

(2021) 11 DEL CK 0166

In the Delhi High Court

Case No : ARB. A. (COMM.) No. 16 Of 2020

World Window Infrastructure Pvt Ltd.

APPELLANT

Vs

Central Warehousing Corporation

RESPONDENT

Date of Decision : 24-11-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 38 Rule 5
Arbitration And Conciliation Act, 1996 — Section 9, 17, 17(1)(ii)(b), 34, 37(2)(b)
Specific Relief Act, 1963 — Section 26

Citation : (2021) 11 DEL CK 0166

Hon'ble Judges : C. Hari Shankar, J

Bench : Single Bench

Advocate : Akhil Sibal, Prashant Mehta, Ishita Choudhry, A.K.Ganguli, Shaiwal Srivastava, Arnab Ganguli

Final Decision : Dismissed

Judgement

C. Hari Shankar, J

1. This appeal, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") challenges orders dated 17th June, 2020 and 15th August, 2020, passed by the learned arbitrator on applications preferred by the appellant M/s World Window Infrastructure and Logistics Pvt. Ltd. under Section 17 of the 1996 Act.

2. The appellant had, in fact, filed three applications before the learned arbitrator under Section 17, on 21st May, 2020, 18th June, 2020 and 26th June, 2020. The application dated 18th June, 2020 was, later, withdrawn. The orders impugned adjudicate the applications dated 21st May, 2020 and 26th June, 2020.

Facts

3. On 26th April, 2004, the respondent, Central Warehousing Corporation (CWC) issued a Request for Proposal (RFP), inviting tenders for providing Strategic Alliance Management and Operations and Commercial Services at six Inland

Container Depots (ICDs)/Container Freight Stations (CFSs). Clause 4.6.5 of the RFP required the operator, to whom the tender was awarded, to submit a minimum yearly return and to commit for a minimum guarantee of business in terms of traffic (referred to, alternatively, as "Minimum Guaranteed Throughput"/"MGT"). In respect of ICD, Loni, the MGT was 18000 TEUs per annum. One TEU represented one (120 foot) container.

4. The appellant was the sole bidder. The financial bid of the appellant was opened on 5th July, 2004. There were various exhibits to the financial bid. Exhibit 10, titled "Format for Commercial Bid", read thus:

"FORMAT FOR COMMERCIAL BID

NAME OF THE CFS/ICD: LONI

A

Fixed Fee (lumpsum) per annum

B(I)

Variable fee per TEU for loaded
container entering or leaving the facility

B(II)

Variable fee per TEU being
transported between gateway ports and Inland CFSs/ICDs

C. The fixed fee as well as variable fee as quoted by the bidder or as negotiated, shall be subject to a yearly escalation of 5% on compoundable basis. The first escalation will take place after one year from the date of commencement of operations."

Exhibit 11 to the Financial Bid was a "Format for Agreement". Clause 17.0 of the said Exhibit 11 set out the format for payments to be made by the "operator" to the CWC, and read thus:

"17.0 Payment to CWC

(i) Fixed Fee

In return for the rights granted to the Operator (Name of the Operator) under the Strategic Alliance Management Contract, the Operator shall pay CWC a fixed fee of Rs. for CFS, per annum.

(ii) Variable Fee

In addition to the above, the Operator (Name of the Operator) shall pay CWC a per TEU fee for each loaded container entering and leaving the Facility @ Rs. for B (i) and Rs. for B(ii). The variable fee shall be payable to the Corporation for the

actual number of containers or for the minimum guaranteed throughput (calculated on monthly basis), whichever is higher.

(iii) Payment shall be exempt on:

? Empty containers leaving the Facility provided they entered the facility in loaded status and per TEU variable fee has already been paid

? Empty containers entering the facility provided the containers leave the Facility in loaded Status and pay the per TEU variable fee

(iv) The Fixed fee and the variable fees, even for the minimum guaranteed throughput, as mentioned above shall be subject to a yearly escalation of 5% P.A. on compoundable basis effective from the date of commencement of the operations."

Thus, Clause C of Exhibit 10 as well as Clause 17.0 (iv) of Exhibit 11 to the Financial Bid, which set out the Formats for the Commercial Bids and for the Agreement to be executed between the successful operator and CWC, required yearly escalation of 5% p.a. on compoundable basis to be paid both on the fixed fee as well as the variable fee. No relaxation, from this dispensation, was envisaged or provided in the RFP or in the Financial Bid.

5. Following the opening and acceptance of the appellant's financial bid, Letter of Intent (LoI) was issued by CWC in favour of the appellant on 15th October, 2004. The LoI provided that the contract would commence from the date of handing over of the facility by CWC to the appellant. It also required the appellant to furnish an irrevocable bank guarantee from a nationalised bank, in favour of the CWC, for the MGT, of Rs. 2,72,90,000/-.

6. The LoI was followed by the execution, between the appellant and the CWC, of a formal Agreement dated 16th February, 2005. Clauses 2.0 to 13.0 set out the obligations of the appellant. Clause 14.0 required customs expenditure, as demanded by customs authorities, to be paid by CWC and reimbursed by the appellant. Clause 15.0 permitted CWC to make business proposals to the appellant, who, subject to the commercial viability thereof, was required to agree to the proposals. Clause 16.0 required the appellant to reimburse, to CWC, the gross salary, perquisites, TA/DA and miscellaneous expenses for the officials of the CWC deputed/posted at ICD, Loni, within 15 days of claim by the CWC. Clause 2.0 of the agreement read thus:

"2.0 World's Window confirms that they are willingly undertaking the Management Contract at ICD, Loni on "As is where is" basis after the exact date of commencement of work as defined in para 18 below of this agreement after CWC has constructed the ICD, Loni as per the LOI date 15.10.2004 at the rates finally offered during negotiation by them on 24/8/04 and 14/9/04 and these rates shall form an integral part of this agreement as Annexure-I. The RFP document (tender document) shall also form integral part of this agreement and World's Window undertakes to abide by them during this contract period."

Clause 17.0 set out the terms of the payments to be made by the appellant to CWC, and read thus:

"17.0 Payments to CWC

(i) Fixed Fee

In return for the rights granted to the World's Window under the Strategic Alliance Management Contract, the World's Window shall pay CWC a fixed fee of Rs.2,00,00,000/- (Rupees Two Crore only) for ICD, Loni per annum.

(ii) Variable Fee

In addition to the above, the World's Window shall pay CWC a per TEU fee for each loaded container entering and leaving the Facility @ Rs.405/- for B (i) (Per TEU for loaded containers entering or leaving the facility) and Rs.1,500/- for B(ii) (Per TEU being transported between Gateway Ports and ICD- Loni) by road. The variable fee shall be payable to the Corporation for the actual number of containers or for the minimum guaranteed throughput (calculated on monthly basis), whichever is higher.

As negotiated, in tandem with the terms and conditions of the tender, World's Window shall be liable to invest/procure one full rake having wagons which can run with 100 KM per hour speed to transport loaded containers between ICD, Loni and Gateway Ports. Other rakes required for this purpose will be arranged by CWC.

In addition, World's Window shall be liable to pay an amount of Rs.1000/- (Rupees One thousand only) per TEU for the containers moved between Loni and Gateway Ports through the Railway wagons/rake procured for the purpose.

However, if such movement is undertaken on hire/leased wagons, the payable amount shall be Rs.500/- (Rupees Five hundred only) per TEU.

One TEU shall mean 20' container and containers more than 20' shall be taken as two containers.

(iii) Payment shall be exempt on:

Empty containers leaving the Facility provided they entered the facility in loaded status and per TEU variable fee as stated at B(i) has already been paid.

Empty containers entering the facility provided the containers leave the Facility in loaded Status and per TEU variable fee as stated at B(i) has already been paid.

(iv) The Fixed fee and the variable fees even for the minimum guaranteed throughput as mentioned above shall be subject to a yearly escalation of 5% P.A. on compoundable basis effective from the date of commencement of the operations except on the containers transported through rail between ICD, Loni and Gateway ports."

Clause 17.2 required the appellant to execute, in favour of CWC, an irrevocable bank guarantee, and read thus:

"World's Window shall execute in favour of CWC an irrevocable with recourse Bank Guarantee issued by a Nationalized Bank/Scheduled Bank equal to the yearly minimum amount payable (Fixed Fee plus Variable Fee on minimum guaranteed throughput) to CWC. The Bank guarantee would be drawn in favour of Regional Manager, Central Warehousing Corporation, Regional Office, Delhi. The Bank Guarantee shall be produced/renewed/extended by World's Window on yearly basis equivalent to yearly minimum committed amount till the continuation of the management contract and shall be invariable be renewed one month in advance before its expiry every year. The bank guarantee for the fifteenth year would however, carry a validity of two years.

The Bank Guarantee shall be encashed by CWC, if the World's Window fails to make the payment of the fixed or/and variable fee, as the case may be by the respective due dates. On encashment of the Bank Guarantee by the CWC, the World's Window shall furnish a fresh Bank Guarantee for a sum equal to the yearly minimum return payable to CWC, within a week of a demand being made by CWC."

Clause 19.0 identified payment of fixed and variable fee by the appellant to CWC as one of the appellant's key obligations under the contract, and further identified, failure to adhere to the stipulated payment schedule, as an "event of default", which could justify termination of the contract.

7. Thus, Clause 2.0 of the Agreement made the RFP an integral part of the Agreement. There was, however, a departure, in Clause 17.0 of the Agreement, from Clause 17.0 of the Format of Agreement constituting Exhibit 11 to the Financial Bid dated 5th July, 2004. An exception, from the requirement of payment of escalation on variable fee was carved out, in sub-clause (iv) of Clause 17.0 in the Agreement, in the case of containers transported through rail between ICD, Loni and Gateway Ports. It is this exception which constitutes the linchpin of the submissions advanced by Mr. Akhil Sibal, learned Senior Counsel for the appellant, and, indeed, is the very fulcrum of the challenge, by the appellant, to the impugned orders of the learned arbitrator.

8. The date of commencement of the contract, in the present case, was 10th March, 2007.

9. The appellant was paying, to the respondent, fixed fee as well as variable fee based on MGT, on a yearly basis. Despite the exception, in Clause 17.0 (iv) of the Agreement, from the requirement of payment of escalation on variable fee in respect of containers transported through rail between ICD, Loni and the Gateway Ports, the appellant was paying variable fee with 5% escalation on all containers, from the inception of the contract till October, 2009. With effect from October, 2009, the appellant stopped paying escalation on variable fee in respect of the containers transported by rail between the ICD, Loni and the Gateway

Ports.

10. This resulted in a slew of communications from CWC to the appellant, calling on the appellant to pay escalation on the variable fee in respect of all containers, as had been paid by the appellant till October, 2009. The last of these communications, dated 6th July, 2011, also put the appellant to notice that default, on its part, in paying escalation on the variable fee would be treated as a breach of the Agreement, and would invite the consequences envisaged in that regard. These demands were reiterated by the respondent, in communication dated 29th August, 2011 addressed to the appellant, which, further, threatened encashment of the bank guarantees furnished by the appellant, if the appellant continued to remain in default of payment of escalation on the variable fee payable by it.

11. In order to attempt a resolution of the imbroglio thus created, a meeting was convened by the office of the Ministry of Consumer Affairs (MoCA) on 19th February, 2013, which was attended by representatives of the appellant and CWC. The decisions taken in the said meeting were enumerated in a Recorded Note of Discussions, which was forwarded by CWC to the Joint Secretary, MoCA on 22nd February, 2013, with a copy marked to the appellant. Serial no. 2 of the decisions taken in the meeting dated 19th February, 2013, as per the recorded Note of Discussions, envisaged payment, by the appellant, to CWC, "escalation on Variable Fee @ 5% per annum on compoundable basis as per agreement".

12. On 22nd May, 2013, the appellant addressed a communication to the CWC, in which it was stated, inter alia thus:

"To,

The Regional Manager,

Central Warehousing Corporation,

Scope Minar, District Centre,

Laxmi Nagar, New Delhi.

Sub: Release of payment towards Variable Fee (escalation amount)

Dear Sir,

This is with reference to the meeting held in the Ministry on 19.02.2013 and onward discussion held in the chamber of MD/CWC on 18.05.2013, in this regard, as agreed, we are releasing the payment towards the Variable Fee (escalation amount) Rs.3,28,87,910/- for period up to 30th April, 2013 after deduction of the TDS, given below are the details of cheques enclosed herewith (details are as per statement enclosed).

S.No.

Cheque no.

Date

Amount

1.

747228

23.05.2013

75,00,000/-

2.

537701

25.05.2013

65,00,000/-

3.

537702

29.05.2013

76,00,000/-

4.

537703

05.06.2013

80,68,991/-"

13. The appellant continued to pay variable fee on MGT, with yearly escalation @ 5% per annum till February, 2020, whereafter it discontinued paying the variable fee at the escalated rate.

14. Disputes arose between the parties on various aspects including, inter alia, the aspect of non-payment of escalation on variable fee by the appellant. These disputes were referred, by the Supreme Court, vide order dated 15th February, 2019, to the learned arbitrator, who is a former Judge of the Supreme Court.

15. CWC was the claimant before the learned arbitrator, and the appellant was the respondent.

16. Statement of claim and Supplementary Statement of Claim were filed by CWC, before the learned arbitrator, on 2nd April, 2019 and 16th September, 2019, respectively. Statement of defence, alongwith counter claim, was filed by the appellant on 14th May, 2019.

17. On 1st April, 2020, the appellant wrote to CWC, invoking force majeure, in the wake of the COVID-2019 pandemic which had ravaged the country since

March, 2020, and seeking exemption from payment of fixed/variable fee on MGT from 1st February, 2020 till 30th June, 2020. This was followed by a second communication dated 28th April, 2020, wherein the appellant sought exemption from the requirement of reimbursing the salaries of CWC's staff posted in the ICD with effect from 1st March, 2020 till 30th September, 2020. Clause 23 of the Agreement, which provided for force majeure, reads thus:

"Either Party shall be excused from performance and neither Party shall be construed to be in default in respect of any obligations hereunder, for so long as an event of Force Majeure shall be the operative cause of such failure to perform the obligations. For the purpose of this clause, Force Majeure shall mean any event or circumstance not within the reasonable control, directly or indirectly, of the Party affected."

18. CWC, vide letters dated 6th May, 2020 and 7th May, 2020, rejected the appellant's requests for exemption from the requirement of payment of fixed fee/variable fee with effect from 1st February, 2020 and from payment of salary on its personnel deputed at the ICD. Further, the communications asserted that any such default in payment, on the part of the appellant, would be viewed as a material breach of the Agreement, inviting coercive action by CWC, including termination of the Agreement and encashment of the bank guarantees furnished by the appellant.

19. First Section 17 Application dated 21st May, 2020: In these circumstances, the appellant filed an application, under Section 17 of the 1996 Act, before the learned arbitrator, on 21st May, 2020. Drawing pointed attention to the hardships being faced in the wake of COVID-2019 pandemic as well as various instructions/circulars and Office Memoranda issued by the Government of India from time to time in that regard, the appellant prayed, in the application, for (i) an ad interim injunction restraining CWC from taking any coercive measures against the appellant pending the arbitral proceedings, (ii) an ad interim injunction restraining the CWC from invoking or encashing the Bank Guarantees furnished by the appellant, (iii) a restraint, against CWC, from breaching the directives issued by the Government in the wake of the COVID pandemic and grant of the benefit, thereof, to the appellant and (iv) a direction to the CWC to defer the recovery of Minimum Guarantee Charges, Fixed Charges, Cost Recovery charges and other charges under the Agreement for at least six months after lifting of the lockdown imposed in the wake of the COVID pandemic.

20. The CWC filed a reply to the aforesaid Section 17 application of the appellant, which stands decided by the learned arbitrator, vide the First Order dated 17th June, 2020, impugned in the present appeal.

21. First Impugned Order dated 17th June, 2020

21.1 The only issue before the learned arbitrator, in this application, was whether, in view of the COVID-19 pandemic and the various directives issued by the Government in the wake thereof, the appellant was excused of its obligations

under the Agreement, or could claim deferral thereof, invoking force majeure. The learned arbitrator answered the issue in the negative and, consequently, rejected the appellant's application.

21.2 The reasoning of the learned arbitrator is contained in the following paragraphs, from the Order dated 17th June, 2020:

"The Applicant is not disputing its obligations for paying the fixed/variable charges but for the situation prevailing in the country due to lock down declared by the Govt. of India...

The Tribunal finds that the applicant has placed considerable reliance on the office memorandums dated 19.02.2020 and 13.05.2020 issued by the Ministry of Finance, Govt. of India, for invoking the force majeure clause 23 of the contract. The office memorandums it is seen have been issued by the Ministry in view of the lockdown restrictions placed on the movement of goods, services and man power. But the Ministry in its guidelines dated 24.03.2020 clearly indicated that though all the transport services - air, rail would remain suspended, transportation for essential goods would stand exempted.

The Ministry by way of an addendum to the guidelines dated 24.03.2020 incorporated further exemptions which read as follows:

"All transport services - air, rail, roadways - will remain suspended Exceptions:

- a. Transportation for essential goods only.
- b. Fire, law and order and emergency services.

Ministry by its subsequent guidelines dated 15.04.2020 also provided as follows:

"to mitigate hardship to the public, select additional activities will be allowed which will come into effective from 20th April 2020...

The movement, loading/unloading of goods/cargo (inter & intra state) is allowed as under:

- i. All goods traffic will be allowed to ply.
- ii. Operations of Railway: Transportation of goods and parcel trains
- iii. Operation of Airports and related facilities for air transport for cargo movement, relief and evacuation.
- iv. Operations of Seaports and Inland Container Depots (ICDs) for cargo transport, including authorized custom clearing and forwarding agents.

The activities / operations carried on in ICD, Loni fall under the exceptions which is clear from all the office memorandums including the addendum dated 25.03.2020 and the guidelines dated 15.04.2020 issued by the Ministry, in the

larger public interest and facts reveal that the Applicant had carried out its usual activities/operations at ICD, Loni which is evident from Table -1 shown in Para 7 of the reply filed by the CWC. The details given in the Table show the volume of the containers handled from October 2019 until April 2020. In March 2020 the volume of containers handled was higher than what was handled in November 2019. The assertion made by CWC that about 99% of the containers had moved through Railway system including during the period March-April 2020 (lockdown period) was also not denied by the applicant.

Tribunal also finds no basis in the contention of the applicant that the whole supply chains for ICD, Loni have been disrupted on account of the lockdown, no materials have been produced by the applicant to establish, that contention.

Further there is nothing to show that the operations/activities at ICD, Loni were affected due to lack of laborers / workers. As already stated, Table - 1 gives a clear indication that during lockdown period the operations/activities at ICD, Loni continued as usual without any interruptions.

The Tribunal also finds that the demand made by the CWC vide its letter dated 06.05.2020 pertains to the last financial year 2019-2020 which has nothing to do with the situations prevailing during the lockdown period even if the lockdown period has affected the operations/activities at ICD, Loni. It is seen that the attempt of the applicant is only to wriggle out of its contractual obligations to pay variable fee which it had otherwise earned since April 2019 until March 2020, under the garb of lockdown. CWC, in my view is right in its contention that the contractual liability to pay outstanding variable fee already stood incurred on 31.03.2020 during which time the applicant had carried on the operation/activities at ICD, Loni. But for an overlapping of 6 days, that is from 25.03.2020 to 31.03.2020 the rest is the liability for the year which was not covered by any of the memorandums / guidelines issued by the Ministry.

CWC is right in its contention that the Bank Guarantees constitute an independent contract between the Bank and CWC notwithstanding any dispute raised by the applicant on strength of clause 23 of the contract, which is well settled by a catena of decisions. Reference has already been made to the judgement of the Supreme Court in Himadri Chemicals case (supra). Facts also reveal that the applicant had not even approached CWC complaining that the activities/operations at ICD, Loni were ever disrupted before April 2020 due to the imposition of lockdown. In my view, since Bank Guarantees are unconditional Bank Guarantees, the Bank is bound to honour the same since CWC has not done any fraudulent act or caused any irretrievable injustice to the applicant. On the other hand as already stated the Applicant had/has carried out the operations/activities at ICD, Loni as usual during the lockdown period since those activities stood excepted from lockdown, in the larger interest of the nation.

Tribunal is therefore of the view the force majeure clause is not available to the applicant to be invoked in the facts and circumstances of this case. If the

Applicant fails to honor its commitments it is open to CWC to invoke the Bank Guarantees and that the demand notices dated 06.05.2020 and 07.05.2020 issued by CWC cannot be set to be hit by the force majeure clause contained in clause 23 of the Contract or by the office memorandums dated 19.02.2020 or 13.05.2020 issued by the Ministry of Finance, Govt. of India. Application therefore lacks merits and the same is dismissed."

22. On the very day when the aforesaid order came to be passed by the learned arbitrator, i.e. 17th June, 2020, three of the bank guarantees furnished by the appellant, dated 1st March, 2019, 27th March, 2018 and 26th March, 2018, for a total amount of Rs. 3, 14,19,109/-, were invoked and encashed by CWC. The appellant, in the circumstances, filed another Section 17 application before the learned arbitrator on 18th June, 2020. As some changes were required to be made in the application, the learned arbitrator permitted the appellant to withdraw the application and file a fresh Section 17 application which came to be filed on 26th June, 2020 and has come to be decided by the Order dated 15th August, 2020, which constitutes the second order under challenge in the present appeal.

23. Application dated 23rd January, 2020 of the CWC: On 23rd January, 2020, CWC moved an application, before the learned arbitrator, for rectification of the agreement dated 16th February, 2005, under Section 26 of the Specific Relief Act, 1963, for deletion, from Clause 17 (ii) B(ii) of the words "by road" and from Clause 17.0 (iv) of the words "except on the containers transported through Rail between ICD, Loni and gateway port". This application was rejected, by the learned arbitrator, vide order dated 13th February, 2020.

24. Second Section 17 application dated 26th June, 2020:

24.1 The appellant, in its Section 17 application dated 26th June, 2020, assailed the act of CWC, in encashing the bank guarantees furnished by the appellant, on 17th June, 2020, as illegal. It was pointed out, in the application that, in its earlier order dated 17th June, 2020, the learned arbitrator had permitted the CWC to encash the bank guarantees furnished by the appellant in the event of failure, on the part of the appellant, to honour its commitment. It was asserted that the commitment of the appellant, under the agreement, was only to pay fixed fee and variable fee. These amounts having been duly paid by the appellant, it was submitted that no default, in honoring its commitment under the agreement, could be laid at the door of the appellant; resultantly, the invocation of the bank guarantees, furnished by the appellant, by CWC on 17th June, 2020, was illegal.

24.2 The appellant urged, as its first ground of challenge, that CWC had erroneously assessed the appellant's liability towards payment of variable fee on the basis of 72,580 TEUs per year, as against the actual MGT of 72,000 TEUs by taking the MGT as 6000 TEUs per month, contrary to the Agreement. The Agreement, it was submitted, required MGT to be computed on an annual basis.

In computing the MGT on a monthly basis, it was alleged that CWC had infringed the contractual terms.

24.3 The second ground, on which the appellant sought to call into question the legitimacy of the invocation, by CWC, of the bank guarantees furnished by the appellant, was predicated on Clause 17.0 (iv) of the Agreement, which excepted, from the requirement of payment of escalation on variable fee, containers which were transported through Rail between ICD, Loni and Gateway Port. It was alleged that, by application of this Clause, the appellant was not required to pay escalation on variable fee, as the containers had moved by Rail between ICD, Loni and Gateway Port. It was pointed out that the appellant had always paid, with due diligence, the fixed fee with escalation as well as the variable fee without escalation.

24.4 Additionally, the appellant re-agitated its submission that, on account of force majeure, it was excepted from its obligations, under the agreement.

24.5 In these circumstances, the application prayed thus:

"In view of the aforementioned grounds, the Counter Claimant/ Applicant prays as follows:

- a) Pass an ad-interim exparte Order holding that Force Majeure Condition is applicable in respect of the present Contract from 1st April' 2020 for a minimum period of six months or till such time normal operations of the Applicant are restored whichever is later;
- b) Pass an ad-interim exparte Order restraining the Claimant from claiming any Fixed charges & Claimant Staff's reimbursement charges proportionate to the unfulfilled volume of MGT i.e. the difference between the volume actually achieved by the Counter Claimant and 72000 TEUs per year during the period of Force Majeure;
- c) Pass an ad interim ex parte order restraining the Claimant from recovering any amount during the force majeure period towards variable charges (as per Agreement) in excess of actual volume achieved by Counter Claimant and accordingly to reduce MGT proportionately for the FY 2020-21;
- d) Pass an ad interim exparte order directing deferment of payments falling due, during the period of Force Majeure, for a period of six months after resumption of normal work, for sustenance of operations.
- e) Pass an ad-interim exparte order directing the Claimant and its officials for returning the amount fraudulently encashed from the Bank Guarantees as bearing BG No. 003GT02190600047, BG No. 003GT02180860007 and BG No. 003GT02180850018 for Rs. 2,18,70,000/-, Rs.68,01,913/, Rs. 27,47,196/- respectively to bank for revival of the Bank Guarantees in question;
- f) Pass an ad interim exparte order restraining the Claimant or its official to take any coercive action against Counter Claimant/ Applicant including but not limited

to as threatened by Claimant's Letter dt. 23.06.2020 and;

g) Pass any other order and/or direction in favour of the Counter Claimant/Applicant and against the Claimant as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case and in the interest of Justice."

25. CWC filed a reply to the above application of the appellant, and also contested the application by way of oral arguments before the learned arbitrator.

26. Rival submissions urged before the learned arbitrator in second S. 17 application of appellant:

26.1 Appellant's contentions:

26.1.1 Before the learned arbitrator, the appellant questioned the justification of the realization, by CWC, by invocation and encashment of the bank guarantees, of an amount in excess of the demand of Rs. 2.05 crores. Computing its liability to CWC on the basis of an MGT of 72,000 TEUs per annum and by assessing variable fee without escalation, the appellant contended that there was no justification for CWC encashing the bank guarantees. The appellant submitted that, under Clause 4.6.7 of the RFP read with 17.2 of the Agreement, the appellant was required to pay only Fixed Fee and Variable Fee. There was no liability to pay escalation on Variable Fee, especially in view of Clause 17.2(iv). For this reason, the bank guarantees provided by the appellant, too did not cover Variable Fee at the escalated rate. Referring to the communications between the appellant and the respondent, it was submitted that the appellant had always disputed its liability to pay escalation on Variable Fee. The payment of Variable Fee at the escalated rate after 2013, was, therefore, submitted the appellant, under duress/protest as was evidenced by the appellant's letter dated 31st May, 2013. In fact, CWC had "virtually admitted", the fact that the Agreement did not require the appellant to pay escalation on Variable Fee in respect of containers which were moved by rail between the Gateway Ports and ICD, Loni. It was for this purpose, submitted the appellant, that CWC had moved an application, before the learned arbitrator, for amending the Agreement by, inter-alia, removing, from Clause 17.0 (iv), the words, "except on the containers transported through rail between ICD Loni and Gateway Port". This application had been rejected by the learned arbitrator. It was not open, therefore, to CWC, submitted the appellant, to contend that the appellant was liable to pay Variable Fee at the escalated rate.

26.1.2 The appellant further submitted that the respondent had erred in computing MGT as 72,580 TEUs per year, instead of 72,000 TEUs per year. This error, it was submitted had taken place because the respondent had worked out the MGT on a monthly, instead of an annual, basis. The appellant pointed out that, for the last 12 years, MGT had been computed on an annual basis. In fact, when the MGT had been enhanced w.e.f June, 2009, by letter dated 26th December 2007, of CWC, to 72,000 TEUs, the appellant had itself furnished an

additional bank guarantee to cover the enhanced amount. Reliance was placed, for this purpose, on Clause 4.6.5 of the RFP as well as letter dated 7th May, 2020 of CWC, which intimated the appellant that it had paid Variable Fee for 49,789 TEUs and that remittance of Variable Fee for 22,211 TEUs was outstanding.

26.1.3 The appellant further reiterated its claim of force majeure and relied, for this purpose, on OM's dated 19th February, 2020 and 13th May, 2020 of the Ministry of Finance, newspaper clippings, charts filed in its Section 17 application and 23 additional documents, of which 14 were filed on 8th July, 2020 and 9 were filed on 19th July, 2020.

26.2 CWC's contentions:

26.2.1 Preliminary objections, regarding the maintainability of the application, were raised by CWC, on the ground of constructive res judicata and the earlier order dated 17th June, 2020, which, in CWC's submission, upheld the right of CWC to encash the bank guarantees furnished by the appellant. The bank guarantees being irrevocable and unconditional in nature, CWC contended that no direction, to return the amounts to the bank, could be passed. It was submitted that the bank guarantees were encashed as fixed fee, for the months of April and March, 2020 and variable fee (with escalation), for the periods of March and April, 2020, were outstanding from the appellant. A total amount of Rs. 1,54,49,778/-, towards outstanding fixed fee and variable fee at escalated rate was, it was submitted, due from the appellant, even after all the bank guarantees had been encashed. Clause 17 (ii) of the agreement was pressed into service, to contend that the appellant, in violation of the said Clause, was paying variable fee on the basis of actual containers, though the Clause required the appellant to pay variable fee on the basis of actual containers or on the basis of MGT calculated on monthly basis, whichever was higher. Since March, 2020, it was contended, the appellant was in breach of this clause. When, with effect from March, 2020, the appellant discontinued payment of variable fee at escalated rate, CWC was constrained to invoke the bank guarantees furnished by the appellant.

26.2.2 The issue of force majeure, it was contended, stood decided by the order dated 17th June, 2020. On facts, it was pleaded that, even during the period of lockdown, the volume of business at the ICD, Loni had not been affected.

27. Findings of the learned arbitrator on the second Section 17 application:

27.1 Having recorded these submissions, the learned arbitrator noted that the main grievance of the appellant was against the letter dated 23rd June, 2020, issued by CWC, invoking Clauses 17.1 and 17.2 of the agreement, as the justification for invoking the three bank guarantees furnished by the appellant, encashed on 17th June, 2020.

27.2 The main question that arose for consideration was identified by the learned arbitrator, in para 36 of his order dated 15th August, 2020, as "whether the

Applicant is liable to pay any escalation on Variable Fee attributable to movement of containers by Rail as per the agreement, especially when the Bank Guarantees furnished by the Applicant were/are not covered any amount other than Fixed Fee and Variable Fee @Rs.405/TEU". Additionally, it is also noted, in para 37 of the impugned order dated 15th August, 2020, that the appellant and CWC were at dispute on whether MGT was to be paid on monthly or annual basis.

27.3 The learned arbitrator addressed, in the first instance, the issue of whether CWC was justified in invoking the three bank guarantees furnished by the appellant, towards the arrears of fixed and variable fees with escalation. In this context, it was noticed that

(i) Clause 17 (iv) of the RFP (which was incorporated by reference into the Agreement dated 16th February, 2005) required payment of 5% yearly escalation on the fixed fee and variable fee, and that the appellant had undertaken to pay fixed fee and variable fee, subject to yearly escalation of 5% in the Format for Commercial bid at Exhibit-10 annexed to the financial bid,

(ii) this proposal had been admitted by CWC and LoI had been issued on 15th October, 2004,

(iii) Clause 3.0 of the LoI, too, envisaged yearly escalation at the rate of 5% on the fixed fee and variable fee,

(iv) despite Clause 17 (iv) and the exception, therein, on the requirement of payment of escalation on variable fee on containers transported through rail between ICD, Loni and the gateway ports, the appellant had been paying the variable fee with escalation at the rate of 5% per annum from the inception of the contract till October, 2009,

(v) thereafter, on the appellant's disputing its rights to continue to pay escalation on the variable fee, the matter had been taken up by the Committee set up by the Ministry of Consumer Affairs, Government of India, during which, too, the appellant had agreed to pay escalation on variable fee at the rate of 5% per annum on compoundable basis,

(vi) this was followed by a letter dated 22nd May, 2013 from the appellant to CWC, agreeing to release payment towards the variable fee on escalated amount for the period until 30th April, 2013 and

(vii) payment on variable fee at escalated rate continued, in fact, to be made by the appellant till February, 2020, when the appellant abruptly discontinued such payment.

27.4 The appellant had, in its counter claim before the learned arbitrator, prayed for refund of the amount paid by way of escalation on the variable fee. The learned arbitrator held, in para 47 of its order dated 15th August, 2020 that the legality of the appellant's claim for refund of the amounts paid by way of escalation, as well as the effect of the agreement dated 19th February, 2013,

arrived at with the involvement of the Ministry of Consumer Affairs, would have to be examined while examining the merits of the claims and counter-claims before passing of the final award, and not in an application under Section 17. At the Section 17 stage, it was observed that the learned arbitrator was only concerned with the question of whether CWC was justified in invoking and encashing all the three bank guarantees furnished by the appellant on the ground that the appellant had defaulted in paying fixed fee and variable fee at the escalated rate.

27.5 The learned arbitrator noted that, on 9th July, 2019, CWC had written to the appellant, pointing out that the bank guarantees furnished by the appellant covered Variable Fee only at the rate of Rs. 405/- per TEU, whereas the Variable Fee had escalated to Rs. 727.32/-per TEU. In these circumstances, the letter called upon the appellant to furnish an additional bank guarantee for Rs. 2,32,07,060/-, towards the increased Variable Fee, failing which the appellant would be treated as being in breach of the Agreement.

27.6 The learned arbitrator observed that the bank guarantees furnished by the appellant to CWC were unconditional and irrevocable. In such circumstances, the invocation of the bank guarantees could be injuncted only if there existed egregious fraud, or the invocation of the bank guarantees was likely to result in irretrievable injustice. Else, as held by the Supreme Court in *Himadri Chemicals Industries Limited v. Coal Tar Refining Co.* (2007) 8 SCC 110, the invocation of the bank guarantee could not be affected by any dispute between the parties. The learned arbitrator distinguished the judgments on which the appellant had placed reliance. *Hindustan Construction Company Ltd. v. State of Bihar* (1999) 8 SCC 436, it was observed, was a case of a conditional bank guarantee, *Gangotri Enterprises Ltd. v. Union of India* (2016) 11 SCC 720 involved invocation of a bank guarantee under a wrong contract, which was unsecured by bank guarantees, and *Hindustan Steel Works Construction Ltd. v. Tarapur & Co.* (1996) 5 SCC 34, was a case of invocation of bank guarantee on fraudulent demand. In the present case, held the learned arbitrator, the respondent had sought to justify invocation of the bank guarantees consequent on the appellant abruptly discontinuing payment of Variable Fee with escalation, w.e.f. March, 2020. Against all the facts noted prior thereto by the learned arbitrator, it was observed that the appellant's reliance was entirely on Clause 17.2(iv) of the Agreement, for which purpose the appellant had filed a counterclaim, seeking refund of the amounts paid by the appellant towards escalated Variable Fee. The merits of the counter claim could not be decided at the Section 17 stage. Similarly, apropos the dispute regarding the manner in which MGT was to be computed, CWC sought to justify the manner in which it was computing MGT on the basis of Clause 17.0(ii), of the Agreement. The respondent pointed out that Clause 17.0(ii), required Variable Fee to be paid on the actual number of TEUs or the MGT calculated on monthly basis, whichever was higher. CWC contended that it had strictly adhered to this Clause.

Wherever the actual number of TEUs was in excess of MGT, the appellant had been billed on the basis of actual number, whereas, where the MGT was in excess of the actual number of TEUs, the appellant had been billed on MGT basis. This controversy, given its nature, could also be adjudicated on merits only at the final stage.

27.7 In these circumstances, the learned arbitrator held that the invocation of the bank guarantees could not be regarded as fraudulent or unjustified. The following passages, from the impugned order dated 15th August, 2020, merit reproduction in this regard:

"63. Clause 17.2 speaks of "an irrevocable without recourse Bank Guarantee". The Bank Guarantees in this case were encashed since there was a failure on the part of the Applicant in paying the Fixed Fee with escalation, Variable Fee with escalation, additional default in payment of 580 TEUs at escalated rate, non-disbursement of salary for staff posted by CWC at ICD-Loni since March 2020 as per Clause 14 of the agreement. Further the Bank Guarantees can also be encashed as per Clause 17.2, if there is a breach on the part of the Applicant, to produce/renew/extend a Bank Guarantee on yearly basis equivalent to yearly minimum committed amount till the continuation of the management contract which shall invariably be renewed one month in advance before its expiry, every year. Bank Guarantee can also be encashed if there is a breach of the agreement apart from the violation of the terms of the Bank Guarantee. The question as to who has committed the breach can be decided only at the final stage of the Arbitration proceedings.

64. The Bank has undertaken to honour the Bank Guarantees without any demur, question or protest merely on receipt of the written demand from CWC. Bank has also undertaken to pay the amount demanded notwithstanding any dispute or disputes raised by the Applicant in any suit or proceeding pending before any Court or any Tribunal since Bank's liability is absolute and unequivocal. As already pointed out most of the issues raised in this application against the invocation of the Bank Guarantees could only be decided when the claims and counter claims are finally adjudicated especially when the Applicant has paid the escalation of 5% p.a. on Variable Fee by way of cheque from the very inception of the contract till February 2020. The Applicant it may be noted had agreed to pay the same in a meeting convened by the Ministry, Govt. of India on 19.03.2013 which is reflected in the Applicant's letter dated 22.05.2013.

65. The Bank Guarantee can therefore be invoked as per the terms of the Bank Guarantee not only when there is a failure to pay the Fixed Fee with escalation and Variable Fee, but also if there is a breach of agreement leading to the termination of the contract. CWC in several letters, already referred to in the earlier part of the order, informed that Applicant that non furnishing of the Bank Guarantee for the yearly escalated Variable Fee @5% p.a. would amount to breach of the contract which is also an added reason for encashing the Bank Guarantee as per its terms. Of course the question as to who has committed the

breach can be decided only at the final stage of the Arbitration proceedings.

66. In view of the above findings no direction can be given to return the Bank Guarantee to the Bank for their revival especially when the Applicant has paid the escalated Variable Fee @5% p.a. from 2007 to February 2020 but discontinued the same inspite the fact that it had agreed to comply with such a stipulation in the meeting convened by the Ministry, Govt. of India on 19.02.2013."

27.8 The plea of force majeure, advanced by the appellant, was also examined in detail by the learned arbitrator. As already noted hereinabove, the learned arbitrator had taken into account the reliance placed by the appellant, on the OMs dated 19th February, 2020 and 13th May, 2020, of the Ministry of Finance, newspaper clippings, 23 documents filed by the appellant and the charts contained in its application. In his findings, the learned arbitrator held, on this aspect thus:

"67. The Applicant has also pleaded that in the facts and circumstances of the case force majeure condition would apply from 1st April 2020 for a minimum period of six months or till such time normal operations are restored whichever is later in view of Clause 23 of the agreement. Reference was made to the circular dated 19.02.2020 issued by the Govt. Of India, circular dated 13.05.2020 by the Ministry of Finance, circular dated 05.06.2020 by the Govt. of India. The Applicant stated due to the lockdown imposed by the Govt. of India the volume of business has gone down in various ICDs like JNPT Mumbai, ICD - Tughlakabad (Delhi), ICD-Dadri, ICD- Garhi, ICD- Patli (Haryana), ICD- ACTL Faridabad, ICD-Garhi Harsaru, ICD-Bawal, ICD - Sonapat etc. Reference was also made to various advisories issued by DG Shipping to waive the charges of all importers since they could not clear the goods so also the advisories issued by the Customs Department and other materials including news paper clippings to show the impact of lockdown on the volume of business at ICD, Loni. Reliance was also placed on the order dated 12.06.2020 passed by Supreme Court in FICUS PAX Private LTD & ORS vs Union Of India & ORS (WRIT Petition(c) Diary No.10983 of 2020), the order of the Delhi High Court dated 21.05.2020 in Ramanad & Ors vs Dr. Girish Soni & Ors (RC. REV 447/2017)

68. CWC stated that the Applicant is using the prevalent lockdown situation as an opportunity not to discharge its contractual obligations of payment of Fixed Fee, Variable Fee with escalation and salary reimbursement of workers of CWC posted at ICD, Loni, MGT charges etc. Further it was also stated that the Government consciously exempted by guideline dated 24.03.2020 various activities, operations carried on in various ICDs/ CFSs etc. since they have to function in the larger public interest. CWC stated ICDs/CFSs on the strength of their operational efficiency and caused advantages and through marketing of their services and networking with other partners/CTOs attracted large volume of business. Further it was also pointed out Applicants business at ICD, Loni if at all had gone down due to lockdown it was due its own inefficiency and bitter

relationship with CTOs/importers / exporters etc. CWC also stated the Applicant even failed to procure one rake in terms of the agreement resultantly it had to hire / lease wagons from various CTOs and from 2015 onwards number of CTOs were reduced due to its bitter relationship with them which has nothing to do with the lockdown situation. CWC also referred to Table No.4 in Para 42 of its reply and stated that at ICD, Bawal which is run by the Applicant the volume of business have not gone down. Further it was also pointed out all the ICDs and CFSs were / are getting adequate volume of EXIM business from foreign countries.

69. This Tribunal have already examined the plea of force majeure raised by the Applicant earlier in its application dated 21.05.2020 and the same was rejected vide the Tribunal's order dated 17.06.2020 where in the Tribunal had recorded a clear finding that the activities/operations carried on in ICD, Loni fall under the exception which is clear from all the office memorandums issued by the Govt. of India including the addendum dated 25.03.2020 and the guidelines dated 15.04.2020 issued by the Ministry of Finance. Further it was also noticed that those exemptions were given in the larger public interest. The plea of force majeure raised by the Applicant in that circumstances was rejected by the Tribunal.

70. ...Further it is seen that CWC is having 299 handling and transport contractors working in PAN India level, for handling export -import cargo and food grain operations, but none of those contractors, except the Applicant has sought to invoke the force majeure clause on the plea of lockdown. Both the Applicant as well as the Respondent has given certain figures in their respective pleadings of fluctuations of business due to lockdown. After weighing the materials provided by the both sides and taking into considerations the fact that the operations/activities at ICD, Loni fall under the exempted categories mentioned the guidelines issued by the Ministry on 24.03.2020, 25.03.2020 and the guidelines dated 15.04.2020, the plea of force majeure stands rejected, reiterating what has already been recorded in the order of the Tribunal dated 17.06.2020."

28. Rival Contentions before this Court

28.1 Mr. Sibal's submissions, on behalf of the appellant:

28.1.1 Mr. Sibal, learned Senior Counsel for the appellant, broadly reiterated the contentions advanced before the learned arbitrator, which already stand noted in Para 26.1 supra. He additionally submitted that the Agreement, by the appellant, to pay the Variable Fee with escalation, consequent to the meeting held on 19th February, 2013, was subject to the respondent honouring its part of the bargain. Apropos, the payment, by the appellant, of Variable Fee with escalation, thereafter, till February, 2020, Mr. Sibal submitted, was under protest. Mr. Sibal emphasized that the only binding contract between the parties was the Agreement dated 16th February, 2005. The discussions which took place during

the meeting dated 19th February, 2013, and any tentative assurances that may have been extended during the said meeting, he submitted, could not constitute a binding agreement, enforceable at law. In this context, he emphasizes that the learned arbitrator committed a fundamental error in rejecting the appellant's submission that it was not liable to pay escalation on Variable Fee, predicated on Clause 17.0(iv), of the Agreement, on the basis of the discussions which took place on 19th February, 2013. He submits that it was nobody's case, before the learned arbitrator, that any enforceable agreement had resulted consequent on the meeting dated 19th February, 2013. In effect, therefore, the learned arbitrator has, according to Mr. Sibal, held in favour of CWC on the basis of a case which CWC itself never pleaded.

28.1.2 Mr. Sibal also emphasized that, having noted the fact that the bank guarantees furnished by the appellant did not cover Variable Fee at the escalated rate, the learned arbitrator signally erred in refusing to interfere with the encashment, by CWC, of the bank guarantees towards the said enhanced Variable Fee. He submits that, once Clause 17.0(iv) was clear and categorical in its excepting, from the requirement of paying escalation on Variable Fee, containers which moved on rail between Gateway Ports and ICD Loni, it could not lie in the mouth of the respondent to contend that it was, nonetheless, entitled to charge Variable Fee at the escalated rate. He submits that the respondent never sought to contend that this Clause had been novated at any subsequent stage.

28.1.3 On the aspect of force majeure, Mr. Sibal faults the reasoning of the learned arbitrator which, according to him, proceeds solely on the premise that the lockdown, consequent to the COVID pandemic did not affect the movement of containers. He referred to the OM's issued by the Ministry of Finance, to contend that, where, on account of the lockdown, the performance of the contract became unremunerative, it amounted to force majeure. The case of his client, according to Mr. Sibal, was completely covered by the Ministry of Finance OM's. Mr. Sibal further submitted that the order dated 15th August, 2020 of the learned arbitrator was in effect non-speaking on the aspect of force majeure, as there was no observation or finding dealing with the volume of material which had been placed on record by the appellant after the passing of the earlier order on 17th June, 2020. As such, he submits, the appellant had no idea as to why the said material did not convince the learned arbitrator regarding the entitlement of the appellant to plead force majeure. Absence of reasons justifying the findings in an award, he submits, constitutes a patent illegality justifying interference. Mr. Sibal took me through various passages in his second Section 17 application, to highlight the fact that considerable material supporting the appellants' plea of force majeure, had been placed on record.

28.1.4 Mr. Sibal submitted, finally, that even if the invocation and encashment of the bank guarantees could not be reversed at this point of time, CWC could not insist on the furnishing, by the appellant, of any fresh bank guarantees especially during the currency of force majeure, which is still to come to an end. He points

out that, if the appellant was to be given the benefit of force majeure, and of Clause 17.0 (iv) of the Agreement, CWC had already encashed and appropriated from the appellants' bank guarantees, Rs. 3.09 crores in excess of the amount payable to it. He submits that his client is willing to pay Fixed Fee with escalation and Variable Fee without escalation on actuals and resort to the arbitral process for recovering any excess due to it.

28.2 Mr. Ganguly's submission, on behalf of CWC

28.2.1 Responding to the submission of Mr. Sibal, Mr. Ganguly submits that the interpretation, placed by Mr. Sibal, on Clause 17.0 (iv), is unsustainable. He exhorted the Court to read Clauses (ii) and (iv) of Clause 17.0 in conjunction. Referring to Clause 17.0 (ii), Mr. Ganguly, pointed out that the said Clause divided movement of containers into two categories, viz., B (i) and B (ii). Category B (i), pertained to loaded containers entering or leaving the ICD whereas B(ii) pertained to containers being transported between Gateway Ports and ICD, Loni. The exception in Clause 17.0(iv), submits Mr. Ganguly, pertains to category B (ii) and not to Category B-(i). The application for rectification, moved before the learned arbitrator was in respect of category B (ii), whereas the claim of CWC, against the appellant is under category B (i). As such, Mr. Ganguly submits that the reliance, by Mr. Sibal, on the rejection, by the learned arbitrator, of CWC's rectification application, is thoroughly misplaced. To support this submission, he has drawn my attention to the order dated 13th February, 2020 passed by the learned arbitrator on CWC's rectification application. In any event, submits Mr. Ganguly, even after the passing of the aforesaid order by the learned arbitrator on CWC's rectification application, on 13th February, 2020, the appellant paid escalation on Variable Fee for the month of February, 2020. As such, till February 2020, the appellant was paying Variable Fee @ Rs. 405/ TEU at the escalated rate.

28.2.2 Qua the manner in which Variable Fee was adjusted, Mr. Ganguly draws my attention to Clause 17.1 of the Agreement , which reads thus:

"17.1 The first fixed fee payment by World's Window shall be made on the date of signing of the Strategic Alliance Management Contract or to be made effective from the exact date of commencement of work, whichever is later for that month or part thereof. Subsequent payments will be payable in advance every month thereafter.

The variable fees for the minimum guaranteed throughput or actual number of TEUs whichever is higher, shall be paid on the third working day of each succeeding month for the containers handled in the previous month.

The per TEU fee of Rs. 1000/- (Rupees One thousand only) and Rs. 500/- (Rupees Five hundred only) for containers freighted through rail wagon/rakes, as the case may be, would also be paid on third working day of each succeeding month for TEUs handled in the previous month.

The payments shall be made through crossed Demand Draft in the name of "Central Warehousing Corporation" and payable at New Delhi.

Simple interest at the rate of 15% per annum shall be paid by the World's Window on any delayed payments."

In accordance with Clause 17.1, the appellant was paying Variable Fee, with escalation, by the third working day of every succeeding month, on the basis of actuals every month. At the end of the financial year, the Variable Fee was accounted vis-à-vis the MGT depending on which was higher. This system continued till February, 2020, when the appellant discontinued payment of Variable Fee with escalation.

This fact, points out Mr. Ganguly has been noted in Para 52 of the impugned order, which reads thus:

"52. The Applicant, as already pointed out, has been paying the monthly Variable Fee with escalation on actual number of containers since the inception of the contract until February 2020 @Rs.727.32 not @405 per TEU with yearly adjustment of "MGT or actual number of containers whichever is higher"."

28.2.3 No occasion arises, therefore, to interfere with the impugned order, in Mr. Ganguly's submission.

Analysis

29. The scope of interference, in appeal, against orders passed by arbitrators on applications under Section 17 of the 1996 Act is limited. This court has already opined in *Dinesh Gupta v. Anand Gupta* MANU/DE/1727/2020, *Augmont Gold Pvt Ltd v. One97 Communication Ltd* 2021 SCC OnLine Del 4484 and *Sanjay Arora v Rajan Chadha* MANU/DE/2643/2021 that the restraints which apply on the court while examining a challenge to a final award under Section 34 equally apply to a challenge to an interlocutory order under Section 37(ii)(b). In either case, the court has to be alive to the fact that, by its very nature, the 1996 Act frowns upon interference, by courts, with the arbitral process or decisions taken by the arbitrator. This restraint, if anything, operates more strictly at an interlocutory stage than at the final stage, as interference with interlocutory orders could interfere with the arbitral process while it is ongoing, which may frustrate, or impede, the arbitral proceedings.

30. Views expressed by arbitrators while deciding applications under Section 17 are interlocutory views. They are not final expressions of opinion on the merits of the case between the parties. They are always subject to modification or review at the stage of final award. They do not, therefore, in most cases, irreparably prejudice either party to the arbitration. Section 17 - like Section 9 - is intended to be a protective measure, to preserve the sanctity of the arbitral process. The pre-eminent consideration, which should weigh with the arbitrator while examining a Section 17 application, is the necessity to preserve the arbitral process and ensure that the parties before it are placed on an equitable scale.

The interlocutory nature of the order passed under Section 17, therefore, must necessarily inform the court seized with an appeal against such a decision, under Section 37. Additionally, the considerations which apply to Section 34 would also apply to Section 37(ii)(b).

Qua impugned order dt. 17th June, 2020 in first Section 17 application

31. Of the two Section 17 applications which stand decided by the orders impugned in the present appeal, the first Section 17 application raised, solely, the issue of force majeure, in the wake of the COVID - 2019 pandemic and the instructions and circulars, issued by the Government in that regard. The prayer, in the application, was for a restraint against CWC from invoking the bank guarantees, furnished by the petitioner. The learned arbitrator went into the aspect of force majeure, on the basis of the material produced by the appellant, and found that the appellant had not been able to make out a case of such substantial disruption, in its activities, as would justify invoking the force majeure principle. The findings, in this regard, stand reproduced in para 21.2 supra.

32. It is not for this court, in appeal, to re-appreciate these findings which are purely findings of fact. The question of whether force majeure does, or does not, apply is, at all times, an issue to be decided on the facts. Having examined the facts before it, the learned arbitrator came to a conclusion that the appellants' situation was not such as would justify excepting it from its obligations under the Agreement on the principle of force majeure. This Court cannot revisit this decision, in exercise of its Section 37(2)(b) jurisdiction.

33. Apropos the prayer for a restraint against invocation of the bank guarantees, the view expressed by the learned arbitrator, in his order dated 17th June 2020, is clearly unexceptionable. There are authorities galore, for the proposition that the invocation of unconditional bank guarantees cannot be restrained save and except where there exists egregious fraud, special equities or irretrievable injustice. A Division Bench of this Court, has in its recent decision in CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of India Ltd 2020 SCC OnLine Del 1526, exhaustively examined this aspect and reiterated the law in this regard. Following CRSC Research and Design 2020 SCC OnLine Del 1526, I have also, in my recent decision in Kuber Enterprises v Doosan Power Systems India Pvt. Ltd. [Decision dated 12th November, 2021 in OMP(I)(COMM)364/2021], reiterated this position. I may, with humility, reproduce the following passages from Kuber Enterprises [Decision dated 12th November, 2021 in OMP(I)(COMM)364/2021], which relies on CRSC Research and Design 2020 SCC OnLine Del 1526:

"17.1 Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in SES Energy Services India Ltd. v. Vedanta Limited 2021 SCC OnLine Del 4196 has

noted these exceptions and observed thus:-

"9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in CRSC Design 2020 SCC OnLine Del 1526 to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from BSES Ltd. v. Fenner India Ltd. (2006) 2 SCC 728, neatly encapsulates this position:

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 that this Court, correctly declared that the law was 'settled'." "

(Italics and underscoring in original)

Additionally, in para 72 of the report in Svenska Handlesbaken v. Indian Charge Chrome (1994) 1 SCC 502, a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in Hindustan Steelworks Construction Co. Ltd v. Tarapore & Co. (1996) 5 SCC 34 held, after noticing and interpreting Svenska Handlesbaken⁴, that, in Svenska Handlesbaken⁴, the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it was held, "not much importance" could be attached "to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case". Vintec Electronics Private Limited v. HCL Infosystems Limited MANU/SC/8095/2007 and BSES Ltd.³ hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice.

17.2 While, therefore, there appears to be some fluidity in judicial thinking on

the issue of whether the "fraud" element would permeate the other two considerations of "special equities" and "irretrievable injustice", there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose."

34. Clearly, therefore, the view, of the learned arbitrator, that no case for injuncting invocation of the bank guarantees by the respondent at that stage existed, does not suffer from any infirmity, let alone patent illegality.

35. No case for interference with the order dated 17th June 2020, therefore, exists. I may note, here, that, in fact, Mr. Sibal concentrated on attempting to demonstrate the vulnerability of the order dated 15th August, 2020 rather than the order dated 17th June, 2020.

Qua impugned order dt. 15th August, 2020 in second Section 17 application

36. The second impugned order dated 15th August, 2020 was passed on the second Section 17 application of the appellant, dated 26th June, 2020. The prayer clause in this application, stands reproduced in para 24.5 supra. Of the six substantive prayers (a) to (f) in this application, prayers (a) to (d) invoke the force majeure principle. Prayer (e) sought a direction to the CWC to "return the amount fraudulently encashed from the bank guarantees as bearing BG No. 003GT02190600047, BG No. 003GT02180860007 and BG No. 003GT02180850018 for Rs. 2,18,70,000/-, Rs. 68,01,913/-, Rs. 27,47,196/- respectively to bank for revival of the Bank Guarantees in question". Prayer (f) sought a restraint against CWC from taking any coercive action against the appellant, specifically, but not exclusively, with reference to CWC's letter dated 23rd June, 2020.

37. The learned arbitrator has rejected all these requests.

38. Before proceeding to the impugned order of the learned arbitrator, in my view, prayer (e) in the application is not even maintainable under Section 17 of the 1996 Act. What was sought in this prayer was a return, by CWC, of the amounts recovered by encashment of the bank guarantees furnished by the appellant, to the bank, so that the bank guarantees could be revived.

39. I am unaware of any procedure by which a bank guarantee which stands encashed could be revived by returning the money to the bank. That apart, such a relief could, by its very nature, not have been sought at an interim stage, as it would amount to a final adjudication of the right of the appellant, vis-a-vis CWC, qua the amounts payable under the Agreement. Once the bank guarantee stood encashed, the only remedy that could be sought against the respondent, under Section 17, would be under Clause (1)(ii)(b) thereof, which would be for a direction to the respondent to secure the amount released by invocation of the bank guarantees. No such prayer was made by the appellant before the learned

arbitrator. This, probably, was because the appellant was well aware of the fact that a direction for security, under section 17(1)(ii)(b), would, then, have to suffer the rigour of Order XXXVIII, Rule 5, of the Code of Civil Procedure, 1908, (CPC), as held by the Supreme Court in *State Bank of India v Ericsson India Pvt. Ltd.* (2018) 16 SCC 617 and by this Court in, inter alia, *Goel Associates v Jivan Binma Rashtriya Avas Samati Ltd.* 2004 SCC OnLine Del 874, *CV Rao v. Strategic Port Investments KPC Ltd.* (2015) 218 DLT 200 (DB), *Ajay Singh v. Kal Airways Pvt Ltd* (2018) 209 CompCas 154 (Delhi) and *DLF Ltd. v Leighton India Contractors Pvt. Ltd.* (2018) 16 SCC 617 and *Tata Advanced Systems Ltd. v. Telexcell Information Systems Pvt. Ltd.* 2020 SCC OnLine Del 1716. An order for securing the subject matter of arbitral proceedings, under Section 17(1)(ii)(b), could be passed only where there was positive evidence to indicate that, were the amount not to be secured, the arbitral proceedings would stand frustrated. This, in turn, would require the applicant under Section 17(1)(ii)(b), to demonstrate that the respondent was in such financially impecunious circumstances, as would frustrate the final arbitral award, even if it were to be passed in favour of the applicant. Else, the applicant would have to demonstrate that the respondent was dissipating its assets with a view to frustrate the arbitral proceedings and the award to be passed therein. No such case has even been pleaded by the appellant against CWC. That apart, it can hardly be said that CWC was in such straitened circumstances as would justify an order for security under Section 17(1)(ii)(b). Possibly, as I have observed, it is for this reason that the applicant did not choose to seek such furnishing of security.

40. What, however, could not be sought directly, cannot be sought indirectly either. Where no case for directing security, by the respondent, of the amounts recovered by encashment of the bank guarantees can be said to exist, equally, there could be no case for directing the respondent to return the said amounts to the bank at an interlocutory stage. Any such direction would require a finding, by the learned arbitrator, that encashment of the bank guarantees was unjustified, which, in turn, would entail a detailed examination of the rival rights and contentions of the parties. All this, as the learned arbitrator has correctly held, could not be done at a Section 17 stage. Prayer (e) in the Section 17 application was, therefore, according to me, thoroughly misconceived and was not maintainable under the said provision.

41. In so far as the reasoning of the learned arbitrator is concerned, I find no infirmity whatsoever with the view that the learned arbitrator has taken. Apart from the aspect of force majeure, three main contentions were advanced, by the appellant, before the learned arbitrator. These were that (i) the appellant's liability to CWC was only to pay Variable Fee, and not Variable Fee at the escalated rate in view of Clause 17.0(iv) of the Agreement, (ii) CWC had wrongly computed MGT at 72,580 TEUs rather than 72,000 TEUs annually as MGT was required to be reckoned on a monthly basis and not on yearly basis and (iii) the bank guarantees did not secure Variable Fee at the escalated rate. Additionally, Mr. Sibal sought to contend, before me, that the learned arbitrator had

misdirected himself in relying on judicial authorities which apply to stay of invocation of bank guarantees, which had no application once the bank guarantees had already been invoked and encashed.

42. I have already set out, in detail, hereinabove, the reasoning of the learned arbitrator on the aforesaid aspects. Any repetition thereof would make this judgment needlessly prolix. On the aspect of Clause 17.0(iv), the learned arbitrator has noticed that, despite the said Clause, the appellant continued to pay Variable Fee at the escalated rate till October, 2009. He has noticed the fact that, when the appellant discontinued payment of Variable Fee at the escalated rate, the matter had been taken up in a meeting convened in the office of the Ministry of Consumer Affairs on 19th February, 2013, in which the appellant also participated and that, in the said meeting, one of the decisions taken, to which the appellant assented, was that the appellant would continue to pay Variable Fee at the escalated rate. The subsequent communication dated 22nd May, 2013 by the appellant to CWC also vouchsafed this position. The appellant, moreover, continued to pay Variable Fee at the escalated rate till February, 2020. Though Mr. Sibal seeks to contend that this was under duress and coercion, there is no material, whatsoever, to indicate so. Duress and coercion, in any case, if alleged, has to be proved on facts. As such, the learned arbitrator can hardly be faulted in his observation that, at the Section 17 stage, it was not appropriate to enter into the dynamics of Clause 17.0(iv) of the Agreement vis-à-vis all these undisputed facts.

43. In this context, I may also borrow from the wisdom of a recent Division Bench judgment of this Court in DLF Ltd.²⁰, which has clearly disapproved any detailed evaluation of the terms of the contract and of the rival contentions of the parties at a Section 17 or a Section 9 stage, thus:

48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be "just and convenient" would certainly vary from case to case. But, while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses. This Bench in Bhubaneswar Expressway [National Highways Authority of India v Bhubaneswar Expressway Pvt. Ltd. 2021 SCC OnLine Del 2421] has held as below-

"44. If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAH has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAH. If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not,

this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide, as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement and of admission, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal."

It may be noted that, having so observed, the Division Bench in DLF Ltd¹⁷ reversed the decision of the learned Single Judge, which had directed security of the amount involved in the arbitration.

44. That the province of Section 9 jurisdiction of the Court, and of Section 17 jurisdiction of the arbitrator, are co-equal, stands settled by the recent decision of the Supreme Court in Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal Ltd AIR 2021 SC 4350.

45. I respectfully agree with the above observations of the Division Bench. They squarely apply to the present case. The appellant having willy nilly agreed to pay Variable Fee at the escalated rate, and having continued to do so till February, 2020, the issue of the liability of the appellant to pay the variable fee at the escalated rate was, at the very least, arguable. The learned arbitrator was, therefore, entirely justified in leaving this issue open for consideration for examination on merits when the substantive claims were being argued. Pending that, the learned arbitrator has correctly observed that, the appellant having abruptly discontinued paying Variable Fee at the escalated rate, which it was paying till February, 2020, and the CWC having, on 6th May, 2020 and 7th May, 2020, cautioned the appellant in this regard, the invocation by CWC, of the bank guarantees furnished by the appellant could not be said to be unjustified. No case for reversing this exercise could, therefore, be said to exist, least of all at an interlocutory stage.

46. On the aspect of the manner in which MGT was to be reckoned, as against the contentions advanced by the appellant, the respondent relied on Clause 17.0 (ii), which stands reproduced in Para 6 supra. According to this Clause, the appellant was liable to pay Variable Fee on the basis of actual movement of containers or MGT, whichever was higher. The respondent's submissions before the learned arbitrator, was, therefore, that it had, at the end of the year, reconciled the MGT with the actual number of containers, and had, thereafter, applied Clause 17.0. This, again, observed the learned arbitrator was an arguable point, which would involve an examination of the contractual covenants; an

exercise which was ordinarily not to be undertaken at the Section 17 stage.

47. In any event, once the issue of the liability of the appellant to pay Variable Fee at the escalated rate was left open for consideration at a later stage, no case for directing any return of the amounts, recovered by encashment of the bank guarantees to the bank, at an interlocutory stage, could be said to exist.

48. The only surviving issue was that of force majeure. Para 27.8 hereinabove reproduces the findings of the learned arbitrator on the aspect of force majeure. The learned arbitrator has noted the fact that additional material had been placed by the appellant, before the learned arbitrator, to substantiate its case of force majeure. The learned arbitrator has, in the impugned order, further noted that the said material had been taken into account, and that having done so, he did not find any case to revisit his earlier conclusion that no case of force majeure could be said to exist. Mr Sibal's objection is that the learned arbitrator has not provided detailed reasons, with respect to the additional material filed by his client in the arbitral proceedings. The following passage, from the judgment of the Supreme Court in Sangyong Engineering & Construction Company Ltd. v. NHAH (2019) 15 SCC 131 neatly encapsulates the legal position regarding the scope of interference by a court with the arbitral award on the ground that it does not consider a plea raised by a party:

"61. The Court of Appeal of Singapore, in CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK 2011 SGCA 33, held as follows:

"32. Second, it must be noted that a failure by an Arbitral Tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in Redfern and Hunter correctly summarises the position:

"The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different." "

(Emphasis supplied)

48.1 The legal position, in respect of a challenge to an arbitral award on the ground that a plea raised by a party was not considered by the learned arbitrator, is, therefore, that the Court would interfere where it is convinced that this plea, if considered, could affect the impugned award or order, and that the omission, on the part of the arbitrator, to consider the contention has resulted in prejudice to either party. Omission to consider, or deal with, an argument canvassed, is not, therefore, invariably fatal to the decision of the arbitrator. Still less would the scope of interference, in appeal, be, where the order under challenge is not a

final award, but merely an interlocutory order on a Section 17 application.

48.2 The present case is not even one of non-consideration of the material placed by the appellant. Indeed, Mr. Sibal, very fairly, did not fault the learned arbitrator for not considering the material placed on record. His submission was that the learned arbitrator had not recorded reasons for rejecting the said material. In exercise of my appellate jurisdiction under Section 37(2)(b), I am not convinced that a case for interference with the impugned order, on this ground, exists. The learned arbitrator was clearly alive to the material placed by the appellant, and has seen the said material. He has, therefore, summarized the contentions of the appellant and the respondent, qua the aspect of force majeure. Having done so, the learned arbitrator has held that the additional material placed on record by the appellant did not convince him to revisit his earlier view. The issue of whether the circumstances in which the appellant was placed, entitled him to plead force majeure, or not, is a pure question of fact. The learned arbitrator having opined, prima facie, on this aspect one way, at the interlocutory stage, no case for interference under Section 37(2)(b) can be said to exist. For this reason, therefore, it cannot be said that the impugned order deserves to be set aside merely for want of what Mr. Sibal would call sufficient reasons in dealing with the force majeure plea advanced by the appellant.

Conclusion

For all the above reasons, I find no reason to interfere in this appeal which is accordingly dismissed, with no orders as to costs. All pending applications stand disposed of.