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

Reserved on: 22.12.2014
Pronounced on: 30.04.2015

\+ **FAO(OS) 21/2009**

PURI CONSTRUCTION P. LTD. AND ORS… ……Appellants.

Versus

LARSEN AND TOUBRO LTD. AND ANR. ……..Respondents

\+ **FAO(OS) 22/2009**

MOHINDER PURI … ……Appellant

Versus

LARSEN AND TOUBRO LTD. AND ANR. ……..Respondents

\+ **FAO(OS) 23/2009**

PURI CONSTRUCTION P. LTD. AND ORS… ……Appellants.

Versus

LARSEN AND TOUBRO LTD. AND ANR. ……..Respondents

\+ **FAO(OS) 194/2009**

M/S. LARSEN AND TOUBRO LTD. ……Appellant

Versus

PURI CONSTRUCTION LTD. AND ORS. . ……..Respondents

Through: Sh. Arvind Nigam, Sr. Advocate with

Sh. M.R. Shamshad, Sh. Shashank Singh and Sh. Abdullah Umar, Advocates, for petitioner in FAO(OS)21/2009 and FAO(OS)23/2009 and respondent in FAO(OS)194/2009.
Sh. Ram Jethmalani, Sr. Advocate with Sh. Neeraj Malhotra and Sh. P. Garg, Advocates, for appellant in FAO(OS)22/2009 and Respondent No.3 in FAO(OS)194/2009.
Sh. Ashok. H. Desai, Sr. Advocate with Sh. Sameer Parekh, Ms. Rukmini Bobde, Sh. Kumar Shashank, Ms. Sanjana Ramachandran and Sh. Abhishek Vinod Deshmukh, Advocates, for L&T.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. These appeals under Section 37 of the Arbitration and Conciliation Act, 1996, (hereafter "the Act") are preferred against the judgment and order of the learned Single Judge dated 26.11.2008, in O.M.P. No. 26/2003. The impugned judgment set aside the order of the learned Sole Arbitrator who constituted the arbitral tribunal (hereafter "the Tribunal"), under Section 34 of the Act. The Tribunal had upheld claims by Puri Constructions Ltd and its sister concerns (collectively referred to as "PCL") against Larsen and Toubro Ltd ("L&T") and awarded, upon a finding of economic coercion of PCL, damages to the tune of ₹35 crores against L&T on account of breach of contract. L&T was directed to settle the claims of Lord Krishna Bank ("LKB") within four weeks - by repayment of loan of ₹ 6 crores with such interest that may be due and payable. A further direction to L&T was issued

to secure the release of title deeds of 15 acres of land from the bank and to reimburse PCL's interest charges and in default pay a sum of ₹75 crores for loss of saleable area in respect of the said 15 acres of land mortgaged with the LKB, within 4 weeks. Other consequential directions were issued in the award.

Facts of the case

2. PCL and its sister companies were in possession of vast stretches of land in Gurgaon District, Haryana. PCL secured licenses from the Director, Town and City Planning, Haryana (hereafter "Town Planner") to develop these lands for residential group housing scheme purposes. Initially, PCL had entered into an agreement with ITCREF (another company) and formed a joint venture known as 'Florentine India Ltd' to develop these lands for residential group housing project purposes. In terms of this joint venture, ITCREF funded PCL for purchasing other lands and acquiring licenses etc. Later, however, ITCREF decided to exit from property development business. For this purpose, it negotiated with PCL and introduced L&T into the project. ITCREF had unsettled claims against PCL. To secure its claim ITCREF mandated that its interests in the project should be mentioned in the agreement between PCL and L&T.

3. L&T (appellant in FAO(OS) 194/2009) and PCL (appellant in FAO (OS) Nos. 21-23/2009) entered into an agreement for land development (hereafter "the Development Agreement") on 10-03-1998 (signed on 19-01-1998). After the Development Agreement, a Supplementary Agreement was entered into between the two on 30-12-1999 (called "Supplementary

Agreement"). Pursuant to the Supplementary Agreement, a Tripartite Agreement was entered into between PCL, L&T and Lord Krishna Bank (LKB) on 10-01-2000 (hereafter "Tripartite Agreement").

Terms of the Development Agreement

4. According to the Development Agreement, the total land to be developed was 40.661 acres (Schedule "A"); however, in the beginning, L&T was to complete construction (within 60 months) in Schedule "B" of the property, which covered 18.025 acres ["Phase 1"]. After the completion of the first phase, L&T, in consultation with PCL, could review and revise the specifications, schedule and the mandate, according to market conditions. The Development Agreement stipulated that development of and construction upon the entire lands was L&T's responsibility, at its costs and expenses. It was entitled- as consideration, to 75% of the built up area together with proportionate interest in the land. PCL and others were entitled to the balance 25% of the area (Clause 7). The agreement, also, specifically recognized PCL's other commitment- in the form of an agreement with ITCREF (dated 30-07-1997) in terms of which PCL was to hand over 1,95,000 sq ft of built up area to ITCREF within 5 years. The option to choose the built up area was with ITCREF. After mentioning this commitment, the Development Agreement provided that the understanding of PCL with ITCREF stood further modified. PCL committed that an area of 2,20,416 sq. ft. was allocable to ITCREF to satisfy the latter's claim against it (PCL) and that the said area shall be out of PCL's share of built up area (in the Development Agreement with L&T). The Development Agreement, consequently, provided that out of the 25% share of PCL, an area of

2,20,416 sq ft stood committed (by it) to ITCREF against its (PCL's) liabilities (Clause 3(c)(i) of the agreement).

5. The agreement further provided that though the total land to be developed was 40.661 acres - mentioned in Schedule 'A', L&T was to undertake and complete construction initially at the spaces (out of Schedule A) known as Schedule 'B' of the property within a period of 60 months or such mutually extended period from the date of sanction of the building plan or clearance obtained under Section 37(i), whichever was later (Clause 26). Clause 26(a) of the Development Agreement stipulated that the construction of first phase i.e. at Schedule 'B' would involve an area of 3,00,000 sq ft; the total development of the area was to be done in 5 years. After completion of first phase, L&T, in consultation with PCL, had the *"option and liberty"* to review and revise the specifications, mandates and the built up area of the plan development and extend the period of completion by further period of 12 months depending upon the market conditions. The agreement provided for development of the area in phased manner in following terms:

> *"As part of Phase I Development, the Developer shall commence developing a portion of the Schedule 'A' Property more fully described in Schedule 'B' written hereunder and delineated in GREEN colour in the Sketch appended hereto, and referred to as 'Schedule 'B' Property' i.e. for an area of 18.025 Acres and complete within 60 months (five years). The balance of the construction in the Schedule 'A' Property will be taken up in terms of the license as per a Schedule of Construction mutually acceptable to the Owner and Developer, taking cognizance of the sales of developed Schedule 'B' Property and the prevailing real estate market conditions."*

6. After approval of the plans, and before the commencement of construction, PCL and L&T were to determine and demarcate the building/floor plans; the relative areas to be allotted proportionately in each block (or each tower), and also specify them by separate agreements: or by exchanging letters within 30 days of commencement of bookings for each place. PCL was to inform L&T about the built up area allocable ITCREF within 15 days thereof. The sale policy was to be finalized mutually between PCL and L&T. The agreement stipulated that the opening sale would be in the region of approximately ₹2000/- per square feet [Clause 18 (c) and (h)]. Clause 20 provided that PCL was to identify the built up area to be retained by the owners within 30 days of commencement of each phase. Clause 26 of the agreement provided that L&T was to complete construction of the building at Schedule 'B' property within a period of 60 months (or within a mutually extended period from the date of the sanction of building plan). Clause 34 of the agreement reads as under:

> *"The Developer shall not be deemed to be in default if the performance of its obligations hereunder is delayed or prevented by conditions constituting force-majeure which shall include but not be limited to any laws, order bye-laws, rule or direction of any Government or Municipal or statutory agency or other authority, restrains, injunctions from any court of law, withdrawal of permissions, non-availability of construction materials strikes, fire or any act of God, as also the prevailing real estate market conditions or any other reason or cause whatsoever beyond and the reasonable control of the Developer. All periods, hereunder fixed shall be deemed to have been extended by the periods equal to the periods of delay on account of the conditions constituting force majeure."*

7. The Schedule attached to the property spelt out the area of Schedule 'B' properties as 18.025 acres (to be developed initially by L&T within a

period of 5 years). This area was spread over on two sides of the road shown in the sketch attached with the agreement and was delineated in green. The agreement also annexed an agreement entered into between PCL and ITCREF; the latter providing that PCL had to pay ITCREF an amount of ₹ 39.59 crore. As a result of the understanding between the parties to resolve the disputes, it was agreed that PCL shall discharge the said debt liabilities by selling, conveying and transferring to ITCREF built up area out of the project. The extent of built up space mentioned in the agreement with ITCREF was 1,95,000 sq ft out of which 1,51,250 sq ft was to be given in Block 'A' and the remaining was to be given in Block B. The agreement also provided that the price or consideration for the built up area would be in the range of ₹2000/- per sq. ft. The Development Agreement specified that the agreement of PCL with ITCREF stood further modified and that PCL had committed 2,20,416 sq. ft. of the built up area to ITCREF and that of this, it committed an area of 1,53,500 sq. ft. to be given in buildings over Schedule B property and remaining area was to be given in phases in rest of the area shown in Schedule 'A' of properties.

Supplementary Agreement and Tripartite Agreement

8. Subsequent to the Development Agreement, parties corresponded with each other. This mainly concerned implementation of the arrangement and difficulties encountered by the parties. After lengthy correspondence and considering market situation, PCL and L&T entered into the Supplementary Agreement dated 30.12.1999. The Supplementary Agreement acknowledged that the parties had executed the Development Agreement; that PCL had obtained development plan sanction from the

Department of Town and Country Planning ("DTCP") *"by which time, in the opinion of the Developer, the adverse real estate market condition made the project financially unviable causing delay in launching of the project contemplated under the Development Agreement as provided under Clause 26"* . The Supplementary Agreement also stated that in terms of the original (Development Agreement) the "onus of paying EDC (External Development Charges) vested with L&T and that it had, in part compliance of that conditions paid ₹25 lakhs as EDC to the DTCP Haryana. The agreement further *inter alia*, stated that:

> *"Whereas the Developer has till date not furnished the Bank Guarantee(s) or paid the EDC, except for the sum of Rs. 25 lac as stated above. The Developer took the stand that in view of the adverse market conditions the project had become unviable and sought further time from the Owner to allow the prevailing real estate market condition to improve;*
>
> *Whereas the parties to the Development Agreement have discussed impact of continued adverse real estate market conditions on the project as also on the Development Agreement vis-a-vis nonpayment of EDC to the DTCP and consequent issue of the Show Cause Notice from DTCP, Haryana, dated 02/11/1999;*
>
> *Whereas the Developer is of the opinion that the project is not financially viable due to adverse real estate market conditions, but the Owner is confident in generating sales, for the project through a network of brokers and securing bookings for 75% of the constructed area of 3.84 lac sq ft. to be launched in the first phase within 3 to 6 months of the launch of sales;*
>
> *Whereas on the assurance as aforesaid of the Owner, the Developer has agreed to enter into a Tripartite Agreement with Lord Krishna Bank having its registered office at Indian Express Building, Kaloor*

Kochi who has agreed to pay Rs. 6 crores to DTCP Haryana as EDC as term loan to the Owner;

Whereas it is agreed between the parties to decide about the continuation/determination/renegotiation of the said Development Agreement depending upon the market response to the I Phase of the project involving construction of 3.84 lakh sq ft. as provided herein..''

9. The Supplementary Agreement specified that the parties would *"decide upon the continuation/determination/renegotiation of the said Development Agreement depending upon the market response to I Phase of the project"* which involved construction of 3.84 lakhs square feet. The Supplementary Agreement also stated that the Development Agreement would continue to bind the parties unless otherwise stated in the Supplementary Agreement, and that it was to come into force in the event of certain conditions being fulfilled, such as L&T replacing or taking over the bank guarantees furnished to the DTPC by PCL, etc. The Supplementary Agreement stated the area of first phase was 3.84 lac sq. ft. In the Development Agreement the area spelt out was 3 lac sq ft. The Supplementary Agreement provided that L&T would start construction in Phase-I of development subject to achieving confirmed bookings and selling targets undertaken by PCL in terms of details given in Annexure-II. Clause IV and V of the Supplementary Agreement stated as follows:

"IV. The Developer and OWNER have agreed to launch the first phase of development and start construction work for 3.84 lacs sq. ft. as the Owner has expressed his confidence in generating sales for the project through a network of brokers and securing confirmed bookings/sale or 75% of the area to be launched in the first phase within 3 to 6 months of the launch of sales.

V. That the Developer shall only commence construction in 1st Phase of Development subject to achieving confirmed booking/selling targets undertaken by the Owner as detailed in Annexure II to this Agreement at the location shown in the sketch annexed hereto with revised plans and specifications mutually agreed between the parties hereto."

10. Consequent to the Supplementary Agreement, a Tripartite Agreement was entered into between PCL, L&T and the Lord Krishna Bank (LKB). The Tripartite Agreement recounted, *inter alia*, the Development agreement, terms of the Supplementary Agreement and adverse real estate market conditions and postponement of the project/contract completion time. The Tripartite Agreement provided that LKB was to pay ₹6 crores to DTCP Haryana against EDC on behalf of PCL on or before 21-01-2000. The amount was to be treated as a term loan by LKB to PCL and ₹15 crore property already mortgaged by PCL was to be continued as a security. LKB was to continue another bank guarantee for a sum of ₹466.175 lakhs in favour of DTCP against the indemnity bond to be executed by L&T and LKB was to release to PCL the counter guarantees outstanding for the bank guarantee for ₹466.175 lakhs and refund - to PCL the margin money with accrued interest. L&T had to pay - to LKB ₹5.19 crores on behalf of PCL to discharge a loan availed by PCL -for payment of EDC on or before 19-01-2000. PCL and L&T also undertook to launch sale of apartments by 15-02-2000. The sale was to be completed within 30 months from the date of commencement of construction and all sale proceeds collected by L&T were to be deposited in an escrow account to be opened with LKB.

11. In a short time after the execution of the Tripartite Agreement, the entire project got mired in controversy. A whole range of disputes

concerning the interpretation of the conditions arose. L&T construed its obligation to pay EDC (to DTCP) *in futuro*, i.e., payment of subsequent EDCs. PCL, on the other hand, insisted that the EDC payment obligation also covered past payments. Apparently on 24.01.2000, it was noted before the DTCP that 4th, 5th and 6th instalments aggregating to ₹6.6 crores were outstanding. PCL asked L&T to provide a counter guarantee to LKB. L&T apparently opened an escrow account in LKB in terms of the Tripartite Agreement and subsequently paid ₹4.08 lakhs which were collected from prospective buyers. Meanwhile, the formal launch of the project was underway and on 28.03.2000, the parties agreed that the inaugural offer would be ₹4.175 lakhs with a discount of 10% per flat. L&T gave a counter guarantee for ₹4.65 crores to LKB on 29.03.2000. The project was launched in April, 2000. L&T sought clarifications on 07.04.2000 that out of the first phase of 3.84 lakhs sq.ft. constructed area, nothing was allocable to ITCREF. On 13.05.2000, an arbitration award was made against PCL in favour of ITCREF obliging the former to allot 106200 sq.ft. This was disclosed to L&T on 22.05.2000. Later, on 26.05.2000, L&T stated that the commitment made by PCL under the award was contrary to the agreement between the parties that the entire 3.84 lakhs sq.ft area could be first sold and no part of it could be allotted to ITCREF. It also claimed to be in the dark about the arbitration between PCL and ITCREF.

12. Subsequently, acrimonious correspondence took place between the parties and ITCREF made public the award and PCL's commitment to it; it also went to Court and secured a restraint order against the PCL, L&T and others on 21.07.2000, requiring them not to create any third party interest over the project. The allotment of area to ITCREF led to disputes and on

18.12.2000, PCL terminated the agreement with L&T. In its letter, it claimed to have taken over possession of the site on 30.10.2000. PCL approached this Court with an application under Section 11 of the Arbitration and Conciliation Act. On 14.02.2001, the Court appointed Justice G.N. Ray (Retired Supreme Court Judge) as the Tribunal to decide the disputes and differences between the parties.

Arbitration Proceedings:

13. On 17.03.2001, PCL lodged its statement of claims and also applied for interim relief under Section 17 of the Act. The claim against L&T was to satisfy the loan availed from LKB and obtain release of title deed of 15 acres of land and for an award of directing L&T to immediately return the title deeds of the land which were with it and also return sanctioned development plans and all connected licences, permits, permissions, etc. Damages to the tune of ₹300 crores and punitive damages to the tune of ₹100 crores were sought. On 31.05.2001, the Tribunal made an order on the Section 17 interim application filed by PCL. The order noted L&T's claim that the Development Agreement between the parties stood repudiated, and that it could not be directed to fulfill any of the obligations under it at that stage including the obligation to pay LKB. The order stated, inter alia, that "*it is, however, made clear that if L&T is compelled to make any payment in connection with the mortgage of some land with the bank, PCL/claimants will be entitled to get back the title deeds since mortgaged to the bank and to proceed with the development work in respect of such land only on payment of the amount which may have to be paid by the L&T to the Lord Krishna Bank after this Order*".

14. L&T challenged this order so far as it directed return of title deeds and plans by filing FAO 319/2001. In terms of the directions of this Court, the deeds and plans were deposited with Registrar of this Court. The Tribunal framed 14 issues or points for decision. PCL also relied on the deposition of its Managing Director, Mohan Puri who was also cross-examined.

15. Based upon the extensive hearings held, the materials placed on record and the written submissions of the parties, the Tribunal published the award on 28.12.2002. The Tribunal's findings, *inter alia*, are that firstly L&T jeopardised PCL's obligations towards ITCREF, whose interest was set out and safeguarded in the Development Agreement. Secondly, the award held that L&T resiled from, and went back upon, its original contractual obligations and tried to make sales unilaterally, without sanction of the revised development plan and without making any provision for the responsibility towards ITCREF. The Tribunal was of the opinion that PCL could not make any sale on the basis of unsanctioned development plans because that would have been illegal and entailed the risk of cancellation of licences. Thirdly, the Tribunal accepted PCL's contention that L&T had consciously decided to abandon the Development Agreement and omitted to pay the EDC and also defaulted in fulfillment of its obligations to the statutory authorities, ITCREF, as well as LKB. Fourthly, the Tribunal held that the object of the Supplementary Agreement (as consideration for the said contract's implementation) was unlawful because it sought to defeat the beneficial interest of the ITCREF, which was a signatory to the Development Agreement as a consenting party. The Tribunal also held that

the Supplementary Agreement was tainted by economic coercion and the signatures of PCL were obtained by withholding trust property.

Challenge to the award and the impugned judgment

16. L&T preferred an application under Section 34 of the Act, urging diverse grounds as the basis to set aside the award. The proceedings were resisted by PCL. After considering the submissions and the record, the impugned judgment was delivered, setting aside the award.

17. The learned Single Judge was of the opinion that the Tribunal committed a fundamental error in holding that there was economic duress or coercion which undermined the legality of the Supplementary Agreement. The impugned judgment held that when two business entities interact with each other and negotiate in business transactions, the primary consideration is profitability and economic viability. It was held, therefore, that the Tribunal fell into error in holding that L&T had insisted on continuation of contract under altered circumstances, and that PCL had no option but to agree to the terms of the Supplementary Agreement. There was no coercion in L&T seeking an assurance from PCL about assuming responsibility of marketing 75% of the developed area. It was also held that both PCL and L&T had equal bargaining power and if the former was unwilling to enter into an agreement, nobody could have forced it to. The learned Single Judge also held that the Tribunal's finding that the Supplementary Agreement was a *"non-starter"* was contrary to the material on record. He took note of the fact that L&T had executed counter guarantees upto the limit of ₹4.65 crores in favour of LKB to cover the guarantees provided by the bank to HUDA on behalf of PCL. The Single Judge set aside the award in totality holding that it was contrary to substantive law and public policy of India.

Contentions of parties: PCL's arguments

18. It was argued that the learned Single Judge fell into error by re-appreciating purely factual findings. Mr. Ram Jethmalani, learned senior counsel relied on *Union of India v. Bungo Steel Furnitures* (1967) 1 SCR 327; *M/s. Sudarshan Trading v. Govt. of Kerala* – (1989) 2 SCC 38; *Hindustan Construction Corporation v. State of J&K* AIR 1992 SC 2192; and *Raveendra Nathan v. State of Kerala* (1998) 9 SCC 410 in support of this submission.

19. It was argued that the findings relating to economic coercion were based on materials placed on record, which the learned Single Judge completely ignored and brushed aside. Learned Senior Counsel relied on the report of the Boston Consulting Group regarding feasibility of the project soon after its commissioning, which L&T's board resolution adopted for implementation. Likewise, its letters on EDC dated 28/9/1998, 8/12/1998, 2/4/1999, 6/4/1999, 27/4/1999, 4/5/1999, 7/5/1999, 6/10/1999, 7/10/1999, 8/10/1999, 14/10/1999 and PCL's letters dated 6/10/99, 8/10/99, 19/5/2000, 25/5/2000, 18/9/2000 and 18/12/2000 documenting coercion were relied upon. In this context, the Tribunal's finding that despite its order in I.A. No.4 of 2001 dated 18.11.2001 directing L&T to produce documents going to the root of the controversy between the parties, the latter *"chose to suppress various material documents..."* and the necessary adverse inference that had to be drawn, was emphasized.

20. Counsel relied on the following findings of the Arbitral Tribunal:

> *"This Tribunal finds that the respondent sought to jeopardize the claimants obligations towards ITC REF whose interests were set out and safeguarded in the Development Agreement dated 10th March, 1998. It also appears to this Tribunal that the respondent had resiled*

from its statutory obligations and sought to make sales unilaterally against express provision of the agreement and without getting the revised development plan sanctioned and without making allocation in favour of ITCREF.

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This Tribunal holds that the claimants were not obliged to make any sale on the basis of unsanctioned development plan because such action on the part of the claimants would be improper and illegal and will entail the risk of the licences being forfeited by DTCP.

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The chain of evidence both documentary and oral clearly establishes that it was the respondent that was in breach. From a mere perusal of the pleadings filed by the parties, it is clear that the respondent has chosen not to reply to paras 45,46,54, 56, 80 and 83 of the claim statement. In respect of paras 33,36, 70, 71, 72, 78, 87, 93, 96, 98, 114, 121, 131 and 143 the standard reply of the respondent has been that no separate comments are required and the record itself may be referred for true and correct import. There is no specific denial by the respondent of specific averments made by the claimants in relation to various paragraphs of the claim statement."

21. Mr. Jethmalani relied on Section 34 and stressed that it did not vest jurisdiction upon the Court to step into the shoes of the Tribunal and re-write the award or to sit as an appellate court. It was highlighted that the Arbitrator was a retired Judge of the Supreme Court, a highly respected and competent jurist and it could not be stated that the award disclosed fundamental breach of substantive provisions of any law, or was contrary to terms of the contract. Reliance was placed on the decisions reported as *Puri Construction v. Union of India* 1989 (1) SCC 411; *State of Orissa v. Kalinga Construction* – 1970 (2) SCC 861; *State of Rajasthan v. Puri Construction Co. Ltd* 1994 (6) SCC 485 and *Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar* 1980 (4) SCC 497.

22. It was argued that the Court could not take upon itself the burden of interpreting the contract and thereafter return a finding that the award was contrary to the contract and as such beyond jurisdiction. *Sudarshan Trading Co.* (supra); *Hindustan Construction Company* (supra) and *Raveendranathan* (supra) as well as *State of UP v. Allied Construction* 2003 (7) SCC 396; *Steel Authority of India v. Gupta Brothers* 2009 (10) SCC 63 and *Rashtriya Ispat Nigam v. Dewan Chand* 2012 (5) SCC 306 were relied on.

23. It was argued that a specific point on which the Tribunal was asked to return a finding by the parties was whether the Development Agreement dated 10.03.1998 entered into between the respondent and the claimants is binding on the parties or it stood novated by the Supplementary Agreement dated 30.12.1999 (first question). The counsel relied on the decision of the Supreme Court in *Alopi Parshad v. Union of India* [1960 (2) SCC 793] where it was held that:

> *".. If the reference is of a specific question of law, even if the award is erroneous, the decision being of arbitrators selected by the parties to adjudicate upon those questions, the award will bind the parties."*

24. To the same effect, the decisions in *Kapoor Nilokheri Co-Op. Dairy Farm Society Ltd. v. Union of India* [(1973) 1 SCC 708 at pg 713] and *Rashtriya Ispat Nigam* [supra] were relied on. In *Rashtriya Ispat (supra)* it was held that:

> *"(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face."*

25. Mr. Arvind Nigam, learned Senior counsel argued that the learned Single Judge failed to consider the findings with regard to (a) coercion by L&T and (b) fundamental breach of the agreement by it. He highlighted the following finding of the Tribunal:

> *"L&T had resiled from its statutory obligations and sought to make sales unilaterally against express provision of the agreement and without getting the revised development plan sanctioned and without making allocation in favour of ITCREF."*

26. It was argued that the Court had no jurisdiction to re-appreciate the facts, by examining the record before the Tribunal. The following findings of the impugned judgment (Paras 34-36 and 44) show that the learned Single Judge sat in appeal and re-appreciated the documentary evidence on record. :

> *"The conditions under which the contract signed are to be inferred from the facts and circumstances of the time when agreement was signed….*
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> ***************** ************
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> *.Section (sic Clause) 34 of the development agreement dated 10.03.1998 specifically provided about the impact of adverse and recessionary market conditions and the project could even be rescinded.....*
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> *********** ************
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> *44. .....It is also provided that recession in the market would have substantial effect, even to the extent of rescinding the contract. Under these circumstances, if any party could have suffered losses by breach of the contract, it was L&T and not PCL. In fact PCL had already pocketed its part of profit of the first phase and on the basis of this pocketing of profit of the first phase only, it was able to have land of 40.661 acres in its own name."*

27. Mr. Nigam submitted that no provision enables a party to abandon the contract and Clause 34 of the said Development Agreement did not aid

L&T. Clause 34 has to be read along with Clauses 27 and 28 of the Development Agreement. He also submits that findings relating to *"pocketing of profit"* were rendered *suo motu* by the learned Single Judge, and not based upon any pleading or evidence. It was urged that it is impermissible in law to read the terms of the contract selectively and to re-write the contract between the parties. Learned counsel argued that the learned Single Judge failed to consider the effects of Clauses 4, 7, 11, 12, 19, 25, 27 and 28 of the Development Agreement. In this context, the findings of the Tribunal that L&T had unilaterally and without provocation abandoned the site in terms of a directive issued by L&T Board of Directors were highlighted to state that consequently, Clauses 26 and 34 became redundant.

28. It was argued that the documentary and oral evidence before the Tribunal established that L&T withheld title deeds to secure PCL's consent to enter into the Supplementary Agreement. PCL signed the agreements under compulsion. It was urged that the impugned judgment did not reveal any reasoning how purely factual findings in the award, were contrary to the evidence on record and how the award was against public policy and law. The impugned judgment does not disclose any reason or *rationale* and is wholly unsustainable.

29. The findings in para 40 of the impugned judgment upsetting the Tribunal's findings, that the Supplementary and Tripartite Agreements were vitiated by PCL having been placed under coercion, are impeached by PCL. By holding that *"No reason whatsoever is given by the Arbitral Tribunal as to how and for what reasons the Tripartite Agreement was binding on L&T*

when the Supplementary Agreement providing execution of the Tripartite Agreement was not binding on the parties" argued Mr. Nigam, the impugned judgment suffers from a patent non-application of mind and misreading of the award. In this context, the operative findings in the Tribunal are relied on. The same is as follows:

> *"....Therefore, only the Development Agreement dated 10.03.1998 is binding on the parties to the said agreement and it is not novated by the Supplementary Agreement dated 30.12.1999. The issue No.1 is disposed of accordingly.*
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> *In the facts and circumstances of the case, as indicated earlier and in view of categorical deposition of Mr. Mohinder Puri had signed Supplementary Agreement dated 30.12.1999 and Tripartite Agreement dated 10.01.2000 under compulsion and in dire need of funding EDC payments."*

30. It was contended that on all counts, the Tribunal's findings were unexceptionable. It was submitted that the repeated failure to pay EDC dues, leading to the issuance of show cause notice by the DTCP, Haryana coupled with PCL's commitment to ITCREF were taken advantage of by L&T, which forced PCL by exerting economic duress, to agree to the terms of the Supplementary Agreement. Learned counsel submitted that the failure of L&T to take any concrete step towards developing the land and putting up any construction, and delaying the same on the pretext of adverse market conditions, amounted to its abandoning the project. Learned counsel relied on several letters by L&T showing that it displayed indifference towards the project, and had even commissioned a secret report from the Boston Consulting Group, to exit the residential real estate segment. However, it took advantage of PCL's prior commitment to ITCREF and sought to

leverage itself unfairly, never intending to really do anything serious towards the development and construction of the project. Counsel highlighted that L&T in fact never started construction, or had held itself in preparedness towards that end, despite plans having been sanctioned long ago. It was also argued that the reasons in the award could not have been faulted, since the Tribunal had the authority – in view of express consent to the issues and claims referred to it to render fact based findings as well as those in law. Learned Senior Counsel lastly submitted that the damages and other amounts awarded are justified and legally tenable.

Contentions of L&T

31. Mr. Ashok Desai and Mr. Atul Rajadhyaksha, learned senior counsel representing L&T argued that the findings of the learned Single Judge are sound and do not call for interference. Elaborating, it was contended that the award impugned by L &T was facially untenable. Counsel urged that after identifying the "core issue" at the outset, the award failed to address it. Instead - urged L&T, the award held that the preconditions for the application were unfulfilled. This finding is unreasoned and could not stand, in view of Section 31 (2) of the Act. Counsel stated that *after* holding that the Supplementary Agreement was not binding on this ground, the Tribunal rendered a conflicting finding inasmuch as it faulted L&T in its obligation to LKB, which was both a third party (to the arbitration agreement) and whose rights if at all, stemmed as a consequence of the Supplementary Agreement. It was emphasized that this ground rendered the award, in fundamental breach of provisions of the Act and invalid under Section 34.

32. It was argued that wherever an Arbitral Tribunal decides the dispute not in accordance with the substantive law for the time being in force in India, the award is liable to be set aside under Section 34 of the Act read with Section 28(1) of the Arbitration and Conciliation Act. It is urged that in the present case, the Arbitral Award decided matters not *in* accordance with terms of the contract and its findings were correctly set aside.

33. It is argued that the Tribunal's findings regarding the conditions precedent, for the applicability of the Supplementary Agreement, i.e Clauses II and III were unwarranted and militated against a plain reading of the contract. Instead, Clause I stipulated the preconditions. The said condition reads as follows:

> *"CLAUSE I: That the terms of Development Agreement will continue to bind the parties hereto, unless otherwise agreed to in these presents which shall come into effect on happening of the following events:*
> *I) DEVELOPER replacing or taking over the Bank Guarantees furnished by the OWNERS through their Banker to DTCP Haryana.*
> *ii) Payment of EDC amounting to Rs. 6 Crore by Lord Krishna Bank to DTCP Haryana, in terms of the Tripartite Agreement between the parties hereto with Lord Krishna Bank.*
> *iii) Reimbursement of expense incurred by the OWNER as detailed in Annexure 1, on production of proof of payment thereof.*
> *iii) Compliance of terms and conditions of the Tripartite Agreement between the parties hereto with Lord Krishna Bank, inter alia the DEVELOPER paying Rs.5.19 crore to Lord Krishna Bank, on behalf of OWNERS towards discharge of the loan availed by the OWNERS for payment of EDC. The said sum of Rs.519 crore shall be a secured interest free loan by the DEVELOPER to the OWNERS."*

34. Underlining that by reason of Section 28 (3), the Tribunal was under a legal mandate to decide the issues referred to it, learned counsel stressed that the summary rejection of applicability of the Supplementary Agreement in

the award rendered it vulnerable; it was, therefore, rightly set aside by the impugned judgment.

35. It is urged that before 27-01-2000, L&T paid ₹5.19 crores to LKB and the bank in turn tendered ₹6. 00 crores to DTCP towards EDC. Conditions No. (ii) and (iv) of the Supplementary Agreement were thus satisfied by end of January, 2000. It was stated that by 01-03-2000, L&T paid ₹46,30,692/- to PCL, as agreed in the Supplementary Agreement fulfilling condition (iii) of the Supplementary Agreement. L&T relied on PCL's letter, dated 15-03-2000 to LKB to show that substitution of the said bank guarantees contemplated in the Supplementary Agreement was not acceptable to DTCP and the existing Bank Guarantee - of LKB on its (PCL's) behalf may be continued with their counter guarantee. L&T also stated that a counter guarantee for ₹465.775 lakhs was given on 29-03-2000 to the bank (LKB) satisfying all the preconditions of the Supplementary Agreement.

36. Learned Senior Counsel stated that the preconditions which actually triggered applicability of the Supplementary Agreement were: (a) L&T replacing or taking over the Bank Guarantees furnished by PCL through their banker to DTCP, Haryana; (b) Payment of EDC amounting to ₹ 6 crores by LKB to DTCP, Haryana in terms of the Tripartite Agreement between the parties (c) Reimbursement of expenses incurred by PCL, detailed in ANNEXURE I (to the Supplementary Agreement) on production of proof of payment thereof; and (d) compliance of the conditions of the Tripartite Agreement between the parties with LKB *inter alia* the L&T paying ₹5.19 crores to LKB, on behalf of PCL towards discharge of the loan availed by the latter for payment of EDC. ₹ 5.19 crores was to be secured interest free loan by L&T to PCL.

37. The Supplementary Agreement, urged counsel, modified Clause 19 of the Development Agreement inasmuch as firstly, EDC charges of ₹1013.14 lakhs paid so far by PCL was reimbursable only after receipt of such amount from prospective purchasers of the apartments in the project. Secondly, L &T agreed to pay the balance EDC as under: (i) ₹ 6 crores through M/s LKB as provided in Clause 1(B); (ii) Pay the remaining EDC charges over a period of 18 months in terms of licenses; (iii) EDC paid by the parties was reimbursable to each of them from out of the sale proceeds, as agreed in the Development Agreement.

38. Learned Senior Counsel argued that L&T's obligations under Clauses 26 and 34 of the Development Agreement underwent a radical change in view of the terms agreed to by PCL in the Supplementary Agreement, which was voluntarily entered into, especially Clauses IV and V. The documents on record in the arbitration established that the prevailing market conditions did not encourage development of the lands. Given this factual position, the Tribunal was bound to give weight and enforce the relevant contractual provisions. The Tribunal did not return any finding that the prevailing market conditions were encouraging or conducive to the development of the lands. The material showed that parties agreed that the prevailing market conditions were not conducive to land development. The Tribunal ignored these conditions and the evidence on record. Its award was arbitrary, irrational and independent of the contract and correctly interfered with under Section 34 of the Act as displaying an error apparent on the record.

39. Mr. Desai urged that PCL in its statement of claim contended that the claims of LKB had to be adjudicated by an appropriate forum since it was

not a party to the Development Agreement and thereby, not party to the arbitration clause. Therefore parties admittedly proceeded on the basis that the claims of LKB including its merits were beyond the scope of the reference. Despite this, the Tribunal directed L&T to settle the claims of LKB within four weeks of the award by repayment of loan of ₹ 6 crores (by the bank to PCL) with such interest that may be due and payable to the Bank. It also directed L&T to secure the release of title deeds from the said bank, and to reimburse PCL the interest charges paid by it to LKB within 4 weeks from the date of award. In default the award directed L&T to pay PCL ₹ 75 crores within four weeks from the date of the award. These directions were beyond the scope of the Tribunal's authority. In essence the merits of LKB's claims against PCL were prejudged to be valid and proper and L&T's responsibility to discharge those claims was fastened.

It is highlighted in this context, that having held that the Supplementary Agreement was not binding, the Tribunal could not have lawfully, even otherwise, rendered a finding based on L&T's default towards LKB, since the latter's rights were consequential to and flowing out of the Supplementary Agreement. This was an incurable illegality on the face of the record, which vitiated the award. Therefore, on both counts, i.e the Tribunal's venturing into areas beyond the reference, and beyond the agreement, in respect of a non-party's claims, and its irreconcilability with other findings, the award was correctly set aside under Section 34. It was further urged that since LKB had security in the form of mortgage over 15 acres of land, prior to the Development Agreement, with which L&T had no concern, the direction to pay ₹ 75 crores in default for not securing the title

deeds within a specified time was clearly beyond the authority of law and an error which vitiated the findings of the Tribunal.

40. Learned counsel for L&T relied on *Rashtriya Ispat Nigam Ltd. vs M/s Dewan Chand Rain Saran* (supra) and *Steel Authority of India Ltd vs. Gupta Brother Steel Tubes Ltd.* (supra) and argued that where an arbitrator travels beyond the contract, the award would be rendered without jurisdiction, resulting in legal misconduct because of which it can be set aside. Likewise, an award that is contrary to a substantive provision of any law is also vitiated and liable to be interfered with. Reliance was also placed on *Himachal Pradesh Electricity Board v R.J. Shah & Co* 1999 (2) SCR 643 where it was held that:

> *"In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the afirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand is the arbitration clause or a specific term in the contract or the law that does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiciton. In order to find whether the arbitrator has acted in excess of jurisdiction the Court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings."*

41. It is further argued that the Tribunal fundamentally erred in overlooking that PCL was in clear breach of the Supplementary Agreement

as it offered to ITCREF an area of 1,06,000 square feet -out a total area of 3,84,000 square feet- and also failed to procure the necessary bookings before which L&T was not obliged to start development in terms of the Supplementary Agreement. It was not PCL's case that it had complied with its obligations under the Supplementary Agreement such as achieving 25% booking. Learned counsel submitted that to the extent that the award dealt with claims of ITCREF and required L&T to provide for fulfillment of PCL's duties in that regard, not only was it beyond the scope of the arbitration agreement and reference, but even pre-judged pending disputes between the said party and PCL - as well as L&T itself. In all this, the award was contrary to substantive law and fundamental public policy of India and was was rightly set aside. Therefore, no interference was called for in PCL's appeals.

42. It was argued on behalf of the L&T that both pleadings and materials on record clearly established that after the Development Agreement had been entered into, the parties were aware about the recession and adverse market conditions. In this regard, various letters written by L&T to PCL (dated 08.12.1998, 22.12.1998, 25.03,1999, 27.05.1999, 07.10.1999, 15.11.1999) and the replies of PCL particularly those dated 10.12.1998, 26.12.1998, 20.03.1999, 03.12.1999 and 22.01.2000 were highlighted. It was submitted that in the light of these adverse conditions, the parties voluntarily entered into the Supplementary Agreement. Learned Senior Counsel highlighted that at no stage did PCL complain that it was forced or coerced into executing the Supplementary Agreement which in clear terms had the effect of reworking the contractual relationships. Reliance was placed upon the Minutes of meeting dated 19.11.1999, 09.12.1999 between

parties as well as several letters including those written by PCL on 22.11.1999, 02.01.2000, 27.01.2000, 21.02.2000, 23.02.2000 and 01.03.2000. It was submitted that in fact PCL had even appreciated the work done by L&T as was evident from the letter placed on the correspondence specially its letter dated 03.04.1998 (to ITCREF); dated 14.07.1998 and 05.08.1998 (to L&T) and even the letter of 12.04.2000 written to L&T well after the Supplementary Agreement and the Tripartite Agreement were executed. Highlighting that quite apart from the fact that the Tripartite Agreement also should have been tainted by coercion - which was in fact not found, it was emphasized that coercion had to be necessarily pleaded, learned counsel stated that none of the averments in the statement of claim in fact argued in terms that the Supplementary Agreement was vitiated on account of coercion. It was highlighted even otherwise that coercion only renders the agreement voidable. All the materials and facts clearly demonstrated that PCL did not avoid the Supplementary Agreement at any stage. Learned counsel relied upon the decisions of the Supreme Court reported as *Bishnu Deo Narain v. Singani Rai*, AIR (1951) SC 280; *Shanti Budhia Vesta Patel v. Nirmala Jai Prakash Tiwari*, (2010) 5 SCC 504. It was argued that reliance placed upon the decisions of this Court as regards economic coercion were not applicable in the circumstances.

43. Learned counsel next argued in the context of economic coercion - that the Development Agreement itself was entered into because PCL could not discharge its obligations under its contract with ITCREF. PCL in fact had no money. All the materials proved that PCL was anxious to enter into the Supplementary Agreement and the Tripartite Agreement; it even drafted the Tripartite Agreement and had requested L&T to draft the Supplementary

Agreement. Having entered into the contract willingly and at no stage having sought to avoid it, PCL could not successfully argue that the Supplementary Agreement was void on account of economic coercion. The findings of the Tribunal were correctly set aside by the learned Single Judge.

44. Counsel for the L&T argued that all the four conditions, i.e., L&T taking over/replacing the bank guarantees furnished by the PCL to DTCP; payment of EDC of ₹6 Crores by LKB to DTCP; reimbursement of expenses to PCL as detailed in Annexure-1 to Supplementary Agreement and payment of ₹5.19 Crores to LKB for discharging loan availed by PCL to pay EDC on interest free loan basis by L&T (to PCL) stood fulfilled. Learned counsel relied upon PCL's letters to L&T dated 27.01.2000, 21.02.2000, 23.02.2000 and PCL's letter to DTCP of 15.03.2000; L&T forwarding its counter guarantee dated 29.03.2000, 28.03.2000 to DTCP under cover of letter the next day, the payment of ₹ 6 Crore on 27.01.2000 by LKB, payment of ₹46,30,692/- by L&T - by way of reimbursement on 01.03.2000 and L&T further paying ₹5.19 Crore to LKB evidenced by letter dated 21.02.2000 were highlighted. It was argued that in the circumstances, the findings of the Tribunal that non-fulfillment of the pre-conditions for applicability of the Supplementary Agreement were without any basis or materials on the record. It was argued that in addition there was sufficient material to show that PCL took full advantage of the supplementary and Tripartite Agreements and then committed defaults, for which it blamed L&T. Various letters written after 19.04.2000 leading up to the termination letter by PCL to L&T on 18.12.2000 were relied upon. It was particularly stated that the L&T was kept in the dark about the pending arbitration before

ITCREF and PCL which resulted in an award dated 13.05.2000 and the MOU which PCL entered into with Ansal Builders dated 14.10.2000 - even during the subsistence of the parties' contract.

45. Learned Counsel argued that the PCL's claim, in arbitration proceedings was contrary to what was awarded. It was submitted that the direction in para V of the award to indemnify PCL against any action by ITCREF or in lieu thereof to pay a sum of ₹ 50 crores to PCL was not in contemplation during the arbitration and there was no prayer to that effect. Thus, this direction is clearly beyond the scope of the arbitration and relates to a person that is not even party to the arbitration. Similarly, the direction in para II to settle the claims of LKB and obtain release of title deeds, or in default pay ₹ 75 crores is also beyond the scope of arbitration inasmuch as LKB's claims were not before the Tribunal, and it was not a party to the arbitration. It was highlighted that PCL, in its affidavit filed by way of evidence before the Tribunal admitted that LKB is a third party and is not before the Arbitral Tribunal, that any action by it (LKB) can only be tried by the Debt Recovery Tribunal. The Tribunal had no jurisdiction or powers to deal with the same. Learned senior counsel stated that the admitted position before the Tribunal was that LKB's claim against L &T stood outside the scope of arbitration. Yet the Tribunal granted relief and directed payment to LKB.

46. It was argued that the Tribunal, while disposing of the application filed under Section 17 of the Act by its order dated 31.05.2001 directed as under:

"Coming to the question of release of documents of title to the extent of about nine acres of land since mortgaged to Lord Krishna Bank, it appears to me that in the interest of PCL/Claimants they will try to get the documents of title mortgaged with the Lord Krishna Bank released at an early date by making the payment of dues of the said bank. If they fail to do so, the lands owned by PCL/Claimants and not by L&T may be sold for redemption of mortgage with the said bank. As L&T is proceeding on the footing that the development agreement between the parties stand repudiated L&T, should not be directed to fulfill any of the obligations under the agreement at this stage including their obligation to pay to the Lord Krishna Bank. It is however made clear that if L&T is compelled to make any payment in connection with the mortgage of some land with the Bank PCL/Claimants will be entitled to get back the title deed since mortgaged to the Bank and to proceed with the development work in respect of such land only on payment of the amount which may have to be paid by L&T to the Lord Krishna Bank after this order." [emphasis supplied].

47. The direction contained in para III to return the licenses, permits etc., within 4 weeks and obtain a certificate of discharge or in lieu thereof pay a sum of ₹ 5 crores as damages is also beyond the pleadings and was never contemplated. There was no pleading or evidence to that effect, and admittedly the documents were with DTCP. It was also argued that further, there is no basis whatsoever for the quantification of the amounts awarded. The Tribunal overlooked the fact that land worth ₹ 203.31 crores was principally bought from money paid by ITCREF, and continued to remain with PCL.

48. L&T specifically argued that a fundamental error in the award related to adverse market conditions and the inference drawn by the Tribunal with respect to the BCG report. It was urged that there were prevailing adverse market conditions along with substantial correspondence in this regard. It is

submitted that from the Agreement dated 30.7.1997 with ITCREF, it is clear that originally PCL had represented that the apartments could be sold at ₹3,000/- per sq. ft. However, L&T taking a conservative estimate, in the Development Agreement itself (Clause 18 (h)) provided that ₹ 2,000/- per sq. ft. wasto be considered as the opening sale price. However, along the way, the prices in the market kept falling and went to below ₹ 1,100/- per sq. ft. This is, in fact, admitted by PCL in various correspondence. The project was finally launched at a sale price of ₹1,395/- per sq. ft. The project was launched on 6.4.2000 (after which PCL expressed satisfaction at the launch by letter dated 12.4.2000). There is no finding in the award withregard to market conditions at all. On the contrary, the award proceeds on the basis and accepts the submission of PCL that L&T wanted to exit real estate based on the report of BCG, and that since, the BCG report was not produced by L&T, adverse inference could be drawn.

49. It is contended that the entire arbitration award is erroneous on this issue. There were two specific reports namely, M/s Richard Ellis (RE) and M/s Jones Lang Lasselle (JLL), which found adverse market conditions. In these circumstances, whether the third report existed or not was irrelevant. More importantly, the Tribunal directed production of the report etc. in so far as they are related to the present project. Both the JLL and RE reports were duly produced. The BCG report related to restructuring of L&T and contained market sensitive information. Accordingly, the BCG report was not produced since firstly, it did not relate to the present project; and secondly, it could have been misused since it contained market sensitive information. Accordingly, the award, which proceeded on a wholly

erroneous basis drawing adverse inference against L&T for non-production of BCG report, is liable to be set aside on this ground as well.

50. L&T argued that the award suffers from other infirmities such as PCL's breaches, which were not considered. It is argued that the Tribunal proceeded on the basis that breaches were solely by L&T. However, the award did not appreciate the breaches by PCL which are evident and cannot be denied. Here it is argued that PCL did not pay L&T the EDC as required under Clause 19 of the Development Agreement. PCL had to pay EDC till the NOC was received from the Income Tax Authorities. This amount was paid finally after the Supplementary Agreement based on the money paid by L&T to LKB. It is argued here that L&T had to pay after 5th installment. On 23.1.1999 when it had paid ₹ 25,00,000/- this was adjusted towards PCL's outstanding liability. PCL contravened the agreement by allocating the land to ITC in the first phase of development contrary to the agreement between the parties. Entering into a fresh agreement with Ansals on 14.10.2000 during subsistence of the present Agreements was another serious breach. Furthermore, learned senior counsel stated that PCL did not get 75% bookings as required under the agreement.

51. Learned senior counsel points out that the award takes the figure of ₹ 280 crores of damages claimed by L&T. Thereafter, it states that since L&T was to keep 75% share, 25% was that of PCL. On this basis, PCL was entitled to get ₹ 93 crores. Subsequently, the Tribunal records that PCL continued to hold the lands and amounts were yet to be paid to ITCREF. Counsel states that the Tribunal further wrongly recorded that ₹ 21 crores had been forfeited by DTCP. Consequently it erroneously held that ₹ 35 crores would be adequate damages. It is submitted that this relief even if it is

in equity is without proper computation and more importantly, is fundamentally flawed. According to the Award the value of land was ₹ 5 crores per acre (i.e. ₹ 75 crores divided by 15 acres). PCL retained and continued to hold title for the 40.6623 acres of land valued about ₹ 203.31 crores. Accordingly, there was no question of paying any damages to PCL or in fact any loss accruing to PCL. Learned Senior Counsel stated that in fact, another error in the award is that L&T was to consider the profit of L&T to arrive at the profit which would have been made by PCL. While L&T's profit was based on the cost of construction, PCL was to provide the land as its share. The computation of profit of L&T cannot be equated to that of PCL. This is more so since a substantial part of the said share was to be used for paying ITCREF.

52. The remaining amounts awarded are also attacked as erroneous, contrary to terms of contract, against public policy and without basis. There are payments to be made in the alternative as penalty, which is neither permissible nor has any basis whatsoever. Here it is pointed out that ₹ 6 crores directed to be paid to LKB by L&T, with interest, to secure release of title-deeds from LKB; (in default whereof to pay ₹ 75 crores for loss of saleable area of 15 acres), is without jurisdiction. Similarly, the direction to return the licenses, permits etc., within four weeks and obtain a certificate of discharge or in lieu thereof to pay a sum of ₹ 5 crores as damages as well as the direction to indemnify PCL against any action or decree of settlement to be enforced by ITCREF, or in lieu thereof pay ₹ 50 crores, was an utterly fanciful award for damages, unrelated to any material on the record and based on no law. It was submitted that the direction to pay interest at 12%

per annum on sums awarded commencing from 4 weeks from date of Award till payment was contrary to law and public policy.

53. It is highlighted that under the order dated 24.1.2003 of the Learned Single Judge in OMP 26 of 2003, L&T paid a sum of ₹ 8.1 crores to LKB on behalf of PCL. This order was passed as an interim measure by the Single Judge pending OMP 26/2003 under Section 34. Since L&T has succeeded before the learned Single Judge, the amount is liable to be returned/refunded by PCL to L&T with interest subject to the findings in this appeal.

54. L&T claims that having spent a sum of ₹ 8,31,53,968/-. L&T is liable to be reimbursed the said amount with interest. L&T's counsel, Sh. Sameer Parekh states that the minimum sale price was fixed under the Development Agreement at ₹ 2,000/- per sq. ft. total 40,00,000 sq. ft. was to be built up. Total sale proceeds would be ₹ 800 crores. 75% of the total sale proceeds would be ₹ 600 crores. The construction cost was taken as ₹ 800/- per sq. ft. Therefore, total cost of construction to be borne by L&T is ₹ 320 crores. Thus, L&T was entitled to ₹ 600- ₹ 320=₹ 280 crores. It is alternatively submitted that the cost of construction decided between the parties for Phase - I pursuant to Supplementary Agreement may be taken i.e. ₹ 950+50=₹ 1,000/- per sq. ft. At this rate the total cost of construction comes to ₹ 400 crores and thus, entitlement of L&T comes to ₹ 600-₹ 400=₹200 crores. It was submitted that on the counter-claim, the learned Single Judge erroneously set aside the entire award and did not revisit the matter. The Tribunal's rejection was not, argued counsel, based on any sustainable reasoning.

55. On the question of title deeds it is submitted that they were initially lying with the agreed Counsel, who held them in trust for ITCREF (Clause 4.c.(vi) of DA in MCC at pg.9). Thus, when the title deeds were given to L&T it was holding them in turn in trust for ITCREF. In any event, they weredeposited before this Court in terms of order dated 30.05.2002 in L &T's appeal, FAO No.319/2001 against interim order or the tribunal directing handing over of title-deeds to PCL. Thus, upon PCL paying the amount mentioned in the counter claim, the Title Deeds may be released to PCL. In these circumstances it is argued that L&T is entitled to the amount paid to LKB, i.e. ₹ 8.1 crores with interest from the date of deposit, cost incurred, i.e ₹ 8,31,53,968/- (in terms of Annexure A) with interest) and damages @ ₹ 280 crores.

Analysis and Findings

The court's jurisdiction to interfere with an award under Section 34

56. Before we analyze the legal issues in this case, a survey of the jurisprudence on the scope of judicial interference with arbitral awards under Section 34 is called for. The provision deals with applications for setting aside an arbitral award. Of particular relevance is Section 34(2)(a)(v), which allows for the setting aside of an award when the arbitral procedure was "*not in accordance with* [Part One of the Arbitration Act], and Section 34(2)(b)(ii) which allows setting aside of an arbitral award in conflict with the public policy of India. In addition, Section 28(1) of the Act enacts that (in arbitrations which are not international commercial arbitrations), the arbitrator shall decide the dispute "*in accordance with the*

substantive law for the time being in force in India." Section 28(3) requires the arbitrator to "*decide in accordance with the terms of the contract*."

57. The interrelationship of these provisions was discussed by the Supreme Court in its landmark 2003 judgment, *Oil and Natural Gas Commission vs Saw Pipes*, (2003) 5 SCC 705 (hereafter *"ONGC"*). In that case, the Court clarified that when Section 34(2)(a)(v) states that the arbitral procedure must be in accordance with Part One, it means that the mandatory requirements of Section 28 must be followed by the arbitral tribunal, and failure to do so entails a setting aside of the award (paragraph 12). The judgment, if one could use the cliché, embodies the postulates upon which courts in India are to test the legality of arbitral awards under the Act. The Court held:

> "*If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties*." (paragraph 14)

58. The Court also held that *"public policy"*, under Section 34(2)(b)(ii), was to be given a *"broad meaning"*, and included situations where an award was *"patently illegal"*:

> "*Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void*." (paragraph 30)

59. In *ONGC*, the Supreme Court set aside the arbitral award on the ground that the tribunal had failed to consider Sections 73 and 74 of the Contract Act, and relevant precedents, in awarding damages. What is *"patent illegality"* has been clarified in subsequent cases. Let us consider some of them. In *Hindustan Coal Ltd. vs Friends Coal Carbonisation*, (2006) 4 SCC 445, the Court set aside an arbitral award which in its opinion – was plainly contrary to the wording of the price-escalation clause in the contract between the parties. The Tribunal had calculated price-escalation based on the price of a certain grade of coal, whereas a different grade was actually being used at the time. The Court held:

> *"But on account of apparent error in the Award, the calculation of escalation has been done with reference to the prevailing price of superior quality of coal (washery grade I) and the base price of inferior quality of coal (washery grade II) instead of calculating escalation with reference to the prevailing price of the superior quality of coal (washery grade I) and the base price of superior quality of coal (washery grade I). In fact, when queried by us, the learned Counsel for respondent could not explain with reference to contrary terms, how the base price of washery grade II coal could be applied to calculate the escalation in coke price produced by using washery grade I coal."*

60. *Delhi Development Authority vs R.S. Sharma* (2008) 13 SCC 80 is another instance, where the Court set aside an arbitral award on the ground that the arbitral tribunal had failed to "*advert to Clause 3.16*" of the disputed contract, which happened to be at the heart of the disagreement, and had given no reason for doing so. The Court held this to be *"an error apparent on the face of the record as well as contrary to the terms of the Agreement."*

61. In *Steel Authority of India Ltd vs Gupta Brothers* (supra), the Court held that Section 34 would be attracted in cases where an arbitrator "*travels*

beyond the contract", or makes an award "*contrary to the terms of the contract*". Section 34 however, the Court stated, cannot be used to set aside awards in which there was an "*error relatable to interpretation of the contract*", or if it was based on a "*possible view of the matter*", or if it was based on a finding of law in a case where a "*specific question of law* [had been] *submitted to the arbitrator*." In short, it was not the task of the Courts to examine the award in an appellate review process. In that case, the question was whether the breaches of contract alleged by the respondent were covered by the clause in the contract that contained the stipulation for damages under certain conditions. The arbitrator had found that they were not, and this finding was challenged. Refusing to set aside the award under Section 34, the Court held:

> *"The arbitrator's view about non- applicability of Clause 7.2 for refusal to supply materials in July-September, 1988 quarter and delayed supply of materials for October-December, 1988 quarter is founded on diverse grounds elaborately discussed in the award. Whether this is or is not a totally correct view is really immaterial but such view is a possible view that flows from reasonable construction of Clause 7.2. The view of the arbitrator being possible view on construction of Clause 7.2, and having not been found absurd or perverse or unreasonable by any of the three Courts, namely , Sub-Judge, District Judge and the High Court, we are afraid, no case for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution… Once the arbitrator has construed Clause 7.2 in a particular manner, and such construction is not absurd and appears to be plausible, it is not open to the courts to interfere with the award of the arbitrator. Legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with*

regard to construction of a contract, if it is a possible view of the matter." (paragraphs 31 – 32)

J.G. Engineers vs Union of India, (2011) 5 SCC 758, is a case where the Court refused to set aside an award on the ground that the arbitrator had erred on questions of fact, holding that factual conclusions were within the domain of the tribunal. The Court held:

> *"Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge."*

Similarly, in *MSK Projects vs State of Rajasthan*, (2011) 10 SCC 573, the Supreme Court noted that:

> *"If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award."*

62. A survey of these judgments reveals that Section 34 authorizes a very narrow – but sharply defined – jurisdiction to set aside the arbitral tribunal's award. Firstly, the court does not act as if it were an appellate court, re-visiting the evidence and undertaking an extensive factual review of the merits of the dispute with the mandate to cure or correct the errors (*Ref Sumitomo Heavy Industries v ONGC Ltd* 2010 (11) SCC 296; *Kwality Manufacturing Corporation v Central Warehousing Corporation* 2009 (5) SCC (Civ) 406). The court can set aside an award if it finds that the tribunal has made an error on the face of the contract, or provided a *"patently illegal"* interpretation of the law. Equally, if the arbitrator commits an error

in the construction of the contract, that is an error within his jurisdiction (Ref *MSK Projects (I) (JV) Ltd* (supra); *G. Ramachandra Reddy v Union of India* 2009 (6) SCC 414; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *Renusagar Power Co. Ltd. v. General Electric Co.* 1984 (4) SCC 679). In *McDermott International*, the Supreme Court clarified the Court's inherent limitation by reason of Section 34 in such matters:

> *"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).*
>
> *113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."*

63. Secondly, unless the Tribunal commits a patent error of law in adjudicating upon a question submitted to it, the Court will not intervene (*J.G. Engineers Pvt. Ltd v Union of India* 2011 (5) SCC 758). The expression "patently" illegal was explained as an error *"which, on the face of it, is patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect*

the administration of justice." (*Union of India v. Col. L.S.N. Murthy* 2012 (1) SCC 718). *J.G. Engineers* (supra) said that patent illegality is one which goes *"...to the very root of the matter and not a trivial illegality..."* The Supreme Court had recognized the high threshold of error of law in *Mc Dermott International*, (supra) where it was emphasized that the illegality should go to *"the root"* of the matter. *Oil and Natural Gas Commission v Western Geco* 2014 (9) SCC 263 outlined what is contrary to "public policy" in an award, warranting interference under Section 34:

> *"all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country." In particular, a court could assess whether a tribunal: (i) has applied a "judicial approach", i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it.."*

The law was succinctly re-visited and the correct principles re-stated in a recent decision reported as *Associate Builders v Delhi Development Authority* 2015 (3) SCC 49.

Were the conditions for applicability of the supplementary agreement satisfied?

64. In the context of this question, a reading of the award discloses that the Tribunal set-out the stipulations, i.e. four conditions (Clauses I (a), (b), (c) and (d). The Tribunal then extracted clauses II and III. The Tribunal was of the opinion that since the conditions precedent for the Supplementary Agreement were not satisfied, it remained a *"non-starter"*. The findings are as follows:

"The conditions precedent as specified in (I), (II)) and (III) of the said Supplementary Agreement were not satisfied. Therefore, the Supplementary Agreement remained a non starter. In that view of the matter, even if it is assumed that Mr. Mohinder Puri had represented other claimants in the supplementary agreement, the same was not operative for the reasons indicated above. Therefore, only the development agreement dated 10.03.1998 is binding on the parties to the said agreement and it is not novated by the supplementary agreement dated 30.12.1999. The issue no.1 is disposed of accordingly."

65. L&T sought to dispel this finding and contended firstly, that the Tribunal did not base its conclusion on any reasoning and that the conclusion is contrary to the record. L&T relies on the correspondence between the two disputing parties. So far as its taking-over or replacing the bank guarantee furnished to the DTCP by PCL is concerned, reliance is placed upon letters written by PCL dated 27.01.2000, 21.02.2000, 23.02.2000 and the letter dated 15.03.2000 by PCL to DTCP, its (L&T's) letter dated 29.03.2000 forwarding the counter guarantee to DTCP. The letter dated 27.01.2000 by PCL reports to L&T that LKB tendered ₹ 6 crores to the DTCP on 24.01.2000. L&T was asked to expeditiously take-over bank guarantee of ₹465.775 lakhs so that the margin money could be released. It also requested L&T to remit ₹ 41,17,322/- and Rupee equivalent of US $ 5000 in terms of the Supplementary Agreement. The letter informed that an affidavit undertaking to the DTCP to pay balance payment of ₹ 30 lakhs per month had been given. L&T was asked to remit ₹ 60 lakhs to DTCP and thereafter remit ₹30 lakhs every month. The letter of 23.02.2000 requested the L&T to furnish counter guarantee/letter of indemnity to LKT which had been furnished with the bank guarantee earlier. A copy of the bank

guarantee was also given to L&T. PCL wrote to LKB on 15.03.2000, requesting it to continue with the present bank guarantees favoring the DTCP against its counter guarantee and security for 15 acres of land. PCL's understanding at that stage was that L&T had furnished the counter guarantee. It is only on 29.03.2000 that a counter guarantee was in fact furnished for ₹ 465.775 lakhs towards bank guarantee facilities extended by LKB to PCL. Likewise, as far as the other conditions, i.e. payment of ₹ 6 crores as EDC [Clause I(b)]; reimbursement of expenses of ₹ 46,30,692/- and payment of ₹ 5.19 crores to LKB for discharging the loan availed by PCL from LKB to pay EDC is concerned, L&T relies upon letters for payment of ₹ 6 crores to DTCP by LKB in 27.01.2000; its payment to PCL on 01.03.2000 of ₹46,30,672/- and its payment of ₹ 5.19 crores to LKB on 21.01.2000.

66. PCL does not dispute the correctness of these facts as the events post the Tripartite Agreement in terms of the four conditions in fact took place. However, it underlines the fact that in terms of the recitals of Supplementary Agreement itself, L&T did not furnish the bank guarantee(s) or pay the EDC except for ₹ 25 lakhs as stated above. L&T took the stand that *"in view of the adverse market conditions, the project had become unviable and sought further time from the owner to allow the prevailing real estate market to improve"*. It is also emphasized that these conditions in fact preceded the coming into force of the Supplementary Agreement itself. PCL urges that L&T admitted before the Tribunal in its pleadings that the conditions precedent were not satisfied and that it did not also set-up the plea of waiver or substituted performance of the conditions precedent. PCL, therefore,

urges that it was in these circumstances that no issue of substituted performance or waiver was urged by the L&T.

67. Para 76 of the Statement of Claim asserted that the conditions for coming into force of the Supplementary Agreement were unsatisfied; Para 79 mentioned the Tripartite Agreement and para 81 averred that PCL altered its position to its detriment after execution of Supplementary Agreement and Tripartite Agreement and acted upon premises and warrants of L&T. Para 82 listed the amounts spent by PCL towards EDC (₹17,28,14,585/-), the last payment being on 24.10.2000; license fee renewal to the tune of ₹18,03,020/-, last payment being on 05.05.2000 and service charges paid between 14.06.1996 and 27.07.1998 aggregating to ₹ 5,99,388/-. Para 84 of the Statement of Claim asserted that the funding by LKB of ₹6 crores was against mortgage of 15 acres of PCL's land and on the undertaking of L&T to launch sale of apartments by 15.04.2000 and its undertaking to complete the development of 3.84 lakhs square feet within 30 months of commencement of construction. Para 86 states that despite express provisions of the Development Agreement and the Supplementary Agreement, even after 30.12.1999 L&T failed to pay even one installment of EDC despite PCL's written request and L&T's own written undertaking to DTCP to pay balance amount of ₹ 30 lakhs per month. PCL stated that it paid another ₹ 90 lakhs as EDC and that as on the date of the filing of the statement (of claim), approximately ₹ 8 crores inclusive of penal interest was due and payable as EDC to DTCP. Paras 91 and 93 mentioned that L&T unilaterally and after keeping PCL in the dark, launched the project on 06.04.2000, which was not approved by PCL.

68. Para 68 of the L&T's reply/counter statement deals with PCL's allegations which generally denies the averments that conditions precedent for the coming into force of the Settlement Agreement were not satisfied and relies upon a tabular statement showing respective obligations of the parties which it alleges that L&T *"satisfied all the conditions precedent that were to be performed"* under the Supplementary Agreement. In this regard, the table lists out the execution of counter guarantee of ₹ 465.775 lakhs and reimbursement of payments made to PCL. L&T also states that it had furnished a letter of indemnity to LKB as required by the latter. In reply to Para 79 of the statement, L&T, by para 70 of its pleadings relied upon various recitals in the Supplementary Agreement. Para 71 denies the averments in para 81 of the statement of claim and goes on to say,

> *"it is pertinent to mention here that preliminary recitals of the supplementary agreement clearly state that the parties to the development agreement have discussed the impact of continued adverse real estate market conditions as also development agreement, non-payment of EDP to DTCP and consequent issue of Show Cause Notice from DTCP dated 02.11.1999. Further, it was also made very clear that this respondent, (i.e. L&T) was of the opinion that the project is not financially viable due to adverse real estate market conditions but the claimants were "confident of raising, through their handwork, secure booking for 75% of the constructed area - 3.45 square feet to be launched in the first week (within three to six months of the launch of sales"*.

In reply to para 86, L&T asserted having paid ₹ 5.19 crores to LKB; payment of ₹ 6 crores by LKB to DTCP on account of EDC and its execution of counter guarantee to the extent of ₹ 465.775 lakhs to LKB towards guarantees given by that bank to HUDA. It also mentions ₹

40,48,660/- deposited in an escrow account maintained with LKB and relies upon documents (R-30 to R-34).

69. These materials on the record and the pleadings demonstrate that the parties were at controversy with respect to whether the preconditions for the coming into force of the Supplementary Agreement were fulfilled. The Tribunal - as is evident from the extract of the award took note not only of the four conditions, which were spelt-out in Clause I, but also the other two conditions, i.e. Clauses II and III. L&T's argument is that these were not pre-conditions and the Tribunal's interpretation of the contract and its conclusions are based on an entire misreading of the agreement. The question is whether the learned Single Judge in exercise of his jurisdiction under Section 34 could have donned the mantle of the arbitrator and re-appreciated the terms and rendered factual findings. Now, Clause II clearly mentioned that the bank guarantees had to be furnished by L&T to DTCP after final approval of term-loan by LKB to PCL and escrow account arrangement finalization, either through the PCL's bankers or any other bank acceptable to DTCP. The bank guarantees were to remain valid and in force up to the date of receipt of the completion certificate of the first phase of the project. Whilst the argument advanced by L&T that only four conditions needed fulfillment for the coming into force of the Supplementary Agreement are *prima facie* merited, it is equally irrefutable that though not listed as a part of the conditions (spelt out with clarity as pre-conditions in Clause I), the need for the bank guarantees in favor of DTCP by L&T, was a vital part of the conditions that triggered the obligations under the Supplementary Agreement. After all, the DTCP's continued approval of the

project in terms of the validity of the licenses was essential. Given that the payments were made by L&T to LKB to cover PCL's past liabilities and that the bank guarantee for ₹ 465.775 lakhs was furnished and a counter guarantee/indemnity was furnished to LKB to the tune of ₹ 465.775 lakhs, the further assurance to DTCP was also crucial.

70. The letter of 15.03.2000 by PCL to LKB refers to the Tripartite Agreement and LKB at the request of L&T having to issue bank guarantee for ₹ 466.175 lakhs in favor of DTCP. This letter states that the DTCP insisted that since PCL was the license holder, the substitution of L&T's bank guarantee was not acceptable. In these circumstances, the bank guarantee favoring DTCP as against the counter guarantee for securing 15 acres of land already given was requested. The terms of the bank guarantee - relied upon by the L&T in the letter dated 28.03.2000 recorded that in terms of the Development Agreement, the saleable space of the property and building was to be shared by the bank and PCL in the proportion of 75% and 25% and that L&T shall develop the scheduled property and construct thereon and complete the said buildings in all respects, and pay the EDC charges after the NOC from the appropriate authority, irrespective of whether the bank guarantees have been extended by LKB to the Director, Town and Country Planning Haryana:

> *"…….DO HEREBY UNDERTAKE AND GUARANTEE AS FOLLOWS…*
>
> *XXXXXX XXXXXX XXXXXX*
>
> *2. Notwithstanding any payment made or satisfaction received from or an account of aforementioned demands, we hereby authorise you to remit the amount directly to the*

beneficiary, Government of Haryana acting through the Director, Town and Country Planning, Haryana which amount, when paid by you shall deemed to be a Demand Loan repayable by us together with interest @ your PLR and penal interest, charges, interest expenses etc. made or incurred on account of the aforesaid Guarantee."

71. The Supplementary Agreement, in terms, sought to clarify the position with respect to the Development Agreement. Its terms had to be read as a whole given the fact that L&T relied upon payments made by LKB (which was of course entitled to in terms of the Development Agreement). The further question would be whether the Tribunal's findings with respect to the Supplementary Agreement being a non-starter is patently illegal and contrary to law as understood in the sense that it offends "justice and morality".

72. A complete reading of the Supplementary Agreement reveals that DTCP had issued a Show Cause Notice for non-payment of EDC and the proposed cancellation of the license on 02.11.1999. The Supplementary Agreement also acknowledged that PCL had paid EDC charges to the tune of ₹ 1013.14 lakhs which were reimbursable at the end of the project. The Supplementary Agreement itself acknowledged that the onus of paying EDC vested with the L&T but that it had paid ₹ 25 lakhs to DTCP by 30.12.1999, i.e. the date of the Supplementary Agreement. In view of these circumstances, this Court is of the opinion that the conclusion and finding of the arbitrator with respect to the Supplementary Agreement not having come into force at all - since it is evident that all the conditions were fulfilled only by end of March 2000 and not contemporaneous to the agreement itself, is

neither unreasonable nor a patent error as to be characterized as contrary to *"justice and morality".*

73. The impugned judgment discusses the factual matrix of the dispute, the award rendered by the Tribunal and the contentions of the parties under Section 34. The scope of the Court's jurisdiction under Section 34 was noticed in paras 30-32 of the impugned judgment. The learned Single Judge then viewed that all three agreements were entered into by the parties after due negotiations. He stated that the conditions under which the contracts were signed were to be inferred from the facts and circumstances at the time when the agreements were executed and felt that the Tribunal *"could not have ignored this correspondence and evidence."* All these materials were discussed in paras 33 and 34. In paras 36 and 37, the question as to whether PCL acted under coercion in entering into the Supplementary Agreement was discussed. Thereafter, in Para 39, learned Single Judge concluded that the Tribunal's findings that PCL entered the Supplementary Agreement under coercion was contrary to the evidence on record as well as contrary to public policy and law. He thereafter adversely commented - in Para 40, on the conclusions of the Tribunal as to its reasoning that the terms of the Tripartite Agreement were binding upon L&T. Para 42 of the impugned judgment, crucially, notices that so far as the first condition of replacing of bank guarantee was concerned, on account of DTCP's reservations, L&T furnished a counter guarantee to LKB which amounted to substantial fulfillment of that stipulation. The learned Single Judge then went into the appreciation of facts and stated that

"record shows that L&T addressed a letter tendering Rs.6 crores in terms of this agreement to the bank for EDC payment. L&T had also reimbursed payment of Rs.40,30,692/- as agreed under the agreement to PCL. The other condition was also satisfied when L&T paid to LKB an amount of Rs.5.19 crores on 21.01.2000. The documents in this regard were on the record of the learned Arbitral Tribunal. The Arbitral Tribunal did not refer to any evidence while holding that the supplementary agreement was a non-starter due to non-fulfillment of conditions."

74. Plainly therefore, the learned Single Judge entered the arena of appreciation of facts based on his reading of the evidence - something which is expressly forbidden. The impugned judgment, in terms rendered findings of fact. The averments of L&T nowhere are to the effect that payment of ₹ 6 crores was ever made. What it argued was that the payment of ₹ 6 crores was made by LKB to the DTCP and that it (L&T) furnished a bank guarantee - in fulfillment of condition I(a) to the tune of ₹ 466.175 lakhs. It also *"reimbursed"* the sum of ₹ 5.19 crores to LKB. However, the assumption that ₹ 6 crores was paid by L&T is not borne out from the record. In effect, that party is not even asserting this fact. It is worthwhile to note here that the bank guarantees - envisioned in Clause II of the Supplementary Agreement were not confined to the quantum furnished by L &T. The reference to a plurality of bank guarantees clearly envisioned that L&T had to make good the Bank Guarantee and assume responsibility - in terms of the other conditions of the Supplementary Agreement (as well as conditions of the Development Agreement) of payment of EDC. That it did not do so is a matter of record; in Para 60 of its written submissions before the Tribunal, it stated as much:

"This Respondent in terms of the Supplementary Agreement dt 30.12.1999 had executed counter guarantees up to a limit of Rs. 465.775 lacs to Lord Krishna Bank for guarantees given by LKB to HUDA on behalf of the Claimants. It is pertinent to mention here that Claimants have been taking an untenable stand that since this Respondent has not taken over or replaced their Bank Guarantees this Respondent has not satisfied one of the conditions precedent for the Supplementary Agreement."

75. For the above reasons, this Court is of the opinion that the findings of the learned Single Judge that the Tribunal did not take into account the necessary facts and that it had rendered an unsustainable award holding that the conditions precedent for the coming into force of the Supplementary Agreement did not take place, are outside the scope of Section 34. L&T's stand is that it executed a counter guarantee dated 29.03.2000 for ₹ 465.775 lakhs - nearly four months after the Supplementary Agreement was executed; it paid ₹5.19 crores to LKB on 21.01.2000 and paid ₹46,30,692/- towards reimbursement of expenses on 01.03.2000. L&T did not comply with the terms of the Supplementary Agreement as it did not take steps to substitute the bank guarantee, but limited its security to ₹ 465.775 lakhs. A desperate and cash starved PCL was facing show cause notice from the DTCP right from November 1999. This was the result of L&T's failure to pay EDC - a matter recorded in the recitals of the Supplementary Agreement. Again, it was the bank which paid DTCP ₹ 6 crores on 27.01.2000. In these circumstances, neither did the findings of the Tribunal constitute patent error or amount to an unreasoned award, on this score, warranting interference.

Economic coercion

76. The Tribunal had found that materials on the record and the overall facts of the case as revealed in the proceeding, established the exercise of coercion upon PCL and that consequently, it was entitled to avoid the Supplementary Agreement. L&T's objection to this is three fold: first, that the plea of coercion was not taken; secondly, that on merits the findings are unwarranted given that PCL entered into the agreement with open eyes and even welcomed its implementation - it could have avoided the agreement, which at best was voidable at its option and thirdly that the Tribunal's finding about the Supplementary Agreement not binding on PCL is contrary to its reliance on the Tripartite Agreement.

77. As far as the question of lack of pleading is concerned, the Court notices that the Statement of Claim is not very specific on this score. Yet, there is some indication (in Para 136 (5) (a) of the Statement of Claim, quoting the notice issued to L&T) and given the nature of arbitration proceedings (where strict rules of pleadings cannot be held to prevail), the following plea can be deemed sufficient:

> *"Despite full knowledge of our obligations to ITCREF cast under the development agreement, you have fraudulently and through the exercise of economic coercion, sought to extort our consent not to allot any areas to ITC REF in the first phase. This act of yours is a classic case of repudiation of a primary obligation and breach of a fundamental term. Thereafter you have attempted to take advantage of your own wrongful conduct. By the said cited letter you repudiated once again another fundamental obligation under the of development."*

Discussion of law applicable

78. *Pao On & Others vs. Lau Yiu & Anr* 1979 (3) All ER 65 (PC), *Universe Tankships Inc of Monrovia vs. International Transport Workers Federation & Others*, (1983) 1 AC 366 and *Atlas Express v Kafco (Importers & Distributors) Ltd* 1989 (1) All ER 641 are decisions where the Courts in United Kingdom (UK) have recognized and applied the concept of "economic duress" as a factor which can successfully avoid a commercial contract. In *Universe Tankships Inc* (supra) it was held that:-

> *"The classic case of duress is not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him.....The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred.....But none of these evidential matters goes to the essence of duress. The victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved. The present case is an excellent illustration. There was no protest at the time, but only a determination to do whatever was needed as rapidly as possible to release the ship. Yet nobody challenges the judge's finding that the owner acted under compulsion."*

79. *Dimskal Shipping Co. v. International Transport Workers' Federation* [1992] 2 AC 152 confirmed that economic pressure may be sufficient to amount to duress. The Court observed that the economic pressure must be *"a significant cause"* inducing the threatened party to enter into the contract. *Huyton v Cremer* [1999] 1 Lloyds Rep 620, upheld an award which found that an impugned agreement was entered into as a consequence of economic duress. The two elements which went to establish that were, first, *"illegitimate pressure by one party"*, and second that (such pressure) should be *"a significant cause inducing the other party to act as he did"*, *"the*

critical enquiry" as being *"not whether the conduct is lawful but whether it is morally or socially unacceptable"*. Yet a note of caution was added that the Court should not set its sights too high and it might be relatively rare to have cases in which *"lawful act duress"* in a commercial context. The most recent English decision on economic duress vitiating a contract was *Progress Bulk Carriers Ltd v Tube City IMS LLC* 2012 (2) All ER (Comm) 855, where an arbitration award which upheld the plea of economic duress-raised by the charterer of a vessel against the vessel owner was confirmed. It was held that:

> *"illegitimate pressure can involve the doing of acts which are not unlawful in themselves, albeit unusually in commercial cases, but in any event, the refusal to substitute the Agia for the Cenk K unless the Charterers agreed to waive their prior breach, has to be seen both in the light of that prior repudiatory breach which was unlawful and the Owner's subsequent attempts to take advantage of the position created by that unlawfulness."*

80. *CTN Cash and Carry Ltd. v. Gallaher Ltd.* [1994] 4 All ER 714 and *DSND Subsea Ltd. v. Petroleum Geo Services* ASA 2000 WL 1741490 are UK cases where the courts refused to apply the doctrine of economic duress. In *DSND Subsea* (suprea) the Court observed that *"Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

81. Chitty on Contract (30th Edition by Hugh Beale, 2008) discusses the subject of contracts vitiated by economic duress. The relevant discussion is extracted below:

"7-006...Further, because duress does not truly deprive a party of all choice, but only presents him with a choice between evils, it is not possible to inquire simply whether the party relying on duress had "no choice"; the inquiry must necessarily be as to the nature of the choices he was presented with.

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7-008. Legitimacy of the pressure or threat. Once it is accepted that the basis of duress does not depend upon the absence of consent, but on the combination of pressure and absence of practical choice, it follows that two questions become all-important. The first is whether the pressure or the threat is legitimate; the second, its effect on the victim. Clearly, not all pressure is illegitimate, nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper....

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7-012 ..It has been said that a threat to destroy or damage property may amount to duress. It is now accepted that the same is true of a true of a threat to seize or detain goods wrongfully...

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7-024 Causation in general. In all cases of duress it is necessary that the victim's agreement was caused by the duress. However, it appears that the nature of the causation required differs according the nature of the duress.

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7-026 "Causation in duress to goods....It seems likely that the victim must show that, "but for" the threat, he would not have entered the contract. We will see that if has been said that this is the appropriate test of causation in economic duress and given the similarity of duress of goods and economic duress, the same test of causation seems appropriate.

7-027 Adopting a "but for" test would place cases of economic duress on par with cases of negligent or non-negligent misrepresentation. This seems appropriate.

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7-031 Reasonable alternative. It is certainly relevant whether or not the victim had a reasonable alternative. The victim''s lack of choice was emphasised by Lord Scarman in the Pao On and Universe Sentinel cases and has clearly been an important factor in those cases in which relief has been given..

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7-034. Protest: In the Pao On case it was said that it was relevant whether or not the victim protested. This again seems to be a question of evidence as whether or not the threat had a coercive effect. It has been accepted for many years that when a payment is made in order to avoid the wrongful seizure of goods, protest "affords some evidence...that the payment was not voluntarily made", but that the fact that the payment was made without protest does not necessarily mean that the payment was voluntary.

7-035. Independent advice. Likewise in the Pao On case it was said that it is relevant whether or not the victim had independent advice. The relevance of this is perhaps less obvious: access to legal advice, for example, will not increase the range of options available to the victim, and lack of advice therefore cannot be an absolute requirement. However, whether or not the victim appreciated that he had an alternative remedy and what the practical implications of following it would be are relevant to the question of causation."

82. *Double Dot Finance Limited v. Goyal MG Gases Limited & Anr*, 2005 (117) DLT 330, *Goyal MG Gases Limited v. Double Dot Finance Limited*, 2009 (2) Arb LR, 655 and *Unikol Bottlers Ltd. v. M/s. Dhillon Kool Drinks & Anr* AIR 1995 Delhi 25 are instances where this Court considered, but did not uphold the plea of economic duress. *Unikol Bottlers* (supra) attempted to explain economic duress in the commercial context. The court however, did not find any economic duress. The learned Single Judge held:

".....while dealing with the question of duress/coercion and unequal bargaining power one is really concerned with the question of free will, i.e. did not parties enter into the agreement with a free will? It is

the plaintiff who has raised the question of its will being dominated by the defendants and, therefore, not being a free agent. Therefore, the plaintiff is on test. It has to be ascertained whether the plaintiff exercised a free will or not while entering into the Supplemental Agreement. For this purpose there are several factors which need to be looked into. They are-

1. Did the plaintiff protest before or soon after the agreement?

2. Did the plaintiff take any steps to avoid the contract?

3. Did the plaintiff have an alternative course of action or remedy?

If so, did the plaintiff pursue or attempt to pursue the same?

4. Did the plaintiff convey benefit of independent advice?"

83. In *M/s. Associated Construction v. Pawanhans Helicopters Pvt. Ltd* AIR 2008 SC 2911, a plea of economic duress was upheld. Likewise, *National Insurance Co. Ltd v. M/S. Boghara Polyfab Pvt. Ltd* (2009) 1 SCC 267 is a case where it was held that a construction company, hard pressed for funds and keen to get the admitted amounts released, might execute a document styled as a "full and final settlement" but such *"discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration."* The Supreme Court also referred to another instance where an insurance claim for loss is not either accepted or rejected and the customer is constrained to sign a full and final voucher without which it was told that the admitted amount too would not be disbursed. The Court recognized that such a document too could not bind the party on account of economic duress:

> *"Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The `accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration."*

84. It is thus evident that the theory of economic duress, or coercion has roots in Indian law and has been in recent instances applied by Indian courts, particularly the Supreme Court. *M/s. Associated Construction* (supra) and *M/s. Boghara Polyfab Pvt. Ltd* (supra) relate to commercial contracts; the last decision even deals with arbitration.

85. In arriving at the finding that PCL was a victim of coercion, the Tribunal took note of stipulations contained in the Development Agreement, particularly Clauses 4(b), 4(c)(v), 7 and 25. The discussion in the award by the Tribunal relating to duress exerted upon PCL in the circumstances of the case by the L&T, reveals that the Tribunal took note of the entire conspectus of circumstances, particularly the conditions in the Development Agreement which obliged L&T to carry-out its activities and obligations in a time-bound manner. The Tribunal first noted that L&T did not specifically deny claims in the pleadings set-up by PCL, particularly paras 33, 36, 70, 71, 72, 78, 87, 93, 96, 98, 114, 121, 131 and 143. The Tribunal also took note of L&T's letter dated 22.12.1998; minutes of meeting signed by PCL and L&T dated 06.04.1999; L&T's letters dated 07.04.1999, 07.05.1999, 07.10.1999 and 10.07.2000. The letter of 07.10.1999 stated *inter alia* that L&T's consultants had reported that it would not be favorable to pursue the project

and consequently "payment of EDC charges at this stage by L&T does not arise." The Tribunal had noted in its order of 08.11.2001 that L&T was directed to produce the documents which were furnished to it in the form of Boston Consulting Group which was acted upon ultimately. L&T did not produce the report and instead stated that the Tribunal may draw necessary inferences. The Tribunal then took note of the inspection conducted in the proceedings on 05.08.2000 and also that the report was not objected to by the party. It then proceeded to state in the award that the inspection clearly showed that the respondent had not even commenced the work of development in terms of the plan sanctioned by DTCP Haryana and had not even applied for water and electricity connection. The award then stated:

> *"These only indicate that right from the start, the respondent was not at all serious about the taking-up work of development. The claimant had led evidence to show the repeated breaches committed by the respondent. As stated earlier, the respondent has not led any evidence whatsoever. Mr. Mohinder Puri was cross-examined at length by Mr. Atul. S. Rajadhyaksha, learned counsel for the respondent. On question of abandonment of site by the respondent, in the cross-examination, Mr. Mohinder Puri has elaborated his evidence inter alia in question nos. 49, 149, 192, 199, 200, 201 and 202. The respondent has chosen not to examine Mr. K.V. Rangaswami, Mr. H.S. Chandrasekhar, Mr. V.B. Gadgil, Mr. N. Narendra even opposed to summon the said officers in the arbitration case. The respondent chose not to lead evidence of said officers and also refused to disclose material correspondence exchanged between these officers and the reports of the consultants, namely Boston Consulting Group, USA. In view of the unrebutted evidence, Mr. Mohinder Puri which was not taken on cross-examination, the admitted documents on record and admission/deemed admissions made by the respondent in respect of bulk of the case of the claims and adverse inference that must be drawn on the facts and circumstances of the case, it is clearly established that L&T had taken a conscious decision to abandon the*

project and had taken steps not to pay EDC or fulfill their obligations to the statutory authority and to ITCREF……."

"In the facts and circumstances of the case, as indicated earlier, and in view of the categorical deposition of Mr. Mohinder Puri and other evidences on the record, this Tribunal finds that Mr. Mohinder Puri had signed the supplementary agreement dated 30.12.1999 and the Tripartite Agreement dated 10.01.2000 under compulsion and in dire need of funding of EDC payments. In the Tripartite Agreement, LKB has sanctioned certain amounts of loan to claimants which were the liability of the respondents."

86. L&T's contention was that the finding in the award with regard to coercion was untenable on merits. It was argued that PCL entered into the Supplementary Agreement with its eyes open and taking into account the ground realities of a recessionary real estate market. It was all along aware of these facts and that the initial over-estimation of the project's capability to yield profits and the attendant risk had been disclosed very early. L&T relied upon its letter written on 30.03.1998 to PCL and the minutes of meeting dated 19.12.1998 - which clearly stated that the onus of paying EDC would be upon L&T only after NOC from the appropriate authority is obtained. PCL's awareness of falling market was evidenced by its letter dated 10.12.1998 which was replied to by L&T's letter dated 29.12.1998 and L&T's letter dated 23.01.1999 enclosing cheque for ₹25 lakhs for EDC charges. The minutes of 06.04.1999 disclosed that certain litigation in respect of a portion of loan with third parties had arisen. L&T's letter dated 07.05.1999 stated that EDC charges would be paid after the market conditions improved - which was again repeated on 07.10.1998 in another letter by L&T to PCL. It was submitted that besides the allegation of

economic coercion, there was practically no material to substantiate PCL's argument in that regard.

87. This Court notices that the award has adverted to several materials, while concluding that in fact L&T exerted economic duress. L&T at one stage had - in the arbitration proceedings - urged that in view of the Supplementary Agreement, correspondence which had ensued between the parties prior to its execution was irrelevant and that the said Supplementary Agreement had in fact novated the contract between the parties embodied in the Development Agreement. However, that argument was not pursued and L&T conceded later in the arbitration proceedings that the Supplementary Agreement had to be read together with the Development Agreement. The Tribunal, therefore, took into consideration the facts and events which took place after the execution of the Development Agreement leading right upto the execution of the Supplementary Agreement. While concluding that economic duress was in fact exerted upon PCL, the Tribunal appears to have attached considerable importance to several factors: (i) that L&T was aware about PCL's precarious financial conditions and its obligations towards ITCREF which had insisted that its rights under the previous agreement with PCL ought to be factored in - and was accordingly recognized and given accommodation in the Development Agreement; (ii) that EDC charges paid right upto the execution of the Development Agreement - and thereafter were reimburseable by L&T and furthermore, the developer had to pay EDC charges directly to DTCP as and when the occasion demanded. The Tribunal took note of the fact that the record clearly established that EDC charges kept mounting but were not paid save an amount of ₹25 lakhs by L&T. The

letter placed on record by L&T on 28.09.1998 - written to LKB states that in terms of the Development Agreement, *"after obtaining NOC from the appropriate authority (since obtained), we are liable to pay EDC charges as well as refund to Puri Construction Private Limited and others, the EDC so far paid by them……..".* Likewise, on 08.02.1998, L&T acknowledged that the onus of EDC from 01.07.1998 was "on us" as per the agreement as the NOC from the appropriate authority was obtained on 30.06.1998. The DTCP sanctioned the development plans for 16.6 acres on 19.02.1999. PCL kept reminding L&T of its obligation to perform its part of the bargain in the Development Agreement, especially payment of EDC charges. On 02.04.1999, L&T took the position that even though EDC charges had fallen due, they would be paid at the time of launching of the property. On 27.04.1999, L&T wrote to PCL stating that, it *"was making efforts to mobilize the requisite funds to pay the overdue instalments of EDC (5th and 6th installments)".* Again on 07.05.1999, L&T agreed that EDC payment was to be made after sanction of the appropriate authority was obtained but that the payment had been delayed because, *"there has been a very poor market".* PCL's letter contained a note of urgency - even desperation. On 07.10.1999, L&T, despite its acknowledgement of the obligation to make payment of EDC and refund past amounts categorically stated *"however, since the report submitted by the consultants are not favorable to pursue the project, the question of payment of EDC charges by L&T does not arise."* This impelled PCL to put L&T on notice of default and warning of serious penal consequences which included forfeiture of EDC already paid on the order of DTCP. Finally, on 02.11.1999, DTCP issued a Show Cause Notice proposing cancellation of license due to breach, i.e. non-payment of EDC. It

was in these circumstances that the Supplementary Agreement was drawn up by L&T and sent to PCL. These were even acknowledged by Supplementary Agreement in two of its recitals where L&T's default in not paying EDC charges except ₹25 lakhs and not furnishing the bank guarantee were put down in writing.

88. The authorities discussed previously, especially recent judgments of the Supreme Court have dwelt upon circumstances where the parties are allowed to contend or take a position which is seemingly contradictory or in conflict with the earlier position if it can establish or prove that it was not a free agent. In other words, economic duress is now a recognized head answering the description of "coercion" entitling the contracting party to avoid the contract or some of its terms. This head of "economic coercion" would fall within the meaning of Section 16 of the Indian Contract Act, 1872 which defines *"undue influence"* as one where the relation subsisting between the parties is such that one of them is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Section 16(3) states that, where a person in a position to dominate the will of the other enters into a contract with him and the transaction appears on the face of it or on the evidence of it to be unconscionable, the burden of proving that there was no undue influence is on the person who is able to dominate the will of the other. Illustrations (c) and (d) particularly deal with cases of economic duress or undue influence. Given the nature of evidence, which was on the record before the Tribunal and the legal position as to economic duress being one of the factors that can successfully avoid a contract, there is no patent illegality in the findings recorded in the award.

Likewise, it cannot be said that the Tribunal arrived at a finding which is contrary to the substantive law of the country or contrary to justice and morality. As a result, the findings of the learned Single Judge that Supplementary Agreement could not be characterized as the product of undue influence and economic duress, because both parties were corporate entities is unsustainable, is, therefore, set aside.

Was there a fundamental breach of contract of the Development Agreement by L&T entitling PCL to relief?

89. L&T argued that the Tribunal committed an error of law apparent on the face of the record when it ignored Clauses 26 and 34 of the Development Agreement which provided that it would not be deemed to be in default of the performance of its obligations if the same is delayed or prevented by conditions constituting *force majeure* which include the prevailing real estate market conditions or any other reason or cause whatsoever beyond the reasonable control of the petitioner. It is submitted that it is not open to the Arbitral Tribunal to ignore a clause of the contract and if it does so, the Arbitral Tribunal commits an error apparent on the face of the record.

90. L&T then submits that it is the public policy of India that an Arbitral Tribunal's duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. Similarly, an Arbitral Tribunal cannot ignore the law or misapply it and he also cannot act arbitrarily, irrationally, capriciously, or independent of the contract. The obligation of L&T to develop properties in question and to perform its obligations was subject to the following condition under the Development Agreement dated 10-03-98:

"CLAUSE 26: The DEVELOPER hereby undertakes and agrees to complete the construction of the said building on the Schedule B property within a period of 60 (sixty) months, or such other mutually extended periods, from the date of Building Plan sanction/37-I. Clearance for this Agreement and making available the said property for development, whichever later. Time is the essence of this Agreement. In the event of any default on the part of the OWNER under this Agreement or in the event of non-availability of building materials controlled by the Government, Government restrictions, Civil Commotion, Court order, Injunction, any act of God, and/or the prevailing market conditions, the DEVELOPER shall be entitled to reasonable extension of time for completing the construction.

CLAUSE 34: The DEVELOPER shall not be deemed to be in default if the performance of its obligations hereunder is delayed or prevented by conditions constituting force-majeure which shall include but not be limited to any laws, order by-laws, rule or direction of any Government or Municipal or statutory agency or other authority, restrains, injunctions from any Court of law, withdrawal of permissions, non-availability of construction materials, strikes, fire or any Act of God, as so the prevailing real estate market condition or any other reason or cause whatsoever beyond fixed shall be deemed to have been extended by the periods equal to the periods of delay on account of the conditions constituting force-majeure."

Similarly, under the Supplementary Agreement dated 30-12-99 the obligation was:

"CLAUSE V: *That the DEVELOPER shall only commence construction in 1st phase of development subject to achieving confirmed booking/selling targets undertaken by the OWNER as detailed in Annexure II to this agreement at the location shown in the sketch annexed hereto with revised plans and specifications mutually agreed between the parties hereto.*

CLAUSE VI: *That it is agreed between the parties that the DEVELOPER shall be free to analysis the real estate market conditions after expiry of One Year of launching of the 1st phase and if the market conditions continue to show recessionary trend or continue to be unfavorable, the DEVELOPER in its discretion may*

either invoke Clause 34 of the Development Agreement or terminate the agreement for development without any liability except for the payment of overdue EDC."

91. Under the contract, therefore, L&T could not be held liable for default of any of its obligations if the discharge of such obligations was, *inter alia*, not warranted by the prevailing market conditions. It is submitted that there was enough material on record to show that the land prices were falling and that the prevailing market conditions did not encourage development of the lands. The documents on record in the arbitration show that the prevailing market conditions did not encourage development of the lands. Given this position, the Tribunal was bound to give weight and enforce these contractual provisions. There is no finding in the award that the prevailing market conditions were encouraging or conducive to the development of the lands in question. In fact, there was evidence that the parties were agreed that the prevailing market conditions were not encouraging and conducive to the development of the said lands. However, the Tribunal ignored these contractual terms and conditions and the evidence on record, thus rendering his award irrational and independent of the contract and liable to be set aside under Section 34 of the Act as displaying an error apparent on the record. Learned senior counsel submitted that the impugned judgment correctly did that and this court should not interfere with those findings.

92. The Tribunal noted PCL's contentions with respect to fundamental breach of contract by L&T. It listed various omissions and breaches, i.e non-payment of a single installment of EDC in terms of clause 19 of the Development Agreement; non-payment, to PCL interest free deposit of ₹ 5 Crores in terms of clause 12 of the Development Agreement; non-

construction of a single floor of any residential building for which development plans were sanctioned; L&T's failure to take up preparatory work for obtaining water and electricity connections from the statutory authority even to the extent of not furnishing any application for the purpose; non-appointment of any architect to plan land development in Sector 53 as part of the project. It was also contended that L&T did not prepare or submit any layout plan or development plan for 23.881 acres of land west of 60 metre sector road nor did it prepare or submit revised development plans to DTCP, on the basis of which general bookings were invited from the general public from 6.4.2000 onwards by way of distribution of brochures and by way of publication of advertisement in the newspapers; not taking any steps to comply with the show cause notices issued by DTCP for the termination of the licenses on account of non-payment of EDC by it (L&T). DTCP was compelled to demolish the unauthorized temporary constructions raised by L&T after due notice to it.

93. L&T had contended that it started its work in terms of the Development Agreement diligently, and that after signing the Development Agreement dated 19.01.1998, it addressed letters in January itself, to M/s. Shikhar Chand Jain, seeking confirmation of its appointment as brokers for the flats to be constructed. Steps for landscaping the area to be developed had been taken and the respondent verified the area from the land reports. It also forwarded to the claimants a draft working order issued to Belt Collins for landscaping and appointed BNB investments & Properties as authorized selling agents. L &T also appointed Arora and Associates as brokers. It forwarded planning of the project to PCL, paid ₹ 25 lakhs on 23.01.1999 towards EDC. L&T argued that in the light of these steps, it was not guilty

of any inaction. It relied on instances of inaction of PLC, and that in order to give the bank guarantee to the DTCP and for that purpose, the original title deeds were required, however, PCL delayed the sending of the title deeds. PCL had handed over the title deeds for 12.875 acres and 15.31 acres on 15th and 16th October, 1998. PCL also informed that the documents of 4 acres would be sent later on. PCL did not pay the EDC installments in time and the DTCP issued notice to PCL that payments of EDC had not been made and renewal of licenses had not been applied for. L&T faced several obstructions in the execution of the project. Some of those obstructions were in the form of legal proceedings from local individuals and residents, including one Hari Singh. It was also argued that PCL sought plans for the entire Schedule A property and not Schedule B property only, contrary to the Development Agreement and besides, sought change in the letter of comfort in particular for deletion of the reference that L&T would pay EDC after approval of the plans. PCL also demanded payment of ₹ 13,05,805 towards official fees for plan approval and requested for an advance of ₹50 Lacs for the payment of the balance 4th installment of EDC even though payment of the 4th installment was PCL's liability. PCL asked L&T to pay ₹ 20,000/- to one Mr. Arun Dhir in order to have the drawings cleared by the SDO, Chandigarh and further sought ₹ 4,50,625/- by way of licence fees and ₹ 5,73,440/- towards renewal of license charges even though it was not L&T's responsibility.

94. The Tribunal recorded its findings as follows:

> *"The respondent, in the opinion of this Tribunal, cannot be relieved of its obligations under the agreement of 10 January, 2000 and the respondent is bound to pay LKB. The respondent is also bound by the agreement of indemnity as reflected in the agreement dated 10th*

March, 1998. This Tribunal finds that the respondent sought to jeopardize the claimants obligations towards 1TC REF whose interests were set out and safeguarded in the Development Agreement dated 10th March, 1998. It also appears to this Tribunal that the respondent had resiled from its statutory obligations and sought to make sales unilaterally against express provision of the agreement and without getting the revised development plan sanctioned and without making allocation in favour of ITC REF. L&T has also not submitted accounts of the money admittedly collected from various buyers. The claimants have been kept in dark about the amount collected from various buyers. This Tribunal holds that the claimants were not obliged to make any sale on the basis of unsanctioned development plan because such action on the part of the claimants would be improper and illegal and will entail the risk of the licences being forfeited by DTCP. In the agreement dated 10th March, 1998, the admitted fact situation was that the claimants were the owners in possession of 40.6623 acres which was licensed by DTCP, Haryana for the construction of Group Housing. It was also an admitted fact situation that the property was free from encumbrances except to the extent of approximately 7 acres of land mortgaged to Lord Krishna Bank. It is also an admitted fact situation that the said agreement of 10th March, 1998 had been arrived at with the consent of 1TCCREF who had signed this document as a consenting witness. It is the common case of the parties that the said lands were free from mortgage and were free from encumbrances except to the extent stated above. The return under 37(I) was filed before the IT authority. In the opinion of this Tribunal L&T has no justification to contend that it has liability to return the title deeds of ITCREF or its successor. This tribunal is of the view that by not returning the title deeds despite the direction given earlier in this arbitration proceedings the respondent has been seeking to exercise economic coercion on the claimants and is also seeking to hold up the development project and causing consequential financial loss to the claimants. The respondent has also failed to make payment of EDC installments in terms of the agreement between parties. The respondent erected a small site office but it did not fund the project from the very beginning. The respondent had even after the Development Agreement was hesitant to proceed with the

Development Agreement in right earnest and failed to fulfill its obligation under the development agreement. The security service maintained at the site was not sufficient and even insufficient security arrangement was unilaterally withdrawn by the respondent. Because of such action, encroachments of some lands under the project had taken place. Such encroachment is bound to cause problems resulting financial loss. But the extent of encroachments and particulars of the encroachers have not been furnished. There is no convincig material in support of the financial loss alleged to have been suffered by the claimants on account of encroachment of land. Therefore, it ¡s not possible to precisely quantify monetary loss suffered by the claimants on account of encroachment. Therefore, issue no. 5 is decided by holding that on account of insufficient security arrangements and ultimate withdrawal of security arrangement unilaterally from the site by the respondent encroachment of some lands of the claimants has taken place but quantification of monetary loss on this account is not possible for want of sufficient materials on record. Considering the materials on record and the evidences both oral and documentary adduced on behalf of the claimants this tribunal finds that the claimants did not commit fundamental breaches of the development agreement dated 10.03.1998 to enable the respondent to resile from the development agreement. This tribunal finds that the respondent was not serious in developing the project in question from the very beginning and had never started the development work by making any construction of a single building for sale during the long period after the commencement of the development agreement. Therefore, issue no. 3 must be answered in the negative. This Tribunal ¡n the facts and circumstances of the case holds that the claimants are entitled to compensation from the respondent and damages suffered by them for the breaches committed by the respondent ¡n respect of the Development Agreement of March, 1998 but this tribunal does not consider that the claimants should get compensation and damages to the extent of Rs. 300 crores and punitive damages to the extent of Rs. 100 crores as claimed by them."

95. During the hearing, considerable argument was made by PCL regarding L&T's failure to disclose the report of the Boston Consulting

Group (BCG), despite the Tribunal's direction, during its proceedings. This is also somewhat reflected in the award, which draws an adverse inference - given that at that time L&T stated that such an inference as was permissible in law may be drawn in answer to the query as to why it did not comply with the directions. The drift of PCL's submissions here was that at a very early stage, after L&T had entered into the Development Agreement, it had misgivings and consequently commissioned the Boston Consulting Group. The latter's report influenced L&T to behave the way it did, i.e not go ahead and perform the contract, leading to its breach.

96. It is a matter of record that the Tribunal had directed disclosure of the BCG report and that this was not complied with. The Tribunal drew an adverse inference. L&T argues that the findings of breach of contract are tainted because the omission to produce the report coloured the Tribunal's views. Given that L&T was directed to produce the report, which it did not, it cannot complain the adverse inference which the Tribunal drew due to the omission. Yet, the findings regarding breach by L&T do not stem solely from that omission. There is considerable material which formed the basis of that conclusion. L&T might not be wrong in saying that the financial viability of its activities has to necessarily be undertaken on a periodic basis. To that extent, its autonomy in commissioning an independent consultant's report cannot be faulted and PCL's argument that L&T had secretly decided to abandon the project and consequently went slow cannot be the only basis to hold that there was breach of contract. At the same time, the Court is of the opinion that irrespective of the motivation of a party to act as it does, the effect of its decisions is a matter of scrutiny, especially in respect of third

parties and contractual relationships with them. In other words, adverse inference in this case was no doubt justified. At the same time, the Tribunal did not rest its award only on that adverse inference and went into other material to hold that L&T committed fundamental breaches of the contract with PCL.

97. The award, in the opinion of the Court, is not unsupported by evidence, nor contrary to law nor opposed to substantive law or public policy. L&T's reliance on some letters written by PCL, expressing confidence in it (primarily letters dated 03-04-1998, 14-07-1998, 05-08-1998 and 12-04-1998) is to be seen in the background of what it actually did, or omitted to do. Here, the records prominently support the Tribunal's conclusions:

(i) The period between 19-01-1998 (date of Development Agreement) and 30-12-1999 saw L&T omitting to pay any amount towards EDC (except ₹ 25 lakhs). The approval of the competent authority for the project had been obtained in June 1998 itself. Clause 19 of the Development Agreement cast an obligation on L&T to bear all EDC charges. This omission went into the root of the matter.

(ii) Almost all the letters written by L&T to PCL and the minutes of meeting between the parties reveal the former's skepticism to go ahead with the project. L&T's reluctance stemmed from what is alleged to be a recessionary real estate market. It voiced this concern by citing its consultant’s reports. PCL on the other hand, kept stressing the need to start the project. This is apparent from L&T's letters dated 30.03.1998,

08.12.1998, 22.12.1998, 29.12.1998, its views recorded in the minutes of meeting dated 06.04.1999 and the letters dated 27.05.1999, 18.09.1999 and 07.10.1999 (disclosing the reports of M/s Richard Ellis and M/s Jones Lang Laselle with respect to the falling trend in real estate markets).

(iii) The records show that the approval of the Competent Authority under provisions of Chapter - XXC was given on 30.06.1998 for an apparent consideration of over ₹117 crores. This was within the knowledge of L&T. Likewise, the plans were sanctioned on 30.09.1998. L&T had expressed the concern that the title deeds were not handed over to it in its various correspondence with PCL, after the Development Agreement was executed. The title deeds were, in fact, handed over on 16.10.1998. At this stage, at least it was not unreasonable for PCL to expect some progress. However, the materials on record disclose that besides the various meetings and correspondence exchanged on the issues with respect to payment of EDC and the concerns of L&T with regard to the market rents, nothing concrete happened. On 02.05.1999, the planning licences expired and PCL was notified by DTCP on 28.05.1999. In the meanwhile, PCL had written on 05.05.1999 to L&T complaining that there was no progress on site. L&T's response was to in turn blame PCL for collecting some cheques contrary to the term that it had the entire responsibility to market the project. At the same time, its letter dated 07.05.1999 also acknowledged that it had a responsibility by ensuring the preparation of drawings and approval of the project. Furthermore, it stated expressly that EDC charges were payable by it after 01.07.1998. Its letter dated 18.12.1999 to PCL shows that even at that late stage, the project was still being planned. In the meanwhile on 27.02.1999, it had appointed one, M/s BNB as its selling agent. The

minutes of meeting dated 06.04.1999 discussed and recorded a consensus with regard to the type of houses to be constructed. In the light of all this, L&T appears to have prepared the drawings and sent them to PCL for comments only much later on 03.11.1999. It is not known whether this was the ultimate project which sought to be launched on 06.04.2000.

(iv) L&T apparently got some brochures for the project printed and launched it on 06.04.2000. PCL immediately wrote on 07.04.2000 stating that this was a unilateral act without its approval, and that the earlier development plans which it was agreed to be a party, have been approved by the DTCP. PCL protested that the project actually launched contained promises of facilities and other aspects which were not agreed to by the parties. L&T in response relies upon what it terms to be a unilateral commitment by PCL with respect to allotment of substantial portion of the constructed property to ITCREF. It states that this was despite the commitment made by PCL in its letters dated 12.04.2000 and 09.04.2000. L&T also accused PCL of keeping it in the dark with respect to the arbitration proceedings initiated by ITCREF and the commitments it made which led to the award on 13.05.2000. PCL on the other hand on 25.02.2000 informed L&T that the consent given in the arbitration was not voluntary.

(v) The project was as a matter of fact launched on 6th April 2000. PCL started accusing L&T of unilaterally starting the project, without its approval. The development plan envisioned by the parties earlier had received DTCP's approval. According to PCL, the kind of project, the amenities offered etc were something not discussed and agreed to by the parties.

(vi) After the start of the present arbitration proceedings, the Tribunal, with consent of parties inspected the site and its report demonstrated that there was no development. Earlier, some minor constructions put up at site were demolished by the authorities as unauthorized.

(vii) None of L&T's officers who were acquainted with the transactions deposed in arbitration. L&T did not also indicate whether any contractor was engaged to carry out work, the extent or progress of the work performed at site, etc.

98. It is also evident that in terms of Clause 12 of the Development Agreement, after obtaining the No Objection Certificate from appropriate authority, L&T was obliged to pay ₹ 5crores to PCL as interest free refundable deposit to be recovered pro rata from the sale proceeds of PCL's allocation within 36 months. Clause 11 envisioned the deposit of title deeds in respect of the area (except 15 acres mortgaged to LKB). As noticed earlier, the No Objection Certificate was obtained on 30.07.1998. The title deeds were deposited with L&T on 16.10.1998. With this, the condition embodied in clause 19(b), i.e., *"the onus of paying EDC after NOC from the appropriate authority to this agreement shall vest with the developer"* became operational. The body of evidence on the record clearly establishes that save and except payment of ₹25.00 lakhs, L&T did not comply with this condition at all and ultimately compelled PCL to enter into a Tripartite Agreement whereby payments towards EDC dues after 30.06.1998 were made by it through loans from LKB. It is a matter of record that the licences had expired on 02.05.1999 and DTCP had issued show cause notices on 07.11.1999 to PCL in this regard.

99. L&T had sought to allege that PCL's conduct in not taking care of some litigation which held the construction, and further that it unilaterally allocated a substantial part of the proposed construction to ITCREF, and that it was kept in the dark of arbitration proceedings, has to be seen in the overall scheme of things. PCL's commitment towards ITCREF was known to L&T; in fact ITCREF was a confirming party to the Development Agreement itself. ITCREF's entitlement to 1.95 lakhs sq.ft. (subsequently modified to 2,20,416 sq. ft.) built up property, within 5 years, was an express part of the Development Agreement - by clause 4(b). The entire argument of L&T that without its consent no part of the project which was launched on 06.04.2000 could be committed to anyone else, has to be viewed in the context that the Supplementary Agreement did not come into force as correctly held by the Arbitrator. Secondly, the Supplementary Agreement was itself a product of economic duress and therefore does not assist L&T. It is natural and reasonable to expect that L&T would have kept itself informed of any developments, vis-a-vis PCL and ITCREF. In fact, the Development Agreement was a project intended to bail out PCL from its commitment with ITCREF, and that PCL in some letters might have not voiced any protest or even agreed to exclusive allotment of the project construction by L&T would not detract from the fact that since the Development Agreement prevailed and was in no manner whittled down by the Supplementary Agreement, ITCREF's entitlements could very well have been dealt with independently by PCL since it was duty bound to do so.

100. The overall conspectus of facts paints a picture whereby L&T's position and continued inaction, led to PCL being forced into a desperate corner and ultimately succumbing to the economic pressure to agree to the

Supplementary Agreement. L&T appears to have resorted to various stratagem such as adverse market conditions, inability to pay EDC (for reasons not connected with PCL's conduct) and fallen back on a diverse litany of complaints that forced a dénouement in the form of PCL's letter of termination of contract. The conditions which were to be fulfilled by L&T for bringing into force that Supplementary Agreement however were not fulfilled. L&T's defaults - in not paying the interest free deposit, defaulting in paying EDC, defaulting for considerable period in substituting the bank guarantees to DTCP and not taking any concrete steps for development of the site, therefore justifies the conclusion of the Tribunal that L&T had committed a fundamental breach of the conditions in the Development Agreement which resulted in PCL calling off the bargain altogether and seeking arbitration. This finding cannot be faulted as patently erroneous on the face of the record or contrary to substantive law or public policy, in any manner whatsoever. The findings in the impugned judgment, therefore, are liable to be set aside on this score.

Counter claim of L&T: Was PCL was in breach of its contractual obligations?

101. L&T's counter claim alleges that PCL was at fault and it breached its commitment. Its decision to allot two Blocks (A3 and A4) and 15,000 sq.ft. in Block-B2 towards ITCREF, was contrary to the specific understanding in L&T's letter on 07.04.2000. L&T alleges that PCL was in breach and liable to make good all losses of L&T and making further restitution in respect of money paid and expenditure incurred by L&T. L&T alleged that it received a spate of letters from LKB calling for payment of interest on short-term and principal in terms of the Tripartite Agreement. Both the obligations were

that of PCL. Clarifying that L&T does not seek specific performance of the contract, it is alleged that PCL committed breach of contract since there is no clause enabling it to validly rescind the agreement. In fact, argues L&T, PCL resiled from and renounced its obligations. L&T states that it was induced to enter into a contract by PCL on the basis of certain reports that minimum sale price of the project would not be less than ₹2,000 per sq.ft. and that 75% of the constructed space could be allotted by L&T. The total area agreed to be built up by L&T was 40.00 lakhs sq.ft. which by its sale price was projected to fetch ₹ 800 crores resulting in L&T's share - at 75% working out to ₹ 600.00 crores. The estimated net profit of L&T, therefore, would have been about ₹ 280.00 crores.

102. Alleging that the market conditions were not of the kind which PCL had portrayed, and that there was an adverse trend which compelled the parties to analyze the situation and modify the understanding by the Supplementary Agreement dated 30.12.1999, L&T alleged that the original contract obligations stood altered and modified and in effect the Development Agreement was novated. L&T claimed reimbursement of ₹ 8,31,53,968/- incurred by it in connection with the work undertaken by it under the various agreements with *pendente lite* and future interest @ 18%, damages to the tune of ₹280.00 crores for breach of contract and a restraint order against PCL from going ahead with the development of project with M/s Ansal Housing & Construction or any other third party. It also sought for a direction for relieving of its responsibility and undertaking to LKB in regard to its obligations to that bank.

103. It was argued by Mr. Sameer Parekh that the breach of contract by PCL entitled L&T to claim damages and also reimbursement of the expenditure. In FAO(OS) 194/2009, L&T argued that the Learned Single Judge fell into error in not dealing with this material aspect, and that to that extent the judgment requires to be set aside. In the grounds of appeal before this Court, it is argued that once the Learned Single Judge allowed the application under Section 34, the impugned judgment ought to have set aside the award to the extent that it rejected the counter claim. It is argued that once PCL took the possession, L&T stood relieved of any obligation to act further. That it had made various payments and undertaken commitments to LKB and incurred costs towards the launch, appointment of consultants and sundry payments stood established as a matter of record. The learned counsel relied upon various letters whereby amounts were paid to LKB, the guarantees were furnished and other expenditure was said to have been incurred. It was submitted that the failure of the Learned Single Judge to set aside the award and remit the matter for consideration of the claims, rendered the impugned judgment liable to be set aside.

104. The submissions of L&T are countered by PCL which argues that at no point of time was the rejection of the counter claim put in issue in the proceedings under Section 34. Inviting the attention of the Court, learned Senior Counsel of PCL argued that there is nothing from the material on record on the face of the impugned judgment to show that L&T ever expressed its grievance with respect to the rejection of the counter claim. It is argued that even in the grounds of appeal before this Court, L&T does not whisper that the alleged wrongful rejection of the counter claim was ever argued before the Learned Single Judge for this Court to conclude that the

impugned judgment requires to be interfere with on this score. It is also lastly argued that the claim of damages to the extent of ₹ 280 crores is highly fanciful, exaggerated and groundless. Urging that no interference is called for with respect to restitution, PCL urges that the expenditure incurred - if at all was pursuant to the commitments which L&T had undertaken in the first instance. If after more than two years, some amount was allegedly spent, it was to prove its entitlement to restitution which is based on an application of an equitable principle. Once L&T was found to have fundamentally breached the agreement, it could not have claimed any order in equity much less towards the expenses allegedly incurred by it.

105. This Court has carefully gone through the application filed by L&T before the Learned Single Judge, i.e. OMP 26/2003. After filing the application, certain amendments were sought and were allowed by the Learned Single Judge during the pendency of the proceedings. Neither the amended grounds, nor in the entire body of the petition did L&T ever urge the issue of its entitlement to damages or a claim for restitution on the grounds it argued before this Court. The entire petition - containing 68 grounds and numerous sub-heads does not allege that the rejection of the counter claim was unlawful calling for setting aside of the award.

106. It is worth noting that both L&T and PCL made rival claims. Both alleged breach of contract by the other party. The claim of PCL was accepted; that of L&T was rejected. L&T preferred a composite application under Section 34. Given that the award accepted PCL's claim and rejected L&T's counter claim, and operated as a decree, it was expected of L&T to comprehensively challenge and canvass all the grounds available to it in law - that both in regard to the adverse findings with respect to PCL's claims as

well as the rejection of its counter claim. It deliberately chose to articulate grievances with regard to the adverse findings recorded by the Tribunal in respect of PCL's claim and did not urge any ground with respect to rejection of the counter claim. Significantly even at the stage when the petition under Section 34 was amended, no ground in regard to the claim for damages or restitution and why such rejection was unlawful, contrary to public policy or patently erroneous was urged. Consequently, the decree in respect of issues which pertained to the rejection of the counter claim became final.

103. The above constitute the most powerful rationale for rejecting L&T's argument that PCL's alleged breaches entitled it to damages and certain amounts in restitution. That apart, this Court also finds no reason to interfere with the impugned judgment on this aspect because of the simple reason that even in appeal L&T had not specifically argued that these aspects were ever urged before the Learned Single Judge. It would be perilous for this Court to second guess in these circumstances, especially given the contentious nature of the dispute, as to whether the Learned Single Judge's confirmation of the counter claim rejection was erroneous. L&T's arguments on counter claim and the erroneous denial of damages and other reliefs in restitution are consequently rejected. Its appeal FAO(OS) 194/2009, therefore, has to fail.

Findings on damages payable by L&T

104. The Tribunal, in the present case, directed L&T to pay damages to the tune of ₹ 35 crores to PCL on account of breach of contract. It directed L&T to settle the claims of LKB within four weeks of the award by repayment of loan of ₹ 6 crores with such interest that may be due and payable to LKB

and further directed L&T to secure the release of title deeds of 15 acres of land from the said bank and to reimburse the claimant's interest charges paid by PCL to LKB and in default thereof, it directed L&T to pay a sum of ₹ 75 crores for loss of saleable area in respect of 15 acres of land placed in mortgage with the LKB, within a period of 4 weeks. It also directed L&T to return licenses, permits and permissions obtained by PCL from various statutory authorities in respect of the lands within a period of 4 weeks and obtain certificate of discharge to that effect or in lieu thereof L&T was to pay a sum of ₹ 5 crores by way of damages within a period of 4 weeks. It permanently restrained L&T, from interfering in any manner with PCL's rights to develop the property. It also directed L&T to indemnify PCL in terms of Clause 4(b) and 25 of the Development Agreement dated 10th March 1998 for any action, or decree, or settlement that may be enforced by ITCREF against PCL or *in lieu* thereof to pay to PCL a sum of ₹ 50 crores as and when the claim of ITCREF against PCL gets crystallized. The Tribunal also directed L&T to pay the cost of the arbitral proceedings to the tune of ₹ 30 lakhs. It directed L&T to pay interest @ 12% per annum on the sums awarded commencing on four weeks from the date of award till actual payment. Thus, the total quantified award was ₹ 91 crores with interest and an additional contingent award of ₹ 75 crores in the event L&T defaulted in securing release of title deeds for 15 acres of land.

105. The damages payable to PCL by L&T, had to proceed on the basis of what was legally tenable. What PCL did prove was the existence of the Development Agreement; that the Supplementary Agreement (which also envisioned the Tripartite Agreement as the basis for funding the EDC by

LKB-the obligation primarily being that of L&T) was not binding for two reasons and that L&T had committed fundamental breach of its obligations under the contract. Two questions arise here. Firstly the extent of scrutiny under Section 34 in regard to award of damages. Secondly, if it is found that the award is unsustainable, the correct approach of the court: can it assess the damages and independently award them.

106. *Saw Pipes* (supra) is an authority for the proposition that award of damages which is patently contrary to substantive law, or without application of any known principle, is an error capable of interference under Section 34. The Supreme Court held that:

> *"It is apparent from the reasoning recorded by the arbitral tribunal that it failed to consider Section 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in the case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different*

and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract is likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach."

107. Under the old Arbitration Act, 1940, it was held, in *Bungo Steel Furniture Pvt. Ltd. v. Union of India* AIR 1967 SC 378 that an Arbitrator's omission to apply Section 73 of the Contract Act, which sets out the principles on which damages for breach of contract are to be assessed and granted, amounts to error of law. Likewise, in it was held by the Supreme Court in *Maharashtra State Electricity Board v. Sterilite Industries (India) & Anr* AIR 2001 SC 2933 that where loss in terms of money can be determined, the party claiming compensation must prove loss suffered by it. In order to attract Section 73, the appellant had failed to prove that it had suffered any loss. The Supreme Court held that it was not entitled to the claim. *M/s. Sikkim Subba Associates v. State of Sikkim* AIR 2001 SC 2062 is another authority on the subject of error of law discerned including in award of damages. In *Shamsu Suhara Beevi v. G. Alex and Anr* 2004 (8) SCC 569 it was held that relief of damages which were on the teeth of express terms of the statute was unsustainable in law. All these decisions indicate that whenever such an issue arises the court has to decide whether the arbitrator in the given facts had ignored the provisions of Section 73 of the Indian Contract Act and had awarded the damages on wrong application of law. *BOC India Ltd. Vs. Bhagwati Oxygen Ltd.* (2007) 9 SCC 503 enjoins courts,

under Section 34 of the Arbitration Act (of 1996) to forbear from interfering with awards so long as the measure adopted for grant of damages is based on a "plausible" view in the established facts of the case.

108. Section 73 of the Indian Contract Act stipulates that upon a breach of contract, the party suffering from such breach is entitled to receive, *"from the party who has committed breach, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from such breach."* Compensation is not paid for any remote or indirect loss or damage sustained by reason of the breach. The explanation to Section adds states:

> *"In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

The settled principles underlying the award of compensation are that the injured party should as far as possible be placed in the same position in terms of money as if the contract had been performed by the party in default. Where the contract is one of sale, this rule requires assessment of damages as at the date of breach. Under a contract for the sale of goods, the measure of damages upon a breach by the buyer is the difference between the contract price and the market price at the date of breach. On a breach of contract to supply goods by the seller, the buyer is entitled to recover all the expenses of procuring same or similar goods. In *Murlidhar Chiranjilal vs. Harishchandra Dwarkadas* AIR 1962 SC 366, the Supreme Court held that the aggrieved party (complaining of breach) has to establish the extent of

damage, by adducing proof. *Trojan & Co. Ltd. vs. RM. N.N. Nagappa Chettiar,* 1953 SCR 789 stated that:

> "*in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then.*"

Furthermore, Section 73 frowns against award of compensation that is remote (and not reasonably foreseeable). The (erstwhile) House of Lords, in its decision reported as *Kourfos v. C. Czarnikow Ltd.* (1969) 1 A.C. 350, enunciated the following guiding principles:

> *"(2) In case of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.... (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or at all events, by the party who later commits the breach.... (4) For this purpose, knowledge 'possessed' is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things and consequently what loss is liable to result from a breach of contract in that ordinary course.' But to this knowledge which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case -knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss."*

109. In claims of damages for breach of contract, damages may be measured by the profits which the plaintiff would have made in the ordinary

course if the contract had been implemented. This approach has been generally followed in later decisions.

110. The arbitrator has granted reliefs in favour of PCL under the following five heads:

a. Damages to be paid by L&T for breach of the Development Agreement amounting to ₹35 crores.

b. Direction to L&T to settle the claims of LKB by repayment of loan of ₹ 6 crores with interest, secure the release of title deeds from LKB and reimbursement for interest paid by PCL to LKB. In default, L&T was directed to pay ₹ 75 crores to PCL for loss of saleable area in respect of 15 acres of land.

c. Direction to L&T to return licences, permits etc., obtained from statutory authorities in respect of the land covered by the Development Agreement. In the alternative, L&T was directed to pay ₹ 5 crores to PCL as damages.

d. Permanent injunction against L&T restraining it from interfering with PCL's rights in respect of the property which forms the subject matter of the Development Agreement, i.e. Schedule A property.

e. Indemnify PCL against action or decree to be enforced by ITCREF in terms of clauses 4(b) or 25 of the Development Agreement. In lieu thereof, L&T was directed to pay ₹ 50 crores to PCL upon the crystallization of ITCREF's claims.

The Tribunal also awarded costs of arbitration to PCL, amounting to ₹ 30 lakhs.

111. This Court agrees with the Tribunal insofar as it frames categories (a) to (d) for grant of compensation to PCL. However, the indemnification against all claims of ITCREF, identified in (e) above, is incorrect and legally untenable for being overbroad in nature. Although clauses 4(b) and 25 of the Development Agreement may suggest that PCL ought to enjoy such indemnification from L&T against ITCREF's claims brought against it, their extent is circumscribed by clause 4(c)(i). This clause acknowledges a modification of PCL's obligations towards ITCREF under the agreement between them dated 30.07.1999 and provides that the provision of 2,20,416 sq. ft. of built-up area by PCL to ITCREF would be in satisfaction of "*the complete claims of [ITCREF] against [PCL]"*. Further, clause 4(c)(iv) provides that the terms of the Development Agreement shall override the agreement between PCL and ITCREF. Therefore, L&T's liability against PCL under clauses 4(b) and 25 of the Development Agreement would be limited to those concerning the transfer of the prescribed built-up area (2,20,416 sq. ft.) to ITCREF. Any other "*type*" or "*kind*" of loss incurred by ITCREF (refer *Kourfos v. C. Czarnikow Ltd.*, (supra) would not be reasonably foreseeable for PCL to be indemnified against. L&T's liability arising out of PCL's failure to transfer the agreed built-up area would have to be accounted for in category (a) above. Therefore, no general relief of indemnification in favour of PCL for ITCREF's claims can be granted.

112. Coming to the issue of quantification, this Court is of the opinion that the Tribunal's approach in computing damages was wholly erroneous and must be set aside.

113. While awarding a sum of ₹35 crores as damages to PCL for breach of the Development Agreement, the Tribunal merely relied upon the figures given by L&T in its counterclaim. Except the statement of Mr. Mohinder Puri, which estimated PCL's loss at ₹117 crores, the Tribunal did not rely upon any evidence to arrive at a fair assessment of the losses actually incurred by PCL. Indeed, PCL did not seek to prove such losses, and based its claim for damages on the estimates provided by L&T. Though the indicative disposal figure for the constructed area was agreed as approximately ₹ 2000/- per square feet, nevertheless the material on record suggests that the prices for such residential properties were fluctuating. In the absence of actual loss established by PCL, the Tribunal could not have awarded compensation. In any event, this Court notices that the manner in which the Tribunal relied upon L&T's estimates is also incorrect. As discussed above, in its counterclaim, L&T had estimated the sale proceeds for 40 lakhs square feet of built-up area to be ₹800 crores (@₹2,000 per sq.ft.). Costs were estimated at ₹320 crores (@₹800 per sq. ft.). Deducting this total cost from its share of the sale proceeds (75% of ₹800 crores, i.e. ₹600 crores), L&T claimed compensation of ₹280 crores from PCL. On this basis, the Tribunal estimated PCL's share of the net receipts (had the Development Agreement been performed) proportionately and arrived at a figure of ₹93 crores. However, the Tribunal lost sight of the fact that the total sale proceeds *and* the net receipts of PCL would be 25% of 800 crores,

i.e. 200 crores, as clause 7 of the Development Agreement provides that L&T was required to develop the area at its own cost, and PCL was not required to contribute to such costs.

The correct approach would have been to determine the prevailing market rate for sale of built-up area at the time of breach and thereupon, determine the proceeds that PCL would have received from sale of its 25% share of the total area - accounting for transfer to ITCREF the area guaranteed under the Development Agreement. More fundamentally, the award of ₹ 35 crores as damages is contrary to Section 73 and what is more, based on figures furnished by L&T's claim, which had been decisively rejected. Having rejected L &T's counter claim (including its calculations of loss of profit, etc) the Tribunal could not have used those figures to saddle that party with damages. This approach was not only illogical and inconsistent, but contrary to substantive law, i.e Section 73.

114. Secondly, the Tribunal's award of a sum of ₹75 crores, in the event of default by L&T in securing the release of 15 acres of mortgaged land from LKB, is also erroneous- and contrary to Section 73. Whilst the direction to pay the principal amount of ₹6 crores (to LKB) with interest till date of the award cannot be faulted, because it was an amount payable by L&T under the Development Agreement, the default of which led to PCL being constrained to enter into the Supplementary Agreement and also the Tripartite Agreement, the alternative award for ₹75 crores - without any proof of the assertion with respect to value of land, is unsustainable. PCL did not show how the Tribunal could have mentioned this amount, especially when the claim did not specify it. The Tribunal has not considered

any evidence/material whatsoever to suggest that value of each acre of land would be ₹ 5 crores. Similarly, the Tribunal's direction to pay a sum of ₹5 crores, in the event of L&T's failure to return the licences and other statutory permits, is also unexplained.

115. In these circumstances, this Court holds that the reliefs granted by the Tribunal cannot be sustained and are hereby set aside. The question that follows is whether this Court, exercising jurisdiction under Section 37 read with Section 34 of the Act, can modify, vary or remit the award. At the outset, it is noticed that there are divergent views on this issue. Here, the Court notices a somewhat divergent approach of various High Courts. The case law is discussed in the following part of the judgment.

Authorities in Favour of the Power to Modify, Vary or Remit the award

116. A learned Single Judge of this Court in *Bhasin Associates v. NBCC*, (2005) ILR 2 Delhi 88 held that "*the power to set aside an award when exercised by the Court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator*". This view was subsequently adopted in Single Bench decisions in *Union of India v. Modern Laminators Ltd.*, 2008 (3) ARB LR 489 (Delhi) (in the context of modification of the award), *IFFCO Tokio General Insurance Co. Ltd. v. Indo Rama Synthetics Ltd.* (decided on 20.01.2015) and *Canara Bank v. Bharat Sanchar Nigam Ltd.* (decided on 26.03.2015). In *Modern Laminators*, the Court relied upon the Supreme Court's decision in *Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd.*, (2007) 8 SCC 466, noting that the Court therein had modified the award in terms of its

findings; and the decision in *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*, AIR 2007 SC 817, where the interest rate awarded by the arbitrator was modified. The learned Single Judge in *Canara Bank* relied upon a decision of a Single Judge of the Madras High Court in *Gayatri Balaswamy v. ISG Novasoft Technologies Ltd.*, (2015) 1 MLJ 5. The Court in *Gayatri Balaswamy* examined the issue in significant and held as follows:

> *"Therefore, in my considered view, the expression 'recourse to a Court against an arbitral award' appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression 'application for setting aside such an award' appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred by the statute. In other words, the right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise."*

The same view had been adopted earlier by Single Bench decisions of the Bombay High Court in *Axios Navigation Co. Ltd.* v. *Indian Oil Corporation Limited*, 2012 (114) BOM LR 392 and *Angerlehner Structurals and Civil Engineering Co. v. Municipal Corporation of Greater Mumbai*, 2013 (7) Bom CR 83 and a Division Bench of the Calcutta High Court in *West Bengal Electronics Industries Development Corporation Ltd. v. Snehasis Bhowmick* (in A.P.O. No. 240 of 2012).

Authorities holding there is nopower to Modify, Vary or Remit the award

117. The Allahabad High Court in *Managing Director v. Asha Talwar*, 2009 (5) ALJ 397 held that the Court under Section 34 does not have the power to grant the original relief prayed for before the arbitrator. This was relied upon by a learned Single Judge of this Court in *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.*, 188 (2012) DLT 172 to hold that the Court cannot correct the arbitrator's errors or remand the matter to the arbitrator. It was held that:

> *"51. The view of the Allahabad High Court in Managing Director v. Asha Talwar appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the Arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal "to eliminate the grounds for setting aside the arbitral award". There is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognized as falling within the ambit of Section 34(4) of the Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned Arbitrator."*

This view was subsequently adopted by this Court in *Bharti Cellular Limited v. Department of Telecommunications*, 2012 (4) ARB LR 473 (Delhi), *State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd.*, 2014 (3) ARB LR 105 (Delhi) and *Delhi Development Authority v. Bhardwaj Brothers*, AIR 2014 Delhi 147. A Division Bench of

the Madras High Court in *Central Warehousing Corporation v A.S.A. Transport*, (2008) 3 MLJ 382 also held that once an award has been set aside, consequential reliefs cannot be granted under Section 34. The Court noted:

> *"17. Though we are not in a position to concur with the reasoning of the learned Single Judge, we are in complete agreement with the ultimate order of the learned Single Judge in setting aside the award. However, the further direction given by the learned Single Judge directing the appellant to appoint an arbitrator at Chennai and for conducting the arbitration are to be set aside as it cannot be given as an order of the Court. Useful reference can be had to the judgment of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. Hence, in an application taken out under Section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired."*

118. This Court is inclined to follow the decisions in *Central Warehousing Corporation*, *Delhi Development Authority*, *State Trading Corporation of India Ltd.*, *Bharti Cellular Limited*, *Cybernetics Network Pvt. Ltd.* and *Asha Talwar*. The guiding principle on this issue was laid down by the Supreme Court in *McDermott International Inc.* (supra), where the Court held:

> *"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The*

> *court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

Although the Madras High Court in *Gayatri Balaswamy* (supra) appropriately noted that these observations in *McDermott International Inc.* were not in the context of the specific issue being dealt herewith, this Court is of the opinion that it is determinative of the Court's approach in an enquiry under Section 34 of the Act. Indeed, a Court, while modifying or varying the award would be doing nothing else but "*correct[ing] the errors of the arbitrators*". This is expressly against the *dictat* of *McDermott International Inc.* Further, if the power to remit the matter to the arbitrator is read into Section 34, it would render inexplicable the deliberate omission by Parliament of a provision analogous to Section 16 of the Arbitration Act, 1940 in the present Act. Section 16 of the 1940 Act specifically armed courts with the power to remit the matter to arbitration. Noticeably, the scope of remission under the present Act is confined to that prescribed in sub-section (4) of Section 34. Besides the Division Bench rulings of this Court in *Delhi Development Authority*, *State Trading Corporation of India Ltd.*, this was also noted by a Full Bench of the Bombay High Court in *R.S. Jiwani v. Ircon International Ltd.*, 2010 (1) Bom CR 529, where the Court held:

> *"An award can only be set aside under the provisions of Section 34 as there is no other provision except Section 33 which permits the arbitral tribunal to correct or interpret the award or pass additional*

award, that too, on limited grounds stated in Section 33… It is also true that there are no parimateria provisions like Sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of Section 34 read together, sufficiently indicate vesting of vast powers in the court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award."

On the other hand, the Calcutta High Court in *Snehasis Bhowmick* did not analyse this distinction, or the specific observations of the Supreme Court in *McDermott International Inc.* quoted above. Further, the decisions in *Numaligarh Refinery* and *Harishchandra Reddy* (supra) did not discuss the Court's power to modify, vary or remit the award under Section 34 of the Act. Therefore, in light of the *dictum* in *McDermott International Inc.* and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to modify, vary or remit the award does not exist under Section 34 of the Act.

119. In the circumstances, the Court concludes as follows:

a. The finding of the Tribunal that the Development Agreement was not novated by the Supplementary Agreement is upheld; similarly the Tribunal's findings that the conditions which were to be fulfilled by L&T subject to which the said Supplementary Agreement was to come into force (but were not fulfilled) are upheld;

b. The finding of the Tribunal that the Supplementary Agreement was a non-starter as it was vitiated by economic duress is upheld. The impugned judgment's ruling to the contrary is set aside.

c. The finding of the Tribunal that L&T committed fundamental breach of the Development Agreement is upheld. The impugned judgment's ruling to the contrary is set aside.

d. The Tribunal's dismissal of L&T's counterclaim is upheld.

e. The Tribunal's quantification of damages for breach of contract (₹35 crores), compensation in lieu of securing title deeds with respect to 15 acres of land (₹75 crores) and compensation for default in returning licences and other permits is set aside (₹5 crores). The permanent injunction granted in favour of PCL restraining L&T from interfering with PCL's development of Schedule A property of the Development Agreement is upheld. The relief granting indemnification in favour of PCL for ITCREF's claims is set aside. It is clarified that this is without prejudice to the indemnification for ITCREF's claims relating to the transfer of 2,20,416 sq. ft. of land to the extent envisaged under the Development Agreement. The Tribunal's order to the extent that it awards costs of arbitration to PCL is upheld. f. Title deeds deposited with the Registrar of this Court pursuant to the directions in FAO 319/2001 are directed to be released to PCL.

120. Before concluding, the court would like to highlight – more as a post script, the prolix and near interminable arguments which were addressed by senior counsel on either side, who were insistent that the arbitral records, such as pleadings and documents, had to be examined, and read out in court. The court unsuccessfully entreatied them to limit oral arguments; equally unsuccessful were attempts at ensuring that written briefs were kept within limits. The citation of numerous authorities on similar propositions, and

reference to factual material, reduced an arbitration appeal (against the decision in Section 34) to the Division Bench into an appeal on facts, which Section 37 was clearly not intended to be. One hopes that there is some clarity within the legal system about the kind of time limit to arguments in such cases, to ensure timely disposal of appeals.

120. In light of the above conclusions, parties are left to pursue the appropriate course of action under law. This Court notices that since the dispute has been in subsistence for a considerable period of time, an attempt may be made at settling the claims through mediation. FAO (OS) 21/2009, 22/2009 and 23/2009 are partly allowed to the above extent; FAO (OS) 194/2009 is dismissed, for the same reasons.

121. No costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

APRIL30, 2015