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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: 31.07.2025***
Judgment delivered on: 21.08.2025

\+ FAO(OS)(COMM) 64/2022 & CM APPL. 13418/2022 (for stay)

CONTAINER CORPORATION OF INDIA LIMITED
.....Appellant

Through: Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Rishi Awasthi & Mr. Avinash Ankit, Advocates.

versus

M/S WATRANA TRACTION COMPANY .....Respondent

Through: Mr. Manish Vashisth Sr. Adv. with Mr. Sanjeev Kumar & Mr. Pankaj Kashyap, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGEMENT

HARISH VAIDYANATHAN SHANKAR J.

1. The present Appeal, filed under Section 37(1)(b) of the **Arbitration & Conciliation Act, 1996**[1] read with Section 13 of the Commercial Courts Act, 2015, challenges the **Judgment dated 17.01.2022**[2] passed by the learned Single Judge of this Court in O.M.P.(COMM) No. 182/2021, as well as the **Arbitral Award dated 20.01.2021**[3]. By the Impugned Judgment, the learned Single Judge

[1] A&C Act
[2] Impugned Judgment
[3] Award

upheld the Award, which had been rendered by a sole Arbitrator.

BRIEF FACTS:

2. The Appellant issued a Notice Inviting Tender for providing Mechanized Cargo Handling and Inventory Management Services at Inland Container Depots. The Respondent submitted an online bid, was declared the successful bidder, and was issued a **Letter of Intent dated 11.09.2017**[4].

3. A **Contract dated 18.09.2017**[5] was thereafter executed, under which the Respondent undertook to provide the services for a period of four years, with an option for extension by one year.

4. In compliance with the LOI, the Respondent furnished a **Bank Guarantee**[6] of Rs. 25,00,000/-.

5. The records indicate that the Respondent could not deploy certain machinery as agreed, resulting in the imposition of a penalty by the Appellant.

6. The Respondent *vide* letter dated 21.04.2018 sought a waiver of the penalty, citing ongoing losses incurred in performing the obligations under the Contract. This was followed by a further letter dated 15.05.2018, wherein the Respondent reiterated its request for a waiver of the penalty and raised concerns regarding its financial position. Specifically, the Respondent stated that its billing for the month of April was lower than its fixed expenses, and further requested permission to remove certain resources to alleviate its financial burden until such time as the volumes of containers stabilized.

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[4] LOI
[5]Contract
[6]BG

7. A subsequent letter dated 14.06.2018 was sent by the Respondent, reiterating its grievance regarding the low volumes of containers, which had rendered it unsustainable for them to continue. The Respondent specifically raised the issue that the billable amounts for imports had decreased to 40% of the projected volume and made a specific request that the **Container Cargo Logistics System**[7] data for all import containers, including Green Channels/RMS containers, be considered for billing purposes. An ancillary issue concerning the refund of penalties, based on the prevailing business, was also raised therein.

8. It appears that the issues raised by the Respondent remained unresolved.

9. By its letter dated 26.07.2018, the Respondent informed the Appellant that, in response to the Tender, it had quoted an amount of Rs. 3,53,83,628/-, which was approximately 2.14% lower than the estimated value, based on the data provided in the tender documents. The Respondent stated that the existing contract had become unviable due to heavy losses, as modifications in the CCLS software had drastically reduced import volumes, causing a significant deviation from the estimated billing. It explained that the quoted rates were highly competitive and given on the assurance of increased business volumes; however, its billing over nine months and twelve days had reached only about 60% of the projected contract value. Accordingly, the Respondent sought either an upward revision of the per-unit rates or suitable compensation for the shortfall, so that it could continue rendering services satisfactorily.

[7] CCLS

10. In the same communication, in the alternative, the Respondent requested permission to exit the contract within three months. It further stated that if neither revision nor termination was agreed, an independent sole arbitrator should be appointed under Clause 20 of the Contract to resolve the disputes. Meanwhile, the Respondent assured that it would not suspend operations and would continue providing services for three months to facilitate the appointment of a new contractor.

11. Pursuant to this, the Respondent sent another request dated 07.09.2018 on similar lines.

12. The Appellant, by its Communication dated 13.09.2018 in response to the Respondent's letter(s), while accepting the Respondent's request for termination, however, called upon the Respondent to continue under the Contract until 25.10.2018 or until the finalization of a new Contract, whichever was earlier. It was also communicated that, failure to do so would result in the Respondent's BG being forfeited and the Respondent being debarred from participating in the next tender.

13. In response to the said letter, the Respondent, *vide* letter dated 14.09.2018, requested the Appellant to appoint a Sole Arbitrator in accordance with Clause 20 of the Contract.

14. The Appellant, however, sent another letter dated 17.10.2018, modifying its earlier letter dated 13.09.2018, calling upon the Respondent to continue under the Contract until finalization of the new Contract.

15. The Respondent sent a reminder on 20.10.2018 and again by letter dated 01.11.2018 reiterated its request for appointment of an Arbitrator, indicating that failing such appointment, it would approach

the High Court for the appointment of an Arbitrator.

16. The Appellant *vide* letter dated 16.11.2018 responded by referring to the arbitration clause and stated that the schedule of quantities set forth in Annexure-I of the Contract were merely approximations of the expected volumes and there was no dispute that could be referred to arbitration.

17. The Appellant, thereafter, approached the Delhi International Arbitration Centre for the appointment of a Sole Arbitrator. The learned Arbitrator, after entering upon reference and considering the pleadings, evidence and submissions of both parties, rendered its Award on 20.01.2021. The relevant portion of the said award is produced herein below:-

> ***"Point No. (i) & (iv)***
> ***(i) Whether the Claimant is entitled for a sum of Rs.2,08,94,299.7/- against the losses suffered by the Claimant due to the alleged change of tender conditions? OPC;***
> ***(iv) Whether the Claimant is entitled to the amounts as stated in points 1 to 3 in view of the clauses 1.1 and 1.2 of Chapter III of the Tender Documents? Onus on Parties.***
> ***43.*** *Since both these points are interlinked and interconnected, the same are being taken together for discussion.*
> ***44.*** *The prime contention in respect of loss of business raised by the Claimant is that there was a change in the billing pattern on account of a change in CCLS software which amounted to a change in the tender conditions. It is the case of the Claimant that despite full cooperation by the Claimant even beyond the contractual obligations, there was no response from the Respondent to address the genuine grievances raised by them. The LOI dated 11.09.2017 and Clause 8 of Chapter II of the Tender Documents provided that the Claimant should commence the work within 30 days from the date of LOI. The Claimant has urged that mobilizing the manpower and machinery within the span of 30 days was itself challenging, however, the Claimant was forced by the Respondent to commence the work within 7 days of the LOI. Procurement of the supplies and mobilizing them to the contractual site within a short period made the Claimant suffer huge losses. Despite the Claimant's cooperation, the Respondent levied the penalty of Rs.1,49,000/- for the delay in the work. The Claimant, vide letters dated 20.04.2018 and 15.05.2018, requested the*

Respondent to waive such penalty as the Claimant was already performing the Contract under losses and had deployed extra equipment for smooth running of operations.

45. *The Claimant referred to Clauses 3 and 4 of Chapter IV of the Tender Documents and contended that the terms and conditions of the Contract were vague and one-sided. It is urged that the language of Clause 3 is vague as it states that in case of any change in volume or any insufficient work, the Claimant shall not be eligible for any compensation. For instance, Clause 3 does not mention any particular volume, it gives a blanket ambit to the Respondent to escape the liability. Similarly, under Clause 4, it was only the Respondent who was entitled to terminate the Contract with a 7 days' notice period. The Claimant has placed reliance on these clauses to show the biasness of the terms of the Contract.*

46. *The Claimant submits that the Contract should be read in entirety, i.e., inclusive of all Tender Documents and Annexures. Referring to the estimated cost i.e., Rs.3,61,59,917/- per annum, the Claimant submits that the estimated cost is the maximum cost, which the Respondent has to levy yearly. The same estimation was considered as a basis by the Claimant to calculate all its costs including profits i.e., Rs.3,53,81,782/- per annum. The tally of the Claimant's computation can be drawn from the inventory of work, marked and annexed as* ***Annexure- I*** *to the Tender Documents.*

47. *The Claimant has urged that the quantities listed in the Annexures are used as a basis for deciding the financial bid. The Respondent was liable to provide the stipulated volume to the Claimant for covering their costs. Clause 6 of Chapter II of the Tender Documents further confirms the fact by stating that the tender rate should be in parity with the schedule of rates (Annexure I). Thus, it is urged that it is wrong on the part of the Respondent to argue that the Respondent has no liability in providing specified business to the Claimant.*

48. *Conversely, the Respondent referred to Sub Clauses 1.1 and 1.2 of Clause 1, Chapter III of the Tender Documents. As per theseclauses, the scope of the work is subject to variation and adjustments depending on the pattern and volume of work. Additionally, the terms related to rates, general conditions, or any alteration cannot be the matter of dispute and in case it requires any interpretation or assistance, the same can be sought from the Tender Accepting Authority of the Respondent. The Respondent submits that these were the express conditions of the Contract, which must be adhered to.*

49. *According to the Respondent, it was the duty of the Claimant to assess the business potential before submitting the bid under the initial tender. Instead of making an actual assessment, the Claimant simply made a vague assumption based on the Respondent's estimation of the business from the Tender*

Documents. Moreover, the estimation of work volume was not a guarantee, rather it was an estimation based on the prior experience of the Respondent. It worked well for the first 8 months of the Contract. Post March 2018, there was a drop in the volume of business for which the Respondent could not be blamed.

50. *The Respondent further argued that when the 305/507 Contract are express, the Tribunal cannot find theconstruction of the Contract on implied terms. In support of their contention, reliance is placed on* ***FCI v. Chandu Construction****, (2007) 4 SCC 697,* ***State of Rajasthan v. Nav Bharat Construction Co****., (2006) 1 SCC 86 and* ***Vidarbha Irrigation Development v. M/S Anoj Kumar Agarwala****, 2019 SCC OnLine SC 89.*

51. *In* ***FCI*** *(supra), the Hon'ble Supreme Court held that the Arbitrator is the creature of the contract and is bound to operate within the ambit of the contract. The relevant paras are extracted herein below:*

> *"11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see: Associated Engineering Co. Vs. Government of Andhra Pradesh and Anr. and Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises & Anr.).*
>
> *xxxxx xxxxx xxxxx*
>
> *15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action [Also see: Associated Engineering Co. Vs. Government of Andhra Pradesh &Anr. (supra)] "*

52. *In* ***Nav Bharat Construction*** *(supra), the Hon'ble Supreme Court held that an Arbitrator needs to adjudicate the dispute within the four walls of the contract. In the name of justice, the Tribunal cannot deliver an Award contrary to the contract. If it does so, the same is liable to be set aside. The relevant paragraphs are reproduced below:*

> *"25. In the same manner, Mr. Mohta took us through a*

large number of other claims to show that they were contrary to the terms of the Contract. As stated above it is not necessary, for the purposes of this Judgment, to set out in detail the submission of Mr. Mohta in respect of other claims referred to by him.

xxxxx xxxxx xxxxx

27. There can be no dispute to the well-established principle set out in these cases. However, these cases do not detract from the law laid down in Bharat Coking Coal Ltd's case or Continental Construction Co. Ltd's case (supra). An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so..."

53. *Similarly, in the later decision of the Hon'ble Supreme Court in* ***Vidarbha Irrigation*** *(supra), it was stated as follows:*

"15) The law on the subject is well settled. In Bakshi Security and Personnel Services Put. Ltd. Vs. Devkishan Computed Put. Ltd. And Ors., (2016) 8 SCC 446, this Court held:

"14. The law is settled that an essential condition of a tender has to be strictly complied with....

xxxxx xxxxx xxxxx

17) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance."

The Respondent in this background submits that the parties are bound by the specific terms of the Contract and the same cannot be given a go-by by either of the parties or by the Arbitral Tribunal.

54. *There is no dispute about the fact that in Sub Clauses 1.1 and 1.2 of Clause 1, Chapter III of the Tender Documents, it was specifically provided that the Contract is subject to variation and the work under this Contract cannot form a basis of the dispute. The relevant clause regarding the scope of work is reproduced as under:*

"1. SCOPE OF WORK

1.1 The scope of work indicated in the paras below is only a guide. The actual requirements are subject to variations/ adjustments depending on the pattern and volume of traffic.

1.2 The scope of work described in this chapter shall not be a basis for any dispute with regard to rates or for alteration of terms and conditions including General Conditions. Doubts, if any, about the interpretation of any

of the clauses in this chapter shall be referred to the Tender Accepting Authority of Container Corporation of India Ltd. whose decision in the matter shall be final and acceptable to the tenderer I contractor."

55. *Further, it is well settled that the Tribunal cannot ignore the terms of the Contract. The question for consideration is whether the terms of the Contract have been changed unilaterally in a manner that has placed the Claimant at a disadvantageous position during the currency of the Contract. To address this issue, it is important to analyse the letters exchanged between the parties and also the cross-examination of the witnesses.*

56. *At this point, the Claimant referred to Question Nos. 13 and 14 dealing with the estimated cost in the cross-examination of the Respondent's witness, RW-1 Ms. Kiran Sharma. The said questions are reproduced hereunder:*

"Q.13 How do you prepare the estimated minimum value of work?
Ans. As per my knowledge, volume is based on the last year volume. Volume is always anticipated.
Q.14 Is it correct that cost of the contract is finalised on the basis of the estimated minimum value of work which is mentioned as Annexure I in the present contract?
Ans. Cost of the contract is based on estimated volume of work."

57. *As mentioned by the RW-1 Ms. Kiran Sharma, the minimum value of work has been decided based on the past year's volume. This is the general practice under a similar type of tender and the Respondent has been following the same practice as well. It is difficult to evaluate the actual volume and cost even before running the Contract, thereby, estimated volume and costs are provided in the Contract for the Contractor to make an informed choice. Even these estimations are based on certain parameters to give a relevant indication of work under the Contract. Generally, previous tenders and past year activities are considered. Thus, the Respondent's declaration of the estimated volume and cost cannot be treated as valueless since the Contractor/tenderer acts upon the same to make the bid.*

58. *The Claimant explained the trajectory of change in business that led to their losses. In April 2013, the Customs Department issued a fresh guideline for cutting the seal of specific containers subject to inspection. But dehors the guidelines for cutting the seal of specific containers, all the containers since April 2013 and even after the instant Contract came into force and up to April 2018, the Respondent was paying for all the containers passing through the Green Channel irrespective of the seal cutting. However, in April 2018, pursuant to the change in the CCLS software, the Respondent started paying the Claimant for only those containers whose seals were opened while still charging all its customers on all the containers. The same is evident from the*

cross-examination of the Respondent's witness, wherein the following was stated:

"Q.21 Is it correct that the Respondent is still charging directly from the customer for the containers passing through green channel?

Ans. It is correct."

Although for the customers, the charges for seal cutting were very nominal, however, it made a huge difference overall in the Claimant's collection as they were charging Rs. 70.90 for 20ft. container and Rs.192.10 for a 40ft. container, as per the Contract between the parties. Additionally, about 40-45% of the import business was derived from the seal cutting of the containers. Thus, making alterations to the mode of payment in respect of import containers largely affected the Claimant's billing.

59. *It is evident from the answers given to Question Nos. 13 & 14 hereinbefore by RW-1 Ms. Kiran Sharma that the cost of the tender is finalized based on the estimated minimum value of work. Although, it is only an estimate, however, there is a categorical admission by RW-1 that the 'estimate' is based on the minimum value of work. This raises the question as to how the estimate went wrong and why even in the subsequent tender, the value of the import containers was less by almost 40% from the previous tender. Is change in CCLS Software, a mere coincidence or an intentional act of the Respondent and thereby hiding the containers passing through the Green Channel on which the cutting charges were being paid not only since 2013 (when the Green Channel was introduced) but even in the instant Contract awarded to the Claimant up to April 2018.*

60. *Even if the Respondent's representation during the pre-bid meeting being not part of the minutes of the meeting, is ignored, still there is overwhelming material on record to show that the change in CCLS software by the Respondent amounted to change in the tender conditions as this drastically reduced the number of the containers passing through the Green Channel that is accounted for the invoice. At this juncture, I would like to refer to the letters written by the Claimant to the Respondent during the currency of the Contract.*

61. *The first of such letter is dated 20.04.2018 whereby the Claimant informed the Respondent about a change in the tender conditions and putting additional work on the Claimant. Then again by letter dated 15.05.2018, the Claimant made a complaint of change in the tender conditions. The relevant portions of the letter dated 15,05.2018 are reproduced herein below:*

> *"1. It is submitted that we had apprised you about the business condition vide following letters and your instructions are awaited:*
>
> *a) Change in Tender/ Business conditions/lower Volume for Mechanized Cargo Handling &*

Inventory Management at ICD/TKD dated 20 April 2018 (copy enclosed)

b) *Waiver of Penalty for Non-Deployment of Equipments (18 T Hydra & 10 T Forklift) dated 21 April 2018' '(copy enclosed)*

c) *Condonation of Time for Deployment of equipment as per terms and conditions under the contract for mechanized cargo handling and inventory management at ICD/TKO dated 01 November 2017 (copy enclosed)*

2. The volume of business has really gone down as compare to tender conditions and hence we are facing huge losses as the situation is well known to your good organization. The billing income of April is far less than the fixed expenses of ours.

3. We have proved our commitment and carrying out our duties with utmost dedication ……."

62. *This was followed by letter dated 14.06.2018, wherein the Claimant again made a grievance about the change in tender conditions leading to very low volume in the import section. The relevant section of the letter dated 14.06.2018 is reproduced below:*

"Dear Sir

This is with reference to our meeting in your good office and also our earlier letters dated 20th April, 21st April and 15th May 2018 refers (Copies Enclosed). We are running the business at huge losses and will not be able to pay the salary to our workers in coming months in view of (sic) following reasons: -

a) *Volume very low in import section leading to low billing thereby not able to sustain fixed cost of the project.*

b) *Earlier Billing used to be on all containers for seal cutting at least at a very nominal rate of Rs. 170.90 for 20'ft containers and Rs. 192.10 for 40' ft containers but now the same is not happening because of* ***change in tender conditions, such as now few of the Import containers are cleared through Green Channel/ RMS Route.***

c) *We have quoted our rates with respect to your volume projections in the tender. We can understand the fluctuation of plus minus 20% but presently, the import billable amount has gone down to approx. 40% of projected volume.*

d) *Till date total penalty paid to Concor is Rs. 343195/- (Three Lakhs Forty-three thousand*

one hundred ninety- five) for no serious fault of ours.

It may be noted that we are maintaining a fleet of 25 MHE's and approx. 125 workers. Our fixed cost of this project is Rs. 22,50,000/- (Rupees Twenty-two Lakhs fifty thousand only).

As we are doing this business at very low rate, the following may be considered on compassionate grounds:

a) The CCLS data of Import Container may be fully considered for billing including Green Channel/ RMS Containers.

b) Our penalty amount may be refunded to us knowing the poor business conditions.

(emphasis supplied)

63. *The Claimant has urged that the time-period from the month of October to January is normally a lean period in respect of import business, still, the Claimant had fairly good volume. The Claimant also attached month-wise volume of business since the inception of the Contract up to April 2018, to highlight that the volume of the business had substantially fallen in April 2018. The Claimant put forth the letter dated 26.07.2018, wherein the Claimant again stated about the change in the CCLS software without taking into consideration the trade that has affected the Claimant's billing. The relevant portion of the letter reads as under: -*

"Further the volume had gone down drastically and CONCOR had also implemented few changes in the ***CCLS software without taking into consideration of trade which has affected our billing and we had to face huge losses****. As we are not even getting the billing as projected, it is humbly requested to please review the upward revision of Rate per unit or the loss shall be compensated by CONCOR based on the estimated value of the contract for sustaining & providing satisfactory services to your valuable customers which will help to increase the prospective volume in future.*

Due to the reasons explained above, it is leading us as to the unsustainable status and the present situation is forcing us to discontinue our services unless the Rate per Unit is escalated and Manpower & machine are reduced. Being bound by the Contract terms & conditions several requests had been made on various occasions for improving the conditions.

Further this is also to inform you that till 30th Jun, 2618, our basic billing without: GST is Rs. 1,82,09,672/- for the period of 9 months and 12 days, which is only 60% of estimated value of the contract if it is taken on annual basis and this loss to us is mainly due to changes in tender

conditions (deviation in billing in CCLS) w.e.f. April 2018 i.e. 6 months after executing the tender.

We had trusted the tender document as it was being prepared by your expert officials and approved by Competent Authority and we had quoted accordingly, and, in such circumstances, we are rendering the services by tweaking/ cutting corners for the expenses and doing the business at a loss of 40%."

64. *The Respondent in their first response by letter dated 13.09.2018 never refuted any specific averment concerning the change in business conditions through changes in the CCLS software. In RW-1 Ms. Kiran Sharma's cross-examination, it was admitted that the Respondent never took the responsibility of making the Claimant aware of the new billing system. At this stage, it would be expedient to refer to Question No. 20 of her cross-examination:*

"Q.20 Can you show any document or notice on record of the Arbitral Tribunal that the Respondent has informed the Claimant about the introduction of new system of billing from April, 2018?

Ans. There is no such document. "

65. *In view of the non-refutation of the Claimant's averments regarding the change in the tender conditions by upgrading the CCLS software contemporaneous to the raising of the dispute in the aforesaid letters, the averments in the Statement of Defense after a lapse of two years can only be treated as an after-thought.*

66. *The Respondent's deliberate avoidance regarding changes in the CCLS software is apparent from the Respondent's solitary witness's cross-examination, wherein contrary to her affidavit (where RW-1 had specifically talked about the updated CCLS software concerning the procedure of clearance through the Green Channel), she stated that she was unaware of the changes in the CCLS software. It would be appropriate to reproduce the relevant portion of cross-examination of this witness as under:*

*"**Q.17** Is it correct that after March, 2018 the Claimant was denied payment for the seal cutting of the import container which was to pass through green channel?*

Ans. I have not seen the payment terms of seal cutting of the import containers.

***Q.18** I put it to you that a new billing system was introduced in April, 2018 without any prior notice to the Claimant wherein the Respondent stopped paying the Claimant for seal cutting of the import container which was to pass through green channel. What do you have to say?*

Ans. I have no idea about this.

The attention of the witness was drawn to para 13 of her affidavit in evidence to find out as to when the new billing system was introduced.

***Q.19** You have mentioned procedure of clearance of RMS/green*

channel containers in para 13 of your affidavit. When this system was introduced in TKD?
Ans. I have not seen the customs notification and therefore cannot tell about the same.

xxxxx xxxxx xxxxx

***Q.21** Is it correct that the Respondent is still charging directly from the customer for the containers passing through green channel?*
Ans. It is correct.
***Q.22** Is it correct that 65 to 70% of the volume of work at TKD of the contractor is from the import containers?*
Ans. The volume of work of the contractor is both from import and export of containers. I can neither admit nor deny that 65 to 70% of the volume of work is from the import containers. Import business is more than the export business.
***Q.23** Do you have any idea what was the percentage of the import containers passed (sic passing) through the green channel during the currency of the contract with the Claimant?*
Ans. I do not have any idea.
***Q.24** I put it to you that the volume of work from the import business of the Claimant has gone down 40. to 45% after April, 2018. What do you have to say?*
Ans. I cannot say about the same.

xxxxx xxxxx xxxxx

***Q.38** I put it to you that due to the change in the tender condition by introducing a new system of billing the Claimant suffered heavy losses. What do you have to say?*
Ans. I am not aware.
*Thus, from the contemporaneous non-refutation of the Claimant's letters regarding the change in the tender conditions coupled with the clear admission and at some places ignorance of RW-1 Ms. Kiran Sharma amply proves that there was change in the tender conditions by changing the billing pattern due to the changes effected in CCLS software. Thus, the judgments in **Chandu Construction, Nav Bharat Construction Co., and Vidarbha Irrigation Development** would not come to the Respondent's rescue because it is amply proved that the tender conditions were impliedly changed by the Respondent.*
***67.** This is further fortified from the fact that the Claimant was persuaded, rather forced to continue with the Contract on the threat of invocation of Bank Guarantee, blacklisting and debarring them from participation in future tenders, although the subsequent tender even after being published had to be scrapped. All the more, the tenderer who was awarded the Contract in September 2019 was with 39% less volume in respect of import containers which exactly is the case of the Claimant. Thus, it appears that at the time of inviting the bid for the instant tender the Respondent themselves*

were not aware that they were going to change the billing pattern by making changes in the CCLS software. Otherwise, a tenderer estimation can never go haywire to the extent of almost 40%. Consequently, since the terms of the contract or tender conditions were changed, Sub Clauses 1.1 and 1.2 of Clause 1, Chapter III of the Tender Documents would not stand in the way of the Claimant in claiming the amount based on the estimated volume of the business as projected in the Tender Documents. I, therefore, hold that the Claimant is entitled to be paid the sum of Rs.2,08,94,299/- on account of the loss of revenue/loss suffered by the Claimant due to change in the tender conditions. Points (i) and (iv) are decided accordingly.

Point No. (ii)

Whether the Claimant is entitled for a sum of Rs.25,00,000/- submitted as bank guarantee en-cashed by the Respondent arbitrarily and illegally? OPC

68. *Vide my findings on points (i) and (iv) above, it is evident that it was the Respondent who was responsible for the change in the billing system which amounted to a change in the tender conditions. Consequently, there was no breach of the Contract on the part of the Claimant. Rather, the Claimant requested to exit from the Contract on account of a change in the tender conditions. As stated hereinbefore, the Claimant since April 2018 made various representations to the Respondent pointing out the changes in the CCLS software affecting the Claimant's billing. But the Respondent neither refuted the Claimant's averments by giving any reply to the various letters referred to hereinabove nor addressed the issue. The Claimant continued to perform their obligation under the Contract despite suffering losses. So much so, that although the Respondent had initially informed the Claimant that the Contract would be over either on 25.10.2018 or on finalization of the new Contract, whichever was earlier yet subsequently by letter dated 17.10.2018, the Claimant was asked to continue the work till the new Contractor was awarded the work (not even specifying the date) to which the Claimant duly complied. The Claimant was not only issued a Satisfaction Certificate dated 25.06.2019 but was also permitted to participate in the subsequent tender. Thus, the Respondent was not entitled to invoke the Bank Guarantee. The invocation of the Bank Guarantee in the said circumstances was arbitrary and illegal.*

69. *Admittedly, the Respondent has neither pleaded nor led any evidence to prove that they had suffered any loss on account of the Claimant exiting the Contract before completion of the full term of four years. All the more, once the Claimant continued to work till the next Contractor was appointed and in the absence of any loss proved by the Respondent due to Claimant's earlier exit from the Contract, the Respondent was neither entitled to invoke nor*

appropriate the amount of the Bank Guarantee. In this connection, a reference may be made to the ***State of Gujarat v. Kothari and Associates****, (2016) 14 SCC 761, wherein the Hon'ble Supreme Court took a view that the demeanor of the respondent by extending the work tenure for the Appellant suggested two things, either there has been no breach as the Respondent kept on awarding work to the Appellant; or, even if the Respondent assumes any breach, the act of continuing with the extension to the Appellant suggested that the Respondent has given up on such breach and the pressing of the breach has to be immediate in nature. The relevant paragraphs are reproduced below:*

> *"**11**. It also appears to us that the contract was clearly not broken as the respondents chose to keep it alive despite its repeated breaches by the appellant State...*
>
> *xxxxx xxxxx xxxxx*
>
> ***12**. The respondent, however, could prima facie be presumed to have accepted a renewal or extension in the period of performance but with the rider that the claim for damages had been abandoned by it. If this assumption was not to be made against the respondent, it would reasonably be expected that the respondent should have filed a suit for damages on each of these occasions. In a sense, a fresh contract would be deemed to have been entered into between the parties on the grant of each of the extensions. It is, therefore, not legally possible for the respondent to contend that there was a continuous breach which could have been litigated upon when the contract was finally concluded. In other words, contemporaneous with the extensions granted, it was essential for the respondent to have initiated legal action. Since this was not done, there would be a reasonable presumption that the claim for damages had been abandoned and given a go-by by the respondent."*

The Hon'ble Supreme Court explained that for every breach, there has to be an immediate legal action i.e., discontinuing the commercial relation. Similarly, in this case despite the termination sought by the Claimant, the Respondent kept moving ahead with the Contract. The reasonable presumption reflects that either the request of termination did not construe as a breach or the Respondent has abandoned their claim of the breach.

70. *Similarly, in the case of* ***Kanchan Udyog Ltd. v. United Spirits Ltd****., (2017) 8 SCC 237, the Hon'ble Supreme Court observed that there is a demarcation between expecting a loss and suffering a loss. A mere allegation of loss would not suffice; there has be to a link between the cause and the loss. The onus is on the party to prove that a breach from one party leads to the infliction*

of loss on the other. The relevant portions of the report are extracted below:

> *"26. In the facts of the present case, it cannot be held that the breach alone was the cause for loss of anticipated profits, much less was it the primary or dominant reason..... In the facts of the present case, it cannot be held that the breach by the respondent was the cause, much less the dominant cause for loss of anticipated profits by the appellant.*
>
> *27. In Galoo Ltd. [Galoo Ltd. v. Bright Grahame Murray, (1994) 1 WLR 1360 (CA)] the emphasis was on the common-sense approach, holding that the breach may have given the opportunity to incur the loss but did not cause the loss, in the sense in which the word "cause" is used in the law. The following passage extracted therein from Chitty on Contracts, 26th Edn. (1989) Vol. 2, pp. 1128-29. Para 1785 may be usefully set out: (WLR p. 1370 A-B)*
>
> > *"... The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must also be proved: there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss."*
>
> *(emphasis supplied)*

Applying the same causation test borne out of the standards of reasonability to the facts of the present case, the onus was on the Respondent to substantiate their claim with sufficient evidence, which would help the Tribunal to draw a nexus between the breach and the actual losses suffered by the Respondent. However, the Respondent failed to prove any losses that were borne out of the termination by the Claimant. So, much so that the Respondent even did not claim to have suffered any loss. Since the Respondent failed to prove any loss, the issue of reinstatement of the Respondent to the previous position did not arise. Therefore, there was no occasion for invocation of the Bank Guarantee.

71. *Likewise, in* ***Kailash Nath Associates v. Delhi Development Authority and Anr.,*** *(2015) 4 SCC 136, the Hon'ble Supreme Court affirmed that the party claiming to be aggrieved, has the onus to prove the loss or any damages. Although, Section 74 of the Contract Act awards compensation for the breach, where the penalty of such breach is pre-determined yet the loss has to be*

proved. The Court further explained that even if the claim of the party is covered under Section 74, there still lies a burden on the shoulder of the claiming party to prove the losses arising out of such breach. Additionally, all the losses or damages in question must be proved as in the case of Section 73 of the Contract Act.

72. *Furthermore, in the case of* ***Bharat Sanchar Nigam Limited v. Reliance Communication Ltd.****, (2016) 4 CompLJ314 (SC), the three-judge bench of the Hon'ble Supreme Court reaffirmed the position of the law that the loss alleged to be suffered by the contractual breach needs to be proved if the party is claiming the compensation for the same. The Hon'ble Supreme Court held as under:*

> *"10... In terms of Section 73 of the Act, the party which suffers by any breach of contract is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. Such compensation is not to be given for any remote or indirect loss or damage. According to the learned Counsel in terms of Section 73 of the Contract Act to receive compensation for loss or damage, the party claiming such compensation must prove the alleged loss or damage."*

73. *In case of the actual loss, the damages are awarded to reinstate the aggrieved party in their original financial position, provided such damages are the direct outcome of the breach. The onus is on the party to prove that such loss occurred to them. Applying the ratio to the present case, no evidence has been led by the Respondent that could reflect any loss suffered by the Respondent or that it is the direct outcome of the Claimant's breach. Hence, the Respondent does not qualify for such damages and consequently, encashment of the Bank Guarantee and its appropriation by the Respondent was wrongful.*

74. *In the background, some secondary arguments concerning the forfeiture were also placed before this Tribunal. The Claimant referred to Clause-17 of Chapter IV of the Tender Documents, which rendered an exclusive exit right upon the Respondent with a 60 days' notice. The one-sided clause left the Claimant remediless. Due to this limitation, Claimant vide letter dated 26.07.2018 requested the Respondent for either an increased revised rate or an exit. The relevant portion of the letter is reproduced as under:*

> *"Since the Clause of Exit i.e. para-17 is unilateral and has given only CONCOR to terminate the contract with a two-month notice period. The request regarding the severe loss due to the reason mentioned above and it is requested to please arrange to re-negotiate the upward revision of Rate on an urgent basis or Exit from the said contract be allowed within three months from the date of said letter.*

In case our request for upward revision is not arranged and exit is not being allowed then it is requested to please nominate an independent Sole Arbitrator as per Clause-20 of the Contract Agreement in terms of the Arbitration and Conciliation (Amendment) Act, 2015, to resolve the grievances & issues related to present contract."

75. *The Claimant wrote another letter dated 07.09.2018, wherein the Claimant emphasized their inability to continue the Contract. The Claimant assured the Respondent that despite facing the financial crisis, the Claimant will not leave the work without serving the notice period for the sanctity of the business relationship. The Respondent, vide letter 13.09.2018 accepted the Claimant's termination w.e.f. 25.10.2018 or finalization of the new Contract, whichever was earlier. In the same letter, the Respondent also intended to forfeit the Bank Guarantee under Clause 4 of Chapter IV of the Tender Documents. The Claimant vide letter dated 14.09.2018, challenged the Respondent's intention of forfeiting the Bank Guarantee and explained that the termination granted by the Respondent is on the request of the Claimant and not for any default. Therefore, such plea of forfeiture is wrong and untenable. The same contention is supported through the Respondent's letter dated 25.06.2019, whereby the Respondent termed the Claimant's work as satisfactory. The work satisfaction could also be proved by the fact that generally during the search of a new Contractor, the usual practice of the Respondent is to issue shorter Contracts i.e., for 3-6 months. The same can be confirmed through RW-1, Ms. Kiran Sharma's cross-examination. However, no such measures were adopted in this case.*

76. *Additionally, in the second letter dated 17.10.2018, the Respondent changes their stand as was stated earlier in letter dated 13.09.2018. As per the second letter, the Contract which by earlier letter was to be terminated by 25.10.2018, made to continue till the finalization of the new Contract. Further, the Claimant also participated in the new tender as opposed to the letter dated 13.09.2018. Thus, the Respondent gave a complete go-by to the conditions incorporated in the letter dated 13.09.2018.*

77. *The Claimant sought the termination to save themselves from incurring further losses, as the Respondent ignored the Claimant's repeated request to alter the rates, which was well within the rights of the Claimant under Clause 4.5 of Chapter III and Clause 23 of Chapter IV of the Tender Documents. The Respondent's act of changing the tender conditions and denying the revised rate led to the termination of the Contract.*

78. *The Respondent relies on Clause 9.6 of Chapter II of the Tender Documents and submits that admittedly, there was no exit clause for the Claimant. Accordingly, the premature termination of the Contract enabled the Respondent to legally forfeit such security deposit.*

79. *Considering the disparity between the parties, 323/507 fruitful to place reliance on* ***Union of India and Others v. M/S Graphics Industries Co. and Others****, (1994) 5 SCC 398, wherein the Hon'ble Supreme Court emphasized the principle of fairness and equality under the contractual relationships. The Court held as under: -*

> *"10...even in contractual matters public authorities have to act fairly: and if they fail to do so approach under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution. In support of this submission, Shri Ganguli has mainly relied upon a two-Judge Bench decision of this Court in Kumari Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 (paras 21-28): 1991 SCC (L&S) 742], of which this aspect of the matter has been dealt with by stating that the requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act even in contractual matters (see paragraph 24). What has been stated in paragraph 28 is that it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of the judicial review to test its validity on the anvil of Article 14. The Bench thereafter referred to various earlier decisions of this Court on this point including Mahabir Auto Stores v. Indian Oil Corpn. [(1990) 3 SCC 752] and Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293]."*
>
> *(emphasis supplied)*

80. *It would also be appropriate to refer to the decision of the Hon'ble Supreme Court in* ***Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan and Ors****, (2019) 5 SCC 725, whereby the Court dealt with the one-sided clauses that are unfair and unreasonable to the weaker party. It was held:*

> *"**6.3**....The Law Commission of India in its 199th Report, addressed the issue of Unfair (Procedural & Substantive) Terms in Contract. The Law Commission inter-alia recommended that a legislation be enacted to counter such unfair terms in contracts. In the draft legislation provided in the Report, it was stated that:*
>
> > *A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.*
>
> *xxxxx xxxxx xxxxx*
>
> ***6.7*** *In Central Inland Water Transport Corporation*

Limited and Ors. v. Brojo Nath Ganguly and Ors., (1986) 3 SCC 156 this Court held that:

89. ... The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable Clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type.

xxxxx xxxxx xxxxx

It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of Rules as part of the contract, however unfair, unreasonable and unconscionable a Clause in that contract or form or Rules may be.

(emphasis supplied)

81. *Similarly, in* ***Indian Oil Corporation Ltd. v. Nilofer Siddiqui and Ors.****, (2015) 16 SCC 125, the Hon'ble Supreme Court shed the light on unequal bargaining power of the parties, especially where one party is the State or instrument of the State. The Court made it evident that although the rights of the parties are flowing through their contractual relation, the manner and the method in which the Contract is conducted has to be subject to the principle of fairness and natural justice. The relevant portion of the observations are as follows:*

24..... IOCL, being a Government of India Undertaking is bound to act fairly and its conduct is subject to scrutiny on the touchstone of Article 14 of the Constitution of India.

xxxxx xxxxx xxxxx

"12....So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu, Maneka Gandhi v. Union of India, Ajay Hasia v. Khalid Mujib Sehravardi, R.D. Shetty v. International Airport Authority of India and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay. It appears

to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non- discrimination in the type of the transactions and nature of the dealing as in the present case."

(emphasis supplied)

The issue of unequal bargaining power in view of standard contract has only academic value in this award. I have already held above that it was the Respondent who had committed a breach of the Contract by changing the tender conditions and still was denying exit to the Claimant even when the Claimant was suffering huge losses due to the change in the tender conditions. Thus, retaining the exit option by the Respondent was unfair and arbitrary.

82. *As per Clause 9.5 of Chapter II of the Tender Documents, the security deposit can be deducted in whole or in part depending upon the actual loss suffered by the Respondent due to the Claimant's performance. However, no such loss has been proved by the Respondent. The issuance of a Satisfaction Certificate would not have been there if Claimant was at default. Despite not suffering the loss, the Respondent without any intimation to the Claimant, invoked the Bank Guarantee and appropriated the same.*

83. *The Respondent relied on Clause 12 of Chapter II of the Tender Documents. As per the Clause, the Claimant was expected to work for 4 years. And thereafter, the Claimant was obliged to work for an additional period of 4 months if so, required by the Respondent. Since the Claimant has exited prematurely, the termination of the Contract by the Claimant amounted to breach of the Contract.*

84. *I have already held above that the Claimant exited the Contract with due notice along with the Respondent's consent, despite breach by the Respondent and that the exit clause was also one-sided. Therefore, Respondent's reliance on Clause 12 of Chapter II of the Tender Documents in the circumstances is misplaced.*

85. *Thus, as stated above the invocation and appropriation of the Bank Guarantee was wrongful, arbitrary, and illegal. The point is answered accordingly."*

18. The Respondent herein was also held entitled to the cost of arbitration and *pendente lite* interest @ 9% per annum, along with future interest @ 9% on the sum awarded, inclusive of *pendente lite* interest.

19. Aggrieved by the said Award, the Appellant filed a petition under Section 34 of the A&C Act before the learned Single Judge of this Court.

20. The learned Single Judge, after hearing the parties, rendered the Impugned Judgment, which is now the subject matter of challenge in the present Appeal. The relevant portion of the Impugned Judgement dated 17.01.2022 is produced herein below:-

> ***"Reasons and Conclusions***
>
> ***19.*** *CONCOR has challenged the impugned award, primarily, on two grounds. First, that CONCOR had not breached the Agreement in question and therefore, WTC's claim for damages was required to be rejected. Second, that even if it was accepted that CONCOR was in breach of the Agreement and WTC was entitled to a claim for damages, it was, nonetheless, essential for WTC to establish loss suffered by it. CONCOR claims that there was no material on record to substantiate the alleged loss suffered by WTC. Therefore, the impugned award is vitiated by patent illegality.*
>
> ***20.*** *Mr Jain, learned counsel appearing for CONCOR, contended that the impugned award is contrary to the express terms of the Agreement between the parties. He pointed out that Clause 3 of the General Conditions of Contract (GCC), expressly stipulate that, WTC would not be entitled for any compensation from CONCOR, in the event of any change in the business pattern, drop in the volumes or insufficient work. He contended that WTC's entire claim is founded on the basis that there has been a drop in the business and therefore, its billings were reduced. Thus, the impugned award is contrary to the terms of the Agreement.*
>
> ***21.*** *CONCOR had issued the NIT for Mechanized Cargo Handling and Inventory Management Services at ICD in two bid mode (Financial and Technical). The bids would be considered on a reverse auction basis and the technically qualified bidder quoting the lowest bid price (L-1) would be considered successful. The bidders were required to quote the schedule of rates as per Annexure-I to the Tender Documents. The bidders were required to*

quote separate rates for separate items of works such as ICD stuffing, direct stuffing, direct transshipment of cargo, loading and unloading of cargo, examination of cargo/container. It is clear that the financial bids submitted by the bidders were required to be evaluated on the said basis. The Tender Document also indicated the estimate value of business at ₹3,61,59,917/- per annum. Annexure- I to the bidding document also indicated the estimated volume of work for each item of work. The bidders were required to deploy the specified resources in terms of manpower and machinery at the ICD and maintain themselves in a state of readiness to carry on the work of cargo handling.

22. *The rates submitted by WTC were found to be the lowest. Accordingly, CONCOR had issued the LoI dated 11.09.2017, in favour of WTC, accepting its tender. Annexure-I to the LoI sets out the rates for certain activities as accepted. Annexure-I to the LoI is relevant and is reproduced below:*

*"**Annexure-1***

ACTIVITY	***SIZE***	***Rate per container (in ₹)***
2.7: Export Cargo Handling		
2.7.1: ICD Stuffing	*20'*	*257.50*
	40'	*324.50*
2.7.2: Direct Stuffing	*20'*	*257.50*
	40'	*324.50*
2.7.3.1:Factory Stuffing (Seal Cutting)	*20'*	*165.00*
	40'	*185.50*
2.7.3.2: Factory Stuffing (Seal Cutting and Cargo Handling)	*20'*	*257.50*
	40'	*324.50*
2.8: Import Cargo Handling		
2.8.1: ICD De-Stuffing	*20'*	*247.00*
	40'	*310.00*
2.8.2: Direct De-Stuffing	*20'*	*247.00*
	40'	*310/00*
2.8.3.1:Factory De-Stuffing (Seal Cutting)	*20'*	*165.00*
	40'	*185.50*
2.8.3.2: Factory De-Stuffing (Seal Cutting and Cargo Handling)	*20'*	*278.00*
	40'	*288.50*
2.9: OUT OF CYCLE		
2.9.1: De-Stuffing of containers	*20'*	*247.00*
	40'	*310.00*
2.9.2: Stuffing of containers	*20'*	*247.00*
	40'	*247.00*
2.9.3: Direct Transhipment of Cargo	*20'*	*247.00*
	40'	*247.00*

2.9.4: Loading/unloading of cargo	*Per MT*	*45.00*
2.9.5: Examination of Cargo/Container	*20'*	*45.00*
	40'	*45.00*
2.10: Work for Inventory Management of Cargo	*Rate per Container*	*268.00"*

23. *There is no dispute that WTC was paid for each activity conducted by it, at the rates as agreed.*

24. *As noted above, WTC's grievance is that the volume of revenue generated was less than the value of business as projected in the Tender Documents. WTC claimed that it had submitted its tender based on the estimated volume projected by CONCOR. The officials of CONCOR had assured WTC that the volume of business at the ICD, Tughlakabad, was increasing and the actual volume of business would be more than the estimated value as set out in the Tender Documents. WTC claimed that it had quoted approximately 2.4% less than the estimated value. WTC believed that it would be paid on the basis of the number of containers and other data as captured under the CCLS data as this was the procedure being followed by CONCOR prior to the Agreement in question. WTC claimed that it had incurred costs of more than 2.5 crores in material handling equipment to perform the Agreement but had found that the business was significantly less than as estimated by CONCOR. WTC claimed that the reduction in the volume was on account of change in the CCLS software made by CONCOR and the same amounted to a change in the Tender Conditions. It also claimed that there was a change in the policy and the billing for cutting seals, which was earlier fixed at 170.90 for a 20 feet container and 192.10 for a 40 feet container, was stopped.*

25. *The Statement of Claims does not contain any allegations that CONCOR had breached any term of the provisions of the Agreement. A plain reading of the impugned award indicates that no such finding had been returned by the Arbitral Tribunal as well.*

26. *However, as stated above, WTC had premised its claim on the allegation that CONCOR had changed the Tender Conditions and the Arbitral Tribunal had also returned a finding to the aforesaid effect.*

27. *The allegation that CONCOR had changed the Tender Conditions is required to be understood by examining the pleadings. In the Statement of Claims filed by the WTC before the Arbitral Tribunal, it had claimed an amount of 2,08,94,299/-. According to WTC, CONCOR had changed the Tender Conditions. WTC claimed that it had suffered a loss to the extent of 2,09,22,028/- on account of change in the Tender Conditions and low volume of business from the month of April, 2018 to September, 2019. Paragraph 29 of the Statement of Claims reads as under:-*

*"**29.** That due to the change in tender condition and low*

volume of business from April 2018 to September 2019, the claimant has suffered a huge loss of Rs.2,09,22,028/- inn running the contract. That as per the business volume projected by the Respondents on which the Claimant has submitted their bid and the contract was awarded to them the Claimant is supposed to get an amount of Rs. 6,97,80,736.7/- for the work done for a total period of 23 months and 20 days but the Claimant has received an amount of Rs.4,88,86,437/- therefore, the Claimant as per the volume of business has suffered a loss of Rs. 2,08,94,299.7/- is due and payable to the claimant by the Respondents. The details are annexed herewith as ANNEXURE P-18."

28. *The computation of the amount as claimed (Annexure P-18 to the Statement of Claims) is relevant and set out below: -*

"SCHEDULE OF THE MONETARY CLAIM OF THE CLAIMANTS

Projected Business as per the tender 2017 for one year.	*Rs. 3,53,81,782/-*
Total projected business as per the tender document for 23 months and 20 days	*Rs. 6,97,80,737/-*
Total amount received under invoices	*Rs. 4,88,86,437/-*
Total amount received under invoices	*Rs. 4,88,86,437/-*
Actual loss as per tender	*Rs. 2,08,94,299/-*
Bank Guarantee Encashed	*Rs. 25,00,000/-*
3. Damages on account of loss of reputation And mental agony	*Rs. 5,00,000/-*
Total	*Rs. 2,38,94,299/-*

(Rupees Two Crores Thirty Eight Lakhs Ninety four thousand and two hundred and ninety nine only)

4. Add interest at the rate of 18% on the sum of Rs.2,38,94,299/- from the date of filing of the statement of claim till the passing of the award and thereafter from the date of the award till the full and final payment of the entire amount as per the award."

29. *A plain reading of the impugned award indicates that the Arbitral Tribunal accepted WTC's contention that dehors the guidelines issued by the Custom Department for cutting seals of only specific containers, CONCOR was paying for all the containers which were passing through the Green Channel irrespective of seal cutting since the month of April, 2013. This continued till the month of April, 2018. However, in the month of April, 2018, CONCOR changed the CCLS software and started paying only for those containers of which the seals were opened.*

However, it continued to charge its customers for all the containers. The fact that CONCOR was charging its customers for all the containers passing through the Green Channel was admitted by CONCOR's witness. The Arbitral Tribunal accepted that the change in the billing made a huge difference in the volume of the business. The Arbitral Tribunal also found that the cost of the tender was finalized based on the estimated value of work. Although, the volume of business indicated in the Tender Document was only an estimate, however, the same was based on the minimum volume of work. The Arbitral Tribunal found that there was material change in the billing pattern due to changes in the CCLS software. The said findings are based on appreciation of evidence produced before the learned Arbitrator. The said conclusion cannot be held to be patently erroneous or one that vitiates the impugned award. It is, therefore, not amenable to review these proceedings.

30. *The Arbitral Tribunal also found that the estimated volume of import containers as projected by CONCOR in the tender floated leading to the award of the contract to the new contractor in the month of September, 2019, was 39% lower in volume than as projected by CONCOR in the Tender Documents. The Arbitral Tribunal inferred that at the time of inviting bids, CONCOR was not aware that it would change its billing pattern by making changes in the CCLS software.*

31. *A reading of the impugned award indicates that the Arbitral Tribunal had accepted that the drop in the volume of business was on account of change in the billing pattern introduced in the CCLS software. In other words, the estimated business as projected in the Tender Documents was based on a billing system that provided for payments for all containers. If the volume of business was estimated solely on the basis of the payments to be made on activity to be performed by the contractor, the volumes as projected would be much lower.*

32. *It is clear that the award entered by the Arbitral Tribunal is not for failure on the part of CONCOR to perform its payment obligations under the Agreement as WTC was paid for the activities performed by it at the agreed rates. The Arbitral Tribunal had entered an award on the ground that CONCOR had changed the Tender Conditions. A plain reading of the impugned award clearly indicates that the expression "change in the tender conditions" is used to mean that the projections of estimated volume of business as made by CONCOR in the Tender Conditions would be correct if it followed the billing pattern as was being followed earlier. But that was subsequently changed. The change in the billing pattern rendered the said estimate untrue.*

33. *The Arbitral Tribunal has entered an award on the basis that CONCOR had procured the Agreement by making a wrong representation as to the volume of business and therefore, WTC is*

liable to be compensated on the basis that the representation was incorrect. The Arbitral Tribunal did not articulate its reasons in the aforesaid manner. However, a meaningful reading of the impugned award clearly indicates so.

34. *In* ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.: (2019) 20 SCC 1****, the Supreme Court has observed as under:*

> ***24.****There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*
>
> ***25.*** *Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.*

*** *** ***

35. *When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree*

of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

36. *The principle that a party, who has entered into a contract by relying on a representation made by the other party, is liable to be compensated, if the representation is found to be untrue is well settled. The aggrieved party is required to be placed in the same position as if the representation was correctly made. It is apparent that the Arbitral Tribunal has awarded damages on the aforesaid principle and the same warrants no interference in these proceedings.*

37. *Mr Jain, had contended that the representation regarding volume of business as set out in the Tender Documents was merely an estimate and WTC had been put to notice that the actual volume of business would vary. He also referred to Clauses 1.1 and 1.2 of Chapter III of the Agreement and Clause 3 of the GCC and contended that WTC could not make any claim on account of variation in the volume of business.*

38. *Clauses 1.1 and 1.2 of Chapter III of the Agreement, reads as under:*

> *"1. SCOPE OF WORK*
>
> *1.1. The scope of work indicated in the paras below is only a guide. The actual requirements are subject to variations/adjustments depending on the pattern and volume of traffic.*
>
> *1.2. The scope of work described in this chapter shall not be a basis for any dispute with regard to rates or for alteration of terms and conditions including General Conditions. Doubt, if any, about the interpretation of any of the clauses in this chapter shall be referred to the Tender Accepting Authority of Container Corporation of India Ltd. whose decision in the matter shall be final and acceptable to the tenderer/contractor."*

39. *Clause 3 of the GCC is set out below:*

> *"3. CHANGE IN BUSINESS PATTERN: In case of drop in volumes or insufficient work contractor will not be entitled for any compensation from CONCOR on this account."*

40. *The Arbitral Tribunal had rejected the contention that the aforesaid clauses proscribed the award of damages. A plain*

reading of Clause 3 of the GCC indicates that it proscribes of raising any claim based on variation of volume of business. There is no dispute that WTC was required to bear the risk of change in the volume of business. The volume of business as mentioned in the Tender Documents was merely an estimate and CONCOR had not held out any assurance that that volume of business would be generated. However, the principal issue in this case is not any variation in the volume of traffic. Clearly, WTC is required to bear the risks in variation in the volume of traffic. However, the Arbitral Tribunal found that a drop in WTC's billing was not attributable to a drop in traffic of containers. The same was as a result of a change in the billing pattern. CONCOR had projected the volume of business on a billing pattern that was subsequently changed thereby, rendering its representation to be incorrect. The variation in the volume of business resulting from change in traffic of containers, is materially different from a variation in the value of billing because the estimated cost was based on a billing pattern different from the one followed for making payments.

41. *The estimated volume of business was based on the volumes in the period prior to issuing the NIT. The bidders were required to take that into account, while submitting their bids. CONCOR could not be held liable for any variation in the volume of business. However, in this case, the impugned award is based on the finding that although there was no material change in the volume of work, the billings dropped below the estimate as represented by CONCOR. There was no material reason not to hold CONCOR liable for the accuracy of its estimate as the bidders had submitted their bid on the aforesaid basis. It is not seriously contended that WTC had any means to check the accuracy of the estimated volume of business.*

42. *In view of the above, the decision of the Arbitral Tribunal to hold that Clauses 1.1. and 1.2 of Chapter III of the Agreement and Clause 3 of the GCC do not apply, cannot be held to be perverse or patently erroneous. The impugned award is based on the finding that CONCOR had made an incorrect representation for procuring the bids.*

43. *Mr Jain contended that WTC had led no evidence with regard to the quantum of loss and the award was based on no evidence at all. The said contention is unmerited as the Arbitral Tribunal has entered an award based on the volume of billing projected by CONCOR. The Arbitral Tribunal has awarded the amount being the difference between the amount paid and the projected volume of business. As stated above, this is to place WTC in the same position as it would have been if the representation made by CONCOR regarding the volume of business,*

44. *The Arbitral Tribunal also awarded a sum of 25 lakhs in favour of WTC being the amount recovered by CONCOR by encashing the BG furnished by WTC. The Arbitral Tribunal found*

that CONCOR had not presented any evidence, which would reflect the loss suffered by it. It, accordingly, directed refund of the said amount. This Court finds no infirmity with the said decision. Mr Jain had fairly not advanced any contention to challenge the impugned award on this ground.

45. *In view of the above, the petition is dismissed. The pending applications are also disposed of."*

CONTENTIONS OF THE APPELLANT:

21. Learned Senior Counsel for the Appellant would commence his submissions by emphasizing that the Contract clearly stipulates that payment would be made strictly on the basis of work actually executed by the Respondent, and since the Respondent has already been paid for the work performed, the claims now advanced are unfounded and appear to rest upon "*pre-contractual assumptions*".

22. Learned Senior Counsel for the Appellant would further argue that both the Award and the Impugned Judgment suffer from patent errors, for the sum granted in favour of the Respondent is in the nature of damages which cannot be awarded in the absence of breach, and since the learned Single Judge has categorically held that no breach occurred, there remains no legal basis for granting damages.

23. To fortify his argument, the learned Senior Counsel for the Appellant would draw attention to specific contractual provisions, *namely*, Clauses 1.1 and 1.2 of Chapter III of the Contract and Clause 3 of the **General Conditions of Contract**[8], which collectively provide that the scope of work is merely indicative and subject to variations, that such scope cannot form the basis for disputes or alteration of terms, and that in case of a drop in volumes, the contractor would not be entitled to compensation. The said clauses are set out as follows:-

[8] GCC

1.1. "The scope of work indicated in the paras below is only a guide. The actual requirements are subject to variations/adjustments depending on the pattern and volume of traffic.

1.2. The scope of work described in this chapter shall not be a basis for any dispute with regard to rates or for alteration of terms and conditions including General Conditions, Doubts, if any, about the interpretation of any of the clauses in this chapter shall be referred, to the Tender Accepting Authority of Container Corporation of India Ltd. whose decision in the matter shall be final and acceptable to the tenderer/contractor.

****

3. CHANGE IN BUSINESS PATTERN: In case of drop in volumes or insufficient work contractor will not be entitled for any compensation from CONCOR on this account."

24. Learned Senior Counsel for the Appellant would also rely upon Clause 13.4 of the Contract, which stipulates that monthly bills must be submitted strictly on the basis of work handled and would be paid after necessary checks and deductions, and while such payments would ordinarily be made within ten days, occasional delay would neither entitle the contractor to claim interest nor allow termination of the Contract. Clause 13.4 of the Contract reads as follows:-

"13.4 The contractor shall prepare and submit monthly bills in prescribed forms based on the quantum of work handled during the previous month to the Terminal In-charge of ICD/TKD. (The format in which the bills should be prepared by the contractor shall be in time with the format in which CONCOR's reports are prepared. This will help to check the bills faster. Payment of the amount claimed will he arranged after necessary checks of the correctness of the claim, deducting all charges/damages/fines/recoveries due, including TDS and/or any other levies at the prescribed rates. The aforesaid payment of the bill will ordinarily be made within (10) ten days of submission. An occasional or inadvertent delay, however, shall neither entitle the contractor to claim interest nor provide a basis for termination of contract. The work shall in no case be hampered on account of non-payment of bills."

25. The gist of the arguments advanced by the learned Senior Counsel for the Appellant would be that, first, since payment was to

be made solely on the basis of the actual work performed by the Respondent and such payments have already been made, the scope of work cannot form the basis for any dispute regarding rates or alteration of the terms and conditions, including those in the GCC; and second, a reading of Clause 1.2 of Chapter III, when read with Clause 3 of the GCC, makes it clear that no dispute can be raised on account of a drop in volumes.

26. Learned Senior Counsel for the Appellant would further argue that there was, in fact, no change in the Contract but only in the business model, and that the Award wrongly proceeded on the assumption that the tender conditions had been altered, for while the learned Arbitrator in paragraph 66 of the Award observed that the terms stood 'impliedly changed', the only change was in the billing pattern due to the introduction of the CCLS software, and none of the contractual conditions had actually been modified.

27. It would also be contended by the learned Senior Counsel for the Appellant that by awarding claims to the Respondent, the learned Arbitrator effectively altered the contractual framework, which is impermissible in law.

28. Learned Counsel for the Appellant would submit that it appears that the impugned Judgment and Award appears to be based on the principles of fairness and reasonableness coupled with what according to him is effectively an alteration of the contractual terms, and to support this submission, reliance would be placed on Para 26 of the judgment in ***Assistant Excise Commissioner v. Issac Peter***[9], where the Hon'ble Supreme Court held that in contracts voluntarily entered

[9]1994 (4) SCC 104

into with the State through tender or negotiation, the doctrine of fairness and reasonableness cannot be invoked to rewrite or supplement the terms merely because one party is the State. Para 26 of the said judgement reads as under:-

> *"26. Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory — at least to the extent of previous year's supplies — by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract — or rather more so. It is one thing to say that a contract — every contract — must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay*

[(1989) 3 SCC 293] it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

29. It would thereafter be asserted by the learned Senior Counsel for the Appellant that Clause 1.2 of Chapter III read with Clause 3 of the GCC expressly prohibits raising disputes on account of reduction in volumes, and hence both the Award and the Impugned Judgment

are unsustainable in law. To reinforce this contention, he would submit that the Contract must be read as a whole, and since the specific clauses cited above expressly preclude claims arising from a drop in volumes, the claims are barred, and in support of this argument reliance would be placed on Para 10 of ***Continental Construction Co. Ltd. v. State of M.P.***[10], which reads as under:-

> *"10. The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company v. Cochin Shipyard Ltd., Cochin [(1984) 2 SCC 680]. There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned down on ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the appellant before us. It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in Tarapore and Company case [(1984) 2 SCC 680]. That made all the difference. The basis of bargain between the parties in both these two cases were entirely different."*

30. Similarly, reliance would be placed by the learned Senior Counsel on ***SAIL v. J.C. Budharaja, Govt. and Mining Contractor***[11], where the Hon'ble Supreme Court held that arbitrator cannot ignore contractual provisions that expressly bar claims, and if they do so, they act beyond jurisdiction and in manifest disregard of the contract, which makes such an award arbitrary and unsustainable. Para 15 of the said judgement states as under:-

> *"15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work*

[10](1988) 3 SCC 82
[11]1999 (8) SCC 122

and for giving the site gradually will be tenable and the Contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the Contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of the Government or other reasons beyond the control of either the Corporation or the Contractor. Obtaining permission from the Forest Department to carry out the work in the wildlife sanctuary depends on statutory regulations. Clause (vi) of the general conditions of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation due to any other cause whatsoever would not entitle the Contractor to damage or compensation thereof; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs 11 lakhs and more for the alleged lapses or delay in handing over the work site is, on the face of it, against the terms of the contract."

31. Learned Senior Counsel for the Appellant would thereafter refer to the judgment of the Hon'ble Supreme Court in ***Joshi Technology International Inc. v. Union of India & Ors.***[12], to contend that since no written amendment was made, the Contract could not be deemed to have been altered, and therefore the learned Arbitrator's finding that the Contract was "changed or impliedly changed" is contrary to law and unsustainable.

[12]2015 (7) SCC 728

CONTENTIONS OF THE RESPONDENT:

32. *Per contra*, learned Senior Counsel for the Respondent would start by drawing this Court's attention to the fact that both the learned Arbitrator and the learned Single Judge of this Court have concurrently ruled in his favor.

33. It would be the learned Senior Counsel's contention that the tender itself was altered during the performance of the Contract, which had been entered into on the premise of certain specified volumes based on the conditions prevailing at the time the tender was floated.

34. Learned Senior Counsel for the Respondent would rely upon the tender document, which projected an estimated cost of Rs.3,61,59,917/-, against which the Respondent had tendered at a discounted value of Rs.3,53,83,628/-, and he would further contend that the Appellant's assertion that the CCLS system had to be modified at the instance of the Customs Department, was incorrect, since the proposal for segregating containers into the Green Channel or the Red Channel under the CCLS system had been mooted as early as 2013 but had not been implemented at the time of tendering.

35. Learned Senior Counsel for the Respondent would contend that the belated introduction of the CCLS software in its present form was a departure from the tender as originally floated, and that its imposition during the tenure of the Contract amounted to a substantive change in the operational conditions, since the tender document, by virtue of Clause 16 of Chapter I, formed an integral part of the Contract and thereby rendered the change a modification in the operation of the Contract itself.

36. Learned Senior Counsel for the Respondent would also point out that as early as April 2013 the Customs Department had issued guidelines requiring inspection of containers before sale, yet up until April 2018 the Appellant continued to make payments for all containers passing through the Green Channel regardless of whether the seal was severed, and with the introduction of the CCLS software in its present form, the volume of billable traffic available to the Respondent was reduced by nearly 40%, thereby causing significant financial losses.

37. Learned Senior Counsel for the Respondent would further emphasize that when the Appellant re-tendered the same work in 2019, the estimated volume was consciously reduced by almost 40%, which, according to him, clearly demonstrated that the Respondent's grievances, now conclusively upheld by both the Arbitral Award and the Impugned Judgment, were genuine; and therefore, there was no infirmity in either the Award or the Impugned Judgment.

38. Although both learned Senior Counsel for the Appellant and the Respondent referred to various portions of the Award and the Judgment to support their arguments, we do not consider it necessary to reproduce them, since the relevant extracts have already been set out earlier.

ANALYSIS:

39. This Court has carefully heard the detailed submissions advanced on behalf of both parties, examined the pleadings along with documents, and scrutinized the Impugned Judgment as well as the Arbitral Award in their entirety.

40. At the outset, it must be reiterated that the scope of judicial interference with arbitral awards under Section 37 of the A&C Act is extremely limited. The legislative intent, reinforced by the authoritative pronouncements of the Hon'ble Supreme Court, is to preserve the sanctity of arbitral proceedings and to prevent courts from reappreciating evidence or substituting their own views for that of the arbitral tribunal. In ***Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills***[13], the Hon'ble Supreme Court once again underscored that interference is permissible only when the award suffers from patent illegality, perversity, or contravention of fundamental policy of Indian law, and that even under Section 37, a court cannot act as a court of appeal over the arbitral award. The relevant paragraphs of ***Punjab State Civil Supplies Corpn. Ltd.****(supra)* state as under:-

> *"**11.** Section 37 of the Act provides for a forum of appeal inter-alia against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act.*
> ***12.** It is pertinent to note that an arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law that too upon reappraisal of the evidence adduced before the arbitral trial. Even an award which may not be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the courts. It is also well settled that even if two views are possible there is no scope for the court to reappraise the evidence and to take the different view other than that has been taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail.*
> ***13.** In paragraph 11 of Bharat Coking Coal Ltd. v. L.K. Ahuja, it has been observed as under:*
>
> > *"11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is*

[13] 2024 SCC OnLine SC 2632

no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."

14. *It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.*

15. *In Dyna Technology Private Limited v. Crompton Greaves Limited, the court observed as under:*

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

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

16*. It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of*

appeal are not beyond the scope of interference provided under Section 34 of the Act.

17. *In paragraph 14 of MMTC Limited v. Vedanta Limited, it has been held as under:*

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

18*. Recently a three-Judge Bench in Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking referring to MMTC Limited (supra) held that the scope of jurisdiction under Section 34 and Section 37 of the Act is not like a normal appellate jurisdiction and the courts should not interfere with the arbitral award lightly in a casual and a cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle the courts to reverse the findings of the arbitral tribunal.*

***

CONCLUSION:

20. *In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out*

in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.

21. *It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."*

41. Bearing these settled principles in mind, we, upon careful analysis of the pleadings, documents, Arbitral Award, and the Impugned Judgment, are of the opinion that the Impugned Judgment does not exhibit any infirmity that would warrant the exercise of jurisdiction under Section 37 of the A&C Act. On the contrary, the Impugned Judgment reflects a correct appreciation of the arbitral record and a proper application of the law.

42. We find ourselves in agreement with the learned Single Judge's finding that the Contract in question was executed purely on the basis of estimates, computations, and projections furnished by the Appellant itself. The Respondent had no independent means of verifying or authenticating these figures, nor was it provided any occasion to question their veracity.

43. It has come on record that the Respondent was induced to enter into the Contract on the basis of data generated from the CCLS system in its existing form at the time of tendering. The estimates reflected total container traffic passing through the terminal without any exclusion. The Respondent was thus led to reasonably believe that its billing and remuneration would be premised upon that basis.

44. Both the learned Arbitrator and the learned Single Judge rightly concluded that the Appellant's subsequent unilateral modification of

the CCLS software, which redefined the billing criteria, amounted to a fundamental alteration of the tender and consequently of the Contract. Such a modification, made without the consent or participation of the Respondent, went to the root of the contractual framework and materially undermined the basis upon which the Respondent had placed its bid.

45. It is also significant that the Respondent's original estimate was, in fact, lower than the Appellant's projections. The subsequent unilateral change by the Appellant directly prejudiced the Respondent's performance, rendering the contract unviable and unfairly shifting the economic burden.

46. A concurrent factual finding has also been recorded that, since April 2013, the Appellant had been paying charges for all containers, irrespective of the channel of clearance or the seal-cutting process, which practice was inconsistent with the prevailing Customs guidelines. This continued until April 2018, during the subsistence of the Contract under question, when the Appellant unilaterally altered the CCLS software to restrict billing only to containers whose seals were opened. This change was not a mere procedural adjustment but a substantive departure from the contractual understanding, which altered the revenue model of the Respondent.

47. The learned Single Judge took into account the fact that, although a change had been made to the CCLS software, which ultimately became the sole basis on which the Respondent could raise their invoices, the Appellant continued to charge its customers for all containers that passed through the green channel which was also admitted by the Appellant's witnesses.

48. The learned Single Judge rightly appreciated that while the Respondent was gravely prejudiced by this unilateral alteration, the scope of interference under Section 34 did not permit a reappraisal of the learned Arbitrator's findings. The learned Arbitrator's factual findings, based on documentary and oral evidence, therefore deserved deference, and the learned Single Judge was correct in upholding the award on that basis.

49. The learned Single Judge's reasoning is further fortified by the fact that, in the subsequent tender floated by the Appellant for the successor or the party that took over the work from the Respondent, the projected container volumes were almost 40% lower than those reflected in the tender on the basis of which the Respondent had entered the Contract. This lends credence to the Respondent's consistent plea that the altered billing mechanism under the modified CCLS software had materially reduced the contractual revenue base.

50. The Respondent's repeated representations to the Appellant seeking to be released from the contract, on account of mounting losses directly attributable to the software modification, also demonstrate its *bona fides*. These requests, however, went unanswered, and the Appellant compelled the Respondent to continue performing its obligations, thereby deepening the financial hardship.

51. Further, the communications from the Appellant to the Respondent were coercive in nature, explicitly threatening blacklisting if the Respondent ceased performance. This Court notes that the Respondent had no exit mechanism under the contract, which reserved the right of termination exclusively with the Appellant. The imbalance of bargaining power was thus stark, and the Respondent was left

without any lawful recourse except continued performance of the contract.

52. In these circumstances, in our opinion, both the learned Arbitrator and the learned Single Judge were correct in holding that the Respondent's grievance did not arise from any natural variation in container traffic or business volume, but from a unilateral alteration of the tender conditions and the billing mechanism by the Appellant itself.

53. The conclusion of the learned Single Judge that the Respondent must be restored to the contractual position originally projected by the Appellant does not appear to be unjustified or perverse. The Appellant's own conduct, continuing to charge its customers on the original basis, while simultaneously denying the Respondent the same benefit, further exposes the inequity of its actions.

54. The Appellant's submission that the Arbitrator impermissibly invoked the doctrine of fairness and reasonableness merely because the Appellant is an entity of the State, in our considered opinion, is wholly misconceived. The findings indeed are rooted not in any such doctrine but in a careful appreciation of evidence, which established that the Appellant's unilateral alteration of the billing pattern constituted a substantive change in the contractual terms themselves.

55. We are also of the opinion that the present is not a case where the terms of the Contract may have been changed, but the continued performance of which had been unilaterally altered. The foundational document, namely the tender, in itself, had undergone a material and substantial alteration, thereby rendering all actions thereupon, as specified in the Contract, to be performed in a manner not originally contemplated or provided for.

56. In light of the afore-stated facts and circumstances, we believe that the findings of the learned Arbitrator and the learned Single Judge are well-reasoned, supported by evidence, and consistent with the settled principles of law, and thus, no ground has been made out, before us, for interference under Section 37 of the A&C Act. Accordingly, the present appeal is devoid of merit and the same stands dismissed.

57. The present Appeal, along with pending application(s), if any, is disposed of in the above terms.

58. No order as to costs.

ANIL KSHETARPAL
(JUDGE)

HARISH VAIDYANATHAN SHANKAR
(JUDGE)

AUGUST 21, 2025/tk/nd/sm/ds