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

ARBITRATION PETITION NO. 1752 OF 2015

Board of Control for Cricket in India,
a Society registered under the Tamil Nadu Societies Registration Act, 1975 and having its head office at Cricket Centre, Wankhede Stadium, Mumbai – 400 020. **...Petitioner**

Versus

Kochi Cricket Private Limited,
a Company incorporated under the Companies Act, 1956 and having its registered office at 504, Churchgate Chambers, 5th Floor, 57, New Marine Lines, Mumbai – 400 020. **...Respondent**

WITH
ARBITRATION PETITION NO. 1753 OF 2015

Board of Control for Cricket in India,
a Society registered under the Tamil Nadu Societies Registration Act, 1975 and having its head office at Cricket Centre, Wankhede Stadium, Mumbai – 400 020. **...Petitioner**

Versus

1. **M/s. Rendezvour Sports World**,
   an unincorporated integrated joint venture carrying on business at : B/53, Indus House, Opp. Monginis Cage Factory, Andheri (W), Mumbai – 400 053, through its authorized representative Mr. Chintan Vora.

2. **M/s. Anchor Earth Pvt. Ltd.**,
registered office at : 33 Hughes,
N. S. Patkar Marg, Opp. Prempuri
Ashram, Grant Road (W),
Mumbai – 400 007.

3. **M/s. Parinee Developers and Properties Pvt. Ltd.**, registered office at : Smag House, 1st Floor, Opp. Darshana Apartment, Sarojini Road Extn., Vile Parle (W), Mumbai – 400 056.

4. **M/s. Anand Shyam Estate Development Pvt. Ltd.**, registered office at : 1, Sun Villa, Peppermint Compound, Lamington Road, Mumbai – 400 004.

5. **M/s. Rendezvour Sports World Pvt. Ltd.**,
registered office at : Pushp Anthrolikar
Nagar No. 2, Solapur – 413 003.

6. **Mr. Vivek Venugopal**,
residing at : Unit 1-B No. 9, Haris Road,
Denson Town, Mangalore – 46.

7. **M/s. Filmwaves Combine Pvt. Ltd.**,
registered office at : 7th Floor,
Mehta Mehal, Opera House,
Mumbai – 400 004. **…Respondents**

Mr. Rafiq A. Dada, Senior Advocate and Mr. T. N. Subramanian, Senior Advocate a/w Mr. Aditya Mehta, Ms. Shivani Garg, Mr. Agneya Gopinath and Mr. Dhruv Chhajed i/b Cyril Amarchand Mangaldas, Advocates for the Petitioner in ARBP/1752/2015.

Mr. T. N. Subramanian, Senior Advocate a/w Mr. Aditya Mehta, Ms. Shivani Garg, Mr. Agneya Gopinath and Mr. Dhruv Chhajed i/b Cyril Amarchand Mangaldas, Advocates for the Petitioner in ARBP/1753/2015.

Mr. Vikram Nankani, Senior Advocate a/w Mr. Sajal Yadav, Mr. Rohan Rajadhyaksh, Mr. Sumeet Nankani, Mr. Anukula Seth, Mr. Aayushya

Geruja and Ms. Vineetha Khandelwal i/b Mr. Gurdeep Singh Sachar, Advocates for Respondent in ARBP/1752/2015.

Mr. Vikram Nankani, Senior Advocate a/w Mr. Sumit Nankani and Mr. Rohan Rajadhyaksh i/b Ms. Nipa S. Gupte, Advocates for Respondent Nos. 1, 2, 3, 5 and 6 in ARBP/1753/2015.

CORAM : R. I. CHAGLA, J.
RESERVED ON : 12th November 2024.
PRONOUNCED ON : 17th June 2025.

JUDGEMENT :

1. By Arbitration Petition No. 1752 of 2015, the Award dated 22nd June 2015 has been assailed (Arbitration Petition No. 1752 of 2015 of Kochi Cricket Private Limited is for convenience referred to as "KCPL's Petition"). By Arbitration Petition No. 1753 of 2015, the separate Award having the same date i.e. 22nd June 2015 has been assailed (Arbitration Petition No. 1753 of 2015 of M/s. Rendezvour Sports World is for convenience referred to as "RSW's Petition").

2. The Award assailed in KCPL's Petition pertains to disputes emanating out of Franchise Agreement dated 12th March 2011 between KCPL and Board of Control for Cricket in India ("BCCI"), whereas the Award assailed in RSW's Petition pertains to disputes emanating out of Franchise Agreement dated 11th April 2010 between RSW and BCCI.

3. In view of there being commonality of facts and intrinsical linkage of both KCPL and RSW references, the disputes under both, KCPL's Franchise Agreement ("KCPL-FA") and RSW's Franchise Agreement ("RSW-FA") came to be consolidated and adjudicated upon by the same Tribunal, by mutual consent of parties.

4. A brief background of facts is necessary and which are as under :-

i. BCCI in the year 2008 issued Invitation to Tender (referred to as "ITT") for the initial eight franchises, which would comprise the Indian Premier League ("IPL").

ii. BCCI issued Operational Rules for the IPL Season 2010 on 26th February 2010.

iii. BCCI issued an Invitation to Tender (referred to as "ITT") on 9th March 2010, inviting bids for upto two more franchises.

iv. RSW was declared the successful bidder for IPL franchise to be based in Kochi and entered into an Unincorporated Integrated Joint Venture Agreement ("UJV Agreement") on 17th March 2010.

v. BCCI issued Operational Rules for the IPL Season 2011 on 18th March 2011.

vi. RSW furnished a bank guarantee in the sum of Rs. 153.34 crores ("RSW BG"), as contemplated by the ITT on 27th March 2010.

vii. BCCI and RSW entered into a Franchise Agreement on an interim basis, pending the incorporation of a joint venture company viz. the Respondent-KCPL that would take on the rights and obligations of the Kochi franchise as per the terms of the UJV Agreement on 11th April 2010. The RSW Agreement continued to govern the relationship between BCCI and the Kochi franchise till the final Franchise Agreement between BCCI and KCPL ("KCPL Agreement") was signed.

viii. BCCI addressed an e-mail dated 5th September 2010 to all the franchisees (including KCPL) informing them of the changed format for 2011 edition of the IPL, whereby the number of matches to be played in the season was reduced.

ix. The Kochi franchise began operating through KCPL on 27th November 2010.

x. KCPL addressed a letter to BCCI, *inter alia,* requesting for reduction in the franchise fees on 10th January 2011.

xi. KCPL addressed a letter dated 7th February 2011 to BCCI, *inter alia*, stating that they be allowed to play at the leased Jawaharlal Nehru Stadium ("JN Stadium") till the Kerala Cricket Association makes an alternative site for the new stadium.

xii. BCCI addressed a letter dated 9th February 2011 to KCPL, *inter alia*, rejecting the request of KCPL for reduction in franchise fees on the ground that the same is contrary to the terms of RSW Agreement or the to be signed the KCPL Agreement.

xiii. KCPL addressed another letter dated 16th February 2011 to BCCI reiterating its request for reduction in franchise fees.

xiv. KCPL addressed a letter dated 28th February 2011 to BCCI once again, *inter alia*, requesting for a reduction of franchise fee.

xv. BCCI addressed a letter dated 3rd March 2011 to KCPL, *inter alia*, confirming to KCPL that its stand on the reduction of the franchise fee is the same as communicated vide letter dated 9th February 2011.

xvi. KCPL addressed a letter dated 9th March 2011 to BCCI urging BCCI to consider its request for reduction in franchise fee whilst expressly stating that subject to such consideration the issue of reduction of the franchise fee may be treated as closed. Vide the said letter, KCPL also informed BCCI that it was upgrading the JN Stadium.

xvii. BCCI and KCPL entered into KCPL Franchise Agreement on 12th March 2011 knowing that KCPL's request for reduction of franchisee fee has already been rejected.

xviii. On 22nd March 2011, KCPL was required to deliver to BCCI a bank guarantee under the KCPL Agreement in the prescribed format and for a specified sum, as per the terms of KCPL Agreement.

xix. At a meeting dated 25th March 2011 of the Board of Directors, KCPL passed the necessary resolution for obtaining the requisite bank guarantee.

xx. On 27th March 2011, RSW was obligated to deliver a fresh bank guarantee as per the terms set out in the RSW Agreement.

xxi. From 22nd March 2011 onwards, the representatives of

RSW/KCPL kept on assuring BCCI that it was in the process of obtaining the requisite bank guarantee and would furnish the same as soon as possible.

xxii. Mr. Hemang Amin of BCCI addressed an e-mail dated 29th March 2011 to Mr. Saket Mehta of KCPL, *inter alia*, reminding that the requisite bank guarantee must be given.

xxiii. Mr. Saket Mehta of KCPL replied to the aforesaid e-mail of BCCI on 29th March 2011, *inter alia*, stating that the existing bank guarantee was valid for 18 months and that KCPL had already applied for extension.

xxiv. KCPL addressed a letter dated 2nd May 2011 to BCCI, *inter alia*, admitting that it was required to furnish the requisite bank guarantee whilst stating that KCPL was in the process of obtaining the said bank guarantee and the same will be furnished as soon as possible.

xxv. KCPL addressed a letter dated 1st July 2011 to BCCI, *inter alia*, admitting that some delay had occurred in furnishing the requisite bank guarantee and requesting that permission for the proposed transfer of Venugopal's shares in KCPL to another company

be granted at the earliest to enable KCPL to furnish the requisite bank guarantee.

xxvi. KCPL addressed a letter dated 17th September 2011, *inter alia*, stating that it would submit the requisite bank guarantee by 5.00 p.m. on 21st September 2011 without making any reference to extension of time.

xxvii. BCCI (through its advocates) addressed a letter dated 17th September 2011 to KCPL, *inter alia*, stating that as and by way of last opportunity KCPL/RSW is required to furnish the requisite bank guarantee on the same day.

xxviii. BCCI (through its advocates) addressed a letter dated 19th September 2011 to KCPL/RSW and terminated the KCPL Agreement/the RSW Agreement in light of KCPL/RSW's failure to deliver the requisite bank guarantee on or before 22nd March 2011/27th March 2011.

xxix. On 19th September 2011, BCCI encashed RSW BG.

xxx. KCPL addressed a letter dated 18th January 2012 to BCCI, *inter alia*, alleging that the termination of the KCPL Agreement by

BCCI was wrongful and invoked arbitration under the dispute resolution clause of the KCPL Agreement.

xxxi. RSW on 4th August 2012 invoked arbitration under the provisions of RSW-FA. During the course of arbitral proceedings, BCCI has filed an Application under Section 16 of the Arbitration Act, challenging the jurisdiction of learned Arbitrator to which Respondent Nos. 1, 3, 5 & 6 filed the joint reply. Respondent No. 4 also subsequently filed its reply by adopting the contents of the Section 16 reply filed on behalf of Respondent Nos. 1, 3, 5 & 6. In the Section 16 Application, the learned Arbitrator passed an order dated 17th July 2015, *inter alia*, rejecting BCCI's Section 16 Application. The Section 16 order has also been challenged by BCCI in RSW's Petition.

xxxii. In KCPL Arbitration, the learned Arbitrator passed an Award on 22nd June 2015, *inter alia*, dismissing BCCI's counter-claim, and directing BCCI to pay to KCPL (i) Rs. 384,83,71,842/-; (ii) interest on the said amount at 18% from 19th September 2011 till the date of the Award; (iii) Rs. 72,00,000/- by way of arbitration costs; and (iv) further interest at 18% on the awarded amount from the date of Award to the date of its realization (the "KCPL Award").

xxxiii. In RSW Arbitration, the learned Arbitrator passed an Award ("the RSW Award") on the same date, i.e., 22nd June 2015, wherein the learned Arbitrator allowed RSW's claim to the extent of "…….; return of the amount of BG, which has been held to be wrongful invoked and encashed by the BCCI…..". BCCI was directed to pay to RSW an amount of INR 1,53,34,00,000/- together with interest thereon at 18% from the date of BCCI's wrongful termination of KCPL-FA until the date of the KCPL Award.

xxxiv. BCCI challenged the KCPL Award as well as the RSW Award on 16th September 2015 and filed Arbitration Petition Nos. 1752 of 2015 and 1753 of 2015 under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court.

xxxv. KCPL filed its Affidavit in Reply on 21st June 2016 in KCPL's Petition.

xxxvi. BCCI filed its Affidavit in Rejoinder on 6th August 2016 to the Reply filed by KCPL in KCPL's Petition.

xxxvii. BCCI filed Notice of Motion No. 531 of 2018 in KCPL's Petition on 16th March 2018, seeking stay of the KCPL Award.

xxxviii. This Court by an order dated 13th April 2018 granted unconditional stay of the KCPL Award.

xxxix. KCPL filed SLP (C) No. 11468 of 2018 before the Supreme Court on 27th April 2018, challenging the order dated 13th April 2018 granting unconditional stay of the KCPL Award.

xl. The Supreme Court modified the order dated 13th April 2018 passed by this Court on 11th May 2018 to the effect of directing BCCI to deposit a sum of Rs. 100,00,00,000/- in this Court, within two months. This Court by separate order dated 13th April 2018 in the RSW Petition passed conditional order of stay of the RSW Award on the condition that BCCI deposited 50% of the awarded sum with interest upto the date of deposit within a period of 8 weeks from the date of said order. BCCI was permitted to deposit the respective balance 50% with interest upto the date of deposit with the Prothonotary and Senior Master, Bombay High Court, which was to be kept alive for the period of 2 years and from that date after obtaining orders of this Court. It was made clear in the event conditions imposed by this Court for grant of stay are not complied with, the order granted stay shall stand vacated without further reference to the Court. RSW was permitted to withdraw 50%

amount deposited upon furnishing BG for a period of 2 years and which was to include interest at the rate of 10%.

xli. BCCI deposited a sum of Rs. 100,00,00,000/- with the learned Prothonotary and Senior Master, Bombay High Court on 10th July 2018, by way of a demand draft.

5. Mr. Rafiq A. Dada, learned Senior Counsel appearing on behalf of BCCI in KCPL's Petition has submitted that KCPL's Petition is governed by Section 34 of the Arbitration Act as it stood on the date of its filing, i.e., 16th September 2015, i.e., prior to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. He has placed reliance upon the decision of Supreme Court in "*Upendra Kantilal Thanawala v. Shreeram Builders*"[1].

6. Mr. Dada has submitted that the scope of interference under Section 34 of the Arbitration Act is well settled. An Award rendered contrary to the terms of contract or based on no evidence is patently illegal and perverse and is open to interference by the Court under Section 34 of the Arbitration Act.

1 2024 SCC OnLine Bom 730 @ Paragraph 90.

7. Mr. Dada has placed reliance upon the following decisions :-

i. ***Associate Builders v. Delhi Development Authority***[2];

ii. ***Rashtriya Chemicals and Fertilizers Limited v. Chowgule Brothers and Ors.***[3];

iii. ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation***[4];

iv. ***Rajuram Sawaji Purohit v. The Shandar Interior Private Ltd.***[5] and

v. ***Upendra Kantilal Thanawala v. Shreeram Builders*** (*supra*) at Paragraph 95.

8. Mr. Dada has submitted that the above position of law has been affirmed and applied by the Supreme Court in its decision in "***Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.***"[6], wherein the Supreme Court, *inter alia*, has held that an Award which (a) contains a finding based on no evidence; (b) ignores vital evidence in arriving at its decision; or (c) contains a construction of the contract that no fair or reasonable person would take including, if the interpretation was not even a possible view, is perverse and liable to be set aside under the head of 'patent

2 (2015) 3 SCC 49 @ Paragraphs 29-34, 36, 42.1, 42.3 and 44.
3 (2010) 1 SCC 86 @ Paragraphs 20-25.
4 (2006) 4 SCC 445 @ Paragraphs 13, 14 and 24.
5 2024 SCC OnLine Bom 583 @ Paragraph 59.
6 2024 SCC OnLine SC 522 @ Paragraphs 40, 47, 55, 65, 66 and 67.

illegality'.

9. Mr. Dada has submitted that the Impugned Award is contrary to the provisions of the substantive law of India, the provisions of the Arbitration Act, is *ex facie* perverse, contrary to and *de hors* the terms of KCPL Agreement, patently illegal, prejudicial to the rights of BCCI, contrary to the fundamental policy of Indian law, and against justice. He has submitted that the Impugned Award is vitiated by several errors apparent on the face of the record, which go to the root of the Impugned Award and is also opposed to public policy of India. The learned Arbitrator has (i) rendered findings, which are wholly unsupported by evidence; (ii) taken into account irrelevant considerations in arriving at findings; (iii) ignored vital evidence in arriving at findings; and (iv) disregarded the express terms of KCPL Agreement, from which his jurisdiction flowed. Accordingly, the Impugned Award is one that warrants interference by this Court under Section 34 of the Arbitration Act and is liable to be set aside.

10. Mr. Dada has submitted that another facet of Section 34 of the Arbitration Act must be borne in mind, namely, that the parties are bound by their stance taken in the arbitration proceedings, and

cannot detract from the same, as has been sought to be done by KCPL during the course of the final arguments. He has submitted that it is well settled, that a party who has succeeded before an Arbitral Tribunal cannot be permitted to supplant those reasons in support of the conclusion drawn by the Arbitrator/Arbitral Tribunal, as has sought to be done by KCPL during the course of the final arguments. He has in this context placed reliance upon the decision of this Court in "***Bhanumati Jaisukhbhai Bhuta v. Ivory Properties & Hotels Private Limited and Anr.***"[7]. He has submitted that in view thereof, this Court wholly disregard KCPL's inconsistent and conflicting contentions and reasons sought to be provided to support the learned Arbitrator's finding that find no mention in the Impugned Award. He has submitted that the Award must be upheld or set aside, basis only the reasons and rationale contained therein.

11. Mr. Dada has submitted that the Impugned Award, in a nutshell, is intrinsically flawed, insofar as it takes into account numerous extraneous factors, irrelevant considerations, and mere perceptions, rather than the terms of the binding contract, the material on record, and the detailed evidence led in relation to the

7 2020 SCC OnLine Bom 157, Paragraph 171.

issues framed. He has submitted that while deciding the initial core issues, viz. the fundamental breaches, the learned Arbitrator has unfortunately given a go-by to the terms of the contract(s) between the parties, and has laid emphasis on several irrelevant factors, which is contrary to settled legal principles.

12. Mr. Dada has submitted that while adjudicating on each of these breaches, the learned Arbitrator has ruled against BCCI on several grounds, which grounds may be easily neutralised basis the explicit terms of the contract, and the evidence on record, thereby rendering the Impugned Award liable to being set aside under Section 34 of the Arbitration Act. He has submitted that thereafter, with regard to the issue(s) pertaining to the furnishing of the bank guarantee and the extension of time in relation thereto, the learned Arbitrator has proceeded on an unsustainable and incorrect legal basis *qua* basic and elementary legal principles such as waiver and forbearance to sue, thereby causing the very basis of such findings to warrant interference of this Court under Section 34 of the Arbitration Act, having ignored the key terms of the contract between the parties. He has submitted that while deciding the reliefs granted *qua* damages, the learned Arbitrator appears to have granted the same in

the teeth of settled legal principles, as also, in a manner which is contrary to KCPL's own pleadings, thereby resulting in the unjust enrichment, on account of which the Impugned Award ought to be set aside.

13. Mr. Dada has submitted that the learned Arbitrator's findings on the 'Lalit Modi Issue' are contrary to substantive law of India and the evidence on record. He has submitted that with regard to the Lalit Modi Issue, the tweets in question were made prior to the signing of the KCPL Agreement, i.e., on 11th April 2010. He has submitted that therefore, KCPL is now estopped from raising the aforesaid allegation after having played in the 2011 Season of IPL and signed the KCPL Agreement, which fact the Arbitrator has curiously failed to appreciate.

14. Mr. Dada has made submissions with regard to the Lalit Modi Issue as well as referring to the finding of learned Arbitrator on this issue. He has submitted that the finding of learned Arbitrator that BCCI is bound by the consequences flowing from the tweets made by Mr. Lalit Modi on the social networking website 'Twitter' is perverse, because it is neither based on any sound legal principle nor

on any fact or evidence. The tweets made by Mr. Lalit Modi were in his personal capacity, and there is no evidence whatsoever to even remotely suggest that Mr. Lalit Modi made those tweets in the course of his duties as the Chairman of the Governing Council of the IPL ("IPL Governing Council"). He has submitted that in absence of such evidence, the learned Arbitrator's finding that BCCI is bound by the consequences flowing from the tweets made by Mr. Lalit Modi is patently illegal/erroneous.

15. Mr. Dada has submitted that the learned Arbitrator's finding that the actions of Mr. Lalit Modi binds BCCI, is contrary to law. He has relied upon Section 237 of the Indian Contract Act, 1872 ("Contract Act"), which provides that only if BCCI has, by its words or conduct, induced third parties to believe that tweeting was within the scope of Mr. Lalit Modi's authority, would BCCI be bound by the acts of Mr. Lalit Modi. In the absence of any evidence whatsoever in this regard, the learned Arbitrator's reliance on Section 237 of the Contract Act is perverse and cannot be sustained.

16. Mr. Dada has submitted that in any event, no evidence has been led by KCPL to show any actual loss, harm or prejudice, if

any suffered by it on account of tweet made by Mr. Lalit Modi. On the contrary, the evidence on record shows that despite the tweets made by Mr. Lalit Modi, KCPL was able to procure 'star players' and also various sponsors. Further the representatives of RSW (the predecessor of KCPL) were satisfied with the actions taken by BCCI against Mr. Lalit Modi and even though the tweets were made by Mr. Lalit Modi in April 2010, KCPL raised the issue for the first time only by way of its letter dated 18th January, 2012 ("Notice of Arbitration"), i.e. around four months after BCCI had terminated the KCPL Agreement, which shows that the same was *mala fide* and clearly an afterthought.

17. Mr. Dada has submitted that it is KCPL's case in its arguments in Reply that it has not claimed any damages in relation to this purported breach and this issue is not a fundamental or repudiatory breach, but a mere incident or event, that occurred in the parallel, which is a new stand, taken during the course of its oral arguments in Reply. He has submitted that in view of KCPL's new stand in arguments, the learned Arbitrator's finding on this issue would now be redundant.

18. Mr. Dada has then dealt with the findings of learned Arbitrator on the Stadium issues. He has submitted that the findings of the learned Arbitrator on the Stadium issues are perverse as the same are not supported by any evidence and are in teeth of the terms of KCPL Agreement. He has submitted that the issues pertaining to the stadium pre-date the signing of KCPL Agreement on 12th March 2011, and therefore, cannot, for any stateable reason, amount to a breach thereof.

19. Mr. Dada has submitted that the learned Arbitrator's finding that the non-availability of a brand-new stadium at Kochi was a breach on the part of BCCI is *ex-facie* materially contrary to the terms of governing contracts/documents.

20. Mr. Dada has placed reliance on the Clause 1.1 of KCPL Agreement. He has submitted that the definition of 'Stadium' expressly includes an alternative stadium at which the team may play its home matches. He has also placed reliance on the Clause 2.1(b) of KCPL Agreement, by which BCCI reserved its right to provide an alternative stadium from the one named in the KCPL Agreement if the same was "unavailable for any reason" and/or BCCI was

unwilling to use it for any reason, or "unable to provide it".

21. Mr. Dada has also placed reliance on the Clause 3(b) of Schedule 2 of KCPL Agreement, by which KCPL agreed to stage its home matches at such alternative stadium provided by BCCI if the one named in KCPL Agreement was "unavailable for any reason", and had acknowledged that if such other stadium was unacceptable (with KCPL acting reasonably in this regard) then it may play each home match at the stadium used by the opposing team.

22. Mr. Dada has also placed reliance on the Clauses 3.8 and 9.1(b) of ITT read with Schedule 5 thereof. He has submitted that though said provisions make it clear that the bidder had the right to choose any of the stadiums mentioned in Schedule 5, the first of which was the Motera Stadium at Ahmedabad ("Ahmedabad Stadium"). Thus, even when a number of stadia already constructed were available, including the Ahmedabad Stadium, KCPL, by its own volition, chose the stadium at Kochi, despite being aware of the fact that it was under the caption 'stadia under construction', and without conducting any inquiry as to the state of the stadium.

23. Mr. Dada has also placed reliance on the Clause 11.1 of the ITT, wherein it is stated that "Each Bidder and Recipient of this ITT shall be responsible for verifying the accuracy of all information contained in this ITT and for making all necessary enquiries prior to the submission of its Bid."

24. Mr. Dada has submitted that the Impugned Award manifestly ignores that the parties were aware that the stadium chosen by KCPL was under construction. He has submitted that at the very least, in March 2011, the parties were aware that the stadium chosen by KCPL was not going to be ready for the 2011 Season of IPL, which commenced on 8th April 2011.

25. Mr. Dada has submitted that it is for this reason that the KCPL Agreement sets out the exact process to be followed in the event the said stadium was unavailable for any reason. In such circumstance, BCCI had the right to provide an alternate stadium, and if such stadium was unacceptable to KCPL, with KCPL acting reasonably in this regard, KCPL could, with BCCI's prior written approval, play their home matches at the stadium used by the opposing team for such match. In view of the KCPL Agreement

providing for the process to be adopted in the event the new stadium was unavailable, which process was followed by BCCI, it was not open for the learned Arbitrator to hold that the "non-availability of a brand new stadium [at] Kochi was a breach" that goes "to the root of the matter". Therefore, the finding of the learned Arbitrator is wholly contrary to the express provisions of KCPL Agreement, and hence, cannot be sustained.

26. Mr. Dada has submitted that the finding of the learned Arbitrator as to BCCI being dogmatically determined to push KCPL to the JN Stadium, which added to the gravity of the fundamental breach is perverse, as it is contrary to the evidence on record. KCPL vide a letter dated 7th February 2011 had itself requested that they be allowed to play at JN Stadium, till Kerala Cricket Association made an alternative site for the new stadium. This letter has, in fact, not even been adverted to, or considered by the learned Arbitrator, thereby displaying that relevant and material evidence on record has been ignored.

27. Mr. Dada has submitted that BCCI had vide its letter dated 3rd March 2011 accepted KCPL's aforesaid request and stated

that "your franchise can play in the Jawaharlal Nehru Stadium until the new stadium is ready in Kochi".

28. Mr. Dada has made submissions with regard to the suitability of JN Stadium as well as placing reliance on the evidence in support thereof. He has submitted that the learned Arbitrator has ignored the contemporaneous evidence on record that the representatives of KCPL had visited JN Stadium to check its suitability for hosting cricket matches. News reports in several credible newspapers quote Mr. Venugopal, that the representatives of KCPL were happy with the stadium and would ensure that at least 7 home matches were played there. Thus the finding of the learned Arbitrator that the JN Stadium and Holkar Stadium did not satisfy the test of being 'alternatives', are not supported by any basis or evidence, credible or otherwise.

29. Mr. Dada has submitted that KCPL entered into the its Agreement with full knowledge and understanding that BCCI has rejected its requests and grievances in relation to the Stadium, which were not in accordance with the terms of KCPL Agreement. He has submitted that in view thereof, the question of any breach on the part

of BCCI does not arise at all, and the grievances sought to be made by KCPL are nothing but an afterthought, which the learned Arbitrator has failed to consider. He has placed reliance upon Clauses 5.1 and 6.1 of the ITT and submitted that an Award rendered contrary to the terms of the contract or based on no evidence is patently illegal and perverse and is open to interference by the Court under Section 34 of the Arbitration Act.

30. Mr. Dada has submitted that KCPL has sought to contend that the Stadium issue is the reason as to why the learned Arbitrator has held that the deadline of March 2011 for furnishing the bank guarantee was given a go-by. This is contrary to the stand taken by KCPL in its written submissions during the arbitration proceedings, where the Stadium issue was considered as a fundamental breach on part of BCCI. In view of the said pleadings, the learned Arbitrator has held the same to be a breach on the part of BCCI going to the root of the matter.

31. Mr. Dada has submitted that the findings of the learned Arbitrator on the issues pertaining to reduction in number of matches, are perverse as it contrary to the terms of KCPL Agreement,

ITT and Operational Rules.

32. Mr. Dada has submitted that the issues pertaining to the reduction in number of matches for the 2011 IPL Season pre-date the signing of KCPL Agreement on 12th March 2011, and therefore, cannot, for any stateable reason, amount to a breach thereof.

33. Mr. Dada has placed reliance upon the Clause 13.1 of KCPL Agreement and, *inter alia*, has submitted that the KCPL Agreement and the IPL Regulations constituted the entire agreement between the parties in relation to the franchise and supersedes any negotiations or prior agreements in respect thereof. Further, in entering into the KCPL Agreement each party confirmed that it has not relied on any warranties or representations which are not expressly set out in the KCPL Agreement. He has placed reliance upon Clause 14.1 of KCPL Agreement and has submitted that under this Clause KCPL has, *inter alia*, acknowledged that all or any information of any kind relating to the operation of the franchise provided to KCPL, whether before the signing of KCPL Agreement (including without limitation in or related to the ITT), was provided on the basis that such information was for KCPL's guidance only and

would in no way be treated by KCPL as a warranty, representation or guarantee of kind, and that KCPL had not relied upon and would not rely upon any such information.

34. Mr. Dada has submitted that the learned Arbitrator's finding that BCCI had made an express representation that the format of the IPL would be on a home and away format, which guaranteed a certain number of matches to each franchise is also *ex facie* contrary to the express terms of the ITT and the Operational Rules for the 2010 IPL Season.

35. Mr. Dada has referred to the clauses of ITT and the Operational Rules for the 2010 IPL Season and submitted that from these clauses, it amply clear that BCCI was entitled to change the format of the IPL at its sole discretion. He has submitted that the learned Arbitrator's finding that by unilaterally reducing the number of matches played, BCCI had acted against the "letter and spirit" of the ITT and the KCPL Agreement, and thereby prejudiced the revenue model of KCPL is perverse, *inter alia*, because it is *ex facie* contrary to the express terms of KCPL Agreement.

36. Mr. Dada has submitted that KCPL's request for reduction in the franchise fee had been rejected by BCCI before signing of the KCPL Agreement. Being cognizant of this fact, KCPL still entered into the KCPL Agreement, and it cannot be allowed to now belatedly raise such allegations, as an afterthought.

37. Mr. Dada has submitted that the learned Arbitrator's finding on the issue pertaining to transfer of Mr. Vivek Venugopal's shares is perverse. He has submitted that the learned Arbitrator's finding, that BCCI's inaction on KCPL's prayer for approval of transfer of shares of Mr. Venugopal amounted to a failure on the part of BCCI to fulfill its obligations in the "commercial sense" is *ex facie* contrary to the Clause 11.2(a) of KCPL Agreement. Clause 11.2(a) of KCPL Agreement provides that KCPL's approval was only required if the transfer of shares amounted to a 'Change of Control', as defined in the KCPL Agreement. Mr. Venugopal held only 5% shares of KCPL and its transfer would not amount to change of control.

38. Mr. Dada has submitted that the findings by learned Arbitrator that the process of furnishing the bank guarantee was delayed on account of the pendency of Mr. Venugopal's transfer

request as a back to back counter-guarantee by Mr. Venugopal/Playon was needed, is perverse, since Clause 8.4 of KCPL Agreement imposes an unconditional obligation on KCPL to furnish the bank guarantee. He has submitted that the aforesaid finding is also contrary to the evidence on record. He has submitted that the said finding has been arrived in an arbitrary, capricious and whimsical manner. The said finding is not in consonance with the Wednesbury principle of reasonableness, and is perverse, and cannot be sustained. He has placed reliance upon "***Associate Builders v. Delhi Development Authority***"[8] in this context.

39. Mr. Dada has submitted that the learned Arbitrator's finding that the time for submission of bank guarantee was deemed to be extended, is contrary to the terms of KCPL Agreement. He has submitted that Clause 21.5 of KCPL Agreement stipulates "No variation of this Agreement will be effective unless it is in writing and signed by or on behalf of the parties." He has submitted that as per the terms of Clause 21.5, the terms of Clause 8.4 of KCPL Agreement cannot be amended unless they are in writing and signed by both the parties.

8 (2015)3 SCC 49 @ Paragraph 28.

40. Mr. Dada has submitted that the learned Arbitrator has held that even if the extension of the deadline for submission of the bank guarantee was not in writing and signed by both parties, does not make a difference in the eyes of law. He has submitted that the aforesaid finding clearly establishes that the learned Arbitrator has acted beyond the terms of the contract. In any event, it is a settled position of law that if the contract between the parties requires the amendment thereof to be in writing and signed by both parties, such a requirement is mandatory in nature and the terms of an agreement cannot be amended by virtue of conduct of the parties. He has in this context placed reliance upon "*Indiabulls Properties Pvt. Ltd. v. Treasure World Developers Pvt. Ltd.*"[9]; "*Tulips Hotels Pvt. Ltd. & Anr. v. Trade Wings Ltd. & Ors.*"[10] and "*M.M.T.C. Ltd. v. G. Premjee Trading P. Ltd.*"[11]

41. Mr. Dada has submitted that the learned Arbitrator's finding that BCCI's act of allowing KCPL to furnish the bank guarantee after the stipulated deadline constituted a waiver is perverse as it is based on erroneous considerations. He has placed

9 2014 SCC OnLine Bom 4768 @ Paragraph 18.
10 Civil Revision Application No. 7 of 2015 @ Paragraphs 50-51.
11 2010 SCC OnLine Del 397 @ Paragraph 18.

reliance upon Clause 21.8 of KCPL Agreement, which provides that "The failure to exercise a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of any other rights or remedies." He has submitted that waiver is consensual in nature and implies a meeting of the minds. It is a matter of mutual intention and does not depend on misrepresentation. He has placed reliance upon the decision of Supreme Court in "***P. Dasa Muni Reddy v. P. Appa Rao***"[12]. He has submitted that there has been no voluntary relinquishment of any right by BCCI.

42. Mr. Dada has submitted that the findings of the learned Arbitrator that (i) in view of BCCI's purported non-insistence for furnishing the bank guarantee, the time for furnishing the same stood extended; and (ii) the requirement under Clause 8.4 of KCPL Agreement was waived by BCCI; and (iii) KCPL's failure to furnish the bank guarantee within the time prescribed under Clause 8.4 did not entitle BCCI to terminate the KCPL Agreement, unless a fresh date was appointed by giving a reasonable notice to furnish the bank guarantee, and yet KCPL defaulted; are contrary to the express terms

12 (1974) 2 SCC 725 @ Paragraph 13.

of the contract. As a result, BCCI's gesture of showing leniency and not immediately terminating the KCPL Agreement by snatching at a breach is nothing but forbearance to sue as opposed to waiver on the part of BCCI.

43. Mr. Dada has submitted that the very fact that extensions were sought by KCPL indicates that it was never in a position to furnish the bank guarantee. Thus, a party that is itself in breach, cannot now seek to argue that time for performance of the contract is no longer sacrosanct. He has submitted that Clause 8.4 of KCPL Agreement deems the non-furnishing of the bank guarantee to be a fundamental breach of the agreement, on account of which the question of any waiver and/or extension does not arise.

44. Mr. Dada has submitted that it is a settled position of law that a party is not required to snatch at a breach and mere forbearance to sue does not amount to a waiver. He has submitted that it has been recognized that the injured party does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and discharge his obligations. He has placed reliance upon "***Metrogem Limited & Anr.***

V. Paul Corett & Anr."[13] and "***Bell Electric Ltd. v. Aweco Appliance Systems GnbH & Co KG***"[14] in this context. He has accordingly submitted that the findings of the learned Arbitrator are contrary to law and the KCPL Agreement, and therefore, perverse.

45. Mr. Dada has submitted that the evidence on record clearly indicates that it was possible for KCPL to either procure the requisite bank guarantee on 17th September 2011 itself or, at the very least, demonstrate that it had taken genuine steps to do so, i.e., displaying its readiness and willingness to furnish the bank guarantee. He has submitted that this is supported by KCPL's own contention during the course of oral arguments that furnishing of KCPL bank guarantee was a mere ministerial action on part of KCPL, as all approvals and necessary arrangements were in place. He has submitted that KCPL has failed to produce any material or evidence to demonstrate its attempts to procure the bank guarantee, which leads to be the incontrovertible conclusion that KCPL was not ready or willing to do so.

46. Mr. Dada has referred to the correspondence exchanged

13 2001 WL 825051 @ Pg. No. 8.

14 2002 EWHC 872 (QB) @ Paragraphs 32-43.

between KCPL and BCCI during the period between 22nd March 2011 and 17th September 2011 and has submitted that from this correspondence, it could only be interpreted to mean that BCCI continuously insisted on the furnishing of bank guarantee. The letter dated 17th September 2011 was a culmination of a significant amount of time that had already been given to KCPL. He has submitted that this aspect, however, has not been examined by the learned Arbitrator.

47. Mr. Dada has submitted that KCPL has argued that BCCI extended the time for furnishing the bank guarantee on account of the Purported Breaches of KCPL Agreement by BCCI. He has submitted that KCPL is precluded from relying upon these Purported Breaches to justify its admitted failure to furnish the bank guarantee.

48. Mr. Dada has submitted that KCPL has consistently contended that BCCI's termination of KCPL Agreement on 19th September 2011 was wrongful, and amounted to a repudiation of the said agreement. He has submitted that it is KCPL's own case that it was KCPL, who had validly terminated the KCPL Agreement vide the Notice of Arbitration, whereunder it accepted BCCI's repudiation. He

has placed reliance on the Statement of Claim, in particular Paragraphs 31 and 41 thereof, as well as Prayer Clause (ii). He has submitted that it is not open for KCPL to, at this stage and in contrary to its stance in the arbitral proceedings, contend that the KCPL Agreement came to end on 19th September 2011. The only logical corollary to the said submission would be that the KCPL Agreement remained alive in the interregnum, i.e., between 19th September 2011 and 18th January 2012.

49. Mr. Dada has submitted that the learned Arbitrator finds that KCPL was justified in accepting BCCI's repudiation of KCPL Agreement, thereby treating the agreement to have come to an end. He has in this context placed reliance on Paragraphs 10(a) and (b) of the impugned KCPL's Award.

50. Mr. Dada has submitted that there was not even a whisper between 19th September 2011 and 18th January 2012 or during the proceedings filed by RSW under Section 9 of the Arbitration Act before this Court, that RSW was ready or willing to furnish the bank guarantee. He has submitted that consequently, RSW would be entitled to damages only in the event RSW had

performed its obligations under the RSW Agreement, i.e., it had furnished the bank guarantee.

51. Mr. Dada has submitted that RSW has not demonstrated its readiness and willingness to furnish the bank guarantee. Further, RSW has not produced a shred of material or evidence to demonstrate its readiness and willingness to furnish the bank guarantee. Despite terming it a ministerial act, there is no explanation, cogent or otherwise, to justify why RSW did not furnish the bank guarantee between 22nd March 2011 to 17th September 2011.

52. Mr. Dada has submitted that KCPL was required to show it was always ready and willing to perform its contractual obligations, during such period. He has submitted that the legal position with regard to the above is clear. In order to sustain a claim for damages, a party is not only required to prove a breach by the counter-party, but must also show that they themselves were ready and willing to perform their part of the contract. He has placed reliance upon "***Ram Chandra Sharma v. Kesar Sugar Mills Limited,***

Bombay"[15]. He has submitted that KCPL's conduct evidences that RSW was at no time ready and willing to honour its obligation to provide the bank guarantee. It is settled law that the party claiming breach must be ready and willing to perform the contract. He has placed reliance upon the judgment of this Court in "***Arrow Engineering v. Punit Jitendra Chande***"[16].

53. Mr. Dada has submitted that BCCI was, in fact, amenable to granting a three day extension to KCPL for the furnishing of the bank guarantee, on the condition that KCPL would waive its legal right to seek legal recourse, if it failed to furnish the bank guarantee within the extended time. He has placed reliance upon the Affidavit in lieu of the Examination in Chief of Mr. Mukesh Patel, CW-3, in particular Paragraph 24 thereof. He has submitted that this further indicates KCPL's lack of readiness and willingness to furnish the bank guarantee. However, the learned Arbitrator has misconstrued this evidence and erroneously records it as "Mr. Shashank Manohar was agreeable to give an extension of 3 days conditional upon the Claimant giving up its legal rights to which obviously KCPL was not agreeable to do". He has submitted that imposition of such condition

15 (1953)2 SCC 52, Paragraphs 17, 22 and 23.

16 2024 SCC OnLine Bom 595 @ Paragraphs 164-166 and 168-169.

by BCCI was not onerous or prejudicial to the interests of RSW, should it have submitted the bank guarantee. Consequently, the learned Arbitrator did not evaluate the impact of grant of extensions by BCCI, while arriving at the conclusion that no reasonable time was granted by BCCI. He has submitted that it is, therefore, clear that the findings of the learned Arbitrator are perverse, and liable to be set aside.

54. Mr. Dada has submitted that non-furnishing of the bank guarantee was termed as a material irremediable breach of the RSW Agreement. Evidently, Clause 8.4 also does not require BCCI to demand a bank guarantee from RSW in terms thereof. Additionally, Clause 12.2 does not require BCCI to give any notice to KCPL prior to termination. KCPL's non-compliance with its obligation under the KCPL Agreement cannot be sought to be evaded for want of notice, which was not a requirement under the KCPL Agreement. Further, the insistence of such a notice would amount to re-writing the contract, which is impermissible in law.

55. Mr. Dada has submitted that the contention that the learned Arbitrator's Award of Damages was based solely on wrongful

termination of KCPL Agreement is contrary to KCPL's submissions before the learned Arbitrator, as KCPL's entire case before the learned Arbitrator was based on the Purported Breaches committed by BCCI. This was noted by the learned Arbitrator himself in Paragraph 7.6.1 of the Award. It is a well settled principle of law that a party who has succeeded before an Arbitral tribunal, cannot be permitted to supplant reasons in support of the conclusions drawn by the learned Arbitrator. He has placed reliance upon "***Bhanumati Jaisukhbhai Bhuta v. Ivory Properties & Hotels Private Limited and Anr.***"[17] in this context. He has submitted that notwithstanding the above submission, if there were no fundamental breaches on the part of BCCI, then there remains no justification whatsoever for KCPL not furnishing the bank guarantee by the stipulated date i.e., 22nd March 2011.

56. Mr. Dada has submitted that the Award of Damages by the learned Arbitrator cannot be sustained as being patently illegal and contrary to substantive law of India, fundamental policy of Indian law and principles of natural justice.

17 2020 SCC OnLine Bom 157, Paragraph 171.

57. Mr. Dada has submitted that the learned Arbitrator has awarded General Damages of INR 153,33,31,800 and Special Damages of INR 231,50,40,042. This is nothing but awarding to KCPL, damages on account of loss of profit (under the guise of general damages) as well as the purported wasted expenditure (under the guise of special damages), concurrently. He has referred to the relevant prayers in the Statement of Claim, namely, Clauses (iii) and (iv), wherein KCPL had itself prayed for damages on account of loss of profit, whilst in the alternative claiming damages on account of wasted expenditure, which shows that even KCPL was aware of the settled legal position, that both cannot be claimed together, but must be claimed in the alternative.

58. Mr. Dada has submitted that it has been well settled by the Supreme Court in "***Kanchan Udyog Limited v. United Spirits Limited***"[18] that an injured party has to elect/choose between claiming damages either on the basis of loss of profit (i.e. expectation loss) or on the basis of wasted expenditure (i.e. reliance loss) and cannot claim both, simultaneously. He has submitted that the Supreme Court has held that recovery for both expectation loss and reliance

18 (2017) 8 SCC 237 @ Paragraphs 30-33.

loss is not possible and can only be awarded in alternative, as it would result in a party being put in a better position than if the contract had been fully performed. He has placed reliance upon "***Cullinane v. British "Rema" Manufacturing Co. Ltd.***"[19] and "***Omak Maritime Ltd. v. Mamola Challenger Shipping Co. Ltd.***"[20].

59. Mr. Dada has submitted that the learned Arbitrator has proceeded to award INR 1,53,33,31,800/- as 'general damages' towards loss of profit whilst also awarding another INR 2,31,50,40,042/- as "special damages" towards wasted expenditure, which goes far beyond what KCPL had even prayed for.

60. Mr. Dada has submitted that in "***Upendra Kantilal Thanawala v. Shreeram Builders***" (*supra*), it has been held by this Court that if an Award, in addition to granting their primary claim, grants damages in lieu of the alternate claim of KCPL, such Award of Damages is contrary to the fundamental policy of Indian law.

61. Mr. Dada has submitted that without prejudice and in the alternate to the submission set out above, it is submitted that

19 (1954) 1 QB 292 @ Pg. Nos. 302, 305-306.
20 2011 Bus LR 212 @ Paragraphs 18-19, 25-33, 59 and 65.

even if KCPL's contention that the learned Arbitrator has granted "General Damages" and "Special Damages" is accepted, the same would amount to a violation of principles of natural justice and has resulted in miscarriage of justice. He has submitted that it is well settled that when there is no prayer for a particular relief, no pleadings/averments are made in support thereof, and when the counter-party has no opportunity to resist or oppose such a relief, a Court considering and then granting such a relief will lead to miscarriage of justice. He has relied upon "***Bachhaj Nahar v. Nilima Mandal***"[21]. In view thereof, he has submitted that the learned Arbitrator could not have awarded any amounts that were not prayed for by KCPL.

62. Mr. Dada has submitted that it is a *sine qua non* that special damages have to be specifically informed to the other side, at the time of entering into the contract, and if it is not done, special damages cannot be claimed in law. He has placed reliance upon "***N.K. Tomar v. Viraj Implex Ltd.***"[22].

63. Mr. Dada has submitted that the learned Arbitrator has

21 (2008) 17 SCC 491, Paragraphs 13, 22 and 23.
22 2012 SCC OnLine Del 5240, Paragraphs 18-19.

awarded loss of profits on an irrational and self-contradictory basis. He has submitted that it is well settled that computation of damages should not be whimsical and absurd and should be commensurate with the loss sustained. He has relied upon "***Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited and Another***"[23]. He has submitted that a claim for loss of profit should be supported by adequate evidence. He has placed reliance upon "***Unibros v. All India Radio 2023 SCC OnLine***"[24].

64. Mr. Dada has submitted that the learned Arbitrator disregarded the detailed expert evidence led by the parties, without providing any reasons, and instead chose to calculate "General Damages" on the 'rough and ready' method. The learned Arbitrator did not have the liberty to disregard the expert evidence and award General Damages in a whimsical manner.

65. Mr. Dada has submitted that the learned Arbitrator's basis of calculating "General Damages", i.e., the loss of profits, is self-contradictory. This can be seen from Paragraph 8.1.21 of the Impugned Award. The learned Arbitrator contradicts himself as at

23 (2015) 3 SCC 49 @ Paragraphs 16, 28 and 47.
24 SC 1366 @ Paragraphs 15-19.

first, he says that it would meet the end of justice if 25% of the franchise fee for 2 years is awarded and then goes on to award a sum equal to 50% of the franchise fee for 2 years. He has submitted that the grant of 50% is perverse as it is double of what the learned Arbitrator himself states will be an amount that will meet the end of justice. He has submitted that even if the aforesaid is viewed as a typographical error, it was open for KCPL to seek correction of the alleged typographical error. However, KCPL not having done so, is now precluded from belatedly making the argument that the same is a typographical mistake.

66. Mr. Dada has submitted that although the learned Arbitrator states that he does not see merit in KCPL's prayer for refund of franchise fee because KCPL participated in the matches for the 2011 Season of IPL and earned whatever benefit it could have earned, he nevertheless awards the Respondent the amount of INR 2,31,50,40,042/- as wasted expenditure, the major chunk of which comprises of the franchise fee paid by the Respondent of INR 1,53,33,31,800/-.

67. Mr. Dada has submitted that whilst awarding claim of

damages based on wasted expenditure, the learned Arbitrator was required to deduct therefrom, such amounts that were earned by KCPL through participation in the 2011 Season of IPL, which he did not do.

68. Mr. Dada has submitted that KCPL had admitted during the arbitral proceedings that if the amount of revenues earned by KCPL is deducted, the amount of wasted expenditure would stand reduced to INR 176,65,42,535.28/-.

69. Mr. Dada has submitted that additionally, an amount of INR 29,00,00,000/- paid by BCCI to KCPL towards central rights income as well as any other income earned by KCPL pursuant to the KCPL Agreement ought to have been deducted, in order to arrive at the amount of compensation, if any, payable on account of wasted expenditure.

70. Mr. Dada has submitted that the Award of INR 2,31,50,40,042/- as damages based on wasted expenditure has the effect of putting KCPL in a significantly better position that it would have been had the KCPL Agreement not been terminated.

71. Mr. Dada has submitted that Clause 20 of KCPL Agreement provides damages in excess of the limitation of liability clause in the KCPL Agreement. He has submitted that Clause 20 of KCPL Agreement, *inter alia*, limits the liability of BCCI to the sums receivable under Clause 8.1 in the year, which amounts to INR 1,53,33,31,800/-, and further prohibits the parties from claiming indirect loss or damages arising out of or in connection with KCPL Agreement. This has been accepted by the learned Arbitrator in Paragraph 8.2.2 of the Impugned Award as it has been concluded that Clause 20 of KCPL-FA would not apply if the breach be fundamental or repuditory.

72. Mr. Dada has submitted that the learned Arbitrator's reliance on the judgment of this Court in "***Maharashtra State Electricity Distribution Co. Ltd. v. DSL Enterprises Pvt. Ltd.***"[25] is misplaced because the said judgment only deals with the issue on, what is fundamental breach and whether it entitles the injured party to repudiate the contract, however the said precedent does not deal with the issue, whether the defaulting party's liability for fundamental breach can exceed the limitation of liability under the

25 2009 SCC OnLine Bom 413.

contract.

73. Mr. Dada has submitted that even under English law, the position is that a fundamental breach does not have the effect of preventing the defaulting party from relying on an exclusion/limitation clause in the contract. He has placed reliance upon "***Photo Production Ltd. v. Securicor Transport Ltd.***"[26]. He has submitted that in any event once it is established that no fundamental breach has been committed by BCCI, Clause 20 of KCPL Agreement would necessarily limit the damages awarded to the Respondent to INR 1,53,33,31,800/-.

74. Mr. Dada has submitted that the Award of Damages by the learned Arbitrator cannot be sustained as it is contrary to Clause 20 of KCPL Agreement. Respondent's argument that the learned Arbitrator split up the amount of INR 7000 million sought in Prayer Clause (iii) is a mere afterthought, adopted after the Order dated 13th April 2018 passed by this Court in the Section 36 Application filed by BCCI, and is a telling attempt by KCPL to belatedly supplant reasons to the Award, which is impermissible in law. He has placed reliance

26 (1980) 1 All ER 556 @ Pg. Nos. 287D-F, 288F-H, 289D-E, 294B-C, F, 295F, 298D-G.

upon "***Bhanumati Jaisukhbhai Bhuta v. Ivory Properties & Hotels Private Limited and Anr.***"[27] in this context.

75. Mr. Dada has submitted that (i) the Award of interest is contrary to the terms of the agreement; (ii) no basis for the Award of Costs has been provided; and (iii) BCCI's counter-claim has been rejected summarily. He has submitted that though Clause 21.11 of KCPL Agreement provides that "Interest shall be payable on all sums due in accordance with this Agreement at the annual rate of four per cent (4%) above the base lending rate from time to time of The State Bank of India from the date the payment becomes due until payment is received both before and after any judgment in respect of it", the learned Arbitrator has calculated interest at 4% above prime lending rate. This is *ex facie* contrary to Clause 21.11 of KCPL Agreement.

76. Mr. Dada has submitted that in awarding of costs of INR 72,00,000/-, the learned Arbitrator has neither provided any justification in relation thereto, nor has provided the manner/computation basis for which such amount was arrived at. He has submitted that the Award of Costs by the learned Arbitrator is

27 2020 SCC OnLine Bom 157, Paragraph 171.

perverse and unsustainable as it based on no evidence and unsupported by any reasons whatsoever.

77. Mr. Dada has submitted that the learned Arbitrator has dismissed the counter-claim of BCCI summarily, *inter alia*, on the basis of the learned Arbitrator's perverse finding that BCCI had itself committed breach of its obligations under the KCPL Agreement. He has submitted that the issue of counter-claim ought to have been considered on merits, in the absence of which the Impugned Award is vitiated.

78. Mr. Dada has submitted that the learned Arbitrator's Award is perverse, not in consonance with the well-established principles of judicial approach and unsustainable. He accordingly has submitted that the Impugned Award warrants interference by this Court under Section 34(2) of the Arbitration Act. He has submitted that on the grounds set forth in the Petition and elucidated hereinabove, the Impugned Award ought to be set aside.

79. Mr. T. N. Subramanian, learned senior Counsel appearing for RSW in the RSW Petition has supported the submissions of Mr.

Dada to the extent of the commonality of issues, which have been determined in the Impugned Awards.

80. Mr. Subramanian has submitted that the reference to Arbitration is invalid in view of Section 19(2)(a) of the Indian Partnership Act, 1932. He has submitted that on 4th August 2012, Respondent No. 1-RSW, on its letterhead, addressed the Notice Invoking Arbitration to BCCI, i.e., invoking arbitration under Clause 22.2 of the RSW Agreement. He has submitted that it is an admitted fact that Filmwaves Combing Pvt. Ltd. ("Filmwaves"), a constituent of the Respondent No. 1, did not authorise/agree/join Respondent No. 1 in the invocation of the arbitration proceedings. He has referred to Section 19(2)(a) of the Partnership Act, which provides that the "implied authority" of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration. He has submitted that in the absence of any usage, custom or trade (which does not exist), Respondent No. 1 could not have referred any dispute to arbitration on behalf of the entire consortium, without Filmwaves' express authorisation. Thus, pursuant to Section 19(2)(a) of the Partnership Act, the very invocation of arbitration proceedings vide the Notice Invoking Arbitration is defective. He has

submitted that such a defect goes to the root of the matter, cannot be cured by subsequent acts and hence, vitiates the Award as being patently illegal.

81. Mr. Subramanian has submitted that the crucial facts make it abundantly clear that Filmwaves (i) did not join the Respondent No. 1's reference to arbitration; and (ii) did not expressly authorize Respondent No. 1; and in fact, opted to pursue its claims against BCCI independently. Filmwaves filed its independent suit against BCCI. He has referred to those proceedings and has submitted that the suit was finally withdrawn on 20th December 2013, i.e., more than a year after the reference to arbitration in August 2012.

82. Mr. Subramanian has submitted that Filmwaves was impleaded as the Respondent No. 2 in the arbitral proceedings, on account of certain admitted differences between Filmwaves and other members of the consortium. He has referred to the pleadings in this context. He has submitted that Filmwaves was clearly not *ad idem* with the Respondent No. 1 regarding the invocation of arbitration against BCCI, and accordingly, BCCI filed the Section 16 Application.

BCCI, in the Section 16 Application, submitted that it had been misled into giving its consent for the reference of disputes to arbitration on account of willful and deliberate misrepresentation and/or suppression of material fact by the Respondent No. 1. The learned Arbitrator, vide the Section 16 Order, rejected BCCI's contentions, *inter alia,* on the ground that Filmwaves "*does not object to his non-joining in the reference, and he rather supports the Claimants*".

83. Mr. Subramanian has submitted that the learned Arbitrator's finding that Filmwaves did not object to their non-joining in the reference, is not based on material produced before the learned Arbitrator, as Filmwaves did not, in any correspondence during the arbitral proceedings or pleading therein, state that *it does not object to its non-joining in the reference*.

84. Mr. Subramanian has submitted that pursuant to Section 19(2)(a) of Partnership Act, the reference to/invocation of arbitration is bad in law, and thus warrants the setting aside of the resultant award passed in such proceedings. He has placed reliance upon "***Maharashtra State Electricity Distribution Company Limited v.***

Godrej and Boyce Manufacturing Company Limited"[28] and "***J.J.L.B. Engineers and Contractors v. Manmohan Harijinder & Associates & Anr.***"[29].

85. Mr. Subramanian has submitted that it is the contention of RSW that Filmwaves was a party to the arbitration agreement and hence agreed to refer the dispute to arbitration. He has submitted that Section 19(2)(a) of the Partnership Act which only applies where there is a valid arbitration agreement, requires an express authorization of all partners at the time of reference/submission of the dispute to arbitration, i.e., at the time of notice invoking arbitration, which was not present for Filmwaves.

86. Mr. Subramanian has relied upon the judgment of the Punjab and Haryana High Court in "***Supreme Builders v. State of Punjab & Anr., Arbitration Case No. 287 of 2016 (O&M)***"[30], which holds at Paragraph 5 that, subject to any usage or custom of trade to the contrary, "*the mere existence of a valid arbitration agreement between a firm and a third party does not entitle one or some of the*

28 2019 SCC OnLine Bom 3920, Paragraphs 68, 97-99, 106 and 109-110.
29 2000 SCC OnLine Bom 670, Paragraphs 6-15.
30 2017:PHHC:114697.

partners of the firm to submit the dispute to arbitration in accordance with the arbitration agreement". He has submitted that even in "***Maharashtra State Electricity Distribution Company Limited v. Godrej and Boyce Manufacturing Company Limited***" (*supra*), there was no dispute that the underlying contract contained an arbitration agreement which had been consented to by all partners. However, this Court still analysed whether all members had expressly authorised the joint venture to submit the dispute to arbitration, and upon finding none, set aside the Award.

87. Mr. Subramanian has submitted that in view thereof, Filmwaves merely having signed the RSW Agreement, which contained the arbitration clause, was insufficient to validate the submission of disputes between the Respondent No. 1 and BCCI to arbitration vide the Notice Invoking Arbitration.

88. Mr. Subramanian has submitted that the very invocation of the arbitration proceedings vide the Notice Invoking Arbitration is defective. He has submitted that such a defect goes to the root of the matter and vitiates the Award as being patently illegal.

89. Mr. Subramanian has referred to "***Sanganer Dal and Flour Mill v. F.C.I. and Others***"[31], which was cited on behalf of RSW. He has submitted that in the cited case, the Respondents had filed an Application under Section 20 of the Arbitration Act, 1940 before the District Court for the Court to refer the said dispute to arbitration. The Application had been filed by the Respondents and not by the partnership firm, where Mr. Satya Narain, one of the partners, had been expressly authorized to enter into the arbitration agreement. He has submitted that this decision is not applicable to the present Petition as Applications made under Sections 8 and 20 of the Arbitration Act, 1940, operate in completely different and distinct spheres. He has placed reliance upon "***Jatinder Nath v. Chopra Land Developers (P) Ltd.***"[32], wherein the Supreme Court has held that the difference between Section 8 and Section 20 shows that the reference flows from an agreement between the parties in the cases falling under Section 8. In a proceeding under Section 8, disputes are presented by the parties before the arbitrator, whereas in proceedings under Section 20, the disputes are referred by the Court.

90. Mr. Subramanian has submitted that the Impugned

31 (1992)1 SCC 145.

32 (2007)11 SCC 453, Paragraph 17.

Award having been passed in the arbitral proceedings commenced pursuant to the defective Notice Invoking Arbitration, and hence cannot be sustained and ought to be aside by this Court.

91. Mr. Subramanian has thereafter referred to the Preliminary Issue B, i.e., Respondent No. 1 and its constituents are not entitled to make any claims in view of the bar contained in Section 69(3) of the Partnership Act. This was raised by BCCI before the learned Arbitrator. He has submitted that as Respondent No. 1 was an unincorporated body and akin to an unregistered firm, the present reference to arbitration on its behalf vide the Notice Invoking Arbitration is invalid under Section 69(3) of the Partnership Act. Further, Respondent No. 1 is not entitled to make any claims in view of the bar contained in Section 69(3) of the Partnership Act. He has referred to this provision, which provides for the effect of non-registration. He has submitted that the learned Arbitrator in rejecting BCCI's preliminary objection, has rendered findings that are contrary to the judgements of Supreme Court in "***Jagdish Chander Gupta v. Kajaria Traders (India) Ltd.***"[33] and "***UP State Sugar Corporation v. Jain Construction***"[34]. He has submitted that the

33 1964 SCC OnLine SC 50, Pr. 5-10.
34 2004 7 SCC 332, Pr. 7.

arbitral proceedings cannot be maintainable at the instance of an unregistered firm, keeping with the mandatory provisions under Section 69 of the Partnership Act and the learned Arbitrator has thus erred in rejecting BCCI's Section 16 Application.

92. Mr. Subramanian has without prejudice to the above submissions, has submitted that the finding of learned Arbitrator that the KCPL Agreement replaced the RSW Agreement and from 12th March 2011 onwards, the rights and obligations were to be worked out between KCPL and BCCI, is wholly contrary to and in the teeth of Clause 13.1 and Clause 21.15 of KCPL Agreement. He has referred to Clause 21.15 of KCPL Agreement to submit that it is abundantly clear that the RSW Agreement shall cease to have effect only upon BCCI confirming in writing that (a) franchise fee being paid by KCPL in respect of 2011; and (b) the bank guarantee deliverable by KCPL by 22nd March 2011, being duly and properly delivered to BCCI. He has submitted that provision has been completely ignored by the learned Arbitrator.

93. Mr. Subramanian has submitted that, given that KCPL did not deliver the bank guarantee to BCCI, the RSW Agreement

continued to remain in force. Consequently, as per Clause 8.4 of the RSW Agreement, the Respondent No. 1 remained obligated to furnish a fresh bank guarantee to BCCI, on or before 27th March 2011. He has submitted that by merely forbearing to sue, i.e., BCCI not exercising its right or remedy under RSW and KCPL Agreements, does not constitute a waiver of any breaches or default by RSW and KCPL, in accordance with Clause 21.8 in both the RSW Agreement and the KCPL Agreement.

94. Mr. Subramanian has submitted that the learned Arbitrator's finding that RSW bank guarantee should have been returned once the franchise fee for 2011 was received by BCCI is wholly contrary to the terms of the contract. He has submitted that there is no inter-linkage between returning RSW bank guarantee and KCPL's obligation to pay the franchise fee. This finding is also contrary to Clause 21.15 of KCPL Agreement. This is also supported by KCPL's letter dated 2nd May, 2011 where it requests BCCI to return RSW bank guarantee on KCPL furnishing a bank guarantee. He has submitted that the learned Arbitrator's conclusion regarding the invocation of RSW bank guarantee being illegal and unauthorised is premised on the above flawed and incorrect reasons/inferences, and

a misreading of the terms of RSW Franchisee Agreement and ignoring the terms of KCPL Agreement, and hence, ought to be set aside.

95. Mr. Subramanian has submitted that in rendering a finding that the invocation of RSW bank guarantee is illegal and unauthorised is perverse and contrary to the terms of RSW Agreement and RSW bank guarantee. The learned Arbitrator has ignored Respondent No. 1's independent obligation to furnish the bank guarantee on or before 27th March 2011, with the failure to do so constituting an irremediable material breach of the RSW Agreement. Further, the finding that RSW bank guarantee could not have been invoked and encashed by BCCI proceeds on the erroneous finding that Respondent No. 1 cannot be said to be in default for not furnishing the bank guarantee for the 2012 IPL Season. He has submitted that the liability of BCCI to furnish a bank guarantee for each of the years of 2011-2019 (inclusive) would have been discharged only on the satisfaction of the conditions set out in Clause 21.15 of KCPL Agreement. He has referred to the RSW Section 9 Order. This interpretation of the KCPL Agreement and the RSW Agreement have been upheld by this Court in the RSW Section 9

Order. He has submitted that though the above order being an interim order rendering *prima facie* observations, is not binding on the learned Arbitrator, or even on this Court, the learned Arbitrator, ought to have at the very least, considered the said order in view of BCCI's submissions. This was clearly not done and no reasons have been provided in the Impugned Award in relation to this aspect.

96. Mr. Subramanian has submitted that RSW was under an obligation to furnish a bank guarantee on or before 27th March 2011, which admittedly it did not. BCCI was entitled to invoke RSW bank guarantee and keep the amount of INR 153,34,00,000/- towards its counterclaim amounting to INR 1,22,66,54,400/-. The learned Arbitrator has summarily dismissed BCCI's counterclaim stating that the KCPL Agreement would govern the rights and obligations of the parties, with effect from 12th March 2011 and therefore, this issue had become "virtually redundant". This finding is perverse and cannot be sustained as it is wholly contrary to Clause 21.15 of KCPL Agreement.

97. Mr. Subramanian has submitted that the learned Arbitrator's finding that encashment of RSW bank guarantee amounts

to unjust enrichment is contrary to terms of the RSW Agreement and hence perverse. The said finding is not supported by any reasons and at best is based on the patently illegal/perverse finding that the encashment was illegal and unauthorised.

98. Mr. Subramanian has submitted that Respondent No. 1 has erroneously attempted to rely on the latter half of Clause 21.15, to contend that the RSW Agreement was kept alive for the limited purpose of safeguarding BCCI from any breach by Respondent No. 1 of the RSW Agreement. He has submitted that the above cannot be countenanced in view of Respondent No. 1 not being permitted to raise this contention for the first time at the stage of Section 34 proceedings. Further, Respondent No. 1 is not permitted to make an attempt to supplant reasons, when the learned Arbitrator has arrived at his conclusions. Nowhere in the Impugned Award has the learned Arbitrator analysed Clause 21.15 of KCPL Agreement, let alone stated the purported purpose for the continued operation of the RSW Agreement.

99. Mr. Subramanian has submitted that it is not permissible for an Arbitrator or this Court, to add additional

obligations/requirements, which are not originally spelt out under the contract, as the same will amount to re-writing the same. In the same breath, it is submitted that the jurisdiction of the learned Arbitrator is limited only to the terms of the contract, and nothing more. He has submitted that it cannot be the case that BCCI reminding KCPL to furnish a bank guarantee amounted to giving a go-bye to the deadline for furnishing the bank guarantee, and not giving a reminder to the Respondent No. 1 amounts to a breach of its obligations.

100. Mr. Subramanian has supported the submissions of Mr. Dada on the damages and interest and costs awarded, being perverse and liable to be set aside.

101. Mr. Subramanian has submitted that the learned Arbitrator has failed to consider the counter-claim of BCCI and has rejected the counter-claim in a summary manner, which is bad in law. He has submitted that admittedly, KCPL/Respondent No. 1 never submitted the bank guarantee and accordingly an amount of INR 1,22,66,54,400/- remained due and payable by Respondent No. 1, in view of the remaining 8 installments of the franchise consideration

payable each year. The learned Arbitrator ignored the fact that BCCI was entitled to claim the said amount from the Respondent as the amount reflects the sum that BCCI would have received if RSW would not have committed an irremediable breach.

102. Mr. Subramanian has submitted that non-consideration of the Counter Claim goes to the root of the matter and makes the Impugned Award liable to be set aside. Mr. Subramanian has submitted that the Impugned Award warrants interference by this Court under Section 34(2) of the Arbitration Act. He has submitted that on the grounds set forth in the Petition and elucidated hereinabove, the Impugned Award ought to be set aside.

103. Mr. Vikram Nankani, learned senior Counsel appearing on behalf of KCPL and RSW in the above Petitions, has submitted that none of the grounds, which have been raised in the above Petitions, pass any muster under Section 34 of the Arbitration Act.

104. Mr. Nankani has submitted that the fundamental basis on which BCCI terminated KCPL-FA, as set out in BCCI's Termination Letter dated 19th September 2011, was on account of "…*KCPL's and*

RSW's (alleged) *failure to provide the said bank guarantee…*", which failure, according to BCCI, constituted an "irremediable material breach" of both, KCPL-FA and RSW-FA.

105. Mr. Nankani has referred to the statement of claim of KCPL, which *inter alia* impugns BCCI's termination of KCPL-FA, as being premature and wrongful, which wrongful termination resultantly amounted to BCCI being in repudiatory breach thereof. He has submitted that BCCI did not insist on the furnishment of the bank guarantee on or before 22nd March 2011 and in fact, kept granting extensions for the same, due to various unresolved issues in relation to BCCI's failure to fulfill its obligations under the Invitation to Tender dated 2nd March 2010 ("ITT") and KCPL-FA. These unresolved issues included: i) the unilateral reduction in the number of matches; (ii) failure to provide a Stadium at Kochi and/or a suitable "alternative"; and (iii) failure to approve the transfer of shares of Vivek Venugopal.

106. Mr. Nankani has submitted that the parties however continued to act on the basis that KCPL-FA was valid and subsisting despite the fact that KCPL did not furnish the bank guarantee on or

before 22nd March 2011. This is evinced by the fact that payments were made by BCCI to KCPL under Article 9.3(a) of KCPL-FA in April and July 2011 respectively coupled with the fact that BCCI accepted payments made by KCPL towards Franchise Fee for the 2011 season on 18th April 2011 and 29th April 2011 respectively.

107. Mr. Nankani has submitted that at no point of time between April 2011 and 17th September 2011, i.e., the date of BCCI's wrongful termination of KCPL-FA, did BCCI claim any breach, much less an irremediable breach by KCPL of KCPL-FA. BCCI did not even call upon KCPL to furnish the bank guarantee during this period.

108. Mr. Nankani has submitted that BCCI waived the requirement under Clause 8.4 of KCPL-FA for furnishment of the bank guarantee for the 2012 season on or before 22nd March 2011. BCCI in its Statement of Defense, *inter alia*, conceded that it acquiesced to the request for extension of the deadline.

109. Mr. Nankani has submitted that BCCI's invocation of the bank guarantee furnished by RSW for securing payment of the Franchise Fee for the 2011 season, which Franchise Fee had

admittedly been paid by KCPL on the basis that KCPL had committed an "irremediable material breach" of KCPL-FA by not furnishing the bank guarantee for the 2012 season on or before 22nd March 2011, is a *malafide* and premeditated act on the part of BCCI. He has submitted that at no point of time did BCCI call upon RSW to renew the said bank guarantee or contend that RSW was in breach of RSW-FA, particularly Clause 8 thereof.

110. Mr. Nankani has submitted that BCCI's termination of KCPL-FA was wrongful and *malafide.* It constituted a repudiatory and fundamental breach of KCPL-FA entitling KCPL to accept the same and sue for damages, as it has done.

111. Mr. Nankani has submitted that BCCI's endeavour for the bulk of the hearings before this Court, has been to impress upon this Court that the unresolved issues between BCCI and KCPL, which included: (i) the unilateral reduction in the number of matches; (ii) failure to provide a Stadium at Kochi or an appropriate "alternative"; and (iii) failure to approve the transfer of shares of Vivek Venugopal, were infact the 'fundamental breaches' complained of by KCPL which lay at the heart of the dispute between the parties. He

has submitted that this contention is utterly misconceived. He has referred to Paragraph 18 of KCPL's Statement of Claim, wherein it is stated that whilst the issues were being discussed between the parties, they continued to remain outstanding and unresolved. Therefore, BCCI did not insist on the bank guarantee being provided by KCPL by 22nd March 2011 but infact gave a go by to that date.

112. Mr. Nankani has submitted that KCPL's challenge to BCCI's termination of KCPL-FA was entirely premised on BCCI's wrongful invocation of the bank guarantee, which in turn amounted to BCCI being in repudiatory breach of KCPL-FA.

113. Mr. Nankani has referred to Paragraph 7.6.13 of the impugned KCPL Award, wherein the learned Arbitrator has also observed that "BCCI was holding KCPL guilty of breach of agreement on account of failure of [the latter] to furnish the bank guarantee. It has already been held that time of furnishing the bank guarantee was extended from time to time and abruptly brought to an end without giving a reasonable time for performance, apart from termination of the agreement having been done without giving 30 days notice or even a reasonable notice to remedy the so-called breach by KCPL."

114. Mr. Nankani has submitted that a conjoint reading of Causes 10(b) and 10(c) of Schedule 5 to RSW-FA makes clear that RSW-BG was to remain in force upto 27th March 2011, with a claim period of six months thereafter, i.e., upto 27th September 2011.

115. Mr. Nankani has submitted that BCCI decided to schedule the commencement of the 2011 season on 8th April 2011, rather than sometime in early March 2011, as was done for, *inter alia*, the 2010 season. It was solely for this reason that the bank guarantee issued by RSW did not end up covering the entirety of KCPL's obligation under Clause 8.1(a) of KCPL-FA. Had the 2011 season commenced in or around early March 2011, RSW-BG would have covered the entirety of KCPL's obligation under Clause 8.1(a) of KCPL-FA.

116. Mr. Nankani has submitted that BCCI invoked the bank guarantee issued by RSW on 17th September 2011, i.e., 10 days prior to the expiry of six month claim period under Clause 10(c) of Schedule 5 to RSW-FA. He has submitted that although BCCI invoked RSW-BG by its letter dated 17th September 2011, it curiously called upon KCPL to comply with its obligations under Clause 8.4 of

KCPL-FA. BCCI did not, at any point of time call upon RSW to renew the bank guarantee issued by it and/or contend that RSW was in breach of RSW-FA, particularly Clause 8 thereof.

117. Mr. Nankani has submitted that extensions for the furnishment of the bank guarantee kept being agreed upon for the reason that there were various unresolved issues as between KCPL and BCCI including that of: the stadium; reduction in match fee and number of games; Mr. Lalit Modi's tweets etc. *Secondly*, BCCI has itself on record, *inter alia,* accepted that "…*all the arrangements for procuring the requisite bank guarantee were already in place. All that KCPL needed to do was address a letter to the bank asking for the issuance of the said bank guarantee….*". Thus, BCCI contradicts its own argument that KCPL was not in a position to furnish the bank guarantee by 22nd March 2011. In so doing, BCCI fortifies KCPL's argument that all that remained for the purposes of furnishing the said bank guarantee (for the 2012 season) was merely a "ministerial act".

118. Mr. Nankani has submitted that BCCI's next contention, in this regard, to the effect that the deadline for furnishing the bank

guarantee cannot be deemed to be extended absent any variation in writing to Clause 8.4 of KCPL-FA, is equally untenable. BCCI is estopped by its own conduct from contending that the deadline for furnishing the bank guarantee can only be varied/extended in writing. Amongst other concessions, BCCI is on record to say that it "*…acquiesced to the request for extension of the deadline….*". BCCI then contends that on KCPL's own showing, BCCI acceded to KCPL's request for 3 day extension to furnish the bank guarantee, which fact is borne out from part of Paragraph 24 of Mukesh Patel's (CW-3) Examination-in-Chief.

119. Mr. Nankani has submitted that this contention is canvassed on a complete misreading of Mukesh Patel's deposition by relying on the phrase "*in the event they failed to provide the bank guarantee within three working days*" in isolation. A proper reading of the excerpt clearly suggests that BCCI's "accession", if any or at all, is contingent on KCPL's "*legal right to seek legal recourse*". Notably, Mukesh Patel was not even cross-examined on this part of his deposition. His testimony on this aspect, therefore, remains untested.

120. Mr. Nankani has submitted that in any event, extensions of time in regard to, *inter alia,* furnishment of a bank guarantee not only have to be reasonable, they also have to be unconditional. He has submitted that no reasonable time was given by BCCI for KCPL to furnish the bank guarantee at the time of fixing the deadline for furnishing the same. In the pleadings, and evidence of Sunder Raman (BCCI's witness), as well as the correspondence addressed by its Advocates, BCCI has unequivocally admitted (notwithstanding its attempt during the hearings to disown the said admissions) that the time for submission of the bank guarantee was indeed extended by it after 22nd March 2011 and that the deadline of 17th September 2011 was set by it on 17th September 2011 itself.

121. Mr. Nankani has submitted that by invoking the bank guarantee issued by RSW on 17th September 2011, BCCI has unjustly enriched itself to the extent of INR 153 crores at the cost of RSW. Having done so and in turn having accelerated the performance of KCPL-FA in respect of the 2012 season, it was incumbent on BCCI to perform its obligations under the KCPL-FA vis-à-vis the 2012 season, *inter alia,* by not depriving KCPL from participating in the 2012 season. Having failed to perform its obligations under the KCPL-FA

and by having wrongfully terminated the same, BCCI is in repudiatory breach thereof.

122. Mr. Nankani has submitted that BCCI had no right to unilaterally retain and appropriate the said amount of INR 153 crores, absent an adjudication in respect thereof, to the effect that it suffered damages to that extent. Admittedly, no claim and/or counter-claim to this effect was filed by BCCI.

123. Mr. Nankani has submitted that BCCI's reliance in regard to the foregoing on the Order dated 21st September 2011 passed by this Court is misplaced. The observations and findings contained therein were only *prima facie* and made in an Application for ad-interim reliefs, whereby KCPL sought to restrain BCCI from encashing the bank guarantee issued by RSW. Quite apart from the fact that *prima facie* findings in an interlocutory order do not bind this Court, the principles applicable in an Application of this nature stand on an entirely different footing.

124. Mr. Nankani has submitted that though KCPL-FA has not furnished the bank guarantee on or before 22nd March 2011 as per

Clause 8.4 of KCPL-FA, BCCI did not terminate the KCPL-FA on expiry of 22nd March 2011 and instead opted to perform the KCPL-FA. BCCI allowed KCPL to play the matches for the 2011 season from 8th April 2011 to 15th May 2011; BCCI paid KCPL its share of the Franchise Fee between June and July 2011; BCCI and KCPL continued to deal with the unresolved issues, particularly with regard to Home Stadium and correspondence between BCCI and KCPL shows that there were discussions in respect of various unresolved issues between April and August 2011, but the same remained inconclusive.

125. Mr. Nankani has referred to the material events, which occurred between 17th September 2011 and 19th September 2011. He has submitted that these material events show that post the expiry of 22nd March 2011, the parties did not by mutual consent agree to or fix any time for furnishing the bank guarantee, as required under Clause 8.4 of KCPL-FA. He has submitted that what happened was the unilateral fixation of time by BCCI. No reasonable notice was given by BCCI to KCPL. The notice for furnishing the bank guarantee on the same day within two working hours has been held to be unreasonable. He has submitted that KCPL was at all times ready and willing to furnish the bank guarantee and equally so

on 17th September 2011, by seeking reasonable time of three working days to do so. BCCI once again unreasonably rejected the request and sought to use the request made by KCPL to pressurize KCPL in giving up its claim against BCCI.

126. Mr. Nankani has submitted that the learned Arbitrator has considered all the relevant facts, and on true and correct appreciation of the evidence on record, including the depositions of Mr. Saket Mehta and Mr. Mukesh Patel and the evidence of Mr. Sunder Raman. The conclusion of the learned Arbitrator is also in consonance with the principles of Section 55 of the Contract Act,1872. He has submitted that the findings of learned Arbitrator on these issues and the consequential wrongful termination by BCCI do not call for interference under Section 34 of the Act.

127. Mr. Nankani has referred to Clause 21.15 of KCPL-FA. He has submitted that BCCI sought to justify invocation of the bank guarantee issued by RSW by relying on the said clause. He has submitted that the plain reading of said clause shows that KCPL would be liable for non-compliance of RSW's obligations under RSW-FA. Indisputably RSW-FA covered only the 2011 Season. All dues in

respect of the 2011 Season were paid to BCCI. There is no allegation of breach under RSW-FA. Hence, Clause 21.15 is of no assistance to BCCI. He has submitted that in any event the interpretation of KCPL-FA and RSW-FA lies exclusively within the domain of the learned Arbitrator.

128. Mr. Nankani has submitted that the damages awarded to KCPL are reasonable and calls for no interference. He has referred to Prayer Clause (iii) of the Statement of Claim, wherein KCPL sought an amount of INR 7000 million "…or such other amount as may be quantified…" towards "losses/damages" on account of BCCI's repudiatory breach. Quite clearly, therefore, KCPL has not restricted its claim for damages to any particular type of damages.

129. Mr. Nankani has submitted that KCPL's claim for damages merely includes a claim for loss of business opportunity and of profits, i.e., general damages. Such an inclusive claim cannot be read in the manner, as contended by BCCI so as to proscribe KCPL from being awarded any additional type of damages.

130. Mr. Nankani has submitted that at Prayer Clause (iv) of

its Statement of Claim, KCPL has made a claim for the expenditure incurred by it. Whilst this claim was in the alternative, the learned Arbitrator has, in addition to having noted that such claim was made in the alternative, *inter alia*, observed that "*In support of the expenditure incurred, voluminous documents have been filed which have been supported and substantiated by the evidence of Saket Mehta …*". He has submitted that having considered such "voluminous documents" and the evidence of Saket Mehta on this aspect, the learned Arbitrator, in his discretion, deemed it fit to grant KCPL's alternate claim for expenditure incurred, as well. This claim was taken into consideration by the learned Arbitrator upon him having exercised his discretion to adopt his own approach for the purposes of computing the damages payable by BCCI to KCPL. Indeed, as noted in the Award, the consideration by the learned Arbitrator of what was styled by KCPL as a claim, in the alternative, for expenditure incurred, was in furtherance of having resorted to "another method available" for the purposes of computing the damages suffered by KCPL, instead of the methodologies adopted by both parties' experts. On this basis, the learned Arbitrator ultimately found that KCPL is entitled to: (i) General damages, i.e. loss of profits/business opportunity, to the tune of INR 153,33,31,800/-; and

(ii) Special damages, i.e. expenditure incurred, to the tune of INR 231,50,40,042/-, together with interest at 18% per annum from the date of termination, i.e. 19th September 2011, upto the date of the Award.

131. Mr. Nankani has submitted that the learned Arbitrator did not deem it fit to consider and/or grant KCPL's (primary) claim for general damages to the tune of INR 700 crores. Having found, by adopting a "rough and ready" method, that "…*investors in franchisee expect to gain at least 50% of the franchisee figures as net revenue…*", the learned Arbitrator held that KCPL was duty-bound to mitigate its damages. On this basis, 50% of the annual Franchise Fee for 2 years, as against the entire term of KCPL-FA, was awarded towards loss of profits/business opportunity, i.e. general damages. Having granted 'general damages' by adopting its own approach and on a rough and ready basis to the limited extent of approximately INR 153 crores (as against the claim of INR 700 crores), the learned Arbitrator also deemed it fit to grant 'special damages' to KCPL. For this purpose, the learned Arbitrator decided to treat KCPL's alternate claim for expenditure incurred as being one for 'Special Damages',

having considered and appreciated the "…*voluminous documents…*", which included invoices, vouchers, receipts, bank statements, and ledger accounts that were on record, which were "…*supported and substantiated by the evidence of Saket Mehta…*".

132. Mr. Nankani has submitted that BCCI assails the learned Arbitrator's computation of general damages on the basis that despite the learned Arbitrator having observed that it would meet the ends if 25% of the Franchise Fee of two years is granted to KCPL, he, instead, goes on to award an amount of 50% of the Franchise Fee of two years. He has submitted that this contention is a desperate attempt at taking advantage of what is, in fact, a typographical error. A conjoint reading of Paragraphs 8.1.20 and 8.1.21 of the Award puts this issue into perspective. The Award of 'General Damages' was to the tune of 50% of the annual Franchise Fee (quantum/measure) for a period of 2 years (period). Accordingly, the featuring of 25% (instead of 50%) at Paragraph 8.1.21 is nothing but a typographical error, of which, capital is sought to be made by BCCI.

133. Mr. Nankani has submitted that BCCI's contention that KCPL is somehow precluded from terming the aforesaid to be a typographical error since it did not prefer an Application under Section 33 of the Act applies equally to it. The ambiguity, if any, cuts both ways. Insofar as KCPL is concerned, 50% of the Franchise Fee for 2 years is what should have been granted and, indeed, what was granted.

134. Mr. Nankani has submitted that Prayer Clause (iii) of the Statement of Claim is not restricted to any particular type of damages. It is, in fact, wide enough to cover any type of damages. It follows that the grant of damages, whether general or special, in favour of KCPL, is and can only be in terms of Prayer Clause (iii). The grant of such relief cannot be construed pedantically, as canvassed by BCCI, to suggest that the learned Arbitrator *simplicitor* granted both, the primary [Prayer Clause (iii)] and alternate [Prayer Clause (iv)] reliefs sought by KCPL.

135. Mr. Nankani has submitted that it is trite that the manner in which damages are to be computed/quantified, including the

methodology adopted for such computation/quantification, falls entirely within the domain of the arbitral tribunal. He has placed reliance upon "***McDermott v. Burn Standard***"[35].

136. Mr. Nankani has submitted that equally trite is the proposition that Courts and arbitral tribunals have the power to mould final reliefs. He has placed reliance upon "***Samir Narain Bhojwani v. Aurora Properties***"[36]. He has submitted that it has also been held that Courts and arbitral tribunals can resort to "honest guesswork"/"rough and ready methods" in computing damages where: (i) no specific evidence of loss suffered is led, but it can be inferred that loss has been suffered by reason of breach; or (ii) the extent of loss suffered is difficult to quantify and/or prove; or (iii) the breaching party leads no specific evidence to show that no loss was suffered by the party complaining of such breach. He has in this context placed reliance upon "***Construction and Design Services v. DDA***"[37] and "***Cobra v. HVPNL***"[38].

35 (2006) 11 SCC 181, Paragraphs 103-110.
36 (2019) 17 SCC 203, Paragraph 24.
37 (2015) 14 SCC 263, Paragraphs 14-18.
38 2024 SCC Online Del 2755, Paragraphs 32-35.

137. Mr. Nankani has submitted that the learned Arbitrator has comprehensively considered the expert evidence led. His observations in respect thereof are at Paragraphs 8.1.9 to 8.1.13 of the Award. He has further submitted that the learned Arbitrator furnishes reasons for not going by the expert evidence at Paragraph 8.1.14 of the Award. He has submitted that the learned Arbitrator is, in any event, as a matter of law, not bound by such expert evidence, *inter alia*, in terms of Section 19 of the Act.

138. Mr. Nankani has submitted that this is not a case where loss of profits and wasted expenditure have, *stricto sensu*, been claimed concurrently. This is a case where the learned Arbitrator, in his discretion, decided to factor in the expenditure incurred by KCPL as being the 'special damages' suffered by them, in addition to awarding General Damages (loss of profits) to the extent of 50% of the Franchise Fee of 2 years, by having adopted a 'rough and ready method'. Be that as it may, the grant of special damages is not unknown to law. He has placed reliance upon the excerpt of Pollock & Mulla, 14th Edn., which *inter alia* states that *"However a mixed claim for capital expenditure and for loss of profits (seeking reliance losses*

and expectation losses) may lie in appropriate cases." He has also placed reliance upon the judgment of the King's Bench in "***Victoria Laundry v. Newman Industries***"[39], wherein it is *inter alia* held that "But to this knowledge, which a contract-breaker is assumed to actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable."

139. Mr. Nankani has submitted that BCCI has treated this Court's jurisdiction under Section 34 of the Act much like a First Appeal. Through its arguments, which spanned across a series of hearings/sessions, BCCI has implored this Court to: (i) venture into a fact-finding exercise by revisiting and re-appreciating the record, on the misplaced pretext that the learned Arbitrator has ignored vital evidence; and (ii) accept competing interpretations of various clauses of the agreements between the parties, by invoking, albeit baselessly, the ground of perversity.

39 [1949] K.B. 528 at P. 539.

140. Mr. Nankani has submitted that the jurisdiction conferred on this Court under Section 34 of the Act is very limited. He has relied upon the judgment of Supreme Court in "***Associated Builders v. Delhi Development Authority***"[40] in this context.

141. Mr. Nankani has submitted that the manner in which BCCI has delved into the merits of the dispute, notwithstanding the fact that BCCI's case is not premised on the Award being in conflict with the public policy of India, is in the teeth of the scope of the grounds contained in Section 34(2)(a) of the Act.

142. Mr. Nankani has submitted that the Award is a reasoned one, and deals with the entirety of what was a voluminous record. Evidence of the parties and testimony of all witnesses has been duly considered. BCCI's dissatisfaction as to the findings rendered in respect of the evidence and/or the merits cannot be a ground to assail the same. He has placed reliance upon the judgment of Supreme Court in "***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***"[41], wherein it is held that "*It is equally well settled that the*

40 (2015)3 SCC 49, Paragraph 17.
41 (2015)5 SCC 739, Paragraph 12.

arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him." He has submitted that this view was upheld and applied by the Supreme Court in "***Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. & Ors.***"[42].

143. Mr. Nankani has also placed reliance upon the judgment of Supreme Court in "***MMTC Ltd. v. Vedanta Ltd.***"[43], wherein it is held that "*the conduct of parties and correspondence exchanged would also be relevant factors and it is within the Arbitrator's jurisdiction to consider the same.*"

144. Mr. Nankani has also placed reliance upon the judgment of Supreme Court in "***Atlanta Limited v. Union of India***"[44], wherein it is held that "*It is also a well-settled principle of law that challenge cannot be laid to the Award only on the ground that the Arbitrator has drawn his own conclusion or failed to appreciate the relevant facts. Nor can the Court substitute its own view on the*

42 (2018)3 SCC 13, Paragraph 51.
43 (2019)4 SCC 163, Paragraph 16.
44 (2022)3 SCC 739, Paragraph 19.

conclusion of law or facts as against those drawn by the Arbitrator, as if it is sitting in appeal." Further it is held that *"As long as the Arbitrator has taken a possible view, which may be a plausible view, simply because a different view from that taken in the Award, is possible based on the same evidence, would also not be a ground to interfere in the Award. …".*

145. Mr. Nankani has submitted that on the finality to be afforded to the findings returned by an arbitrator on aspects concerning interpretation of contracts, the Supreme Court in "***UHL Power Co. Ltd. v. State of H.P.***"[45]*, inter alia*, placed reliance upon its decision in "***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***"[46], wherein it was held that "*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."* The Supreme Court has held that *"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*

45 (2022)4 SCC 116, Paragraph 18.
46 (2019)20 SCC 1.

dispute resolution would stand frustrated."

146. Mr. Nankani has submitted that the grounds of patent illegality and perversity have been invoked by BCCI on the basis of imploring this Court to embark on a fact-finding exercise by undertaking a long-drawn analysis of the pleadings and evidence. Such an approach has been deprecated by the Supreme Court in "***Reliance Infrastructure v. State of Goa***"[47].

147. Mr. Nankani has accordingly submitted that the captioned Petitions, therefore, warrant dismissal, *inter alia*, in terms of the catena of authorities circumscribing the remit of a Court's jurisdiction under Section 34 of the Act.

148. Having considered the submissions, BCCI has in both KCPL's Petition and RSW's Petition drawn emphasis on the fact that the unresolved issues between BCCI and KCPL which included (i) The Tweets of Lalit Modi; (ii) Failure to provide a Stadium at Kochi or an appropriate "alternative"; (iii) the unilateral reduction in the number of matches and (iv) failure to approve the transfer of shares

47 (2024)1 SCC 479, Paragraph 57.

of Vivek Venugopal were infact the 'fundamental breaches' as complained of by KCPL and which lay at the heart of the dispute between the parties. However, BCCI overlooks KCPL and RSW's contention in the statement of claim viz. that the aforementioned issues were being discussed between the parties and continued to remain outstanding and unresolved. Further, it was the contention of KCPL and RSW that, BCCI did not insist on the bank guarantee being provided by KCPL by 22nd March, 2011, but infact, gave go by to that date. This has been specifically pleaded in Paragraph 18 of KCPL's statement of claim.

149. It is pertinent to note that the learned Arbitrator in the impugned KCPL Award and RSW Award has considered the aforementioned issues as being the reason for BCCI not insisting on the furnishing of the bank guarantee by KCPL by 22nd March, 2011. This finding was in the perspective of KCPL and RSW's challenge to BCCI's termination of the KCPL-FA being entirely premised on BCCI's wrongful invocation of the bank guarantee, which in turn, amounted to BCCI being in repudiatory breach of the KCPL-FA.

150. It is not for this Court to go into whether the learned

Arbitrator was right in considering the aforementioned issues as fundamental breaches as this was not the basis for the claim of KCPL and RSW, namely the wrongful invocation of the bank guarantee which amounted to BCCI being in repudiatory breach of KCPL-FA having been upheld. The arguments of BCCI have been centered upon the aforementioned issues having been held to be fundamental breaches contrary to the evidence on record. This Court exercising jurisdiction under Section 34 of the Arbitration Act cannot act as a Court of First Appeal. A review on merits is largely proscribed. This has been held by the Supreme Court in ***Associated Builders*** (*supra*) at Paragraph 17. BCCI has called upon this Court to venture into a fact finding exercise by revisiting and re-appreciating the record and accepting competing interpretations of the various clauses of the agreements between the parties, by invoking the ground of perversity. The jurisdiction of this Court under Section 34 of the Arbitration Act is very limited. BCCI's endeavour to delve into the merits of the dispute, is in teeth of the scope of the grounds contained in Section 34 of the Act. BCCI's dissatisfaction as to the findings rendered in respect of the evidence and/or the merits cannot be a ground to assail the Award.

151. It has been held by the Supreme Court in a catena of judgments that the Arbitrator appointed by the parties is the final judge of the facts and the finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. These judgments of the Supreme Court have been relied upon on behalf of the KCPL and RSW and which include ***Swan Gold Mining Ltd.*** (*supra*) at Paragraph 12, ***Maharashtra State Electricity Distribution Co. Ltd.*** (*supra*) at Paragraph 51, ***MMTC Ltd.*** (*supra*) at Paragraph 16, ***Atlanta Limited*** (*supra*) at Paragraph 19 and ***UHL Power Co. Ltd.*** (*supra*) relying upon ***Dyna Technologies (P) Ltd.*** (*supra*).

152. The Supreme Court in a recent decision in ***Reliance Infrastructure*** (*supra*) has held in Paragraph 57 as under :-

> ***"57. As noticed, arbitral award is not an ordinary adjudicatory order so as to be lightly interfered with by the Courts under Sections 34 or 37 of the Act of 1996 as if dealing with an appeal or revision against a decision of any subordinate Court. The expression "patent illegality" has been exposited by this Court in the cases referred hereinabove. The significant aspect to be reiterated is that it is not a mere illegality which would call for interference,***

> ***but it has to be a "patent illegality", which obviously signifies that it ought to be apparent on the face of the award and not the one which is culled out by way of a long-drawn analysis of the pleadings and evidence.***

153. Thus, it is not open for this Court to revisit the findings of facts arrived at by the Arbitral Tribunal after the appreciation of evidence and documents on record or to interfere with the Award on the ground that the terms of the contract were not correctly interpreted by the learned Arbitrator.

154. The learned Arbitrator has in the impugned KCPL and RSW Awards decided the core issue, viz., whether BCCI has wrongfully invoked the bank guarantee furnished by RSW and whether this amounted to a repudiatory breach of KCPL-FA, by considering the material facts and documents on record as well as the evidence recorded. The learned Arbitrator has further considered whether the non furnishing of bank guarantee by KCPL by 22nd March, 2011 constitutes an "irremediable material breach" of the both KCPL and RSW-FA. There is a finding in the impugned Awards that the material on record militated against a finding of "irremediable material breach".

155. It has been duly considered by the learned Arbitrator that BCCI had at no point of time between April, 2011 and 17th September, 2011, when BCCI terminated the KCPL-FA, claimed any breach, much less an irremediable breach by KCPL of the KCPL-FA by non-furnishing of the bank guarantee. It is pertinent to note that BCCI did not even call upon KCPL to furnish the bank guarantee during this period. There were various extensions granted which the learned Arbitrator has held were due to the unresolved issues as aforestated. There were payments made by BCCI to KCPL under Article 9.3 (a) of the KCPL-FA in April and July, 2011 respectively. This is coupled with the fact that BCCI accepted payments made by KCPL towards the Franchise Fee for the 2011 season on 18th April, 2011 and 29th April, 2011 respectively. These payments were made by the KCPL and received by BCCI after the stipulated deadline for furnishing of the bank guarantee i.e. on 22nd March, 2011. Thus, based on these material facts and documents on record, the finding of the learned Arbitrator that BCCI waived the requirement under Clause 8.4 of the KCPL-FA for furnishment of bank guarantee for 2012 season on or before 22nd March, 2011 cannot be faulted. Further, BCCI has on record conceded that it acquiesced to the request for extension of the deadline.

156. It is the contention of BCCI that Clause 8.4 of the KCPL-FA requires that any variation of the terms of KCPL-FA, is to be in writing. Further, it is the contention of BCCI that mere forbearance on the part of BCCI to sue does not constitute a waiver in terms of Clause 21.8 of the KCPL-FA. These contentions are untenable in view of the conduct of BCCI which was to acquiesce in the request of KCPL for extension of the deadline for furnishing of the bank guarantee and thus BCCI is estopped by such conduct from making such contentions.

157. BCCI had not terminated the KCPL-FA on expiry of deadline for furnishing of bank guarantee i.e. 22nd March, 2011 but had as aforementioned, opted to perform the KCPL-FA. Mr. Sunder Raman (RW1) of BCCI had all of sudden on 17th September, 2011 called upon Mr. Saket Mehta (CW1) of KCPL to furnish the bank guarantee on that very day. It is pertinent to note that 17th September, 2011 was a Saturday. Mr. Sunder Raman made the call to Mr. Saket Mehta at 11.00 a.m., though the banks were opened only until 1.00 pm. This had given KCPL only two hours to furnish the bank guarantee. Mr. Mukesh Patel (CW3) upon having been informed by Mr. Saket Mehta of the demand of BCCI called the then

BCCI President Mr. Shashank Manohar and had requested for time of three working days to be given to KCPL to furnish the bank guarantee. This was responded to by Mr. Shashank Manohar agreeing to give time of three working days to KCPL for furnish the bank guarantee provided that the KCPL waives all its claims against BCCI. This is stated in the Examination in Chief of Mr. Mukesh Patel (CW3) at Paragraph 24. This was followed by a formal written request of KCPL vide letter dated 17th September, 2011 which was rejected by BCCI by its Advocates' letter of even date.

158. The learned Arbitrator has after considering the aforementioned material on record and appreciating the evidence came to a finding that no reasonable notice was given by BCCI to KCPL for furnishing of a bank guarantee. The learned Arbitrator has further considered that KCPL's request for three working days time for furnishing a bank guarantee was well before the expiry of the claim period under the existing bank guarantee issued by RSW (for the 2011 season) which was valid until 27th September, 2011. Thus, no prejudice would have been caused to BCCI if extension of three working days time from 17th September 2011 had been granted. Further, the learned Arbitrator has also considered the material facts

and subsequent correspondence on record. This included BCCI's Advocates' letter dated 19th September, 2011, received by KCPL around 9.30 a.m., terminating the KCPL-FA which rejected the aforementioned request of KCPL. Further, BCCI by a separate letter addressed to the bank dated 17th September, 2011, but acknowledged as being received on 19th September, 2011 at 10.30 a.m., invoked the bank guarantee. Thereafter, KCPL by letter dated 18th January, 2012 treated the termination of KCPL-FA by BCCI as amounting to a repudiatory breach and therefore, terminated the KCPL-FA.

159. The conclusion of the learned Arbitrator namely that BCCI had wrongfully invoked the bank guarantee which amounted to a repudiatory breach of the KCPL-FA would call for no interference under Section 34 of the Arbitration Act considering that this is based on a correct appreciation of the evidence on record.

160. BCCI has contended that it was justified in invoking the bank guarantee issued by RSW and has placed reliance on the Clause 21.15 of KCPL-FA. Clause 21.15 of the KCPL-FA reads as under :-

"21.15 It is agreed that upon BCCI confirming to the

> *Franchisee in writing that (A) payment in full has been made by the Franchisee to BCCI-IPL of the sum due to BCCI-IPL in respect of 2011 under Clause 8.1 (a) (ii) and (B) the bank guarantee referred to in Clause 8.4 deliverable by the Franchisee to BCCI-IPL by 22nd March, 2011 has been duly and properly delivered to BCCI-IPL in accordance with Clause 8.4, the Existing Franchise Agreement shall cease to have any further force and effect and the Franchisee agrees to be obliged and liable to BCCI-IPL to comply fully with all outstanding and / or unperformed obligations thereunder and to be fully liable BCCI-IPL in respect of any of RSW's liabilities or breaches under or of the Existing Franchise Agreement.*
>
> *(emphasis supplied)*

161. Clause 21.15 of the KCPL-FA provides that KCPL would be liable for non compliance of RSW's obligations under the RSW-FA. The RSW-FA covered only the 2011 season. The learned Arbitrator has found from the material on record that all dues in respect of 2011 were paid to BCCI. Further, there was no allegation of breach of the RSW-FA. Hence, Clause 21.15 of the KCPL-FA does not assist BCCI. The interpretation of Clause 21.15 by the learned Arbitrator is a possible interpretation which cannot be interfered with by this Court under Clause 34 of the Arbitration Act.

162. The challenge of BCCI to the damages awarded by the learned Arbitrator on the ground that the learned Arbitrator has erroneously awarded damages on account of loss of profits as well as

wasted expenditure which cannot be cumulatively granted cannot be accepted. The manner in which BCCI has read the claim for damages of KCPL is misconceived. This can be seen from the prayer Clause (iii) of the statement of Claim, where KCPL has claimed an amount of INR 700 Crores "… or such other amount as [may] be quantified …" towards losses/damages on account of BCCI's on repudiatory breach. Therefore, KCPL has not restricted its claim for damages to any particular type of damages. KCPL's claim includes a claim for business opportunities and profits i.e. general damages. Whereas at prayer Clause (iv), KCPL has made in a claim for the expenditure included by it. Whilst the claim was in the alternative, and the learned Arbitrator upon observing the same, has considered the voluminous documents filed by KCPL in support thereof and which is further supported and substantiated by the evidence of Saket Mehta and deemed it fit to grant KCPL's alternate claim for expenditure incurred, as well. The learned Arbitrator has in exercising his discretion adopted his own approach for the purpose of computing the damages payable by BCCI to KCPL. Further, the learned Arbitrator has resorted to 'another method' available for the purpose of computing damages suffered by KCPL, instead of the methodologies adopted by both parties experts. The learned

Arbitrator has found that KCPL is entitled to general damages as well as special damages together with interest.

163. The learned Arbitrator by adopting such 'rough and ready method' and instead of granting general damages to the tune of INR 700 crores has awarded damages of 50% of the annual franchisee fee for 2 years, as against the entire term of the KCPL-FA, which had been claimed by KCPL. Further, the learned Arbitrator has decided to treat KCPL's alternate claim for expenditure incurred as being one for 'special damages', based on the voluminous documents and supported by the evidence of Saket Mehta.

164. The contention of BCCI that the learned Arbitrator having observed that it would meet the ends of justice if 25% of the franchise fee for two years is granted to KCPL has gone on to award an amount of 50% of the franchise fees of two years, overlooks the fact that the mention of 25% is obviously a typographical error in the impugned award. This is apparent from the conjoint reading of Paragraphs 8.1.20 and 8.1.21 of the Award. In Paragraph 8.1.20 there is a finding of the learned Arbitrator that the investors in the franchisee expect to gain at least 50% of the franchisee figures as net revenue and in Paragraph 8.1.21 there is a finding that the parties

are *ad idem* as to the appropriate 'period' for which the quantum and/or measure of general damages is to be computed; having been found to be two years. I do not find merit in the submission on behalf of BCCI that KCPL is precluded from terming the error in the award as a typographical error, since it did not prefer an application under Section 33 of the Arbitration Act. I find that the award of damages by the learned Arbitrator is unambiguous.

165. In prayer Clause (iii) of the statement of claim KCPL has claimed INR 700 Crores "… or such other amount as (may) be quantified towards the losses/damages suffered by (KCPL) on account of the repudiatory breach committed by the (Petitioner)...". This leaves it open to the learned Arbitrator to grant a lesser amount than that claimed by KCPL as general damages and in addition award special damages. The manner in which the damages are to be computed/quantified, including the methodology adopted for such computation/quantification, falls entirely within the domain of the Arbitral Tribunal. This has been held by the Supreme Court in ***McDermott*** (*supra*) at Paragraphs 103 – 110 relied upon on behalf of the KCPL. Further, the Courts and Arbitral Tribunals have the power to mould the reliefs as held in ***Samir Narain Bhojwani***

(*supra*). The Courts and Arbitral Tribunals can also resort to 'honest guesswork'/'rough and ready methods' in computing damages where no specific evidence of loss suffered is led, but it can be inferred that loss has been suffered by reason of breach or the extent of loss suffered is difficult to quantify and/or prove, or the breaching party leads no specific evidence to show that no loss was suffered by the party complaining of such breach. The decision of the Supreme Court in ***Construction and Design Services*** (*supra*) at Paragraphs 14-18 and ***Cobra*** (*supra*) at Paragraphs 32-35 relied upon on behalf of KCPL are apposite.

166. Further, BCCI's contention that the learned Arbitrator ought to have furnished reasons for not having granted damages in terms of the expert evidence led, overlooks the fact that the learned Arbitrator has considered the expert evidence led and in Paragraph 8.1.14 of the KCPL Award opined, it will not be advisable to go by an expert assessment, which at the end would only be an option. There is another method available and relied on in the alternative on behalf of KCPL. The learned Arbitrator in any event is not bound by the expert evidence as has been held by the Supreme Court in ***McDermott*** (*supra*) at Paragraphs 106-107.

167. Further, the grant of special damages in addition to general damages is not unknown to law. In ***Pollock & Mulla, 14th Edition,*** relied upon on behalf of the KCPL, it has been observed that a mixed claim for capital expenditure and for loss of profits (seeking reliance losses and expectation losses) may lie in appropriate cases. This type of additional loss has been recognized in the judgment of the King's Bench in "***Victoria Laundry V/s. Newman Industries***"[48] at Page 539.

168. BCCI has relied upon the decision of the Delhi High Court in ***N.K. Tomar*** (*supra*) in support of its submission that special damages cannot be granted, if the counter party is not informed as to such likelihood at the time of entering the contract. This reliance is misplaced. In the said judgment at Paragraph 19, the learned Single Judge has observed that the party seeking special damages had failed to file concrete evidence or credible evidence. The Defendant therein cannot be said to have discharged the onus of proving the loss as alleged in the Written Statement in those circumstances.

169. Further, BCCI has also relied upon judgment of the Supreme Court in ***Kanchan Udyog Ltd.*** (*supra*) in support of its

48 (1949) K.B. 528.

submission that both, loss of profits and wasted expenditure cannot be granted. The Supreme Court has extracted a portion of the treaties in ***Pollock & Mulla (14th Edition)*** which was relevant to the facts before it. However, the next paragraph of treaties which has been referred to states that a mixed claim of capital expenditure and for loss of profits may lie in appropriate cases.

170. It is relevant to deal with the additional grounds raised by BCCI in the RSW Arbitration Petition viz. that the reference to arbitration being invalid in view of Section 19(2)(a) of the Indian Partnership Act, 1932 as Filmwaves which was a constituent of RSW did not authorize, agree, join RSW in the invocation of arbitration. Section 19(2)(a) of the Partnership Act provides that the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration. There are submissions made with regard to Filmwaves having adopted its own proceedings including filing of Suit and taking out Notice of Motion. Reference is also made to Filmwaves having withdrawn the Suit on 20th December, 2013 i.e. more than the year after the reference to arbitration in August, 2012. There is further reference to Filmwaves having been impleaded as Respondent No. 2 in the arbitral

proceedings on account of differences between Filmwaves and other members of the consortium. Reliance is placed on certain pleadings filed in the arbitral proceedings. BCCI has also relied on ***MSEDCL*** (supra) and ***J.J.L.B. Engineers and Contractors*** (supra) in support of its submission that a reference and/or invocation of arbitration if bad in law warrants the setting aside of resultant Award passed in such proceedings.

171. The learned Arbitrator in its order dated 17th July, 2013, which has been impugned by BCCI has considered the submissions of RSW including that there was a clear admission on the part of BCCI that the reference to arbitration was by consent and that such reference would be valid and maintainable but for the fact that there was an alleged material concealment of the fact by RSW of Filmwaves not consenting to the reference. BCCI having not opted for adducing any oral evidence in support of its plea of 'material concealment' taken in the application, which was a question of fact, the Arbitral Tribunal records a finding on the issue of 'material concealment' viz. that there is no merit in the plea that the fact of Filmwaves not joining the reference had been concealed from BCCI. Further, the learned Arbitrator has held that Filmwaves has not

objected to its non-joinder of the reference and has infact supported RSW in its claim as can be seen from the pleadings filed by Filmwaves in the Arbitration Petition.

172. Considering the aforementioned findings of the learned Arbitrator in the Order dated 17th July, 2013, which is based on the material on record, I find no merit in the contention on behalf of RSW that the reference to arbitration is invalid. The plea as to material concealment of Filmwaves joining in the reference is a question of fact and BCCI not having produced evidence in support of the plea taken, the learned Arbitrator has arrived at a correct finding that this contention has no merit.

173. The other issue raised by BCCI is on the entitlement of RSW to make claims in view of Section 69(3) of the Indian Partnership Act, 1932. This issue has been correctly answered by the learned Arbitrator. Section 69(3) of the Partnership Act refers to proceedings to enforce a right arising from a contract and there being a bar to such proceedings being instituted by an unregistered partnership firm. However, this is not applicable to arbitral proceedings as held in ***Komal Kush Enterprises*** (*supra*). Although in the judgment BCCI relied upon by viz. ***U.P. State Sugar*** (*supra*) at

Paragraph 7, it is recorded that it is true that arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provision contained in Section 69 of the Partnership Act 1932, this cannot be considered to be a dictum of the Supreme Court or even an *obiter dictum* of the Supreme Court. It has been rightly held by the learned Arbitrator that in the impugned order that this merely expresses an assumption of the Supreme Court.

174. Further, the judgment of the Supreme Court in ***Jagdishchandra Gupta*** (*supra*) relied upon by BCCI, which holds that 'other proceedings' occurring in Section 69(3) of the Partnership Act must receive a full meaning untrammeled by the words 'a claim or set off' is to be read in the context of the facts of that case. The Supreme Court has not ruled that reference of the Court to an Arbitral Tribunal and that to by consent would be hit under Section 69(3) of the Partnership Act. This judgment has been considered by the Delhi High Court in "***Noida Toll Bridge Company Ltd. v/s. Mitsui Marubeni Corporation***"[49] and it has been held that the observations of the Supreme Court cannot be read to mean that the question regarding applicability of Section 69(3) of the Partnership Act is a

49 OMP No.65 of 2005 decided on 16th September, 2005.

jurisdictional issue. The bar under Section 69 is not absolute because it does not destroy every right arising under the contract. The Delhi High Court has gone on to hold that the impugned Order in the nature of interim award can be challenged under Section 34 of the Act and the Petition is maintainable. It has upheld the view of the learned Arbitrator on Section 69 of the Partnership Act having no application to the proceedings before the Arbitral Tribunal. The Delhi High Court has in so holding also considered the earlier decision of the Supreme Court in ***U.P. Sugar*** (*supra*).

175. The learned Arbitrator in the impugned Order has considered the settled law laid down by the Supreme Court and Delhi High Court in holding that the arbitral proceedings are not hit by Section 69(3) of the Partnership Act. Further, the reference to arbitration was by consent of parties. Thus, I find that the challenge to this finding of the learned Arbitrator is without any merit.

176. I am of the considered view that there are no valid grounds raised in KCPL's Petition and RSW's Petition under Section 34 of the Arbitration Act to warrant an interference with the KCPL Award and the RSW Award, which have been impugned therein. There is no patent illegality in the impugned awards which requires

an interference by this Court. In view thereof, the Arbitration Petition No. 1752 of 2015 and Arbitration Petition No. 1753 of 2015 are devoid of merit and are accordingly dismissed. KCPL and RSW are permitted to withdraw the amounts deposited by BCCI after a period of four weeks from the uploading of this judgment and Order.

177. There shall be no order as to costs.

[R. I. CHAGLA, J.]

178. Mr. Rafiq Dada, learned Senior Counsel appearing for the Petitioner-BCCI has applied for further time to be granted to the Petitioner in order that they may prefer an appeal from this Judgment and Order, considering that in Paragraph 177 of this Judgment and Order, KCPL and RSW have been permitted to withdraw the amounts deposited by the BCCI after a period of four weeks from uploading of this Judgment and Order.

179. Upon considering that there has been a conditional stay of the impugned Awards operating for a few years, time is extended by a further period of two weeks and accordingly KCPL and RSW are permitted to withdraw the amounts deposited by BCCI after a period of six weeks from uploading of this Judgment and order.

[R. I. CHAGLA, J.]