IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 439 OF 2024

Regus South Mumbai Business Centre Private Limited ...Petitioner

V/s.

Marie Gold Realtors Private Limited ...Respondent

Mr. Zal Andhyarujina, Senior Advocate *with Ms. Revati Desai, Mr. Manish Dembla, Mr. Muneeb Rashid Malik, Mr. Yash Pitroda, Mr. Digant Bhatt & Ms. Amrita N. i/b Mr. Mayur Shetty c/o. Kochhar & Co., for Petitioner.*

Mr. Pradeep Sancheti, Senior Advocate *with Mr. Pranav Sampat & Ms. Rakshika Bajpai i/b Khaitan & Co.,for Respondent.*

CORAM: SANDEEP V. MARNE, J.

Reserved On: 14 November 2025.
Pronounced On: 25 November 2025.

JUDGMENT:

THE CHALLENGE

1) This Petition is filed by the Petitioner under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)** challenging the Award dated 18 October 2019 passed by the learned sole Arbitrator. The learned Arbitrator has held the Petitioner to be in breach of the obligations under the terms of Management Agreement in failing to make endeavour to achieve revenue projections in the Business Plan furnished by it to the

Respondent and has held that the Respondent is entitled to damages on that account. The learned Arbitrator has accordingly directed Petitioner to pay to the Respondent sum of Rs.10,10,01,000/- by way of damages alongwith interest @ of 12% p.a. from 31 July 2014 till payment and/or realisation alongwith cost of Rs.60,00,000/-. The claims raised by the Petitioner as well as other counter claims raised by the Respondent (*except to the extent of award of damages of Rs.10,10,01,000/-*) are rejected by the learned Arbitrator. Petitioner is aggrieved by the Award to the extent it allows the claim of Respondent for damages and rejects the claim of the Petitioner for refund of amount of Rs.2,25,00,000/- and has accordingly filed the present Petition challenging the Award.

FACTS

2) Petitioner and Respondent entered into a Management Agreement dated 20 December 2010 in respect of property owned and possessed by the Respondent as Ismail Building at Hutatma Chowk, Fort, Mumbai. Under the Management Agreement, Petitioner was to operate a business center from ground and mezzanine floors of the building by sharing 75% of the net turnover with the Respondent. Respondent was to refurbish, at its own cost and expense, the premises as per requirements of layout design and specifications provided by the Petitioner. According to the Petitioner, a tentative Business Plan was prepared with only indicative figures on the basis of then market conditions with respect to the estimated outflow of cost and inflow of turnover and profits to be generated out of performance of services in the premises. Such Business Plan was appended to the Management Agreement. The initial term of the Management Agreement was for

the period of three years from practical completion, upon expiry of which Respondent was to take performance review of the business center and then take a call either to terminate the arrangement or to induct the Petitioner as a licensee in respect of the premises. Petitioner was required to furnish bank guarantee of Rs.2.25 crores, which was invocable upon happening of the specified events.

3) The Respondent handed over ground floor premises to the Petitioner on 15 April 2011 and mezzanine floor on 2 February 2012. According to the Petitioner, it discovered major multiplication errors in the Business Plan in October-2013. According to Petitioner it could not achieve the objective contained in the Business Plan appended to the Management Agreement on account of multiplication errors therein. Accordingly, the revised Business Plan was handed over to the Respondent. Petitioner had handed over bank guarantee dated 9 April 2011 to the Respondent of Rs.2.25 crores. Respondent invoked the bank guarantee on 16 January 2014 on the ground of alleged losses due to inability of the Petitioner to achieve the revenue targets as spelt out in the Business Plan. Respondent issued termination notice dated 21 January 2014 terminating the Management Agreement.

4) Petitioner filed Arbitration Petition (L) No.343 of 2014 before this Court to restrain Respondent from dispossessing the Petitioner from the premises. Respondent also filed Arbitration Petition (L) No.351 of 2014 *inter alia* seeking a direction for securing amount of Rs. 14,96,01,000/-. On 27 March 2014, Minutes of Orders were recorded in the two Arbitration Petitions for continuation of Management Agreement till 31 July 2014. Petitioner agreed to hand

over possession of the premises on or before 31 July 2014. By consent of the parties, disputes were referred to Arbitration. Both the Arbitration Petitions were disposed of in terms of Minutes of Order dated 27 March 2014.

5) Petitioner filed Statement of Claim before the learned Arbitrator claiming sum of Rs.2,25,00,000/- towards loss suffered by it due to wrongful and fraudulent invocation of Bank Guarantee alongwith interest. Petitioner also sought compensation of Rs.10 crores for breach of contract from the Respondent and further sum of Rs.30,00,000/- towards loss of investment opportunity. Respondent opposed the claim and also filed a counterclaim claiming various amounts from the Petitioner viz., damages /compensation on account of misrepresentation of Rs.10,10,01,000/- loss of investment of Rs.7,78,72,640/-. Amount of Rs.19,72,670/- towards wrongful deduction of TDS. Rs.14,70,127/- towards wrongful deduction of legal charges, amount of Rs.13,84,596/- towards wrongful deduction of bank loan interest on premium payable to the Petitioner, amount of Rs.7,67,230/- towards property taxes and damages of Rs.10 crores for loss of goodwill and reputation. This is how Respondent claimed total amount of Rs.28,44, 68,083/- together with 18% interest (total amount of Rs.28,87,23,596/-). Based on the pleadings, the learned Arbitrator framed issues. Respondent led oral evidence in support of its claim. It appears that the Petitioner did not lead any oral evidence.

6) The learned sole Arbitrator delivered Award on 18 October 2019 holding that the Petitioner was in breach of the obligation under the terms of Management Agreement, under which it

ought to have made endeavour to achieve revenue objectives in the Business Plan furnished by it. Accordingly, the learned Arbitrator has awarded damages of Rs.12,35,01,000/-. Since Respondent had already recovered amount of Rs.2,25,00,000/- by encashment of bank guarantee, the actual sum awarded in favour of the Respondent is Rs.10,10,01,000/-. All the claims raised by the Petitioner are rejected. Excepting the amount of Rs.10,10,01,000/-, all other claims of Respondent in the counterclaim are also rejected. Aggrieved by the Award dated 18 October 2019, Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

7) By order dated 30 August 2024, this Court condoned the delay in filing the Arbitration Petition after imposing costs. When Petitioner sought stay of the Arbitral Award, this Court directed deposit of amount of Rs.10 crores by order dated 9 April 2025. Since deposit was not made, Interim Application for stay came to be dismissed by order dated 9 April 2025. In pursuance of order passed by this Court on 9 April 2025, written submissions have been filed on behalf of Petitioner and Respondent. The Petition is accordingly taken up for hearing and disposal.

SUBMISSIONS

8) Mr. Andhyarujina, the learned Senior Advocate appearing for the Petitioner would submit that the impugned Award passed by the learned sole Arbitrator is contrary to the express terms of contract agreed between the parties, the findings recorded therein are perverse and the learned Arbitrator has rewritten the terms of the contract. He

would submit that the Award is also contrary to the public policy of India, and that the Award also suffers from patent illegality.

9) Mr. Andhyarujina would submit that the learned Arbitrator has awarded damages to the Respondent without identifying any breach on the part of the Petitioner. That there is no pleading much less evidence to establish any breach of Management Agreement on the part of the Petitioner. That the learned Arbitrator has erred in relying upon Respondent's statement that difference between the amount receivable on revenue projections in the Business Plan and the premium actually received by the Respondent constitutes loss or damages. That no inquiry is instituted by the learned Arbitrator as to how the Petitioner has committed any breach of its obligation under the Management Agreement. No finding is recorded in respect of any specific step, which the Petitioner was supposed to undertake towards performance of his obligations under the Management Agreement.

10) Mr. Andhyarujina would further submit that the impugned Award is also perverse on account of reversal of burden of proof by the learned Arbitrator. Since the Respondent alleged breach of Management Agreement, the burden was on the Respondent to establish the breaches. In support, he would rely upon judgment of the Apex court in ***Rajasthan State Road Transport Corporation And Another Versus. Bajrang Lal***[1]. That the burden would have shifted on the Petitioner only after specific steps are identified which the obligor has failed to perform. In support, he relies upon judgment of the Court of Appeal of Singapore in ***KS Energy Services Ltd Versus. BR Energy***

[1] (2014) 4 SCC 693

(M) SDn Bhd[2]. That instead of making the Respondent responsible for identifying the specific steps which the Petitioner was supposed to undertake, the learned Arbitrator erroneously shifted the burden onto the Petitioner to prove its endeavors agreed under the Management Agreement. The finding of putting onus on the Petitioner to prove taking of steps to achieve revenue projections is contrary to the fundamental policy of Indian law and against the most basic notions of justice.

11) Mr. Andhyarujina would further submit that the findings recorded by the learned Arbitrator are contrary to the contractual terms. He would submit that in paras-2.31 and 2.32 of the Award, the learned Arbitrator rejected the case of Respondent of negligent misrepresentation by the Petitioner. He also held that the Management Agreement was not in the nature of minimum guarantee and that the Petitioner never assured the Respondent minimum revenue from operation of business center. That in para 2.33 of the Award, the learned Arbitrator further held that the Business Plan did not constitute either a warranty or an actionable misrepresentation, which would make the claimant liable for any damages. However, according to Mr. Andhyarujina, the learned Arbitrator contradicted himself in holding in para-3.13 of the Award that the Petitioner was required to be held to the touchstone of Business Plan in determining whether it complied with the obligations under Clauses-8.2 and 11.1 of the Management Agreement. That further finding of the learned Arbitrator about breach of Clauses-8.2 and 11.1 of the Management Agreement are also contrary to the findings recorded in paras-2.32 and 2.33 of the Award.

[2] (2014) SGCA 16

That since the findings are wholly inconsistent and cannot stand together, the impugned Award is rendered perverse and patently illegal. In support of his contention that inconsistent and contradictory findings in the Award reflect patent illegality, reliance is placed on judgment of this Court in ***Maa Ashish Textile Industries Private Limited vs National Insurance Company Limited***[3].

12) Mr. Andhyarujina would further submit that the learned Arbitrator has determined the damages in absence of any evidence and is based on mere assumptions. That the learned Arbitrator has erroneously held that if the Petitioner had complied with all its obligations in the Management Agreement, the projections in the Business Plan would have met. That business plan consisted of only tentative and indicative figures determined on the basis of market conditions and it was never the foundation of the Agreement. That therefore business plan could not have been treated as binding commitment for the Petitioner. That therefore, the approach of the learned Arbitrator in treating the business plan as binding amounts to foisting a new commercial bargain. That the learned Arbitrator also erred in recording an erroneous finding that the factum of business plan suffering from errors was not pleaded by the Petitioner. That the revised business plan was produced by the witness of the Respondent, thereby supporting Petitioners case of original business plan suffering from errors. The learned Arbitrator erred in ignoring the revised business plan which was never actually met by the Petitioner.

[3] (2019) SCC Online Bom. 887

13) Mr. Andhyarujina would further submit that the learned Arbitrator has interpreted the contract in a way that no fair mind or reasonable person would have interpreted the same. Relying on Clause 21 of the of the Management Agreement, he would submit that the contract clearly provided for consequences for failure to meet the projections in the business plan and the learned Arbitrator has recorded a finding to this effect in the impugned Award. However, despite holding so, the learned Arbitrator proceeded to award damages to the Respondent ignoring the position that there was no specific clause in the Management Agreement requiring the Petitioner to compensate the Respondent for any shortfall in the figures contained in the business plan. In awarding such damages, the learned Arbitrator has exceeded its jurisdiction, foisted new commercial bargain between the parties and has rewritten the contract which is contrary to public policy. In support reliance is placed on Judgments of Apex Court in ***PSA Sical Terminals Private Limited Versus Board of Trusteed of V.O.Chidambranar Port Trust Tuticorin And Another***[4] and ***Patel Engineering Limited. Versus. North Eastern Electric Power Corporation Limited***[5].

14) Mr. Andhyarujina would further submit that the impugned Award is perverse since the learned Arbitrator has ignored material evidence. That the evidence produced by the Respondent in the form of additional affidavit of evidence clearly indicating error in the original business plan is ignored by the learned Arbitrator. Non consideration of vital evidence on record constitutes a valid ground of

[4] (2023) 15 SCC 781
[5] (2020) 7 SCC 167

challenge as held by the Apex Court in ***Associate Builders Versus. Delhi Development Authority***[6].

15) Lastly, Mr. Andhyarujina would submit that Clause 8.2 of the Management Agreement merely required the Petitioner to 'endavour' to achieve the projections. That the learned Arbitrator erred in relying upon foreign judgments and assumed that they accurately represented Indian law. That such reliance without domestic judicial authority renders the impugned Award patently illegal and contrary to public policy as held by the Apex Court in ***Oil and Natural Gas Cororation Limited Versus. Western Geco International Limited***[7].

16) In support of the contention that loss of profit needs to be proved by leading evidence, reliance is placed on judgment of the Apex Court in ***Bharat Coking Coal Limited Versus. L.K. Ahuja***[8] and ***UniBros versus. All India Radio***[9] and of this Court in ***New India Insurance Company Limited Versus. Pyarelal Textile Limited***[10] .On above broad submissions, Mr. Andhyarujina would pray for setting aside the impugned Award.

17) The Petition is opposed by Mr. Sancheti, learned Senior Advocate appearing for the Respondent submitting that the Petition is filed seeking re-appreciation of evidence as if it is an appeal in disguise. That the learned Arbitrator has interpreted the terms of the contract which is his exclusive domain. That mere error in interpretation of

6 (2015) 3 SCC 49
7 (2014) 9 SCC 263
8 (2004) 5 SCC 109
9 (2023) SCC Online SC 1366
10 (2013) 2 BomCR 740

terms of contract does not constitute a valid ground for setting aside the Award. That all contractual clauses are to be given meaningful effect and in the present case, the learned Arbitrator has holistically considered all the contract clauses for holding that the Petitioner was under obligation to pay to the Respondent on the basis of the figures projected in the business plan forming part of the contract. That the learned Arbitrator has rightly held that the 'best endeavour' clause in the contract becomes binding obligation on parties. In support he would rely upon judgment of the Apex Court in ***NBCC India Limited Versus. Shri Ram Trivedi***[11].

18) Mr. Sancheti would further submit that the Courts have repeatedly held that a clause in the contract restricting a party from claiming damages is void. In support he would rely upon judgment of the Delhi High Court in ***MBL Infrastructures Limited versus Delhi Metro Rail Corporation***[12]. That therefore provisions of Clause 21 of the Management Agreement cannot be construed as restriction on the Respondent from claiming damages. That in the present case, two types of damages were claimed by the Respondent. The first set of damages were towards difference in receivable premium of Rs.10,10,01,000/- and second set of damages were loss of goodwill and reputation of Rs.10 crores. That the learned Arbitrator has awarded only first set of damages. That the claim awarded is essentially on account of failure on the part of the Petitioner to deliver as per the business plan agreed between the parties.

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11 (2021) 5 SCC 273

12 O.M.P.(COMM) 311/2021 decided on 12 December2023

19) Mr. Sancheti would further submit that the interpretation of Management Agreement as placed by the Petitioner would render the contract meaningless. That no person with reasonable business sense would ever enter into contract which provides for no obligation on person taking over the premises to pay any specific sum and also not providing for any consequence for breaches.

20) Mr. Sancheti would further submit that the Petitioner did not lead any evidence before the learned Arbitrator to prove its case and is now estopped from challenging the Award on the ground of insufficiency of evidence. That there are no contradictions in the findings recorded by the learned Arbitrator. That no evidence was led to demonstrate any error in Respondent's Computation of damages. That the learned Arbitrator therefore rightly held that failure on the part of the Petitioner to adduce evidence of making any endeavor to achieve the projections amounts to breach of Management Agreement. That the damages awarded are for this breach on account of lack of many computations provided by the Petitioner. That onus to prove Clauses 8.2 and 11.1 of the Management Agreement was on the Petitioner. Nonetheless, Respondent provided specific steps that Petitioner was required to take for endeavoring to achieve business plan. That Petitioner failed to prove any error in the business plan. In fact, the plea of error in the business plan and production of subsequent alleged revised business plan would contain a implied admission that Petitioner was obliged to act as per the business plan appended to the Management Agreement. Mr. Sancheti would accordingly pray for dismissal of the Arbitration Petition.

REASONS AND ANALYSIS

21) Respondent is the owner/occupier of the premises located at a prominent place near Flora Fountain, Fort, Mumbai. Petitioner and Respondent embarked upon a business venture, under which Petitioner was appointed by the Respondent to provide operating services, office, business centers and other ancillary services initially for a period of three years. Under the Agreement, Respondent was supposed to execute the works necessary for establishment of business center by incurring expenditure. Petitioner presented a Business Plan comprising of indicative figures determined on present market conditions with respect to estimated outflow of costs and inflow of turnover and profits to be generated out of performance of services in the premises. The term 'business plan' was defined in the Agreement as under:-

> Business Plan" shall mean the annual business plan, for each Financial Year, drawn up by Regus and annexed hereto as Annexure-3 and comprising of indicative figures, determined on present market conditions, with respect to the estimated outflow of Costs and inflow of turnover and profits to be generated out of the performance of Services in the said Premises

22) Clause-8 of the Management Agreement dealing with provision of Services by Petitioner-Regus provided thus :-

> 8. PROVISION OF SERVICES BY REGUS
>
> 8.1 Regus will, on execution of this Agreement and on Practical Completion of the Work being carried out at the Premises and in the normal course of its business as a supplier of serviced office accommodation and conference facilities, commence and provide and carry out the Services by:

> 8.1.1 exercising all proper professional skill and care and in an efficient and competent manner;
>
> 8.1.2 using appropriately experienced, suitably skilled and trained personnel;
>
> 8.1.3 rendering the Services in accordance with all applicable legislation.
>
> 8.2 **In providing the Services and carrying on its business from the Premises, Regus shall endeavour to achieve and exceed the estimated Net Turnover as projected and indicated in the Business Plan.**
>
> 8,3 Regus hereby agrees that during the subsistence of this Agreement, Regus shall use its reasonable endeavours to ensure that the advertising and marketing costs in relation to the Premises does not exceed Five Percent (5% (5%) of the Gross Turnover.
>
> 8.4 Regus hereby covenants to indemnify MG against such costs, claims, losses and demands made directly by Regus client/s against MG, or indirectly in connection with the Service Agreements which Regus enters into with its clients.
>
> *(emphasis and underling added)*

23) Thus, the Petitioner-Regus agreed to 'endeavour to achieve' and exceed the estimated net turnover as projected and indicated in the business plan. In Clause-11 of the Management Agreement, Respondent agreed to enter into Agreement based on projected outflow of costs and inflow of turnover made by Petitioner-Regus in the business plan. Petitioner-Regus once again undertook to endeavour to minimize the costs and maximize the gross turnover as indicated in the business plan. Clause-11 of the Management Agreement provided thus:

> 11. ADHERENCE TO BUSINESS PLAN
>
> 11.1 Regus is aware that MG has agreed to enter into this Agreement, interalia, based on the projected outflow of Costs and inflow of Turnover made by Regus in the Business Plan and in the event, after three (3) years from the Date of Practical Completion, MG is not satisfied with performance of Regus, the provisions of

Clause 21.1 shall apply. **Regus hereby confirms that during the subsistence of this Agreement, Regus shall endeavour to minimise the Costs and maximize the Gross Turnover as stated in the Business Plan.**

11.2 Regus hereby acknowledges and agrees that Regus shall submit to MG, at the beginning of each calendar year (January to December), the budget schedule with respect to the Services to be provided at, in, or from the Premises in the said calendar year.

(emphasis and underlining added)

24) Under Clause-12 of the Management Agreement, Respondent was entitled for premium calculated at the rate of 75% of the net turnover as set out in Schedule-III. Clause- 12 provided thus:

12. PAYMENT

During the Term of this Agreement, MG shall be entitled to MG Premium and Regus shall pay MG Premium which shall be due and payable in the manner, set out in the Schedule - III hereunder. Regus shall be entitled to retain Regus Premium i.e. the amount which is left balance after priority deduction and payment of MG Premium at the rate of 75% (Seventy Five Percent Only) of the Net Turnover. MG Premium for a particular operational month shall be paid by Regus to MG, on or before and not later than the 20th day of the immediately succeeding month and this date shall be taken as the "Due Date" for the purposes of this Agreement.

25) Clause-21 of the Agreement provided for performance review by Respondent at the end of initial tenure of three years. Clause-21 provided thus :-

21. PERFORMANCE REVIEW

21.1 Notwithstanding what is contained herein, upon the expiry of three (3) years from the Date of Practical Completion, MG shall have the right to undertake a performance review of the business centre operated by Regus from the Premises vis-à-vis the Business Plan (the "Performance Review"). The Performance Review shall be

undertaken jointly by MG and Regus; however, with respect to the outcome of the Performance Review, the discretion and decision of MG shall be final.

21.2 In the event MG determines that the performance of Regus is acceptable, the Parties acknowledge and agree that this Agreement shall be renewed on the same terms and conditions for a period of three (3) years and shall be renewable thereafter for a further term of three (3) years in accordance with the provisions of Clause 24 hereof.

21.3 If after conducting the Performance Review, MG determines that the performance of Regus is not acceptable, Regus shall have the following options:

21.3.1 terminate this Agreement and vacate the Premises in accordance with Clause 22 herein below; or

21.3.2 to remain in possession of the Premises and convert this Agreement into a leave and license agreement with respect to the Premises for a term of three (3) years from the date of expiry of this Agreement (on the commercial terms and conditions to be mutually agreed between the Parties at such time) and, renewable thereafter, at the discretion of Regus, for a further period of three (years). In the event MG and Regus do not mutually agree upon the commercial terms of the proposed leave and license agreement within three (3) months after expiry of the said Term, then in such event MG shall be entitled to deal with the Premises as it deems fit without any further reference or notice to Regus.

26) Under Clause-24, duration of the Management Agreement was agreed as three years. Under Clause-33, the Petitioner was to provide Bank Guarantee to Respondent in the sum of rupees 2.25 crores.

27) Annexure-3 to the Management Agreement was the 'Tentative Business Plan' for five years based on current conditions prevailing at the time of preparing the proposal. Under the projections in the Business Plan, the rent per month was reflected as Rs.196/- per sq.ft for first year, Rs. 277/- per sq.ft for second year, Rs.342/- per sq.ft

for third year, Rs.400/- per sq.ft for fourth year, and Rs.458/- per sq.ft for the fifth year.

28) There is no dispute to the position that Petitioner was not able to perform as per the projections indicated in the Business Plan. It was able to achieve only 32.13% of revenue projections indicated in the business plan during the three-year tenure. The total share of revenue earned by the Respondent in three-year period was only Rs. 584.75 lakhs. The Respondent claims to have spent amount of Rs.7.8 crores i.e. more than revenues earned by the Petitioner in the three-year contract period. Respondent thus contended before the learned Arbitrator that it actually incurred losses rather than earning anything. Respondent therefore encashed the bank guarantee and receivered amount of Rs. 2.25 crores. This is how the total amount earned by the Respondent in the transaction with Petitioner was Rs. 5.84 cr + Rs. 2.25 cr. = 8.09 cr.

29) Based on the pleadings filed by the rival parties, the learned Arbitrator framed following issues. :-

1. Whether the Bank Guarantee dated 9th April 2011 has been correctly invoked by Marie Gold under the Management Agreement?
2. Whether Regus is entitled to an amount of Rs.2,25,00,000/- together with interest of Rs. 16,74,166 upto to the date of their Statement of Claim, on account of the invocation of Bank Guarantee by Marie Gold being wrongful?
3. Whether Regus is entitled to an amount of Rs. 10,00,00,000/-towards compensation for breach of contract, undue hardship and harassment or loss of reputation and goodwill?
4. Whether Regus is entitled to an amount of Rs. 30,00,000/- towards loss on investments?
5. Whether Regus is entitled to an amount of Rs. 17,39,440/- towards the expenses incurred by Regus in respect of the Business Centre Operations for the period up to 31 July 2014?

6. Whether Regus is liable to pay to Marie Gold an amount of Rs. 10,10,01,000/-as on 31 July 2014 on account of a shortfall in Marie Gold's share of premium under the Management Agreement?

7. Whether Marie Gold is entitled to an No amount of Rs. 7,78,72,460 as on 31 July 2014 on account of Marie Gold's loss of investment in the premises owing to any misrepresentation and/or material breach of the Management Agreement by Regus?

8. Whether Marie Gold is entitled to an amount of Rs. 19,72,670 as on 31 July 2014 on account of deductions of TDS amounts on the premium payable to Marie Gold under the Management Agreement?

9. Whether Marie Gold is entitled to to be amount of Rs. 14,70,127 as on 31 July 2014 on account of deductions of legal charges from the premium payable to Marie Gold under the Management Agreement?

10 Whether the claim of Rs. 14,70,127/-as to be on 31 July 2014 made by Marie Gold on account of deductions of legal charges is maintainable before the Arbitral Tribunal?

11 Whether Marie Gold is entitled to amount of Rs. 13,84,596/-as on 31 July 2014 on account of deductions of bank loan interest from the premium payable to Marie Gold under the Management Agreement?

12 Whether Marie Gold is entitled to an amount of Rs. 7,67,230/- on account of revised property taxes paid by Marie Gold retrospectively for the years 2011 -2012, 2012-2013 and 2013-2014 and also for the period from 1" April 2014 to 31 July 2014?

13 Whether Marie Gold is entitled to an amount of Rs. 1,97,935/- on account of MG Premium for the month of July 2014 due and payable by Regus?

14 Whether Marie Gold is entitled to an amount of Rs. 28,198/- on account of bad debts wrongfully debited as Cost from the Gross Turnover by Regus?

15 Whether Marie Gold is entitled to an amount of Rs. 1,07,921/-on account of bonus and Ipad Mini distributed to Regus employees and wrongfully debited as Cost from the Gross Turnover by Regus?

16 Whether Marie Gold is entitled to an amount of Rs. 16,00,798/-on account of deductions of alleged prior period expenses debited as Cost from the Gross Turnover by Regus?

17 Whether Marie Gold is entitled to an amount of Rs. 11,069/- on account of interest on delayed payment of electricity charges debited as Cost from the Gross Turnover by Regus?

18 Whether Marie Gold is entitled to an amount of Rs. 51,495/- on account of 5.5% excess common cost debited as Cost from the Gross Turnover by Regus?

19 Whether Marie Gold is entitled to an amount of Rs. 7,72,705/- on account of MG Premium for the period of January 2014 to March due and payable by Regus?

20 Whether Marie Gold is entitled to an amount of Rs. 10,00,00,000 on account of loss of goodwill and reputation and loss of opportunity due to any illegal or fraudulent acts of Regus?

21 Whether Marie Gold is entitled to an amount for Rs. 71,87,971/- on account of service tax payable under the Management Agreement is premature and therefore not maintainable before the Arbitral Tribunal?

22 If the aforementioned is answered in the negative, whether Marie Gold is entitled to the said sum of Rs. 71,87,971/- on account of service tax payable under the Managing Agreement?

23 Whether parties are entitled to interest on the amounts claimed by them? If yes, then at what rate?

24 What order as to costs?

25 What reliefs, if any?

30) Both the Petitioner and Respondent raised claims against each other. Petitioner raised the claim of Rs. 2.25 crores, which amount was recovered by the Respondent by encashing the bank guarantee. Petitioner also claimed compensation for breach of contract of Rs. 10 crores. On the other hand, Respondent raised following claims in its counterclaim :-

Sr.	Particulars	Amount(Rs.)(A)	Interest (B)	Total (A+B)
1.	Damages/compensation on account of misrepresentation (shortfall of Premium payable to Claimant) as on 31 July 2014 Sub: amounts recovered by invoking Bank Guarantee dated April 7 2011	12,35,01,000 (2,25,00,000) 10,10,01,000	15,15,015 @18 % FROM 1 August 2014 to 31 August 2014	10,25,16,015
2.	Claimants' cost of Investment in the Premises under the Management Agreement	7,78,72,460	11,68,087 @18 % FROM 1 August 2014 to 31 August 2014	7,90,40,547
3.	Amounts payable on account of wrongful deductions of TDS amount on the Premium payable to Claimant under the Management Agreement.	19,72,670	29,590 @18 % FROM 1 August 2014 to 31 August 2014	20,02,260
4.	Amounts payable on account of wrongful deductions of legal charges on the Premium payable to Claimant under the Management Agreement.	14,70,127	22,052 @18 % FROM 1 August 2014 to 31 August 2014	14,92,179
5.	Amounts payable on account of wrongful deductions of Bank Loan interest on the Premium payable to Claimant	13,84,596	20,769 @18 % From 1 August 2014 to 31 August 2014	14,05,365

	under the Management Agreement.			
6.	Amounts payable on account of Property tax	7,67,230	--	7,67,230
7.	Damages on account of loss of goodwill and reputation	10,00,00,000	15,00,000 @18 % FROM 1 August 2014 to 31 August 2014	10,15,00,000
	Total	28,44,68,083	42,55,513	28,87,23,596

31) The learned Arbitrator has rejected all the claims raised by the Petitioner. He has also not granted Claim Nos.2 to 7 raised by the Respondent. The sole claim awarded by the learned Arbitrator in the Counterclaim is the claim for damages/compensation in the form of shortfall of premium of Rs.12,35,01,000/-. However, since the amount of Rs.2.25 crores was already recovered by the Respondent. The net claim is over Rs.10,10,01,000/-.

32) Thus, the short issue that arises for consideration is whether the impugned Award allowing the claim in respect of the difference in the amount of premium payable as per Business Plan and premium actually paid to the Respondent, warrants interference under Section 34 of the Arbitration Act.

33) The learned Arbitrator has held that the said claim of shortfall of premium of Rs.12,35,01,000/- is awarded in the form of damages for breach of obligation under Management Agreement to endeavour to achieve the revenue projections in the Business Plan. This is clear from the conclusions and operative part of the impugned Award which reads thus :-

Conclusion:

10.1 As indicated above, I have held that the Claimant was in breach of its obligation under the terms of the Management Agreement to endeavour to achieve the revenue projections in the business plan furnished by it and have held the Respondent entitled to damages on that account. In the light of these findings, I pass the following Award:

a. The Claimant shall pay over to the Respondent a sum of Rs. 10,10,01,000/-(Rupees Ten Crores Ten lakhs One Thousand Only) by way of damages for breach of its obligations under the Management Agreement to endeavour to achieve the revenue projections in the business plan, along with interest thereon at the rate of 12% per annum from 31 July 2014 till payment and/or realisation.

b. The claims and the counterclaims except to the extent indicated above are rejected:

c. The Respondent shall be entitled to costs in the sum of Rs. 60,00,000/- (Rupees Sixty Lakhs Only).

NO ACTIONABLE MISREPRESENTATION

34) Perusal of the findings recorded by the learned Arbitrator in the impugned Award would indicate that he has rejected Respondent's case that the business plan annexed to the Management Agreement could potentially constitute an actionable misrepresentation. The learned Arbitrator held that Management Agreement was not in the nature of minimum guarantee as Petitioner never assured the Respondent any minimum revenue from operation of the business center. These are findings in favour of Petitioner. The findings recorded in paras-2.31, 2.32 and 2.33 in the impugned Award read thus:

2.31. Thus, while the business plan annexed to the Management Agreement could potentially constitute an actionable misrepresentation, being made by a person with special expertise and

having been relied upon by the person who received it, I believe there are other considerations in the present matter which would prevent the Respondent from successfully maintaining an action for negligent misrepresentation. These considerations are the terms of the Management Agreement itself.

2.32 It is significant that the Management Agreement is not in the nature of a minimum guarantee. In other words, the Claimant did not assure the Respondent a minimum revenue from the operation of the business center, in line with the projections in the business plan or otherwise. The evidence, both oral and documentary, would suggest that the Respondent mooted a minimum guarantee clause which was not accepted by the Claimant. On the contrary, a reading of the Management Agreement would reveal that the parties in fact contemplated the possibility of the projections in the business plan not being achieved and provided for the consequences of such failure.

2.33 Clause 8.2 of the Management Agreement provided that "[I]n providing the Services and carrying on its business from the Premises. Regus shall endeavor to achieve and exceed the estimated Net Turnover us projected and indicated in the Business Plan.". While clause 11.1 of the Management Agreement records that the Claimant is aware that the Respondent has entered into the Management Agreement on the basis of the projections in the business plan, it also stipulates that in the event of the Respondent being dissatisfied with the performance of the Claimant, the provisions of Clause 21.1 shall apply. Clause 21.1 essentially provided for a performance review upon expiry of three years from the date of practical completion. In the event the Respondent were to be satisfied with the performance of the Claimant, the Agreement was to stand renewed on the same terms and conditions for two further terms of three years each. In the event of the Respondent not being so satisfied, the Claimant was to have the option of vacating the premises with the Agreement standing terminated or of remaining in possession of the premises under a Leave and License Agreement on commercial terms and conditions to be mutually agreed between the parties. Subject to the outcome of the performance review and the options stipulated in clause 21, neither party was entitled to terminate the Management Agreement before the expiry of a period of 3 years from the date of practical completion, save and except in the circumstances set out in clause 22.2. It would thus appear from a conjoint reading of these provisions that in the event of the Claimant being unable, despite its best efforts, to achieve the projections in the business plan, the only consequence they would suffer is a non-renewal of the Management Agreement in its favour: The Respondent, on the other hand, would have me hold that apart from the consequence of non-renewal stipulated in clause 21, they would also be entitled to treat the

> business plan as a minimum guarantee and to payment over by the Claimant of MG Premium computed on the difference between the projected revenue and the actual business generated. I find myself entirely unable to so hold. If I were to accept the argument advanced on behalf of the Respondent, I would be making for the parties a bargain that they themselves chose not to strike. On the contrary, a minimum guarantee clause, which figured in the earlier drafts that were circulated, was consciously and deliberately dropped from the Management Agreement as finally executed. I would therefore hold that the business plan did not constitute either warranty or an actionable misrepresentation which would make the Claimant liable in damages. There, however, remains the issue as to whether the Claimant was in breach of its obligations under the Management Agreement to make best efforts to achieve and exceed the projections contained in the business plan.

35) Having held that the Business Plan did not constitute either a warranty or an actionable misrepresentation, the learned Arbitrator thereafter proceeded to inquire as to whether Petitioner was in breach of its obligation under the Management Agreement. For enquiring into the allegation of breach, it became necessary for him to first find out the exact obligation which the Petitioner was required to fulfill under the Management Agreement. Such obligation was identified by the learned Arbitrator to mean making best efforts/endeavour to achieve and exceed the projections contained in the business plan. It therefore cannot be contended that the learned Arbitrator did not identify the exact obligation of which breach was alleged against the Petitioner. Submission raised on behalf of the Petitioner in this regard is accordingly rejected.

ENFORCEABILITY OF '*SHALL ENDEAVOUR*' CLAUSE

36) The learned Arbitrator has thus held that though mere failure to achieve revenue projections did not constitute a breach but not making best efforts to achieve revenue projections in the business

Plan as per Clauses 8.2 and 11.1 of the Management Agreement was breach thereof. The learned Arbitrator accordingly proceeded to construe the words 'shall endeavour' appearing in Clauses 8.2 and 11.1 of the Management Agreement. Relying on the judgment of the Supreme Court of British Columbia in ***Atmospheric Diving Systems Inc. Versus International Hard Suits***[13] and judgment of Queen's Bench and the High Court of England in **Astor** ***Management AG And Anor Versus. Atalaya Mining Plc And Others***[14] the learned Arbitrator has held that the clause 'shall endeavour' was perfectly sensible and he did not find any difficulty in enforcing it.

37) This finding of the learned Arbitrator about enforceability of 'shall endeavour' clause by relying on two foreign judgments is sought to be criticized by the Petitioner contending that there is no domestic judicial authority upholding enforceability of 'shall endeavor' clause and reliance is placed on judgment of the Apex Court in ***Western Geco International Limited*** (supra). In that judgment, the Apex Court has laid down the juristic principle to be strictly followed by the arbitrators and has held at the expression 'fundamental policy of Indian law' includes all such principles that provide basis for administration of justice and enforcement of laws in India. The Apex Court has laid down three (non-exhaustive) juristic principles of (i)duty to adopt judicial approach, (ii) compliance with principles of natural justice by applying mind to attendant facts and circumstances while taking view one way or the other and (iii) decision not being so perverse or irrational that no reasonable person would have arrive at. The judgment in ***Western Geco International Limited*** (supra), in my

13 Inc. 1994 Cardswell BC 158
14 (2017) EWHC 425 (COMM)

view, cannot be pressed into service to criticise the finding of the learned Arbitrator about enforceability of 'shall endeavour' clause after taking into consideration the two English judgments. It is not that the learned Arbitrator has imported a concept unknown to fundamental Indian law. He has merely drawn support from the two foreign judgments, which otherwise follow the legal principles recognised in India. The learned Arbitrator has held that the principle laid down in the two judgments reflect with accuracy the law in this regard in India. Also, it is not that no Indian judgment recognises the principle of enforceability of 'shall endeavour' clause. In ***NBCC India Limited Versus. Shri Ram Trivedi*** (supra), the Apex Court has interpreted the word 'shall endeavour' in relation to construction contract executed with a developer to mean enforceable obligation. In that case, the developer had agreed to make an endeavour to provide possession within 2 and ½ years of date of allotment. The Apex Court held that even if the expression 'endeavour' does not mean an absolute commitment to handover possession on/or before the specified date, the expression has to be read in the context and entirety of the clause. It has further held that to construe the expression 'endeavour' as the date of handing over possession indefinite and at the absolute discretion of the developer would leave the purchaser at the mercy of the builder. It would be apposite to reproduce paras- 5.3, 6 and 7 of the judgment which read thus :-

> 5.3. The Appellant committed that it would "endeavour" to complete the project within two and a half years of the date of allotment and there was no unconditional commitment for delivery by a specific date;
>
> 6. The NCDRC rejected the submission that the Appellant had only agreed to "endeavour" to provide possession within two and a half

> years of the date of allotment. It held that even if time is not the essence of the contract, substantial reasons have to be furnished by the developer for not handing over possession in terms of the date agreed in the letter of allotment. The NCDRC computed the period of two and a half years from the month of June 2012 when the letter of allotment was issued and, thus, concluded that possession ought to have been delivered by December 2014. Giving the Appellant a further grace period of six months, it directed the payment of interest at 10% per annum from July 2015 till the actual date on which possession was handed over. The correctness of the decision falls for determination in the backdrop of the submissions recorded earlier.
>
> 7. Clause 20 of the letter of allotment provides that the Appellant shall "endeavour" to complete the construction of the dwelling unit within two and a half years from the date of the letter of allotment. The expression 'endeavour' meant that the Appellant would make an earnest effort to hand over possession by that date. Even if the expression does not mean an absolute commitment to hand over possession on or before a specified date, this expression has to be read in the context of the entirety of the clause. To construe the expression as leaving the date for handing over possession indefinite and at the absolute discretion of the developer would leave the purchaser at the mercy of the builder. Clause 20 must be construed to require the builder to make all reasonable efforts to comply with the duty to hand over possession by the stipulated date. The burden would lie on the developer to explain the steps taken to comply with the contractual stipulation

38) Thus, the word ‘endeavour’ needs to be read not in isolation but in the context of the entire agreement between the parties. In the present case, the learned Arbitrator has considered the entirety of Management Agreement between the parties and has thereafter held that the promise to endeavour to achieve the revenue projections in the business plan was enforceable. Even if the semantics are ignored and the real intention of contracting parties is gathered, it is seen that the Respondent had expended huge amount of Rs.7.8 crores in making the premises suitable for Petitioner’s operation as business center. Petitioner had represented to the Respondent that the projections reflected in the Business Plan were achievable and that he shall endeavour to achieve the same. There was thus express promise that

Petitioner would do every possible effort to achieve what it projected in the business plan. Thus, there was a specific promise made by the Petitioner to the Respondent to endeavor to achieve revenue projections in the business plan. This promise, in my view, is clearly enforceable.

39) In my view, therefore, the learned Arbitrator has correctly appreciated a very fine distinction between the concepts of 'breach on account of non-achieving of projected figures' and 'breach on account of failing to make endeavor to achieve the projected figure'. Though the distinction is very fine, the same is very important. The learned Arbitrator has rightly held that the former is not breached but the latter is. Far from treating this as a mere plausible view, in my view, the view taken by the learned Arbitrator is the correct view in law.

BURDEN OF PROOF

40) The next issue that was taken up for consideration by the learned Arbitrator was about burden to establish failure to perform obligation under Clauses 8.2 and 11.1. The learned Arbitrator held that the burden to prove breach by the claimant of its obligation to endeavor to achieve projections in the business plan was on the Respondent. The learned Arbitrator then went on to draw distinction between the concepts of burden and onus. The learned Arbitrator held that the Petitioner alone was in the sole management of the business center and then invoked provisions of Section 106 of the Indian Evidence Act, 1872 to hold that claimant alone was in a position to explain what efforts it made and why those efforts failed to achieve revenue projections made in the Business Plan. I again do not find

anything objectionable in this approach adopted by the learned Arbitrator, and I am in full agreement with the approach.

41) The 'burden of proof' and 'onus of proof' are distinct concepts in law, where the burden of proof is the overall responsibility to prove a case and generally never shifts, while the onus of proof is the responsibility to prove a specific fact and can shift continuously during a trial as evidence is presented. The party with the initial burden of proof is the one who would lose if no evidence were presented at all. When that party presents evidence to meet its burden, the onus of proof shifts to the opposing party to provide rebutting evidence. In the present case, the Respondent discharge the burden of proving that the revenue projections made in the business plan were not met and that the Petitioner was under obligation to make best endeavours and efforts to meet the same. The onus then shifted on the Petitioner to prove that it made the best possible efforts to meet the revenue projections in the business plan. As per Section 106 of the Evidence Act, since the manner in which the business center was operated was in the sole knowledge of the Petitioner, the burden to prove making of best efforts fell on the Petitioner.

42) Once it is held that Petitioner alone was in a position to show the exact efforts made by it to achieve the projections made in the business plan, the learned Arbitrator did not find any evidence on record led by the claimant to prove any such efforts. As observed above, the claimant shied away from the witness box for unfathomable reasons. Thus, Petitioner has not led evidence to prove that it made any efforts or endeavor to achieve the projections in the business plan. The

Petitioner thus represented to the Respondent that the project is capable of achieving the projected figures, it promised to the Respondent that it will do every possible not only to achieve but exceed such projected figures and then did not think it necessary to even prove before the learned Arbitrator that it indeed made any efforts and endeavor. The Petitioner thus lost an important opportunity made available to it to prove the efforts/endeavours made by it to achieve the revenue projections and the reasons why such efforts/endeavours failed. It cannot now turn around and state that the Counterclaim ought to have been dismissed as the burden was on the Respondent to prove failure of efforts of Petitioner's part. The Arbitral Tribunal rightly put the onus on the Petitioner to prove positive (*making of efforts by it*) rather than expecting the Respondent to prove the negative (*non-making of efforts by Petitioner*).

DEFENCE OF REVISED BUSINESS PLAN

43) Also of relevance is the fact that the Petitioner, who now seeks to wriggle out of the revenue projections in the Business Plan, contemporaneously believed otherwise. Petitioner believed that it was under obligation to make efforts to meet revenue projections in the Business Plan. After execution of the Management Agreement, it realized that the projections it had made to the Petitioner contained an error and apparently presented a revised Business Plan. However, in its pleadings, Petitioner made no reference to such revised Business Plan and the same was brought on record by Respondent's witness. Be that as it may, the very fact that the Petitioner felt need to revise the business projections would contain an implied admission that there

was some obligation to make endeavors to meet the revenue projections in the Business Plan. If Business Plan was just a piece of paper, there would have been no obligation on the Petitioner to make any endeavor to meet the same. There was no necessity for the Petitioner to present any revised Business Plan. Thus, Petitioner believed exactly contrary to what it contends now. I have therefore no hesitation in holding that the Petitioner always believed that it was under obligation to make endeavors to meet and exceed the revenue projections made by it to the Respondent in the Business Plan.

44) The Petitioner raised a false defense of alleged errors in the Business Plan appended to the Management Agreement. However, it did not consider it necessary to raise any pleadings with regard to the alleged errors in the statement of claim. Far from disclosing the factum of submission of revised plan, Petitioner shockingly denied having presented any revised Business Plan right till the stage of oral arguments. As is noted by the learned Arbitrator in para-3.12 of the Award, the Petitioner thought towards the end of the Arbitral proceedings that reliance on revised Business Plan would assist it in establishing error in the original Business Plan and accordingly took a volte-face and started relying on the same. However, mere reliance on revised Business Plan produced by the Respondent's witness did not relieve the Petitioner from the obligation to prove alleged errors in the original Business Plan. The learned Arbitrator, in my view, has rightly rejected false and baseless theories raised by the Petitioners about errors in the Business Plan appended to the Management Agreement.

45) After having debunked the theory of alleged errors in the Business Plan, the learned Arbitrator proceeded to conclude in para-3.13 that the Petitioner must be held to be the touchstone of the Business Plan annexed to the Management Agreement. He has held in para 3.13 as under :-

> 3.13 In these circumstances, the Claimant must be held to the touchstone of the business plan annexed to the Management Agreement in determining whether it has complied with its obligations under clauses 8.2 and 11.1 of the Management Agreement. It is apparent and indeed admitted that the Claimant has not met the revenue projections in the original business plan annexed to the Management Agreement. I have already held that the Claimant has failed to discharge its burden of establishing that it had done everything in its power, or indeed even made efforts that may be construed as "reasonable", to achieve the revenue projections in the business plan and that it had failed to do so despite such efforts. The necessity for such an explanation was all the greater given that the Claimant's representatives repeatedly asserted that the projections in the business plan were in fact conservative and would in practice be exceeded. As such, it is quite clear to me that the Claimant is in breach of its obligations under clauses 8.2 and 11.1 of the Management Agreement

I am in full agreement with the above findings recorded by the learned Arbitrator.

DAMAGES

46) After holding that the Petitioner committed breach of the obligation to make endeavour to achieve revenue projections in the Business Plan, the learned Arbitrator proceeded to determine the damages for such breach. The learned Arbitrator took into consideration that the if the revenue projection in the Business Plan was achieved by the Petitioner, Respondent's share in the same would have been Rs. 18,19,76,000/- for the period up to July 2014. The

learned Arbitrator considered that Respondent had received only Rs.5,84,75,000/- which was paid by the Petitioner, leaving shortfall of Rs. 12,35,01,000/-. As observed above, the amount of Rs. 2.25 crore was recovered by the Respondent by encashing the Bank Guarantee. After deducting the recovered bank guarantee amount of Rs. 2.25 crores from shortfall amount of Rs. 12,35,01,000/-, the learned Arbitrator held the difference between the projected premium and actual premium of Rs.10,10,01,000/- would constitute damages payable by the Petitioner to the Respondent.

47) It is contended on behalf of the Petitioner that the award of damages of Rs.10,10,01,000/- by the learned Arbitrator is in the teeth of the contract Clause-21. According to the Petitioner, if it had failed to perform as per revenue projections to the liking of the Respondent, only two consequences could flow therefrom viz. (i)termination of Agreement and vacation of premises, or (ii) conversion of agreement into leave and license. It is contended on behalf of the Petitioner that under no circumstances, any third consequence in the form of damages could be awarded by the learned Arbitrator and that award of damages is like rewriting the terms of contract. Reliance is placed on judgment of the Apex Court in ***PSA Sical Terminals Private Limited Versus Board of Trusteed*** (supra) in support of the contention that the learned Arbitrator cannot rewrite the terms of the contract. I am unable to agree that award of damages would amount to rewriting any clauses of the Management Agreement. The effect of Clause-21 of the Management Agreement, cannot be that no damages can be awarded upon breach of contract

and all that can be done is to terminate the contract or convert the same into a license.

48) Petitioner's submission that breach of obligation to make best endeavor to achieve revenue projections made in the Business Plan would entail only consequences stipulated in Clause-21 of the Management Agreement. As rightly pointed out by Mr. Sancheti, the proposition is well settled, and Mr. Andhyarujina does not fairly dispute, that any contract stipulating nonpayment of damages would be void. Reliance by Mr. Sancheti on judgment of Delhi High Court in ***MBL Infrastructures Limited*** (supra) in this regard is opposite. In fact if the learned Arbitrator was to hold that no damages were payable on account of stipulation in Clause-21, such finding would have been in conflict of public policy of India.

49) It therefore cannot be accepted that though breach on the part of the Petitioner to make best endeavours to achieve revenue projections is proved, Petitioner will still walk away without any consequence. No person with a common business sense would ever agree that upon breach of the agreement there would be no consequence for party committing breach. The Respondent in the instant case has expended amount of Rs.7.8 crores in furnishing the premises to the liking of the Petitioner. Therefore it could never have agreed to a term that even if Petitioner was not to earn any revenue for the Respondent, there would be no consequence to be suffered by the Petitioner. Going by that interpretation, Petitioner could have not commenced the operations and not inducted any person for use of the premises and could have paid zero amount to the Respondent and all

that Respondent could suffer for such act was only termination of the Agreement or to convert the same into leave and license. This would make an absurd business proposition, which no fair-minded person would ever agree for. In my view therefore, the objection to award of damages raised on behalf of the Petitioner is clearly erroneous. If Petitioner was to lead some evidence to prove any mitigating factors, the learned Arbitrator could have reduced the amount of damages. However, Petitioner thought it appropriate not to avail opportunity of leading evidence and left no choice for the learned Arbitrator but to award full difference in projected premium and actual premium as damages.

50) Since common business sense between the parties is being discussed, it would not be out of place to note here that Respondent had handed over premises admeasuring about 17,837 square mtrs. located at a very prominent place at Flora Fountain Fort, Mumbai. Petitioner projected per square foot premium ranging between Rs.196/- per sq.ft to Rs.458/- per sq.ft over five years. Even going by most modest median rate of Rs.300 per sq.ft as license fees receivable per square foot per month, Respondent could have earned license fees in the range of Rs.19 crores from the premises during three year tenure. But what it actually earned is Rs.5.84 crores. Respondent appears to have entered into the venture of running business center with a view to earn something more than the prevailing license fees. However, what it actually earned was only 25% of the expected license fees. It therefore becomes difficult to believe that Petitioner could have entered into an open ended arrangement leaving no consequence for Petitioner in respect of liability to pay any particular agreed sum. When compared

with the expected amount of license fees of Rs. 19 crores, the damages of Rs. 12.23 crores awarded by the Arbitrator is on a conservative side.

51) It is sought to be contended on behalf of the Petitioner that award of damages by the learned Arbitrator is in absence of proof of Respondent having suffered any losses. Reliance is placed on judgment of the Apex Court in ***Bharat Coking Coal Limited, UniBros*** (supra) and of this Court in ***New India Insurance Company Limited*** (supra). While there can be no dispute about general proposition that damages cannot be awarded in absence of proof of cause of loss, in the present case, it was not necessary for the Respondent to separately prove cause of loss. This is because sum of Rs.10,10,01,000/- awarded by the learned Arbitrator is towards difference in the premium projected in the business plan and premium actually paid to the Respondent. The learned Arbitrator has awarded compensation equivalent to the rent/license fees it would have earned on leave and license basis. The learned Arbitrator has also rejected the claim of the Respondent for recovery of amount of Rs.7,78,72,460/- towards costs incurred in furnishing the premises. He has also rejected the claim for damages for loss of reputation, etc, for which evidence would have been necessary. What is awarded to the Respondent actually is the amount it was entitled to receive under the contract. In that view of the matter, it was not really necessary for the Respondent to lead any separate evidence of cause of loss. It is another thing that cause of loss to the Respondent is writ large on the face since it has received premium of only Rs.5.84 crores after having expended the amount of Rs.7.8 crores for furbishing the premises.

52) The learned Arbitrator is also sought to be criticized, with certain degree of severity, for having awarded interest on the amount of damages. However, what is missed by the Petitioner is the fact that the learned Arbitrator has not awarded the damages in Claim No.7 raised by the Respondent of Rs.10 crores for loss of goodwill and reputation. Therefore, the usual principle of damages becoming payable on the date of determination would not be attracted in the present case. What is awarded by the learned Arbitrator is the sum which Respondent would have and ought to have earned if Petitioner was not to commit breach of the contract. It is like recovery of debt due to the Respondent. Therefore, payment of interest on such amount becomes imminent. I therefore do not find any error on the part of the learned Arbitrator awarding interest in favor of the Respondent on the amount of damages of Rs.10,10,01,000/-

53) I do not find any contradictions or any inconsistency in the findings recorded by the learned Arbitrator and therefore reliance by the Petitioner on judgments of this Court in ***Maa Ashish Textile Industries Private Limited*** (supra) and ***Rakesh S. Kathotia Versus. Milton Global Ltd. & Ors***,[15] is inapposite. Several other judgments are relied upon by the Petitioner which deal with the principle of scope of power of the Court under Section 34 of the Arbitration Act. However Petitioner has failed to make out any of the enumerated grounds of challenge to the award.

[15] ARBITRATION PETITION NO. 544 OF 2018 decided on 3 November 2025

CONCLUSIONS

54) Considering the overall conspectus of the case, I am of the view that construction and interpretation of the Management Agreement made by the learned Arbitrator is not just plausible but correct. Even if this Court was to sit in appeal over the Arbitral Award, which it is not supposed to do, the Award would still have been unexceptionable. The contours of Court's power under Section 34 to interfere in Arbitral Award is circumscribed. As repeatedly held by the Apex Court, the mandate under Section 34 is to respect the finality of the Arbitral Award and the party autonomy to get their disputes adjudicated before an alternative forum. The Court needs to be cautious and must show deference to the view taken by the Arbitral Tribunal even if it feels that an alternate view is also possible. It is another thing that in the present case, even alternate view is not possible since view expressed by the learned Arbitrator is the only view that can be taken based on the evidence appearing on record. The learned Arbitrator has undertaken the exercise of finding out fine but important distinction between failure to achieve revenue projections in Business Plan not constituting breach but failing to make endeavour to achieve the same constituting the breach. The Learned Arbitrator has therefore rightly held that there is failure on the part of the Petitioner to make endeavour to achieve, if not exceed, the revenue projections made in the Business Plan. He has rightly rejected baseless defence of errors in the appended Business Plan. Petitioner-Claimant chose not to lead any evidence to prove making of any efforts to achieve revenue projections in the Business Plan. Considering this position, the learned

Arbitrator had no other choice but to award difference in the amount of projected premium and actual premium as damages to the Respondent.

ORDER

55) The Award, to my mind, appears to be unexceptionable. Consequently, the Petition must fail. The Arbitral Tribunal has already awarded costs of Rs.60,00,000/- in favor of the Respondent and in the facts and circumstances of the present case, though the Petition is found to be baseless, warranting imposition of further costs, I deem it appropriate not to impose any further cost on the Petitioner. The Arbitration Petition is accordingly **dismissed** without any further order as to costs.

[SANDEEP V. MARNE, J.]