proceedings and passed the Final Award (majority) on 22.08.2016, which awarded as follows:

“IX. RELIEF

234. Therefore, the Arbitral Tribunal hereby makes an Award:

A. SUPPLY CONTRACT

- (i) Declaring that Respondent's ongoing retention of the Performance Guarantee is unlawful;*
- (ii) Ordering Respondent to repay to Claimant No. 1 € 4,761,963.50 paid pursuant to the*



invocation and retention of the Performance Guarantee;

(iii) Ordering Respondent to pay to Claimant No. 1 pre-award simple interest on the sum awarded at (ii) above at EURIBOR plus 500 basis points per annum from January 20, 2014 to the date of this Final Award;

(iv) Ordering Respondent to pay to Claimant post-award simple interest on the sum awarded at (ii) above at EURIBOR plus 500 basis points per annum from the date of this Final Award to the date of payment of the sum awarded at (ii) above;

B. MSA

(v) Declaring that Respondent breached the MSA by failing to pay duly rendered invoices;

(vi) Ordering Respondent to pay Claimant No.2 INR 51,275,413.5 and the INR equivalent of € 544,103.89 (at the rate of exchange as notified by the Reserve Bank of India prevailing on the day when the money is paid);

(vii) Ordering Respondent to pay Claimant No.2 pre-award simple interest on the sums awarded at (vi) above at EURIBOR (as at the due date for payment of each invoice) plus 300 basis points



per annum from the due date for payment of each invoice to the date of this Final Award;

(viii) Ordering Respondent to pay to Claimant No.2 post-award simple interest on the sums awarded at (vi) above at EURIBOR plus 300 basis points per annum from the date of this Final Award until the date of payment of the sums awarded at (vi) above;

C. COSTS

(ix) Ordering Respondent to pay Claimants US \$ 225,000, being the portion of the ICC costs of the arbitration advanced by Claimants;

(x) Ordering Respondent to pay Claimants £ 506,193.10 plus € 48,871.75 plus AU\$ 10,550, being Claimants' reasonable legal costs.

(xi) Ordering Respondent to pay Claimants pre-award simple interest on the sums awarded at (ix) and (x) above at 3% per annum from the date of payment by Claimants of the costs (as indicated in Claimants' Updated Appendix A submitted with their letter to the Arbitral Tribunal dated June 5, 2016) to the date of this Final Award;

(xii) Ordering Respondent to pay to Claimants post-award simple interest on the sums awarded



at (ix) and (x) above at 3% per annum from the date of this Final Award to the date of payment by Respondent of the costs.”

15. It is pertinent to note that on 22.08.2016, a minority award was also passed by one of the co- arbitrators dismissing all the claims of the petitioners.
16. Hence, the present petition has been filed seeking enforcement and execution of Partial Award on costs of jurisdictional challenge dated 15.12.2015 and Arbitral Award dated 22.08.2016.
17. As per the petitioners, the total amount due is about Rs 62,05,61,883.89/- (Rupees Sixty-Two Crore Five Lakh Sixty-One Thousand Eight Hundred Eighty-Three Point Eight Nine Only); inclusive of post award interest calculated till 01.11.2019, at the prevalent exchange rates.

PROCEEDINGS BEFORE THE DELHI HIGH COURT

18. The respondent filed a petition under section 34 of the 1996 Act, against the Arbitral Award dated 22.08.2016 and the Partial Award on costs of jurisdictional challenge dated 15.12.2015, being O.M.P.(COMM.) 7/2017, however, the same was dismissed by this court vide judgment dated 25.10.2018 on the ground of lack of jurisdiction. The respondent thereafter, has preferred a petition under section 37 of the 1996 Act challenging the judgment dated 25.10.2018, being FAO (OS) (COMM.) 292/ 2018 which is pending adjudication.

SUBMISSIONS



Objections on behalf of the Respondent

19. Mr Bakhru, learned counsel for the respondent submits that the Arbitral Award dated 22.08.2016 is in direct conflict with the basic notions of morality and justice, as it fails to consider and address key material issues that are central to the dispute. Furthermore, the Impugned Award contravenes the fundamental policy of Indian law.
20. He further submits that the Arbitral Award dated 22.08.2016 has overlooked the applicability of section 59(1)(a) of the Sale of Goods Act, 1930, along with section 73 of the Indian Contract Act, 1872.
21. Section 59(1)(a) of the Sale of Goods Act, 1930 expressly permits a purchaser, in the event of a breach of warranty, to set off the breach of warranty in diminution or extinction of the price, against the seller. Further, section 73 of the Indian Contract Act, 1872 and its illustration (m), establishes that a purchaser is entitled to compensation upon proving that the goods delivered did not conform to the contracted quality, without the need to demonstrate actual “loss”. In this regard, he places reliance on the judgment passed by the House of Lords, United Kingdom ***Ruxley Electronics and Construction Ltd v. Forsyth*** (1995) 3 WLR 118.
22. It is stated that the Sale of Goods Act and the Indian Contract Act codify Common Law principles governing reasonableness and fair play in contractual obligations.
23. He states that it is a settled principle that when a party incurs loss due to the supply of defective products, the purchaser is entitled to claim damages. The difficulty in estimating or precisely assessing



such damages does not absolve the seller of the obligation to compensate for the breach. In this regard, reliance is placed upon ***Board of Trustees of the Port of Calcutta v. Bengal Corporation Pvt. Ltd.***, 1978 SCC OnLine Cal 218.

24. He states that the minority award has explicitly dealt with contentions raised by the respondent and disagreed with the Majority Award requiring evidence for loss.
25. The learned AT, has perversely and without any cogent reasons ignored the evidence on record and the governing law and wrongly delivered the full cost of the Rolling Stock to the petitioners, despite it noting that the stock supplied did not meet the contractual specifications.
26. He lastly submits that the AT in the Arbitral Award dated 22.08.2016 has wrongly appreciated the law laid down by the Hon'ble Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority and Anr.*** (2015) 4 SCC 136. He states that the aforesaid judgment was not a case of breach of warranty and, in fact, was a case where there was not even a breach of contract.
27. Learned counsel further places reliance on the following judgments:
 - (i) ***Patel Engineering Ltd. v. North East Electric Power Corporation India Ltd.*** (2020) 7 SCC 167; (ii) ***Vijay Karia and Others vs Prysmian Cavi E Sistemi SRL and Others***, (2020) 11 SCC 1.

On behalf of the Petitioners

28. Ms. Das, learned counsel for the petitioners, primarily submits that



the jurisdiction under Section 48 of the 1996 Act is extremely limited. It does not extend to a merits-based review of the Arbitral Award, including an assessment of the minority opinion or re-evaluation of evidence. He states that the enforcement of a foreign award shall only be refused under section 48 (2)(b) of the 1996 Act only if the same is contrary to the fundamental policy of the Indian Law or interest of India or justice or morality. The wider meaning of “public policy of India” in section 34 (2)(b)(ii) of the 1996 Act does not apply to section 48 (2)(b) of the 1996 Act. Further, the enforcement court does not exercise appellate powers and does not have the powers to review the foreign awards. Reliance is placed upon *Shri Lal Mahal Ltd. v. Progetto Grano SPA* (2014) 2 SCC 433.

29. She submits that the case of the respondent before the learned AT was that no loss was required to be proved, and given the fact that petitioners failed to meet contractual obligations under the Supply Contract and the MSA, itself sufficed for the purposes of awarding compensation to the respondent. However, the learned AT was of the view that the compensation can be given only for damages or loss actually suffered. While such damages or loss need not always be monetary loss, or be proven with mathematical precision, the existence of such damage/loss suffered was a necessary precondition to claim compensation. In this regard, she draws my attention to para 159 of the Award dated 22.08.2016 which reads as under:



“159. The Arbitral Tribunal does not agree with this. It is, as stated in Kailash Nath Associates, a basic principle of Indian law that compensation can only be given for damage or loss actually suffered. Such loss does not necessarily need to be quantified with mathematical precision, or based on any kind of monetary loss, but it does need to be proved.”

- 30.** She states that the respondent has failed to provide any substantiation whether any loss was suffered by them. On the contrary, the Delhi Metro Rail Corporation had issued a certificate on 19.08.2015 stating that the operation of the trains has been running to the satisfaction of the Delhi Metro Rail Corporation and the same has also been recorded by the AT in para 112 of the Arbitral Award dated 22.08.2016 which reads as under:

“112. On August 19, 2015, DMRC provided a certificate "issued on the specific request of [Claimant No. 1]" stating (among other things) that "[t]he trains have been in revenue service since [July 2013] and are running to the satisfaction of DMRC.”

(emphasis supplied)

- 31.** She states that the requirement to prove such loss arises only if the loss has, in fact, been suffered. The respondent has failed to establish that it incurred any loss. On the contrary, the Delhi Metro Rail Corporation Certificate confirms otherwise. Even before the Learned AT, the respondent was unable to demonstrate that DMRC



had imposed any liability or penalties on it for the alleged non-compliance of rolling stock specifications under the Supply Contract, despite repeatedly asserting such claims.

32. As regards the objection raised by the respondent regarding the non-applicability of section 73 of the Indian Contract and its illustration (m) is concerned, it is stated that the supply of the rolling stock by the petitioners to the respondent was for further onward supply to the Delhi Metro Rail Corporation, and in such a scenario any claim towards loss suffered by the respondent would be in the nature of a reimbursement and tempered by back-to back claims of Delhi Metro Rail Corporation on the respondent.
33. Further, the learned counsel submits that a contracting party suffering a loss due to breach of contractual obligations by the counterparty, is entitled to claim compensation, however suffering a loss is a mandatory pre-condition and sine qua non for claiming damages, which the respondent has failed to do.
34. She relies on the judgment passed by the Hon'ble Supreme Court in **Vijay Karia** (supra). The operative portion reads as under:

“43. It will be noticed that in the context of challenge to domestic awards, section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as 'the public policy of India ' ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration



conducted in India, the ground of challenge relating to "public policy of India " would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India, in this respect, it is important to advert to paras 41 and 69 of Ssangyong as follows.....

.....

Discretion of the Court to enforce foreign awards

51. Thus far, it is clear, that enforcement of a foreign award may under Section 48 of the Arbitration Act be refused only if the party resisting enforcement furnishes to the Court proof that any of the stated grounds has been made out to resist enforcement. The said grounds are watertight — no ground outside Section 48 can be looked at. Also, the expression used in Section 48 is “may”. Shri Vishwanathan has argued that "may" would vest a discretion in a Court enforcing a foreign award to enforce such award despite the fact that one or more grounds may have been made out to resist enforcement. For this purpose, he relied upon



Sections 45 to 47. which contain the word “shall” in contradistinction to the word “may”. He also relied upon Article V of the New York Convention which also uses the word “may”

35. She states that it is unclear as to how the Performance Bank Guarantee, which was reduced by half after the Commercial Operations Date, could serve as a benchmark for a “*genuine pre-estimate of loss*” suffered by the respondent due to non-compliance with the contractual obligations. This is questionable given that the Arbitral Award recognized that defects in the rolling stock had arisen even before the issuance of the Provisional Acceptance Certificate.
36. Learned counsel further places reliance on the following judgments: (i.) *Alstom T&D India Ltd. v. M/s. Aradhya Infra-Tech Pvt. Ltd.*, 2017 SCC OnLine Del 12193; (ii.) *RS Infraprojects Pvt. Ltd. v. Zamil Infra Pvt. Ltd. and Ors*, 2024 SCC OnLine Del 5310; (iii.) *Mercator Limited v. Dredging Corporation of India Limited*, 2024 SCC OnLine Del 3075; (iv.) *Cruz City 1 Mauritius Holdings vs Unitech Limited* 2017 SCC OnLine Del 7810.

ANALYSIS AND FINDINGS

37. I have heard learned counsel for the parties and perused the documents on record.
38. Admittedly, in the present case, the dispute between the parties arose on account of some defects in the rolling stock provided by petitioner no. 1 under the Supply Contract. The disputes were also



regarding the invoices raised by petitioner no. 2 under the MSA and regarding the other obligations of the parties under the Supply Contract and the MSA. The AT in its final award on 22.08.2016, as regards, the claims raised under the Supply Contract held that the rolling stock supplied by petitioner no. 1 under the Supply Contract did not conform to the contractual specifications, however, the respondent was not entitled to any compensation for the breach, as it failed to establish any actual loss resulting from the non-compliance/breach. Consequently, the AT held that the respondent's continued retention of the Performance Guarantee was unlawful and directed them to refund an amount of € 4,761,963.50 along with interest. As regards the claims raised under the MSA, the learned AT directed the respondent to pay a sum of € 544,103.89 along with interest towards the invoices raised by petitioner no. 2 under the MSA.

- 39.** Section 48 of the 1996 Act sets out the grounds on which enforcement of a foreign award can be refused. The same reads as under:

“Section 48 – Conditions for enforcement of foreign awards.

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to



them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

PROVIDED that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or



(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]



(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

- 40.** In the present case, the primary objection raised by the respondent is that the Arbitral Award dated 22.08.2016, is in direct conflict with the basic notions of morality and contravenes the fundamental policy of India which is dealt in section 48(2)(b) read with Explanation 1 (iii) of the 1996 Act.
- 41.** At the outset, it is important to examine Section 48(2)(b) of the 1996 Act, which provides that the enforcement of a foreign arbitral award may be refused if the court finds that such enforcement would be contrary to the public policy of India. Further, Explanation 1(iii) to Section 48 clarifies that an award is deemed to be in conflict with the public policy of India if it violates the most basic notions of justice or morality. A foreign arbitral award shall not be enforced if it is fundamentally unjust or shocks the conscience of the court. However, courts have consistently held that the threshold for invoking this ground is extremely high, and if the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, the foreign award must be enforced. In this regard, the



Hon'ble Supreme Court in **Vijay Karia** (supra) inter alia held as under:

“83. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos. It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the Tribunal considered essential and has addressed must be given their due weight — it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counterclaim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the



claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nitpicking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow.”

(emphasis supplied)

42. In the present petition, the respondent has majorly objected on the ground that the AT, despite holding that the stock supplied by the petitioner no. 1 failed to meet the contractual specifications, delivered the full cost of the rolling stock to the petitioner no. 1 and therefore, the Arbitral Award dated 22.08.2016 has overlooked section 59(1)(a) of the Sale of Goods Act read with section 73 of the Indian Contract Act, 1872 and more particularly illustration (m), which provides that on mere proof that the quality delivered was not the quality contracted for, the purchaser of such goods would be entitled to compensation without having to prove “loss”. In this regard, the relevant findings of the Arbitral Award dated 22.08.2016 reads as under:

“137. As explained at 123 above, Claimants have submitted that this is ambiguous. The Arbitral Tribunal disagrees. When seen in context it seems clear to the Arbitral Tribunal that “vehicles moving inside tunnels (like undergrounds)” refers to any vehicle moving



inside tunnels that is not “chiefly outside moving”. Paragraph 6.2.1 of ISO 3381 explains whether to test for sound in free-field or real conditions. It would be very odd if it were only to do so for “chiefly outside moving” vehicles and those that move only inside tunnels, thus leaving a void for all other vehicles. Indeed, when asked by the Arbitral Tribunal whether Claimants’ case was that the present case did not fall within either the first or second sub-paragraph of paragraph of 6.2.1 of ISO 3381, Claimants’ counsel responded “I don't know that we can say that.”

138. Accordingly, the Arbitral Tribunal finds that:

- “Chiefly outside-moving” vehicles were to be tested in free-field conditions; and*
- All other vehicles were to be tested in real conditions.*

.....

141. Tested under such conditions, they failed to meet the contractual specifications, even after the various improvements described at 77 et seq. above had been made. As Respondent says, this has been conceded by Claimants' expert witness, Mr. Thrane, whose opinion was indeed that the trains as designed could never achieve the noise specifications if testing took place in real conditions.



.....

144. Accordingly, the Arbitral Tribunal finds that the rolling stock did not satisfy the requirements of the Supply Contract.”

**Applicability of Section 59(1)(a) of the Sales of Goods Act, 1930
read with Sections 73 and 74 of the Indian Contract Act, 1882**

43. Section 59 (1)(a) of the Sale of Goods Act reads as under:

“59. Remedy for breach of warranty.—

(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or”

44. The plea taken by the respondent is that the AT in the Arbitral Award has determined that a breach of warranty has occurred, with petitioner no. 1 failing to comply with the internal noise specifications stipulated under the Supply Contract. Despite the same, the Arbitral Award failed to address the arguments on appropriate method of quantification by ignoring concepts of “loss”, “damage” and “compensation”, hence the AT has held that even though the seller is in breach of its warranties, a purchaser cannot



proceed under section 59(1)(a) of the Sale of Goods Act unless it shows proof of actual loss.

45. To my mind, the argument of the respondent is misconceived. Section 59 (1) (a) of the Sale of Goods Act shows that the party aggrieved by a breach of warranty is entitled to: - (a.) set up (b) against the seller (c) the diminution or extinction of price. The question that remains to be answered is what is “diminution” or “extinction of price”. Will it be 10 percent, will it be 20 percent or will it be the entire price. The same also would be dependent on the level of breach. It cannot be that where the warranty has been breached to the extent of 5 percent or if it is a minor breach, the aggrieved party would be entitled to entire extinction/diminution of the price. Conversely, where the breach is of all material warranties, the aggrieved party cannot be entitled to 5 percent diminution. The key word of section 59 (1) (a) of the Sales of Goods Act, 1959 is also ‘set up’, meaning thereby that the aggrieved party for a breach of warranty is entitled to make a claim for that breach. Hence, reliance must be placed on section 73 and 74 of the Indian Contract Act:-

“73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the



contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.— When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

....

74. Compensation for breach of contract where penalty stipulated for:—[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]”

46. In the above context, the courts have time and again held that in



order to claim compensation, the aggrieved party should have actually suffered a loss and whether that loss has been proved or not. In ***Kailash Nath*** (supra), the Hon'ble Supreme Court, while referring to section 74 of the Indian Contract Act, 1872 inter alia held as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-



known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”

(emphasis supplied)

47. Further, the Hon’ble Division Bench of this court in ***Sudershan Kumar Bhayana vs Vinod Seth*** 2023 SCC OnLine Del 6097 while reiterating the position laid down in ***Kailash Nath*** (supra) inter alia held as under:

41. It is well settled that there are three essential



ingredients that are required to be pleaded and established by a party claiming damages. First, that there is a breach of the Contract by the counterparty. Second, that the party complaining of such breach has suffered an injury as a result of the breach of the contract by the counterparty. And third, that the injury suffered is proximate and a direct result of the breach committed.

.....

44. Absent any pleadings that the owners had suffered damages or incurred loss on account of the delay in construction of the work, a claim of damages would not be sustainable. In addition, as noted above, admittedly there is no evidence or material on record to establish that the owners had suffered any loss or the quantum of such loss.....

....

46. In Hindustan Petroleum Corporation Ltd., Mumbai v. Offshore Infrastructure Ltd., Mumbai, the Bombay High Court following the decision of the Supreme Court in Kailash Nath Associates v. Delhi Development Authority had observed that “Unless loss is pleaded and proved, where it capable of being proved, it cannot be recovered. There cannot be any windfall in favour of the respondent to recover



liquidated damages even if no loss is suffered or proved.”

47. The Division Bench of this Court in Hindustan Petroleum Corporation Ltd. v. Dhampur Sugar Mills had upheld the decision of the learned Single Judge setting aside an arbitral award awarding damages on the basis of a penalty clause. In the aforesaid context, the Division Bench of this Court had observed as under:

“11.2. A careful perusal of the same would show that the appellant claimed “penalty”. Penalty is generally construed as a sum stipulated in terrorem. On the other hand, damages, liquidated or unliquidated, when awarded, have a compensatory flavour to it. Liquidated damages are awarded by a court only if it construed as a genuine pre-estimate of the loss that is caused in the event of breach. It is no different from unliquidated damages i.e., it cannot be granted if there is no loss or injury. Where parties have agreed to incorporation of a liquidated damages clause in the contract, the Court will grant only reasonable compensation, not exceeding the sum stipulated. Liquidated damages does away with proof where loss or



damage cannot be proved, but not otherwise. Thus, the party suffering damages can be awarded only a reasonable compensation, which would put such party in the same position, in which the party would have been had the breach not been committed. The appellant's pleadings are woefully deficient in this regard. Unless loss is pleaded and proved, where it capable of being proved, it cannot be recovered.”

(emphasis supplied)

- 48.** A perusal of the aforesaid text indicates that the words ‘loss’ or ‘damage’, would necessarily indicate that the party who complains of breach must have really suffered some loss or damage apart from being faced with the mere act of breach of contract. That is because every breach of every contract need not necessarily result in actual loss or damage. Compensation payable under section 73 and 74 is only for loss or damage caused by the breach and not on account of the mere act of breach. If in any case the breach has not resulted in or caused any loss or damage to a party, it cannot claim compensation.
- 49.** In my view as well, this is the correct approach. The endeavour of the courts should be to carefully assess whether the claimed damages reflect a genuine financial or consequential impact rather than merely being based on contractual stipulations. Compensation can only be awarded only for real harm/loss resulting from the



breach.

- 50.** It cannot be said that the learned AT failed to discuss the said issue as the AT in the Arbitral Award dated 22.08.2016 has made a clear finding that the respondent did not suffer any actual loss. The Tribunal emphasized that compensation could only be awarded if the respondent proved the damage suffered, whether in the form of a price reduction or damages. The relevant paras of the Arbitral Award dated 22.08.2016 are as under:

“155. The starting-point is that a party who has been victim of a breach of contract must be compensated for the loss it has suffered as a result of that breach. In the present case, therefore, Respondent must be compensated for the loss that it has suffered as a result of Claimants' failure to meet the technical specifications in the Supply Contract.

156. Accordingly, the question that the Arbitral Tribunal has to answer is this: what (if any) loss has Respondent suffered as a result of the rolling-stock supplied by Claimant No. 1 failing to meet contractual specifications?

157. Respondent has failed to provide any evidence of any such loss, whether monetary or otherwise.....

.....

158. Instead, Respondent has argued that it does not need to prove any loss, and that the fact that the



specifications were not met is enough to establish that Respondent is entitled to compensation.

.....

162. Accordingly, the Arbitral Tribunal considers that Respondent must prove that it has suffered damage in order for the Arbitral Tribunal to be able to award it compensation (whether by way of a diminution of the price or of damages). This is particularly so given that Claimants (i) specifically pleaded that Respondent had suffered no loss as a result of the breach, and (ii) produced a certificate from DMRC dated August 19, 2015 (referred to at seq. 112 above) stating that the trains “are running to the satisfaction of DMRC.”

163. Respondent could have done so by providing the evidence of an expert in valuation of rolling-stock that the rolling-stock it had purchased was (as a result of the breach of internal noise specification) worth less than it would have been had it reached that specification. Alternatively, Respondent could have provided evidence that the noise levels had led to complaints from customers and an estimation of the reduced use of the metro as a result. Or else Respondent could have provided evidence that the failure to reach the internal noise specification had in turn resulted in liability to DMRC.



...

166. Since Respondent has not provided any evidence of loss, and no longer relies on its earlier allegations that DMRC was raising penalties in respect of the noise levels, the Arbitral Tribunal cannot award it compensation.”

(emphasis supplied)

- 51.** Further, the respondent has relied on the illustration (m) of section 73 of the Indian Contract Act which reads as under:

“(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.”

- 52.** This court cannot ignore the fact that the petitioner has produced a certificate from DMRC dated August 19, 2015, before the AT, confirming that the trains were operating to its satisfaction. Accordingly, the Tribunal found that the respondent failed to establish any compensable loss arising from the alleged breach. The learned AT has also taken a note of the same and the same has been reproduced in para 30 above. The illustration (m) also shows that the amount that can be claimed under section 73 is by way of compensation which has become liable to be paid due to the breach



of warranty.

53. In this regard, the reliance placed by the petitioners on the judgments passed by the coordinate benches of this court in **Alstom** (supra) and **RS Infraprojects**(supra) is well placed as in those cases, the court was of the view that where a contracting party has suffered losses, the onus is on them that in order to get a reasonable compensation, they should prove that the party has actually suffered a loss. In the present case, the respondents have not been able to prove the actual loss. The operative portion of **Alstom** (supra) reads as under:

“19. The learned Arbitrator has held that in absence of any loss having been suffered by the petitioner due to such delay, it was not entitled to levy liquidated damages on the respondent. It was not shown before the Arbitrator and even before me that MSETCL had levied any damages on ground of alleged delay in execution of the work on the petitioner.

20. The counsel for the petitioner has submitted that certain work had been withdrawn from the respondent and had been given to third party, details of which were produced before the Arbitrator. The petitioner, therefore, submits that loss suffered by the petitioner could have been inferred from the same.

21. I am afraid that even this submission of the petitioner is not acceptable. The petitioner had merely



placed before the Arbitrator the value of the work which had been granted to the third party after withdrawal of the same from the respondent. It had not been shown that for award of such work, it had incurred any additional cost. The counsel for the respondent, on the other hand, has pointed out that the original contract awarded in its favour was for Rs. 4.96 Crores approximately; the work executed and paid for by the respondent was Rs. 3.27 Crores and the work awarded to third party was around Rs. 1.22 Crores. Therefore, the work done by the respondent and that got done by the third party would still be short of the original value of the work allotted to the respondent. This could not be refuted by the counsel for the petitioner. It is, therefore, evident that for withdrawal of the work from the respondent and taking the same from the third party, the petitioner had not suffered any loss.....

22. Therefore, even for claiming Liquidated Damages it was incumbent on the petitioner not only to show that the respondent had breached the Agreement that also due to such default the petitioner had suffered damage or loss. As held by the Arbitrator, petitioner has failed to prove any loss being suffered by it due to delay in execution of the work by the respondent, if any,



therefore, respondent's claim under Claim No. 7 was rightly allowed by the Arbitrator.”

54. Further, the relevant paras in **RS Infraprojects**(supra) reads as under:

“58. Therefore, it is trite law that where a sum is named in a contract as liquidated damages, the party complaining of a breach can receive, as reasonable compensation, such liquidated amount only if the damage or loss suffered by it is proved. Damage or loss is a sine qua non for the claim of damages under Section 74 of the Contract Act. It has been held that the expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not to be dispensed with. It is only in cases where the damage or loss is difficult or impossible to prove that the liquidated amount named in the contract if it is a genuine pre-estimate of damage or loss, can be awarded.

....

60. In the present case, the Defendants have not pleaded, and even otherwise, it cannot be said that it was impossible for the Defendants to have proved the actual damage or loss caused by the Plaintiff. In fact, as noticed hereinabove, the Defendants made no



endeavor whatsoever to prove any such damage or loss, leave alone the quantum thereof. Apart from stating that it has suffered loss of goodwill and reputation and has failed to obtain future orders from its Principal Employer and others, no evidence in this regard has been led by the Defendant No. 2. In fact, as noted hereinabove, the Defendants have led no oral evidence whatsoever in support of their case. There is also no documentary evidence to support the said assertion. Therefore, in view of the judgment in Kailash Nath Associates (Supra) and other judgments referred hereinabove, the Defendants are not entitled to claim damages from the Plaintiff, much less liquidated damages. In the absence of any evidence regarding any loss or damages suffered by the Defendants due to the alleged delay in performance of the contract by the Plaintiff, the Defendants could not have levied liquidated damages on the Plaintiff.”

- 55.** On the contrary, the respondent rather than proving the losses, went on to prove that the need for proving any loss is not required. It cannot be said that it was impossible to prove the losses suffered by the respondent due to the acts of the petitioners. In fact, the respondent was able to prove its case beyond reasonable doubt that the rolling stock supplied by the petitioner no. 1 was not as per the contract entered between the parties, however as regards, the other



claim, in my view, the respondent did not make any endeavour whatsoever to prove any such damage or loss. The learned AT in para 163 of the Arbitral Award dated 22.08.2016 has rightly observed that the respondent could have proven actual loss by presenting expert valuation evidence showing that the rolling stock's value was reduced due to non-compliance with internal noise specifications. Alternatively, it could have provided evidence of customer complaints leading to decreased metro usage or some liability incurred to DMRC due to the noise levels.

56. I am of the view that no such ground has been raised by the respondent under section 48 of the 1996 Act to reject the enforcement of the Arbitral Award dated 22.08.2016. It is well established that courts, in proceedings seeking enforcement of a foreign arbitral award, do not sit in appeal over the award and are not to reassess the factual findings or conclusions reached by the arbitral tribunal. In this regard, the Hon'ble Supreme Court in ***Shri Lal Mahal Ltd. v. Progetto Grano SpA*** (2014) 2 SCC 433, *inter alia* held as under:

“45. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a “second look” at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may



be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

....

47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to : (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b).”

(emphasis supplied)

57. The judgments relied by the respondent are also of no avail and the same are distinguished below:

- I. ***Ruxley Electronics*** (supra) – The said judgment pertains to a dispute concerning the depth of a swimming pool, which was not constructed in accordance with the contractual specifications. This deviation ultimately resulted in an award of damages amounting to £2,500 to



the party alleging the breach. It is, however, pertinent to note that the said damages were awarded as general damages for the loss of pleasure and amenity, which the aggrieved party had suffered and would continue to suffer by the non-compliant construction of the pool. In the present case, there is no loss of pleasure or amenity shown by the respondent.

II. ***Board of Trustees of the Port of Calcutta*** (supra) – In that case, the party alleging breach had, in fact, adduced evidence to demonstrate that it had suffered some form of damage as a result of the breach—unlike in the present case, where no such evidence has been brought on record.

58. For the said reasons, I find no substance in the arguments of the respondent and the amount payable under the Arbitral Award dated 22.08.2016 is upheld.

Partial Award on Costs of Jurisdictional Challenge dated 15.12.2015

59. As far as the Partial Award on costs of jurisdictional challenge dated 15.12.2015 is concerned, it is pertinent to note the findings made by the learned AT in the said award. The operative portion reads as under:

“46. Whether Claimants ought to be awarded costs in relation to the jurisdictional phase, and what proportion. A majority of the Arbitral Tribunal considers that Claimants, having defeated



Respondent's jurisdictional objection before the Arbitral Tribunal, should in principle be entitled to the costs that they incurred in doing so. Whatever the Arbitral Tribunal may decide in its final award, nothing will change the fact that Respondent's jurisdictional objection was unjustified and Claimants should be compensated for the costs of having to meet it.

.....

47....

Accordingly, it is necessary to consider whether there are any such circumstances, apart from the fact that Claimants defeated Respondent's jurisdictional objection. A majority of the Arbitral Tribunal considers that there are not. In particular, there is nothing in the way that Claimants have conducted the jurisdictional phase of this arbitration that should dictate a departure from the principle referred to at 46 above, namely that Claimants, having defeated Respondent's jurisdictional objection, should be entitled to the costs they incurred in doing so.

48. Accordingly, a majority of the Arbitral Tribunal considers that it should at this stage award Claimants their reasonable legal and other costs incurred in defeating Respondent's jurisdictional objection before



the Arbitral Tribunal.

....

51. Whether the costs claimed by Claimants are "reasonable" The question remains whether the costs claimed by Claimants are "reasonable" for the purposes of Article 37. A majority of the Arbitral Tribunal consider that they are not, but that £ 80,000 is a reasonable amount for Claimants to be awarded for the costs of the jurisdictional phase. Although the majority agrees with Respondent (and the dissenting arbitrator) that it is more difficult to assess the reasonableness of the costs claimed by Claimants without being able to see detailed (or indeed any) invoices, it considers that it can nevertheless take a view, based on its knowledge of the issues and procedure involved in the jurisdictional phase, as to the reasonableness of those costs.....

.....

52. This analysis has led the majority to conclude that £ 80,000 is a reasonable amount for Claimants to be awarded for the costs of the jurisdictional phase of this arbitration £40,000 for the preparation of the written submission; and £40,000 for the preparation for and attendance at the Jurisdiction Hearing.

...



54. Accordingly, a majority of the Arbitral Tribunal has decided to award Claimants £ 80,000 as reasonable legal costs for the jurisdictional phase of this arbitration.”

- 60.** The respondent has neither raised any objection nor addressed any arguments, in relation to the Partial Award on costs of jurisdictional challenge dated 15.12.2015. To my mind, the amount granted under the Partial Award on costs of jurisdictional challenge i.e. £80,000 is reasonable. Hence, the amount payable under the Partial Award on costs of jurisdictional challenge dated 15.12.2015 is upheld.

CONCLUSION

- 61.** The objections raised by the respondent under Section 48 of the 1996 Act stand rejected.
- 62.** The enforcement petition is allowed. The judgment-debtor/respondent is directed to pay to the decree holder/petitioners, the entire awarded amount along with awarded interests and costs in terms of the Foreign Award dated 22.08.2016 passed by the learned AT in ICC Case No. 19997/TO and Partial Award on costs of jurisdictional challenge dated 15.12.2015 passed in ICC Case No. 19997/TO within 4 weeks from today. The calculation sheet shall be filed by the petitioner within 1 week from today.
- 63.** List for compliance on 09.04.2025 .

O.M.P.(I) (COMM.) 375/2020

- 64.** In view of the judgment passed today in O.M.P.(EFA)(COMM.) 15/2019, the present petition becomes infructuous.



65. Hence, the present petition is disposed of being infructuous.

JASMEET SINGH, J

MARCH 28, 2025 /*priyesh*