

(2014) 07 BOM CK 0097

In the Bombay High Court

Case No : Arbitration Petition Nos. 361 and 695 of 2011

Dirk India Private Limited

APPELLANT

Vs

Maharashtra State Electricity Generation Company Limited

 Maharashtra State Power Generation Company Limited
Vs Dirk India Private Limited

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16(6), 24, 28, 28(2)
Contract Act, 1872 — Section 55, 56, 73

Citation : (2014) 07 BOM CK 0097

Hon'ble Judges : N.M. Jamdar, J

Bench : Single Bench

Advocate : R.A. Dada, Senior Advocate, Dr. Birendra Saraf, Mukul Taly, Shamima Taly, Mallika Taly i/by S. Mahomebhai and Co., Aspi Chinoy, Senior Advocate and Prashant V. Bhalerao i/by S.S. Kulkarni, D.D. Madon, Senior Advocate, Advocate for the Appellant; R.A. Dada, Senior Advocate, Dr. Birendra Saraf, Mukul Taly, Shamima Taly, Mallika Taly i/by S. Mahomebhai and Co., Aspi Chinoy, Senior Advocate and Prashant V. Bhalerao i/by S.S. Kulkarni, D.D. Madon, Senior Advocate, Advocate for the Respondent

Final Decision : Allowed

Judgement

N.M. Jamdar, J.—The Arbitration Petition No. 361 of 2011 is filed by the Petitioner-Dirk India Private Ltd. against the Respondent-Maharashtra State Electricity Generation Company Ltd. The petitioner challenges the award of the Arbitral Tribunal dated 30 March 2011. By the impugned award, the Arbitral Tribunal rejected the claim made by the Petitioner. The main prayer of the Petitioner was to set aside the notice dated 23 November 2006 issued by the Respondent, terminating the agreement between the parties, and to direct the Respondent to specifically perform the agreement dated 4 October 2000, and the terms and conditions of the minutes dated 11 April 2005, with certain particulars. The Petitioner had also claimed various other reliefs, including a prayer for damages.

2. Arbitration Petition No. 695 of 2011 is filed by the Maharashtra State Power Generation Company Limited against the Dirk India Private Limited challenging the same award passed by the Arbitral Tribunal, to the extent that it relates to the dismissal of its counter claim. The petitioner-Maharashtra State Power Generation Company Limited had sought damages from the Dirk India Private Limited.

3. Since both the petitions, filed u/s 34 of the Arbitration and Conciliation Act, 1996, have arisen from the same arbitral award, they were heard together and are disposed of by this common judgment.

4. The Dirk India Private Limited (Dirk India) is a company incorporated under the provisions of the Companies Act, 1956. It is part of a group of companies based in United Kingdom. It specializes in recycling by-products generated by thermal power stations. Dirk group of companies use Pulverised Fly Ash, which is a waste product generated in coal fired thermal power stations to manufacture cement replacement material under the brand name of "Pozzocrete." The Maharashtra State Electricity Generation Company Limited (Mahgenco), which was earlier known as Maharashtra State Electricity Board, is a government company incorporated under the Companies Act, 1956. Mahgenco has various thermal power plants, one of which is Nashik Thermal Power Station, Eklahare, Nashik.

5. The disputes between the parties relate to Nashik Thermal Power Station (NTPS). The NTPS uses coal as fuel for generation of electricity. Coal is burnt in a boiler with the help of air supplied by fans. The waste product is ash. The ash generated is of two types. One is Furnace Bottom Ash comprising of coarse ash. Second is Pulverized Fly Ash (PFA). Due to the heat and the air circulation of the fans used at the power station, PFA which is a fine ash, rises to the top of boilers. The Bottom Ash generated is mixed with water and converted into a slurry. This slurry is then pumped out from the bottom of the boilers and is disposed off in an Ash lagoon. The Bottom Ash is generally about 20% of the total ash. The PFA which rises to the top of the boilers is trapped by Electrostatic Precipitators (ESPs) installed along the outer sides of the boilers. Each particle of PFA has a small electric charge. The ESPs are rows of large plates made of copper, each carrying an electric current of varying intensity. If the PFA escapes in the air, it being very fine, can cause serious atmospheric pollution. Traditionally Individual contractors were lifting a small quantity of waste fly ash from NTPS, while most of the ash was being washed away into the lagoon or escape into the air. This was the position when the parties negotiated an agreement in respect of the PFA.

6. Negotiations culminated into an agreement between Dirk India and the MSEB on 4 October 2000. In the recital of the agreement it was stated that the MSEB was interested in disposal of PFA to avoid atmospheric pollution. MSEB was satisfied about the capacity of Dirk India to make cement substitute products from PFA, and that MSEB agreed to supply PFA to Dirk India for manufacturing

Pozzocrete on the terms and conditions specified in the agreement.

7. Pursuant to the agreement, Dirk India was allotted a piece of land for installing their ash and processing plant and machinery at some distance from the NTPS. Dirk India complained that no valid lease deed was executed in its favour, and no right or title was created, which made it difficult to raise finances. Dirk India commenced construction of the Ash Handling plant (PFA plant) on the land demarcated by Mahgenco. Between October 2000 and April 2002, issue arose as to whether the land allotted to Dirk India was "forest", also issues regarding construction and maintenance of the direct approach road, and shifting of high tension wires. Around April 2001, Dirk India erected one Silo. Silos/hoppers are receptors for collection of ash. As further narration would show, a serious dispute arose between the parties as regards these Silos/Hoppers. According to Mahgenco, Dirk India was supposed to create four large hoppers. According to Dirk India, hoppers could not be created since system of delivery of PFA was not provided by Mahgenco and the locations of the hoppers were not specified. On 24 January 2005, PFA Plant put up by Dirk India was inaugurated. The dispute regarding collection of PFA however remained unresolved. A meeting took place on 11 April 2005, between the Chairman of Mahgenco and Chairman of Dirk India, and others and certain agreement was reached. This agreement was also acted upon later. Dirk India made an additional investment of Rs. 5 crores for processing the PFA from NTPS, and also made other investments.

8. Between January 2006 to March 2006, Mahgenco addressed letters to Dirk India stating that Dirk India failed to collect the required quantity of PFA and unless that was done, Mahgenco would deny the facility of collecting the PFA. By letter dated 23 November 2006, Mahgenco purported to terminate the agreement between the parties. Dirk India was called upon to remove the plant and machinery and to hand over the vacant possession of the PFA plant site. By letter dated 1 December 2006, the Dirk India replied to the notice dated 23 November 2006.

9. On 13 December 2006, Dirk India filed a petition in this Court u/s 9 of the Arbitration and Conciliation Act, 1996 for interim protection. On 22 December 2006, the Court passed an order permitting Dirk India to collect the PFA in the same manner before the termination notice was issued. It was directed that if Mahgenco found that Dirk India was not able to lift the entire PFA, Mahgenco was permitted to take the PFA to the lagoon, and other consequential directions were also issued. The arbitration petition thereafter came up for hearing and it was disposed of on 8 March 2007, restraining Mahgenco from selling or delivering PFA to the strangers or otherwise disposing of the same, without first offering it to Dirk India, to the extent of 3000 MT/day. If Dirk India failed to remove PFA to the extent specified within 24 hours, the Mahgenco was free to dispose of the PFA. Mahgenco was restrained from dispossessing the plant and machinery of Dirk India and from taking such coercive actions. An Arbitral Tribunal of three Arbitrators, senior retired judges was constituted. On 10 September 2007, Dirk

India filed its claim. Mahgenco filed its Say and also filed its counter claim.

10. This is briefly how the dispute came to be referred for arbitration. Both sides presented their version before the arbitrators. In following paragraphs, the case of each side, as it appears in the pleadings, is reproduced in brief.

11. The case of Dirk India :

(a) In July 2000, the Chief Minister of Maharashtra accompanied by Industries Minister and the then Chairman of the MSEB, visited United Kingdom and solicited large scale foreign investment in the State of Maharashtra. Dirk India entered into an Agreement dated 4 October 2000 with MSEB. Dirk India invested in a captive plant at NTPS. Mahgenco gave exclusive rights to Dirk India lift the PFA generated at NTPS for a term of 30 years. Under the Agreement, Dirk India was required to make a huge investment in order to build, at their own cost, a PFA Handling plant on a piece of land next to the NTPS to be leased by Mahgenco for thirty years. The PFA collected by the ESPs needed to be transported by a Dense Phase Conveying System to a central point of collection or a silo/hopper meant for storage of the PFA and its ultimate disposal. The Dense Phase Conveying System was to be built and commissioned by Mahgenco at their cost so as to enable them to provide the PFA to Dirk India. Mahgenco was to deliver the PFA in the hoppers of Dirk India as provided in Clause 3.2 of the Agreement. The Thermal Power Plants of Mahgenco at Paras, Parli, Kaparkheda and Bhusawal have such a Dense Phase Conveying System installed at their ESPs/boilers;

(b) During the period 1999-2005, the total ash generated in the five boilers of NTPS on an average was 3386 MT per day. About 20% of this ash was Bottom Ash. About 2776 MT of the total ash was PFA. Due to the inefficiency of the ESPs and other similar reasons, about 1000 MT of the PFA escaped the ESPs, and was released into the air. On an average about 1800 MT of PFA per day was available for being lifted from the ESPs;

(c) Dirk India in or around November, 2000 commenced construction/erection of the PFA plant on the land demarcated by Mahgenco. On February 3, 2001, the Technical Director, MSEB visited the site and assessed the requirements for performance by Mahgencos of the said Agreement. Dirk India handed over the plans to Mahgenco of the Dense Phase Conveying System to be built and commissioned by Mahgenco, which was discussed at the time of the site visit on 3 February 2001. Accordingly, Dirk India wrote a follow-up letter dated 28 March 2001 to the Technical Director and informed him that on 24 March 2001 Dirk India had been requested by the Manager of NTPS to have a meeting with Dirk India's Technical Design Staff to explain the design proposal for the Dense Phase Conveying System meant for NTPS;

(d) Dirk India received a letter dated 3 May 2001 from the Technical Director in reply to Dirk India's letter dated 31 March 2001 wherein it was alleged that the detailed equipment lay-out is not submitted by Dirk India even after repeated requests of the Chief Engineer of Mahgenco. The drawings had been given to

Mahgenco on 23 January 2001. As per clause 3.2 of the agreement dated 4 October 2000 between the parties, Dirk India had an exclusive right to receive from Mahgenco the entire PFA from the ESPs. Mahgenco was required to deposit the PFA in the Hoppers constructed by Dirk India within the precincts of the NTPS in accordance with clause 3.1 of the said agreement;

(e) Mahgenco did not commence construction of the Dense Phase Conveying System. By their letters dated 12 August 2002 and 19 August 2002, Mahgenco alleged that Dirk India was not lifting the contracted quantities of PFA, and sought a schedule of installation, completion of the plant and machineries plans for lifting fly ash. Dirk India at its own costs constructed one Silo, into which Mahgenco was required to deliver the PFA. Mahgenco did not deliver the PFA into the Silo erected by Dirk India. Consequently, Dirk India did not erect the Hoppers. As Mahgenco was not attempting to construct a Dense Phase Conveying System in order to deliver the PFA to Dirk India as per the said Agreement, at an unforeseen extra cost, Dirk India resorted to a system for manual removal of the PFA;

(f) At the request of Mahgenco, Dirk India installed valves being opened at the bottom of the ESPs and the PFA was manually removed. This process was laborious, environmentally not desirable and slow and is not designed to handle all fly ash generated. Between 2002-2005, Dirk India continued to invest their own funds in the project and by early 2005 reached an overall investment of Rs. 25,00,00,000/- (Rupees Twenty Five Crores only). On 20 October 2004, a meeting was held between the officers of Mahgenco and the representatives of Dirk India. It was agreed that Dirk India will pay at the rate of Rs. 30/- per metric ton of Pozzocrete produced by Dirk India, and Mahgenco would rebuild the public road connecting the Nashik-Pune Road with the Village of Eklahare and Dirk India's plant. On 24 January 2005, Dirk India inaugurated the extension of the PFA plant put up by them;

(g) A meeting was held on April 11, 2005 at the Head Quarters of Mahgenco at Mumbai, which was attended, by the Chairman of Mahgenco and the Chairman of Dirk India's group of companies, and other officials from both sides. Minutes of meeting served as an explanation to the original Agreement. It was agreed that Dirk India would erect the remaining three Silos/Hoppers to meet a completion date of the promised PFA supply system, which Mahgenco promised to build without delay. Mahgenco however did not install the PFA supply system viz. the Dense Phase Conveying System and alleged that this should have to be done by Dirk India;

(h) During January 2006 to March 2006, Dirk India received letters from Mahgenco in which they alleged that Dirk India was to build the Dense Phase Conveying System and that Dirk India had failed to do so. Dirk India is, always was and is now ready and willing to perform its part of the said Agreement and Dirk India also has performed its part of the said Agreement. Therefore, the purported termination of the agreement and the demand to hand over the land,

plant and machinery was unjustified and illegal.

12. The case of Mahgenco:

(a) Mahgenco allotted and handed over a plot of land admeasuring 2500 sq. mtrs. to Dirk India for installation of dry fly ash handing system. Dirk India gave up its claim for a lease and in the year 2002 itself the clause pertaining to sublease stood altered. Dirk India insisted on electricity supply without security deposit, which was contrary to the rules. Dirk India did not make the deposit and did not comply with the formalities, till 2004. It failed to erect all four hoppers as agreed by it vide clause 3.1 till date, save and except one Silo;

(b) According to clause 3.1 and 3.2, Dirk India was to erect four hoppers and Mahgenco was to provide PFA, into these hoppers. As Dirk India failed to erect the four hoppers, the question of Mahgenco providing PFA to hoppers did not arise. Mahgenco never agreed to erect any PFA Collection System to Dirk India's hoppers. Dirk India agreed to install the Dry Ash Collection System and submitted drawings and description of mechanical Dry Ash Collection System in the meeting dated 23 January 2001. In a meeting dated 31 March 2001, Mahgenco approved Dirk India's proposal to install dry ash collection system and silos i.e. hoppers at Unit No. 4 and 5 at Stage 2;

(c) In the meeting dated 11 April 2005, Dirk India agreed that it would not insist for a lease, and agreed that it had exclusive right on entire PFA generated, only if it invested Rs. 5 crores for processing the Dry PFA. Dirk India again agreed to erect remaining three hoppers with a completion date of the supply system, which Mahgenco would install.

Therefore unless Dirk India commenced construction of silos/hoppers, there was no question of Mahgenco arranging a supply system. Mahgenco made a reciprocal promise contingent upon Dirk India's erection of hoppers/silos. The Chairman of Mahgenco did not sign the minutes and no proposal in terms of minutes was ever finalized. The Board did not approve the proposal. Minutes were not acted upon;

(d) In the one silo constructed by Dirk India, Dirk India was pouring the collected PFA into grades, and it was using only fine quality of the ash, and the reminder was discharged in lagoon. Dirk India manually collected PFA in large polythene bags. The bags were placed haphazardly, causing a spillage, which went into the gutters and choked them. Dirk India implemented the agreement as per its convenience and the agreement was not workable. The intention of Mahgenco behind the Agreement was to dispose the PFA and not earn income;

(e) Mahgenco gave a legal notice on 13 March 2006 stating reasons and thereafter terminated the Agreement vide notice dated 23 November 2006. The agreement was validly terminated. The clause 11 of the contract contemplated termination by either party without giving any reasons. Dirk India caused serious damage to the plant and machinery of NTPS and extra expenses had to be

incurred for repairs, replacements, and for employing additional manpower, and Mahgenco is entitled to the damages to the tune of Rs. 1867.58 lakhs with interest @ 18 % p.a.

13. With these pleadings Dirk India made it's claim. Mahgenco replied to the claim and made a counter claim of damages. The parties filed rejoinders and replies. On 19 December 2007 the Arbitrators framed 22 issues. Parties led evidence accordingly. Dirk India examined Mr. George Dirk, it's Chairman, as its witness. Mahgenco examined Mr. R.G. Morale, an engineer, as its witness. Evidence before the Arbitral Tribunal was concluded on 16 December 2009. After conclusion of the oral arguments, parties filed written statement in January 2010. Thereafter, the impugned award came to be passed on 31 March 2011. The claim of Dirk India and the counter claim of Mahgenco were dismissed. Both are aggrieved by dismissal of their claim and counter claim respectively and have filed the present petitions.

14. I have heard Mr. Rafiq Dada, learned Senior Advocate for Dirk India and Mr. Aspi Chinoy and Mr. D.D. Madon, learned Senior Advocates with Mr. S.S. Kulkarni, Advocate, for Mahgenco.

15. The learned counsel made submissions in extention. It is however necessary to keep in mind the scope of challenge u/s 34 of the Act lest it becomes an exercise of an appellate power. It is trite to state that the petition u/s 34 of the Act is not an appeal and the merits of the award cannot be examined exercising appellate powers. The scope of enquiry lies in a narrow field. The scope of scrutiny u/s 34 is a subject matter of various judicial pronouncements. The review of the decisions would indicate that the Court leans in favour of confirming the arbitral award. There are however certain situations where the Court exercises powers u/s 34 of the Act to set aside the award. Therefore, unless a petitioner brings its case within the available grounds, the petitioner cannot succeed.

16. In the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the Apex Court took a review of the decisions as regards the enquiry u/s 34 and observed paragraphs in 22, 55, 56, 60 and 74 as under :-

22. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under CPC that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court

exercising revisional jurisdiction, the jurisdiction of such Court would be wider. therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the arbitral tribunal could be set aside. If narrow meaning as contended by the learned senior counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that arbitrator shall decide *ex aequo et bono* [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided u/s 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

* * * *

55. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the arbitral tribunal was not with regard to interpretation of question of law. it was only a general reference with regard to claim of Respondent. Hence, if the award is erroneous on the basis of record with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.

* * * *

56. Dealing with the similar question, this Court in *Alopi Parshad & Sons Ltd. v. The Union of India* observed that the extent of jurisdiction of the Court to set aside the award on the ground of an error in making the award is well defined and held thus (AIR p. 592 para 16):--

The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as

for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous--Champsey Bhara and Company v. Jivaraj Balloo Spinning and Weaving Company Limited. If however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside--In the matter of an arbitration between King and Duveen and Ors. and Government of Kelantan v. Duff Development Company Limited.

Thereafter, the Court held that if there was a general reference and not a specific reference on any question of law then the award can be set aside if it demonstrated to be erroneous on the fact of it. The Court, in that case, considering Section 56 of the Indian Contract Act held that the Indian Contract Act does not enable a party to a contract to ignore the express provisions thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity and that the arbitrators were not justified in ignoring the expressed terms of the contract prescribing the remuneration payable to the agents. The aforesaid law has been followed continuously. M/s. Sikkim Subba Associates Vs. State of Sikkim, and G.M., Northern Railway and Anr. v. Sarvesh Chopra.

* * * *

60. Further, in AIR 2001 2933 (SC) the Court observed as under:--

"9. The position in law has been noticed by this Court in Union of India (UOI) Vs. A.L. Rallia Ram, and Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, to the effect that the arbitrator's award both on facts and law is final that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In the understanding what would be an error of law on the face of the award, the following observations in Champsey Bhara & Co. v. Jivraj Balloo Spg and Wgv. Col. Ltd. a decision of the Privy Council, are relevant (IA p. 331s)

An error in law on the face of the award means, in Their Lordship's view, that you can find in the award on a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can that say in erroneous."

10. In M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and

but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

* * * *

74. In the result, it is held that:--

A. (1) The Court can set aside the arbitral award u/s 34(2) of the Act if the party making the application furnishes proof that:--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

2) The Court may set aside the award:--

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:--

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:--

(a) fundamental policy of Indian law;

- (b) the interest of India; or
 - (c) justice or morality, or
 - (d) if it is patently illegal.
- (4) It could be challenged:--
- (a) as provided u/s 13(5); and
 - (b) Section 16(6) of the Act."

17. In the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , the Apex Court observed as under :-

65. We may consider the submissions of the learned counsel for the parties on the basis of the broad principles which may be attracted in the instant case i.e. (I) whether the award is contrary to the terms of the contract and, therefore, no arbitrable dispute arose between the parties; (ii) whether the award is in any way violative of the public policy; (iii) whether the award is contrary to the substantive law in India viz. Sections 55 and 73 of the Indian Contract Act; (iv) whether the reasons are vitiated by perversity in evidence in contract; (v) whether adjudication of a claim has been made in respect whereof there was no dispute or difference; or (vi) whether the award is vitiated by internal contradictions.

18. The issue as to whether an award containing perverse conclusions and findings on wrong basis could be set aside, and came up for consideration before the Apex Court in the case of ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., The Apex Court held :-

30. There is no proposition that the courts could be slow to interfere with the arbitrator's award, even if the conclusions are perverse, and even when the very basis of the arbitrator's award is wrong. In any case this is a case where the interference is warranted and we set aside the norms prescribed by the arbitrator as upheld by the learned Single Judge and the Division Bench.

19. There are various decisions of the Apex Court and this Court, indicating the narrow compass within which the Court must consider the challenge to the award. It is not necessary to burden the record with series of judgments on that proposition, as there is no dispute about that legal position, at the bar.

20. Mr. Rafiq Dada, learned Senior Advocate has sought to bring the challenge of Dirk India under the following heads in support of his contentions in Arbitration Petition No. 361 of 2011.

- a) The award is patently perverse;
- b) The arbitrators have not decided the dispute in issue and have decided issues which were never in dispute.

c) The award is without reasons. It does not consider the submissions made by the parties and it contains no reason for accepting and not accepting the submissions;

d) The arbitrators have simply ignored the material produced on record, or relied on material never existed and did not carry out any enquiry;

e) There was a gross delay in making the award, and the issues framed were abandoned without notice, which has resulted in the arbitrators missing the key issues to be decided.

21. The response of Mr. Chinoy, learned Senior Advocate is that no case is made out for invoking the limited grounds of challenge available. According to him, Dirk India seeks to challenge the award on merits, which is impermissible. According to Mr. Chinoy, the contentions of Dirk India are contrary to the contract and the award discloses no error of law. It was not necessary for the Arbitrators to write a detailed and elaborate judgment, and since it is found that 22 issues framed earlier were superfluous, they were narrowed down to 5 key issues. It is clear that Dirk India failed to perform its part of the contract, contract was rightly terminated, therefore no elaborate award was necessary.

22. The first ground of challenge is that the arbitrators did not decide the real dispute in question and decided something which is not in dispute between the parties. If this is shown to be correct, it is an available ground of challenge. For this purpose, it would be necessary to appreciate the exact controversy between the parties. The dispute arose and centered around the clauses of the contract. The relevant clauses are as under:

"1. DEFINITIONS AND INTERPRETATIONS

1.4 "Hoppers" shall mean P FA collection systems which MSEB shall permit DIPL to erect on the land of MSEB the NTPS wherein MSEB shall deposit the PFA for off take by DIPL.

1.9 "Site" shall mean the piece and parcel of land situate admeasuring approximately 2500 sq. meters adjacent to the NTPs which shall be leased by MSEB to DIPL for the initial period of 30 (Thirty) years from the Effective Date or the termination of this Agreement for any reason whatsoever, whichever is earlier, for the purposes of the installation of the P FA Plant.

2. PFA HANDLING PLANT

2.1 DIPL shall, at its own costs, expenses and charges and risk and responsibility erect, install and commission the PFA Handling Plant (the "PFAH Plant") including, inter alia, construction of Silo(s), the common fabrication of connecting spool between the Hoppers etc. at the Site within a period of 12 (twelve) calendar Months from the Effective Date for the purposes of manufacture and production of Pozzacrete, and for no other purpose so permitted by MSEB in writing. DIPL shall also construct a compound wall around the PFAH plant.

3. PFA SUPPLY, DELIVERY AND TRANSPORTATION

3.1 MSEB shall permit DIPL and DIPL shall, erect at its entire costs, expenses and charges, four Hoppers for collection of the P FA within the precincts of the NTPS at such locations as may be agreed to by the MSEB PROVIDED however that DIPL shall at no time again or claim to have gained any rights, title or interest in the land upon which such Hoppers are erected. PROVIDED further, that DIPL shall, if so required by MSEB during the currency of this Agreement, relocate the Hoppers at such other place(s) within the NTPS at their own cost, expenses and charges, as may be directed by the MSEB PROVIDED also that the Hoppers so erected or relocated by DIPL with the permission of MSEB shall in no way whatsoever affect the functioning and operations of the NTPS.

3.2 MSEB shall provide PFA from the ESPs of Unit No. 1 to 5 (i.e. stage I & II) from NTPS and deliver the PFA to DIPL by depositing the same in the Hoppers constructed by DIPL as stated in clause 3.1 above. "DIRK INDIA" has exclusive right to determine the hoppers from which fly ash for Dirk's process is taken.

3.4 MSEB shall supply and deliver PFA to DIPL by the depositing the same in the Hoppers as stated in clause 3.2 above. Provided however that MSEB shall supply and deliver the P FA as aforesaid on an as-is-where-is basis. DIPL does hereby agree and acknowledge that MSEB neither guarantees that the PFA supplied by it to DIPL under this Agreement is of any particular quality or grade, nor assume any responsibilities for the same. DIPL further agrees acknowledges that it has offer to MSEB to consume and utilize the PFA replying solely upon the test carried out by it on the samples of PFA collected by DIPL from the NTPS.

3.5 DIPL shall transport the PFA from the Hoppers to the P FA Plant situated at the Site at its own costs and on its entire responsibility. Provided however, that DIPL shall during such transportation exercise all such due care and diligence so that the same does not result in any environmental problem or hazard, Further, such transportation of PFA to the P FA Plant at the Site is and shall always be carried out in a manner whereby the same does not in any manner violate any applicable pollution control Laws, including without limitation. The Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 and the rules and regulations hereunder. MSEB shall, only for the purposes of the transportation of the PFA from the Hoppers to the PFAH Plant as stated above, permit DIPL to use the road leading to the Hoppers."

Perusal of the above clauses shows that as per clause 2.2, Dirk India was to construct a PFA handling plant which was to be at some distance away from NTPS. The place was defined as the "Site." The Dirk India was also to construct four hoppers for collection of PFA within the precinct of NTPS.

23. Therefore, three different locations were contemplated.

(i) NTPS where PFA was being generated; (ii) location of four hoppers which were to be constructed within the precinct of NTPS;(iii) the site of PFA plant, which

was some distance away. There were two stages of transportation of PFA. (a) ESP to hoppers (clause 3.2); and (b) From hoppers to the PFA plant (clause 3.5).

24. According to Dirk India, the PFA was to be transported by Dense Phase Conveying System to the central point of collection of silo or hopper made for storage, that is stage (a). According to Dirk India, Dense Phase Conveying System was to be built by Mahgenco. According to Dirk India, every other thermal station has a Dense Phase Conveying System. Since inspite their responsibility under the agreement no such facility was provided by Mahgenco, a meeting was held on 11 April 2005 when it was agreed that Mahgenco had to build such supply system. Since the supply system was not built, Dirk India could not collect the stipulated quantity of PFA and since there were various breaches of the contract by Mahgenco itself, the action of terminating the contract was illegal. According to Dirk India, it had constructed a small silo and unless Mahgenco specified where the other hoppers were to be constructed, they could not be constructed. Therefore, the PFA was manually constructed. So, according to Dirk India, the main failure on the part of Mahgenco was not providing the facility for collecting the PFA and, therefore, four hoppers could not be constructed. Only when the PFA would be collected in these four hoppers, it was to be transported to PFA plant i.e. stage (b) and responsibility of transporting at stage (b) was of Dirk India. So, according to Dirk India, it was the responsibility of Mahgenco to provide delivery system for PFA to be brought to the hoppers under stage (a). Mahgenco controverted the assertions of Dirk India. It was their contention that Dirk India constructed only one silo/hopper but failed to construct other three hoppers and, did not collect the requisite amount of PFA. According to Mahgenco, unless Dirk India commenced construction of the hoppers, there was no question of a supply system for stage (a).

25. So the pleading of the parties clearly indicated that the dispute was whose responsibility it was to create a methodology for collection of transport of PFA from ESP to Hoppers to be constructed nearby i.e. for the stage (a). It was never disputed by Dirk India that the transport from the Hoppers to its PFA plant-stage (b) was the responsibility of Dirk India, and it was being done by plying trucks. When the parties led their evidence before the arbitral tribunal, this position came more in sharp focus.

26. Mr. Dirk on behalf of M/s. Dirk India in his deposition reiterated that since Mahgenco did not make any arrangement to deliver the PFA from hoppers to be constructed stage (a), and the location for other hoppers were not specified, a small silo was built. He said that it was not possible for Dirk India to collect adequate amount of PFA, without resorting to manual collection. He asserted that it was the obligation of Mahgenco to deliver the PFA into hoppers of Dirk India and for that purpose, Mahgenco had to install Dense Phase Conveying System which they failed. Mr. Dirk was cross-examined extensively. In the cross-examination, various suggestions were given. Mahgenco examined its engineer Mr. R.J. Morale. Mr. Morale specifically averred that Dirk India erected only one

silo and it failed to erect remaining hoppers. He specifically stated that as per clause 3.2 of the agreement, Mahgenco was to deliver the PFA to Dirk India's hoppers, which were never constructed. There was no question of construction of a delivery system and Mahgenco was under no legal obligation to provide a PFA delivery system. He stated that the erection of a delivery system without any hoppers would have been a meaningless exercise. He stated that primary default was on the part of Dirk India in not constructing the four hoppers. It is to be noted that all these assertions were regarding stage (a).

27. Thus the dispute between the parties was regarding PFA was to be delivered from ESP to the hoppers, that is stage (a). To repeat clause 3.2 and clause 3.5 covered different transportation stages. Clause 3.2 was for stage (a) ESP to the hoppers. Clause 3.5 was for stage (b) hoppers to the PFA plant. The term "Site" meant where the PFA plant was constructed. It is clear from the pleadings of the parties and evidence that the controversy is surrounded itself as regards the obligations under clause 3.2. As a corollary, various issues arose : whether it was the obligation of Dirk India; whether Dirk India was to first construct the hoppers then delivery system was to be constructed; whether Mahgenco was right that without hoppers there could be no delivery; whether since the Dirk India installed only one silo and did not collect requisite amount of PFA there was a breach of contract; whether it was the responsibility of Mahgenco to construct a Dense Phase Conveying System; whether it was the responsibility of Dirk India to construct the Dry Ash System.

28. Mr. Dada submitted that the Arbitrators completely confused the two stages of transportation, and purported to decide a dispute as regards stage (b) which never existed, and used those conclusions to hold against Dirk India. If the following passages from the award are perused, the submission has merit.

29. The relevant findings from the award are reproduced below:

"10. Under the contract, it was necessary for the company to erect at its own cost a system for transportation of PFA deposited in the silos built by it on the site of Genco and the company failed to do so completely.

x x x

11. It is clearly provided that the company shall transport the PFA from the Hoppers to the Plant at its own cost and on its entire responsibility. The transport of P FA was thus squarely the responsibility of the Claimant Company. According to the Company the responsibility was, after April, 2005, that of the Genco and it was because of the failure of Genco to have the conveyance system that the company was unable to lift the contracted quantity of PFA.

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12. It will thus be seen that the responsibility of transportation of PFA from NTPS to Pozocrette plant was always of the Company, how the company undertakes that transport was look out solely of the company, it could do so by

conveyance system or it could do so by transporting in closed tankers or trucks from the premises of the NTPS to the premises of the company. It is therefore clearly established on record that the company failed in its responsibility to transport PFA from NTPS to its plant.

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22.(c) A scrutiny of the contract dated 4.10.2000 will show that it was the responsibility of Genco to put the P FA into the Silos on its site and it was the responsibility of the Company to take it from there to the Silos on its site. The responsibility was that of the Company and not of Genco. The Company has taken clearly contradictory stand with regard to transport of P FA from the five units of "Genco to the plant of the Company adjutant to the NTPS Genco. In clause 3 of the Agreement it is unequivocally stated that the company shall erect at its own cost four hoppers for collection of PFA within the precincts of the NTPA. The responsibility of the Genco was of depositing the P FA in the hoppers constructed by the company within the premises of the NTPS. In clause 3.5 it is clearly agreed that the company shall transport the PFA from hoppers to the "plant situated at the site of the company at its own cost and responsibility. This clause in fact puts the entire responsibility of transporting PFA on the company. The Company, however, has claimed that the Claimant never unconditionally agreed to put up any mechanical delivery system. This contention on the face of it is untenable. From the quotation of the clause 3 above, it will be clear that the responsibility of transporting PFA from NTPS to the plant of company was always that of company and it completely failed to do so.

xxx

22.(d) From the pleadings of the company as also from the scrutiny of the agreement dated 04.10.2000, it will be clear that a responsibility of transporting PFA was always that of the company. How it does, it was the discretion of the company. Rights to use the roads within the NTPS were also given to the company for transportation of PEA and yet nothing was done to effect transport of 1000 MT/per day PFA from the NTPS to the company plant at any time. Failure to lift even 1/5th of the agreed quantity of the PFA throughout the period of subsistence of the contract is therefore substantial and valid reason for which the contract can be terminated. The most vital purpose of the agreement dated 04.10.2000 was effective prevention of atmospheric pollution caused by PFA. It cannot be matter of dispute that this was the basic reason for which the entire contract was tailored: The company having failed to lift anything more that 600 MT/per day throughout the period of subsistence of the contract there was total failure to achieve this object for which the entire contract was executed. Therefore, the Genco had very substantial reason for terminating the contract.

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24. It must be noted that inspite of crystal clear terms of the agreement as quoted earlier; particularly entire clause 3 of the said agreement, the Claimant

Company has brazenly pleaded and sought to prove that the responsibility of transportation of PFA was of the Respondent Genco and not Claimant Company. At the cost of repetition, we will reconsider on repeated reproduction, clause 3 of the agreement.

3.5 "DIPL shall transport the PFA from the Hoppers to the P FA Plant situated at the site at its own cost and on its entire responsibility".

In spite of this crystal clear term of the contract, it was brazenly pleaded by the company that the responsibility of supplying PFA was that of Genco. Mr. Dirk in his affidavit in evidence has also stated on oath that it was so. Even during the course of argument on 16.11.2009 the Claimant tendered before us as many as 19 proved documents relating to delivery of pulverized fly ash. A communication dated 26th February, 2001 issued within 3 months of the contract whereby it was specifically brought to the notice of the company that the transportation of PFA was to be arranged by the company and yet it was claimed by the letter correspondence that the responsibility was of the Genco and not the company. Thereafter on 31st March, 2001 a letter was addressed by the Claimant to the Respondent stating although the contract does not require it, the Claimant was transporting the PFA to its plant. This claim in writing is on the face of it contrary to the provisions of clause 3.5 of the agreement as quoted above.

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25. It must be noticed that the basic purpose of entering into this contract was to provide a permanent solution to environmental pollution in the matter of P FA and therefore by this contract the Genco agreed to give free of cost supply of PFA to the Claimant deliver the PFA into the hoppers/silo of the company erected by the company at the site of Genco. The responsibility to carry it from there to the Pozocrette plant was squarely that of the company as will be seen from clause 3.5 of quoted above. This was never done and then the Claimant comes up with the theory of amendment of the contract by the meeting dated 11th April, 2005. According to the pleading and evidence of the Claimant the responsibility of transportation of PFA from NTPS plant to Pozocrette plant was always that of Genco, if this is factually proved by the terms of the contract then there was no need to show that the responsibility of transportation of PFA was shifted from Genco to Claimant by amendment of the agreement. This obvious change in the stance of the Claimant Company proves beyond doubt that even according to the company the responsibility of transportation of PFA was that of the Claimant Company till 11th April, 2005. There is nothing on record to show that anything substantial in this regard was undertaken by the company to perform its part of the contract. According to us there is a gross failure to perform an all important term of the contract by the company by not doing anything for transportation of PFA from its Silos in the NTPS to its silos in the Pozocrette plant. It cannot therefore be said that Genco avoided its responsibility of delivering PFA. In our opinion, the Respondent Genco has completely proved one valid reason for termination of contract namely non transportation of PFA in agreed quantities

from NTPS plant to Pozocrette plant to prevent pollution for a continuous period of 4 years."

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30. Perusal of the above mentioned passages would show that the Arbitrators repeatedly referred to clause 3.5 which places responsibility on Dirk India to carry PFA from hoppers to PFA plant i.e. stage (b). In para 22, they hold that clause 3.5 puts everything beyond dispute. They hold that Dirk India brazenly avoided its obligation by relying on clause 3.5. The reference to and the reliance on clause 3.5 runs through the entire reasoning and often gets intermixed with the obligation under clause 3.2. With respect, the Arbitrators completely got tangled in these two different stages. There was no dispute as regards obligation of Dirk India under clause 3.5 [stage (b)] neither Dirk India asserted so therefore, there was no question of its denial by Mahgenco. The arbitrators in the award again and again go back to clause 3.5. Mr. Chinoy contended that the reference to clause 3.5 by the Arbitrators is only to hold that it was the responsibility of Dirk India to transport the PFA. He submitted that it includes responsibility under clause 3.2 as well. According to him, the finding under clause 3.5 will not detract from the finding as regards the basic obligation to transport the PFA.

31. When the contract stipulated different kinds of obligations for different stages of transport and the parties knew that was to be so, the decision of the arbitrators ought to have been on those lines. If one looks the passages from the award culled out above again, the Arbitrators have not made any distinction between the transport for stage (a) and stage (b). The arbitrators hold that it is the responsibility of Dirk India to transport from PFA to PFA plant and it could do so by installing a conveyor system, tankers or trucks. When Dirk India was manually collecting the PFA, it was transporting it by trucks from NTPS plant to its PFA plant. That it was the responsibility of Dirk India to transport from hoppers to its PFA plant, at the cost of repetition, was not disputed by anybody. The Arbitrators brought on to themselves to decide an issue which was never in dispute. There is confusion as regards the distinct responsibilities of the parties in respect of two distinct stages of transportation. The Arbitrators imposed a denial of obligation for stage (b) on the part of Dirk India and then castigated it for the denial.

32. Now it will have to be considered whether findings on clause 3.5 and 3.2 can be severed. In my opinion, it is not possible. There is total confusion between the two stages of transportation. This confusion again and again appears in the award and it is so intrinsically mixed with the findings that it is very difficult to hold that even if the observations as regards clause 3.5 is kept aside, rest of the reasoning was the adjudication of the dispute between the parties. This flaw permeates through the entire fabric of the award and vitiates it. Failure to distinguish between two stages of transportation was a fundamental failure. Though there is a finding that Dirk India failed to lift the PFA from ESP by not

constructing hoppers on the site, it is based on a wrong clause of the contract. To put in short, the responsibility for stage (a)-the real dispute, is decided by adjudicating the clause governing stage (b). In a petition u/s 34 of the Act, it may not be possible to test the merits of the award, but once it is found that outcome is a result of adjudication of dispute which never arose, then it will be a fundamental flaw. If the flaw is so fundamental and intermixed, then the entire award will be vitiated and cannot stand.

33. Having dealt with the part where the Arbitrators decided the issue which never arose, now to the issues which arose but were not decided. Disputes was : whether hoppers had to be constructed first or whether the location had to be provided first; whether Dense Phase Conveying System had to be constructed; what is the effect of minutes of meeting of 11 April 2005, whether it constituted an amendment or not, whether it confirmed the obligations or whether new obligations were cast; whether Dirk India had to provide a Dry Ash system.

34. According to Dirk India, hoppers could not have been constructed before the Supply System and specifications of the location were given. According to Mahgenco, Dirk India had to first construct four hoppers which they did not do, and they did not collect the PFA. The parties led evidence at great length on these issues. When 22 issues framed earlier by the Arbitrators, two issues were included in it. First, whether Mahgenco was under an obligation to provide Dense Phase Conveying System, and for delivery of PFA to the hoppers. Second issue was whether Dirk India agreed to install dry fly ash collection system. There was an another issue as to whether Dirk India had committed breach of contract by erecting one hopper out of four.

35. The Arbitrators straightaway went to the issue whether Dirk India committed any breach by not collecting the PFA, but with no consideration of the issue as regards the Dense Phase Conveying System. These issues could not have been separated. Whether there was an obligation to construct a Dense Phase Conveying System or not, was an equally vital issue to be considered. These vital issues were not decided as the Arbitrators found that the admission of Dirk India was enough, and the clause 3.5 was clear.

36. Mr. Dada made a grievance that 22 issues framed earlier, however at the time of writing the award, after the matter was closed, were re-cast and most of the issues were dropped and only four issues were framed. 22 issues which were framed are as under :-

" Settled Issues

1. Whether the Respondent has committed breach of the Agreement by failing and neglecting to execute and register a proper lease deed in respect of land admeasuring 19,000 sq. meters on which the plant of the Claimant is put up, as alleged in paragraph 22 of the Statement of Claim?
2. Whether the Claimant gave up its claim to sub-lease and the clause relating to

sub-lease stood altered in the year 2002, as alleged in paragraph 5.2.3 of the Written Statement?

3. Whether the Respondent caused delay and obstructions in the construction and installation of the plant by the Claimant, as alleged in paragraph 23 of the Statement Claim?

4. Whether the Respondent is under an obligation to build and provide a Dense Phase Conveying System at its cost in order to deliver the PFA in the Hopper of the Claimant, as alleged in paragraph 17 of the Statement of claim?

5. Whether the Claimant agreed to install Dry Ash Collection System as alleged in paragraph 5.4.4 of the Written Statement?

6. Whether from the date of the commencement of the Agreement, till date, the Claimant has failed to lift the agreed quantum of PFA, as alleged in paragraph 5.5.1 of the Written Statement?

7. Whether the Claimant committed breach of contract by erecting only one hopper out of four and whether question of providing PFA to hoppers did not arise as alleged in paragraph 5.4.2 and 6.2 of the Written Statement?

8. Whether there is mishandling PFA by the Claimant as alleged in paragraph 5.6.2 of the Written Statement?

9. Whether the Claimant has exclusive right to receive from the Respondent the entire PFA from the Electro Static Precipitators of Unit Nos. 1 to 5 of NTPS belonging to the Respondent, as alleged in paragraph 29 of the Statement of Claim?

10. Whether the Respondent committed breach of contract by permitting third parties to lift the PFA at the NTPS, as alleged in paragraph 67 of the Statement of Claim?

11. Whether the contract is validity terminated as alleged in paragraph 50 of the Written Statement?

12. Whether the Claimant is entitled to specific performance of the Agreement dated 4th October 2000 and of Minutes of Meeting dated 11th April 2005, as sought in prayer (B) and (C) of the Statement of Claim?

13. Whether in addition to the claim for specific performance, the Claimant is entitled to damages in the sum of Rs. 63,31,070 on account of installation of additional valves and third party lifting the PFA, as alleged in paragraph 83 of the Statement of Claim?

14. Whether the Claimant is entitled to damages in addition to the claim of Specific Performance:

(a) Of Rs. 8,43,01.154/32 on account of costs, charges and expenses incurred by the Claimant for manual lifting

- (b) Of Rs. 39,00,000 on account of costs, charges and expenses incurred by the Claimant for installation of the collection valves;
- (c) Of Rs. 23,90,826.27 on account of costs, charges and expenses of FIBC 1 (only loading expenses) incurred by the Claimant;
- (d) Of Rs. 1,62,09,094 on account of costs, charges and expenses of FIBC 2 (only loading expenses) incurred by the Claimant;
- (e) Of Rs. 2,60,73,097 on account of costs, charges and expenses of FIBC 3 (only loading expenses) incurred by the Claimant;
- (f) Of Rs. 25,75,993.91 on account of cost of spares and maintenance incurred by the Claimant;
- (g) Rs. 40,12,696 on account of Electricity charges paid to NTPS for running FIBC 1;
- (h) Of Rs. 64,97,896 on account of Electricity charges for running FIBC 2 and FIBC 3;
- (i) Of Rs. 50,50,200 on account of Labour costs incurred by the Claimant for running the FIBC;
- (j) Of Rs. 4,59,82,885 on account of the cost incurred by the Claimant for purchase of bags for collection;
- (k) Of Rs. 79,28,32,000 on account of loss of profit suffered by the Claimant because the Respondents has not built and commissioned a Dense Phase Conveying System;
- (l) Of Rs. 37,03,771 on account of fixed cost incurred during December 2006 when the Respondents prevented the Claimant from lifting the PFA from NTPS paid and borne by the Claimant;

As alleged in paragraph 84 of the Statement of Claim?

15. Whether, in the alternative to the relief of specific performance, the Claimant is entitled to a sum of Rs. 142, 33, 87,067.10 as and by way of reimbursement of costs, charges and expenses, as alleged in paragraph 85 of the Statement of Claim?

16. Whether the Claimant is entitled to permanent injunction as alleged in paragraph 86 of the statement of claim?

17. Whether the Respondent is entitled to recover from the Claimant damages:

- (a) Of Rs. 179.98 lakhs on account of replacement cost for damaged impellers and fabric expansion joint for I.D. fan;
- (b) Of Rs. 42.87 lakhs on account of expenses incurred in the works contracts and acid cleaning expenses;

(c) Of Rs. 114.41 lakhs on account of expenses for cleaning of cable trays, cleaning of suspension tubes and rods, replacement of rectifier transformer, cleaning of isolator, replacement of different equipment i.e. emitting electrodes, shaft insulator, various heaters, solenoid valves for ESP power cylinders, rubber seals for ESP power cylinders etc.

(d) Of Rs. 775.84 lakhs on account of expenses incurred for maintenance of slurry pumps, expenses incurred for various contracts for ESP, maintenance of cooling tower, disposal of PFA in slurry form from hoppers to lagoon, various material like pipes, valves, gear boxes, bends etc. caused due to non lifting of PFA;

(e) Of Rs. 169.94 lakhs on account of cost of Electrical consumption of various auxiliaries required for disposal of unified PFA by the Claimant;

(f) Of Rs. 565.58 lakhs on account of expenses incurred to supervise the Ash Disposal System and various operation of machines and technical as well as supervisory staff essential for disposal of non-lifted PFA;

(g) Of Rs. 61.88 lakhs on account of expenses incurred to dispose the un-lifted PFA;

(h) Of Rs. 545 lakhs on account of water charges for disposal of the un-lifted PFA in slurry form

(i) Of Rs. 14691.05 lakhs on account of generation loss

18. Whether either party is entitled to interest on the monetary if so, at what rate, on what amount and for what period?

19. Whether the Claimant is entitled to specific performance of the Contract dated 04.10.2000?

20. Whether the Claimant was and is ready and willing to perform his obligation under the Contract dated 04.10.2000?

21. If so, whether the Claimant is entitled to specific performance of the Contract?

22. What order as to costs?"

However, after the arguments were closed and when the award was declared, the award contained the following issues :-

"1. Does the Respondent prove that the termination of Contract dated 4 October 2000 was valid and proper? If No

2. Does the Claimant prove that it is entitled to specific performance of the entire contract for a period of 30 years ? If No

3. To what damages is the Claimant entitled?

4. Does the Respondent prove that the Claimant was solely responsible for the losses caused to it after termination of contract?

5. Does the Respondent prove that it is entitled to all the damages claim under various heads in the counter claim?

6. What award?"

37. According to Mr. Chinoy, 22 issues were superfluous and four issues which were framed were the only issues that arose and, therefore the Arbitrators rightly narrowed them down the four issues. He submitted that the arbitral tribunal is not a civil Court and no error can be found with this approach. Mr. Dada submitted that the parties advanced their arguments and led their evidence according to the 22 issues. However, since only four issues were framed, focus was lost and it resulted in the award with several flaws.

38. Had this been a stand alone argument of Mr. Dada, I may not have accepted it. However, if it is to be considered along with the other flaws narrated above, there does seem to be the merit in the grievance made by Mr. Dada. When the Arbitrators framed the issues, it was for the parties to focus their attention on the real dispute and they were also to serve as a guidance for the Arbitrators to proceed. The issue as to whether it was the responsibility of Mahgenco to construct Dense Phase Conveying System, was one of the core issues that had to be decided. Once the issues were deleted, the enquiry proceeded rudderless, without any focus, and drifted in a wrong direction.

39. Mr. Dada submitted that a meeting took place on 11 April 2005 and minutes of meeting constituted an admission of an existing liability by Mahgenco. According to him, in the minutes, it was admitted that Mahgenco would construct the Dense Phase Conveying System and inspite of agreeing to the same, they breached this agreement. According to him the minutes only clarified the contract. He submitted that while dealing with this issue, the arbitrator rendered a finding which is perverse.

40. A meeting took place on 11 April 2005 in the office of Mahgenco. The Chairman, Technical Director and Chief Engineer of MSEB were present. The Chairman and Directors of Dirk India were also present in the meeting. Since the minutes of meeting are of importance, they are reproduced as under :-

"1) MSEB enquired about the amount of fly ash lifted by M/s. DIPL after installation of Phase-II of new plant. DIPL reported that current off take is between 9000 to 12000 M.T. Per month and is expected to reach 15000 M.T. per month now.

2) The contractual obligations/terms between MSEB & Dirk were discussed. Currently two items which are not fulfilled by MSEB:

a) Providing lease of 30 years for the land on which DIPL has erected its plant.

b) MSEB is not providing the ash from the ESP into the hoppers to be provided

by DIPL.

3) It was agreed that DIPL will not any more insist on the lease contract, if MSEB provides a separate annexure to the contract that DIPL has the exclusive right on all dry pulverized fuel ash from NTPS. DIPL agrees that this exclusivity is only valid if DIPL makes additional investment of Rs. 5 crores for processing the dry PFA from NTPS and for other related investment into the DIPL plant. It was agreed that if DIPL is not lifting the ash because of slack sales situation or any other reasons, DIPL will make such ash available to other parties which are not in competition with DIPL. Against payment of handling cost plus 10 % profit of handling cost.

4) DIPL had erected already one silo inside the NTPS and will erect the remaining three silos with a completion date of the supply system MSEB will install without delay. Mr. Dirk pointed out that it is impracticable to collect more than 1000 MT per day manually. If MSEB is not providing the ash into the hoppers, the new investment of Rs. 5 crores can not be put to full use.

5) MSEB agreed that NTPS will write to DIPL a letter stating MSEB has no objection if DIPL is processing cenospheres on the land mentioned in the main agreement.

6) DIPL mentioned that it was agreed that DIPL will build a road, using Rs. 30/- per tonne MSEB is charging to DIPL. DIPL has provided to MSEB a study for this project. So far MSEB has not officially responded to the proposal. By March, 2005 DIPL is holding accrued amount. DIPL has asked for written permission to MSEB whilst being released from its commitment to build the road. MSEB stated that MSEB's Civil Engg. Deptt. will look into this matter.

41. Perusal of the minutes reproduced above would show that the contractual obligations were discussed and it was noted that the MSEB had not providing the ash from ESP into the hoppers to be constructed by Dirk India. It was noted that Dirk India had already erected one silo inside the NTPS and will erect remaining three silos with a completion date of the supply system MSEB will install without delay. It was pointed out by Dirk India that it is not possible to collect more than 1000 MT per day.

42. Before the Arbitrators, both sides had placed their interpretation as regards minutes of meeting and their implications. It was the case of Dirk India that minutes were an admission of liability on the part of Mahgenco to ensure the delivery of PFA. It was their case that Mahgenco was in default to comply their obligations. They failed to deliver the PFA to Dirk India and did not construct Dense Phase Conveying System. There was also a debate between the parties as to whether there was an amendment of the agreement. Dirk India in its statement of claim stated that minutes were an explanation to the agreement and were only a guideline. It was their case before the Arbitrators that everything recorded in the meeting did not have an effect to modify the agreement and some of the points in the minutes were clarificatory in nature.

The issue then arose whether it was the responsibility of Mahgenco to construct Dense Phase Conveying System and whether setting up of Supply System was to be done simultaneously with the construction of the silos. It was the stand of Mahgenco that it was never their responsibility to construct Dense Phase Conveying System and it was the responsibility of Dirk India to construct silos/hoppers first. So the issue arose as to whether the system of delivery of PFA to be constructed first or hoppers to be constructed first. Most of the dispute centered around this question. Both the parties led evidence and witnesses were cross-examined on this issue. It was the specific contention of Dirk India that the minutes of meeting dated 11 April 2005 did not totally modify the agreement but only reiterated the obligation of Mahgenco that it would install PFA supply system.

43. The Arbitrators concluded that even according to Dirk India, the responsibility of transportation of PFA was with Dirk India. They based this conclusion on the pleadings of Dirk India regarding the meeting dated 10 April 2005 that the contract was amended on 11 April 2005. According to the Arbitrators, since Dirk India itself stated that by meeting of 11 April 2005, the contract was amended and the responsibility was shifted to Mahgenco, it was clear that before this amendment, admittedly the responsibility of transportation of PFA was with Dirk India, and further enquiry was necessary. If the Arbitrators were to shut out any further enquiry on the ground that Dirk India itself had admitted the liability by pleading theory of amendment, the Arbitrators should have examined whether such pleadings existed. Dirk India specifically pleaded that there was no amendment as such to the contract in the meeting of 11 April 2005, but minutes were only clarificatory in nature and the responsibility was always on the Mahgenco. The Arbitrators then went on to observe that the theory of amendment of contract cannot be accepted as it could be only done by notice under Clause 11.2 of the contract. In fact Mahgenco had stated that the minutes had no force and could be taken into account. Thus, the Arbitrators placed reliance on an non-existent admission of Dirk India to reach at an important conclusion, without further enquiry. Thus this dispute was never decided. According to the Arbitrators it was not necessary as the admission of Dirk India was clear. If the foundation to fix the responsibility on Dirk India was their own pleadings and if such pleadings never existed, then the finding would be rendered perverse on the face of it.

44. As regards the submission of Mr. Dada that the award is without reasons, Mr. Chinoy submitted that it is not necessary to give a detailed award and no elaborate reasoning in support thereof need to be given. He submitted that obligation under the contract was admittedly not performed by Dirk India and, therefore no detailed award was necessary. It is true that an arbitral award need not be very detailed, but at the same time, unless the parties agree, reasons have to be given in the award. If the parties go to the Arbitrators with specific issues to be decided, not only they must be decided, but the parties must be informed why the dispute was decided in a particular manner.

45. It is true that an elaborate award like a judgment of a court need not be given by the Arbitrators, but there is one aspect that needs to be kept in mind. It is open to the parties to choose their arbitrator. The parties may choose an arbitrator with a technical background to decide the technical issues. They may choose an arbitrator with a judicial background if judicial expertise is what they want. Their choice reflects how they want the arbitration to be conducted. Once the parties choose an arbitrator with a judicial background, they expect that the arbitrator would apply judicial and legal expertise and resolve the dispute evaluating the veracity of assertions of both the sides. Parties expect the judicial mind will understand and appreciate the real dispute between the parties better and bring it into focus and give a just and reasoned decision. When the parties choose an arbitrator with a technical background they rely more on the technical approach rather than a judicial approach, and may not expect a detailed reasoning. The parties may decide that no reasons be given in the arbitration award. The parties may choose an arbitrator from similar background as themselves. They may choose an arbitrator with an expertise in the subject or they may choose an arbitrator with a judicial background. The expectations of the parties as regards the form and content of the award in all these contingencies differ. Their expectation as to how the award should be delivered also differs. The depth and quality of reasoning will differ and cannot be placed on the same pedestal. This is not to lay down any absolute proposition of law but a factor to be kept in mind when a party makes a grievance about an unreasoned award.

46. Mr. Dada also made another grievance that the arguments were concluded on 12 December 2009 and the award was rendered on 31 March 2011 and there was a gross delay. Again had this been a lone argument, it may or may not result in setting aside the award. But when the outcome of the proceedings was as narrated above, one wonders whether it was the result of time gap between the closure of argument and pronouncement of the award.

47. Mr. Dada has also touched upon various other findings of the award. But to go further into the details of the controversy will not be permissible as it would amount to exercising an appellate power over the Arbitrators findings. Even with the restricted jurisdiction available u/s 34, it can be seen that the award is fundamentally flawed. According to Mr. Chinoy, none of the above grounds constitute any ground for interference u/s 34 of the Act. According to him, there was nothing complicated in the dispute. It was the responsibility of Dirk India to collect the specified quantity of PFA which they admittedly failed to do and, therefore the contract was rightly terminated and which action has been correctly upheld by the Arbitrators. I am afraid the controversy was not as simple as that. Mr. Dada is successful in demonstrating that there is a complete omission to decide the core issues and the issues decided are irrelevant. He also demonstrated that the dispute which never arose was decided. He has also been successful to demonstrate that this flaw is of such a fundamental nature that the award is rendered perverse. If the Arbitrators did not decide the dispute and

decided a dispute which never arose, the entire purpose of arbitration is lost, rendering it a completely futile exercise.

48. Dirk India alone is not dissatisfied with the award. Mahgenco has also filed its petition being Arbitration Petition No. 695 of 2011 challenging the dismissal of its counter claim. Mahgenco had sought damages from Dirk India on various counts. Mahgenco sought damages of Rs. 18671.58 lakhs with interest @ 18% p.a. The damages were sought on the ground that Mahgenco had entered into the contract with Dirk India for removing the PFA to avoid environmental pollution and Dirk India not only failed to lift the agreed quantity, but caused damage. According to Mahgenco, the machinery inside ESP hoppers and fabric expansion joint was damaged. The acid cleaning of condenser tubes has been undertaken, for which Mahgenco incurred heavy expenses. Damages were also sought for cleaning cable trays; cleaning of suspension tubes and rods; replacement of rectifier transformer; cleaning of isolator; emitting electrodes; shaft insulator; various heaters etc. Mahgenco contended that slurry pumps had to be maintained. And PFA had to be dumped in the lagoon. Various pumps is required to run 24 hours, causing heavy electrical consumption. Various machines and supervisory staff had to be maintained because the PFA was not lifted by Dirk India. Various problems arose such as reduction in vacuum, poor performance of cooling towers, machinery was chocked up and additional supervisory staff had to be engaged. Sums under various heads were specified. Correspondence was placed on record and Mr. Morale deposed to that effect.

49. The Arbitrators dismissed the claim of Mahgenco in totality. The Arbitrators held that the documents which were sought to be proved by the witness of Mahgenco were not proved. The Arbitrators held that even if they were accepted in evidence, the exact loss is not discernable and Mahgenco did not prove that it had spent so much amount for preventing environmental pollution. The Arbitrators also held that Mahgenco did not challenge various orders passed by the High Court from time to time and Dirk India alone was not responsible for the losses caused by Dirk India by implementation of the orders of the High Court.

50. Mr. D.D. Madon, learned Senior Advocate for Mahgenco contended that the approach of the Arbitrators in dismissing the entire claim of Mahgenco is perverse. He submitted that the orders passed by the High Court were without prejudice to the rights and contentions of the parties and merely because Mahgenco did not challenge the orders of the High Court, and Mahgenco, a statutory body, decided to comply with the orders, it cannot be deprived of claiming damages which it had suffered. He also submitted that evidence produced on record was official correspondence, about which there could not have been any dispute. In the petition filed by Mahgenco challenge this part of the award is on the ground of breach of principles of natural justice and that the finding that Mahgenco is precluded from seeking damages by not challenging the orders of the High Court, is perverse.

51. I am in agreement with the submissions of Mr. Madon. Because the orders

passed u/s 9 of the Act, by the High Court, were not challenged, the entire claim of damages of Mahgenco could not have been dismissed. Mahgenco, a statutory body, if had suffered damages, this aspect should have been looked into by the Arbitrators. The correspondence which was sought to be relied upon by Mahgenco was an Official correspondence in the course of official business. The Arbitrators have simply rejected the same on the ground that it was not legally proved. The entire claim of Mahgenco seeking damages of Rs. 18671.58 lakhs has been dismissed in two paragraphs. The Arbitrators have refused to even look at the counter-claim. Mr. Madon is right in contending that this approach is perverse. Mr. Dada submitted that though it is his contention that Mahgenco is not entitled to any damages, he supports the contention of Mr. Madon that the award is perverse. He further submitted that since both the parties are terming rejection of the respective claims as perverse, this is one more ground to set aside the entire award.

52. Taking an overall view of the matter, I am satisfied that the challenge to the award by both the Petitioners needs to be allowed by setting aside the award, u/s 34 of the Act.

53. Accordingly, the Arbitration Petition No. 361 of 2011 filed by Dirk India, and the Arbitration Petition No. 695 of 2011 filed by Maharashtra State Power Generation Company Limited, are allowed. The impugned award of the Arbitral Tribunal dated 31 March 2011 is quashed and set aside.