IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 29, 2023

\+ O.M.P. (COMM) 274/2022, I.A. 10459/2022

DAG PRIVATE LIMITED

..... Petitioner

Through: Mr. Sanjeev Puri, Sr. Adv. with Mr. Faisal Sherwani, Mr. Aditya Vikram, Ms. Sanjukta Kaushik & Mr. Shashwat Dhyani, Advs.

versus

RAVI SHANKAR INSTITUTE FOR MUSIC AND PERFORMING ARTS

..... Respondent

Through: Dr. Amit George, Mr. Dhilip Philip, Mr. Dhiraj Philip, Mr. Piyo Harold Jaimon and Mr. Samuel David, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of 1996') seeking setting aside of the arbitral award dated February 04, 2022 ('Impugned Award') passed by the Arbitral Tribunal ('Tribunal') in favour of the respondent and against the petitioner.

2. Through this petition, the petitioner has specifically sought the following prayers:

> *"It is therefore, most respectfully prayed that this Hon'ble Court may be pleased to:*
>
> *(a) Set aside the Impugned Award, dated the 04.02.2022 passed by the Ld. Arbitral Tribunal in the matter of arbitration between Ravi Shankar Institute for Music and Performing Arts and DAG Private Limited;*
>
> *(b) Call for the records of the present arbitration proceedings;*
>
> *(c) Pass such other and further order or direction or relief as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.*

3. Facts which led to the filing of the present petition are: that on June 10, 2005, a Perpetual Lease Deed was entered into between the President of India acting through the Land and Development Officer ('L&DO'), Ministry of Urban Development, Government of India, and the respondent, wherein the former (i.e., the lessor) demised unto the respondent a land admeasuring 3874.661 sq. meters at 7, Rizal Marg, Chanakyapuri, New Delhi 110021 ('rented property'), in perpetuity, subject to the covenants, terms and conditions contained therein.

4. After lapse of considerable amount of time, on November 06, 2018, the petitioner and the respondent entered into a Deed of Sub Lease ('sub-lease deed'), for a period of eighteen years with effect from October 01, 2018, in respect of 50% of the total built up space

amounting to 1138.72 sq. meters with a initial rent-free period of nine months from the date of commencement. The afore-said area was taken on rent by the petitioner, primarily, to carry out the following activities: (i) running art galleries; (ii) organising exhibitions relating to Indian art; and (iii) organising talks, seminars and other information events on various art forms.

5. On November 24, 2018, the respondent delivered vacant physical part possession to the petitioner of the area of the upper ground floor of the Property viz. Office/Multi-purpose Hall/ Pre-Function Area and Auditorium.

6. Furthermore, on July 02, 2019, the respondent delivered vacant physical possession of the further area within the permissible limit and issued final possession letter to the petitioner in respect of the total covered area of 1138.372 sq. meters. It is stated that due to the loss of time in the process of identification and handing over of the physical possession of the rented property for various reasons, the parties mutually agreed to extend the rent-free period from nine months to twelve months i.e., till October 2019 and executed a 'Deed of Sub Lease Amendment No.'1 which contained the exhibit demarcating the area which was handed over to petitioner.

7. It is stated that on March 24, 2020, on account of the COVID-19 pandemic, the Ministry of Home Affairs, Government of India issued an order imposing a nationwide lockdown prohibiting, *inter alia*, social and cultural gatherings for a period of twenty-one days with effect from March 25, 2020. So, it is stated that the rented

property became unfit for the purposes for which it was sub-let to the petitioner due to unprecedented circumstances on account of COVID-19 pandemic which were beyond the control of the petitioner.

8. On May 05, 2020, by way of email, the petitioner brought to the notice of the respondent that because of COVID-19, the Property was no longer fit for carrying out any of the activities for which it was sub-leased to the petitioner. In this e-mail, the petitioner urged that the unwarranted pandemic and its aftermath, being beyond the control of the petitioner, have rendered meaningless the very objectives and purpose for which the parties entered into the sub- lease deed. In this background, the petitioner suggested the Parties may hold discussions regarding bringing the sub-lease deed to a closure in a mutually amicable manner.

9. It is stated that on May 13, 2020, the respondent also issued a notice of default and directed the petitioner to make payment of rent for the months of April and May 2020, upon failure of which the respondent would terminate the sub- lease deed and recover the arrears of rent as well as the rent for the remaining lock-in period.

10. It is further stated that on May 20, 2020, owing to substantial differences between the parties in relation to various issues regarding the sub-lease deed, the petitioner issued a notice of dispute under Clause 28 of the sub-lease deed and proposed a conference call with the intention to negotiate in good faith and resolve all the disputes.

11. Thereafter, on May 23, 2020, the respondent through its counsel replied to the notice dated May 20, 2020, thereby refusing to

acknowledge the existence of any dispute between the parties and sought withdrawal of the notice of dispute sent under Clause 28 of the sub-lease deed. Further, the respondent stated that the said notice is non-compliant with Clause 28 of the sub-lease deed as it did not overtly specify or contain any specific reference to the disputes which had arisen between the parties.

12. It is stated that in view of the notification issued by Ministry of Home Affairs, Government of India dated May 30, 2020, by way of which the socio-cultural gatherings remained to be prohibited, it became sufficiently apparent to the petitioner that the rented property will not be available for its use for ninety days, and as such, the petitioner, on June 04, 2020, issued a notice of its intention to terminate the said sub- lease deed in terms of Clause 8(B) of the sub-lease deed. On June 11, 2020, the respondent replied to said notice issued by the petitioner and stated that the said notice did not meet the requirements of Clause 8(B) of sub-lease deed and was simply another excuse to avoid paying the rent. Thus, the petitioner was called upon to comply with the respondent's notice dated May 13, 2020.

13. Thereafter, on June 12, 2020, in continuation with its earlier notice dated May 13, 2020, the respondent issued its own notice of termination, requiring the petitioner to handover peaceful vacant possession of the rented property within a period of fifteen days i.e., on or before June 27, 2020 along with arrears on rent, expenses, and ‘Balance Rent’ of ₹4,94,17,273/- , as on the date of the notice.

14. It is further stated that since the period of ninety days, as stipulated under Clause 8(B) of the sub-lease deed, stood completed on June 23, 2020, the petitioner out of abundant caution and in order to strictly comply with the terms of the sub-lease deed, issued a prior notice of termination dated June 23, 2020, informing the respondent about its intention to terminate the sub-lease deed upon expiry of thirty days from the date of such notice and sought refund of the security deposit of ₹ 69,00,000/- in terms of Clause 15 of the sub-lease deed.

15. On June 30, 2020, the respondent issued response to the prior notice of termination dated June 23, 2020, issued by the petitioner, demanding peaceful possession of the property within five days and stated that on account of the failure of the petitioner to pay rent for the consecutive months of April and May 2020, the sub-lease deed stood terminated on June 12, 2020.

16. Pursuant thereto, on July 5, 2020, the petitioner responded to the letter dated June 30, 2020 and justified its termination in terms of Clause 8(B) of the sub-lease deed and rejected the termination of the respondent under Clause 8(A) in its notice dated May 13, 2020, as well as notice dated June 12, 2020.

17. It is stated that on July 10, 2020, discussions were held between the Founder Trustees of the respondent and Mr. Ashish Anand (Managing Director &Chief Executive Officer) on behalf of the petitioner. However, the said individuals were only able to arrive at a consensus qua handing over of the possession of the rented property by the petitioner to the respondent.

18. Thereafter, the petitioner and the respondent executed a possession handover letter, by way of which, possession of the rented property was handed over to the respondent and wherein the respondent agreed to waive off any claim on account of or for damages/ repairs to the rented property which may have occurred during handing-over of the possession by the petitioner.

19. On August 10, 2020, the petitioner issued a letter to the respondent stating that the sub-lease deed stands terminated with effect from handing over of complete vacant physical possession of the property in terms of Clause 8(B) of the sub-lease deed. In response to that letter, the respondent on August 26, 2020, rejected the termination of sub-lease deed under Clause 8(B) and reiterated that the sub-lease deed stood terminated only on June 12, 2020 and accordingly it was informed that the petitioner was required to handover peaceful vacant possession of the rented premises on or before June 27, 2020 i.e., within fifteen days from the date of termination.

20. That on December 12, 2020, the counsel on behalf of respondent issued a notice to the petitioner, invoking arbitration in terms of Clause 28 of the sub-lease deed and whereas on December 24, 2020, the petitioner issued its response to the notice invoking arbitration, consenting to the appointment of Hon'ble Mr. Justice (Retd.) Badar Durrez Ahmad as the Sole Arbitrator to adjudicate the disputes which had arisen between the parties.

21. On February 4, 2022, the Tribunal passed the Award (which is the subject matter of challenge before this Court), directing the

petitioner herein to pay to the respondent (i) a sum of ₹3,50,69,609/- towards the 'Balance Rent'; (ii) an amount of ₹40,15,230/- by way of interest on the amount of 'Balance Rent'; and (iii) GST on the amount of ₹ 3,50,69,609/- at the applicable rate.

22. Aggrieved by the findings of the Tribunal in the Impugned Award, the petitioner has preferred the present petition.

PETITIONER'S SUBMISSIONS

23. It is the case of the petitioner and so contended by Mr. Sanjeev Puri, learned Senior Advocate, that the Tribunal, in complete derogation of the fundamental contractual principles on damages and in complete disregard of judicial precedents on that subject matter and as well as the material evidence available on record, held the following:

a) that the sub-lease deed was validly terminated by the respondent on June 12, 2020 in terms of proviso (b) to Clause 8(A) of the sub-lease deed on account of failure of the petitioner to cure default in payment of rent for the months of April and May 2020;

b) that the sub-lease deed was not validly terminated by the petitioner on the basis that the conditions for termination stipulated under Clause 8(B) were not satisfied by the petitioner prior to the termination of the respondent on June 12, 2020. Also, the petitioner was held to be not entitled for the refund of security deposit;

c) that the proviso (c) to Clause 8(A) of the sub-lease deed is not in the nature of liquidated damages but a 'debt'. The Tribunal held that even assuming that it is liquidated damages, it is payable, as it was the agreed rent between the parties. The respondent was held to be entitled to the entire amount of 'Balance Rent' of ₹3,50,69,609/- with interest and GST at the applicable rate.

24. In essence, the petitioner has challenged the Impugned Award on the following grounds:

A) Firstly, the Tribunal holding that the provision as to 'Balance Rent' was not in the nature of liquidated damages but 'debt', has erroneously applied the decision of a Single Judge of the High Court of Bombay in ***Indiabulls Properties P. Ltd. vs. Treasure World Developers P. Ltd., 2014 SCCOnLine Bom 4768***, to the facts of the present case, in utter disregard of the substantive law on damages as expounded by the Supreme Court;

B) Secondly, while arriving at a decision on the basis of an assumption that the provision for 'Balance Rent' is of liquidated damages, the Tribunal has ignored the vital evidence on record pertaining to mitigation of losses suffered by the respondent on account of alleged breach and disregarding fundamental principles of contract law while assessing damages;

C) Thirdly, in holding that while COVID-19 would in all probability qualify as an 'Act of God', the subsequent lockdown was an act of man, as the decision to impose a lockdown was taken by a man. The said finding is unreasonable, since the nation-wide lockdown imposed in the month of March 2020 was unprecedented and could not have been anticipated by either of the parties at the time of entering into the sub-lease deed and is clearly an' Act of God'.

25. Mr. Puri, has also substantiated the grounds for challenge in the following manner:

A. <u>IT IS HIS CASE THAT THE 'BALANCE RENT' AWARDED IN FAVOUR OF THE RESPONDENT OUGHT NOT TO HAVE BEEN TERMED AS A 'DEBT':</u>

a. It is his submission that the term 'debt', in a legal parlance, refers to an ascertained and definite amount which is 'due and payable' and cannot be equated with a claim for compensation/damages or a claim which requires assessment by a Court. Reliance has been placed upon the judgment of the High Court of Karnataka in the case of ***M/s Greenhill Exports (P) Ltd. vs. Coffee Board, ILR. 2001 Kar2950***, to contend the same.

b. He submitted that the 'Balance Rent' in terms of the sub-lease deed was not an ascertained and definite

amount due/promised to be paid by the petitioner to the respondent and this fact is apparent from perusal of Clause 8(B) of the sub-lease deed, as per which the respondent was not entitled to receive the 'Balance Rent', in the event the sub-lease deed was terminated under the said clause.

c. He further submitted that the Tribunal, in complete derogation of the fact that in view of Clause 8(B) of the sub-lease deed, the 'Balance Rent' cannot be termed as an ascertained and definite amount which was due/promised to the respondent, has erroneously arrived at the finding that the 'Balance Rent' was guaranteed to the respondent. It is his submission that the 'Balance Rent' was not a guaranteed or ascertained/definite amount which was due/promised to be paid by the petitioner; otherwise, there would not have been an exception such as Clause 8(B) stipulated in the sub-lease deed.

d. He submitted that a sum ascertained by an aggrieved party, in a manner provided in the contract, like in the instant matter in terms of proviso (c) to Clause 8(A) of the sub-lease deed i.e., the 'Balance Rent', does not convert a claim for damages into a claim for an ascertained sum due and therefore, automatically into a 'debt'. It cannot be regarded that since the sum towards

the lock-in period of 3 years claimed by the respondent was ascertainable in terms of proviso (c) of Clause 8(A) of the sub-lease deed, such claims can be deemed as 'debt' as against damages. The claim of the respondent, nonetheless, remains that of damages arising out of the purported breach committed by the petitioner and ascertainment of the amount is only consequential to award of damages

e. It is his case that the Tribunal, contrary to the above principle, has erroneously deemed the lease rental for the period of 3 years as an ascertained and assured sum. He submitted that even if the sum was ascertainable in a way provided under the sub-lease deed, in the form of rent for 3 years, such a sum does not take a shape of a 'debt' instead of 'damages' and the Tribunal has erred in observing the rent for 3 years was assured to the respondent in the backdrop of Clause 8(B) of the sub-lease deed.

f. He contended that besides not being an ascertained and definite amount which was due / promised to be paid by the petitioner, the ‘Balance Rent’ was not admitted as being due and payable by the petitioner, and neither was it adjudicated to be due, until the passing of the Impugned Award. In such circumstances, wherein none of the conditions required to succeed in proving a sum to

be a 'debt' arc met, the ‘Balance Rent’ cannot be held to be a 'debt' which was guaranteed to the respondent.

g. It is his submission that for a debt to exist, it is a *sine qua non* that there has to be an existing obligation to pay a particular sum of money. He substantiated this by saying that an essential condition for any sum to qualify as a 'debt', is that, it is a sum of money which becomes payable now or will become payable in future, only by reason of a present/existing obligation. As highlighted hereinabove, with Clause 8(B) in the sub-lease deed, it is evident that there was no absolute obligation on the petitioner to pay the ‘Balance Rent’ to the respondent, much less a present or existing obligation. In the framework of the sub-lease deed the ‘Balance Rent’ cannot be held to be an 'existing obligation to pay a sum of money' upon the petitioner to the respondent.

h. He further submitted that the default or breach of any stipulation in a contract only gives a right to an aggrieved party to sue for damages. He substantiated it by submitting that it is a settled law that when there is a breach of contract the only right which accrues to the person who complains of the breach is the right to sue for damages and not to claim any 'debt'. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Union of India v. Raman Iron Foundry,***

(1974) 2 SCC 231, wherein it was categorically held that in case of a breach of contract, the party complaining of the breach does not become entitled to a 'debt' due from the other party.

i. He submitted that in comparison to a 'debt' which becomes payable *eo instanti*, as observed in the afore-said case, in case of a breach of contract, the party which commits the breach does not *eo instanti* incur any pecuniary obligation. In the afore-said case, the Supreme Court had approved the view taken by the High Court of Bombay in the case of ***Iron and Hardware (India) Co. vs. Shamlal and Bros., AIR 1954 Bom 423*** that a person who commits breach of contract does not incur any pecuniary liability. Besides this, the Tribunal records the submission of the respondent in the Impugned Award, that 'Balance Rent' is in the nature of a 'debt' which became payable due to the default committed by the petitioner.

j. It is his case that the Tribunal despite acknowledging that the case of the respondent rests on the purported default committed by the petitioner, it has, in complete derogation of the established principles that a default gives right only to sue for damages and does not give rise to a 'debt', agreed with the submission of the

respondent that proviso (c) to Clause 8(A) was not in the nature of damages.

k. He further contended that based on the established jurisprudence on consequences of breach of contract, it cannot be held that the party complaining of breach is entitled to 'debt' which becomes instantly payable to such party and thus, no automatic pecuniary liability can be incurred by such a party by committing a breach. He submitted that in the instant case, it is the contention of the respondent itself that the petitioner had defaulted in payment of rent for the months of April and May 2020, resulting in breach of Clause 4 of the sub-lease deed, leading to cause of loss to the respondent, which was required to be adjudicated, assessed, and quantified before qualifying as a 'debt due'. In this backdrop, the Tribunal has erred in accepting the contention of the respondent that the ‘Balance Rent’ in terms of proviso (c) to Clause 8(A) is not a provision for liquidated damages and that it qualifies as a 'debt'.

l. He averred that the Tribunal has drawn support from the decision of the Single Judge of the High Court of Bombay in ***Indiabulls Properties Private Limited (supra)*** for the view taken in the Impugned Award that the ‘Balance Rent’ was in the nature of 'debt' as it was an ascertained and assured sum which was guaranteed to

the respondent. It is his case that decision in the afore-said case is clearly distinguishable from the facts of the present matter and is not applicable to the present case for the following reasons: -

la) that in the case of ***Indiabulls Properties Private Limited (supra)*** the licensee had voluntarily terminated the leave and license agreement by vacating the rented property therein, thus consequently, incurring the obligation to pay rent for the unexpired lock-in period and there was no issue of breach of contract on account of any purported default. However, in the case at hand, it is the case of the respondent itself that the petitioner had committed a breach of the sub-lease deed and which merely gives a right to sue for damages and does not convert a claim for damages automatically into a claim for debt.

lb) Moreover, in ***Indiabulls Properties Private Limited (supra)*** the claim for the remainder of the license fee was held to be a 'debt' in the backdrop of Clause 13.2 therein and moreover the issue therein fell under the first part of said clause which was termination by the licensee for no cause.

lc) Interestingly, even in ***Indiabulls Properties Private Limited (supra),*** it was argued that in case the termination of the deed would have been on account of

default/breach committed by the licensee then it would have required evidence to the extent of whether the licensee was in default or whether the licensor afforded to the licensee the opportunity to cure the default.

ld) it is his submission that in the present case, the Tribunal erroneously drew support for its finding of 'Balance Rent' being in the nature of 'debt' from the case of ***Indiabulls Properties Private Limited (supra)*** inasmuch as it failed to take into account that in the facts therein, the licensee had voluntarily terminated the leave and license agreement, and that it was a case of no-cause termination, resultantly, the license fee for the lock-in period was held to be a 'debt' and not treated as damages and such is not the case here.

B. AWARD FOR 'BALANCE RENT' IS ALSO CONTRARY TO THE PRINCIPLES OF LAW ON DAMAGES

a) **No facts to show that 'Balance Rent' was a genuine pre-estimate of damages**- it is Mr. Puri's submission that the position of law with respect to claim for the period of lock-in is no more *res integra*. It is settled law that a party aggrieved of breach of contract is required to plead facts and circumstances to establish that the Clause in a contract relating to lock-in period was a genuine pre-estimate of damages which the party would have suffered in case of premature exit during the lock-in period. To this effect, reliance has been placed

upon the judgment of the coordinate bench of this Court in the case of ***Manju Bagai vs. Magpie Retail Limited, (2010) 175 DLT 212***. He submitted that the respondent was bound to plead specific facts and circumstances to establish that the rent for the unexpired lock-in period of 15 months was a genuine pre-estimate of damages or loss which the respondent would have suffered on account of termination during the lock-in period. It is further his case that the respondent had simply stated that the amounts claimed by it were genuine pre-estimation of losses, however, no specific facts and circumstances had been pleaded to that effect. Moreover, no specific factors or special circumstances were pleaded by the respondent to establish that the 'Balance Rent' was a genuine pre-estimate of loss which would have been suffered by it. The Tribunal has failed to consider that the respondent had failed to demonstrate that the 'Balance Rent' was a genuine pre-estimate of damages. While deciding the claim for 'Balance Rent' in the Impugned Award, there was no discussion at all on the pleadings of the respondent. In spite of absence of any pleading showing as to how could the respondent claim the 'Balance Rent' to be a genuine pre-estimate of loss, the Tribunal yet arrived at the finding that the 'Balance Rent' was a genuine pre-estimate of damages. He further submitted that Tribunal erred in disregarding the well settled principle of law on liquidated damages as laid down in ***Manju Bagai (supra)*** that the respondent ought to have pleaded specific facts and circumstances to establish that the 'Balance Rent' was a genuine pre-estimation of damages. Hence, the Impugned

Award ought to be set aside being in violation of the fundamental policy of Indian Law.

b) **Balance lock-in Rent not held to be Genuine Pre-Estimate of damages on account of Rent Free Period**- Mr. Puri submitted that during the course of hearing before this Court, the respondent had submitted that the 'Balance Rent' represents the genuine pre-estimate of loss, since the petitioner enjoyed a rent free period of twelve months from the date of commencement of the sub-lease deed. However, the Impugned Award does not hold the 'Balance Rent' to be a genuine pre-estimate of loss based on the reasoning attempted to be put forth by the respondent now before this Court. It is his case that it is a settled law that the respondent cannot supplement the reasons given by the Tribunal by relying on pleadings and documents which had not even been considered by the Tribunal. He contended that given the Impugned Award does not record a finding which is now sought to be canvassed by the counsel for the respondent, it cannot be assumed that the Tribunal may have taken into consideration this aspect, since it is not reflected anywhere in the Impugned Award and the Impugned Award should speak for itself and disclose all reasons while arriving at a conclusion. Reliance has been placed on the judgments rendered by the High Court of Bombay in the cases of ***B.E. Billimoria & Company Limited vs. Raheja Universal Private Limited; (2015) SCC OnLine Bom 5614*** and ***Bhanumati Jaisukhbhai Bhuta vs. Ivory Properties and Hotels Pvt., 2020 SCC OnLine Bom 157***, to this effect.

c) **No Evidence was adduced by the respondent to prove that it incurred Loss/Damages because of breach committed by the petitioner**- Mr. Puri further submitted that besides pleading specific facts and circumstances, it is also required that proper evidence of specific nature is led by the aggrieved party to prove that the amount towards lock-in period is a genuine pre-estimation of damages. The evidence which is required to be led by the aggrieved party to prove that the claim for lock-in period is a genuine pre-estimate of damages was enumerated by the Division Bench of this Court in the case of ***Tower Vision India Private Limited v. Procall Private Limited; 2012 SCC OnLine Del 4396.*** He further submitted that the respondent ought to have led evidence to prove that it had altered its position by sub-letting the rented property to the petitioner or incurred any expenditure towards renovation, whitewashing, fixtures and fittings etc. Also, the respondent was required to prove that as a result of the default committed by the petitioner leading to termination of the sub-lease deed, the respondent was constrained to once again incur the cost towards whitewashing, fixing, renovating etc., for leasing it out to another tenant. Admittedly, the rented property was not leased out to another tenant and did not have any tenant even prior to the petitioner's subleasing the property. He contended that the respondent did not incur any expenses on renovation/modification for the purposes of making it suitable for use of the petitioner herein. Plus, there is no evidence which indicates that the respondent had incurred any expenditure on the property to

make it suitable for the specific requirements of the petitioner. The Tribunal, while assessing whether the 'Balance Rent' was a genuine pre-estimate of damages suffered by the respondent, ought to have considered the aforesaid relevant factors on the basis of the material available on record and thereafter should have arrived at the finding. However, Tribunal arbitrarily concluded that the 'Balance Rent' was a genuine pre-estimate of loss as rent for a period of three years period was "guaranteed" to the respondent and since it is axiomatic that this is the loss, no further proof of loss is required. He further submitted that the Tribunal simply failed to justify or substantiate this crucial finding on how the 'Balance Rent' was a genuine pre-estimate of damages. The aforesaid findings are ex-facie arbitrary and based on no evidence or material at all. By assuming that the loss suffered by the respondent is the loss of rent for the unexpired period, the Tribunal effectively granted liquidated damages without proof or quantification of loss.

d) **'Agreed Rent' cannot be termed as Genuine Pre-Estimate of Loss suffered by the respondent**- Mr. Puri also submitted that while assessing compensation for breach of contract, it is a well-settled principle of law that only reasonable compensation can be awarded. The liquidated damages or the amount fixed in the contract for breach of contract is the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled to. It is only a reasonable compensation that is to be awarded which should not exceed the amount so stated. It is his submission that the factors

which may be looked into for determining reasonable compensation in lock-in period clauses have been discussed by this Court in ***Soril Infra Resources Limited vs. M/s Annapurna Infrastructure Private Limited and Others***, ***FAO(OS) Comm. 20/2017***, decided on ***August 04, 2017***, such as **(i)** time which may be reasonably taken to find a new tenant while factoring in the time required to carry out repairs **(ii)** cost incurred in advertising the property for finding a new tenant **(iii)** offering of any rent-free period, if any. He submitted that the High Court of Calcutta in the case of ***Jute Corporation of India Ltd. vs. ABL International Ltd.***, ***2018 SCC OnLine Cal 1264***, while setting aside the arbitral award categorically held that the lease rent cannot be taken as the only factor in calculating damages and reasonable letting out value of the property for the unexpired period would also be a factor for calculating damages as the property may not be let out at the existing rent. It is his submission that contrary to the above principles, the Tribunal while failing to assess, if the 'Balance Rent' of the entire 15 months period, as claimed by the respondent in the arbitration proceedings, was a reasonable sum based on factors enumerated by various High Courts mentioned in the foregoing paragraphs, arrived at the finding that the loss equivalent to 15 months of rent was reasonable, since it was computed on the basis of agreed rent. Reliance has also been placed upon a decision of the National Company Law Tribunal, Cuttack Bench, wherein it dismissed a petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, vide order dated April 8,

2022, passed in ***Smartworks Coworking Spaces Private Limited vs. Turbot HQ India Private Limited, CP(IB) No.181/CB/2020***. He submitted that in the afore-mentioned case, the petitioner therein made a claim for amounts on the basis of the monthly fee fixed in the agreement and it was held that when the petitioner claims rent for a lock-in period, it has to be decided by a civil court and it was reiterated that in case of breach of agreement, the party complaining of breach merely gets a right to sue for damages. It was further observed that even in cases of liquidated damages, the amount fixed in the contract is a ceiling and is not the actual amount which is supposed to be paid. He also submitted that it is a settled law that fundamental policy of Indian Law also includes disregard to the decisions of the superior courts. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Renusagar Power Co. Ltd. vs. General Electric Co., (1994) Supp 1 SCC 644***, wherein it was held that disregarding the orders passed by superior courts would adversely affect the administration of justice and consequently an award passed in such disregard to orders of superior courts shall also be a violation of fundamental policy of Indian law. He further relied upon another judgment of the Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49*** wherein the Supreme Court whilst relying upon ***Renusagar Power Co. Ltd. (supra)*** had reiterated that disregarding orders of superior courts in India would be regarded as being violative of the fundamental policy of Indian law. Further reliance has been placed

upon the judgment of this Court in the case of ***Fiberfill Engineers vs. Indian Oil Corporation Limited, 2019 SCC OnLine Del 8255*** to contend the same. It is his submission that in the Impugned Award, the Tribunal has awarded 'Balance Rent' simply for the reason that it was the agreed rent between the parties. It has failed to consider the contours of Section 74 of the Indian Contract Act, 1872 and the principles applicable for granting the award of damages for breach of contract. He submitted that the Tribunal has acted contrary to the settled law on the award of liquidated damages including the principles laid down by the Supreme Court in the case of ***Kailash Nath Associates vs. Delhi Development Authority, (2015) 4 SCC 136***. So, it is his submission that the Impugned Award being perverse, based on no evidence or material, is patently illegal and against the public policy of India, more so, for violation of basic principles of contract law on damages, is thus, should be set aside.

e) **Non-Application of Doctrine of Mitigation of Losses**

It is his submission that one of the essential principles based on which damages are assessed is whether the party claiming liquidated damages took all reasonable steps to mitigate losses consequent to breach. In cases of breach/ default of lock-in period the landlord is required to prove that it had taken all reasonable steps to minimize loss. To contend this reliance has been placed upon ***Tower Vision India Private Limited (supra)***. He submitted that the obligation on a party claiming rent for the lock-in period to mitigate losses was also emphasised by this Court in the case of ***Adidas India Marketing***

Private Limited vs. Hicare India Properties Private Limited, 2014 SCCOnLine Del 6948. Reliance has again been placed upon ***Jute Corporation of India Ltd. (supra)***, wherein the High Court of Calcutta had set aside the arbitral award for being unreasonable, irrational and based on no evidence, on the ground that the learned arbitrator therein, did not consider the question of mitigation of damages at all and specifically ruled that the landlord claiming damages had a duty to reduce damages as far as possible. It is his submission that in view of the above judicial precedents, the Tribunal was bound to consider, after assessing the evidence on record, if the respondent took all reasonable steps to minimize its loss, like whether the respondent had searched for an alternative tenant or whether advertisements were taken out for leasing the premises. So, he submitted that the Tribunal ignored the contentions of the petitioner that the respondent failed to mitigate losses and has failed even to consider the well settled principle of mitigation of losses and apply the same to the facts of the instant matter.

f) <u>Disregard of Vital Evidence on Mitigation of Losses by the Tribunal</u> –

It is his submission that the evidence led by the respondent did not prove that it has suffered actual losses and took all reasonable steps to mitigate its losses. Despite the evidence of the respondent being available on record with respect to mitigation, the Tribunal ignored such evidence and simplicitor awarded the amount for 'Balance Rent'. He substantiated this by stating that a reference may be made

to the cross-examinations of CW-1 and CW-2, wherein, they had admitted that no steps were taken by them to lease out the rented property after the termination of the sub-lease deed. However, there was no discussion at all of any evidence led by the respondent on loss or injury suffered or mitigation of its losses thereof. There is no reference to the oral testimony or deposition of the witnesses at all. It is his case that the Tribunal, without giving any cogent reasons, has ignored the vital evidence and overlooked the material on record forming part of cross-examination of the witnesses of the respondent. He submitted that the Tribunal, after considering the evidence, ought to have returned a finding as to whether any loss or injury was suffered by the respondent and if the respondent took reasonable steps to mitigate its losses. However, none of these findings are found in the Impugned Award. It is settled law that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. To this effect, reliance has been placed upon the judgment of the Supreme Court in the case of ***Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India, (2019) 15 SCC 131***. So, he concluded that due to the failure of the Tribunal in assessing the crucial evidence and ignoring the relevant material, the Impugned Award is perverse and suffers from patent illegality and ought to be set aside.

RESPONDENT'S SUBMISSIONS

26. It is primarily the case of the respondent and so contended by Dr. Amit George, learned counsel appearing on behalf of the respondent that the scope of interference by this Court while exercising jurisdiction under Section 34 of the Act of 1996 is extremely narrow and as such this Court can neither re-appreciate the evidence nor can it sit in an appeal over the arbitral award. As per him, the alleged Impugned Award passed by the learned Tribunal is a well reasoned award and does not warrant any interference. Reliance has been placed on the judgment passed by the Supreme Court in the cases of ***Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131***, ***Dyna Technologies Private Limited vs. Crompton Greaves Limited, (2019) 20 SCC 1*** and ***MMTC Limited vs. Vedanta Limited, (2019) 4 SCC 163*** to substantiate the same.

27. He further submitted that it is a settled principle of law that the terms of a contract agreed between the parties have to be construed strictly and given its normal meaning. Reliance has been placed upon the judgments passed by the Supreme Court in the cases of ***Datar Switchgears Ltd. vs. Tata Finance Ltd. and Another, (2000) 8 SCC 151*** and ***K. Sugumar and Another vs. Hindustan Petroleum Corpn. Limited and Another, (2020) 12 SCC 539*** to this effect.

28. As far as facts of the instant case are concerned, it is his submission that because of the following reasons, the respondent had agreed to lease the rented property for the rent-free for the first twelve months of the lease tenure to the petitioner:

a) that the petitioner and respondent were both fully aware regarding the restrictions in leasing the rented property by the respondent to any tenant;

b) that the respondent being aware of the restrictions on the rented property was agreeable to enter a long-term lease of eighteen years with the petitioner and to grant initially a rent-free period of nine months which was later on extended to twelve months;

c) that the lock-in period was also incorporated in the sub-lease deed as the L&DO was to receive 10% of the rent realized based on the sub-lease deed. In the event, there had not been a lock-in period, the petitioner would have been at liberty to exit the rented property after the rent-free period, thereby ensuring that the L&DO would have received no rent whatsoever;

d) that the lock-in period was also included so as to ensure that the petitioner after having enjoyed the rent-free period of twelve months could not terminate the sub-lease deed as per its own whim and fancy and walk out without paying any rent to the respondent;

29. He also submitted that the conduct of petitioner, as far as payment of rent was concerned, had been delinquent from the very beginning, as it had started defaulting from the very inception of the sub-lease deed. He substantiated his submissions in the following manner:

A. <u>DEFAULT BY THE PETITIONER IN RESPECT OF PAYMENT OF MONTHLY RENT FOR JANUARY AND FEBRUARY 2020</u>

30. He submitted that the Tribunal in the alleged Impugned Award has rendered a categorical finding regarding the petitioner's conduct and its default in paying the rent in the following manner:

> *"28. The argument of alleged mala fides raised on behalf of the Respondent has no place in the backdrop of clear contractual terms agreed upon by the parties. In this context, it must also be seen that it not only during pandemic that the Respondent has defaulted in paying the rent. As pointed out in the sequence of events above, the Respondent had failed to pay the rent for October and November 2019 whereupon the Claimant issued a notice under Clause 8A(ii) on 21.11.2019. The default was cured by the Respondent by making the requisite payment on 20.12.2019 and that notice was deemed to have been withdrawn. Then, again, the respondent defaulted in payment of rent for January and February 2020. The Claimant issued a notice under Clause 8A(ii)on 06.02.2020. This default was also cured by the Respondent by making the requisite payment on 04.03.2020 and, consequently, that notice was deemed to have been withdrawn.*

31. He submitted that in October 2019, the respondent raised an Invoice on the petitioner for the monthly rent of October 2019 which was due by 5th day of the month, i.e., by October 05, 2019. It is his submission that despite Clause 4 of the sub-lease deed stipulating that the petitioner was to

make payment of monthly rent in advance, petitioner failed to make the payment in respect of rent and other expenses on a timely basis.

32. Thereafter in November 2019, the respondent again raised an Invoice on petitioner for the monthly rent of November 2019 and also in respect of reimbursement of expenses for November 2019. However, despite raising of the Invoice in respect of rent and expenses for October and November2019 having become due and payable, petitioner defaulted in respect of its contractual obligation and failed to pay the rent and expenses for two consecutive months i.e., of October and November 2019.

33. He submitted that Clause 8 stipulated that respondent could issue a notice and invoke the right to terminate the sub-lease deed only in the event of default in payment of monthly rent for two consecutive months and not merely on the default of one month's rent and since the petitioner was in default of its monthly obligations qua October and November 2019, the respondent only on November 21, 2019, issued a Notice to the petitioner under Clause 8(A)(b) of the sub-lease deed to remedy the default within 30 days.

34. He further submitted that pursuant to the issuance of the Notice, the petitioner remedied the default and tendered the outstanding payment along with late payment and default Notice period interest. Thereafter, in January 2020, the respondent issued Invoice to the petitioner for monthly rent of January 2020. Simultaneously thereto, respondent also raised the Invoice on petitioner in respect of expenses for January 2020. Thereafter, in February 2020, respondent raised an Invoice on petitioner for monthly rent of February 2020. Simultaneously thereto, respondent also raised the Invoice

on petitioner in respect of expenses for February 2020. It is his submission that despite raising Invoices in respect of rent and expenses for January and February 2020 having become due and payable, petitioner defaulted in respect of its obligation to pay rent.

35. As a result on February 06, 2020, the respondent issued another Notice to petitioner under Clause 8(A)(b) of the sub-lease deed to remedy the default within 30 days. Pursuant to the receipt of the said Notice, the petitioner remedied the default and tendered to respondent, with substantial delay, the outstanding monthly rent for January 2020 along with late payment and default Notice period interest. However, the rent for February 2020 was still not paid by petitioner.

36. It is his case that the petitioner continued to default in respect of the rent for February 2020 as it was aware that unless there shall be a default for a period of two months, the respondent will not be able to invoke Clause 8(A) and initiate the process for termination of the sub-lease deed.

37. Nevertheless, on March 04, 2020, the petitioner tendered the monthly rent for February 2020 and the reimbursement in respect of January 2020 along with late payment interest. In March 2020, the respondent issued an Invoice to petitioner in respect of rent for March 2020. Simultaneously thereto, respondent also raised the Invoice on petitioner in respect of expenses for March 2020. The respondent tendered payment for monthly rent of March 2020 and reimbursement for February 2020 only with the delay on April 04, 2020, along with late payment interest.

B. **DEFAULT BY THE PETITIONER IN RESPECT OF PAYMENT OF MONTHLY RENT FOR THE MONTHS OF**

APRIL AND MAY 2020 AND FAILURE TO CURE DEFAULT WITHIN DEFAULT CURE PERIOD

38. He submitted that similarly in April 2020, the respondent issued an Invoice to petitioner in respect of rent for April 2020 and also raised the Invoice in respect of expenses for April 2020 and the monthly payment of rent for May 2020 became due and payable by May 05, 2020.

39. On May 05, 2020, the petitioner despite being liable to pay the monthly rent and expenses for both April and May 2020 defaulted in respect of its obligation to pay rent for the consecutive months of April and May 2020. Therefore the respondent issued a default Notice under the sub-lease deed to cure the default.

40. It is his submission that the petitioner being in default of its obligations to pay rent for April and May 2020 and which became due on May 05, 2020 and also anticipating issuance of another default notice by petitioner seeking monthly rent, expenses and reimbursement for April and May 2020, sent an email to the respondent May 05, 2020, contending that the pandemic has rendered meaningless the objective of entering into the sub-lease deed. The petitioner also contended in its email that the sub-lease deed has come to an end; No reference to any clause in the sub-lease deed was mentioned.

41. On May 13, 2020, the respondent in response to the petitioner's email dated May 05, 2020 expressed its surprise at its unilateral conclusion and assertion that the sub-lease deed had purportedly come to an end and therefore it called upon the petitioner to cure the default in respect of outstanding amounts owed under the sub-lease deed within thirty days from

the receipt of the Notice and failing which the sub-lease deed would stand terminated.

42. He submitted that on May 20, 2020, the petitioner issued a notice to respondent under Clause 28 of the sub-lease deed contending that substantial differences in relation to various issues had arisen between them. It is his case that the said Notice did not specify or narrate the purported "substantial differences", which according to the petitioner, had arisen between the parties.

43. To this, the respondent clarified that petitioner's Notice, did not specify any particular dispute and hence could not be considered as a Notice under Clause 28.

44. On June 04, 2020, the petitioner, in the Notice sent to the respondent disputed its obligation to pay monthly rent for the months of April and May 2020, on account of the lockdown imposed by the Government of India, due to COVID-19 break-down.

45. He submitted that the petitioner mischievously contended that the afore-said Notice has to be treated as a Notice of intention to terminate the sub-lease deed under Clause 8(B). According to him, Clause 8(B) of the sub-lease deed, permitted petitioner to terminate the sub-lease deed only in the event that an 'Act of God' had prevented the use of the rented property for which it was rented for a continuous period of 90 days and that too after giving 30 days prior notice in writing to the sub-lessor intimating its intention to terminate the sub-lease deed.

46. It is his submission that the petitioner was not prevented from using the rented property and it was on its own accord that the rented property

was not being used to carry out activities as per the sub-lease deed. He submitted that in fact, petitioner conducted several online events, art fairs, exhibitions and art sales at their premises at Hotel Claridges, which is just 2 kilometres away from the location of the rented property. He further submitted that the conduct of the petitioner at their premises in Hotel Claridges, wherein they had organised online events, art fairs, exhibitions and art sales, clearly establishes that petitioner was not prevented from using the rented property.

47. So, it is his submission that a Notice issued by the petitioner on June 04, 2020 was premature and illegal as the mandatory pre-requisite period of 90 days as stipulated under Clause 8(B) of the sub-lease deed had not been completed.

C. <u>FAILURE OF PETITIONER TO REMEDY DEFAULT WITHIN EXPIRY OF DEFAULT CURE PERIOD I.E., TILL JUNE 12, 2020 WHICH LED TO VALID AND LAWFUL TERMINATION OF THE SUB-LEASE DEED BY THE RESPONDENT</u>

48. Qua this, it is his submission that on June 12, 2020, the cure period of 30 days, pursuant to respondent's Notice dated May 13, 2020, got expired without petitioner having cured the default. On that very date, the respondent intimated the petitioner that since it has failed to cure the default, the sub-lease deed stands terminated. Therefore, the petitioner was directed to vacate and handover the property within 15 days from the date of termination i.e., by June 27, 2020. Moreover, the petitioner was also

intimated about arrears of rent, expenses and balance-rent for the lock-in period. He further submitted that the total amount owed by the petitioner as on June 12, 2020 was ₹4,94,17,273/-. It is his submission that the petitioner did not hand over the possession of the rented property to the respondent by June 27, 2020.

49. It is also his submission that invocation of the Clause 8(B) by the petitioner pursuant to the termination by the respondent on June 12, 2020, was *non-est*, invalid and of no credence.

50. Moreover, it is also the contention of Dr. George that findings of the Tribunal are flawless and duly conform with the law of the land. He substantiated and crystallized this contention in the following manner:

A. <u>FINDING OF THE TRIBUNAL ON ISSUE NO. 1 VIZ. WHETHER THERE WAS A VALID TERMINATION OF THE SUB-LEASE DEED BY THE RESPONDENT:</u>

51. He submitted that the Tribunal qua this issue has held that it was clear from plain reading of Clause 8(A)(ii) and its proviso (b), that the respondent had a right to terminate in case of default in payment of rent and despite the petitioner having opportunity to cure the defect failed to do so, therefore the termination was strictly in conformity with terms of Clause 8(A) of the sub-lease deed, hence, the termination of the sub-lease deed by the respondent was legal and valid

52. The Tribunal further held that it was an admitted position that the petitioner had not paid rent for two consecutive months of April and May 2020. The petitioner had an opportunity to cure the default in the Notice

period but failed to do so. Hence, as per the Tribunal, the sub-lease deed stood terminated, at the end of the Notice period, i.e., on June 12, 2020.

53. Moreover, it was held that the plea of the petitioner that the respondent acted pre-emptively to thwart petitioner's intended termination under Clause 8(B) on the ground of *force majeure* does not hold any water as nothing prevented the petitioner from curing the default and then on expiry of 90 days, issuing notice under Clause 8(B).

54. The Tribunal held that even if it is assumed that an 'Act of God' purportedly prevented the petitioner from using the property, the mere occurrence of an 'Act of God' did not suspend petitioner's contractual obligations under the sub-lease deed to pay rent. There is no such term or condition in the sub-lease deed.

55. It was further the observation of the Tribunal that the petitioner had sought to interpret the sub-lease deed contrary to the express terms by contending that it was not required to perform its obligation since it was purportedly prevented from using the rented Property. It is the finding of the Tribunal that the afore-said argument raised by the petitioner is specious and liable to be, rejected as even prior to the lockdown, the petitioner was in repeated breach of its obligations to pay the monthly rent. Right from the initiation of the period, when the obligation to pay the monthly rent began, the petitioner defaulted at all instances and did not make good the payments within time and as a result the respondent was compelled to issue contractual Notices, pointing out such breach and it is only thereafter, in a lackadaisical and delayed manner, that the payments were remitted by the petitioner. Moreover, the petitioner never conducted a single event at the

rented property even prior to the onset of the COVID-19 pandemic. The Tribunal further observed that the petitioner was never serious about complying with its contractual obligations and attempted to use the onset of the COVID-19 pandemic to escape from the obligations owed to the respondent.

56. Therefore, he submitted that the aforesaid findings of the Tribunal are purely factual and also involve an interpretation of the contractual provisions and thus such a determination cannot be called into question by the petitioner considering the limited ambit of the scope of challenge in a Section 34 Petition.

B. <u>FINDING OF THE TRIBUNAL ON ISSUE NO. 2 AND ISSUE NO. 7 VIZ. WHETHER THE SUB-LEASE DEED DATED NOVEMBER 06, 2018 WAS VALIDLY TERMINATED BY THE PETITIONER</u>

57. Qua these issues, it was observed by the Tribunal that since the respondent had already validly terminated the sub-lease deed, which had taken effect on June 27, 2020, the petitioner could not have invoked Clause 8(B) as the period of 90 days, with effect from March 25, 2020, which was a condition precedent for invoking Clause 8(B), had not been completed. It was further held that the period of 90 days was completed only on June 23, 2020, when the petitioner issued the Notice under Clause 8(B). However, by then, the sub-lease deed had already been terminated by respondent on June 12, 2020. Hence, the Tribunal concluded that the termination by petitioner was invalid and of no effect.

58. It is his submission that the petitioner having deliberately acted in breach of the sub-lease deed cannot be permitted to contend that the Tribunal misconstrued the terms of the sub-lease deed.

59. He submitted that the petitioner has relied upon the decision rendered by the Single Judge of this Court in ***Halliburton Offshore Services Inc. vs. Vedanta Limited and Another, (2020) SCC OnLine Del 542 (Halliburton Offshore Services 1)***, to contend that the lockdown was only an 'Act of God'. It is his submission that the petitioner has concealed from this Court that the aforesaid decision has already been set aside/vacated by the decision rendered by this Court in ***Halliburton Offshore Services Inc. vs. Vedanta Limited & Another***, ***2020 SCC OnLine Del 2068*** **(Halliburton Offhsore Services 2)**. Hence, the reference to the said precedent by the petitioner is of no avail.

60. He contended that this Court in **(Halliburton Offshore Services 2)** has categorically held that COVID-19 would not justify non-performance. Even more crucially, this Court has also noted that the conduct of the party prior to the onset of the COVID-19 pandemic is also required to be considered.

61. So, it is his submission that if it is seen from the aforesaid perspective as well, the Tribunal has arrived at a completely correct conclusion inasmuch as the defaults that had arisen even prior to the onset of the COVID-19 pandemic would amply demonstrate that the petitioner could not seek to use the COVID-19 pandemic as a carte-blanche to justify its frequent and unrepentant breaches of the solemn contractual obligations.

C. FINDING OF THE ARBITRAL TRIBUNAL ON ISSUE NO. 3 VIZ. WHETHER THE RESPONDENT IS ENTITLED TO ARREARS OF RENT FOR THE MONTHS OF APRIL, MAY AND JUNE 2020 AND THE 'BALANCE RENT' FOR THE LOCK-IN PERIOD

62. He submitted that the Tribunal while dealing with this issue has held that since Clause 8(A)(ii) was correctly invoked by the respondent and the sub-lease deed was validly terminated by the respondent, thus the petitioner was liable for payment of rent for the months of April, May and June 2020.

63. He further submitted that the respondent's right to terminate the sub-lease deed in the event of default by the petitioner in payment of monthly rent for two consecutive months was subject to the respondent issuing to the petitioner thirty (30) days prior notice, in writing intimating its intention to terminate the sub-lease deed and it would stand terminated accordingly. Accordingly, on account of the default committed by the petitioner in respect of payment of monthly rent and expenses, the respondent through its Notice dated May 13, 2020, called upon the petitioner to cure the default in respect of outstanding amounts owed under the sub-lease deed within 30 days, failing which the sub-lease deed would stand terminated.

64. The respondent intimated the petitioner that since it failed to cure the default, the sub-lease deed stood terminated on June 12, 2020. Thus, the petitioner was directed to vacate and handover the property within 15 days from the date of the termination i.e., by June 27, 2020.

65. It is his case that immediately on the termination of the sub-lease deed, proviso (c) to Clause 8 stood attracted, which clearly stipulated that in the event, respondent terminated the sub-lease deed under Clause 8(A), then the petitioner would be liable to pay the total aggregate rent for the remainder portion of the unexpired lock-in period.

66. He contended that the petitioner and respondent entered into a long-term lease for a period of 18 year with a provision for 3-years of lock-in period. It is his case that within these 3 years of lock-in period, the petitioner enjoyed a rent-free period of twelve months and thus the balance lock-in period comprised of only 24 months. Moreover, out of the aforesaid period of 24 months, the petitioner defaulted from the very inception thereby constraining respondent to issue default notices. At the time of issuing of the final default Notice on May 13, 2020, the petitioner had tendered the rent only for six months, i.e. from October 2019 to March 2020.

67. He submitted that de-hors respondent's claim qua the rent for the balance lock-in period, since the Tribunal had ruled in favour of respondent qua Issue No.1, (regarding the termination), the respondent was held to be entitled for the rent from April 2020 till the actual date of handing over of the rented property i.e., July 18, 2020. He contended that the balance lock-in period, after the date of actual handing over of the rented property, till September 2021 comprises of only 14 months. Thus, the balance lock-in period of 14 months when considered with the rent free period of twelve months enjoyed by the petitioner is most certainly a genuine pre-estimate of the loss suffered by the respondent.

68. He further submitted that the petitioner's obligation of payment of rent for the remainder lock-in period is a genuine pre-estimate of the loss suffered by respondent as the rented property in question is located at a prime location in Delhi and the area in question also comprised of a significant area i.e., of 1338.72 sq. meters and the same cannot be let out to any commercial tenant, as the exercise of letting out has to be in accordance with the restrictions and guidelines prescribed by the L&DO i.e., the land-owning agency. Hence, it has been emphasized that the obligation of payment of rent for the remainder lock-in period is a genuine pre-estimate of the loss suffered by respondent.

69. It has been submitted that it is a settled principle of law that when the terms of the contract are clear and unambiguous, stipulating a certain amount in case of breach of contract, unless it is held that such estimate of compensation is unreasonable or by way of a penalty, the defaulting party is under an obligation to pay the amount stipulated and provided for under the contract.

70. It has been further submitted that contrary to the assertions of the petitioner, the respondent had squarely articulated the present claim before the Tribunal as 'Balance Rent' for the remaining lock-in period instead of liquidated damages. He further contended that adjudication as to whether an amount stipulated under a contract in the event of a breach is payable or not, is inherently facts specific and contract-specific and in the present case, the nature of the contractual provisions *inter-alia*, the significant rent-free period of one year, combined with the un-characteristically long period of the lease (18 years) and the factual background, *inter-alia*, the petitioner

enjoying the rent-free period and then defaulting consistently and flagrantly from the very onset with the obligation to pay rent, would reveal that the decision of the Tribunal to bind the petitioner is in conformity with the contractual mandate and thus un-impeachable. He submitted that if the case of the petitioner was to be accepted then it could have opted to terminate the sub-lease deed immediately after the expiry of the one year rent-free period without any consequence or liability to pay any amounts towards the lock-in period. Such an interpretation which provides a windfall to an unscrupulous party can never be countenanced.

71. It is his further submission that the contention raised by petitioner regarding the provision of 'Balance Rent' being in the nature of liquidated damages was also rejected by the Tribunal. The Tribunal held that even if it were to be assumed for the sake of argument that the provision regarding 'Balance Rent' was in the nature of liquidated damages, the rent for the unexpired lock-in period would still be payable, since it was a genuine pre-estimate of loss that the respondent would have suffered in case the sub-lease deed were terminated within the lock-in period.

72. He submitted that the petitioner's contention regarding the 'Balance Rent' for the lock-in period not being a genuine pre-estimate of loss has been categorically rejected by the Tribunal. The termination during the lock-in was account of the default and breach by the petitioner. It is his submission that the petitioner deliberately breached the sub-lease deed which led to the termination and thereby caused the loss to respondent. In the event, petitioner had complied with the contractual terms, there would

not have been any reason or occasion for the respondent to terminate the sub-lease deed.

73. He submitted that the balance lock-in period of 14 months when considered with the rent-free period of twelve months enjoyed by the petitioner is most certainly a genuine pre-estimate of the loss suffered by the respondent. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Kailash Nath Associates (supra)***, wherein, it was held that where a liquidated amount is named in the contract and it is a genuine pre-estimate of damage or loss then a party should be entitled to the same.

74. So, it is his case that since the Tribunal has categorically held that the rent for the balance lock-in period is a genuine and reasonable pre-estimate, the scope of interference in the present proceedings gets limited.

75. He further submitted that the petitioner's contention stating that the respondent did not take steps to mitigate the loss is also misplaced and liable to be rejected. He crystallized this by submitting that subsequent to the handing over of the rented property by the petitioner and during the remainder lock-in period, the respondent made best efforts to find an alternate tenant and also to mitigate the damages.

76. He submitted that in order to mitigate the damages, the respondent even reached out to CBRE (Coldwell Banker Richard Ellis), a leading real estate company, to lease out the rented property to any other interested party, as the said real estate company was the best company to render such services in the area where the rented property was located. However, despite its best efforts, the respondent was not able to find an alternate tenant and mitigate the damages. Reliance has been placed upon the

following judgments: ***Corporate Management Council of India P. Ltd v. Lonza India P. Ltd. (formerly known as Camber India P. Ltd.), (2009) 150 Comp Cas 898 (Bom)*** and ***Lonza India P. Ltd v. Corporate Management Council of India P. Ltd., (2014) 183 Comp Cas 478 (Bom)***, to contend that it is not always necessary for a licensor to mitigate loss in the case of a breach of a leave and license agreement by the licensee.

77. Reliance has been placed upon the judgment of the High Court of Bombay in the case of ***Indiabulls Properties P. Ltd. (supra)***, wherein the Court, after analyzing various judgments containing leave and license agreement and lock-in clause, had held that a commercial court cannot blind itself to the realities of the world of commerce, to the ordinary and usual manner in which parties do business and to the common considerations that weigh-in when parties usually transact. It was further held that when a party solemnly binds itself to a three year license term for the premises and the licensor agrees in exchange, not to increase the license fee for that duration, the agreement manifests that the licensee will have to pay the licensor the agreed fee for three years. To allow the licensee not only the option of a premature exit, but also to allow it to slither out of its financial liability, and correspondingly, to drive the licensor to a protracted civil proceeding in which it needs prove, nothing is clearly unjust.

78. He submitted that the petitioner's argument that the award incorrectly 'prefers' a judgment of the High Court of Bombay over the judgments rendered by this Court is not only puerile, but is also rooted in an unacceptable parochialism. He further submitted that in ***Indiabulls Properties P. Ltd. (supra)***, the Court had succinctly considered the relevant

judgments, including the judgment of this Court, as pointed out by the petitioner, and has distinguished them as per their applicability in the light of facts and circumstances of the present case. He contended that the reasoning of the judgment in ***Indiabulls Properties P. Ltd. (supra)*** finds closest resonance with the contractual and factual background of the present case, and thus it has been relied upon by the Tribunal.

79. He submitted that the Tribunal had even considered the judgments relied upon by the petitioner, including the judgments in the cases of ***Manju Bagai (supra)*** and ***Tower Vision India Private Limited (supra)***.

80. He asserted that this Court in ***Adidas India Marketing Pvt. Ltd. (supra)*** had reiterated and held that the documents concerning commercial transactions have to be interpreted to further trade and commerce and in harmony with the facts which existed when parties struck the bargain.

D. <u>FINDING OF TRIBUNAL ON ISSUE 5, VIZ. WHETHER THE RESPONDENT IS ENTITLED TO PENDENTE LITE AND FUTURE INTEREST ON THE AMOUNTS CLAIMED</u>

81. He submitted that the Tribunal had held that the sub-lease deed did not stipulate any interest on 'Balance Rent', nevertheless, the respondent claimed the compound interest @1.5% per month on the 'Balance Rent'. Since, it was not stipulated in the sub-lease deed, the respondent was only held to be entitled to a reasonable interest and as such, the Tribunal found simple interest @7% per annum as reasonable.

82. The Arbitral Tribunal accordingly held that the respondent was entitled to ₹40,15,230/- by way of interest on the 'Balance Rent' for the period from June 13, 2020 to January 31, 2022.

83. It is his submission that as it has been recently reiterated by the Supreme Court in ***Delhi Airport Metro Express Private Limited (supra)***, that when the agreement between the parties clearly provides for the mode and manner of payment of interest, the Arbitral Tribunals are mandatorily required to award interest in terms thereof and this is what has been complied with in the present case by the Tribunal.

E. <u>FINDING OF THE TRIBUNAL ON ISSUE NO. 6 VIZ. WHETHER THE RESPONDENT IS ENTITLED TO CLAIM ALL APPLICABLE TAXES AND EXPENSES FOR UP -KEEP, ELECTRICITY, WATER AND OTHER EXPENSES TILL THE DATE OF HANDING-OVER OF THE PREMISES</u>

84. He submitted that the Clause 11 of the sub-lease deed stipulated that the respondent had to be reimbursed for the actual expenses for up-keep, electricity, water and all other expenses.

85. Clause 11 of the sub-lease deed also stipulated that in addition to the monthly rent, the petitioner was also liable to pay the following:

> "a) to the Respondent or directly to the relevant tax collection agency/authority, all applicable taxes (including GST or any other similar or replaced tax) on such monthly rent excluding income tax applicable on the income of the Respondent and the property tax applicable on the Property both of which will be the obligation of the Respondent; and
>
> b) To the Respondent or directly to the relevant agency/authority for up keep, electricity, water, and all other expenses in respect of the Property as per the bills or demands received from time to time and

for security of the Property including gardens and common area as well as the cost of repair, maintenance and running of the in-house generator".

86. He further submitted that the Tribunal by relying upon the said Clause adjusted the expenses incurred by the respondent, the rent till the date of actual handing over of the possession and the security deposit lying with the respondent. Even after adjustment, an amount of ₹5,69,609/- was still due and payable, which was added to the 'Balance Rent' for the lock-in period. The Tribunal accordingly held that that the respondent was entitled to ₹ 3,50,69,609/- by way of arrears of rent for the months of April, May and June 2020 and 'Balance Rent' for 15 months of the unexpired lock-in period after adjusting the security deposit of Rs. 69,00,000/-.

87. He submitted that the petitioner has sought to contend that the awarded amounts qua GST are purportedly in the nature of damages. It is clarified that the amounts awarded under the said head were awarded as the respondent was held entitled to rent and awarded the amount of ₹ 3,50,69,609/- by way of 'Balance Rent' and not towards damages. Hence, it is his submission that the awarding of GST by the Tribunal was just and proper.

88. He substantiated his argument by submitting that the Clause 11 (a) of the sub-lease deed stipulated that the petitioner was liable to pay to the respondent or directly to the concerned tax collection agency, all applicable taxes, including GST on monthly rent. From the very inception, the respondent deposited the GST towards the monthly rent and expenses. The respondent also raised invoice on the petitioner and deposited the GST as

the same was to be deposited with the Government in the following month by 20th day. The GST payments deposited by the respondent were also filed before the Tribunal. The corresponding entries in respondent's account statement in respect of the GST amount deposited were also produced. Hence, it is his submission that the amount awarded by the Tribunal under the said head was just and proper.

89. So. on the afore-said grounds, the respondent submitted that the present petition under Section 34 of the Act of 1996 is unmerited and deserves rejection by this Court.

90. It is also his submission that the following judgments, relied upon by the petitioner, have no applicability in the facts and circumstances of the present case:

A. <u>NON-APPLICABILITY OF THE JUDGMENT IN *TOWER VISION INDIA PVT. LTD. (SUPRA)* RELIED UPON BY PETITIONER</u>

91. He submitted that the judgment rendered by the Division Bench of this Court in ***Tower Vision India Private Limited***, ***(supra)*** relied upon by the petitioner is inapplicable to the present case. Firstly, because, the judgment was rendered by the Division Bench, in a case adjudicated under Section 433 of the Companies Act, 1956. Secondly, the Court was not dealing with such a lease which had a rent free period of 1 year (12 months) or such a long tenure of the lease which was extending to 18 years or a *sui-generis*, such as the nature of the rented property in the present case.

92. He further submitted that the said judgment is inapplicable to the facts of the present case as the Tribunal had categorically held that the

contention of the petitioner that the provision of 'Balance Rent' was in the nature of liquidated damages was untenable. The Tribunal held that even if it were to be assumed for the sake of argument that the provision regarding the 'Balance Rent' was in the nature of liquidated damages, the rent for the unexpired lock-in period would still be payable since it was a genuine pre-estimate of loss that the respondent would have suffered, had the sub-lease deed been terminated within the lock-in period. It was also held by the Tribunal that when the parties entered into the sub-lease deed, they mutually agreed to the fact that the sub-lease deed would be for the period of 18 years and further agreed that there would be a lock-in period of three years. So it is his submission that except, as provided in the sub-lease deed itself, neither party could wriggle out of their obligation to keep the sub-lease deed alive for at least three years of lock-in period.

93. He also submitted that the Tribunal further held that the rent for the entire three years was an ascertained and assured sum and moreover, it was a guarantee to the respondent that it would receive the entire rent amount for the three years at least. It is his case that the lock-in period Clause was also an assurance to the petitioner that its right to enjoy the rented property would not be disturbed by the respondent for at least three years. Therefore, the finding rendered by the Tribunal that the rent for the unexpired lock-in period is a genuine pre-estimate of loss that the respondent would have suffered, had the sub-lease deed been terminated within the lock-in period, is a factual finding which is not liable to be interfered in the petition filed under Section 34 of the Act of 1996.

94. He contended that in-fact, the aforesaid judgment militates against the submissions of the petitioner as the judgment had itself rendered that one of the factors to determine the amount stipulated as payable for the lock-in period is a genuine pre-estimate of damages, is to look into the factor that whether the landlord had made available the premises to the tenant keeping in view the tenants' specific requirements and at a cost to the landlord.

95. It is his case that the petitioner in the present case has enjoyed the rent free period of twelve months at the cost of the respondent and had only paid the rent for the period of six months i.e., from October 2019 to March 2020. Moreover, the respondent had also agreed to enter into a long term lease of 18 years with the petitioner and was also agreeable to grant of a rent-free period of 9 months which was later on extended to twelve months. The lock-in period was included, so that petitioner having used the rented property for twelve months on a rent-free basis, could not terminate the sub-lease prior to the lock-in period.

96. He submitted that in the present case, the nature of the contractual provisions, *inter-alia*, the significant rent-free period of (one year) combined with the uncharacteristically long period of the lease (eighteen years); the factual backgrounds such as, the petitioner enjoying the rent-free period and then defaulting consistently and flagrantly from the very onset would reveal that the decision of the Tribunal to bind the petitioner to contractual mandate is unimpeachable.

B. NON-APPLICABILITY OF THE JUDGMENT IN *SORIL INFRARESOURCES LIMITED (SUPRA)*

97. It is his submission that the aforesaid decision is inapplicable to the present case for the following reasons:

a) The aforesaid judgment was not rendered in a case where the Lease contained a rent-free period of 1 year (12 months), as in the present case;

b) The aforesaid judgment was not rendered in a case where the property was merely commercial but did not contain any restriction on leasing to any alternate tenant nor had the location distinctiveness as it is with property rented out in the present case;

c) The aforesaid judgment was not rendered in a case where the Lease was for only 10 years and not for an unusually long period of 18 years as in the present case;

d) The aforesaid judgment rendered in the factual scenario where the termination notice issued by the tenant was held to be invalid by the Tribunal and affirmed by the Court. The factual contours of the present case are materially different as the termination notice issued by the respondent has been held to be valid;

e) The arbitrator in the award leading up to the aforesaid judgment had held that a period of 6 months was a reasonable period. The decision and rationale by the arbitrator was not interfered upon by the Court and not held to be perverse. In the present case, on account of the one year rent-free period and after giving credit to the petitioner for remitting rent for certain months to the respondent, the liability towards the lock-in period of 3 years (36 months) was whittled down in the ultimate award to only the period between July, 2020 to

September, 2021 i.e. only for 14 months. It is stated that the balance lock-in period of 14 months when considered with the rent-free period of twelve months enjoyed by the petitioner is most certainly a genuine pre-estimate of the loss suffered by the respondent.

f) The Tribunal has rendered a categorical finding that even if it were to be assumed for the sake of argument that the provision regarding 'Balance Rent' was in the nature of liquidated damages, the rent for the unexpired lock-in period would still be payable since it was a genuine pre-estimate of loss that the respondent would have suffered in case the sub-lease deed had been terminated within the lock-in period.

g) The aforesaid judgment was rendered in a case where the owners/landlords did not take any steps to mitigate the damages by locating an alternate tenant. The present case is materially different as the respondent herein had taken material steps to find an alternate tenant and mitigate the damage.

ADDITIONAL SUBMISSIONS OF THE PETITIONER

98. It has been additionally submitted by Mr. Puri that the respondent never made a claim for 'Balance Rent' alleging it to be in the nature of a 'debt', before the Tribunal. On the contrary the respondent in the arbitration proceedings categorically contended that it was entitled only to loss/damages on account of the default and breach committed by the petitioner herein.

99. So, it is his case that it is a settled proposition of law that a decision of a case cannot be based on grounds outside the pleadings and that in the

absence of such pleadings the court cannot make out a case not pleaded before it. He submitted that the respondent did not make any averments demanding 'Balance Rent' on the ground that it is a 'debt' and categorically pleaded it to be a loss/ damage which it suffered on account of the alleged breach committed by the petitioner. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Union of India vs. Ibrahim Uddin & Anr., Civil Appeal No.1374 of 2008***, decided on ***July 17, 2012***, to contend that a decision of a case cannot be based on grounds outside the pleadings.

100. He submitted that it is a settled position of law that to establish a claim for damages or compensation for losses suffered on account of a defaulting party, proper evidence of specific nature has to be supplied by the aggrieved party claiming for such damages. He contended that the impugned order is perverse since it fails to appreciate that the respondent did not substantiate its claim for loss or damages with cogent evidence of specific nature to establish that the 'Balance Rent' was a genuine pre-estimation of damages. Reliance has been placed upon the judgment of the coordinate bench of this Court in the case of ***Manju Bagai (supra),*** to contend the same.

101. He further averred that in addition to pleading of specific facts and circumstances, it is an essential pre-requisite for the asserting party to furnish cogent evidence in support of their claim for damages which must fittingly be capable of demonstrating or justifying the sum of amount claimed for the lock- in period as a genuine pre-estimate of damages.

102. Again, reliance has been placed upon the judgment of the Division Bench of this Court in ***Tower Vision India Private Limited (supra),*** wherein it was observed that a claim for damages must be aptly substantiated by the aggrieved party proving that all steps towards mitigation of losses have been reasonably undertaken by the party making such claims, in order to vitiate the losses sustained on account of the breach of contract. It is his case that in the instant case, besides CW-1, admitting during the cross examination that he has not taken any steps towards leasing out the property after termination of the sub-lease deed, and similarly, CW-2 admitting that no reasonably appropriate steps were taken for leasing the property after October 31, 2020, the respondent has failed to mitigate the alleged losses asserted to have been incurred by them on account of the breach of contract by the petitioner.

103. He submitted that the Courts on several occasions have settled the position of law with respect to evaluating compensation to be awarded for breach of a contract. He contended that any claim for damages or compensation must be reasonably awarded. The liquidated damages which is the sum of amount affixed in a contract for its breach is only the ceiling amount and does not signify to be the actual amount which a party complaining of breach becomes automatically entitled to, in the absence of proof or mitigation of losses. Some of the determining factors which may be considered by the courts in assessing reasonable compensation or damages, specifically qua clauses pertaining to the lock-in period, have been enunciated by the Division Bench of this Court in the case of ***Soril Infra Resources Limited (supra).***

104. So, he concluded that the assessment qua the provision of 'Balance Rent' being characterised to be a genuine pre-estimate of damages suffered by the respondent was made arbitrarily without considering the above stated factors and in utter disregard to the crucial material available on record. As such, the arbitrarily concluded finding that the 'Balance Rent' was a genuine pre-estimate of loss which was "guaranteed", without substantive reasons being put forth, is perverse and in violation of the fundamental policy of Indian Law.

ANALYSIS

105. Having heard the learned counsel for the parties, it is now to be adjudicated, whether the Impugned Award dated February 04, 2022 passed by the Arbitral Tribunal consisting of a sole Arbitrator is liable to be set aside in view of Section 34(2) of the Act of 1996.

106. The grounds on which the Impugned Award has been challenged have been culled out in paragraph 25 above.

107. Broadly three issues arise for consideration in this petition. Firstly, whether the Tribunal was justified in holding that though COVID-19 would in all probability qualify as an 'Act of God', but the subsequent imposition of the lockdown by the Government of India, was an 'Act of Man'. Secondly, whether the Tribunal was justified to hold that the provision as to 'Balance Rent' was not in the nature to liquidated damages but in the nature of debt and as such the respondent is entitled to the same. Thirdly, whether the Tribunal was justified in holding that the termination effected by the petitioner was not as per the terms of the sub-lease deed i.e., Clause 8(B),

and whereas the termination effected by the respondent was in conformity with Clause 8(A)(b) of the sub-leased deed.

108. Before answering the three issues which falls for consideration, it is necessary to state the settled position of law i.e., a party to the contract can invoke the *force majeure* Clause, only if the contract stipulates so. If the contract has a *force majeure* Clause, then it need to be construed strictly ***(Ref: Ramanand and Ors. v. Girsh Soni and Ors., MANU/DE/1072/2020*** and ***Halliburton Offshore Services 2)***.

109. On the above premise, I proceed to answer the three issues as formulated above.

110. To answer the same, it is necessary to re-produce Clause 8(A)(c) and Clause 8(B) of the sub-lease deed, which reads as under:

> *"8 (A)(c) Notwithstanding the provisions of Clause 7 of this this Deed of Sub Lease, within the Lock-in Period:*
> *(A) The Sub Lessor shall have a right to terminate this Deed of Sub Lease, in the event:*
> *(i) the Sub Lessee uses the Property for purpose(s) other than the Sub Lessee's Activities or as provided under the Lease Deed or in violation of either the applicable law or the Orders; or*
> *(ii) the Sub Lessee fails to pay rent, along with interest at the Applicable Interest Rate, for a consecutive period of 2 months,*
> *after giving thirty (30) days prior notice to the Sub Lessee in writing intimating its intention to terminate, and this Deed of Sub Lease shall terminate accordingly.*
>
> *Provided that:*
> *xxx xxx xxx*

> *(c) In case of termination by the Sub Lessor under this sub- clause 8A, the Sub Lessee shall be further liable to pay the total aggregate rent for the remainder portion of the unexpired Lock-in Period of the sub lease (hereinafter referred to as the 'Balance Rent')*
>
> *8(B) The Sub Lessee shall have a right to terminate this Deed of Sub Lease, in the event of an act of God that prevents the use of the Property for the purposes for which the Property has been sub leased for a continuous period of ninety (90) days after giving thirty (30) days prior notice to the Sub Lessee in writing intimating its intention to do so and the Deed of Sub Lease shall terminate on the day of expiry of the notice period of thirty (30) days. The Sub Lessor shall refund the remaining 1madjusted monthly rent, if any, minus the rent already paid to the competent authority, if any, to the Sub Lessee. In case of termination by the Sub Lessee under this sub-clause 8(B), the Sub Lessee shall not be liable to pay any Balance Rent."*

111. In so far as the first issue is concerned, the submission of Mr. Puri was that since the nationwide lockdown imposed in the month of March, 2020 was unprecedented and could not have been anticipated by either of the parties at the time of entering into sub-lease, the same was clearly an 'Act of God' and not merely 'Act of Man', as wrongly held by the learned Arbitrator.

112. The finding of the learned Arbitrator on the 'first issue' is as under:

> *"43. There was some debate whether the Covid-19 pandemic and the consequent lockdown imposed by the Government would qualify as an 'act of God'. While the Covid-19 pandemic would in all probability qualify as an 'act of God', there is considerable doubt as to whether the lockdown (or a combination of the Covid-19 pandemic and lockdown) would fall within the ambit of the*

*expression 'act outstanding God'. Surely, the lockdown was an act of man. The Covid-19 pandemic by its very nature was and is a worldwide event. Some countries have imposed lockdown of various degrees of severity while others have not. The decision to impose a lockdown is taken by man**. However, there is no need to render a conclusive finding on this aspect as, even if it is assumed that the Covid-19 pandemic and the lockdown constituted an 'act of God', since the other conditions stipulated in Clause 8B were not satisfied by the time the Claimant terminated the Sub Lease Deed on 12.06.2020, the result would still be the same: that the purported termination by the Respondent was not valid. For this reason, there is no necessity to discuss the decisions cited by the learned counsel on what is meant by an 'act of God' and whether Covid-19 by itself or in combination with the lockdown constituted an 'act of God'.**"*

(Emphasis supplied)

113. Suffice to state, though the learned Arbitrator did hold that COVID-19 pandemic would in all probability qualify as an 'Act of God' but the subsequent imposition of lockdown was only an 'Act of Man', he had justified the aforesaid finding by noting that while some countries had imposed lockdown of various degrees of severity, the other countries did not and moreover, the decision whether to impose lockdown or not, was surely taken by a man. Even otherwise, the learned Arbitrator was of the view that since the other conditions stipulated in Clause 8(B) were not satisfied by the time the respondent terminated the sub-lease deed, on June 12, 2020, the result would, still be the same, i.e., the purported termination by the petitioner would not be valid. In other words, it was held that the respondent having already validly terminated the sub-lease deed because of failure on the part of the petitioner to pay the rent for two consecutive

months of April and May 2020, the termination effected by the petitioner (after issuance of default notice) was held to be invalid being not in accordance with Clause 8(B) which is the only provision in the sub-lease deed which prescribe the eventuality when the petitioner could have invoked the *"force majeure"* / *"Act of God"* stipulation. As per Clause 8(B), it could be only after 90 days and after giving notice of 30 days, which never happened, rather before it could happen, the respondent on failure on the part of the petitioner to pay the rent for two months had terminated the sub-lease deed. So the finding of the learned Arbitrator on this issue cannot be faulted.

114. The aforesaid conclusion of mine shall also govern the 'third issue' inasmuch as the Tribunal in paragraph 39 has rightly held as under:

> *"39. There are several reasons as to why the submission of the learned counsel for the Respondent that the Respondent had validly terminated the Sub Lease Deed under Clause 8B thereof cannot be accepted. First and foremost is the reason that the Claimant had terminated the Sub Lease Deed in terms of Clause 8A(ii) because the Respondent had defaulted in payment of two months (April and May 2020) rent and despite the cure notice of thirty 30 days had failed to cure the default. This termination under Clause 8A(ii) took effect on 12.06.2020 as already held above under Issue 1. At that point of time, the Respondent could not have invoked Clause 8B as the period of 90 days (w.e.f 25.03.2020 when lock down was first imposed) had not elapsed which was a condition precedent for the exercise of the right under Clause 8B. In fact, the period of 90 days were completed on 23.06.2020, when the Respondent issued the notice under Clause 8B. But by then, the Sub Lease Deed had already been terminated by the Claimant on 12.06.2020. Hence, It has to be held that the so called termination by the Respondent was invalid and of no effect."*

115. In other words, on the 'third issue', it is the finding of the learned Arbitrator that the petitioner herein could not have invoked Clause 8(B) as the period of 90 days (as stipulated in the Clause), (w.e.f. March 25, 2020, when the lockdown was first imposed) had not elapsed, which was a condition precedent to exercise the right to terminate the sub-lease deed under Clause 8(B). In fact, the period of 90 days was completed only on June 23, 2020, when the petitioner had issued the Notice under the said Clause and by that time, the sub-lease already stood terminated by the respondent.

116. It follows the sub-lease deed having been validly terminated by the respondent, the subsequent alleged termination by the petitioner is of no consequence. So, this plea/issue advanced by Mr. Puri in contesting the aforesaid finding of the learned Arbitrator, is rejected.

117. Now coming to the 'second issue' as raised by Mr. Puri that the Tribunal has erred in construing the provision related to the 'Balance Rent', as the same was not in the nature of liquidated damages but in the nature of debt is concerned, Mr. Puri, had relied upon the judgments of this Court in the case of ***Manju Bagai (supra)***, which on, reference has been upheld by the Division Bench of this Court in the case of ***Tower Vision India Private Limited (supra)***, wherein the Division Bench, on the issue, has held that even if there is a Clause qua liquidated damages, in a given case, it is for the Court to determine and adjudicate as to whether it represents pre-estimate of damages. In that eventuality, such a provision only dispenses with proof of actual loss or damage. The Court also held the person claiming liquidated damages is still to prove that because of the legal injury,

he has suffered some loss. The Court held, he may also be called upon to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry into these aspects that a Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. The Court also held that even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the Court, it does not result into a 'debt'.

118. The learned Arbitrator, having noted the conclusion arrived at, by the Division Bench in the case of ***Tower Vision India Private Limited (supra)***, and also in the case of ***India bulls Properties P. Ltd. (supra)*** relied upon by the counsel for the respondent and also referring to ***Manju Bagai (supra)*** on an similar issue, was of the following view:-

> "49. *The argument of the learned counsel for the Claimant that the provision of Balance Rent in Proviso (c) to Clause 8A is not a provision by way of liquidated damages is a plausible one with which I agree. When the parties entered into the Sub Lease, they agreed that it would be for 18 eighteen years. They specifically agreed that there would be a Lock-in Period of three years. In other words, save and except as provided in the Sub Lease Deed itself, neither party could wriggle out of their obligation to keep the Sub Lease alive for at least three years. The rent for the entire three years was an ascertained and assured sum. To the Claimant there was the guarantee that it would receive the entire rent amount for the three years at least. To the Respondent there was the assurance that its right to enjoy the Property would not be disturbed by the Claimant*

for at least three years. However, by virtue of Clause 8A the Claimant had the right to terminate even during the Lock-in Period due to the uncured default on the part of the Respondent. Because such a termination would be occasioned by the default of the Respondent it was reasonably agreed by the parties that the Balance Rent for the unexpired Lock-in Period became immediately payable. On the other hand if the termination had been by the Respondent under Clause 8B, different consequences would have followed. The Respondent, because the termination would not have been on its account, would be entitled refund of the Security Deposit and would not have the liability of paying the Balance Rent.

xxx xxx xxx

"51. Even if it is assumed, for the sake of argument, that the provision as to Balance Rent was in the nature of liquidated damages, the same would still be payable by the Respondent. This is so because it is a genuine pre-estimate of loss that the Claimant would suffer in case the Sub Lease Deed were terminated within the Lock-in Period. The premature termination because of the default of the Respondent would result in the Respondent not getting any rent for the unexpired three years period although the same was, in a sense, guaranteed by the stipulation of a lock-in period. Furthermore, the termination itself, if not for this proviso, would have resulted in the loss of rent for the unexpired Lock-in Period. It is axiomatic that this is the loss and therefore no further proof of loss is required. It is reasonable because it is computed on the basis of the agreed rent. As such, even if the Balance Rent were regarded as liquidated damages, the Claimant would be entitled to it."

119. From the perusal of the above paragraphs, I find that in paragraph 49 of the Impugned Award, the learned Arbitrator has delineated the scope of Clause 8(A) and also Clause 8(B) of the sub-lease deed. In respect of Clause 8(A), the conclusion of the learned Arbitrator was that under the

said Clause, the respondent had the right to terminate the sub-lease deed even during the lock-in period due to the uncured default on the part of the petitioner. He also held that because the termination has been occasioned in view of the default of the petitioner in paying rent for two months, it was reasonably agreed by the parties that the 'Balance Rent' for the unexpired lock-in period shall become immediately payable and has granted the same for 15 months. On Clause 8(B), the learned Arbitrator held difference consequences would follow, i.e., as the termination was on account of petitioner [under Clause 8(B)] the petitioner would be entitled for refund of security deposit and would not have the liability of paying the 'Balance Rent'.

120. Whereas in paragraph 51 of the Impugned Award, the learned Arbitrator has considered and rejected the argument as advanced by the petitioner that the 'Balance Rent' being in the nature of liquidated damages, the same would not be payable unless the damages are being proved by holding that the 'Balance Rent' rent was in the nature of pre-estimate of loss that the respondent would suffer in case the sub-lease deed were to be terminated within the lock-in period. This according to the learned Arbitrator is because the respondent herein would not get any rent for the unexpired period although the same was in a sense guaranteed by the stipulation of a lock-in period. The learned Arbitrator also held that the 'Balance Rent' being genuine pre-estimate of loss, no further proof of loss was required.

121. Suffice to state, the conclusion of the learned Arbitrator in paragraph 49 of the Impugned Award is on an interpretation of Clauses 8(A)(c) and

8(B) of the sub-lease deed. The said interpretation is the right interpretation of the Clause. It is settled law that this Court in exercise of its power under Section 34 of the Act of 1996, shall not/ought not disturb the interpretation given by the learned Arbitrator, merely because another interpretation of the same Clause is also possible. Similarly, the conclusion arrived at by the learned Arbitrator in paragraph 51 of the Impugned Award is a plausible interpretation of the Clause 8(A)(c) of the sub-lease deed and as such cannot be interfered with considering the limited scope of interference with the award under Section 34 of the Act of 1996.

122. Also, the submission of Mr. Puri that when the issues in hand are governed by the judgments of this Court in the cases of ***Manju Bagai (supra)*** and ***Tower Vision India Private Limited (supra),*** which have a precedential value and could not have been ignored, and any deviation from the law laid down in those judgments shall be in violation of the fundamental policy of India, by relying upon the judgments in the cases of ***Renusagar Power Co. Ltd., Associate Builders (supra)*** and ***Fiberfill Engineers (supra),*** is concerned, the same is not appealing. This I say so, as it is not his case that the learned Arbitrator has not at all referred to the judgments in the case of ***Manju Bagai (supra)*** and ***Tower Vision India Private Limited (supra)***. However, the learned Arbitrator, while referring to these judgments, had also referred to the judgment of the High Court of Bombay, in the case of ***Indiabulls Properties P. Ltd. (supra),*** wherein the Bombay High Court, in paragraph 59, has stated as under:

> *"59. I am unable to see how Claim 3, for licence fees for the remainder of the lock-in period, couched in the manner it is*

> *in the contract, can be said to be one for damages of any kind. Treasure World's liability arises not from clause 3.2, which makes no mention of any payment at all, but only says that there, is a lock-in period of 36 months during which Treasure World may not terminate. It arises under clause 13.2: should Treasure World, despite the interdiction of clause 3.2, terminate after that lock-in period commences but before it ends, it incurs an immediate liability to pay for the remainder of the 36 months term. This is a debt. It is payable eo instanti; debitum in praesenti and solvendum in praesenti."*

and on the basis of the afore-mentioned observation, it decided to hold that loss of rent being there, no further proof of loss was required.

123. I must also state, Mr. Puri had also relied upon the following judgments in support of his submissions that the Impugned Award being in contravention with the fundamental policy of Indian Law and also being vitiated by patent illegality appearing on the face of the Impugned Award, should be set aside:

(A) In support of his submission that the imposition of lockdown was an 'Act of God', Mr. Puri had relied upon the judgment of the Coordinate Bench of this Court in the case of ***Halliburton Offshore Services 1***. The said judgment was passed in a petition under Section 9 of the Act of 1996, unlike the present petition, which is a petition under Section 34 of the Act of 1996. In any case, in view of the conclusion drawn by the learned Arbitrator in the Impugned Award, the said judgment is clearly inapplicable / distinguishable.

(B) Mr. Puri had also relied upon the judgment in the case of ***Ibrahim Uddin & Anr. (supra)*** to contend that it is a settled proposition of law that a

decision of a case cannot be based on grounds outside the pleadings, i.e. in the absence of any pleadings the Court cannot make out a case not pleaded before it. The reliance placed by Mr. Puri is primarily in the context that respondent had not pleaded damages before the learned Arbitrator and as such the same could not have been granted to it. Suffice to state, the respondent had made a prayer for 'Balance Rent' for the remaining lock-in period from July 1, 2020 to September 30, 2021 which excludes the first twelve months of the lease period from October 1, 2018 to October 1, 2019. Moreover, reliance was also placed on ***Ssangyong Engineering and Construction Company Limited (supra)***, to contend that it is settled law that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. I am unable to agree with the submission of Mr. Puri as it is clear from the Impugned Award that the respondent had sought the rent for the balance lock-in period as a pre-estimate of loss, there is some basis for the learned Arbitrator to grant it. It cannot be stated as perverse findings. Hence, the said judgment is also clearly distinguishable.

(C) Similarly, he had relied upon the judgment in the case of ***M/s Greenhill Exports (P) Ltd. (supra)***, to contend that a sum ascertained by an aggrieved party, in the manner provided in the contract herein, i.e., the 'Balance Rent', does not convert a claim for damages into a claim for an ascertained sum due. In view of my conclusion above, the said judgment shall be distinguishable on facts.

(D) Reliance was also placed upon the judgment in the case of ***Raman Iron Foundry (supra),*** to contend that it is a settled law that when there is a breach of contract the only right which accrues to the person who complains of the breach is the right to sue for damages and not to claim any 'debt'. It was also his submission that the Supreme Court in the aforesaid case had also approved the view taken by the High Court of Bombay in the case of ***Iron and Hardware (India) Co. (supra),*** that a person who commits breach of contract does not incur any pecuniary liability to be construed as a debt. Suffice to state, the reasoning given by the learned Arbitrator is on an interpretation of the sub-lease deed that too by considering the plea raised by the petitioner herein. The view cannot be set to naught only on the ground that other view is possible.

(E) Reliance was also placed upon the judgments of the High Court of Bombay in the cases of ***B.E. Billimoria & Company Limited (supra)*** and ***Bhanumati Jaisukhbhai Bhuta (supra),*** to contend that it is settled law that the respondent cannot supplement the reasons given by the learned Aritrator by relying on pleadings and documents which have not been considered by the learned Arbitrator, as it was Mr. Puri's case that counsel for the respondent could not have urged before this Court during the hearing that the 'Balance Rent' represents the genuine pre-estimate of loss since the petitioner enjoyed a rent free period of twelve months from the date of commencement of the sub-lease deed, as the learned Arbitrator in the Impugned Award does not hold the 'Balance Rent' to be a genuine pre-estimate of loss based on rent free period of twelve months. The reliance is misplaced in the facts of this case. In any case, the plea of M. Puri, can

have no bearing on the final conclusion arrived at by the learned Arbitrator on an interpretation of the Clause in the sub-lease deed.

(F) Mr. Puri has also relied upon the judgment ***Jute Corporation of India Ltd.(supra), Smart works Co-working Spaces Private Limited (supra)*** and ***Adidas India Marketing Private Limited (supra),*** to contend that the respondent was required to mitigate the damages for which the claim could be made. Suffice to state, these judgments are distinguishable on facts in view of the above conclusion of the learned Arbitrator in the facts of this case.

(G) In so far as the judgment in the case of ***Soril Infra Resources Limited (supra)*** is concerned, though Mr. Puri had strenuously argued that it is also a well-settled principle of law that only reasonable compensation can be awarded. The liquidated damages or the amount fixed in the contract for breach of contract is the ceiling and not the actual amount which a party complaining of breach becomes automatically entitled. It is only a reasonable compensation that is to be awarded which should not exceed the amount so stated and the Courts should consider the following factors while determining reasonable compensation in lock-in period clauses: (i) time which may be reasonably taken to find a new tenant while factoring in the time required to carry out repairs (ii) cost incurred in advertising the property for finding a new tenant (iii) offering of any rent-free period, if any. Similarly, reliance was also placed upon the judgment of the High Court of Calcutta in the case of ***Jute Corporation of India Ltd. (supra)***, to contend that the lease rent cannot be taken as the only factor in calculating damages and reasonable letting out value of the property for the unexpired

period would be a factor for calculating damages as the property may not be let out at the existing rent. Moreover, reliance was also placed by Mr. Puri on the judgment of the NCLT, Cuttack Bench in the case of ***Smartworks Coworking Spaces Private Limited (supra)***, wherein it was held that when a petitioner claims rent for a lock-in period, it has to be decided by a civil court and it was reiterated that in case of breach of agreement, the party complaining of breach merely gets a right to sue for damages. Reliance was also placed upon the judgment of the Supreme Court in the case of ***Kailash Nath Associates (supra),*** to contend that the learned Arbitrator has failed to consider Section 74 of the Indian Contract Act, 1872 and the principles applicable for the award of damages for breach of contract and moreover the learned Arbitrator has acted contrary to the settled law on the award of liquidated damages including the principles laid down by the apex court in the aforementioned case. In this regard, it must be stated, in view of the latest position of law, more specifically in the context of arbitration law and more specifically considering the scope of interference under Section 34 of the Act of 1996, the said judgments are also distinguishable on facts.

(H) It had also been submitted by Mr. Puri by relying upon the judgment in the case of ***Dyna Technologies Private Limited (supra)*** that levy of GST on the awarded rent for the balance lock-in period is in contravention of the fundamental policy of Indian law since the Central Goods and Services Tax Act, 2017, cannot be made applicable in the absence of offering of any goods or services. Suffice to state, the respondent herein had claimed GST in the statement of claim filed before the learned Arbitrator. It is also noted

that the respondent has paid GST on the rent @ 18% as is clear from the document appended at page 276 of the respondent's documents.

124. At this stage, I must refer to the latest judgment of the Supreme Court on the scope of judicial review in the context of Section 34 of the Act of 1996, in the case of ***Delhi Airport Metro Express Private Limited (supra)***, wherein the Supreme Court has, in paragraphs 28 to 32, held as under:-

> *"28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.*
>
> ***29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate***

evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General

Electric Co., 1994 Supp (1) SCC 644] . In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]

32. In light of the principles elucidated herein for interference with an arbitral award by a court in exercise of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11-5-2017."

(emphasis supplied)

125. Similarly, the Supreme Court in the case of ***South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., (2020) 5 SCC 164***, has in paragraphs 12 and 13 held as under:

"12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts.* ***We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.*** *Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.* ***The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."***
>
> *(emphasis supplied)*

13. ***It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning.*** *This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p. 12, para 25)*

> *"25.* ***Moreover, umpteen number of judgments of this Court have categorically held that the Courts should***

> ***not interfere with an award merely because an alternative view on facts and interpretation of contract exists.*** *The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."*
>
> *(emphasis supplied)*

126. The Supreme Court has also in the case of ***UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116***, in paragraphs 18 and 19, held as under:

> *"18.* ***It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other****. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)*
>
> > *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere*

with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

19. ***In Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552] , adverting to the previous decisions of this Court in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] , wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground,*** *it has been held thus : (Parsa Kente Collieries case [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552] , SCC pp. 244-45, para 9)*

"9.1. ***… It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a***

trained legal mind would not be held to be invalid on this score.

9.2. Similar is the view taken by this Court in NHAI v. ITD Cementation India Ltd. [NHAI v. ITD Cementation India Ltd., (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716] , SCC para 25 and SAIL v. Gupta Brother Steel Tubes Ltd. [SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] , SCC para 29."

(emphasis supplied)

127. In view of my above discussion, the Impugned Award of the learned Arbitrator does not call for any interference.

128. The petition is dismissed. No costs.

I.A. 10459/2022

Dismissed as infructuous.

V. KAMESWAR RAO, J

MAY 29, 2023*/aky*