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

COMMERCIAL ARBITRATION PETITION NO. 371 OF 2017

Maharashtra State Road Development Corporation Limited, near Priyadarshini Park, Napeansea Road, Mumbai – 400036 ... Petitioner

Versus

PLUS BKSP TOLL LTD., a company incorporated under the Companies Act, 1956 having its office at Gala No.1, 2 and 3, Siddhivinayak Residency, Plot No.40, Sector 9, Kamothe, Navi Mumbai – 410209 ... Respondent

Mr. Iqbal Chagla Sr. Counsel a/w Rajiv Kumar Sr. Counsel a/w Aliabbas Delhiwala and Mr. Jehaan Mehta, Jayendra Kapadia, Fozan Lakdawala a/w Ms Riddhi Pawar i/b Little & Co. for the Petitioner.

Mr. Darius Khambatta, Sr. Counsel a/w Zal Andhyarujina, Sr. Counsel, Anshul Tyagi, Prithvi Sidhu and Saloni Sharma i/b Yakshay Chheda for the Respondent.

CORAM : B.P. COLABAWALLA, J.

Reserved on : 22nd February, 2021

Pronounced on :19th April, 2021

JUDGMENT :

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short **"the Act"**), the petitioner challenges the Interim Award dated 25th April, 2017, passed by the Arbitral Tribunal to the extent it awards and determines:

(i) that the Concession Agreement dated 25th August, 2006 was validly terminated, both on account of Political Force Majeure Events and material default on the part of the Petitioner thereby holding / finding that the issue of liability against the Petitioner is finally determined;

(ii) that the hearing stands bifurcated and all quantum related issues deferred to a second phase to decide the quantum of the Respondent's claims;

(iii) the issues that would arise in the second stage of the arbitration as set out in paragraph 83 of the Impugned Award;

(iv) that there was no conciliation under the Arbitration and Conciliation Act, 1996;

(v) that the second phase may involve a brief set of pleadings whereby the Respondent may make fresh quantum claims, and the Petitioner may file its response

to the quantum, claims, and documents may be relied upon by parties;

(vi) that the need for any oral or expert evidence would be determined by the Tribunal in the second phase; and

(vii) that its decision on the Counter Claim is deferred.

2. A further direction is sought to set aside the impugned Award insofar as it rejects the petitioner's case and contentions.

3. The basic grounds of challenge to the impugned Interim Award are as under:

I **Reliance placed by the Arbitral Tribunal on evidence which was inadmissible in law;**

II **Upholding the validity of the termination of the Concession Agreement dated 25th August, 2006;**

III(A) **The Award is contrary to the procedure agreed upon between the parties as provided by section 19(2) of the Act;**

III(B) Legal misconduct on the part of the Tribunal; and

III(C) Failure of the Tribunal to consider and decide the Counter Claim filed by the petitioner.

4. Before I examine these grounds of challenge, it would be necessary to encapsulate the brief facts of the matter. The present dispute arises out of a Concession Agreement dated 25th August, 2006 (for short **"the Concession Agreement"**) which was entered into between the petitioner and the respondent for the purpose of four-laning, improvement and maintenance of the Bhiwandi-Kalyan Shil-Phata Highway (for short **"the Project Highway"** and/or the **"Project Road"**). The Project Highway is a road in the Mumbai Metropolitan Region which provides an East-West Link and connects NH3 to NH4. This Project Highway bears a heavy load of commercial traffic as well as caters to passenger vehicles commuting between Kalyan-Bhiwandi and Dombivali. The road measures 21.6 kilometers in length of which four kilometers was a four lane Highway from before and the rest of the road was of poor quality and a two-lane undivided carriageway. Additionally, over

fifty percent of the road length had stretches with poor driving conditions and was in need of immediate attention for road strengthening etc. The Project comprised of strengthening the existing four lane dual carriageway and widening the existing two-lane carriageway to a four lane dual carriageway.

5. In order to carry out work on the Project Highway, the Government of Maharashtra, by its letter dated 31st January, 2005, and Notification dated 24th July, 2006, appointed the petitioner (MSRDC) as an entrepreneur to implement the said Project with a concession period of 15 years 8 months and 15 days in two phases on a build, operate and transfer (BOT) basis. Phase-I was for strengthening the existing two lane divided carriageway and widening the existing two-way carriageway to a four lane divided carriageway. Phase-I concession period was for 9 years, 10 months and 15 days. Phase-II was for constructing the Kalyan Bypass with a major bridge on Ulhas river and Railway Over Bridge (**"ROB"**) on the Central Railway Line along with the approach roads.

6. In order to carry out the aforesaid work, the petitioner invited bids on 19th July, 2005. Pursuant thereto, a consortium of

"Plus Expressways Berhad" and *"Concept Management and Consulting Private Limited"* bid for the said Project and was found to be the successful bidder having offered the lowest concession period of 6 years, 8 months and 4 days. *"Plus Expressway Berhad"* is stated to be wholly owned by the investment arm of the Government of Malaysia. The consortium partner, *"Concept Management Consulting Private Limited"* is a company incorporated in India under the Companies Act, 1956. The bid of this consortium, namely the Plus – Concept Consortium was accepted by the MSRDC vide a letter dated 12th May, 2006. Subsequently, as required under the agreement, the consortium promoted and constituted a special purpose vehicle called *"Plus BKSP Toll Limited"* and who was the Claimant in the arbitration proceedings (the respondent herein). Accordingly, the petitioner, the respondent and the consortium entered into a Concession Agreement dated 25th August, 2006, and which is the Agreement out of which the present disputes arise. For the sake of convenience, the petitioner shall be referred to as **"MSRDC"** and the respondent shall be referred to as **"PLUS"**.

7. As per the Concession Agreement, M/s. S.N. Bhobe and Associates Private Limited was appointed as an Independent

Consultant (for short the **"IC"**) for the Project. The IC was appointed by MSRDC under clause 20 of the Concession Agreement. Clause 20.1, *inter alia*, provided that MSRDC will monitor and supervise the Project. However, MSRDC could appoint a consulting firm for this purpose by following an appropriate selection process and the name of the finally selected IC was to be communicated to the Concessionaire (PLUS).

8. In accordance with the terms and conditions of the Concession Agreement, the date of the commencement of construction was reckoned as 25th August, 2006. The Commercial Operations Date (**"COD"**) was to be 24th February, 2008 and was the date on which MSRDC was to issue the completion certificate or provisional completion certificate. The concession period was to run until 28th April, 2013, namely, the period from the date of signing of the Concession Agreement and ending on the termination date.

9. According to MSRDC, it was agreed between the parties that PLUS would not be entitled to recover Toll until after receipt of the completion certificate or the provisional completion certificate

and after removing the defects, if any. The provisional completion certificate came to be issued to PLUS on 22nd June, 2009, subject to certain terms and conditions. In the meantime, the Government of Maharashtra issued a Toll Notification on 13th August, 2009, authorizing PLUS to collect and retain the Toll from 22nd August, 2009 till 28th April, 2013. In a meeting held on 23rd October, 2009 between PLUS and MSRDC, it was decided that the date of the provisional completion certificate would be deemed to be 22nd August, 2009.

10. Thereafter, on 30th October, 2009, MSRDC granted PLUS an extension of the construction period until 29th December, 2009, which was an extension of 674 days from the original schedule Project completion date. As there was a delay in completion of the construction of the Project, PLUS addressed a letter to MSRDC and the IC, *inter alia*, requesting MSRDC to pay a sum of Rs.161.65 crores (being the difference between the actual cost incurred by PLUS and the original Project cost) towards additional direct cost incurred due to the alleged material default of the Concession Agreement by MSRDC as well as a Force Majeure Event. Thereafter, on 16th April, 2010, PLUS, while referring to its letter dated 24th

February, 2010, *inter alia,* stated that it was seeking compensation for all additional direct costs suffered and incurred by it and called upon MSRDC to pay the purported dues for which it provided the certificate from the statutory auditors. According to MSRDC, since disputes arose between the parties, PLUS, by its letter dated 10th May, 2010, called upon the IC to act in accordance with clause 39.1(b) of the Concession Agreement and referred six claims to it for conciliation. I must note that this is seriously disputed by PLUS as, according to it, only one claim for 'additional direct cost' was referred to the IC under clause 39.1(b) and not all six claims. I will deal with this aspect later in my judgment.

11. Be that as it may, the IC, by its letter dated 15th May, 2010, agreed to act as a Mediator in accordance with clause 39.1(b). Thereafter, several meetings were held and correspondence was exchanged between the parties for the purpose of and in pursuance of the request for conciliation/mediation. Finally, MSRDC and PLUS forwarded a joint proposal to the Government of Maharashtra for its consideration. During the pendency of the said proposal, PLUS, by its two letters dated 19th March, 2013 terminated the Concession Agreement. However, PLUS did not stop collecting Toll from the

said date and vide its letters dated 8th April, 2013 and 22nd April, 2013 requested for an amicable settlement. The Concession Agreement thereafter came to an end on 28th April, 2013. PLUS, therefore, by its letter dated 25th April, 2014, made a reference of all disputes and differences, including the Counter Claim between MSRDC and PLUS to the Vice Chairman and Managing Director of MSRDC. Thereafter, several discussions and meetings took place between the parties. As the disputes could not be resolved, PLUS, by its letter dated 31st July, 2015, invoked arbitration and appointed the Hon'ble Mr. Justice Aftab Alam (Retired) as their nominee Arbitrator. On the other hand, MSRDC by its letter dated 27th August, 2015, appointed Mr. R.M. Premkumar (Retired), an IAS Officer, as their Nominee Arbitrator and all disputes and differences were referred to arbitration. Thereafter, the Indian Council for Arbitrators, by their letter dated 15th December, 2015, appointed the Hon'ble Mr. Justice Shafee Syed Parkar (Retired) as the Presiding Arbitrator. Accordingly, the Arbitral Tribunal was duly constituted.

12. In its first meeting held on 20th February, 2016, the Arbitral Tribunal, in consultation with the parties and their

advocates, passed a detailed Procedural Order. By the said Procedural Order, the Arbitral Tribunal fixed a detailed procedure and passed directions for filing of the pleadings, documents, evidence etc, including the dates for cross-examination of witnesses by each party and also the dates for oral hearing. It was made clear that only in exceptional circumstances, extension of time would be granted, but under no circumstances, the scheduled dates of hearings fixed by the Arbitral Tribunal would be affected or altered. The relevant portion of this Procedural Order reads as under:

> **"Practice Directions [under Section 19(3) of the Arbitration and Conciliation Act, 1996]**
>
> After discussion, the Learned Counsel for the parties have agreed on this practice and procedure to be followed and in accordance therewith the following directions are issued by the Tribunal:
>
> 1. Extension of time shall be granted by the Tribunal in its discretion:
>
> (a) in exceptional cases only;
>
> (b) provided that a request is submitted before the date scheduled; and
>
> (c) as soon as it appears that the deadline cannot be complied with.
>
> The Parties may also agree between themselves for short extensions of time, on the basis of mutual courtesy, as long as those extensions do not materially affect the time table (the dates scheduled for the sittings of the Tribunal must not be affected) and that the Tribunal is informed prior to the scheduled deadline."

(emphasis supplied)

13. Accordingly, as per the Procedural Order dated 20th February, 2016, PLUS filed its Statement of Claim. MSRDC, by its advocate's letter dated 28th April, 2016, sought four weeks' time to file the Statement of Defence and Counter Claim for the reasons more particularly stated in the said letter. PLUS objected to granting further time to MSRDC to file its Statement of Defence and Counter Claim on the ground that the schedule fixed by the Arbitral Tribunal on 20th February, 2016, was prepared after discussing and obtaining the consent of the lawyers for both parties. The Arbitral Tribunal, by its order dated 4th May, 2016, granted two weeks' time to MSRDC to file its Statement of Defence and Counter Claim. Thereafter, by its Procedural Order dated 12th May, 2016, the Arbitral Tribunal rescheduled the dates only to the extent to which it concerned filing of the pleadings, documents and evidence. The dates fixed for cross-examination of witnesses as well as for oral hearings was kept unchanged. In other words, the time fixed for cross-examination of witnesses from 17th January, 2017 to 21st January, 2017, remained unchanged and similarly, the dates fixed

for oral arguments from 31st January, 2017 to 4th February, 2017 also remained unchanged.

14. Thereafter, the respondent filed its Statement of Defence and Counter Claim before the Arbitral Tribunal, taking up various defences. The record reflects that thereafter PLUS filed an application for production of documents which was objected to by MSRDC on various grounds. One of the main grounds was that the documents sought to be produced were expressly barred under sections 75 and 81 of the Act and/or section 23 of the Evidence Act and/or that they were privileged and/or were confidential. The Arbitral Tribunal held a meeting on 17th October, 2016, wherein it deferred all issues raised by the parties at the final hearing. By the said order dated 17th October, 2016, the Tribunal once again confirmed the fact that the other directions given in the Procedural Order dated 20th February, 2016, shall remain unchanged.

15. Thereafter, as per the schedule fixed by the Arbitral Tribunal, from 17th January, 2017 to 21st January, 2017 cross-examination of witnesses of both parties was done and the arguments were heard from 31st January, 2017 to 4th February,

2017. On 4th February, 2017, the hearing concluded and the Arbitral Tribunal directed the parties to file their written submissions and the matter was reserved for passing an Award. It was made clear by the Arbitral Tribunal that there would be no more hearings unless the Arbitral Tribunal was of the opinion that after going through the written submissions some clarification was required. Thereafter, on 26th April, 2017, MSRDC received from the Arbitral Tribunal, a photocopy of the Interim Award dated 25th April, 2017, and which is impugned in the present petition. It is aggrieved by this Interim Award that MSRDC is challenging the same on the grounds mentioned by me earlier.

16. As noted above, the Interim Award is challenged on five different grounds. I find that ground (i) the Award is contrary to the procedure agreed to between the parties [ground IIIA]; (ii) the failure of the Tribunal to consider / decide the Counter Claim [ground IIIC]; and (iii) legal misconduct on the part of the Tribunal [ground IIIB]; are all inter-twined together and, therefore, my findings on these three grounds will be decided together. The two other independent grounds I find are with reference to (i) the Tribunal placing reliance on inadmissible evidence which vitiates

the Award [ground I]; and (ii) upholding the validity of the termination of the Concession Agreement [ground II]. I shall deal with these two grounds first and separately before I decide the other three grounds of challenge.

I. RELIANCE ON INADMISSIBLE EVIDENCE VITIATES THE AWARD:

SUBMISSIONS OF MSRDC:

17. Mr. Chagla, the learned senior counsel appearing on behalf of MSRDC, submitted that the Arbitral Tribunal has arrived at its findings by relying upon documents and purported admissions made in documents which in law were inadmissible and hence could not be relied upon or looked at by the Tribunal. This argument is premised on the basis that the documents relied upon by the Tribunal were documents that were exchanged between the parties during the course of mediation /conciliation /settlement proceedings before the IC as contemplated under clause 39.1(b) of the Concession Agreement. He submitted that the documents and/or admissions exchanged between the parties during the course of such mediation/conciliation proceedings could not be relied upon as it is

impermissible in law. To substantiate this argument, Mr. Chagla submitted that PLUS made six claims before the IC as a mediator under clause 39.1(b) of the Concession Agreement. He submitted that clause 31.2 of the Concession Agreement categorically stipulates that in the event of MSRDC being in material default and such default is cured before termination, MSRDC shall pay to the Concessionaire, as compensation, all additional direct cost suffered or incurred by the Concessionaire arising out of such material default by MSRDC in one lumpsum within thirty days of receiving the demand or, at MSRDC's option, in three equal annual instalments, with interest. Mr. Chagla submitted that the term 'additional direct cost' under the Concession Agreement is, therefore, an omnibus term referring to all costs suffered or incurred by PLUS in any capacity as long as it arises out of a material default by MSRDC. He submitted that this is borne out by the correspondence on record before the termination of the Concession Agreement. He submitted that PLUS' letter dated 24th February, 2010 to MSRDC categorically refers to 'additional direct cost' reimbursement due to material default by MSRDC of the Concession Agreement. By the said letter, PLUS sought Rs.161.65 crores as 'additional direct cost' incurred due to material default of

MSRDC under clauses 4.1(b), 4.3, 10.1(i), 10.1(ii) and 10.1(iii). Therefore, by the said letter, PLUS sought all additional direct costs incurred by it on account of material defaults on the part of MSRDC. In other words, it was the submission of Mr. Chagla that all claims were referred to mediation/conciliation under clause 39.1(b) and not just one claim, namely claim No.5 for 'additional direct cost' as held by the Arbitral Tribunal.

18. Mr. Chagla thereafter brought to my attention, another letter dated 16th April, 2010, which again reiterates that PLUS had sought compensation from MSRDC for all additional direct costs suffered and incurred by them arising out of the purported material defaults by MSRDC. Mr. Chagla pointed out that a similar letter was again written by PLUS on 30th April, 2010. Finally, on 10th May, 2010, PLUS invoked clause 39.1(b) of the Concession Agreement and called upon the IC to mediate and assist in resolving the reimbursement demands already raised in respect of compensation for all additional direct costs suffered due to material defaults of the Concession Agreement by MSRDC under clause 31.2 of the Concession Agreement. The subject of the letter is identical to the earlier letters and the letter itself refers to the letter of 30th April,

2010, and to all preceding communication to MSRDC on the abovementioned subject. Therefore, Mr. Chagla submitted that by the said letter, various alleged material defaults on the part of MSRDC were referred to the IC, including the claims arising out of material defaults under clause 10.1(v) of the Concession Agreement. Mr. Chagla submitted that after a meeting on 5th June, 2010, scheduled by the IC, in pursuance of PLUS' invocation of conciliation, PLUS, *inter alia*, stated that it was continuing to suffer huge losses in revenue and that there was reduction in Toll income and that it was seeking compensation for all direct losses suffered by PLUS arising out of the erection of barrier by the Government Agency (The Commissioner of Police). PLUS also stated that it was willing to accept the extension of the concession period in lieu of cash payment in light of loss in Toll revenue which was stated as Rs.103.9 crores. Mr. Chagla thereafter also brought to my attention the letter written by the IC dated 14th July, 2010 to MSRDC which categorically submitted the revised calculations in respect of the loss in total revenue due to delay in issue of Toll Notification, non-payment of Toll by KDMT and NMMT buses and loss due to diversion of heavy vehicles. He thereafter brought to my attention the letter written by the IC to MSRDC dated 23rd June, 2011, wherein one

Dhruv Consultant provided the expenditure figures and stated that the IC had revised the same to Rs.161.19 cores and incidentally Annexure B to the said letter explicitly calculates the loss due to diversion of heavy traffic. He also brought to my attention other letters written by the IC to MSRDC dated 9th July, 2011 and 2nd August, 2011. He also submitted that subsequent thereto, MSRDC, on 20th October, 2011, made an offer to PLUS in respect of the request for conciliation under their letter dated 10th May, 2010 by proposing an extension in the concession period until 10th July, 2024 in lieu of claim Nos.1, 4, 5 and 6 and rejecting the claim for compensation for loss of revenue on account of delay in issuing the Toll Notification and KDMT and NMMT buses refusing to pay Toll. This offer was accepted by PLUS by its letter dated 4th November, 2011. He submitted that pursuant thereto, PLUS drafted the terms of a Settlement Agreement and Recital D thereof is very relevant. Mr. Chagla was at pains to point out Recital D of the draft terms of Settlement Agreement clearly stipulates as under:

> "D. Further, in pursuance of Clause 39.1 ("Amicable Resolution") of the Concession Agreement, the Concessionaire, vide its letter no. BKSP/PD/CA/E/C/435-10-5-2010 dated May 10, 2010, and earlier letters on the subject, raised six (6) claims (as more particularly described under "Annexure A" hereto) with MSRDC ("Claim Letter"). Subsequently, pursuant to recommendations of

> independent consultant appointed by MSRDC, M/s S.N. Bhobhe & Associates Pvt. Ltd. (hereinafter referred to as "Independent Consultant") contained in various letters resting with the last letter on the subject matter bearing no. SNBAPL/MSRDC-33/BKSP/PLA-EST/2010-11/P-113/545-D/1530 dated July 19, 2011 which contained revised cash flows on the claims submitted on the Claim Letter, and upon complying with various internal procedures and approvals within MSRDC, including the approval from MSRDC Board of Directors Resolution vide Item Number 06 dated September 27, 2011, MSRDC, vide its letter number MSRDC/02/JMD(I) BKSH/F.No. 142/3987 dated October 20, 2011 made an offer of an amicable settlement to the Concessionaire regarding the six(6) claims presented by the Concessionaire vide the Claim Letter ("MSRDC Offer") (as detailed in "Annexure B" hereto). The MSRDC Offer was duly accepted by the Concessionaire vide the letter no. BKSP/PD/CA/E/C986-04-11-2011 dated November 4, 2011 ("Acceptance Letter) (as annexed hereto as **"Annexure C")"** .

19. Relying upon the aforesaid recital, Mr. Chagla submitted that even according to PLUS, all six claims were referred to conciliation under clause 39.1(b) and, therefore, it was wholly incorrect on the part of the Arbitral Tribunal to come to the conclusion that only one claim, namely, for 'additional direct cost' was referred to conciliation and not the other claims. He submitted that this was contrary to the entire record, including what was stated in the termination notice issued by PLUS dated 19th March, 2013.

20. Mr. Chagla then submitted that even in PLUS' own pleadings [in the Statement of Claim], under the heading *"Facts about traffic diversion due to ban on entry of heavy vehicles on the BKSP Road"*, PLUS has clearly averred that it invoked clause 39.1 for amicable dispute resolution and requested the IC to mediate and assist. All this material, therefore, clearly establishes that even on PLUS' own pleaded case, conciliation proceedings, while under the nomenclature of 'additional direct cost', actually encompassed all claims raised by PLUS. He submitted that, therefore, the findings of the Tribunal that the offer of conciliation was only in relation to the claim for 'additional direct cost' and that the conciliation proceedings were only invoked in relation thereto, is directly contrary to the documents on record and the express admissions made by PLUS and are, therefore, perverse and completely unsustainable.

SUBMISSIONS OF PLUS:

21. On the other hand, Mr. Khambatta, the learned senior counsel appearing on behalf of PLUS, submitted that the IC was appointed by MSRDC to monitor and supervise the Project on its behalf in terms of clause 20 of the Concession Agreement. The IC

was to act as an agent / representative of MSRDC for supervising the Project. All communications addressed by MSRDC or PLUS were sent to the IC or the IC was also marked on the said communication. Apart from this, the IC also wore another hat under the Concession Agreement which is as a Mediator in respect of such disputes which were specifically referred to him under clause 39.1(b). Under clause 39.1(b) there were two modes of mediation. In case of a dispute between MSRDC and PLUS, either party could, with regard to that specific issue or dispute, call upon the IC to mediate that particular dispute. Failing mediation by the IC or without the intervention of the IC, either party could refer such dispute to the Vice Chairman and Managing Director of MSRDC and the Chairman of the Board of Directors of PLUS, for an amicable settlement. In the facts of the present case, MSRDC appointed M/s. S.N. Bhobe and Associates Private Limited as the IC for the current Project.

22. Mr. Khambata submitted that the six claims submitted by PLUS to the IC can be divided into two types. Firstly, those claims that were lodged by PLUS with the IC on account of various reasons during the usual course of business. Secondly, those claims in respect of which there was a dispute and PLUS had invoked

clause 39.1(b) of the Concession Agreement for mediation by the IC. Mr. Khambatta submitted that in the facts of the present case, the six claims submitted to the IC were as under:

Claim No.1	Extension in Concession Period due to revision of COD to 29.12.2009.
Claim No.2	Loss in Toll revenue due to delay in Toll Notification.
Claim No.3	Loss in Toll revenue due to ban on heavy vehicles on the Project Highway.
Claim No.4	Loss in Toll revenue due to refusal to pay the Toll fee by KDMT/NMMT for their buses plying on the Project Highway.
Claim No.5	Additional direct cost reimbursement due to material default of the Concession Agreement by MSRDC. - **Submitted for mediation of the IC under clause 39.1(b)**.
Claim No.6	Variation in project cost due to changes in the Scope of Work.

(emphasis supplied)

23. Mr. Khambatta submitted that only claim No.5 and which was for 'additional direct cost', was referred to mediation of the IC under clause 39.1(b). He submitted that this was clear from the fact that PLUS by its letter dated 26th February, 2010, addressed

to MSRDC, filed the claim for 'additional direct cost' reimbursement as a result of the material defaults of the Concession Agreement by MSRDC. This claim was for Rs.161.65 crores. PLUS wrote another letter on 16th April, 2010, to MSRDC demanding reimbursement of the 'additional direct cost' due to material default of MSRDC. Thereafter, on 30th April, 2010, PLUS addressed another letter to MSRDC stating the urgency of resolving the issue of 'additional direct cost' within the defined time lines. Since MSRDC did not make any payments, with reference to the 'additional direct cost', PLUS wrote a letter dated 10th May, 2010 to the IC invoking the provisions of clause 39.1(b) for assistance and contractual mediation in resolving the issue of 'additional direct cost' reimbursement and no other claim. Further, on receipt of the aforesaid communication, the IC, vide its letter dated 15th May, 2010, informed MSRDC that PLUS had invoked clause 39.1(b) of the Concession Agreement in relation to the issue of 'additional direct cost'. MSRDC thereafter by its letter dated 29th May, 2010, requested both PLUS and the IC to attend a meeting for resolution under clause 39.1(b) in relation to the issue of 'additional direct cost' reimbursement. Thereafter, the IC, in its communication dated 11th October, 2010, addressed to MSRDC discussed various claims

submitted by PLUS. However, what is important to note is that the IC categorically mentioned that clause 39.1(b) was invoked only with reference to 'additional direct cost'. The IC subsequently, on 23rd June, 2011, wrote to MSRDC in relation to the calculation for the 'additional direct cost' reimbursement whereby the revised amount was Rs.161.19 crores. Mr. Khambatta submitted that on looking at this letter it was abundantly clear that the claim was only for 'additional direct cost' in the sum of Rs.161.19 crores and not the other claims which were independent of the claim for 'additional direct cost'. He pointed out that thereafter, by a letter dated 3rd February, 2011, MSRDC informed PLUS stating that they had referred all the claims of PLUS to a Committee of Directors consisting of the Vice Chairman and Managing Director of MSRDC. The Committee was to consider the claims and decide on their admissibility and thereafter quantify the same. The Committee was to also determine the conversion of the quantified claim to the concession period in terms of the Concession Agreement and the resultant increase in the concession period. He submitted that all claims were referred to the Committee of Directors for the purpose of compensating PLUS by extending the Toll period in lieu of cash. Mr. Khambatta submitted that this Committee of Directors was not

the joint mediation envisaged under clause 39.1(b) and which was to consist of (i) the Vice Chairman and Managing Director of MSRDC and (ii) the Chairman of PLUS. This Committee of Directors was an internal Committee of MSRDC. He thereafter brought to my attention, the report of the Committee of Directors of July, 2011. He submitted that the Committee of Directors considered all the claims and presented its report in respect thereof. In the said report it is mentioned that PLUS had lodged six claims with the IC. The report analysed each claim individually and gave separate recommendations for each claim. Out of the six claims, the Committee accepted claim Nos.1, 3, 4 and 6 to be admissible whereas claim No.2 was not accepted as a valid claim. With reference to claim No. 5, and which related to 'additional direct cost', the Committee of Directors stated as under:

> "The Concessionaire has already requested for resolution of this issue under the provisions of dispute resolution as per clause 39.1(Annexure 13) of the Concession Agreement, for which MSRDC has appointed Mr. A.V. Deodhar, Superintending Engineer, MSRDC to represent itself in the dispute resolution proceedings.
>
> It is most suitable that this issue is resolved as per the provisions of the Concession Agreement for determination of the value of additional direct cost and grant of extension in concession period to the Commissionaire as compensation based on the computed value of additional cost which will also save MSRDC from substantial financial burden of paying cash compensation."

(emphasis supplied)

24. Mr. Khambatta submitted that the Committee summarized its findings, reiterating that claim Nos.1, 3, 4 and 6 were accepted in terms of the recommendations of the IC and claim No.2 was rejected. However, regarding claim No.5, i.e. 'additional direct cost', the Committee recommended *"Resolution of dispute as per the provisions of the Concession Agreement for settlement of issue"*. He submitted that from this report of the Committee of Directors, it is clear that the Committee either accepted or rejected the claims of PLUS, except the claim for 'additional direct cost' which was claim No.5. This claim was to be resolved by mediation of the IC as per clause 39.1(b) of the Concession Agreement. Mr. Khambatta submitted that keeping in line with this, the IC also, in its communication dated 2nd August, 2011, addressed to MSRDC, listed out six claims, including the claim for 'additional direct cost'. The IC thereafter dealt with each individual claim separately. As far as claim No.5 is concerned, the IC recommended that PLUS has already requested for resolution of this claim under the provisions of dispute resolution as per clause 39.1 of the Concession Agreement for which MSRDC has appointed Mr. A.V. Deodhar, Superintending

Engineer, MSRDC to represent itself in the dispute resolution proceedings. The IC recommended that it is most suitable that this issue is resolved amicably as per the provisions of clause 39.1 of the Concession Agreement through negotiated settlement with PLUS for determining the value of 'additional direct cost' and grant of extension in the concession period as compensation based on the negotiated value of the additional cost and which also would save MSRDC from a substantial financial burden of paying cash compensation. Mr. Khambatta submitted that all this material clearly goes to show that only the claim for 'additional direct cost' in the sum of Rs.161.19 crores was referred for conciliation under clause 39.1(b) and not all the claims as sought to be contended on behalf of MSRDC. He submitted that, in fact, the claim of additional direct cost has been reduced by the IC from Rs.161.69 crores to Rs.40.04 crores and which was accepted by PLUS. This is another factor which clearly goes to show that 'additional direct cost' was a completely separate claim and only that claim was referred to mediation/conciliation under clause 39.1(b).

25. This apart, Mr. Khambatta submitted that there is ample correspondence on record to show that MSRDC has engaged in

correspondence with several third parties in which they admitted their own defaults and which cannot be termed as correspondence entered into during conciliation proceedings. He, therefore, submitted that the contention of MSRDC that all claims were referred to mediation is wholly without substance and deserves to be rejected. Mr. Khambatta also submitted that when one reads the findings of the Arbitral Tribunal on this issue, it is quite clear that from the documents on record, it is certainly a plausible view and if that be the case, no interference is called for under section 34 of the Act. He, therefore, submitted that the aforesaid argument holds no merit and ought to be rejected.

FINDINGS OF THE COURT:

26. I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the above petition. The point to be decided here is whether all six claims were submitted by PLUS to the IC under clause 39.1(b), as sought to be contended by Mr. Chagla, or whether only the claim for 'additional direct cost' was submitted under the said clause. To put it in a nut-shell, according to Mr. Chagla, if all claims were submitted for conciliation under clause 39.1(b), then all correspondence

exchanged between the parties during the period of conciliation would be privileged and/or confidential and could not be relied upon for any purpose by the Tribunal. On the other hand, if only the claim for 'additional direct cost' was submitted for conciliation, the situation would be quite different.

27. To understand this controversy, one must understand the role of the IC. The IC is defined in the definitions clause (clause 1.1). It stipulates that the IC (Independent Consultant) shall have the meaning ascribed to it in clause 20.1. Correspondingly, clause 20 of the Concession Agreement deals with the appointment of the IC and his duties and obligations. Clause 20 of the Concession Agreement reads thus:

> "20. INDEPENDENT CONSULTANT
>
> 20.1 MSRDC will monitor & supervise the Project. However MSRDC may appoint a consulting engineering firm for this purpose by following an appropriate selection process. The name of the finally selected such Independent Consultant will be communicated to the Commissionaire.
>
> 20.2 The appointment of the Independent Consultant pursuant to Clause 20.1 shall initially be for a period of one and half (1.5) years from the date of its appointment. MSRDC may in its discretion thereafter renew such appointment or appoint another person.
>
> 20.3 The Independent Consultant shall report to MSRDC about their work, services, and activities pursuant hereto through

regular periodic reports (at least once every month) as the situation may warrant. Such report of Independent Consultant shall include but not be limited to the matters and things set forth in said Schedule 'O'.

20.4 The cost of supervision and monitoring by MSRDC / Independent Consultant shall be borne by Concessionaire. An amount of Rs.15,00,000/- (Rupees Fifteen Lakhs) per month during Construction Period and an amount of Rs.5,00,000/- (Rupees Five Lakhs) per month after COD up to the end of Concession Period shall be paid by Concessionaire to MSRDC before 10th of every month.

20.5 MSRDC may terminate the appointment of the Independent Consultant at any time subject to appointment of their replacement by another Independent Consultant in accordance with this Article XXII.

20.6 If the Concessionaire has reason to believe that the Independent Consultant is not discharging its duties in a fair, efficient and diligent manner, it may make a written representation to MSRDC, stating its reasons in detail, seeking termination of the appointment of the Independent Consultant. Upon receipt of such representation, MSRDC shall hold a tripartite meeting with the Concessionaire and Independent Consultant for amicable resolution of the dispute. If the dispute remains unresolved, it shall be resolved in accordance with the Dispute Resolution Procedure. In case the appointment of Independent Consultant is terminated under this Clause, it shall be replaced by another Independent Consultant in accordance with this Article XX.

20.7 If either party disputes any advice, instruction or award of the Independent Consultant, the dispute shall be resolved in accordance with the Dispute Resolution Procedure."

(emphasis supplied)

28. As can be seen from the aforesaid clauses, it was the obligation of MSRDC to monitor and supervise the Project. However, MSRDC could appoint a Consulting Engineering Firm for this

purpose, namely, to monitor and supervise the Project. The Independent Consultant (IC) was to report to MSRDC about the working, services and activities through regular periodic reports. Such reports were to include but not limited to the matters and things set forth in Schedule-O. MSRDC also had the right to terminate the appointment of the IC at any time, subject to appointment of their replacement by another IC in accordance with Article XXII. From the aforesaid clauses, it is clear that the IC was a person appointed by MSRDC to monitor and supervise the Project and was to report to MSRDC regarding its progress by filing regular periodic reports. Apart from this role, the IC had another role to play. This was to act as a Mediator as contemplated under clause 39.1(b) of the Concession Agreement. For the sake of convenience, Clause 39.1 is reproduced hereunder:

> "39. DISPUTE RESOLUTION
>
> 39.1 Amicable Resolution
>
> (a) Save where expressly stated to the contrary in the Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompletion of the Project Highway between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Sub-clause (b) below.

> (b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the VC & MD of MSRDC and the Chairman of the Board of Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Authorities shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Authorities, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 39.2.
>
> (c) If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 39.2 shall apply."
>
> (emphasis supplied)

29. As can be seen from clause 39.1, where there was any dispute, difference or controversy of whatever nature arising under, out of, or in relation to the Concession Agreement, the aggrieved party could, by writing, inform the other party about such dispute and the same was to be attempted to be resolved amicably in accordance with the conciliation procedure set forth in sub-clause (b) of clause 39.1. Sub-clause (b) stipulates that in the event of any dispute between the parties, either party may call upon the IC to

mediate and assist the parties in arriving at an amicable settlement thereof. Failing mediation by the IC, or without the intervention of the IC, either party may require such dispute to be referred to (i) the VC and MD of MSRDC and (ii) the Chairman of the Board of Directors of PLUS, for an amicable settlement. In other words, conciliation proceedings under clause 39.1(b) could be undertaken either by (i) the IC; or (ii) the VC and MD of MSRDC alongwith the Chairman of the Board of Directors of PLUS. Reading these clauses, I find considerable force in the argument of Mr. Khambatta that the IC, under the Concession Agreement, wore two different hats. Firstly, he was a person who was supposed to monitor and supervise the Project and report to MSRDC. The second was to act as a Mediator under clause 39.1(b), if the said clause was so invoked by either party.

30. Having said this, I shall now examine whether the factual situation before me is one where mediation / conciliation was invoked with reference to all six claims submitted by PLUS to the IC or whether it was only the claim for 'additional direct cost' that was the subject matter of mediation/conciliation under clause 39.1(b). In this regard, I find considerable force in the arguments canvassed

by Mr. Khambatta. Clause 39.1(b) was invoked by PLUS vide its letter dated 10th May, 2010. This letter was issued in relation to the claim for 'additional direct cost'. On receipt of the aforesaid communication, the IC, vide its letter dated 15th May, 2010, informed MSRDC that PLUS had invoked clause 39.1(b) of the Concession Agreement in relation to the issue of 'additional direct cost'. MSRDC thereafter, by its letter dated 29th May, 2010, requested both PLUS and the IC to attend a meeting for dispute resolution under clause 39.1(b) in relation to the issue of 'additional direct cost' reimbursement. Thereafter, the IC in its communication dated 11th October, 2010, addressed to MSRDC discussed the six claims submitted by PLUS. However, what is important to note is that the IC categorically mentioned that clause 39.1(b) was invoked only with reference to the claim of 'additional direct cost' which arose due to the delay in the Commercial Operations Date (**COD**) and not for other claims. In fact, on the face of it, claim Nos.3 & 4, and which related to (i) loss in Toll revenue due to ban on heavy vehicles on the Project Highway and (ii) loss in Toll revenue due to refusal to pay the Toll fee by KDMT/NMMT for their buses plying on the Project Highway, are not, as they could not have been, claims made

due to the delay in the Commercial Operations Date (**COD**) at all. The relevant portion of the said letter reads thus:

> "… … …
> 6) Additional Direct Cost due to material default of the concession agreement by MSRDC: This claim is due to the delay in COD of the project highway and additional direct costs suffered by the concessionaire as a result of this delay. The sequence of events and concessionaire's claim are as follows:
>
> a. As per the terms of the Concession Agreement, it was a condition precedent under clause 4.1(b) and an obligation of MSRDC under clause 10.1(i) to grant the concessionaire way leaves required in connection of the project highway and provide the right of way for the alignment of the project free from any encumbrances.
>
> b. The above matter resulted in delay in COD by 674 days.
>
> c. Subsequently, in order to ensure completion of the project highway construction despite the material default, with the cognizance of the causes of delay, the construction period and date and COD were extended by 674 days to 29.12.2009 by MSRDC vide its letter no.MSRDC/02/JMD(1)/BKS:1/File No.102/49999 dt. 30.10.2009. To provide this extension, MSRDC invoked Force Majeure clauses 29.4 and 29.6(b), latter being the only clause in the concession agreement which provides for extending the concession period.
>
> d. Concessionaire vide letter no.BKSP/PD/CA/E/C/366 dated February 24, 2010, and various subsequent letters on the subject matter, demanded that they should be compensated for additional direct costs suffered due the delay in COD for which it is contractually entitled under clause 31.2, that provides for compensation in the event of MSRDC being in material default of the concession agreement and also under 29.6(d) read with clause 29.7(c) that provide for reimbursement of cost actually incurred and certified by the statutory auditors of concessionaire in case of Political Force Majeure event.
>
> e. MSRDC vide its letter referred at sr. no. 9 above communicated to the concessionaire its denial on material default of the concession agreement.

f. Concessionaire vide its letter referred at sr. no. 10 has provided its response, reiterating the basis for compensation, clarifying that the extension in construction period merely attempts to restore the original operations period which was drastically reduced due to delay in COD and does not compensation for the additional direct costs suffered due to the delay; further maintaining its stand that it was an event of material default of the concession agreement by MSRDC.

g As per clause 39.1(b) of the concession agreement, concessionaire has called upon us to mediate and assist in arriving at an amicable settlement of the issue vide its letters numbered 435 and 439 dated 10.05.2010 and 26.05.2010 respectively.

… … …"

(emphasis supplied)

31. Apart from this, I find that all the claims submitted by PLUS were referred by MSRDC to a Committee of Directors consisting of the Vice Chairman and Managing Director of MSRDC. This Committee of Directors thereafter prepared a report in July, 2011 wherein it considered all the claims of PLUS and presented its report in respect thereof. The said report categorically mentions that PLUS had lodged six claims with the IC. The report analysed each claim individually and gave separate recommendations for each claim. Out of the six claims submitted by PLUS, the Committee accepted claim Nos.1, 3, 4 and 6 (set out earlier) to be admissible, whereas claim No.2 was not accepted as a valid claim. With

reference to claim No.5 and which related to 'additional direct cost', the Committee of Directors noted that PLUS had requested for resolution of this issue under the provisions of the Dispute Resolution as per clause 39.1 of the Concession Agreement and for which MSRDC had appointed Mr. A.V. Deodhar to represent itself in the dispute resolution proceedings. It was thereafter recommended that it would be more suitable that this issue is resolved as per the provisions of the Concession Agreement for determination of the value of 'additional direct cost' and to grant extension in the concession period which will also save MSRDC a substantial financial burden of paying cash compensation.

32. From all this material, I find that Mr. Khambatta is correct in his submission that only the claim for 'additional direct cost' [namely, claim No. 5], was the claim that was referred to mediation / conciliation under clause 39.1(b) of the Concession Agreement. I am unable to agree with Mr. Chagla that the words 'additional direct cost' should be read in an omnibus fashion which would include every single claim that was submitted by PLUS to the IC. This is not how the IC understood it and neither was it the understanding of MSRDC or the Committee of Directors of MSRDC.

33. This apart, I find the discussion on this aspect by the Arbitral Tribunal is at paragraphs 65, 75 and 76 respectively. The Tribunal has noted that the letter dated 10th May, 2010, and the letters issued earlier to it do not actually refer to the six claims, but rather only to the claim of 'additional direct cost'. This claim was first put forward by a letter dated 24th February, 2010 where PLUS claimed an amount of Rs.161 crores as the escalated project cost on account of material default of MSRDC. Subsequently, this claim was pursued by further letters dated 16th April, 2010 and 30th April, 2010. Finally, by means of the letter dated 10th May, 2010, PLUS proposed conciliation. It is in this light that the Arbitral Tribunal came to a finding that the offer of conciliation was in relation only to the claim for 'additional direct cost'. The Tribunal held that though it is true that other claims had also been raised by that time, these were by means of separate letters and were separately pursued. It is only much later, by a communication dated 2nd August, 2011, that the Independent Consultant clubs the various claims under the six heads and makes its recommendations with relation to each claim. With reference to claim No.5 ('additional direct cost'), the IC once again notes that PLUS has already requested for resolution of this

issue under the provisions of the Dispute Resolution as per clause 39.1 of the Concession Agreement and it is most suitable that this issue is resolved amicably as per the provisions of clause 39.1 through negotiated settlement and granting extension in the concession period will save MSRDC a substantial financial burden of paying cash compensation. The Tribunal further notes the strong objection of MSRDC regarding the admissibility of not only the Director's report referred to above, but to a very large number of documents / correspondence exchanged between PLUS, the IC and MSRDC in regard to the claims raised. It notes that the objection to the admissibility of these documents is the most prominent and consistent theme of the case of MSRDC. The main objection is that the correspondence between the parties was made in the course of conciliation proceedings and, therefore, protected by confidentiality on account of sections 75 and 81 in Part III of the Arbitration & Conciliation Act, 1996 and/or section 23 of the Evidence Act. After considering the material and giving a careful consideration to the objection raised by MSRDC, the Tribunal finds no merit in this contention. The Tribunal holds that firstly the conciliation proceedings were only invoked in relation to the claim for 'additional direct cost' whereas the figure of Rs.112 crores includes

loss on other grounds as well (loss of Toll revenue on account of traffic regulations and non-payment of Toll by Municipal buses). The Tribunal, therefore, holds that the alleged confidentiality attached to the conciliation proceedings can, at best, be attached to matters pertaining to the claim for 'additional direct cost', but not the other claims. The Tribunal also correctly holds that the Concession Agreement never envisaged or contemplated a conciliation as contemplated under Part III of the Act and neither any such procedure was followed. It also noted that the IC was a nominee of MSRDC performing MSRDC's obligations under the agreement which it could outsource to the IC. Part III of the Act, however, requires that there should be an independent and impartial third-party Conciliator to mediate and assist in the resolution dispute. Given that the IC was a nominee of MSRDC, it could never, therefore, have performed the role of a Conciliator as understood and envisaged under Part III of the Act. It could, at best, have been a contractual conciliation procedure. The third point that the Tribunal holds on this issue is that clause 39.1(b) of the Agreement did not expressly contain any confidentiality restrictions with regard to the correspondence exchanged during the conciliation procedure and nor are any documents marked 'without prejudice'. It is in these

circumstances that the Tribunal rejected the contention of MSRDC that the documents exchanged between the parties was a part of conciliation and, therefore, inadmissible in the proceedings. The Tribunal thereafter, though holding that the documents were admissible, categorically recorded that it would still be required to be determined as to the weightage that could be attached to these documents as evidence of an admitted quantification of the loss suffered by PLUS.

34. Having gone through the findings given by the Arbitral Tribunal in the relevant paragraphs mentioned above, it can hardly be stated that the view taken by the Tribunal suffers from any patent illegality or is perverse. The Tribunal has examined the record, heard the parties and thereafter come to its conclusion. The Arbitral Tribunal has categorically held that after looking at the correspondence on record, the conciliation proceedings were only invoked in relation to the claim for 'additional direct cost' and not with reference to any other claim. This finding can hardly be termed as perverse and is certainly a plausible view taken by the Tribunal to hold that the objection to the admissibility of the

documents on the ground that they are part of conciliation proceedings is without any merit.

35. Before concluding on this issue, it would only be fair to deal with the reliance placed by Mr. Chagla on Recital 'D' of the draft settlement agreement (reproduced above). I find that the reliance placed by Mr. Chagla on Recital 'D' is wholly misplaced. Firstly, PLUS itself sought to rely upon this draft (to establish admission of liability) and which was negated by the Tribunal on the ground that the same was never signed by either of the parties and hence could not be relied upon. I then fail to see how MSRDC can rely upon it when it does not admit the same. Secondly, Recital 'D' talks about the six claims that were raised pursuant to a letter dated 10th May, 2010 and earlier letters on the subject. In fact, the letter dated 10th May, 2010 (and the earlier letters) clearly shows that six claims were never raised and only the claim for 'additional direct cost' was raised under the said letters which culminated into conciliation proceedings under clause 39.1(b). The Tribunal too, after examining the correspondence on record, categorically records that the letter dated 10th May, 2010 and the letters issued earlier to it, do not actually refer to the six claims, but rather only to the claim

for 'additional direct cost'. In fact, the Tribunal also records that though it is true that other claims had also been raised by that time, these were by means of separate letters and were separately pursued. This being the position, I find that the reliance placed by Mr. Chagla on Recital 'D' of the draft settlement agreement is wholly misplaced. Similar is the case in relation to the pleadings filed before the Arbitral Tribunal. The Tribunal has considered the pleadings and has thereafter come to the conclusion that it was only the claim for 'additional direct cost' that was referred to mediation / conciliation and not any other claim. In these circumstances, I do not find that the Tribunal was in any error in holding that it was only the claim for 'additional direct cost' that was referred to mediation / conciliation under clause 39.1(b) and not any other claim. I, therefore, do not find any reason to interfere with the Interim Award on this issue.

II. UPHOLDING THE VALIDITY OF THE TERMINATION OF THE CONCESSION AGREEMENT:

SUBMISSIONS OF MSRDC:

36. Mr. Chagla submitted that the findings of the Arbitral Tribunal upholding the termination of the Concession Agreement is contrary to the record and, therefore, wholly illegal and perverse. He submitted that the Concession Agreement could be terminated under two different clauses, namely, clause 32.4 and clause 29.8 of the Concession Agreement. Clause 32.4 gave a right to PLUS to terminate the Concession Agreement in the event of any default committed by MSRDC. On the other hand, clause 29.8 gave a right to either party to terminate the agreement if a Force Majeure event subsisted for a period of 180 days or more within a continuous period of 365 days. Under clause 32.4.1, the termination notice was to be given in writing by giving a ninety days' notice under clause.

37. Mr. Chagla submitted that the findings given by the Arbitral Tribunal in paragraph 70 of the Award upholding the termination of the Concession Agreement under clauses 32.4.1(1) and 32.4.1(3) thereof, are wholly illegal and perverse. He submitted that PLUS, by its termination notice dated 19th March, 2013, sought to terminate the Concession Agreement under clause 32.4 thereof. In order for it to be a valid termination, clause 32.4 requires four conditions that need to be satisfied, namely: (1) that there is a

breach of the Concession Agreement; (2) The breach should have a material adverse effect on the project; (3) that a 90 days' notice be given; and (4) MSRDC failing to cure the said breach or take effective steps for curing the said breach within 90 days of receipt of the notice. Mr. Chagla submitted that in the facts of the present case, none of the aforesaid conditions are satisfied. He submitted that firstly clause 32.4 mandatorily required termination to be 90 days after a written notice in respect thereto was given to MSRDC. It is an admitted position that the 90 days' notice has not been given. Despite this, the Arbitral Tribunal, in paragraph 70 of the Award records that though a 90 day notice was required, the notice period was complied with as PLUS had only refrained from issuing a formal termination notice on the assurance of MSRDC and, therefore, MSRDC had much more than the 90 day notice period to cure the breach. The Tribunal has, in this respect, referred to a letter dated 4th February, 2013. Mr. Chagla submitted that even assuming whilst denying that this letter amounted to a written notice under clause 32.4, the time period from 4th February, 2013 to 28th April, 2013, did not satisfy the 90 day notice period. He submitted that termination under clause 32.4 requires strict compliance and failure to give notice of 90 days clearly renders the

termination illegal and invalid. He, therefore, submitted that on this ground alone it should be held that the Award is illegal and perverse as it runs directly contrary to the express wordings of clause 32.4.

38. Mr. Chagla then submitted that in any event, the termination under clause 32.4 cannot be held to be valid as there was no breach on the part of MSRDC. He submitted that MSRDC was obliged to provide the land for the approach road to the Railway Over Bridge (ROB). MSRDC had complied with its obligation by the time the Railways modified the dimensions of the ROB. This modification necessitated additional land to be acquired and also for the drawings to be approved by the Railways. The preparation and approval of the drawings were the obligations of PLUS. Therefore, until the drawings were approved, the ROB could not be constructed. The Arbitral Tribunal has completely ignored the obligation of PLUS as contained in clause 2 of Schedule B, clause 9.8(ii), notes 3 and 4 to the drawing of the Katai ROB and clause 9.4(v) of the Concession Agreement. Mr. Chagla submitted that the admitted position is that MSRDC had acquired the additional land before the drawings were approved by the Railways as recorded in the letters dated 2nd May, 2009 and 11th September, 2009. Therefore, there was no delay

occasioned or prejudice caused to PLUS by reason of the delay in acquisition in land and, therefore, no breach was committed by MSRDC.

39. Mr. Chagla thereafter submitted that even assuming that there was a breach on the part of MSRDC, there was no material adverse effect on PLUS. He submitted that the only evidence led by PLUS before the Arbitral Tribunal was the correspondence addressed complaining of "losses"; constraint on its "cash flow position"; that its operations were being jeopardized; and mentioning alleged figures of loss etc. PLUS led no evidence in support of the alleged losses or constraint on its cash flow or its operations being jeopardized, save and except what transpired before the IC in the course of conciliation proceedings. As recorded by the Tribunal in paragraph 77 of the Award, various figures of loss were proposed by either side in the spirit of settlement while they were trying to work out a rough and ready compromise. These were sought to be relied upon by PLUS as admissions of liability and which were expressly rejected by the Arbitral Tribunal. In fact, the finding of the Tribunal is that it is for PLUS to prove and quantify the loss it has suffered and claim damages on that basis and that the

claim for Rs.112 crores was based only on admissions made by MSRDC in the course of conciliation which the Arbitral Tribunal did not accept. Mr. Chagla submitted that for the Tribunal to come to a finding that there had been a material adverse effect, it was essential for the Tribunal to examine the evidence and conclude that PLUS had suffered loss or damage which, in turn, would be the material adverse effect caused to PLUS. On coming to the conclusion that on the available evidence, the Tribunal was not in a position to conclude that there was a loss or damage, the Arbitral Tribunal could not have concluded that there was a material adverse effect. The findings in this regard, therefore, are patently illegal and wholly perverse, was the submission of Mr. Chagla.

40. In the alternative to the above argument, Mr. Chagla submitted that even assuming that MSRDC had committed a breach, it had taken effective steps to cure the same. He submitted that clause 32.4 allows MSRDC a period of 90 days to cure the alleged breach. The Arbitral Tribunal has held that MSRDC had granted an extension of 674 days to the construction period vide its letter dated 18th June, 2010. The said letter clearly records that the extension was granted under clause 29.6(b) of the Concession Agreement and,

therefore, the monetary claim was rejected by MSRDC. Further, MSRDC had also got an interim Toll Notification issued on 26th April, 2013 permitting PLUS to collect Toll for a period three months from 28th April, 2013. PLUS refused the said interim Notification on the ground that there was a new condition of depositing the amount of Toll in an Escrow Account. Mr. Chagla submitted that there was no new condition of depositing the money in the Escrow Account as the same was already provided for in clauses 6.3. 6.4, 25 and 34.11 of the Concession Agreement. He submitted that it is pertinent to note that the Arbitral Tribunal has categorically held that the default of the MSRDC is not the failure to have a Toll Notification issued in respect of the proposed extended concession period. In light of all this, Mr Chagla submitted that MSRDC had taken all effective steps to cure the breach, if any. In any event, PLUS terminated the Concession Agreement even before the 90 day period was over and, therefore, the Tribunal could not have held that MSRDC had not cured the breach within the period of 90 days. In these circumstances, Mr. Chagla submitted that the finding of the Arbitral Tribunal upholding the termination of the Concession Agreement under clause 32.4.1 is patently illegal and perverse and ought to be set aside.

41. Similarly, Mr. Chagla submitted that the findings of the Arbitral Tribunal upholding the termination of the Concession Agreement under clause 29.8 are also patently illegal and ought to interfered with. Mr. Chagla submitted that in the termination notice dated 19th March, 2013, PLUS sought to terminate the Concession Agreement under clause 29.8, *inter alia*, on the following grounds:

(a) Non issuance of Toll Notification by the Government of Maharashtra till 10th July, 2024 in pursuance of the Settlement Agreement;

(b) Refusal of KDMT and NMMT buses to pay Toll; and

(c) Traffic Control Notification dated 11th May, 2009, banning entry of multi axle vehicles through Kalyan city and Notification dated 29th December, 2009 closing entry of all heavy vehicles on the said Project Road.

42. Mr. Chagla brought to my attention that the Arbitral Tribunal upheld the termination of the Concession Agreement under clause 29.8 on grounds (b) and (c) above and rejected the termination on ground (a). Mr. Chagla took me through clause 29 of

the Concession Agreement and which deals with the events of Force Majeure. He submitted that in the present case, PLUS has claimed existence of a Political Force Majeure event and which is defined in clause 29.4. He submitted that a Political Force Majeure event shall mean one or more of the acts of events by or on account of MSRDC, GOM or any other Governmental agency, as more particularly set out in clauses 29.4(i) and 29.4(iii). Whilst interpreting the aforesaid clauses, Mr. Chagla submitted that it was clear that five conditions required fulfilling. They were: (a) the event should be a Political Force Majeure event as defined in clause 29.4 of the Concession Agreement; (b) the said event should prevent the party from performing its obligations under the Concession Agreement; (c) the said event is beyond the reasonable control and not arising out of the fault of the affected party; (d) the affected party is unable to overcome the said event by exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money; and (e) the said event has a material adverse effect on the Project. Mr. Chagla submitted that the Arbitral Tribunal held that refusal of KDMT and NMMT buses to pay Toll [ground (b) above] is an expropriation of the rights of PLUS and, therefore, constitutes a Political Force Majeure event within

the meaning of clause 29.4 of the Concession Agreement. This finding can be found at paragraph 61 of the Award. Mr. Chagla submitted that the said finding offends the plain dictionary meaning of the word 'expropriation' in that the refusal to pay Toll, can by no stretch of the imagination, be termed as an expropriation. In this regard, he relied upon the Black's Law Dictionary and the Oxford English Dictionary meanings of the word "expropriation".

43. This apart, Mr. Chagla submitted that in any event PLUS was not prevented from performing its obligations. The finding that PLUS was prevented from performance of its obligations is illegal and perverse as it is contrary to a categorical admission made by the Director of PLUS during cross-examination, wherein he admitted that PLUS had the ability to perform its obligations. In this regard, he brought to my attention a question put to the Director of PLUS wherein he was asked as to whether it would be correct to say that from 4th November, 2011 to 28th April, 2013, PLUS was not prevented from performing its obligations under the Concession Agreement. The answer to this question was *"We had the ability to perform because the toll notification was there and we were able to collect toll upto 28th April, 2013"*. Mr. Chagla submitted that

despite this admission, the Arbitral Tribunal, in paragraph 62 of the Award, completely disregards and dismisses the same as an isolated statement, holding instead that regard must be had to the entirety of the documents on record to ascertain whether, in fact, PLUS was prevented in performance of its obligations. Mr. Chagla submitted that the said finding has been arrived at without identifying the documentary evidence on record in support of such a finding. This finding is also contrary to the Arbitral Tribunal's own finding in paragraph 43 of the Award wherein it held that the period from November, 2011 to April, 2013, PLUS was still able to collect and retain Toll on account of the original Toll Notification till 28th April, 2013. Mr. Chagla submitted that, therefore, the findings in paragraph 62 of the Award are not only self-contradictory but also contrary to the admission made by the witness of PLUS.

44. Mr. Chagla next submitted that even if a Political Force Majeure event arose, the same was on account of the fault of PLUS. He submitted that the finding of the Arbitral Tribunal that the said event, namely, refusal of KDMT and NMMT buses to pay Toll was entirely beyond the control of PLUS and certainly not on account of any fault of PLUS, is patently illegal and perverse inasmuch as the

said event occurred solely on account of the failure on the part of PLUS to perform its obligations under the Concession Agreement. Mr. Chagla submitted that clause 18.1 of the Concession Agreement obliged PLUS to prevent unauthorised entry and exit from the Project Road. Further, it was the duty and obligation of PLUS to levy and collect Toll from the users of the Project Road and refuse entry of any vehicle if the Toll fee was not paid. Mr. Chagla submitted that the finding of the Arbitral Tribunal on this aspect is arrived at without considering the material clauses of the Concession Agreement and has resulted in PLUS being virtually absolved from its obligations under the Concession Agreement and which is clearly impermissible. He submitted that PLUS could have overcome the event by exercising due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money. The finding of the Arbitral Tribunal that PLUS exercised necessary due diligence and that precipitating matters any further could lead to serious law and order repercussions is incorrect and contrary to its own conclusion that it was for PLUS to exercise legal remedies to enforce its rights under the Toll Notification. Mr. Chagla submitted that the Arbitral Tribunal has arrived at this finding on the basis of assumptions and presumptions and has virtually absolved PLUS of

its obligations to collect Toll and prevent entry of any vehicle that was not authorised to use the Project Road. Since PLUS chose not to collect Toll from the KDMT and NMMT buses though they were entitled to under the Concession Agreement, PLUS now cannot claim that the same amounts to a Political Force Majeure event which entitles them to terminate the agreement. To put it differently, Mr. Chagla submitted that PLUS cannot take advantage of its own wrong.

45. Mr. Chagla lastly submitted that in any event there was no material adverse effect caused to PLUS by KDMT and NMMT buses not paying the Toll. He submitted that the Arbitral Tribunal has held that it is unable to arrive at a quantum determination based on the existing record and submissions and the Tribunal cannot place much weight on the quantum figures arrived at during the stage of settlement. Further, the loss on account of Toll revenue from KDMT and NMMT buses was also submitted to the IC during conciliation proceedings initiated by PLUS. There was, therefore, no evidence or material before the Tribunal on the basis of which the Tribunal could have arrived at a finding that there was any material adverse effect. Further, the Arbitral Tribunal has not referred to

any evidence in order to arrive at the said finding, was the submission of Mr. Chagla. He, therefore, submitted that the finding of the Arbitral Tribunal in this respect is patently illegal and perverse.

46. Mr. Chagla then submitted that similar is the case with reference to the ban on heavy vehicles and multi axle vehicles [ground (c) above]. He submitted that the ban on heavy vehicles and multi axle vehicles did not constitute a Political Force Majeure event and the same is evident from the fact that the ban on the said vehicles did not amount to a change in law and there was no material adverse effect on account of the said ban. Mr. Chagla submitted that the finding of the Arbitral Tribunal that PLUS was not aware of the resolution passed by KDMC allowing heavy vehicles to ply on the project road/project highway only from 10.00 p.m. to 6.00 a.m. is contrary to the evidence on record. He submitted that PLUS was all along aware about the circular dated 20th March, 2006 as by the very circular itself, NOC was granted to KDMC to carry out the work. The said NOC was admittedly obtained by PLUS as recorded in the Minutes of the Meeting held on 31st July, 2006 and which Minutes were forwarded to MSRDC by PLUS by its letter

dated 3rd August, 2006. The finding of the Arbitral Tribunal that PLUS was unaware of the said circular is belied by the deposition and cross-examination of MSRDC's witness wherein the witness of MSRDC has clearly stated that the ban on heavy vehicles was applicable much before the tender was issued for the Project Road and the said Resolutions dated 9th March, 2006 and 20th March, 2006 were public documents and known to the public. Mr. Chagla submitted that the Notifications of 11th May 2009 and 29th December, 2009 imposing a complete ban did not amount to a change in the law or an expropriation of the rights of PLUS within the meaning of clause 29. He, therefore, submitted that the ban on heavy vehicles, in any event, did not amount to a Political Force Majeure event as it did not amount to a change in law.

47. Even assuming for the sake of argument that it would amount to a Political Force Majeure event, Mr. Chagla submitted that there was no material adverse effect as a result of the said ban. The finding of the Arbitral Tribunal that undoubtedly the event had a material adverse effect on the Project as the amount of uncollected Toll was allegedly in excess of Rs.60 crores is perverse as the Arbitral Tribunal has arrived at this conclusion in the absence of

any evidence as no loss has been proved by PLUS. In any event, this finding in respect of the figure of Rs.60 crores is also on the basis of a figure worked out by the IC during the course of conciliation proceedings. PLUS has even admitted in paragraph 6.53 of the Statement of Claim that the loss on account of ban on heavy vehicles was calculated by the IC vide its letter dated 14th July, 2010, in furtherance of the conciliation proceedings initiated by it. This finding has been arrived at by relying upon documents exchanged between the parties during the course of mediation and/or conciliation and/or amicable settlement. Further, the said figure of Rs.60 crores is included in the figure of Rs.112 crores. The Arbitral Tribunal has rejected the said claim as is evident from the finding of the Arbitral Tribunal in paragraphs 77, 79, 86 and 87 of the Award. Therefore, the finding of the Arbitral Tribunal that ban on heavy vehicles resulted in a material adverse effect is not only self-contradictory, but without any basis. He, therefore, submitted that even the termination under clause 29.8 was wholly unwarranted and the findings of the Tribunal in this regard are contrary to the record and are patently illegal and perverse and ought to be interfered with under section 34 of the Arbitration & Conciliation Act, 1996.

SUBMISSIONS OF PLUS:

48. On the other hand, Mr. Khambatta, the learned senior counsel appearing on behalf of PLUS, submitted that in the present case, the issue whether the termination of the contract was valid or not is a finding of fact. If it is a finding of fact, the challenge to the findings on the termination being valid is not maintainable under section 34 as the Arbitral Tribunal is the final Judge of the facts of the matter. He submitted that this Court under section 34 does not sit in appeal over the findings given by the Arbitral Tribunal. He submitted that the Concession Agreement was terminated by two separate termination notices, both dated 19th March, 2013. One was for termination on the ground of Political Force Majeure (under clause 29.8) and the other was for defaults committed by MSRDC (under clause 32.4). Mr. Khambatta submitted that the termination notice issued pursuant to clause 32.4 of the Concession Agreement was on account of defaults committed by MSRDC in failing to pay the admitted claims of the petitioner, including the 'additional direct cost' incurred by PLUS due to the lapses of MSRDC. Mr. Khambatta brought to my attention paragraph 70 of the Award wherein the Tribunal clearly observed that the terms of the Agreement leave no

doubt that it was MSRDC's obligation to make the Project site available and MSRDC defaulted on this obligation. Thus, MSRDC was in breach of its obligations under clause 4.1(b) as well as clauses 10.1(i), 10.1(ii) and 10.1(iii). The Tribunal, therefore, held that there does exist a valid basis for termination, both under clause 32.4.1(1) and 32.4.1(3). Mr. Khambatta also brought to my attention that the Tribunal has also observed in paragraph 70 of the Award that there were enough documents on record wherein the IC and MSRDC have acknowledged that MSRDC was responsible for making the Project site available. In fact, MSRDC itself admitted that PLUS was entitled to extension both on account of delayed acquisition of land as well as for the delay in the construction of the Railway Over Bridge (ROB). Even as far as the 90 day notice period is concerned, Mr. Khambatta submitted that the Tribunal correctly held in paragraph 70 that the requirements under clause 32.4 of the Concession Agreement for a 90 day notice was complied with by PLUS since it had held out the prospect of termination long before it was terminated and had refrained from issuing a formal notice due to MSRDC's assurance that the issue would be sorted out. This being the case, Mr. Khambatta submitted that if one goes through the Award on the issue of termination under clause 32.4, it is clear that

the Tribunal has taken everything into consideration and has thereafter come to its finding that the termination is valid under the said clause. He submitted that the finding of the Tribunal on this aspect can certainly not be termed as either patently illegal or perverse and is certainly a plausible view. If this be the case, then, there is no question of interfering with the impugned Award on this count, was the submission.

49. Similarly, Mr. Khambatta submitted that even termination under clause 29.8 (for a Political Force Majeure event) is legal and valid as held by the Arbitral Tribunal. Mr. Khambatta pointed out that paragraphs 61 and 62 of the Interim Award hold that the right to collect Toll is an entitlement of PLUS under clause 6.1 of the Concession Agreement. The refusal to pay Toll by KDMT and NMMT Government buses was held as amounting to expropriation or taking away the rights of PLUS to collect and retain Toll from these buses in accordance with the Toll Notification. He submitted that in paragraph 62, the Tribunal held that PLUS took up this issue with KDMT and NMMT, and MSRDC was also alerted in January, 2010 that these Government buses were not paying Toll. Further, it was also observed that an account was kept of the

number of Government buses passing through the Toll on a daily basis and PLUS, therefore, took all necessary steps to overcome the Political Force Majeure event. The Tribunal further held that non-payment of Toll by the Government buses seriously impacted the amount of revenue that was to be received by PLUS under the Toll Notification.

50. Mr. Khambatta submitted that the Government buses of KDMT and NMMT were specifically shown in the Project Information Memorandum (PIM) and the Concession Agreement as a category of vehicles which would have to pay Toll and was not listed as exempted vehicles either in the Concession Agreement or in the Toll Notification. Accordingly, the bid submitted by PLUS was on the basis that these buses would be paying Toll. MSRDC always admitted that PLUS had a right to collect Toll as is evident from its letter dated 18th July, 2011 to the Transport Commissioner, KDMT. MSRDC also wrote to the Government of Maharashtra asking it to ensure that KDMT and NMMT pay the Toll failing which MSRDC itself would have to pay the balance Toll. Mr. Khambatta pointed out that these letters can never be termed as letters exchanged during conciliation proceedings as this was correspondence

addressed to third parties. This was a clear admission on the part of MSRDC that KDMT and NMMT were refusing to pay the Toll. This non-payment amounts to an expropriation of PLUS rights to collect and retain the Toll under clause 6.1 of the agreement. Not only that, it was also an obligation of PLUS under clause 9.1(xv) to levy and collect Toll from users of the Project Highway as per the rates set forth in the Toll Notification and in accordance with the Concession Agreement and regulate the traffic on the Project Highway in accordance with the applicable laws. Mr. Khambatta, therefore, submitted that non-payment of the Toll by these Government buses was thus clearly a Political Force Majeure event as it satisfied all the ingredients required as per clause 29.1 of the Concession Agreement and correctly spelt out by the Tribunal in paragraph 58 of the impugned Award.

51. Mr. Khambatta then submitted that the Tribunal has correctly held that the termination under clause 29.8 is valid also on account of the ban / diversion of heavy and multi axle vehicles and which also constituted a Political Force Majeure event. In this regard, Mr. Khambatta brought to my attention, paragraph 63 of the Interim Award regarding the ban on heavy vehicles by the Police

authorities. The Tribunal held that all the ingredients (as set out in paragraph 58 of the Award), for a Political Force Majeure event are made out. It was further held that the said statutory traffic Notifications passed under section 15 of the Motor Vehicles Act, 1988 amounted to a change in law in terms of Article 29.4(i). Mr. Khambatta submitted that as per the PIM, the Concession Agreement and the Toll Notification, heavy vehicles, including two axle, three axle and multi axle vehicles were shown as a category of vehicles which would use the Project Highway and pay Toll and were not in the exempted category. As per clause 10.1(v) of the Concession Agreement, it was the duty of MSRDC to ensure that no barriers were put on the Highway. However, the Police authorities issued a Notification dated 11th May, 2009, whereby these multi axle vehicles were completely banned and heavy vehicles were partially banned from the said Project Road. These Traffic Regulation Notifications were issued by the Maharashtra Police which is a limb of the Government of Maharashtra and, therefore, a Governmental agency. These Government Notifications, therefore, clearly amounted to a change in law. Mr. Khambatta submitted that this does not stop here. In fact, MSRDC admits that PLUS has a right to collect Toll from heavy and multi axle vehicles. This is

evident from the letter dated 2nd August, 2010 written by MSRDC to the Police authorities asking them to lift the ban on multi axle vehicles. Even upon the termination of the Concession Agreement, MSRDC began collecting Toll and itself wrote several letters to the Chief Secretary, Home Department asking for lifting the traffic ban on heavy vehicles. He, therefore, submitted that all this material would show that the complete ban imposed on multi axle vehicles and a partial ban on heavy vehicles from using the Project Road was clearly a Political Force Majeure event which entitled PLUS to terminate the Concession Agreement under clause 29.8 thereof.

52. Mr. Khambatta, lastly submitted that if one goes through the Award and especially its findings with reference to termination, either under clause 29.8 or clause 32.4, it is clear that the findings given therein are purely factual in nature and the said findings are rendered after examining the record and the evidence led by the parties. In such circumstances, it is not for this Court under section 34 to sit in appeal over those findings. The findings arrived at are certainly a view which is a possible view and hence ought not to be interfered with under section 34 of the Act. Consequently, he

submitted that even this ground raised by the petitioner is of no merit and ought to be rejected.

FINDINGS OF THE COURT:

53. I have heard the learned counsel for the parties at length on this issue and have also perused the papers and proceedings in the above petition, including the impugned Award. In the impugned Award, the Tribunal had framed the following issues/points for determination:-

> "*(a) the validity of the termination under Clause 29.8 on the ground of various force majeure events, as alleged;*
>
> *(b) The validity of the termination under Clause 32.4 on the ground of various acts/ omissions / delays in performance of its obligations by MSRDC which had a material adverse impact on the Claimant;*
>
> *(c) The relief to which the Claimant is entitled if either or both of the termination notices are upheld as being valid.*
>
> *(d) The amount to which the Respondent MSRDC is entitled on account of Counter Claims filed by it."*

54. Issue (a) was whether the Concession Agreement was validly terminated under Clause 29.8 on the ground of various Force Majeure Events and issue (b) was whether the termination was valid under Clause 32.4 on the ground of various acts/ omissions /

delays in performance of its obligations by MSRDC which had a material adverse impact on PLUS. The Tribunal noted that although the issues (a) and (b) have been framed separately, it would in fact be sufficient if PLUS were in a position to justify the termination either under clause 29.8 or 32.4. This is for the simple reason that the Concession Agreement could be terminated only once. Therefore, termination could be held to be valid either under clause 29.8 (the Force Majeure events) or clause 32.4 (material default by MSRDC), if the same are made good by PLUS. Further the Tribunal held that even within each of these grounds there are several sub-grounds, and it would be enough for PLUS to show that any one particular Political Force Majeure event existed/occurred as a basis for terminating the Concession Agreement, or any one particular material default is committed by MSRDC for terminating the said Agreement.

55. While discussing the facts of the matter, the Tribunal noted that PLUS' grievances were three-fold: (i) the delays in land acquisition as well as in finalization of plans for the Railway Over Bridge (for short "ROB") at Katai which led to an overall delay in the construction of the project. This resulted in an 'additional direct

cost' being incurred by PLUS; (ii) that traffic police restricted the entry of certain heavy vehicles on the Project Highway, thus reducing the traffic flow, which in turn led to a reduction in Toll received; and (iii) that the municipality buses (namely KDMT and NMMT buses) refused to pay Toll that they ought to have paid and which also led to a reduction in Toll received by PLUS. The Tribunal records that these grievances unfolded at different points in time during the execution of the project, and voluminous correspondence has been exchanged by the parties and the IC on each of these issues, much of which has been placed on record before the Tribunal. The Tribunal notes that to some extent, the stand taken by MSRDC in these proceedings is at variance with the position adopted by it in the contemporaneous correspondence exchanged between the parties. Therefore, while the Tribunal found it unnecessary to refer to each and every document, it referred to some of the key correspondence exchanged between the parties as the project progressed. The Tribunal noted that the 18 month period from the signing of the Concession Agreement [during which construction was expected to be completed], was to end on 24th February, 2008. Immediately prior to this, in a communication dated 22nd February, 2008, MSRDC itself acknowledged that 95% of the work was

completed. It further noted that the remaining work was delayed on account of land acquisition issues as well as the delay in approval of the design of the Katai ROB, by the Railways. The Tribunal, after examining the record, noted the correspondence exchanged between the parties for completion of the construction due to delays in land acquisition as well as the delayed approvals of the design of the ROB at Katai. In effect, PLUS sought extension of the construction period up till 12th January, 2010. Despite this request, PLUS actually completed the work by 23rd May, 2009 and claims to have done so by making a significant capital commitment to bring in extra resources. The Tribunal notes that from the correspondence referred to, it is clear that (i) there were delays with land acquisition as well as with the approval from the Railways with regard to the ROB at Katai; (ii) that these delays were on account of MSRDC (or, at any rate, not on account of PLUS), and were acknowledged by both, the IC and MSRDC at the time; (iii) the construction period was extended from time to time, and ultimately extended by a period of 674 days up till 29th December, 2009; (iv) PLUS had requested a consequent extension in the concession period and the IC had endorsed the request by making a recommendation that the concession period be extended; (v) the

ultimate extension granted by MSRDC did not expressly state that the concession period had also been extended, but noted that it would be determined after taking into account various other factors.

56. Thereafter, the Tribunal also notes that on 11th May, 2009, i.e. a week before PLUS was to complete the actual construction of the project, the Police Commissioner (Thane) issued a Traffic Regulation Notification banning the entry of heavy commercial vehicles in Kalyan city. Though PLUS does not appear to have protested immediately, it wrote to MSRDC on 18th September, 2009 protesting the traffic restriction and cited clauses 10.1(v) and (vii) of the Concession Agreement to contend that MSRDC had an obligation to ensure that no barrier was erected to the collection of Toll. It, therefore, requested MSRDC to take this up with the police authorities so that an amicable resolution could be found. Despite this protest, on 29th December, 2009, another Notification came to be issued by the Police Commissioner (Thane) banning/restricting the entry of certain other categories of vehicles on the Project Highway. On 25th February, 2010, PLUS wrote to the Police Department, with a copy marked to MSRDC, requesting that the traffic restrictions be lifted and the same be re-diverted onto the

Project Highway. The Tribunal notes that there is extensive correspondence exchanged between PLUS, MSRDC, the IC and also the Police Department on the losses being suffered by PLUS on account of the traffic restrictions and it, therefore, states that apart from the 'additional direct cost' claim, the traffic restrictions leading to a loss in Toll collection, constituted an independent basis for a claim by PLUS. Similar is the case with reference to non-payment of Toll by the Municipal buses. The Tribunal notes that on 23rd January, 2010, PLUS wrote to MSRDC alerting them that KDMT buses were using the Project Highway, but refusing to pay Toll. As a result, PLUS had incurred losses for which it sought compensation. It also requested MSRDC to issue necessary instructions to KDMC for their buses to pay the Toll. A week later, on 30th January, 2010, PLUS issued a similar letter to MSRDC about non-payment of Toll by NMMT buses. The Tribunal notes that despite these grievances being pointed out by PLUS, this stalemate continued and these buses continued to use the Project Highway, but did not pay the Toll. PLUS maintained that restraining/stopping these buses would have led to a law and order situation, given the voluminous number of trips made by such buses and the fact that they were transporting ordinary citizens. Thus, the only option for

PLUS was to maintain a record/details of the trips done by such buses on a daily basis, and compute and maintain the amount of the forsaken Toll, which was informed to MSRDC at regular intervals. The amount of loss naturally kept increasing as the period of such non-payment of Toll was continuing. The Tribunal notes that there is correspondence to suggest that MSRDC agreed with the position that these buses ought to pay Toll, and has even stated as such to the concerned Municipal Commissioner (Transport), on certain occasions. However, MSRDC was unable to resolve the deadlock and impress upon KDMT and NMMT to have their buses pay the requisite Toll. The Tribunal notes that from November 2011 to early 2013, the parties exchanged correspondence without the matter progressing any further. During this period, PLUS was still able to collect and retain Toll on account of the original Toll Notification, which subsisted till 28th April, 2013. However, according to the Tribunal, it was quite clear that as the expiry of that Notification drew near, PLUS was increasingly anxious about the finalization of the settlement terms and the consequent extension in the Toll Notification. On 4th February, 2013, PLUS wrote to MSRDC again pointing out that it retains the right to terminate the Agreement. On 8th February, 2013, MSRDC writes to PLUS dissuading it from

terminating and assuring it that the rights accrued to it under the amicable settlement remain unaffected and the matter is progressing. Quite evidently, these words of comfort were insufficient to assuage PLUS and with the matter having dragged on for more than a year, PLUS finally issued two termination notices, both dated 19th March, 2013. One was issued under Clause 29.8 and the other under Clause 32.4 of the Concession Agreement.

57. After examining both the termination notices as well as the correspondence exchanged between the parties, the Tribunal in paragraph 53 set out certain basic features that appear from the facts and circumstances narrated in the impugned Award. They were:-

(i) Despite repeatedly pointing to the economic unviability of the project and holding out threats of termination, it was clear that PLUS was in fact anxious to carry on with the project. Perhaps it hoped that the project would turn profitable if MSRDC acceded to its demands, or perhaps it looked upon this project as a launching pad for further such projects in this country. Whatever be the reason, PLUS did its very best to accommodate so that the issues could somehow be resolved, until

the matters reached an absolute breaking point when it was constrained to terminate the Agreement;

(ii) MSRDC and the IC consistently acknowledged that there was substance in the grievances being raised by PLUS at different points in time under different heads, and yet, even while acknowledging this, MSRDC stopped short of committing itself to any position, and resorted to the easier course of referring matters to the Government of Maharashtra; and

(iii) The Government of Maharashtra, for its part, adopted a somewhat casual approach in simply sitting idle even though various issues of pressing importance to the project had been referred to it by MSRDC. While MSRDC had referred the matters to the Government of Maharashtra, the Government of Maharashtra failed to take any decision at all.

58. It is in this background that the Tribunal framed the four issues referred to earlier.

59. Turning to the termination on the ground of Political Force Majeure (clause 29.8), the Tribunal discussed the same from

paragraphs 58 to 64 of the impugned Award. The Tribunal notes that there are five key ingredients that must exist for there to be a finding that a Force Majeure event exists. These ingredients are:-

(a) the existence of an event, namely, a non-political event or an indirect political event or a political event as defined in the Concession Agreement. Since, in the present case, the allegation is that there was a political event, it may be noticed that clause 29.4, in turn, identifies three categories of political events. Briefly, they are (i) change in law; (ii) expropriation by any governmental agency of any project assets or rights of the Concessionaire (PLUS); or (iii) unjustified refusal to grant or renew any consent or approval required by the Concessionaire (PLUS);

(b) the event must frustrate the performance of obligations, namely, those events must be such that they prevent the party claiming the Force Majeure Event from performing its obligations under the Agreement;

(c) that the event was beyond the control of the party claiming the Force Majeure and not arising on account of its own fault;

(d) duty to mitigate, namely, the party claiming Force Majeure has an obligation to attempt to overcome the event by exercising due diligence and reasonable efforts, skill and care, including the expenditure of reasonable sums of money; and

(e) the event must have a material adverse impact on the project.

60. The Tribunal also noted that once a Force Majeure Event is found to exist, the effect of that Force Majeure Event depends on the stage at which such event occurs. In cases where the event occurs after the Commercial Operations Date (COD) under the Concession Agreement, the effect is provided in Clause 29.6 (c). However, in certain cases, if the Force Majeure Event subsists for a period of more than 180 days within a continuous period of 365 days, it furnishes a right to either party to terminate the Agreement with a notice period of thirty days.

61. In this background, the Tribunal thereafter went on to examine the Force Majeure Events. The first Force Majeure Event alleged by PLUS was that the parties had reached a settlement on

account of exchange of letters dated 20th October, 2011 and 4th November, 2011 and by virtue of such settlement, a Toll Notification was to be issued for the extended concession period. The non-issuance of such Toll Notification was claimed as a Political Force Majeure Event. This Force Majeure Event was negated by the Tribunal as can be seen from paragraph 60 of the impugned Award.

62. Thereafter, the second Force Majeure Event canvassed by PLUS was the non-payment of Toll by the NMMT and KDMT buses, which is alleged to be an expropriation of the rights of the Concessionaire (PLUS), and therefore, a Political Force Majeure Event. In this regard, the Tribunal held that the right to collect Toll is an entitlement of PLUS under Clause 6.1 of the Concession Agreement. The concerned Municipal undertakings are undeniably Government agencies within the meaning of clause 29.4 (ii) of the Concession Agreement. The refusal to pay Toll by the buses owned by these undertakings is an expropriation of the rights of the Concessionaire (PLUS), and specifically the right to collect and retain Toll in accordance with the Toll Notification. The Tribunal, therefore, found that this did constitute a Political Force Majeure Event within the meaning of Clause 29.4. The Tribunal thereafter

went on to examine whether the other elements necessary for constituting a Force Majeure Event are also made out. In paragraph 62, the Tribunal examined the other elements. The Tribunal held that MSRDC (in its Written Submissions: Part VI) has relied upon the cross-examination transcript to contend that it is an admitted position that PLUS was not prevented from performing its obligations under the Concession Agreement. The Tribunal further found that the reliance on an isolated statement in response to one question put in cross-examination may not be conclusive on whether, in fact, PLUS was prevented from performing its obligations. Moreover, regard must be had to the terms of the Concession Agreement (which specify the obligations of each party) and also to the entirety of the documentary evidence on record, to ascertain whether in fact PLUS was prevented in the performance of its obligations. The Tribunal further held that the collection and retention of Toll is not just an entitlement, but also an obligation of PLUS in terms of clause 9.1(xv) of the Concession Agreement. The performance of this obligation was directly interfered with by the actions of NMMT and KDMT buses and, therefore, the Political Event did prevent PLUS from performing its obligations. It further held that this was entirely beyond the control of PLUS and certainly

not on account of any fault of PLUS. The Tribunal thereafter opined that the position with respect to duty to mitigate is more finely balanced. The Tribunal held that it is reasonable to contend, as MSRDC has done, that the Toll Notification statutorily authorized PLUS to collect Toll from all vehicles other than those specifically exempted, and it was for PLUS to exercise legal remedies to enforce its rights under the Toll Notification. At the same time, it must be borne in mind that Municipal buses account for a large part of the traffic on the Project Highway, and such buses make several trips in a day, ferrying different passengers, some of whom may have no other mode of transport. Preventing the passage of these vehicles would, in the circumstances, have created a law and order situation and PLUS cannot be faulted for not carrying these matters ahead. PLUS has also pointed out that stopping the Municipal buses would have jammed the entire Toll plaza, and led to PLUS being in breach of its obligations under the Concession Agreement. The Tribunal also held that it is not as if PLUS was idle or slept over its rights or failed entirely to press its legitimate claims. The matter was taken up with the concerned Municipal Authorities, and MSRDC was also alerted as early as January 2010 that NMMT and KDMT buses were not paying Toll, even though they were required to do so in terms of

the Notification. Further, this issue was raised repeatedly, and an account was kept of the number of such vehicles passing the Toll collection point on a daily basis. This data was made available to MSRDC at regular intervals (as well as to the Municipal Authorities), and MSRDC by and large appeared to have accepted the claim of PLUS and even took up the matter with the concerned Municipal Commissioners. The Tribunal, therefore, held that PLUS made several efforts to prevail upon the concerned Municipal undertakings to issue necessary directions for the Municipal buses to pay the Toll. In these circumstances, the Tribunal was of the view that PLUS had exercised necessary due diligence and precipitating the matters any further could have had serious law and order repercussions, as well as an impact on traffic regulation at the Toll Plaza. The Tribunal, therefore, came to a finding that the steps necessary in the circumstances to overcome the Force Majeure Event were duly taken by PLUS. Finally, even the loss of revenue to PLUS from non-payment of Toll by so many vehicles making so many trips over so many months, clearly amounted to a material adverse effect on the project. The Tribunal held that there is ample correspondence to show that the failure to collect Toll contributed to the cash flow issues faced by PLUS, which had an impact on loan

servicing as well as operational expenses. The Tribunal, therefore, was of the view that there was a material adverse effect on the project. Accordingly, the non-payment of Toll by the Municipal buses was a Force Majeure event within the meaning of Clause 29.1 of the Concession Agreement. Since the said event subsisted for more than 180 days within a continuous period of 365 days (it commenced on 22nd August, 2009, from which date the Toll collection commenced, and continued up till the termination date and beyond), it did give rise to a right to terminate the Concession Agreement under Clause 29.8. The Tribunal, therefore, held that the termination notice was valid on this ground.

63. The third Force Majeure Event which was alleged by PLUS was the traffic regulation banning the entry of heavy vehicles during certain specified hours. It was the case of PLUS that this amounted to a change in law, or alternatively expropriation of its rights, and therefore, a Political Force Majeure Event occurred. In response to this, MSRDC contended that the ban on heavy vehicles pre-dated the Agreement, and PLUS was aware of this fact, or at any rate, ought to have been aware. MSRDC relied on a Resolution of the Municipal Corporation, which notes that "*heavy vehicles are allowed*

to run on this road from 10 p.m. to 6 a.m. and it should not be changed." The Tribunal found that this resolution was not a public document and PLUS, therefore, cannot be expected to be aware of it. Further, even if the said decision was communicated to MSRDC, it was for MSRDC to refer to it in the Project Information Memorandum (PIM). The PIM, however, contained no such reference and bids were invited on the basis that heavy commercial vehicles would be part of the traffic flow which determines the revenue base of PLUS. The Tribunal thereafter held that in any event PLUS is correct to point out that (i) the restrictions that were imposed in May 2009 went further and beyond the resolution to impose a total ban on entry of certain categories of vehicles; and (ii) the Notifications were statutory Notifications issued under the Motor Vehicles Act, 1988 and it was only with the issuance of such Notifications that a ban/restriction operationally came into effect. The Tribunal noted that it is not even MSRDC's contention that prior to this, there was any such Notification issued under the Motor Vehicles Act, 1988. The Tribunal, therefore, was of the view that this amounted to a change in law and in the alternative would, in any event, amount to an expropriation of the rights of PLUS as the project bid had been made on the basis of certain traffic projections.

The ban/restrictions that were imposed on various categories of vehicles had a drastic effect on those projections, as it severely curtailed the heavy vehicular traffic on the said road. Thus, the Tribunal was of the view that there was a Political Force Majeure Event. The Tribunal held that all other ingredients of the Force Majeure Event were also made out. It noted that PLUS was prevented from performing its obligations (collecting Toll) under the agreement. It was also prevented for reasons beyond its control and not on account of its own fault. PLUS did exercise the necessary due diligence to overcome this event by taking up the issue with the police authorities as well as with MSRDC and undoubtedly the event had a material adverse effect on the project, as the amount of uncollected Toll was allegedly in excess of Rs.60 Crores. Further, the event subsisted for the requisite period as specified under Clause 29.8 of the agreement, and therefore, PLUS was justified in terminating the Agreement. The Tribunal, therefore, held that the termination on this ground was valid. In conclusion, the Tribunal held that as far as the termination on account of Force Majeure is concerned, the validity of the said termination is upheld to the extent it was occasioned by non-payment of Toll by Municipal buses and the traffic restrictions on heavy vehicular traffic. The Tribunal

also noted that the termination on the ground of non-issuance of the Toll Notification for the extended period pursuant to an alleged settlement/ agreement between the parties, stood rejected.

64. Looking at the facts adverted to by the Tribunal (set out above) and its findings in relation thereto, I find that the Tribunal has carefully examined all the facts, including the correspondence between the parties and thereafter come to its conclusion. I am in full agreement with Mr. Khambatta that all these findings are really findings of facts. Clause 6.1 of the Concession Agreement clearly stipulates that the right to claim Toll is an entitlement of PLUS. Refusal to pay Toll by KDMT and NMMT buses was held as amounting to expropriation or taking away the rights of PLUS to collect Toll from these buses in accordance with the Toll Notification. It is not as if PLUS sat idle and did nothing. This issue was specifically taken up by PLUS with KDMT & NMMT, and MSRDC was also alerted of the same. In fact, PLUS also kept an account of all these buses passing through the Toll Plaza without paying Toll and which was regularly submitted to MSRDC. It can therefore hardly be contended that in such a scenario the same did not have a material adverse effect on the project. Merely because the exact loss

wasn't quantified would make little difference. The fact that these buses (and which were large in number) were to pay Toll and which they refused to do, would clearly indicate that there was a material adverse effect on the project. Further, these Government buses were specifically shown in the PIM and the Concession Agreement as category of vehicles which would pay Toll and were not listed as exempted vehicles. In fact, by its letter dated 18th July, 2011, MSRDC informed the Transport Commissioner of KDMT that PLUS had the right to collect Toll under the Concession Agreement. MSRDC also wrote to the Government of Maharashtra asking it to ensure that KDMT and NMMT buses pay the Toll, failing which MSRDC itself would have to pay the balance Toll. This is a clear admission on the part of MSRDC that KDMT and NMMT were refusing to pay Toll. Even if I was to assume for the sake of argument that certain correspondence between MSRDC and PLUS forming the subject matter of the Arbitration are inadmissible (and which I have rejected earlier), the letters written by MSRDC to the Transport Commissioner of KDMT and to the Government of Maharashtra is correspondence addressed to third parties, and therefore, can never amount to correspondence entered into between MSRDC and PLUS during conciliation proceedings.

65. Even the Notifications issued under the Motor Vehicles Act, 1988 banning of heavy vehicles, MSRDC admits that PLUS has a right to collect Toll from heavy and multi axle vehicles. This is evident from the letter dated 2nd August, 2010 written by MSRDC to the Police authorities asking them to lift the ban on multi axle vehicles. Even upon the termination of the Concession Agreement, MSRDC began collecting Toll and itself wrote several letters to the Chief Secretary, Home Department asking for lifting the traffic ban on heavy vehicles. When one looks at the findings given by the Tribunal, I find that the Tribunal has given appropriate and cogent reasons for upholding the termination of the Concession Agreement under Clause 29.8 thereof. The Tribunal has considered the relevant documents and the evidence on record, the arguments canvassed by the parties and thereafter come to its conclusion. Not only do I find that the said conclusion is correct, but even otherwise it is certainly a plausible conclusion. The Tribunal has considered everything on record and thereafter held that the Concession Agreement is validly terminated due to Force Majeure Events. I do not find anything patently illegal or perverse in the said findings so as to interfere with the same under Section 34 of the Act. I am

unable to agree with the submissions of Mr. Chagla that the findings in the impugned Award on this issue are either contradictory or ignores any vital evidence. The Tribunal has considered all the evidence, including the so called admission made by the witness of PLUS. What weightage is to be given to the evidence is left entirely upto the Tribunal and this Court is not supposed to sit in appeal and re-examine and re-appreciate the evidence. The Tribunal, after noting the admission, held that one isolated statement cannot form a basis of their finding. The entirety of the documents on record has to be looked into, as well as the evidence, to ascertain whether in fact PLUS was prevented in performance of its obligations. I do not find that the approach of the Tribunal in this regard can be faulted. As mentioned earlier, I find that the impugned Award on this issue has given appropriate and cogent reasoning which requires no interference. In these circumstances, in so far as the Tribunal holds that the Concession Agreement was validly terminated under clause 29.8 (due to Force Majeure Events) requires no interference by this Court.

66. Apart from upholding the termination of the Concession Agreement due to Force Majeure Events, the Tribunal also held that

the said Agreement was validly terminated under Clause 32.4 on account of material defaults by MSRDC. The discussion and the findings with reference to termination under Clause 32.4 can be found from paragraphs 65 to 70 of the impugned Award. In paragraph 65, the Tribunal held that the termination notice refers to a letter dated 10th May, 2010 and the letters issued earlier to it, which are stated to be relied upon by PLUS. However, the letters do not actually refer to six claims, but rather only to the claim for 'additional direct cost'. This claim was forwarded by letter dated 24th February, 2010 wherein PLUS claimed an amount of Rs.161 Crores as the escalated project cost on account of material default by MSRDC. Subsequently, this claim was pursued by further letters and finally by means of the letter dated 10th May, 2010 PLUS proposed conciliation. Thus, the offer for conciliation was in relation to the claim of the 'additional direct cost' and not the other claims. The Tribunal noted that it is true that other claims had also been raised by that time and those were by means of separate letters and were separately pursued. It is only much later that the IC, by its communication dated 2nd August, 2011, clubbed various claims under six heads and which I have adverted to earlier. The Tribunal therefore, proceeded to examine whether any defaults by MSRDC

furnished a valid basis for terminating the Concession Agreement under clause 32.4. The Tribunal noted that the principal claim with respect to material default is the claim for 'additional direct cost'. This claim has been clubbed with the claim of project costs together with escalated project costs. PLUS contended that this claim arises due to default on the part of the MSRDC to complete the land acquisition process in a timely manner and also on account of delays in getting design approvals from the Railway Authorities in respect of the Katai ROB. The discussion on this can be found in paragraph 70 of the Award which reads thus:-

> "70 The principal claim with respect to material default is the claim for direct additional cost. This claim has been clubbed with the claim for variation in project work. Together, they resulted in an escalation of project cost. Together, they resulted in an escalation of project cost. The Claimant's contention is that the delay resulted on account of the failure of the MSRDC to complete the land acquisition process in a timely manner, and also on account of delays in getting design approvals from the Railway Authorities in respect of Katai ROB. As a factual matter, on a review of the documentary record, it is very clear that the delays did in fact take place, and that these delays were acknowledged both by the IC and the MSRDC. Two days before construction was scheduled to be completed, in its letter dated 22.2.2008, the MSRDC noted that 95% of the project work was complete, and the remaining could not be completed because of land acquisition issues and delays in getting approvals. This was also acknowledged by the IC on several occasions. The details of this correspondence have already been set out in the factual narration above, and need not be repeated. The Claimant put forward a detailed summary of the various causes of delay in its communication dated 11.5.2009. This ultimately led to the construction period being extended, and a consequent extension in the concession period. However, by its communication dated 24.2.2010 (Exh. CD 52), the Claimant stated

that the revised project cost was in excess of Rs.280 crore, and made a claim for Rs.161.5 crore as direct additional cost (i.e. escalation in project cost because of the delays and defaults). It stated that it was an acknowledged and documented position that the MSRDC had defaulted in its obligations to make the project site available free from all encumbrances and to assist in the obtaining of all applicable permits. The claim, at that stage, was put forward both as a material default claim and as a force majeure claim. The Claimant sought compensation under Clause 31.2 and costs for subsisting force majeure under Clause 29.7 (c). However, in the subsequent termination notices, and in these proceedings, the claim for direct additional costs is presented only as a claim based on MSRDC's material default, and not as a force majeure claim. We are of the view that the record is replete with acknowledgments from IC and MSRDC regarding the delays that took place with regard to making available the project site. The record is further replete with correspondence from the Claimant pointing out how this delay is constraining its cash flow position, and jeopardizing operations. The terms of the Agreement leave no doubt that it was MSRDC's obligation to make the project site available, and MSRDC defaulted on this obligation. Thus, MSRDC was in breach of its obligations under Clause 4.1(b) of the Agreement, as well as Clauses 10.1 (i) , 10.1(ii) and 10.1(iii). Accordingly, there does exist a valid basis for termination both under Clause 32.4.1(1) and Clause 32.4.1(3). Accordingly, the termination for MSRDC default is upheld to this extent. We may clarify, here, that the default of MSRDC is not the failure to have a toll notification issued in respect of the proposed extended concession period. As we have notified earlier, there was no final settlement with regard to the extended concession period, as it was necessarily subject to approval from Government of Maharashtra, which approval was never forthcoming. However, the underlying defaults, which provided the basis for the direct additional cost claim, remain – and the Claimant was entitled to terminate the Agreement on this notice. We may further point out that although Clause 32.4 requires 90 days notice to be given, and the Claimant provided less than 90 days from its notice dated 19.3.2013, the notice period must be viewed in the overall context of the entirety of correspondence. The Claimant had held out the prospect of termination long before 19.3.2013, and had only refrained from issuing a formal notice at the specific request of MSRDC, with the assurance that matters would be sorted out. MSRDC had much more than the required 90 days notice period to actually cure the defaults, if it had so intended. Instead, it kept holding out a carrot to the Claimant, and dragging

matters perilously close to the expiry of the period covered by the toll notification. In these circumstances, in our view, the notice period must be held to have been complied with."

(emphasis supplied)

67. As can be seen from the paragraph reproduced above, the Tribunal opined that the record before the Tribunal was replete with acknowledgments from the IC and MSRDC regarding the delays that took place with regard to making available the project site. The record is replete with further correspondence from PLUS pointing out how this delay is constraining its cash flow position and jeopardizing operations. The Tribunal further held that the terms of the Agreement leave no doubt that it was MSRDC's obligation to make the project site available, and MSRDC defaulted on this obligation. MSRDC was, therefore, in breach of its obligations under Clause 4.1(d) as well as Clauses 10.1(i), 10.1(ii) and 10.1(iii). The Tribunal, therefore, came to a finding that there exists a valid basis for termination, both under clauses 32.4.1(1) and Clause 32.4.1(3).

68. Before I examine this aspect, it would be apposite to set out clause 32.4.1 which reads thus:-

"**32.4 Termination for MSRDC Event of Default.**

32.4.1 The Concessionaire may after giving 90 (ninety) days notice in writing to MSRDC terminate this Agreement upon the occurrence and continuation of any of the following events (each a MSRDC Event of Default) unless any such MSRDC Event of Default has occurred as a result of Concessionaire Event of Default or due to Force Majeure Event.

(1) MSRDC is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and MSRDC has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;

(2) MSRDC repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;

(3) MSRDC or GOM or any Government Agency have by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and have failed to cure the same within 90 (ninety) days of receipt of notice by MSRDC in this behalf from the Concessionaire;

(4) MSRDC has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days."

69. Clause 32.4.1 entitles PLUS to terminate the Concession Agreement on the occurrence of any of the events listed in the said

clause and described as MSRDC's event of default, by giving a 90 day notice in writing to MSRDC. In the event MSRDC's event of default has occurred because of PLUS' default or due to Force Majeure events, then PLUS would not be entitled to terminate the Concession Agreement under the said clause. Clause 32.4.1(1) stipulates that PLUS is entitled to terminate if MSRDC is in breach of the Concession Agreement and such breach has a material adverse effect on PLUS and MSRDC has failed to cure such breach or take effective steps for curing the same within 90 days of receipt of a notice in that behalf from PLUS. Similarly, clause 32.4.1(3) stipulates that if MSRDC or the Government of Maharashtra or any Government Agency have, by an act of commission or omission created circumstances that had a material adverse effect on the performance of the obligations of PLUS and have failed to cure the same within 90 days of receipt of a notice issued by PLUS to MSRDC, PLUS would be entitled to terminate the Agreement. On a conjoint reading of clauses 32.4.1(1) and 32.4.1(3), it is clear that the following conditions need to be fulfilled: (i) that there is an event of default by MSRDC; (ii) The said default should have a material adverse effect on PLUS; (iii) PLUS must give a 90 day notice in writing to MSRDC to terminate the Concession Agreement; and (iv)

MSRDC fails to cure the said default / breach or take effective steps for curing the same within 90 days of receipt of such notice.

70. In the present case, it is not in dispute that the 90 day notice (as contemplated in clause 32.4.1) was not given by PLUS to MSRDC. It is specifically recorded by the Tribunal in paragraph 70 of the Award, that although clause 32.4 requires a 90 day notice to be given, and PLUS provided less than 90 days from its notice dated 19th March, 2013, the notice period must be viewed in the overall context. The Tribunal held that PLUS had held out the prospect of termination long before 19th March, 2013 and it also refrained from issuing a formal notice at the specific request of MSRDC, with the assurance that matters would be sorted out. The Tribunal held that MSRDC had much more than the required 90 day notice period to actually cure the defaults, if it had so intended. Instead, it kept holding out a carrot to PLUS and dragging matters perilously close to the expiry of the period covered by the Toll Notification. It is in these circumstances that the Tribunal held that the notice period must be held to have been complied with.

71. I am unable to understand how the Tribunal has come to

this finding. The termination notice dated 19th March, 2013 reads as under:-

"**PLUS**
PLUS BKSP Toll Limited

March 19, 2013.

The Vice Chairman & Managing Director
Maharashtra State Road Development Corporation Limited
Near Priyadarshini Park,
Nepean Sea Road,
Mumbai 400 036 – India.

Sub:- TERMINATION NOTICE UNDER CLAUSE 32.4 OF THE CONCESSION AGREEMENT DATED AUGUST 25, 2006 ("CONCESSION AGREEMENT") ENTERED INTO BETWEEN MAHARASHTRA STATE ROAD DEVELOPMENT CORPORATION LIMITED ("MSRDC") AND PLUS BKSP TOLL LIMITED ("PLUS BKSP")

Dear Sir,

1. With reference to the Concession Agreement, PLUS BKSP had, vide a letter dated May 10, 2010 and earlier letters, raised 6 claims on MSRDC which related to losses incurred by PLUS BKSP due to acts/ omissions/ delays in performance of obligations under the Concession Agreement by MSRDC.

2. MSRDC subsequently made an offer of an amicable settlement to PLUS BKSP vide its letter dated October 20, 2011 ("Offer Letter"). In the said Offer Letter, MSRDC offered an extension of the Concession Period until July 10, 2024 in lieu of cash payments for compensating PLUS BKSP.

3. In the spirit of resolving the matter, PLUS BKSP has accepted MSRDC's offer; PLUS BKSP's acceptance is contained in its letter dated November 4, 2011 ("Acceptance Letter"). With the acceptance of MSRDC's offer, PLUS BKSP was hopeful that MSRDC will be able to expedite the issuance of toll notification until the proposed extended term of the Concession Agreement i.e. July 10, 2024 ("Toll Notification").

4. We note that unfortunately till date MSRDC has not been able to cause issuance of the Toll Notification while the present toll notification is due to end on April 28, 2013, which is fast approaching.

5. Hence, we are hereby issuing this notice under Clause 32.4 of Concession Agreement. The breaches/ acts/ omissions by MSRDC under the Concession Agreement have caused a Material Adverse Effect on PLUS BKSP and thus, making PLUS BKSP entitled to compensation under Clause 31.2 and to exercise its right of termination under Clause 32.4.

6. PLUS BKSP previously refrained to terminate the concession in response to MSRDC's request to do so in its letter dated Feb 8, 2013. Please note that PLUS BKSP will not be able to proceed with its operations beyond April 28, 2013 until the issuance of the Toll Notification. Therefore, kindly issue by April 28, 2013, the extension of the concession period and Toll Notification to July 10, 2024. If MSRDC shall fail to do so, the Concession Agreement shall terminate on April 28, 2013 and MSRDC shall be liable to pay us the Termination Payment as provided in Clause 32.4.2 and the settlement of claims as provided in Clause 31.2 both with interest until date of payment.

7. Without prejudice to any rights accrued/ available to PLUS BKSP under law or otherwise, the Parties shall continue to be bound by the clauses of the Concession Agreement which survive termination, including without limitation, the clauses relating to Termination Payment, Compensation, Divestment Requirements, release of funds lying in Escrow Account and release of Performance Security.

8. For avoidance of doubt, it is hereby clarified that the initially capitalized term used herein but not defined shall have the same meaning as assigned to them in the Concession Agreement.

Yours faithfully,

Sd/-

NOORIZAH HJ. ABD. HAMID
Chairman."

(emphasis supplied)

72. From the aforesaid termination notice, it is clear that the said notice was issued under clause 32.4 of the Concession Agreement. Clause 32.4.1 clearly required PLUS to give a 90 day notice in writing to MSRDC for terminating the Agreement upon occurrence and continuation of any of the events of default as set out therein. The 90 day period was to enable MSRDC to cure any breach or to take effective steps for curing the same. However, in the aforesaid notice, PLUS requests MSRDC to issue, by 28th April,

2013, the extension of the concession period and the Toll Notification upto 10th July, 2024 failing which the Concession Agreement is to stand terminated on 28th April, 2013. From the aforesaid notice it is clear that time was granted to MSRDC to cure any defect on its part from 19th March, 2013 to 28th April, 2013. This is far less than the period of 90 days as stipulated in clause 32.4.1. On a plain reading of the said notice, I find that the submission of Mr. Chagla is well founded when he submits that the findings given by the Tribunal that MSRDC had much more than 90 days to cure the breaches, is factually incorrect. I must mention that the Tribunal whilst coming to the aforesaid finding opined that PLUS had held out the prospect of termination long before 19th March, 2013 and refrained from issuing a formal notice at the specific request of MSRDC. In this regard, the only letter referred to by the Tribunal is a letter dated 4th February, 2013 issued by PLUS to MSRDC (paragraph 43 of the impugned Award). By the said letter, PLUS informs MSRDC that in the spirit of amicable settlement, PLUS desires to draw the attention of MSRDC to the Toll Notification which is valid upto 28th April, 2013 whereas their actual original concession period runs upto 3rd March, 2015. It therefore informs MSRDC that despite the present Toll Notification expiring less than

90 days from the date of the said letter, PLUS' right to serve a termination notice under the Concession Agreement remains intact and in full force and they reserve their right to exercise the right of termination any time before 28th April, 2013 and such notice, if and when served upon MSRDC, shall be fully binding on MSRDC with respect to its obligation to pay Termination Payment as certified by the statutory auditors of PLUS. This letter is clearly not a termination notice as contemplated under clause 32.4.1 of the Concession Agreement. Be that as it may, even if I was to assume that this letter is a notice as contemplated under clause 32.4.1, the time period between 4th February, 2013 till 28th April, 2013 (the date on which the Toll Notification came to an end), still does not comply with the period of 90 days, as contemplated under the aforesaid clause. I am in agreement with Mr. Chagla that termination of a contract has serious consequences. Therefore, termination under clause 32.4.1 requires strict compliance. Failure to give notice of 90 days would clearly render the termination under clause 32.4.1 of the Concession Agreement illegal and invalid. I therefore am of the view that the finding of the Tribunal in so far as it upholds the termination of the Concession Agreement under clause 32.4 suffers from a patent illegality as its findings run in the

teeth of the plain language of clause 32.4.1 and hence cannot be sustained.

73. As far as the argument of Mr. Chagla that the actions/omissions of MSRDC did not have a material adverse effect on the project, I am unable to agree with the same as that is a question of fact which is examined by the Tribunal. The Tribunal finds that the record is replete with correspondence from PLUS pointing out how this delay is constraining its cash flow position, and jeopardizing operations. This would clearly amount to a material adverse effect on the project. However, as mentioned earlier, termination under Clause 32.4.1 cannot be held to be valid in view of the fact that a 90 day notice was not given by PLUS to MSRDC as contemplated in clause 32.4.1 of the Concession Agreement.

74. Despite having held that the termination of the Concession Agreement under clause 32.4 cannot be held to be valid, I find that it makes little difference in the present matter. As noted earlier, the Concession Agreement could be terminated under Clauses 29.8 as well as 32.4. Even if one of them is held to be valid

then the Concession Agreement would stand validly terminated. Considering that I have held that the findings of the Tribunal regarding termination of the Concession Agreement under Clause 29.8 does not require any interference, it makes little difference whether termination under Clause 32.4 is held valid or otherwise. This is more so when one takes into consideration that the Termination Payment formula under clause 29.9(c) and 32.4.2 is exactly the same.

III(A) – AWARD IS CONTRARY TO THE PROCEDURE AGREED UPON BETWEEN THE PARTIES AS PER SECTION 19(2) OF THE ACT;

III(B) – LEGAL MISCONDUCT ON THE PART OF THE TRIBUNAL; AND

III(C) – FAILURE OF THE ARBITRAL TRIBUNAL TO CONSIDER/DECIDE THE COUNTER CLAIM FILED BY MSRDC:

SUBMISSIONS OF MSRDC:

75. As mentioned earlier, I find that the aforesaid three grounds of challenge, namely: (i) the Award is contrary to the procedure agreed to between the parties; (ii) the failure of the Tribunal to consider / decide the Counter Claim of MSRDC; and (iii)

legal misconduct on the part of the Tribunal; are all inter-twined together and hence these three grounds are being decided together.

76. Firstly, Mr. Chagla submitted that the Tribunal, with the consent of the parties, laid down the entire schedule for the arbitral proceedings as recorded in the minutes of the meeting dated 20th February, 2016. In the said minutes, the Tribunal passed a detailed procedural order wherein the Tribunal made it clear that the dates fixed for hearing, i.e. for the evidence and final arguments were inflexible. Mr. Chagla submitted that the Tribunal reiterated upon the inflexibility of the aforesaid dates in its further procedural orders dated 4th May, 2016 and 12th May, 2016. He submitted that on a conjoint reading of the procedural orders passed by the Tribunal from time to time, namely, procedural orders dated 20th February, 2016, 4th May, 2016, 12th May, 2016 and 17th October, 2016, read along with the transcripts dated 17th January, 2017, 20th January, 2017, 3rd February, 2017 and 4th February, 2017, establish beyond a doubt that the dates fixed by the Tribunal were not only inflexible, but the proceedings were to be conducted as one consolidated proceeding and the Tribunal was to pass one Award. He submitted that the Tribunal's directions to make payment of the

full fees for hearings scheduled on 17th January, 2017 to 21st January, 2017 and thereafter from 31st January, 2017 to 4th February, 2017 also indicated that there was to be only one consolidated hearing and was not to be broken up, as was done in the present case. He submitted that the transcript of 4th February, 2017, and which was the last date of hearing, expressly records that arguments were closed.

77. Mr. Chagla submitted that party autonomy is considered to be the backbone of arbitration and failure to follow the procedure agreed upon between the parties vitiates the entire arbitral procedure. He submitted that by its procedural order dated 17th October, 2016, the Tribunal directed that all documents were taken on record, subject to the proof of objection as to admissibility. PLUS filed four affidavits of evidence and MSRDC filed three affidavits of evidence on record along with all the documentary evidence in their custody. He submitted that in the present case, the parties led evidence before the Arbitral Tribunal, both oral and documentary. Parties also advanced oral arguments and filed written submissions in support of their respective cases. At no point of time did PLUS seek an opportunity to lead any further evidence or to amend its

claims. The Arbitral Tribunal was, therefore, bound to decide all issues as set out in paragraph 54 of the Award and not break up the hearing as was sought to be done by the impugned Award. Mr. Chagla submitted that what was even more shocking was that after considering the complete evidence and the submission of the parties, the Tribunal rejected certain specific claims of PLUS and expressed its inability to decide the other claims on the available evidence. He submitted that the parties are required in law to produce all evidence in support of their case which, in the present case, PLUS claimed it had done and having regard to the findings of the Arbitral Tribunal, the claims of PLUS ought to have been dismissed. He submitted that the findings of the Arbitral Tribunal amount to a final adjudication and the nomenclature "Interim Award" is misplaced and unwarranted and has been done only to permit PLUS to file further pleadings and lead further evidence. Mr. Chagla submitted that, in effect, the Tribunal *ex-facie* seeks to review its own final adjudication, which is impermissible in law.

78. Mr. Chagla thereafter brought to my attention the findings of the Arbitral Tribunal in respect of various claims made by PLUS. The first claim made by PLUS was for Termination

Payment of Rs.495 crores. Mr. Chagla submitted that this claim was purportedly made under clause 29.9(c) and clause 32.4.2 of the Concession Agreement. He submitted that it was the express case of PLUS that Termination Payment became mechanically / automatically due and payable on the expiry of thirty days from the date of the Statutory Auditor's certificate certifying the 'Termination Payment' being submitted to MSRDC. It was also the contention of PLUS that once the same became due and payable, there was no mechanism in the Concession Agreement to reverse the same and no further evidence, apart from the Statutory Auditor's certificate, was required to be led by it to prove its claim. MSRDC, on the other hand, contended that as per the formula for the calculation of Termination Payment, the same could not be applied mechanically and that damages could not be awarded unless PLUS proved that it had suffered actual losses / damages and the quantum thereof. Mr. Chagla submitted that in this connection, the Arbitral Tribunal in paragraph 72 of the Award has, *inter alia*, held as under:

> "Prima facie the Tribunal would need to be satisfied about the element of proportionality in the working of the Termination Payment clause. We notice that the MSRDC has strongly contested

> the Termination Payment also on the ground of each individual head that is to be calculated under the formula, and it would be beneficial to the Tribunal to invite further hearing and submissions on this issue."

79. Mr. Chagla submitted that if the Tribunal required any further hearings and submissions, it should have fixed such further hearings and heard the submissions on the issue and not defer the same to a further arbitral hearing after passing the impugned Award. He submitted that, in effect, when one reads the aforesaid paragraph, the claims of PLUS, on the available evidence and submissions, stood rejected.

80. Mr. Chagla submitted that similar is the case for the claim of Rs.469 crores and which is in the alternative to the claim for Termination Payment. He submitted that the alternative claim of Rs.469 crores was allegedly based on amounts invested by the shareholders of PLUS. He submitted that the Tribunal held that this figure was virtually a proxy claim for Termination Payment. In view of this finding, the Tribunal ought to have rejected this claim. Instead, the Tribunal held that since the Tribunal is inclined to defer its decision on the issue of Termination Payment, the decision on

this alternative claim also stood deferred. In this regard, Mr. Chagla brought to my attention, paragraph 73 of the Award.

81. Mr. Chagla then brought to my attention that over and above the aforesaid two claims, a claim of Rs.112 crores was also made for reimbursement of 'additional direct cost', the loss of Toll revenue and restoration charges. In the arbitration, PLUS proceeded on the express basis that these amounts were admitted by MSRDC in the correspondence exchanged in the course of settlement/conciliation. However, the Tribunal conclusively held that these cannot be said to constitute admissions of quantum of liability as placing weight on the quantum figures exchanged between the parties while working out a compromise would not be fair as they were made during the course of settlement. In this regard, Mr. Chagla brought to my attention the finding of the Tribunal in paragraph 77 of the Award. He submitted that the Tribunal further held that the same would not be a sound basis to arrive at any conclusion on the quantum of loss. It was the submission of Mr. Chagla that reading paragraphs 77, 79 and 86 of the Award clearly constituted a rejection of PLUS' claims.

82. Mr. Chagla then submitted that the finding of the Arbitral Tribunal in paragraph 86 of the Award, namely, *"The Tribunal cannot arrive at a quantum determination based on the existing record and submissions"* applied to all claims made by PLUS and is final and binding. The said finding has not been challenged by PLUS and has, therefore, attained finality and operates as *res judicata* and/or issue estoppel between the parties. Mr. Chagla submitted that looking at the way the matter progressed before the Arbitral Tribunal (and which is clear from the different Procedural Orders as well as the transcripts referred to above), what emerges is that (i) there was to be one consolidated hearing determining the claims of PLUS as well as the Counter Claim filed by MSRDC; (ii) the dates fixed by the Tribunal were to be strictly adhered to and were inflexible; (iii) the evidence of both parties was complete; (iv) arguments on all the issues were addressed before the Tribunal and even the written submissions filed by both parties covered the claim and the Counter Claim on all issues; (v) the hearing was finally concluded on 4th February, 2017 and the matter was stood over only for pronouncement of the Award. He submitted that from the record it was clear that no further hearing was contemplated except a short focused hearing, if required by the Tribunal and that too after they

perused the written submissions filed by the parties. He submitted that no further procedural order was passed after 4th February, 2017 and no further hearing was held before the passing of the Interim Award, either for a clarification or otherwise. He submitted that neither the parties nor the Tribunal ever contemplated the passing of an Interim Award and deferring the hearing on the quantum at a later date. He submitted that, in fact, the parties had led their entire evidence before the Arbitral Tribunal and the Tribunal, therefore, could not have given the directions it did in paragraphs 77, 79, 84 and 85 of the impugned Award. Mr. Chagla submitted that in effect, once having come to the conclusion that the evidence led by PLUS was inadequate to decide on the quantum of the claims, it should have rejected the claims of PLUS for want of evidence. Instead, it has effectively allowed PLUS to improve its case by leading further evidence, if necessary. Mr. Chagla submitted that this was wholly impermissible in law, especially considering that the Tribunal itself had made it clear that there would be only one Award for the entire proceedings and both parties had led their respective evidence in its entirety to prove their respective claims. In these circumstances, there was no question of allowing either party to lead further evidence to prove their claims. If the evidence

was inadequate, the only option available to the Tribunal was to reject the claims. He submitted that adoption of such a procedure by the Tribunal not only vitiates the Award on the ground of perversity, but also suffers from a patent illegality, and clearly amounts to legal misconduct on the part of the Arbitral Tribunal. Mr. Chagla submitted that the record would clearly establish that the counsel for MSRDC asked for further time for cross-examination and for presentation of its arguments which was rejected by the Tribunal. However, the Tribunal nevertheless granted liberty to PLUS to fill up any lacuna in its pleadings and evidence by making the observations as mentioned in paragraphs 77, 79 and 85 of the Award. This clearly amounted to legal misconduct on the part of the Tribunal and which indicated a definite bias in favour of PLUS and against MSRDC. To put it in a nutshell, Mr. Chagla submitted that the Tribunal had not treated the parties equally and had acted in violation of section 18 of the Act and would, therefore, clearly amount to legal misconduct on the part of the Tribunal.

83. Lastly, Mr. Chagla submitted that the transcripts clearly show that the procedure was agreed and the parties also always understood that there would be one consolidated Award and one

consolidated proceeding, including a decision on the Counter Claim filed by MSRDC. Though MSRDC made a Counter Claim of around Rs.93 crores under twelve different heads, and despite the Tribunal framing an issue as to what would be the amount to which MSRDC would be entitled to on account of its Counter Claim, the finding of the Arbitral Tribunal in paragraph 85 of the Award that sufficient time was not devoted to the Counter Claim is patently illegal and perverse considering that pursuant to the directions passed by the Tribunal, both, the claim and Counter Claim were heard. In fact, the parties filed their detailed written submissions in support of and in reply to the Counter Claim. Despite this, the fact that the Counter Claim was not adjudicated upon by the Arbitral Tribunal vitiates the Award. In support of this submission, Mr. Chagla relied upon the following:

a. An Award should be final and the arbitrator cannot, in his Award, reserve to himself the power of performing in future, any act of a judicial nature in respect of the matters submitted. [**Russel on the Law of Arbitration 24th Edition, para (b)**]

b. Failure by the arbitral tribunal to deal with all the issues that were put to it would amount to serious irregularity and the Award can be challenged on that ground

[**Halsbury's Law of England 5th Edition, volume 2, para 1277**]

c. ***Vijay Kari & Ors. v. Prysmian Cavi E Sistemi SRL & Ors. [2020 SCC OnLine SC 177]; para 86.***

d. ***K.V. George v. Secy. To Govt., Water and Power Deptt., [(1989) 4 SCC 595]; para 12.***

84. In conclusion, Mr. Chagla, therefore, submitted that the entire Award is vitiated as the same was in violation of the agreed procedure as contemplated under section 19, legal misconduct on the part of the Tribunal as well as on the ground that it failed to consider the Counter Claim filed by MSRDC. Consequently, he submitted that the arbitration Petition be allowed and the impugned Award be set aside.

SUBMISSIONS OF PLUS:

85. On the other hand, Mr. Khambatta, the learned senior counsel appearing on behalf of PLUS submitted that the entire decision to bifurcate the arbitral proceedings into two phases, first to make an Interim Award and thereafter defer the hearing to decide on the quantum of the claims was neither contrary to the agreed procedure and nor was it patently illegal or against the

fundamental policy of Indian law. He submitted that the Tribunal is empowered to devise its own procedure. In this regard, he brought to my attention, sections 19(2) and 19(3) of the Act which, *inter alia*, stipulate that subject to Part I of the Act, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings and failing any such agreement between the parties, the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate. Mr. Khambatta submitted that section 19(3) of the Act clearly empowers the Tribunal to devise its own procedure, unless there is an agreement between the parties to the contrary. It was his submission that in the present case, there was no agreement regarding the procedure to be followed by the Tribunal and, therefore, the Tribunal devised its own procedure under section 19(3). He submitted that in its procedural order dated 20th February, 2016, the Tribunal gave directions in respect of the procedure it proposed to follow. This was after discussion with the parties who agreed to the practice and procedure suggested by the Tribunal. Mr. Khambatta submitted that these directions were not exhaustive of the procedure and neither did they restrict the Tribunal to pass a single unified Award. He submitted that under section 19(3) of the Act, the Arbitrators have procedural autonomy,

unless the same is restricted or modified by the parties by agreement. He submitted that in the facts of the present case, there is no restriction placed by the parties on the Tribunal's power to bifurcate the proceedings and to pass two Awards. Mr. Khambatta strongly relied upon paragraph 15 of the procedural order dated 20th February, 2016 to contend that the Tribunal expressly reserved the discretion to itself to amend or modify the procedure pursuant to such further directions or procedural orders as the Tribunal may, from time to time, consider necessary. He submitted that the said procedural order was passed after discussion with the parties who agreed to the practice and procedure to be followed, including paragraph 15 of the said order. Thus, the Tribunal was entitled to amend the procedure for conducting the proceedings if it considered it necessary, was the submission of Mr. Khambatta. In any event, Mr. Khambatta submitted that the said procedural order did not exclude the power of the Tribunal under section 19(3) of the Act to determine the procedure nor did it describe that there would be only one final Award. He, therefore, submitted that the submission of Mr. Chagla that the procedure contemplated by the Tribunal was to pass one final Award is not well founded.

86. Mr. Khambatta then submitted that it is not uncommon in both International and domestic arbitrations for a Tribunal to pass an Interim or Partial Award, bifurcating the proceedings. Under section 2(c) of the Act, an Arbitral Award includes an Interim Award. Section 31(6) of the Act provides for passing an Interim Award. The Interim Award is a final Award in relation to issues which are finally decided therein. An Interim Award finally decides an issue without necessarily disposing off all the claims. He submitted that the term "Interim Award" is often used synonymously with the term "Partial Award". In the present case, Mr. Khambatta pointed out that by way of an Interim Award, issues (a) and (b) [framed by the Tribunal in paragraph 54 of the Award] regarding the validity of the termination notices were finally decided by the Tribunal and issues (c) and (d) relating to quantum of the claims [of PLUS] and the Counter Claims [of MSRDC] were deferred to the second phase. He submitted that there was absolutely nothing wrong in the Tribunal adopting this procedure, especially considering that the Tribunal was empowered to do so under section 19(3) of the Act. He submitted that this has also been held to be valid by the Supreme Court in the case of ***McDermott International Inc. vs. Burn Standard Company Ltd. & Ors.,***

[(2006) 11 SCC 181]. Mr. Khambatta submitted that even under section 27 of the Arbitration Act, 1940 [corresponding to section 31(6) of the Act], the Arbitral Tribunal had the power to make an Interim Award, deciding the question of liability first and permitting the leading of evidence thereafter on the question of damages. In this regard, Mr. Khambatta relied upon a decision of a Division Bench of this Court in the case of ***Manganese Ore (India) Ltd. & Ors. Vs. Ram Bahadur Thakur Limited*** **[2006 SCC Online Bom. 507]**. Mr. Khambatta submitted that even the second edition of Gary B. Born, International Commercial Edition recognises the utility and benefits of bifurcating the proceedings and the passing of Interim or Partial Awards. Only clear and unambiguous language should be permitted to produce the unusual and inefficient result of denying the arbitrators the authority to make Partial Awards. Allowing the arbitrator to pass Partial Awards enables the Tribunal and the parties to focus on and resolve issues sequentially, rather than in a single decision. This sometimes has very significant advantages in terms of efficiency and speed. A Tribunal's decision whether or not to bifurcate proceedings and to resolve certain issues

before others usually turns on minute assessments of efficiency that are the domain of the Arbitral Tribunal, was the submission.

87. Mr. Khambatta then submitted that PLUS has placed all material / proof in support of its claims before the Tribunal including the one for Termination Payment. What the Tribunal has done is that it has only deferred the quantum of those claims and not rejected them as sought to be contended by Mr. Chagla. He submitted that Mr. Chagla's reliance on a single sentence of paragraph 86 of the impugned Award is completely misplaced and out of context. Mr. Khambatta submitted that the Concession Agreement provided for Termination Payment in terms of clause 29.9(c) and 32.4.2 thereof and which are identical in nature. He submitted that such a clause is inserted to encourage Public Private Partnership. The concept of a Public Private Partnership (for short **"PPP"**) Project is introduced to help in developing public infrastructure through private investment which otherwise would have to be funded by the Government. In PPP Projects, the concept of Termination Payment has been introduced by which, in the event of termination of the contract, regardless of who has committed the default, Termination Payment has to be paid by the Government or

the PSU in all cases of termination. This concept helps in attracting private entities and provides adequate security to the lenders as it is not possible to secure them through collateral assets as the assets belong to the public. He submitted that Termination Payment is not the same as damages or even liquidated damages. When the Concession Agreement is terminated for default by either party, the Government takes over the asset and the amount paid for such taking over of the asset is termed as 'Termination Payment'. Termination payment represents only a return on equity and repayment of debt as per the pre-agreed formula. On the other hand, damages or liquidated damages can never be claimed by a defaulting party whereas in case of Termination Payment in a PPP contract, even on the default of the Concessionaire, the Concessionaire would be entitled to Termination Payment.

88. Mr. Khambatta submitted that all that the Tribunal has done is deferred the first claim for Termination Payment (Rs.4,95,80,21,040/- along with interest) to consider the issue of proportionality and which was actually done purely for the benefit of MSRDC. He submitted that all documents required for quantification of Termination Payment were duly filed and proved

by PLUS. The quantum of Termination Payment has to be done by applying the figures of debt, equity and subordinate debt to the formula as provided in clause 29.9(c) and 32.4.2 of the Concession Agreement and which are identical. He submitted that the Statutory Auditor's certificate, which provided the amount of Termination Payment payable, was never challenged by MSRDC. Under clause 28.1, the accounts of PLUS audited and certified by its Statutory Auditors would form the basis of various payments by either party under the Concession Agreement. MSRDC also chose not to appoint another firm of Chartered Accounts to audit and verify the Auditor's certificate which MSRDC was entitled to do as per clause 28.4. Reliance upon the Auditor's certificate by PLUS at paragraph 6.91 of the Statement of Claim was clearly met with merely a bald denial at paragraph 7.54 of the Statement of Defence. Hence, Mr. Khambatta submitted that as per clause 32.6 of the Concession Agreement, MSRDC was required to pay to PLUS the Termination Payment within thirty days of the demand being made by PLUS accompanied by such Statutory Auditor's certificate. Mr. Khambatta submitted that MSRDC accepts the fact that it is liable to make payment to PLUS. This is clear from the fact that the Toll Notifications that were issued by the Government of Maharashtra

after the termination of the Concession Agreement authorised MSRDC to collect the Toll and directed the amount so collected to be kept in an Escrow Account so that the same could be utilised to settle the claims of PLUS.

89. Mr. Khambatta submitted that in paragraph 11 of the Interim Award, the Tribunal has observed that the point at which termination might take place did not have any bearing on the computation of the Termination Payment. Nevertheless, in paragraph 72, the Tribunal stated that it needed to be satisfied about the proportionality in the working of the Termination Payment clause as MSRDC had contested the said payment also under each individual head that was to be calculated under the formula and for this reason, the Tribunal wanted to have a further hearing and submissions. From all this material, Mr. Khambatta submitted that adopting proportionality as a factor in addition to the formula [as laid down in clauses 29.9(c) and 32.4.2], worked to MSRDC's advantage. Mr. Khambatta submitted that this was, in fact, done for the benefit and, in fact, benefitted MSRDC and, therefore, it does not lie in their mouth to contend that the Tribunal could not have done so. This is for the simple reason that otherwise

PLUS would have been entitled to Termination Payment as per the formula set out in clauses 29.9(c) and 32.4.2 and which were identical in nature. The deferment to consider the proportionality was really for the benefit of MSRDC and not to the benefit of PLUS.

90. Mr. Khambatta thereafter submitted that even the deferment of quantum of the second claim of PLUS towards damages on account of breaches committed by MSRDC (for Rs.112 crores) operates to the benefit of MSRDC and not to the benefit of PLUS. He submitted that this claim arose in terms of clause 32.8 of the Concession Agreement under the head "Other Claims". The loss suffered by PLUS was on account of breaches by MSRDC prior to the termination date. The loss had, therefore, accrued much before the termination and the amount would have merely compensated PLUS for the said loss. Mr. Khambatta submitted that PLUS had filed and proved documents in support of its claim by primarily relying on admissions by MSRDC on both, liability and quantum contained in MSRDC's various documents, including the letters dated 20th October, 2011, 18th July, 2011, 4th March, 2008, 24th / 25th June, 2009, 2nd May, 2013, 2nd August, 2010 and MSRDC's Director's Report for the year 2011. MSRDC had claimed that these

documents were part of the conciliation proceedings and, therefore, inadmissible, which contention was rejected by the Tribunal. The Tribunal did not determine the quantum based on the figures quoted during the settlement discussions holding it would be unfair on MSRDC to do so. The Tribunal held that despite the fact that the documents were admissible, the Tribunal felt that it is still required to determine the weight that can be attached to these documents as evidence of an admitted quantum of loss. The Tribunal was of the view that it would be unfair on MSRDC to determine the issue of quantum with reference to the figures quoted during settlement discussions and in these circumstances, it would not be fair to place much weight on the quantum figures exchanged by the parties while working out the settlement. The Tribunal held that these cannot be said to constitute admissions of quantum of liability. Mr. Khambatta submitted that despite the fact that the amounts claimed under the head 'Other Claims' were admitted by MSRDC in various documents, the Tribunal nevertheless held as follows:

> "If, on the other hand, the Tribunal ultimately reaches the conclusion that the Termination Payment is not possible (despite there being a valid termination), then it is for the Claimant to prove and quantify the loss that it has suffered, and claim damages on that basis. The Tribunal is not inclined – at this stage – to award Rs. 112 crore in damages, based on any admissions by the MSRDC, as alleged. Since this figure is arrived at in course of

> correspondence exchanged during the settlement phase, although the documentation itself is admissible, the Tribunal feels that it would not be a sound basis to arrive at any conclusion on the quantum of loss based on these figures alone. We are, therefore of the view that even on this issue, further hearing and submissions are required. We clarify that in making these submissions, the Claimant need not be restricted to the amounts allegedly admitted by MSRDC, but may even claim amounts higher than that should it elect to do so. However, if would need to prove and quantify its loss by leading appropriate evidence if necessary. Similarly, the MSRDC shall not be bound by any alleged admissions made during the settlement phase, but may independently rebut the Claimant's claim for damages, including by way of leading appropriate evidence if necessary."

91. Mr. Khambatta submitted that it is in this context that the findings of the Tribunal have to be read and understood. When read and understood in that context, it is clear that the deferment was purely to benefit MSRDC and was not to be benefit of PLUS at all. This being the case, it can hardly lie in the mouth of MSRDC that any injustice has been done to them by the Tribunal by deferring the issue of quantum of PLUS' claims at a later stage.

92. Even as far as MSRDC's Counter Claims are concerned (for Rs.93,04,88,558/-), Mr. Khambatta submitted that the same was deferred to allow MSRDC a full opportunity of presenting its case. Mr. Khambatta submitted that it is evident on a bare perusal of paragraph 85 of the Interim Award that the parties had filed

several volumes in respect of the Counter Claims filed by MSRDC. However, during the hearings, sufficient attention was not devoted to the Counter Claims as the parties concentrated mainly on the claims made by PLUS and MSRDC's defence thereto. It was, therefore, decided by the Tribunal that it would not be fair to decide the rights and liabilities of the parties with respect to the Counter Claims without affording a fair opportunity to the parties to present their case qua each Counter Claim. It is in this light that the Tribunal, therefore, deferred the decision on the Counter Claim also to the second phase. Mr. Khambatta submitted that the Tribunal has thus given an opportunity to MSRDC to make good its case. It is in this context the one sentence relied upon by Mr. Chagla in paragraph 86 of the Interim Award has to be read and understood. Mr. Khambatta submitted that the Tribunal in paragraph 86, is not referring to insufficiency of evidence led by PLUS. In any event, whether or not the evidence was insufficient to award payment / damages is a matter to be dealt with while examining the final Award. Moreover, paragraph 87 of the Interim Award makes it clear that this observation is only *prima facie* in nature as the determinative findings in the Interim Award are only in respect of liability. He, therefore, submitted that all this clearly goes to show

that there is absolutely no merit in the contention of Mr. Chagla that the Tribunal could not have bifurcated the proceedings which vitiates the Award. If this be the case, Mr. Khambatta submitted that there is no legal misconduct on the part of the Arbitral Tribunal. Consequently, he submitted that there was no merit in the aforesaid objection to the Interim Award and the same ought to be rejected. He therefore submitted that the above Petition has no merit and the same ought to be dismissed with costs.

FINDING OF THE COURT:

93. I have heard the learned counsel for the parties at great length on this issue. To understand the present controversy, it would be necessary to understand how the arbitration proceedings progressed before the Arbitral Tribunal. On 20th February, 2016, the Arbitral Tribunal passed a detailed procedural order giving various directions. A time-frame was set out by which the Statement of Claim as well as the Statement of Defence and Counter Claim were to be filed, so also the Statement of Defence of PLUS to MSRDC's Counter Claim. Directions were also given to MSRDC and PLUS to submit their affidavit of denial / dispute in respect of any document filed by each other and/or request for inspection and/or production

of documents. In the said procedural order, it was directed that the Tribunal will have sittings from 17th January, 2017 to 21st January, 2017 for cross-examination of witnesses of each party by the other side and oral arguments would be heard by the Tribunal from 31st January, 2017 to 4th February, 2017. The timing for all sittings was fixed from 11.00 a.m. to 5.00 p.m. with an hour's break for lunch. In the said procedural order, Practice Directions under section 19(3) of the Act were also set out in great detail. The relevant portion of the Practice Directions read thus:

> **"Practice Directions [under Section 19(3) of the Arbitration and Conciliation Act, 1996]**
>
> After discussion, the Learned Counsel for the parties have agreed on the practice and procedure to be followed and in accordance therewith the following directions are issued by the Tribunal:
>
> 1. Extension of time shall be granted by the Tribunal in its discretion:
>
> (a) in exceptional cases only;
> (b) provided that a request is submitted before the date scheduled; and
> (c) as soon as it appears that the deadline cannot be complied with.
>
> The Parties may also agree between themselves for short extensions of time, on the basis of mutual courtesy as long as those extensions do not materially affect the time table (the dates scheduled for the sittings of the Tribunal must not be affected) and that the Tribunal is informed prior to the scheduled deadline.
>
> … … … …

> 6. In arbitral disputes, it is not necessary to frame or settle issues. However, for the purpose of focusing attention of the parties and the Tribunal, the points for determination / list of disputes on which the Tribunal would be called upon to adjudicate may be settled. For this purpose, the Learned Counsel for the parties would exchange in advance draft / proposed points for determination (list of disputes) on which adjudication by the Tribunal would be needed. The Tribunal would appreciate if the Learned Counsel may sit together and file before the Tribunal an agreed memo of points for determination.
>
> 7. Filing by either party of any pleading, document, application and communication etc., shall be deemed to have been effectively done and completed only on having been delivered to the Tribunal and its copy having been previously or simultaneously delivered to the opposite party.
>
> … … … …
>
> 15. The Procedural Order may be amended or supplemented, and the procedures for conduct of this Arbitration modified, pursuant to such further directions or Procedural Orders as the Tribunal may from time to time consider necessary and issue.
>
> … … … … "
>
> (emphasis supplied)

94. What can be seen from the aforesaid detailed procedural order is that the procedure was fixed by the Tribunal under section 19(3) of the Act and after discussion with the learned counsel for the parties who agreed to the same. In the said procedural order, it was made clear that extension of time would be granted only in

exceptional circumstances and as long as the extensions do not materially affect the time table (the dates scheduled for the sittings of the Tribunal should not be affected) and that the Tribunal was informed prior to the scheduled deadline. The Tribunal also reserved to itself, to amend the procedural order or supplement the same for conducting the arbitration proceedings by issuing further directions or further procedural orders as the Tribunal may, from time to time, consider necessary.

95. Since MSRDC could not adhere to the time-table for filing its Statement of Defence and Counter Claim, on 28th April, 2016, it e-mailed the Arbitral Tribunal asking for four weeks' extension. This was objected to by the counsel of PLUS. Whilst dealing with the aforesaid extension, the Tribunal, by its order dated 4th May, 2016, *inter alia* held as under:

> "The respondent's request is based primarily on three grounds; (i) the respondent is still in the process of tracing out and ascertaining the necessary correspondences / documents relevant in the matter, (ii) The concerned engineers/officers of the respondent who were dealing in the said matter have either retired or transferred and hence, it is taking sometime for the respondent to trace out and ascertain all the relevant documents and (iii) The pleadings and documents filed by the claimants are voluminous in nature.

It may be recalled that the schedule of proceedings under the Procedural Order passed on 20th February 2016 were fixed in consultation with the counsel for the parties and dates were assigned to the parties to take steps in the arbitration proceedings, allowing full accommodation to the request made by the counsel appearing on their behalf. Though, the claimant was allowed four weeks' time for filing the Statement of Claim, on the request of the counsel for the respondent, six weeks' time was allowed for filing Statement of Defence and Counter-claim. At the same time it was also made clear to all concerned that the schedule fixed in the Procedural Order was inflexible and must be adhered to by both the sides. A stipulation to this effect was also made in the very opening paragraph of the Practice Directions given at the end of the schedule of dates.

All the grounds on which the request for four weeks' further time for filing Statement of Defence and Counter-claim is made were fully within the knowledge of the respondent even on the date the Procedural Order was passed or at any rate when the claimant submitted its Statement of Claim as per the schedule on 19th March, 2016.

It is, therefore, clear that the request for extension of time by four weeks is quite unreasonable and the point of time at which it is made (just two days before the date of submission) makes it even more so. Further, acceding to the respondent's request for extension of time by four weeks would completely disrupt the entire schedule and it will become nearly impossible to hold the final sittings, as fixed in the schedule, from 30th January to 4th February 2017.

However, rejecting the respondent's request for extension of time altogether at this stage would mean shutting out the respondent completely from raising any defence or any counter claim in the matter. Such a consequence would be indeed quite unjust and the Tribunal would certainly not like any procedural order passed by it to lead to such consequences.

> Balancing the rights of the parties, the respondent is allowed two weeks' further time for submission of Statement of Defence and Counter-claim, if any. The respondent may thus submit its Statement of Defence and Counter Claim, if any by 15th May 2016.
>
> It is made clear that no further extension of time will be allowed for submission of the Statement of Defence and Counter Claim. It is further made clear once again that the Tribunal intends to maintain the dates fixed for the final sittings undisturbed. Hence, suitable adjustments will have to be made in the rest of the schedule by shortening the time allowed to the parties by a few days at the different stages in the proceedings before the final sittings. The parties will be intimated of the amended schedule in due course.
>
> The parties are once again advised to realise that the schedule fixed under the Procedural Order passed on 20th February 2016 is inflexible and if any request for adjournment is made at all, it must be made in accordance with the provision in the Practice Directions."
>
> (emphasis supplied)

96. As can be seen from this order, the Tribunal had made it clear to all concerned that the schedule fixed in the procedural order dated 20th February, 2016 was inflexible and must be adhered to by both sides. It held that the request for four weeks' further time for filing the Statement of Defence and Counter Claim was on grounds which were fully within the knowledge of MSRDC even on the date of the procedural order dated 20th February, 2016 and, in any event, when PLUS submitted its Statement of Claim on 19th

March, 2016. The Tribunal further felt that the request for extension of time by four weeks was quite unreasonable as granting the aforesaid extension would completely disrupt the entire schedule and it would become nearly impossible to hold the final sittings as scheduled from 31st January, 2017 (wrongly mentioned as 30th January, 2017) to 4th February, 2017. However, the Tribunal felt that rejecting MSRDC's request for extension altogether would be unjust and, therefore, to balance the equities, MSRDC was allowed two weeks' time for submission of its Statement of Defence and Counter Claim. It was made clear that no further time would be allowed and that the Tribunal intends to maintain the dates fixed for the final sittings undisturbed. Hence, suitable adjustments would have to be made in the rest of the schedule by shortening the time allowed to the parties by a few days at the different stages in the proceedings before the final sittings and the parties would be intimated of the amended Schedule in due course. It was once again reiterated that the Schedule fixed under the procedural order passed on 20th February, 2016 was inflexible and if any request for adjournment was made, it would have to be in accordance with the Practice Directions issued on 20th February, 2016.

97. Pursuant to the aforesaid order dated 4th May, 2016, on 12th May, 2016, the Arbitral Tribunal, accordingly, changed the dates by which the pleadings and evidence of the parties was to be filed. The Tribunal set out that the dates mentioned in the procedural order from Sr. Nos.1 to 10 were uniformly extended by a fortnight as set out in the said order. The dates with reference to the cross-examination of witnesses from 17th January, 2017 to 21st January, 2017 as well as the sittings of the Tribunal to hear oral arguments from 31st January, 2017 to 4th February, 2017 remain unchanged.

98. Thereafter, in the meeting of the Tribunal on 17th October, 2016, the Tribunal considered several applications filed by the parties. They were: (i) the application of PLUS regarding averments submitted along with the affidavit of admission/denial of documents; (ii) application dated 31st August, 2016 filed by MSRDC for production of documents by PLUS; (iii) application by MSRDC for leave to file sur-rejoinder; (iv) application for production of documents by PLUS and MSRDC respectively; and (v) application by PLUS to file additional documents. After considering all these

applications and passing its order thereon, the Tribunal, *inter alia*, clarified that the remaining schedule as per the amended procedural order dated 20th February, 2016, shall remain the same. In other words, the arbitration sittings fixed for cross-examination of witnesses from 17th January, 2017 to 21st January, 2017 as well as for hearing oral arguments from 31st January, 2017 to 4th February, 2017, were to remain unaffected.

99. On reading all the aforesaid procedural orders, two things become absolutely clear: (i) both parties, namely, PLUS as well as MSRDC were to file their pleadings and evidence in a time-bound manner. If any party sought an extension, the same was to be granted only in exceptional circumstances and as long as those extensions did not materially affect the sittings of the Tribunal that were to be held between 17th January, 2017 to 21st January, 2017 and from 31st January, 2017 to 4th February, 2017; (ii) the dates for hearing the matter, namely, for cross-examination of witnesses (from 17th January, 2017 to 21st January, 2017) and for hearing oral arguments (from 31st January, 2017 to 4th February, 2017) were inflexible. This was made abundantly clear by the Tribunal in its various procedural orders referred to above. Another thing that

emerges from these procedural orders is that both parties were to lead their entire evidence in support of their respective claims. In none of these procedural orders was there any indication to either of the parties that the proceedings would be bifurcated wherein the Tribunal would first decide on issues (a) and (b) set out in paragraph 54 of the impugned Award [relating to the validity of the termination of the Concession Agreement] and defer the hearing for deciding issues (c) and (d) [which related to quantum of the claims and Counter Claim]. I may hasten to add that I am not for a moment suggesting that the Tribunal could not have done the same, especially considering that the Practice Directions that were issued by the Tribunal were under section 19(3) of the Act where the Tribunal is empowered to decide its own procedure. The only reason I am stating this is because the Tribunal insisted on both sides filing their complete pleadings as well as leading the entire evidence at one go. It was not in contemplation of either of the parties that evidence would be led in a piece-meal manner, whereby first it would be on the issue of whether there was a valid termination of the Concession Agreement and depending on the finding thereof, further evidence would be led on the quantum of the claims and Counter Claim. In fact, the arguments were also closed on 4th February, 2017

and only the passing of the Award was reserved. This will become further clear when I refer to the relevant portions of the transcripts before the Tribunal on 17th January, 2017, 20th January, 2017, 3rd February, 2017 and 4th February, 2017, respectively.

100. During the hearing on 17th January, 2017, the counsel for MSRDC (MR. KUMAR) sought a clarification as to whether they were going to lead evidence on the Counter Claim at the same time and whether there would be two separate Awards or there would be one Award. The Tribunal clarified that there would only be one Award. This was also the understanding of the counsel for PLUS (MR. MUKHOPADHAYA). The relevant portion of the aforesaid Minutes is reproduced hereunder:

> "MR. KUMAR: I want clarification, as per the last minutes, there is no clarification as to whether we are going to lead evidence on the counterclaim at the same time. He's tendering affidavits which are in rebuttal for the counterclaim. So, do we take it that there's going to be common evidence, because we were not aware of that?
>
> CHAIRMAN: Yes, I think so.
>
> MR. MUKHOPADHAYA: Yes, but normally you wouldn't expect the witness to come back –

MR. KUMAR: No, Sir, because as far as counterclaim is my claim and he's tendering his affidavits in rebuttal, I don't mind. But the minutes should then be clear on that, that we will have separate awards or we'll have one award. It's my claim.

CHAIRMAN: One award.

MR. MUKHOPADHAYA: Consolidated proceedings.

MR. JUSTICE ALAM: We'll have one award, we'll clarify it in today's minutes.

MR. KUMAR: Very well. Then my time constraint will change.

MR. MUKHOPADHAYA: Because as far as time is concerned, I want submissions as we all went on the basis of a 5-day hearing which is equal time two and a half days each, and we have to structure our cross-examination based on that. I have two witnesses to cross-examine, but I must do it in two and a half days, whether I do it in less, that's a different matter, but even if I can't take more than that, because that's the basis on which you proceed and you finish the cross-examination. You don't have to put every document, everything of your case, you have to put your main case, you have to make sure that you have put the main case. There are ancillary points, suggestions, for example, we take it is not necessary if you don't give a particular suggestion, doesn't mean that it will be held against you, as long as you put your main case. You can save time.

CHAIRMAN: We can record that you have not put your case for denial, just simply for denial.

MR. KUMAR: No, sir, I understand, there's no need to. But on the last occasion when we met, we did not have their affidavit of evidence, we only had the pleadings. After we have received their affidavit of evidence there are several documents which have been introduced by way of his evidence and there are several documents which are incomplete, which we want to point out just now and we were not aware about the counterclaim. We had the understanding that as far as the counterclaim is concerned, my witness will go in the box and then they will step in for rebuttal.

CHAIRMAN: That will be more convenient. Separately we record this one.

MR. JUSTICE ALAM: It will only extend the proceedings you want to split it into two "proceedings", it will extend the proceedings, time constraint, expenses involved, but it's up to you. I thought that will be one consolidated proceeding.

MR. KUMAR: Then, sir, personally, I have no objection to that. Only thing is that time constraint of two and a half days should not apply to me. But that's my only request. I'll try my best to complete.

MR. JUSTICE ALAM: What time you think –

MR. KUMAR: I would like to then take this entire session, because if the counterclaim is involved, then I will have to take that entire session.

MR. JUSTICE ALAM: Then we come back to the same situation, because it will be –

MR. MUKHOPADHAYA: We have serious reservations about that, because even I have to cross-

examine on his counterclaim, as also his defence, within that two and a half days. That's how it is done always, when we do have time restrictions, we have to manage our affairs in that way, it is not unusual, in fact it is done in every case that you do claims and counterclaims to the witness in one shot, so the witness doesn't have to come back. So I'm the claimant, I'm putting him in rebuttal, as we know each other's case, we know which documents are on the record, so it is possible to ---

MR. JUSTICE ALAM: No, but if he says that he needs more time, we must allow him to explain his position.

MR. KUMAR: I'll try to keep myself within the two and a half, three days period, but as I see from the documents, I don't think that will be possible. So I must tell the tribunal. I'll try my best.

MR. JUSTICE ALAM: We don't have that manual kind of taking down of the witness statement. These ladies are going very fast.

MR. KUMAR: That's right, I know. I'm aware of that. I'll try my best. That's all I can say.

MR. JUSTICE ALAM: Please.

MR. KUMAR: Only I'll request your Lordships to keep that in mind that in view of the affidavit which is dealing with several documents, there are some inconsistencies between the statement of claim and the evidence. I may take more time. Now that the counterclaim is also introduced, I will have to now deal with though he's taking a risk by calling his witness and he is understood the counterclaim. For me, I will not object to

that. But to deal with that, it will be a different aspect altogether.

MR. JUSTICE ALAM: Let us proceed. Let us see how it unfolds."

(emphasis supplied)

101. Thereafter, the cross-examination continued on 18th January, 2017 and 19th January, 2017 where the Tribunal consistently called upon the counsel for MSRDC to tell them as to what would be the reasonable time required to complete the evidence on the Counter Claim. In fact, the counsel for PLUS submitted before the Tribunal that there was no question of the Counter Claim coming later as there were two sets of dates for completing the entire proceedings. During the cross-examination, on 20th January, 2017, it appears that the Tribunal was quite peeved at the fact that the counsel for MSRDC was not adhering to the strict time schedule. The relevant portion of the transcripts of 20th January, 2017 read thus:

"MR. JUSTICE ALAM: I'm anxious that you complete by the lunchtime. I'm feeling a little bad, but you seem to be telling us that you just don't care for the schedule fixed by the tribunal and you will go as you think best and as you please.

MR. KUMAR: No sir, I'm sorry if I have given you that impression.

MR. JUSTICE ALAM: See the first order. The schedule was in presence of both sides with the express consent of both sides. You knew the magnitude of the case then. Of course, you were not there in the first hearing, but after you came and you thought that this matter may take longer time, you could have always asked us, told us that this schedule is not realistic, it needs to be reviewed. We had fixed five days for witnesses examination. Three and a half days still over. So what time will he get? This will completely change the entire schedule.

We have other commitments. He might have other commitments. If you thought that this five days for witnesses was not realistic, you could have told us, requested for a review of the schedule, months or weeks ago.

MR. KUMAR: That I should have done. We should have done that. I'm sorry about that.

MR. JUSTICE ALAM: We are at a stage when the whole schedule is getting disturbed and, as I said, that the order that we passed, the first procedural order is practically meaningless.

MR. KUMAR: I'll only say one thing.

MR. JUSTICE ALAM: If you take four days, he may also say.

MR. MUKHOPADHAYA: My I make one suggestion? I think that even if he finishes by the end of the day today and that should be the ultimate time limit, no longer than that, I have one full day tomorrow. I will complete the cross-examination of Mr. Kulkarni,

who's the main witnesses tomorrow itself. On the second witness, who's Mr. Jadhav, he's speaking on a very limited aspect. That is during a period of 14 January 2014 to some time in 2015 on costs incurred by them, which is in relation to the counterclaim only. Maybe we don't even need to cross-examine him. I'll discuss with Mr. Kumar at the end of the day on that and see whether we can reach an agreement as to what the status of his affidavit should be, given the time constraints that have developed. Otherwise, I mean, anyway, I could have done his cross-examination about two hours maximum, maybe even less.

But we can dispense with that, if we can reach an agreement on —

MR. KUMAR: You have already told me in the morning. I'll talk to the clients about it.

Sir, I must tell you - -

MR. JUSTICE ALAM: Please don't misunderstand me.

MR. KUMAR: Not at all, sir.

MR. JUJSTICE ALAM: I respect you and think that you're entitled to your cross-examination but in that case, we should have been informed earlier. Then we would have considered changing the schedule then. This leads me to ask, what about the hearing dates?

MR. KUMAR: Hearing dates, I must tell you, I will need five days. I'm telling you now.

MR. MUKHOPADHAYA: I have one submission on that. I don't think a hearing of this nature needs five days. I think two and a half days each is

more than enough. It's documents which are on the record that we have to deal with.

MR. JUSTICE ALAM: Mr. Mukhopadhaya, everyone has his own way of making submissions.

MR. MUKHOPADHAYA: No, there are time constraints to every tribunal, time constraints to parties and the cost involved in every day's hearing.

CHAIRMAN: Do you have time for rejoinder in the argument?

MR. MUKHOPADHAYA: I'll take one and a half hours for rejoinder, that's it. We'll give written submissions after the hearing, so that whatever time is - - this is done in all major arbitrations.

MR. JUSTICE ALAM: You will make submissions first.

MR. MUKHOPADHAYA: Yes, as claimant, I would make the submissions first.

MR. JUSTICE ALAM: You will take how much time?

MR. MUKHOPADHAYA: I will finish in two days maximum, so that he can have two and a half days for his reply.

MR. JUSTICE ALAM: We can give you a maximum of three days.

MR. KUMAR: I'm telling you now that my request is I need five days.

MR. JUSTICE ALAM: No, we can give you three days and after that, you can give us your written submissions. Kindly tailor your arguments that way."

(emphasis supplied)

102. In the very same transcript (of 20th January, 2017), during cross-examination, the Tribunal, in fact, made a comment on the way the documents were being marked considering that there was going to be one consolidated Award. The relevant portion of this portion of the transcript of 20th January, 2017 reads thus:

"MR. JUSTICE ALAM:	I wish to say something about the marking of the documents. <u>If there's going to be one consolidated award, it will create a lot of confusion. So kindly re-number or re-mark your documents</u>.
MR. DELHIWALA:	Only RD three will be a problem.
MR. KUMAR:	We said CCD because commercial documents.
MR. TYAGI:	In RD also it will be only 15 documents, because you have filed only till RD15.
MR. MUKHOPADHAYA:	Now 16.
MR. TYAGI:	Now 18. So after that, it is only RRDS. So it is only about those 18 documents.
MR. JUSTICE ALAM:	Whatever.
MR. TYAGI:	We'll work that out.
MR. JUSTICE ALAM:	<u>Be careful, because I think in the award, there will be a lot of confusion. I don't know at what stage somehow or other you took it that there would be two different proceedings</u>."

(emphasis supplied)

103. From the aforesaid two transcripts of 17th January, 2017 and 20th January, 2017, it clearly appears that the parties were to lead their entire evidence on all issues and the Tribunal was going to pass one consolidated Award. This was made clear, not only in the transcript of 17th January, 2017, but also in the transcript of 20th January, 2017. Thereafter, the cross-examination continued and was completed on the scheduled date of 21st January, 2017. The arguments thereafter commenced as per the schedule laid down by the Tribunal. The transcript of 1st February, 2017, in fact, indicates as to how the matter was under progress during oral arguments. The parties, in fact, were directed to file their written submissions by the dates mentioned in the said transcript. The relevant portion of the said transcript of 1st February, 2017 reads thus:

> "MR. JUSTICE ALAM: Both of them will submit their respective written submissions by 14th. With liberty to file reply to the other side's by 20th. And then we will decide whether we need any clarification or any further sittings.
>
> MR. MUKHOPADHAYA: That's fair.
>
> MR. PREMKUMAR: Right now, the discipline imposed by the schedule, I think we need to follow that in terms of completing it and then written submissions.
>
> CHAIRMAN: Both of you file your written submissions by 14th and then thereafter you will both

have the occasion to reply to each other's submissions, then we will consider whether we need the hearing.

MR. JUSTICE ALAM: We will consider in two or three days and intimate whether we need a further hearing or not.

MR. KUMAR: Therefore, he will file submissions, I will submissions of what we argue?

MR. JUSTICE ALAM: With copies to each other. It will be open to both of you to file your reply to the written submissions filed by the other side by 20th. Definitely by 20th. You may."

(emphasis supplied)

104. On 3rd February, 2017, the Arbitral Tribunal passed certain directions with reference to payment of their fees. The relevant portion reads thus:

"CHAIRMAN: Now, we have to issue certain directions about the payment of the arbitrators' fees.
You are requested to pay deposit for the fees of arbitrators for a period of three days working. That is two days for internal discussion among the arbitrators and one day for the pronouncement of the award.

MR. MUKHOPADHAYA: What about writing of the award itself? That also takes time.

MR. JUSTICE ALAM: Two sittings for that. Third sitting for pronouncement.

CHAIRMAN: So three days' fees for the arbitrators at the rate of - -

MR. MUKHOPADHAYA: 50 per cent.

CHAIRMAN: - - 2 lakhs per arbitrator per day. That to be deposited by 28 February."

105. Then, we come to the transcript of 4th February, 2017. After the hearing was over, on 4th February, 2017, this is what transpired before the Tribunal:

"17.08 We will give that in our submission.

MR. PREMKUMAR: I think in all fairness we will require a little more time for this.

MR. JUSTICE ALAM: If both sides agree, we are willing to sit.

MR. MUKHOPADHAYA: The problem is the time, really speaking, that is the difficulty. If we had booked earlier, seven days, eight days, we would have kept our diaries open for that.

MR. PREMKUMAR: I mention if both sides agree, we can sit for a day or something.

MR. MUKHOPADHAYA: It is better to do it after the submissions.

MR. PREMKUMAR: So that we have more clarity.

MR. MUKHOPADHAYA: What some tribunals do, if I may suggest, before the hearing also if your Lordships have any clarification questions, because instead of addressing everything again, your Lordships have heard everything, but if there are specific points which your Lordships need clarification on, just say

that these are the points on which we want clarification, so we are prepared with that and it can be a short, focused hearing, everything else will be on written submissions. If your Lordships feel it is necessary we have no difficulty with that.

CHAIRMAN: So arguments from both sides are closed today. Both sides are given time approved, 14 February to file their written submissions.

[Offline discussion]

CHAIRMAN: So your submissions by 20 February and thereafter by 27 February you can file reply, if any, to these submissions by the other side. Thereafter, if we feel that it requires some hearing clarifications after going through your submissions, the date will be fixed for the further hearing if any required.

MR. KUMAR: Sir, my request would be that in case you do decide to hold the hearing, between 25 March and 5 April, I will have a difficulty.

MR. JUSTICE ALAM: The date will be fixed only by consent.

CHAIRMAN: We are closed for the day.

MR. KUMAR: We are grateful to your Lordships for at least tolerating us. It is a pleasure appearing before your Lordships. And I must thank my learned friend.

CHAIRMAN: Both sides helped us very well.

(5:14 p.m.)
(The hearing concluded)"

(emphasis supplied)

106. What is clear from this transcript is that arguments from both sides were closed and both sides were given time to file their written submissions. After going through the written submissions, if the Tribunal felt that it required any hearing for clarifications, a date would be fixed for a further hearing. In fact, this transcript makes it very clear that after going through the submissions given by the parties, if the Tribunal required any clarification in relation thereto, it would fix a further focused hearing.

107. When one reads the procedural orders set out earlier along with the transcripts referred to above, it becomes clear that on 4th February, 2017, all arguments were concluded and all evidence was led and all that was required to be done was to pass an Award. After going through the submissions of the parties, if the Tribunal felt that it required any clarification, only then it would fix a further hearing. On reading these procedural orders and transcripts, I find that it was never in contemplation, either of the parties or the Tribunal, that the proceedings would be bifurcated wherein the Tribunal would pass an Interim Award, first deciding on the issue of

termination of the Concession Agreement and thereafter defer the hearing on the question of quantum of the respective claims. The way the matter has proceeded before the Tribunal, it is quite clear to me that parties were directed to lead their entire evidence on all issues, including the quantum, and the arguments also proceeded on that basis. I, therefore, fail to see as to what was the need to bifurcate the proceedings by first passing an Interim Award on the issue of termination and thereafter defer the hearing on the question of quantum. I am not for a moment suggesting that an Arbitral Tribunal is not empowered to do so. It certainly does. In fact, in the present case, if the Tribunal had simply said that they want to hear further arguments on the question of quantum [without suo-moto giving liberty to the parties to file fresh pleadings and lead further evidence], I do not think there could have been any objection to the bifurcation of the proceedings as set out in the Interim Award. However, that is not the case. What the Tribunal has done in the impugned Award is allowed the parties to file fresh pleadings and lead further evidence in the second stage of the arbitration. In fact, after considering the evidence and submissions of the parties, the Tribunal rejected certain specific claims of PLUS and expressed its inability to decide the other claims on the

available evidence. It is even the case of PLUS that it had produced all the evidence in support of its case and never made any request to the Tribunal for leading any further evidence. Despite this, when it came to the issue of Termination Payment, both under clause 29.9(c) and clause 32.4.2, the Tribunal in the Interim Award, *inter alia*, held that *prima facie* Termination Payment payable to PLUS would have to be decided on the element of proportionality in the working of the Termination Payment clause. The Tribunal noticed that MSRDC had strongly contested the Termination Payment also on the ground of each individual head that is to be calculated under the formula and it would be beneficial to the Tribunal to invite further hearings and submissions on this issue. As far as the alternative to the claim for Termination Payment (of Rs.469 crores) is concerned, the Tribunal was of the opinion that since it was deferring its decision on the issue of Termination Payment, the decision on the alternative claim also ought to stand deferred. Paragraphs 72 and 73 of the impugned Award clarifies the above position. The said paragraphs read thus:

> "72. As regards Termination Payment, both under Clause 29.9 and Clause 32.4.2, an issue arises as to whether such payment becomes *ipso facto* payable in the event of a termination, without regard to either the stage at which the Agreement is terminated or the losses caused to the

Claimant / Concessionaire. To take an example, if the Agreement were to be terminated at the inception stage (say, for example, after a mere seven months post the COD), would such termination attract the same Termination Payment as a case where the Concessionaire has been collecting toll for the entire duration of the toll notification, and elects to terminate the Agreement on the very last day of the toll collection period, having exhausted its revenue stream. This is particularly relevant because many of the costs in such projects may be incurred up-front, or at any rate, may be front-loaded. Therefore a termination in the early stages of the Agreement, would arguably leave a Concessionaire stranded having incurred significant costs, and not having had the opportunity to recover any revenue. But a termination on the last date of the subsistence of a toll notification finds the Concessionaire in a position where he has finished collecting revenue for a period of several years, as per the original toll notification. Should two such cases be treated the same, inasmuch as should the same Termination Payment be payable – as a mechanical application of the formula in the Agreement. *Prima facie*, the Tribunal would need to be satisfied about the element of proportionality in the working of the Termination Payment clause. We notice that the MSRDC has strongly contested the Termination Payment also on the ground of each individual head that is to be calculated under the formula, and it would be beneficial to the Tribunal to invite further hearing and submissions on this issue.

73. As an alternative to its claim for Termination Payment, the Claimant has also made a claim of approximately Rs.469 crore, based on amounts invested by shareholders and an assumed return of 14.74%. This alternative claim is virtually a proxy claim for Termination Payment, but calculated not as per the contractual formula, but based on the actual amount invested by shareholders. Since the Tribunal is inclined to defer its decision on the issue of Termination Payment, the decision on this alternative claim of Rs.469 crore approximately also stands deferred."

108. Thereafter, the Tribunal deals with the claim for Rs.112 crores which claim the Tribunal records is largely predicated and premised on the alleged admissions of liability (and quantum) made by MSRDC and recorded in the Director's Report of July, 2011. The objection taken with reference to these admissions by MSRDC was that all the alleged admissions were made during conciliation proceedings and hence were inadmissible. Despite over-ruling this objection, the Tribunal opined that it was still required to determine what weight could be attached to these documents as evidence of an admitted quantum of loss. The Tribunal was of the view that it would be unfair on MSRDC to determine the issue of quantum with reference to the figures quoted during settlement discussions. The Tribunal did not agree with PLUS that the figures cited in the IC's correspondence necessarily reflected any independent analysis or calculation of loss, either by the IC or MSRDC. The Tribunal was *prima facie* of the view that these figures were put forward by PLUS' representatives and accepted (with minor modifications) by the IC. In fact, the Tribunal noted that initially on the specific issue of 'additional direct cost', PLUS' representative put forward a figure of Rs.162.37 crores, which was then accepted by the IC with minor modifications as the revised project cost of Rs.161.19 crores. The

Tribunal also further noted that a huge difference in the revised project cost first projected by PLUS on 24th February, 2010 and the other put forward by its representative (as recorded in the letter dated 23rd June, 2011) is itself indicative of the fact that figures quoted in the correspondence have themselves fluctuated with time and that too, quite significantly. This, according to the Tribunal, was further indicative of the fact that these figures were proposed by either side in the spirit of settlement while they were trying to work out a rough and ready compromise. It is in these circumstances that the Tribunal was of the opinion that it would not be fair on their part to place much weight on the quantum figures exchanged by the parties while working out a settlement. According to the Tribunal, these figures did not constitute admissions of quantum of liability. The Tribunal thereafter also opined that PLUS had made its claim for damages of Rs.112 crores in addition to its claim for Termination Payment. *Prima facie*, the Tribunal was of the view that this claim can only be in the alternative. If PLUS was to satisfy the Tribunal that Termination Payment is payable, then that would exhaust all reliefs and would be to the exclusion of other reliefs that PLUS had made under section 73 of the Contract Act or otherwise. If, on the other hand, the Tribunal ultimately reached the conclusion that

Termination Payment was not payable (despite there being a valid termination), then, it would be for PLUS to prove and quantify the loss that it had suffered and claim damages on that basis. The Tribunal was, therefore, not inclined at that stage to award Rs.112 crores in damages based on the alleged admissions of MSRDC. The Tribunal was, therefore, of the view that even on this issue, further hearings and submissions were required. It was clarified that in making these submissions, PLUS need not be restricted to the amounts allegedly admitted by MSRDC, but may even claim amounts higher than that, should it be allowed to do so. However, it would need to prove and quantify its loss by leading appropriate evidence, if necessary. Similarly, MSRDC was not bound by any alleged admissions and was free to independently reject PLUS' claim for damages, including by way of leading appropriate evidence, if necessary. It is thereafter highlighted in paragraph 86 of the Award that while deferring the quantum issue to a second stage, the Tribunal is very mindful of the fact that such a second phase of the arbitration is likely to involve both time and expense. The Tribunal further holds that this is unavoidable in the circumstances as the Tribunal cannot arrive at a quantum determination based on the existing record and submissions.

109. It is all these parts of the Award and which I have set out earlier, to which Mr. Chagla has taken strong objection and in which I find considerable merit. As mentioned earlier, the arbitration proceedings had commenced and continued before the Arbitral Tribunal on the basis that the entire evidence was led by both parties. In fact, the written submissions also filed before the Tribunal by both parties would reflect the same. If the Tribunal was not satisfied with the evidence led by either of the parties, it ought to have rejected the claims on which the evidence was inadequate. After making the parties lead their entire evidence, the Tribunal could not have allowed either party to lead further evidence to substantiate their claims when neither party made any such request. If the Tribunal was of the opinion that the evidence was inadequate, either to grant any claim of PLUS or any Counter Claim of MSRDC, it ought to have rejected the claim / Counter Claim, as the case may be. This entire exercise by the Tribunal of suo-moto allowing the parties to lead further evidence, once the evidence was closed and final arguments were also concluded, to my mind, clearly vitiates the Award in so far as it allows parties to file fresh pleadings and lead further evidence. The Tribunal has no power to allow a

party to lead further evidence after the evidence is closed without the concerned party seeking leave of the Tribunal to lead further evidence in that regard. I say this because if an application to lead further evidence [after it is closed] is made by either party, the Arbitral Tribunal would be bound to permit the other party to respond to the same and thereafter render its decision thereon. Failing to do so [i.e. granting the opposite party an opportunity to contest the application for leading further evidence] would itself render the Award vulnerable inter alia on the ground of breach of principles of natural justice. The Tribunal, after the evidence is closed, cannot suo-moto allow either party to lead further evidence merely to accommodate a party to improve its case. That would be contrary to all principles of fair play in any adversarial litigation and would be in breach of the provisions of section 18 of the Act. In the present case, the situation would have been quite different if the Tribunal had made it clear to the parties that they need to lead evidence only with reference to the issue of termination first, and depending on the answer to the aforesaid issue, further evidence would be allowed to be led by the parties regarding the quantum. The situation would also have been different if the Tribunal had bifurcated the proceedings to hear further arguments on the

quantum issue on the basis of the evidence already led by the parties. However, that is not the case. The parties led their entire evidence before the Tribunal and arguments were also canvassed in relation thereto. Evidence was led not only with reference to termination but also with reference to the quantum of each claim. In other words, the parties proceeded before the Tribunal on the basis that all issues would be decided by the Tribunal at one and the same time and that they had presented their entire evidence and case before the Tribunal. This being the situation, the Tribunal, on its own, could not allow either party to lead further evidence, after the evidence was already closed and all arguments were also canvassed and written submissions filed. I am therefore of the view that the Award is vitiated to the extent that it allows the parties to file fresh pleadings and lead further evidence in the second stage of the arbitration.

110. I am unable to agree with the submission of Mr. Khambatta that all this was done primarily for the benefit of MSRDC and, therefore, it does not lie in their mouth to complain of the procedure adopted by the Tribunal. Firstly, from the Award itself, it is clear that with relation to Termination Payment, the Tribunal was

of the opinion that it would have to consider whether payment under clause 29.9(c) or 32.4.2 ought to be mechanically granted to PLUS or whether it ought to be done on the basis of proportionality. If Mr. Khambatta is correct that in relation to Termination Payment, the evidence was already on record, nothing stopped the Tribunal from ruling in favour of PLUS on the aforesaid issue. However, obviously the view of the Tribunal was different. It is in these circumstances and taking into consideration the objections laid out by MSRDC that the Tribunal felt that the question of proportionality has to be gone into.

111. Even as far as the claim for damages of Rs.112 crores is concerned, the Tribunal was clearly of the view that PLUS had based the aforesaid claim primarily on the admissions made by MSRDC and on which not much weightage could be applied considering that those admissions were made in the spirit of settlement. The Tribunal, therefore, held that PLUS would have to independently lead evidence to substantiate those claims. PLUS, clearly had not asked for any permission of the Tribunal to lead any further evidence. If PLUS was not interested in leading any further evidence, the Tribunal ought to have rejected the claim of PLUS if it

was dissatisfied with the evidence already led by PLUS on the aforesaid claim. The Tribunal could not have, on its own, given liberty to the parties to lead further evidence on the aforesaid claim.

112. Similar is the case of the Counter Claim filed by MSRDC. MSRDC too had led all its evidence with reference to its Counter Claim and had even made oral arguments in relation thereto. MSRDC too had filed its written submissions before the Arbitral Tribunal. Despite this, I fail to understand as to how the Tribunal has come to a finding that it is deferring its decision on the Counter Claim as adequate time had not been dedicated to the Counter Claim. In fact, the transcripts reflect that the counsel for MSRDC had consistently been asking for further time which was refused and was asked to complete, not only the cross-examination, but also his arguments in the time-frame set out by the Tribunal. Once, having fixed those dates and which clearly the Tribunal held as inflexible, I fail to see how the Tribunal has come to the conclusion that inadequate time was devoted to the Counter Claim filed by MSRDC. The entire procedure followed by the Tribunal in relation to deferring the claim for quantum at a later date by allowing the parties to lead further evidence and file fresh pleadings is patently

illegal and cannot be allowed to stand. As mentioned earlier, considering that the procedure in relation to the arbitration proceedings was laid down by the Tribunal under section 19(3) of the Act, there would be nothing wrong if the Tribunal had bifurcated the proceedings to hear further arguments on the quantum issues [with reference to the claims of PLUS as well as the Counter Claim of MSRDC] on the basis of the evidence already led by the parties and the existing record before the Tribunal. However, to defer the decision on the quantum of each claim filed by PLUS as well as the Counter Claim filed by MSRDC to enable parties to file fresh pleadings and lead further evidence is patently illegal and wholly unacceptable.

113. I must mention that the Supreme Court in the case of **Associate Builders** Vs. **Delhi Development Authority** [**(2015) 3 SCC 49**] has held that *"the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective."* The relevant portion of this decision reads thus:-

"Fundamental Policy of Indian Law

27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

28. In a recent judgment, *ONGC Ltd.* v. *Western Geco International Ltd.* [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

> "*35.* What then would constitute the 'fundamental policy of Indian law' is the question. The decision in *ONGC* [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration.

Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

(emphasis in original)

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side,

anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:

> "**18.*Equal treatment of parties***.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
>
> ***
>
> **34.*Application for setting aside arbitral award***.—(1)***
>
> (2) An arbitral award may be set aside by the court only if—
>
> (*a*) the party making the application furnishes proof that—
>
> ***
>
> (*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"

****

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

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Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"."

(emphasis supplied)

In the case of **SSANGYONG Engineering and Construction Co. Ltd.** Vs. **National Highways Authority of India (NHAI**) [**(2019) 15 SCC 131**] the Supreme Court has also explained the observations of Associate Builders and had *inter alia* opined that a decision which is perverse, will no longer being a ground for challenge under "public policy of India", but would certainly be a patent illegality appearing on the face of the Award. The observations of the Supreme Court in both these decisions would certainly apply to the facts of the present case and hence I have no hesitation in holding that the Impugned Award is vitiated to the extent that it allows the parties to file fresh pleadings and lead further evidence in the second stage of the arbitration.

114. Before concluding it would only be fair to deal with the judgements relied upon by Mr. Khambatta and referred to earlier. I find that the reliance placed by Mr. Khambatta on the decision of the Supreme Court in the case of **McDermott International Inc.** Vs **Burn Standard Co. Ltd. and Ors.** [**(2006) 11 Supreme Court Cases 181**] is wholly misplaced. There is no dispute on the

proposition that the Arbitral Tribunal certainly has the power to pass an Interim Award /Partial Award if it so chooses to do. This power is statutorily given to the Arbitral Tribunal even under section 31(6) of the Act. However, that is not the issue before me. As mentioned earlier, the entire evidence of the parties was led before the Tribunal prior to the passing of the impugned Interim Award. In such a situation, the Arbitral Tribunal could not have passed an Interim Award determining the validity of the termination notices issued by PLUS and deferred the hearing for deciding the issue of quantum of each claim/Counter Claim at a later date by allowing the parties to file fresh pleadings and lead further evidence. It is this action of the Arbitral Tribunal that I find objectionable. The power of the Tribunal to pass an Interim/ Partial Award is certainly there and given by the Statute itself. Under what circumstances it is to be exercised, would certainly depend on how the arbitration has proceeded either as per the agreement between the parties or the procedure evolved by the Arbitral Tribunal. The reliance, therefore, placed by Mr. Khambatta on the aforesaid decision is of no assistance to PLUS.

115. Even the decision of the Division Bench of this Court relied upon by Mr. Khambatta in the case of ***Manganese Ore (India) Ltd. & Ors. Vs. Ram Bahadur Thakur Limited*** [**2006 SCC Online Bom. 507**] is wholly misconceived. The facts of this case would clearly reveal that the learned arbitrator made an Interim Award and held that the appellant had committed breach of the said agreement by failing to supply 15,000 metric tonnes of manganese ore of 46/48% grade as required under the contract and that the respondent was entitled to recover from the appellant damages, if any, by reason of breach of the contract. The learned arbitrator further held that no evidence on the quantum of damages could be led before him unless he first came to the conclusion that there was a breach of contract committed by the appellant, and therefore, fixed the date for further hearing for the purpose of enabling the parties to lead evidence on the question of damages. It was in this factual scenario that the Division Bench of this Court took a view that in such circumstances the procedure adopted by the arbitrator could not be faulted. The facts of this case would reveal that the parties had led no evidence whatsoever on the quantum of damages as the arbitrator (in the Interim Award) was only deciding whether

in fact there was a breach of the agreement. Only once he came to that conclusion, he gave liberty to the parties to lead evidence on the question of quantum. The facts of the case before me are however totally different. In the present case, the parties led their entire evidence, not only with reference to the validity of the termination notices issued by PLUS but also on the quantum of each claim/Counter Claim. Once this was done and the evidence was closed by the Tribunal, without there being any application for leading further evidence, the Tribunal could not have suo-moto allowed the parties to file fresh pleadings and lead further evidence in support of their respective claims. This being the case, I find that the reliance placed on the aforesaid decision is also wholly misplaced.

116. In view of the foregoing discussion:-

(i) The challenge to Interim Award dated 25th April, 2017 on the ground that the Arbitral Tribunal relied upon evidence which was inadmissible in law is rejected;

(ii) The challenge to the Interim Award upholding the validity of the termination of the Concession Agreement dated 25th August, 2006, under clause

29.8 [Force Majeure Event] is rejected;

(iii) The Interim Award is set aside in so far as it upholds the termination of the Concession Agreement dated 25th August, 2006 under clauses 32.4.1(1) and 32.4.1(3) [for material default of MSRDC]. However, as mentioned earlier, this would make little difference to the termination of the Concession Agreement as the termination under Clause 29.8 is upheld, and therefore, the Concession Agreement dated 25th August, 2006 validly stands terminated;

(iv) The Interim Award is set aside in so far as it permits the parties to file fresh pleadings and lead further evidence in the second stage of the arbitration.

117. The Arbitration Petition is disposed of in the aforesaid terms. However, there shall be no order as to costs.

118. All parties to act on an authenticated copy of this order duly signed by the Private Secretary/Personal Assistant/Associate of this Court.

B.P. COLABAWALLA, J.