REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10466 OF 2017

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD. .....APPELLANT(S)

VERSUS

M/S. DATAR SWITCHGEAR LIMITED & ORS. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The appellant herein had awarded a contract to the respondent. Dispute had arisen leading to the constitution of an Arbitral Tribunal (having regard to the Arbitration Agreement contained in the contract between the parties) and those arbitration proceedings culminated in the Arbitral Award dated June 18, 2004. An application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') was filed by the appellant, questioning the correctness of the Award which was dismissed by the learned Single Judge of the High Court vide orders dated March 18, 2009 and April 30, 2009

thereby affirming the Arbitral Award. Intra-court appeal thereagainst, which was preferred by the appellant, has been dismissed by the Division Bench of the High Court vide judgment dated October 19, 2013. It is the validity of that judgment which is the subject matter of the instant appeal.

2) With the aforesaid preliminary comments on the nature of proceedings, we turn to the events that took place, in a chronological manner, that are relevant for deciding the *lis:*

EVENTS :

The respondent was awarded a contract for installation of Low Tension Load Management Systems (LTLMS) at various locations by the appellant during the year 1993-1994. The respondent participated in another tender in the year 1996 for installation of approximately 23000 numbers LTLMS. The appellant awarded a work order dated January 15, 1997 for installation of 11760 numbers of LTLMS to the respondent against the above tender of 1996 and the balance quantities were awarded to other tenderers. According to the appellant, against the installation made by the respondent previously in the year 1993-1994, there were large scale complaints and the issue of defective equipments having been supplied by the respondent

which issue was being raised in the press repeatedly. In view of the criticism faced by the respondent, the respondent voluntarily offered to not only supply 11760 LTLMS against the order placed in January 1997 but also undertook to replace all defective Low Tension Switched Capacitators (LTSCs) supplied by them against the previous contract of 1993-1994 with new technology LTLMS and charge the old lease rentals against the replaced LTSC during the pendency of the earlier contract. The appellant accepting the package offer by the respondents issued Letter of Intent in respect of 12555 numbers panel of 1993-1994 contract objects to be replaced by new panels along with additional quantity of 23672 numbers fresh panels. The appellant finally placed a composite work order dated March 27, 1997 with the respondent to:

(i) Supply 11,760 numbers equipments against the tender of 1996-1997 contract. **B-I** Locations;

(ii) 12,555 numbers replacement of equipments against the 1993-1994 contract – **B-II** locations; and

(iii) 23,672 numbers equipments which was a package with the B-II locations – **B-III** locations.

Clause 5.1 of the letter of Work Order dated March 27, 1997

provided as under:

> "The supply and installation of the LM Systems shall commence within four months from the date of this work order or opening of Letter of Credit or receipt of complete list of locations of DTCs whichever is later. The entire supply and installation of LM System covered under schedules at Annexure – B-I, Annexure – B-II and Annexure – B-III shall be completed within twenty months thereafter."

3) During the execution of the said contract, some issues arose between the parties. As per the respondents, the appellant primarily committed two kinds of breaches, namely, the appellant did not supply the list of location where the contract objects had to be installed and, further, the appellant also did not renew the Letter of Credit (LC) through which the lease rentals were being paid for the installed objects. A series of correspondence was exchanged between the parties on the aforesaid two counts as the appellant maintained that it had not committed any fault in respect of any of the aforesaid aspects. As against the total number of 47497 LTLMS to be installed by the respondents, it installed 17294 numbers and thereafter terminated the contract vide letter dated February 19, 1999 alleging breaches on the part of the appellant which according to the respondent entitled the respondent to terminate the contract. The respondent undertook to maintain 17,294 contracts objects installed by them on the

condition that lease rental of the same would be paid by the appellant. The respondent further claimed that they had manufactured 14,206 numbers objects which were waiting to be installed for which locations were not intimated by the appellant.

4) As per the appellant, under the original tender of 1996, the respondent was only entitled to supply and maintain 11760 contract objects and 12555 replacement of 1993/94 contract was as a package, with 23672 supply of contract objects and, failure to replace the contract objects of 1993/94 completely disentitled the respondent from the right to supply any contract object under the additional quantities of 23672 contract objects awarded as package beyond the ratio in which the B-II locations were replaced vis-a-vis the additional quantity awarded in B-III locations. Thus, the partial termination by the respondent was illegal and arbitrary because as against 12,555 B-II locations, the respondent had installed only 2,014 equipments and thus they were aware of 10,541 B-II locations which were for replacement basis. Hence it was incorrect on their part to suggest that they had a right to terminate the contract due to non-supply of list of locations.

5) A meeting was held between the officials of the appellant and

representatives of the respondent and it was duly recorded in the Minutes of Meeting dated March 11, 1999 that the Chairman of the appellant had informed the respondent that the maps were readily available in the Kolhapur zone and requested the respondent to take up the work immediately. However, the respondent stated that it was not in a position to start the work immediately. The appellant wrote letter dated April 5, 1999 to the respondent bringing out its extreme dissatisfaction in the manner in which the work was being carried out by the respondent and calling upon the respondent to stick to the implementation of the programme as per the terms and conditions of the Work Order. The respondent by letter dated April 21, 1999 terminated the contract in its entirety and refused to maintain even the objects installed by them.

6) Dispute having arisen; for adjudicating these disputes, Arbitral Tribunal in terms of Arbitration Agreement was constituted. The Tribunal commenced its proceedings on February 19, 1999 and on June 18, 2004 passed a final award directing the appellant to pay Rs.185,97,86,399/- to the respondent as damages which included:

(i) Rs. 109 crores towards the installed object.

(ii) Rs. 71 crores towards the objects manufactured by the respondent which were ready for installation which they claimed could not be installed due to lack of list of locations; and

(iii) Rs. 6.52 crores towards raw material allegedly purchased by the respondent for the manufacture of remaining equipments.

7) As aforesaid, before the arbitrators, the respondents had primarily contended two defaults by the appellant. First, that the appellant did not supply the list of locations where the contract objects had to be installed and second, that the appellant did not renew the LC through which the lease rentals were being paid for the installed objects.

8) The Arbitral Tribunal, however, found no fault with the appellant as regards non-renewal of the LC observing that the respondent had terminated the contract in its entirety on April 21, 1999 whereas the LC was valid upto April 30, 1999.

The finding regarding non-renewal of LC by the Arbitral Tribunal was affirmed by the learned Single Judge (Justice D.K. Deshmukh) vide judgment dated August 3, 2005 when the Award was initially set aside. The said finding was also affirmed by the

Ld. Division Bench of the Bombay High Court vide its judgment dated October 22, 2008. However, partly allowing the appeal of the respondent, the judgment of the learned Single Judge dated August 3, 2005 was set aside and the matter was remanded back for fresh consideration. While adopting this course of action, the Division Bench in its judgment dated October 22, 2008 observed as under:

> "44. The Court if decides an application under Section 34 should either expressly or impliedly say that the award was being set aside because it was contrary to the terms of the contract or the Award was in any way violative of the public policy or the award was contrary to the substantive law in India viz., Sections 55 and 73 of the Indian Contract Act or the award was vitiated by perversity in evidence in contract or the adjudication of a claim has been made in respect whereof there was no dispute or difference or the award was vitiated by internal contradictions. In the present judgment which is under challenge, we have not found any such findings either expressly or impliedly though in the pleadings the issues were raised which should be the subject matter of a petition under Section 34 of the Act of 1996. Therefore, we find that it will be necessary for this Court to set aside the judgment impugned and remand the case back for adjudication afresh in accordance with the parameters set out by Section 34 of the 1996 Act.
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> 45. In view of the above, the appeal is allowed. Impugned judgment and order dated 3rd August 2005 passed by the learned Judge of this Court in Arbitration Petition No. 374 of 2004 is set aside. The case is remanded back for adjudication afresh in accordance with the parameters set out by Section 34 of the Arbitration and Conciliation Act, 1996."

9) After the remand, the learned Single Judge (Justice Roshan

Dalvi) by order dated March 18, 2009 rejected the case of the appellant on the ground that no case under Section 34(2)(iv) of the Act had been made out by the appellant. The aforesaid order dated March 18, 2009 of the learned Single Judge was challenged by the appellant before the Division Bench of the Bombay High Court. The Division Bench, while hearing the appeal, passed the following order on April 21, 2009:

> "1. Learned counsel for the petitioner has tried to submit before this Court that certain arguments quoted by the learned Single Judge in the impugned judgment were not argued by him and they have been put up by the learned Single Judge in his mouth. Under these circumstances we find it appropriate to direct the petitioner to approach the Ld. Single Judge seeking correction and/or withdrawal and/or the modification of the submission which are put up in his mouth. After appropriate orders are passed by the Ld. Single Judge, appeal be placed for admission.
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> 2. Appeal No. 165 of 2009 be heard along with this Appeal.
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> 3. Since contentions raised before the Ld. Single Judge are in dispute as stated above and the Petitioner has been directed to approach the Ld. Single Judge for the purpose of correction and/or modification, and also in view of the fact that the impugned order has not attained finality for the purpose of being considered by us, we find it inappropriate to consider Notice of Motion (being Notice of Motion No. of 2009) for interim relief at this stage. The said notice of motion will be considered after the appropriate orders are passed by the Ld. Single Judge on approach to the Ld. Single Judge by the Petitioner."

10) The learned Single Judge by order dated April 30, 2009 clarified her order by saying that although the appellant has

argued the matter challenging the award being beyond the contract between the parties and being opposed to public policy, the learned Single Judge in her considered opinion rejected the same under Section 34(2)(iv) of the Act.

11) Appeal of the appellant was thereafter listed before the Division Bench in which order dated May 2, 2009 was passed staying the Award upon the condition that the appellant deposits the principal amount and submits bank guarantee *qua* the interest awarded by the arbitrators. This order was challenged by both the parties by filing their respective SLP. This Court while hearing these SLPs, modified the order of the High Court, directing the appellant to deposit Rs.65 crores with the Bombay High Court and furnish a bank guarantee in the sum of Rs.200 crores. Amount of Rs.65 crores was allowed to be withdrawn by the appellant upon furnishing bank guarantee subject to the outcome of the appeal before the High Court.

12) In the appeal before the High Court, the appellant raised certain additional grounds. Thereafter, the matter was heard finally and vide impugned judgment, the appeal of the appellant has been dismissed by the High Court.

ORDER OF THE HIGH COURT

13) Before adverting to the arguments that are advanced by Mr. Vikas Singh, learned senior counsel appearing for the appellant and reply thereto of Mr. Rafique Dada, learned senior counsel who appeared for the respondent, it would be wise to scan through the impugned judgment of the Division Bench in order to understand and appreciate the line of reasoning which is the basis of justifying and upholding the order of the learned Single Judge and dismissing the objections of the appellant to the award rendered by the Arbitral Tribunal. In a very elaborate judgment, which runs into more than 150 pages, the High court has discussed various facets of the case under the following heads:

1. Brief Synopsis and chronology of events.
2. Remand
3. Submissions and finding on interpretation of the order of Apex Court dated 25/8/2009 passed in SLP filed by MSEB, challenging the order of remand passed by the Division Bench of this Court headed by Bilal Nazki, J
4. Notice of Motion No.3227 of 2010
5. Notice of Motion No.461 of 2010.
6. Scope of interference under Sections 34 and 37 of the said Act; the interpretation of the term "public policy"

and; power of the Court to interfere on that ground.

7. Points (i) to (vi) extensively urged by MSEB

8. Submissions and finding on Point No.(i) Whether the Arbitral Tribunal and the learned Single Judge were justified in coming to the conclusion that the MSEB had committed breach of contract by not supplying DTC Lists?

9. Submissions and finding on Point No.(ii) Whether the contract was one complete contract and the same could not be split up as argued by the Claimants?

10. Submissions and finding on Point No.(iii) Whether Claimants/DSL waived their right to receive complete lists of locations; and on Point No (iv) Whether the Award is contrary to the public policy as mentioned under Section 34 of the Arbitration and Conciliation Act, 1996?

11. Submissions and finding on Point No. (iv) Whether the Award is contrary to the Public Policy as mentioned under Section 34 of the Arbitration and Conciliation Act, 1996? (v) Whether the damages were properly awarded? and (vi) Whether the aspect of mitigation was properly considered?

12. Chamber Summonses filed by MSEB

13. Conclusion.

14) After narrating the scope of the work and the gist of the dispute which led to initiation of arbitration proceedings, the High Court noted that respondent filed its claims under various heads aggregating to Rs.1053,06,78,342/- and the counter claims of the appellant were to the tune of Rs.1273,70,26,669/- crores approximately. Appellant had examined as many as 26 witnesses in support of its case whereas the respondent had examined its Managing Director who was in charge of the project. After conclusion of the evidence and hearing the arguments, the Arbitral Tribunal partly allowed the claims of the respondent, holding that respondent was entitled to a sum of Rs. 1,79,15,87,009/- (Rs. 185,97,86,399 – 6,81,99,390) along with interest @ 10% per annum payable from the date of the Award till realisation. Cost of rupees one crore was also awarded. Counter claims of the appellant were dismissed. After taking note of the aforesaid facts in brief, the High Court dealt with the contention of the appellant herein that the matter needed to be remanded back to the learned Single Judge on the ground that the submission of the appellant that the Award was against the public policy had not

been considered by the learned Single Judge. After comprehensive discussion, this argument has been rejected authoritatively. In the process, the High Court also dealt with the submissions predicated on Order dated August 25, 2009 passed by this Court in special leave petition which was filed by the appellant whereby order of remand passed by Division Bench of the High Court, in the earlier round was challenged. Notice of Motion Nos. 3227 of 2010 and 461 of 2010 also came to be included in the discussion while dealing with the aforesaid issue. Thereafter, the High Court has discussed the scope of interference under Sections 34 and 37 of the Act, with particular reference to the ground of challenge on the basis that the award is against "Public Policy of India". After referring to the law on this pivotal aspect, the High Court noted the points of arguments advanced by the appellant affirming part of challenge to the Award. Six points which were advanced by the appellant in this behalf are as under:

(i) Whether the Arbitral Tribunal and the learned Single Judge were justified in coming to the conclusion that the MSEB had committed breach of contract by not supplying DTC Lists?

(ii) Whether the contract was one complete contract and the same could not be split up as argued by the Claimants?

(iii) Whether Claimants/DSL waived their right to receive complete lists of locations?

(iv) Whether the Award is contrary to the public policy as mentioned under Section 34 of the Arbitration and Conciliation Act, 1996?

(v) Whether the damages were properly awarded?

(vi)Whether the aspect of mitigation was properly considered?

15) Thereafter, discussion ensued on each of the aforesaid issue, one-by-one. On the first point, the High Court has concluded that the Arbitral Tribunal was justified in coming to conclusion that the appellant had committed breach of the contract by not supplying DTC list. While so concluding, the High Court went into the events which took place in this behalf, gist of the evidence as well as the manner in which the issue was upraised by the Arbitral Tribunal. The High Court has held that the finding which was given by the Arbitral Tribunal, after taking into consideration the rival contentions raised in the claim and in the written statement on this aspect is a finding of fact which was given after examining the material on record. The High Court further noted that this finding was upheld by the learned Single Judge also and the manner in which the learned Single Judge

dealt with the issue has been taken note of. This being a finding of fact, as per the High Court it was not possible for it to substitute its own view to the views taken by the Arbitral Tribunal or the learned Single Judge and arrive at different conclusion, even if two views were possible. Notwithstanding the same, the Division Bench again examined this very issue on merits after going through the various clauses in the contract entered into between the parties. Taking particular note of clauses 5.2 and 5.3, the Division Bench has affirmed the findings of the Arbitral Tribunal in the following manner:

> "46. Clause 5.2 is also relevant since it stipulates about the manner in which installation/replacement work was to be carried out by DSL. The work was to be completed in three Zones, viz., Kolhapur Zone, Nasik Zone and Aurangabad Zone. In clause 5.2 sequence of Zones was mentioned in which the work was to be carried out and it was as under:-
>
> (a) Kolhapur Zone
> (b) Nasik Zone. Work to be commenced on completion of work in Kolhapur Zone.
> (c) Aurangabad Zone. Work to commence on completion of work in Nasik Zone.
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> The sequence therefore was that, first in Kolhapur Zone B-I, B-II, B-III objects were to be installed and, thereafter, in Nasik again B-I, B-II, B-III objects were to be installed and finally in Aurangabad, B-I, B-II and B-III objects were to be installed. The said schedule of completion of work, however, was changed from time to time and, finally, again, in December, 1998 MSEB informed DSL to follow the schedule as per clause 5.2.

47. Clause 5.3 lays down that supply, erection at site and commissioning of the contract objects was to be done within a stipulated time. It also clarified that time is the essence of the contract and if there was delay in performance due to any reason MSEB would be entitled to claim liquidated damages. The chronology of events indicates that on 14/7/1997, MSEB by its letter informed DSL that Lists of DTC locations were ready with the Circle Offices and DSL should collect the same. The case of DSL in brief is that though it was represented by MSEB that Lists were ready and available on 14/7/1997, Lists were not supplied and, as a result, installations could not be done and as many as 120 letters had to be written by DSL to MSEB, requesting them to supply the Lists. Secondly, sequence of completion of work also was changed from time to time and suddenly on 21/12/1998 Circle Engineer informed DSL that sequence as per clause 5.2 of the work order had to be adhered to and, DSL was therefore constrained to send a letter of termination dated 19/02/1999 and even thereafter in a meeting which was held on 11/3/1999 between the Chairman of the MSEB, DSL and other two parties who were awarded the contract, as mentioned in clause 17 of the minutes of the meeting, the Chairman informed DSL that the Lists were readily available in Kolhapur Zone and asked Mr. Datar to take up the work under B-II and B-III schedule immediately and the Chairman directed that CEs present in the meeting that it was the Board's responsibility to give the list with maps to the agencies and expeditious steps should be taken in that regard. It was, therefore, contended that as late as 11/3/1999, the Chairman himself had conceded that the Lists were not made available to DSL. In this context, certain letters assume importance regarding change of sequence of work. The work order dated 27/3/1997 shows that the work initially had to be done in Kolhapur Zone, then in Nasik Zone and finally in Aurangabad Zone. Thereafter, Chief Engineer, MSEB by his letter dated 4/11/1997 changed the sequence and directed that the work should be completed initially in Nasik Zone in respect of B-I, B-II, B-III Lists, then in Kolhapur Zone and finally in Aurangabad Zone. This sequence was again modified by the Chief Engineer's letter dated 25/5/1998 and modification was made in the

> sequence of schedule and sequence of zone continued and work could be completed at any stage in any Zone. Again, third modification was made by Chief Engineer's letter dated 17/6/1998 and there was modification in respect of Zones and work could be carried out in any Zone in any sequence.
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> Then there was fourth modification by Chief Engineer's letter dated 21/12/1998 and direction was given to strictly adhere to the original work order sequence. According to DSL, because the Lists were not supplied though the contract objects/gadgets were ready for installation and though they were taken to the sites at the respective Zones, they could not be installed and were lying stranded causing monetary loss on account of transportation, manual labour etc. and non-installation of contract objects resulted in DSL not getting benefit of lease rentals."

16) Interestingly, before the Division Bench, the appellant had raised certain additional points on this aspect, which were not argued before the Tribunal or even before the learned Single Judge, viz., the non-supply of DTC locations did not amount to breach of fundamental term of the contract which led to termination of contract by the respondent. We would like to reproduce, at this stage, this part of discussion as well:

> "48. It must be noted here that before the learned Single Judge and before this Court, some of the points which were never urged before the Tribunal had been sought to be urged. In the written submissions which have been tendered before us and what was urged before us was that the Arbitral Tribunal had committed serious error by holding that non- supply of DTC locations amounts to breach of fundamental term of contract which led to termination of contract by Respondents/Claimants. It has been contended before us that since each contract object was a separate lease contract, the Arbitrator's Award has to be considered in

three parts (i) qua uninstalled objects, (ii) qua installed objects and (iii) damages in respect of the objects not even manufactured and it has to be noted here that Tribunal has framed one of the points as under:-

(A) Whether the Claimants were ready and willing to perform their part of the contract and if so, whether Respondents prevented the Claimants from doing so?

While answering this point, the point was discussed in two parts. Firstly, whether the Claimants were ready and willing to perform their part of the contract and, secondly, whether Respondents have prevented the Claimants from doing so. In this context, after having held that Claimants were ready and willing to perform their part of the contract, while considering the second point, the Tribunal had taken into consideration the question of supply of DTC Lists and whether it was a fundamental term of the contract. After having held that MSEB had prevented DSL from performing their part of the contract even though they were ready and willing to do so, the question of damages has been thereafter separately considered and on that point Tribunal has adopted a particular method of calculation of damages. In our view, it is not permissible for MSEB to now change their submissions in this manner. However, even if the submissions, as advanced before us by MSEB, are taken into consideration, they are devoid of merits."

17) Thereafter, the High Court took note of another argument of the appellant herein, namely, the contract was terminated by the respondent on account of non-renewal of Letter of Credit in view of respondent's letter dated February 19, 1999. However, the High Court did not accept the said argument as valid and rejected the same. Thereafter, the High Court has recorded its specific findings on Point No. 1 and we reproduce relevant portion thereof

as under:

> "In our view from the material on record, it is abundantly clear that supply of DTC Lists was a fundamental term of the Work Order and MSEB had miserably failed in complying with the said fundamental term and there was a breach on the part of the MSEB in supplying the DTC locations which eventually prevented DSL from installation of contract objects. It has to be noted here that after the work order was issued by MSEB, DSL had to make necessary arrangements for the purpose of carrying out the process of installation of the contract objects. This included procurement of raw material from a foreign country, starting the process of manufacturing gadgets, making arrangements for transportation of these contract objects to the places where the said gadgets were to be installed, employment of trained, skilled and other staff, making available vehicles for transporting these contract objects to the DTC location where they were to be installed and, finally, coordinating with the Officers of MSEB so that after the contract objects were installed, a Certificate of installation could be given by the Officers of MSEB so that from that point onwards, lease rentals could become payable to DSL. It has to be borne in mind that the nature of the Work Order was such that it was in the interest of DSL to ensure that the contract objects are installed and certificates to that effect are obtained from the Officers of MSEB. It does not sound to reason that after having invested huge amount of almost Rs 163 crores, as observed by the Tribunal in the Award, DSL would not install the objects because it was in their interest to get the objects installed so that returns on their huge investment would start thereafter. It is inconceivable therefore that though DTC Lists were available, DSL would not install the contract objects. Various facts and figures were given by MSEB to show that DTC locations were known to DSL and yet they had failed in installing the contract objects is without any substance. It cannot be forgotten that, initially, the sequence of installation was Kolhapur, Nasik and Aurangabad. This sequence was later on changed to Nasik, Kolhapur and Aurangabad. This was again changed and permission was given to DSL to install the objects at any time at any place and, lastly, again, this was changed and direction was given to DSL to adhere to the sequence as per the Work Order. This being the position, even assuming that

> B-II Lists were available, DSL could not have installed these contract objects because they were asked to follow the schedule again by letter dated 21/12/1998 and, therefore, even if the lists were available, it was not possible for DSL to simultaneously install all those objects since they were told to adhere to the sequence in the Work Order if the lists of locations under B-I were not given, even assuming that they had B-II lists of locations they could not have and were not actually allowed to install at the said B-II locations. It has come on record that more than 10,000 objects were manufactured and ready for installation. There is no earthly reason why DSL would fail to install the objects which were inspected and ready for installation. The only obvious reason would be that they were unable to do so on account of various orders which were passed by MSEB from time to time preventing them from performing their obligation. MSEB has not examined any of its Superintending Engineers who were in charge of supplying the Lists. The cumulative effect of all the material which has been brought on record is that it clearly demonstrates the failure on the part of MSEB in supplying the Lists of DTC locations which was a fundamental term of the contract."

18) Coming to point no. 2, the High Court noted that this point was not urged before the Tribunal or before the learned Single Judge, namely, the contract was not one complete contract. For this reason, held the High Court, it was not permissible for the appellant to urge the same for the first time before it.

19) Point nos. 3 and 4 were taken up together for discussion. Insofar as point no. 3 is concerned, the Court noted that relevant provisions in the light of which this point was to be examined, were Sections 39, 53, 55 and 63 of the Contract Act. The High

Court found that when Chief Engineer of the appellant had written a letter dated December 21, 1998 informing the respondent that work had to be carried as per the original schedule given in the Work Order, viz., Kolhapur, Nasik and Aurangabad and a further direction was given not to install objects at B-III locations, only at that stage the appellant had refused to perform their part of promise. Only, thereafter, notice was given by respondent on February 19, 1999 and finally the contract was terminated on April 21, 1999. Therefore, there was no waiver of right of acquiescence on the part of the respondent and, thus, argument of the appellant could not be accepted that the respondent had waived their right to terminate the contract. The High Court also held that the question of waiver or acquiescence is a question of fact and since there was a finding of fact by the Arbitral Tribunal (which was upheld by the Single Judge as well) that there was no waiver or acquiescence on the part of the respondent, such an argument was not even available to the appellant in appeal under Section 37 of the Act. On this basis, the Division Bench rejected the contention of the appellant that the respondent waived its right to receive complete list of locations. In the process, the High Court has also rejected the contention of the appellant that as a consequence of waiver of right to receive list of DTC locations,

the only option which was available to the respondent was to have given notice to the appellant that it was accepting the performance of the promise other than at the time agreed upon or that the respondent was entitled to any compensation.

20) With the aforesaid findings on Point no. 3, the High Court rejected the contention of the appellant that the award of damages was against the public policy.

21) Thereafter, the High Court discussed the question of quantum of damages as raised in Point No. 5. It went through the exercise done by the Arbitral Tribunal in this behalf, i.e., the manner in which the damages are calculated by the Tribunal. It found that the Tribunal had appreciated to determine the damages payable to the respondent in respect of lease rent for duration of seven years for 17294 contract objects which were installed and a figure of Rs. 108,02,53,173/- in this behalf was arrived at. In respect of 14206 stranded objects, the Tribunal held that the damages which were payable on account of aforesaid stranded objects were to the tune of Rs. 14,28,55,536/- for a period of one year at the rate of Rs. 10,056/- per year for each contract object and for a duration of five years Rs. 71,42,77,680/-. As regards those objects which were not manufactured, the

Arbitral Tribunal took into consideration the value of unused imported raw material. On that basis it came to the conclusion that damages in respect of imported raw material left unused for 16487 contract objects were Rs. 6,52,55,546/-. In this manner, it arrived at a total figure of Rs. 185,97,86,399/- and deducted a sum of Rs. 6,81,99,390/- which was paid by the appellant to the respondent pursuant to interim orders passed by the Tribunal.

22) After taking note of the manner in which the Tribunal awarded the damages, the High Court noted the challenge of the appellant's counsel to the award of damages, which were as under:

(i) Since there was no breach committed by the appellant and that the respondent had no right to terminate the contract, no damages were payable.

(ii) Since the cost of contract object was on an average of Rs. 9,000/- per object, the respondent, at the best, was entitled to nominal profit of 10-15% on the said cost. Therefore, the Arbitral Tribunal had granted excessive damages.

(iii) The damages were wrongly awarded for objects not even manufactured and such an award was in

violation of public policy as mentioned in Section 34 of the Act.

(iv) According to the understanding of the appellant, the contract was coming to an end on March 19, 1999 and the contract objects, therefore, should have been manufactured by it. Thus, failure to manufacture the same did not entitle them to claim any damages *qua* the objects not manufactured.

(v) Since the contract was novated, the respondent was obliged to manufacture the objects as and when the lists were supplied to it and, therefore, the question of payment of any compensation *qua* the objects not manufactured did not arise.

(vi) There was no default *qua* the installed or *qua* uninstalled objects and on this ground also the Tribunal was not justified in granting any compensation whatsoever.

(vii) In respect of the installed objects, the only breach was non-renewal of the Letter of Credit. Likewise, in respect of un-installed objects, the only breach was non-submission of lists of locations. Insofar as non-renewal of Letter of Credit is concerned Arbitral

Tribunal had decided this issue in favour of the appellant and, therefore, no damages were awardable. In respect of uninstalled objects, the respondent had 16473 lists of location and they were obliged to maintain 2500 buffer stock. However, the respondent had manufactured only 14206 objects, therefore, there was no question of payment of any damages *qua* uninstalled objects.

23) Since this issue was connected with Point No. 6, i.e., mitigation of damages, the High Court dealt with the argument of mitigation as well. Here, contention of the appellant was that according to the respondents the breach, if at all, took place only on December 21, 1998 when permission for simultaneous installation in B-III was withdrawn and no steps whatsoever to remedy the breach thereafter were taken by the respondents. This showed that the respondents had not tried to mitigate their loss and were not entitled to get damages. Here the argument of the respondent was also noted and after considering the respective arguments, the High court has not found any substance in the submissions of the appellant. It has given following reasons for adopting this course of action:

"73. We agree with the submissions made by the

learned Senior Counsel appearing on behalf of DSL for the following reasons:

> First of all, it has to be noted that Arbitral Tribunal in its Award has recorded a finding of fact that MSEB had committed breach of the contract by not supplying the lists of DTC locations and this breach was a fundamental breach of the agreement. Secondly, it is held that MSEB had prevented DSL from performing its part of the contract and, therefore, they were entitled to get damages. The Arbitral Tribunal, thereafter, relying on the Judgment of the Supreme Court in Union of India v/s. Sugauli Sugar (Pvt.) Ltd. [(1976) 3 SCC 32)] has observed that innocent party who has proved the breach of contract to supply what he had contracted to get, such a party should be placed in as good a situation as if the contract had been performed and, therefore, damages which the Claimants/DSL were entitled to have to be determined on the said principle. The Tribunal has then held that lease rent is one of the measures for ascertaining damages and, in that context, after relying on the Work Order, came to the conclusion that entitlement of the Claimants was to secure lease rent accrued from the date of installation of the contract objects. In this context, therefore, for the sake of convenience the question of quantum of damages was considered with reference to (a) installation of contract objects, (b) stranded objects and (c) objects not manufactured. The submission of the learned Senior Counsel appearing on behalf of MSEB that the Arbitral Tribunal had split up the contract into three parts, though the contract was one single contract, is without any substance. It has to be noted that the Arbitral Tribunal first came to the conclusion that there was a breach on the part of MSEB in supplying the lists of DTC locations. Having held, that there was a breach and that the Claimants/DSL were entitled to claim compensation, while ascertaining the amount of compensation, for the sake of convenience, it has considered the aspect of granting damages in the above manner. The entire thrust of the argument of MSEB, therefore, is misconceived. MSEB has tried to give a twist to their tale by contending that 17,294 contract objects being installed, there was no question of awarding

damages for the installed objects and, secondly, since termination of Letter of Credit was held not to be illegal, it was not open for the Arbitral Tribunal to have awarded damages for the uninstalled objects and the objects which were not manufactured. This submission is totally misconceived, firstly because it has been consistently held that the Arbitral Tribunal alone is competent to decide the manner of calculation of damages which are to be awarded as also the method which is to be adopted by the Tribunal. In the present case, the Arbitral Tribunal has held that lease rent is one of the measures for ascertaining damages. The Apex Court in *McDermott vs. Burn Standard* [(2006) 11 SCC 181] has observed as under:-

> "106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.
>
> 110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law."

24) Citing few more judgments and after extensively quoting therefrom[1], the High Court proceeded further with the discussion

1 (a) Dwarka Das v. State of M.P. and Another
(b) ONGC v. Comex
(c) Prakash Kharade v. Dr. Vijay Kumar Khandre and Others
(d) Grandhi v. Vissamastti
(e) Mirza Javed Murtaza v. U.P. Financial Corporation Kanpur and another

as follows:

> "The Arbitral Tribunal, therefore, after having adopted lease rent as one of the methods of ascertaining damages has thereafter considered what damages should be awarded by way of lease rentals on installed objects, stranded objects and the objects not manufactured. In our view, it is not possible to find fault with the finding of the Arbitral Tribunal on the measure and method for ascertaining and calculating the damages which have been adopted by it to arrive at the final figure of compensation to be payable to the Claimants/DSL.
>
> It is also quite well settled position in law that once it is established that the party was justified in terminating the contract on account of fundamental breach of contract then, in that event, such an innocent party is entitled to claim damages for the entire contract, i.e., for the part which is performed and also for remaining part of the contract which it was prevented to perform. This principle is quite well settled in number of cases. The Tribunal, therefore, was perfectly justified in calculating the damages in the aforesaid manner. In this view of the matter we do not propose to deal with the judgments on which reliance is sought to be placed by MSEB.
>
> So far as the question of mitigation is concerned, the Tribunal has specifically held that the contract objects were unique objects which had to be manufactured according to the specifications laid down by the MSEB and, therefore, these contract objects could not be disposed of in the open market. Even if the said contract objects were dismantled, value would become nil. The Tribunal also observed that Datar deposed with reference to Exhibit-C-16 that efforts were made to sell the contract objects stranded in the factory to other Electricity Boards but those efforts did not succeed. The question of mitigation, therefore, was considered by the Tribunal and the submissions of MSEB were not accepted. In our view, reasoning given by the Tribunal cannot be faulted."

25) According to the High Court, the Arbitral Tribunal had

awarded damages in a most conservative manner and, thus, committed no illegalities in awarding these damages. At the end, the High Court dealt with the Chamber Summons which were filed by the appellant and on detailed discussion thereupon, dismissed all these Summons.

26) As a consequence, the appeal of the appellant stood dismissed.

ARGUMENTS OF THE APPELLANT :

27) Mr. Vikas Singh referred to the tender of 1993-94, pursuant to which the respondent had installed 12,555 numbers of LTSC, and submitted that the respondent was maintaining the same but large scale complaints about the inefficiency of LTSC was received with the appellant. Having regard to this criticism faced by the respondent, it volunteered to replace the installations made in the earlier contract and charge the old rental in respect of the same. In the meantime, pursuant to tender of the year 1996 for installation, the respondent was awarded work for installation of 11,760 contract objects. Going by the said assurance, the appellant awarded a work order dated March 27, 1997 for replacement of 12,555 panels of earlier contract objects plus installation of 23,672 LTMS panels and the work order finally

became as under:

(i) Supply 11,760 numbers equipments against the tender of 1996-1997 contract. **B-I** Locations;

(ii) 12,555 numbers replacement of equipments against the 1993-94 contract – **B-II** locations; and

(iii) 23,672 numbers equipments which was given as a package with the B-II Locations – **B-III** locations.

28) Mr. Vikas Singh referred to Clause 5.1 of the contract as per which entire supply and installation of L.M. Systems covered by schedules at Annexures – B-I, B-II and B-III was to be completed within twenty months. He thereafter read out the correspondence that was exchanged between the parties and on that basis, he sought to argue that as per the appellant, the list of locations was ready on July 14, 1997 but it is the respondent who was facing difficulties in installation of the contract objects and violating the terms of the contract with impunity. The respondent had even withdrawn money in excess of its entitlement. Vide letter dated December 21, 1998, the appellant had written to the respondent to do installation of B-I and B-II first before B-III locations, as by that date, the respondent had already installed 17,294 objects out of which B-II was only 2014. However, the respondents in their

reply dated March 21, 1998 asserted their right to install the objects at B-III locations simultaneously. He further pointed out that in their letter dated February 18, 1999, the respondent admitted having received Rs.4.34 crores in excess of their entitlement, however, on the very next date, i.e. on February 19, 1999, it sought to terminate the contract *qua* the uninstalled objects numbering 30,695 but volunteered to maintain the installed objects provided that the rent for the same was forthcoming. It was argued that since the payment of rent was by means of an irrevocable LC, and since the LC was valid on February 19, 1999, the offer of maintaining 17,294 objects was clearly accepted by the appellant as the appellant did not cancel the LC in spite of termination of the contract *qua* uninstalled objects on February 19, 1999. In other words, the LC continued to remain alive even after termination of the contract on February 19, 1999 in order to make payment of future rentals *qua* the uninstalled objects. In spite thereof, the respondent, vide its communication dated April 21, 1999, terminated the contract. It was submitted in the aforesaid backdrop that the action of the respondents was clearly illegal. It was further argued that the findings of the Arbitral Tribunal that the appellant had committed the fundamental breach of the contract in not providing the

complete list of the contract objects to the respondents is clearly erroneous which is patently illegal and contrary to the terms of the contract. It was submitted that the entire premise of the Arbitral Tribunal to record this finding was on the basis of the letter of the appellant dated December 21, 1998 which had only debarred the respondent from installing B-III locations as the respondent was indulging in the malpractice of charging bills higher than what they were entitled to which is proved by the credit note given by the respondents themselves on February 18, 1999. The said letter did not debar the respondent from installing the B-II locations which were 10,541 remaining to be installed on February 19, 1999. The Arbitral Tribunal recorded a perverse finding which resulted in patent illegality in the award that by letter dated December 21, 1998 the appellant had debarred the respondent from installing the B-II locations when clearly neither the same was mentioned in the said letter nor was the same understood contemporaneously by the respondent in their response dated December 23, 1999 wherein they merely protested from being denied the opportunity to install the B-III objects. The Arbitral Tribunal accordingly committed a grave mistake in holding that the appellant had committed a fundamental breach when clearly on the date of termination the

respondent had with them 10541 B-II locations and admittedly 1633 B-I locations in Kolhapur Zone and they were under an obligation under the contract to maintain 2500 buffer objects and hence the respondent had only 14026 contract objects at that time whereas they were required to maintain at least 14,674 contract objects on the said date.

29) Next submission of Mr. Vikas Singh, learned senior counsel, was that the Arbitral Tribunal gave a specific finding that the LC was valid till April 30, 1999 and there was no default on the part of the appellant in this behalf, which finding was also confirmed by the learned Single Judge as well as by the Division Bench which had heard the appeal in the first round. Therefore, there was no occasion whatsoever for the Arbitral Tribunal to award damages *qua* the installed objects as there was no default alleged and there was no default held to have been committed by the appellant *qua* the same.

30) Much emphasis was laid by the learned senior counsel for the appellant on the order dated August 3, 2005 passed by the learned Single Judge in the appellant's petition under Section 34 of the Act (in the first round), whereby the learned Single Judge had decided the case in favour of the appellant holding that there

could not be any direction for payment of damages in respect of the installed objects as no default was found by the Arbitral Tribunal and, therefore, the Tribunal committed a grave mistake in awarding compensation in respect thereof. In order dated August 3, 2005, the learned Single Judge had also held that the Arbitral Tribunal had committed illegality by awarding compensation in respect of the objects manufactured but not installed while permitting the respondents to retain the same. Likewise, the award was faulted with to the extent that the Arbitral Tribunal awarded the amount for the raw material available with the respondent, without directing the respondent to handover the said raw material to the appellant. Though, this order dated August 3, 2005 was set aside by the Division Bench in appeal which was preferred by the respondent, submission of the learned senior counsel was that it was erroneously set aside on the only ground that the Single Judge while allowing Section 34 petition had not specifically mentioned the particular section under which the petition had been allowed when clearly the order of the learned Single Judge had been passed on the ground that the award is against the public policy of India and hence it was clearly referable to Section 34(2)(b)(ii) of the Act. Hence, there was no occasion or necessity to remand the matter back to the

Single Judge of the High Court. Since the direction by the Division Bench were to the Single Judge was to decide the matter in a time bound manner, even before the appeal against the order of the Division Bench could be heard by the Supreme Court, the learned Single Judge of the Bombay High Court rejected Section 34 petition on a completely erroneous premise as if that the appellant had argued the case under Section 34(2)(iv) when admittedly no arguments had been raised under the said Section and the entire arguments as well as the written submission were only with regard to the award being contrary to the public policy which is under Section 34(2)(b)(ii). In this manner, submitted the learned senior counsel, the learned Single Judge went beyond the mandate of the Division Bench while dismissing the petition of the appellant in its entirety under Section 34 of the Act and the Division Bench has also erred in giving its imprimatur to such an order of the Single Judge.

31) Continuing his submissions with great emphasis, Mr. Vikas Singh further argued that an important issue which need consideration is as to whether the contract was one complete contract and whether the same could or could not be split up as argued by the respondents. He referred to the provisions of the

contract, the relevant correspondence and the submission of the respondents witnesses to refute the respondents contention that the contract was one bargain and there was no right to split up the same. He also referred to the certain judgments[2] to contend that the contract in question can be held to be clearly severable and it is the duty of the Courts to severe the enforceable part vis-à-vis the unenforceable part.

32) Touching upon the facet of the uninstalled object, it was submitted that in terms of the work order, the supply and installation was to commence from the date of the work order or opening of LC or receipt of complete list of locations of DTCs, whichever is later. On July 14, 1997, the appellant wrote to the respondents that the list of locations was available with the circle office. The respondents assumed July 14, 1997 as the date of making available the complete list of locations without actually receiving the said list from the circle office. The clause very clearly provided the four month period to commence from the date of receipt of list of complete locations and admittedly the respondent did not receive the list of locations on July 14, 1997 nor any time thereafter till they started installation on November

2 ***Firm Bhagwandas Shobhalal Jain, a Registered firm and Anr.*** v. ***State of Madhya Pradesh***, AIR 1966 MP 95; ***Shin Satellite Public Co. Ltd.*** v. ***Jain Studios Ltd.***, (2006) 2 SCC 628; ***Beed District Central Coop. Bank Ltd.*** v. ***State of Maharashtra & Ors.***, (2006) 8 SCC 514, ***Daruka & Co.*** v. ***Union of India & Ors.***, (1973) 2 SCC 617 and ***Food Corporation of India*** v. ***Yousuff and Co.,*** Kerala High Court (DB) (17.11.1980) A.S. No. 31 of 1976 at Page 2296 (starting from 2280-2297 of volume X)

18, 1997, considering the four month period to start from July 19, 1997 i.e. the date of receipt of the communication dated July 14, 1997. Clearly, the respondent had enough time after July 14, 1997 to insist upon the complete list of locations before any installation was started by them on November 18, 1997. Therefore, argued the learned senior counsel, it is the respondent which committed breach of contract in not completing the work.

33) Mr. Vikas Singh once again emphasised the submission which was made before the learned arbitrator as well as the High Court, that there was a waiver by the respondent in respect of list of DTC location and the consequences of such a waiver had to flow as per Section 55 read with Section 63 of the Contract Act. It was submitted that this Court has held in the case of ***Waman Shriniwas Kini*** v. ***Ratilal Bhagwandas & Co.***[3] at para 13 "waiver is the amendment of a right which normally everybody had a liberty to waive. A waiver is nothing unless it amounts to a release it signifies nothing more than an intention to insist upon the right". Accordingly, once the waiver takes place, the clause with regard to providing the complete list does not remain a fundamental term of the contract and the respondent would not be entitled to claim any damages for the non-supply of the list.

3 1959 Supp. (2) SCR 217

He also referred to the decision in ***Jagad Bandhu Chatterjee*** v. ***Smt. Nilima Rani & Ors.***[4] wherein at para 5, it is stated "it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit." He also relied upon the judgment in ***Babulal Badriprasad Varma*** v. ***Surat Municipal Corporation & Ors.***[5] and pointed out that in that case, the Court has considered various judgments on the issue of waiver in paragraph 42 to 49, which laid down that waiver amounts to abandonment of right in such a way that the other parties entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either expressed or implied from the conduct. Number of other judgments laying down the same proposition of law were also referred to.

34) Additionally, it was submitted that the appellant had on June 17, 1998 permitted the respondent to make feeder-wise installation irrespective of **B-I, B-II** and **B-III** locations. Between June 17, 1998 to December 21, 1998 i.e. for a period of more than six months, the respondents had all the B-II locations available to them which is 12,555 out of which they only installed

4 (1969) 3 SCC 445
5 (2008) 12 SCC 401

2014 and they did not install 10541 B-II locations which were the locations where the respondent had themselves installed the contract objects against tender of 1993 and 1994 and were maintaining the said objects at the time when the present tender was awarded and hence were in the complete knowledge of the said locations. The endeavour was to show that the respondent was aware of sufficient number of locations, even B-II locations and, therefore, there was no reason to terminate the contract and, in fact, it is the respondent which had failed to perform its obligations under the contract and was, thus, responsible for the breach thereof. On that premise, the submission was that award of the Arbitral Tribunal *qua* the uninstalled object is patently illegal and it also shocks the conscience of the Court and is liable to be set aside as being opposed to public policy. Specifically adverting to the damages awarded *qua* installed objects, it was argued that the work order clearly provided that each contract object was a separate contract between the appellant and the respondent and, therefore, it was incumbent upon the Arbitral Tribunal to decide as to what fault had been committed by the appellant *qua* the installed objects before granting any damages for the same. Absence of this exercise, contended the learned senior counsel, had rendered the award illegal and in violation of

public policy as mentioned in Section 34 of the Act.

35) While questioning the damages awarded in respect of objects not even manufactured; quantum of damages awarded by the Tribunal and failure on the part of the respondent to mitigate the losses, the same arguments were advanced which were taken before the High Court as well. It is also submitted that the High Court committed serious error in rejecting the chamber summons.

ARGUMENTS IN REPLY BY THE RESPONDENT :

36) Mr. Dada, learned senior counsel appearing for the respondent, strongly refuted all the aforesaid submissions of the appellant and made earnest effort to show that the entire approach of the Arbitral Tribunal in dealing with the issues and awarding the damages was correct in law and this award was rightly held by the learned Single Judge as well as the Division Bench of the High Court.

37) At the outset, Mr. Dada emphasized the crucial nature of the contract in question, which was essentially for operating lease for ten years in respect of energy saving devices which were to be installed by respondent No.2 on the locations to be given by the

appellant herein. He pointed out that since it was a contract for operating these devices on lease basis, entire investment was to be made by respondent No.2 and the appellant was only to give the lease rent, that too on the condition that contract objects were working satisfactorily. Further, the contract being a 'lease' contract, the ownership of the equipment had to remain with respondent No.2 and was never to be transferred to the appellant. In the aforesaid scenario, argued the learned senior counsel for respondent No.2, respondent No.2 could perform its part of the contract of installation of objects only on furnishing the DTC locations. He argued that the appellant failed to discharge this obligation and, thus, committed fundamental breach of the contract. This has been held so by the Arbitral Tribunal and this very finding was upheld by the High Court as well. Submission was that this being a finding of fact, the breach of contract on the part of the appellant stands established.

38) Elaborating on this aspect, it was contended that the appellant made an unequivocal representation to respondent No.2 on 14.07.1997 that complete lists for DTC locations, including Schedule B-II, are ready with the district offices. Respondent No.2 acted upon the said representation and

commenced installation in November 1997. On 20.04.1998, the appellant threatened respondent No.2 with liquidated damages and warned that time will not be extended for installation. This letter glossed over the fact that DTC locations were withheld by the district offices of the appellant. Both parties were *ad idem* that time had started to run and installation was to be completed before 18.03.1999 (twenty months from 18.07.1997, i.e. the date of receipt of the letter dated 14.07.1997 from the appellant). Despite rigorous follow up and distress appeals by respondent No.2 through more than 120 letters, the appellant did not furnish complete lists of DTC locations. On 21.12.1998, the appellant directed the work to proceed strictly in the sequence – Kolhapur, Nasik and Aurangabad Zones, with further sequences B-1, B-2 and B-3. The appellant stopped work under B03 indefinitely without assigning any reason. However, even till 19.02.1999, respondent No.2 was not provided with complete list of B-I locations in Kolhapur. Despite representation of 11.02.1999 from Technical Member of the appellant to give lists within four days, i.e. by 15.02.1999, no lists were received. Realizing the futility of expecting cooperation from the appellant, respondent No.2 terminated the contract on 19.02.1999.

39) It was further submitted that respondent No.2 still 'offered' to maintain the 17294 installed objects (however, the appellant was admitting installation of only 7000 contract objects as of July 199, as stated by respondent No.2 in the interim application filed before the Arbitrators), provided that payment was made without demur or dispute – obviously alluding to the financial blockade by *NIL* performance certificates and fabrication of failure reports. Respondent No.2 gave the appellant seven days to convey if the said "offer" was acceptable. Admittedly, the appellant did not accept the offer and proceeded to make a counter claim against respondent No.2 on the footing that respondent No.2 had abandoned the entire contract on 19.02.1999, including that for installed objects.

40) It was next argued by Mr. Dada that after the disputes were referred to the Arbitral Tribunal, it went into the length and breadth of each issue in minute detail. This Tribunal consisted of eminent retired Judges who scanned through the deposition of witnesses produced before it as well as other documentary evidence. 125 sittings, over a period of five years, were held in the process, which culminated into a fully reasoned and unanimous award dated 18.06.2004 running into 150 pages, as per which the

matter was decided in favour of respondent No.2 and against the appellant. His argument was that most of the submissions of the appellant were questioning the findings of facts only and this Court would not embark on such a journey and decide correctness thereof in exercise of its jurisdiction under Article 136 of the Constitution.

41) We find adequate force in the aforesaid submission of Mr. Dada. Let us first take note of these findings:

FINDINGS OF FACTS :

42) Reasoning contained in the Award reveals following salient findings returned by the Arbitral Tribunal:

(i) The appellant prevented respondent No.2 from performing the contract.

(ii) Respondent No.2 was ready and willing to perform the contract all throughout.

(iii) The appellant chose not to examine any of its Superintending Engineers who were in-charge for giving DTC locations to respondent No.2 and, as found by the Arbitral Tribunal, they were the kingpins of each circle for performance of the contract.

(iv) There is considerable merit in the submission of respondent

No.2 that the Minutes of the Meeting dated 24.06.1998 is a fabricated document.

(v) It is not possible to accede to the submission of the appellant that respondent No.2 had adequate lists of locations available and still failed to install the contract objects.

(vi) It is obvious that there is something seriously wrong in the working of the appellant. Once a letter is listed in the affidavit of documents, it is surprising how the letter was not traceable. Be that as it may, the fact remains that prior to the date of termination of contract, at least in three Circles, the appellant had directed stoppage of installation work.

(vii) It is unfortunate that the Head Office of the appellant lacked control over the field offices and which ultimately led to the failure of the project. It is futile to even suggest that the breach was not a fundamental one.

(viii) Respondent No.2 was ready and willing to perform their part of the contract while the appellant committed a breach by failure to supply DTC locations as per the terms of the contract.

(ix) Respondent No.2 invested Rs.163 crores in the project.

(x) The appellant failed to prove that deductions effected in the

Performance Certificates were proper.

(xi) The appellant indulged in tampering the commissioning reports produced on record. The attempt does not behove to a statutory body and requires to be deprecated. The attempt made by the appellant by producing documents which are tampered with and which are not genuine indicates that the appellant was willing to go to any extent to make allegations against respondent No.2.

(xii) The appellant did not make available large number of documents disclosed in the affidavit of documents on the ground that the same are not available.

(xiii) Counter claim of the appellant is misconceived and is nothing short of counter blast to the claim made against respondent No.2.

(xiv) It was the appellant and appellant alone who had committed fundamental breaches of the terms of the work order.

(xv) The appellant has raised untenable and unsustainable defences which led to considerable delay in concluding the proceedings.

These are findings of facts based upon the material

evidence that emerged on the record of the case.

TERMINATION OF CONTRACT WAS VALID AND JUSTIFIED :

43) Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as respondent No.2 is concerned, it was always ready and willing to perform its contractual obligations, but was prevented by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is that the appellant had not given the list of locations and, therefore, its submission that respondent No.2 had adequate lists of locations available but still failed to install the contract objects was not acceptable. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract. These are findings of facts which are arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental breach on the part of the appellant in carrying out its obligations, with no fault of respondent No.2 which had invested whooping amount of Rs.163 crores in the project. A perusal of the award reveals that the Tribunal investigated the

conduct of entire transaction between the parties pertaining to the work order, including withholding of DTC locations, allegations and counter allegations by the parties concerning installed objects. The arbitrators did not focus on a particular breach *qua* particular number of objects/class of objects. Respondent No.2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract and once acted committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the termination of contract by respondent No.2 was in order and valid. The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by catena of judgments pronounced by this Court without any exception thereto[6].

44) At this stage, we may deal with the contention of the appellant to the effect that the arbitrators have themselves recorded a finding that the LC was still in operation and had not expired and, therefore, the finding of the Tribunal that the contract was terminated validly was self contradictory.

6 (See – *Associate Builders* v. *Delhi Development Authority*, (2015) 3 SCC 49, and *S. Munishamappa* v. *B. Venkatarayappa & Ors.*, (1981) 3 SCC 260)

45) Though this contention appears to be attractive in the first blush, we find no substance in the same on deeper examination thereof. It was rightly contended by Mr. Dada that the Arbitral Tribunal has held that since the contract was terminated on 19.02.1999, the appellant was not required to renew the LC. In other words, since there was no contract in existence after 19.02.1999, there could not be a breach. It is APT to quote the following discussion from the award of the arbitrators:

> "24...The grievance of the Claimants that by not renewing letter of credit which expired on April 30, 1999, the Respondents have committed the breach, cannot be accepted. In the first instance, the Claimants cannot complain about non-renewal of Letter of Credit on April 30, 1999 when the claimants themselves have terminated the contract by notice dated February 19, 1999. Secondly, the claimants have invoked the arbitration on April 13, 1999 and these events having taken place prior to April 30, 1999, there was no point in Respondents renewing Letter of Credit for the benefit of the Claimants."

46) By the aforesaid analysis, the Arbitral Tribunal did not accept the contention of respondent No.2, which was predicated on non-renewal of the LC. However, the context in which these observations are made is abundantly clear. The Arbitral Tribunal had confined the discussion revolving around the contention of respondent No.2 as to why the LC was not extended even after 30.04.1999. In this hue, it was observed that there was no

reason or rationale in doing so when the contract had itself come to an end as it had been terminated by respondent No.2 itself vide notice dated 19.02.1999. It would not follow therefrom that respondent No.2 was wrong in terminating the contract. Insofar as the termination of the contract is concerned, the Arbitral Tribunal dealt with the issue specifically and on independent examination thereof had came to the conclusion that respondent No.2 was justified in the said action as there were other breaches on the part of the appellant. It is to be borne in mind that non-renewal of LC was not the only breach alleged by respondent No.2, which had asserted various other acts of breach on the part of the appellant. In this behalf, Mr. Dada drew our attention, and rightly so, to the letter dated 18.11.1998 which is contemporaneous to the letter of termination, wherein respondent No.2 categorically alleged fabrication of Commissioning Reports of installed objects and the financial blockade created by the issue of *NIL* Performance Certificates by the appellant. This letter is referred to in the letter of 19.02.1999 by incorporating references contained in the letter dated 23.12.1998. Respondent No.2, in its Statement of Claim, has also asserted the harassment and deliberate breach of the appellant in the course of installation of objects such as fabrication of failure reports and

commissioning reports, obstructing payments by bogus deductions in performance certificates and other wrong practices of the appellant staff. The serious grievances of respondent No.2 in respect of installed objects were considered at length by the Arbitral Tribunal and accepted the same.

47) We have already referred to these findings hereinabove. Learned senior counsel appearing for respondent No.2 referred to the judgment of this Court in ***Juggilal Kamlapat*** v. ***Pratapmal Rameshwar***[7] wherein it has been held that repudiation of a contract can be justified on the basis of any ground that existed in fact, even though not stated in the correspondence. Following passage from the said judgment needs a quote:

> "23. It was also contended that the defendant not having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective, was estopped from justifying their requisition of the contracts on that around. As the High Court has pointed out no case of estoppel was pleaded by the plaintiff and, therefore, it was the plaintiff who should be precluded from raising the question of estoppel. Apart from that, the law permits defendant to justify the repudiation on any ground which existed at the time of the repudiation whether or not the ground was stated in the correspondence. (See *Nune Sivayya* v. *Maddu Ranganayakulu,* AIR 1935 PC 67 : 62 IA 89, 98)."

48) One more aspect needs to be adverted to at this stage

7 (1978) 1 SCC 69

which incidentally arises in view of the submission of Mr. Vikas Singh, learned senior counsel appearing for the appellant.

49) It was argued that respondent No.2 should have installed objects at least under category B-2, even if there was breach on the part of the appellant in supplying locations for categories B-1 and B-3. This was refuted by learned senior counsel appearing for respondent No.2 on the round that the Arbitral Tribunal had specifically considered and rejected this argument and the approach of the arbitrators is even upheld by the learned Single Judge as well as the Division Bench of the High Court. We may point out that the Arbitral Tribunal has dealt with this aspect in the following manner:

> "Datar was asked a specific question as to how the Claimants did not install the contract objects in category B-II and the answer of the witness was in four parts. The witness claimed that (a) the contract was entered into considering the commercial efficacy of installing given quantity of B-I and B-III categories to counter balance low revenue from B-II category. The witness claimed that as the Respondents did not supply the list of categories B-I and B-III, the Claimants were entitled to withhold installation of category B-II; (b) The annually installed at Nasik under B-II category was install at Nasik under B-II category was relatively less obstructive in Nasik Circle; (c) the locations under category B-II were intervened with locations of categories B-I and B-III and it was practically unviable to install objects of category B-II selectively. The list of B-II category was also required to be re identified by the Respondents separately as was done for the Nasik Circle and (d) the Respondents unilaterally willingly revoked the

permission granted earlier to install simultaneously by letter dated December 21, 1998. Some of the reasons given by the witness cannot be termed as unreasonable in the facts and circumstances of the case. It cannot be overlooked that in respect of installation of objects under category B-II, the Claimants were entitled only to the rates fixed under year 1993 and 1994 contract till the expiration of six year period while in respect of categories B-I and B-III, the lease rentals were considerably high.

In any event, it does not lie in the mouth of the Respondents to urge that the claimants should have installed contract objects under category B-II when specific directions were given on December 21, 1998 to install objects under category B-II only after completion of installation under category B-I. The Respondents claimed that 16,477 locations were available on February 19, 1999 but that is not correct because taking into consideration 10,541 locations of category B-II the available locations out of B-I and B-III categories were 5,932."

50) The Division Bench dealt with this contention in the following manner:

"In our view from the material on record, it is abundantly clear that supply of DTC Lists was a fundamental term of the Work Order and MSEB had miserably failed in complying with the said fundamental term and there was a breach on the part of the MSEB in supplying the DTC locations which eventually prevented DSL from installation of contract objects. It has to be noted here that after the work order was issued by MSEB, DSL had to make necessary arrangements for the purpose of carrying out the process of installation of the contract objects. This included procurement of raw material from a foreign country, starting the process of manufacturing gadgets, making arrangements for transportation of these contract objects to the places where the said gadgets were to be installed, employment of trained, skilled and other staff, making available vehicles for transporting these contract objects to the DTC location where they were to be installed and, finally,

co-ordinating with the Officers of MSEB so that after the contract objects were installed, a Certificate of installation could be given by the Officers of MSEB so that from that point onwards, lease rentals could become payable to DSL. It has to be borne in mind that the nature of the Work Order was such that it was in the interest of DSL to ensure that the contract objects are installed and certificates to that effect are obtained from the Officers of MSEB. It does not sound to reason that after having invested huge amount of almost Rs 163 crores, as observed by the Tribunal in the Award, DSL would not install the objects because it was in their interest to get the objects installed so that returns on their huge investment would start thereafter. It is inconceivable therefore that though DTC Lists were available, DSL would not install the contract objects. Various facts and figures were given by MSEB to show that DTC locations were known to DSL and yet they had failed in installing the contract objects is without any substance. It cannot be forgotten that, initially, the sequence of installation was Kolhapur, Nasik and Aurangabad. This sequence was later on changed to Nasik, Kolhapur and Aurangabad. This was again changed and permission was given to DSL to install the objects at any time at any place and, lastly, again, this was changed and direction was given to DSL to adhere to the sequence as per the Work Order. This being the position, even assuming that B-II Lists were available, DSL could not have installed these contract objects because they were asked to follow the schedule again by letter dated 21/12/1998 and, therefore, even if the lists were available, it was not possible for DSL to simultaneously install all those objects since they were told to adhere to the sequence in the Work Order if the lists of locations under B-I were not given, even assuming that they had B-II lists of locations they could not have and were not actually allowed to install at the said B-II locations. It has come on record that more than 10,000 objects were manufactured and ready for installation. There is no earthly reason why DSL would fail to install the objects which were inspected and ready for installation. The only obvious reason would be that they were unable to do so on account of various orders which were passed by MSEB from time to time preventing them from performing their obligation. MSEB has not examined any of its Superintending Engineers who were in

> charge of supplying the Lists. The cumulative effect of all the material which has been brought on record is that it clearly demonstrates the failure on the part of MSEB in supplying the Lists of DTC locations which was a fundamental term of the contract."

51) We agree with the contention of respondent No.2 that these are pure findings of facts and there is no perversity therein. It may, however, be pointed out that out of 12555 B-2 category objects under the work order, 9515 objects were to be installed in Kolhapur Zone, i.e. 76% of the said category. Vide letter dated 14.07.1997, the Chief Engineer, Kolhapur Zone admittedly directed respondent No.2 to first complete new installation (B-1 and B-3) and only thereafter take up installation under category B-2. The locations for B-1 and B-3 from Kolhapur were admittedly never furnished. Therefore, this contention of the appellant also warrants a rejection.

52) The award of the Arbitral Tribunal having been affirmed by the learned Single Judge as well as the Division Bench of the High Court, that too after dealing with each and every argument raised by the appellant in detail, which is negatived, we hold that Mr. Dada is correct in his argument that there is no question of law which is involved herein and the only attempt of the appellant was to re-argue the matter afresh, which was impermissible.

AWARD OF DAMAGES :

53) Refuting the argument of the appellant that there was no breach in respect of 17294 installed objects and, therefore, no damages were payable in that behalf, Mr. Dada pointed out that the appellant had itself submitted before the Arbitral Tribunal as under:

> "The respondents submitted that the claimants at the most would be entitled to the costs of the objects installed, i.e. cost of 17294 contract objects. Alternatively it was submitted that the claimants would be entitled to lease rent for reasonable period after deducting the cost of maintenance and taking out of print outs."

He also pointed out that identical submission is to be found in the written submissions filed by the appellant before the Arbitral Tribunal at para 13. According to him, the arbitrators accepted the said submission of the appellant and awarded damages. The appellant is, therefore, not at all entitled to invoke public policy to challenge the award on the said premise. This aspect has been considered by the Division Bench at para 73, which has already been reproduced above.

54) We see substance in the contention of respondent No.2 and are of the opinion that the appellant cannot now turn around and raise objection to the award of damages which are measured

having regard to the loss suffered by respondent No.2 in terms of lease rent for reasonable period for which it would have been entitled to otherwise.

55) That apart, we also find that the Arbitral Tribunal, while awarding the damages, has relied upon the judgment of this Court in ***Union of India & Ors.*** v. ***Sugauli Sugar Works (P) Ltd.***[8] wherein a cardinal principle of damages had been laid down to the effect that the injured party should be placed in as good a position as money could do as if the contract had been performed. Following passage from the said judgment was kept in mind by the Arbitral Tribunal:

> "22. The market rate is a presumptive test because it is the general intention of the law that, in giving damages, for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. The rule as to market price is intended to secure only an indemnity to the purchaser. The market value is taken because it is presumed to be the true value of the goods to the purchaser. One of the principles for award of damages is that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach. Therefore, the principle is that as far as possible the injured party should be placed in as good a situation as if the contract had been performed. In other words, it is to provide compensation for pecuniary loss which naturally flows from the breach. The High Court

8 (1976) 3 SCC 32

> correctly applied these principles and adopted the contract price in the facts and circumstances of the case as the correct basis for compensation."

56) In the instant case, applying the aforesaid principle, the Arbitral Tribunal, for the purpose of classification, considered a 30% reduction in lease rent to compute damages for installed objects, 50% reduction in lease rent to compute damages for manufactured but uninstalled objects and the bare cost of raw materials for the objects not manufactured. No *pendente lite* interest was awarded, though the proceedings went on for five and a half years. Thus, the Arbitral Tribunal awarded almost the same amount as was invested by respondent No.2 for the project. Interest was awarded only @ 10% per annum from the date of the award as opposed to the prevailing bank rate of about 21%.

The aforesaid being a reasonable and plausible measure adopted by the Arbitral Tribunal for awarding the damages, there is no question of interdicting with the same.

57) It may be noted that Mr. Dada had argued that it was incumbent upon the Arbitral Tribunal to take into account the practices of leasing trade when making the award, having regard to the provisions of Section 28(3) of the Indian Contract Act, 1872. He had drawn our attention to Article 13(2) of UNIDROIT

Convention on international lease, which stipulates as under:

> "Where the lessee's default is substantial, then subject to paragraph 5 the lessor may also require accelerated payment of the value of the future rentals, where the leasing agreement so provides, or may terminate the leasing agreement and after such termination:
>
> (a) recover possession of the equipment; and
>
> (b) recover such damages as will place the lessor in the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms."

58) In the aforesaid backdrop, we agree with the approach of the High Court in spelling out the proposition of law that once it is established that the party was justified in terminating the contract on account of fundamental breach thereof, then the said innocent party is entitled to claim damages for the entire contract, i.e. for the part which is performed and also for the part of the contract which it was prevented from performing. We may usefully refer to the following dicta laid down in ***Suisse Atlantique Societe d'Armament SA*** v. ***NV Rotterdamsche Kolen Centrale***[9]:

> "...if facts of that kind could be proved I think it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already

9 1966 A.C. 361 (pages 397-398)

> happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance.
>
> If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term..."
>
> (emphasis supplied)

59) We, thus, do not find any infirmity in the manner in which damages are awarded in favour of respondent No.2.

RE : MITIGATION OF DAMAGES

60) Mr. Rafique Dada also countered the argument of the appellant on mitigation of damages with the submission that this aspect was specifically considered and the contention of the appellant in this behalf was rejected not only by the Arbitral Tribunal but by the High Court as well. He referred to the relevant portion of the discussion in the award as well as the judgments.

We find that the Arbitral Tribunal has dealt with this aspect and held that the contract objects were custom built in the

following manner:

> "55. Respondents submitted that the Claimants did not make any efforts to mitigate the loss suffered. The submission is without any merit for more than one reason. In the first instance, the contract objects manufactured in pursuance of the orders of the Respondents were custom built i.e. to the specifications laid down by the Respondents and these contract objects cannot be disposed in open market. Datar deposed with reference to Exh. C 16 that efforts were made to sell the contract objects stranded in the factory to other Electricity Boards but those efforts did not succeed. It was contended by the Respondents that the claimants should have dismantled the stranded contract objects and sold the components thereof. The submission is only required to be slated to be rejected. Once an electronic instrument is dismantled, then the value almost becomes nil. In any event, the Claimants have established that efforts were made to mitigate the loss."

61) The learned Single Judge as well as the Division Bench of the High Court has given its imprimatur to the aforesaid findings. It, therefore, becomes apparent that the objects in question were manufactured by respondent No.2 to suit the specific needs of the appellant ad they could not be used otherwise. Therefore, there was no possibility on the part of respondent No.2 to make an endeavour to dispose of the same in order to mitigate the loses.

RE : WAIVER

62) The argument of the appellant on waiver is also successfully met by respondent No.2. Submission of Mr. Dada,

on this argument, was that both parties went to trial before the Arbitral Tribunal on the basis that the time to start work under the contract had commenced with reference to letter dated 14.07.1997 of the appellant signed by the Chief Engineer who was the competent authority under the contract. The same Chief Engineer insisted, by letter dated 20.04.1998, that liquidated damages would be imposed if the work was not completed in time. We may point out that the Arbitral Tribunal considered and rejected this argument of waiver, as set up by the appellant, in the following words:

> "18... It was then contended that the Claimants had waived the right to receive the lists of locations from the Respondents. By reference to clause 5.1 of the work order, it was submitted that the Claimants were to commence installation within four months from (a) the date of the work order; (b) opening of Letter of Credit and (c) on receipt of complete list of locations, whichever is later. It was contended that the Claimants were entitled to wait till all the lists were supplied to installation, but as the Claimants commenced installation even though the entire lists were not supplied, it should be concluded that the Claimants have waived their right. The submission is desperate and wholly unfair. The Respondents were in a hurry to complete the installation within a period of 20 months with an object to save the large amount lost due to loss of energy. Merely because the Claimants acted in a reasonable manner and did not insist upon the terms of the contract, it is absurd to suggest that the Claimants waived their right to complain about non-supply of lists of locations. It was then submitted that the Claimants had installed contract objects on the oral instructions and on the basis of chits issued by some of the Officers of the Respondents and that was contrary to the terms of the work order which

> provided that installation should be only on locations, the lists of which are given in accordance with the format at Annexure 'E' to the work order. It was also submitted that on 155 locations at Jalgaon, Dhule and Aurangabad, the lists were received by the Claimants from Authorities who were not competent to issue such lists. The submission has no merit because while undertaking such a huge project, the parties were not keen on strict compliance of each and every term and condition of the contract. Such an instance would have defeated the contract at once because the contract had to be carried out over a large area and with the interaction of large number of people. These factors cannot establish that the claimants have waived their right to complaint about the failure to supply lists of location..."

63) Mr. Vikas Singh, learned senior counsel appearing for the appellant, referred to and relied upon various judgments in support of his contention. These judgments deal with the scope of interference in the awards passed by the arbitrators. It is not even necessary to deal with these judgments inasmuch as, on the facts of this case, as discussed in detail hereinabove, none of the judgments gets attracted. Likewise, effort on the part of the appellant to rely upon the judgment of the learned single Judge of the High Court in the first round is futile as that was set aside by the Division Bench and matter was remitted back to the single Judge of the High Court to decide it afresh.

RE: ORDER ON CHAMBER SUMMONS

64) Three chamber summons were taken out by the appellant during the pendency of this appeal before the Division Bench. By

these chamber summons, the appellant intended to amend the petition which was filed by it under Section 34 of the Act as well as the appeal. The High Court after detailed discussion in the impugned judgment rejected these summons. We find that the amendment sought was highly belated. Arbitration petition filed under Section 34 of the Act was sought to be amended after a delay of eight years. Further, the amendment in the appeal, taking those very grounds on which amendment in the arbitration petition was sought, was sought after a delay of 3½ years. The High Court, thus, rightly rejected these summons and it is not necessary to have any elaborate discussion on these aspects.

65) In the ultimate analysis, having found no merit in any of the arguments raised by the appellant, the appeal is dismissed with costs.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI;
JANUARY 18, 2018.