$~J

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

Judgment reserved on:13.02.2026
Judgment pronounced on: 01.07.2026

\+ **O.M.P. (COMM.) 62/2022 & I.A. 944/2022**

SOUTH EASTERN RAILWAY ....Petitioner
Through: Mr. Saransh Kumar, Ms. Harshita Kumar, Advs.

versus

SARA INTERNATIONAL PVT. LTD. ....Respondent
Through: Mr. Gaurav Pachnanda, Sr. Adv. Mr. Gyanendra Kumar, Sr. Adv. with Ms. Anuradha Mukherjee, Ms. Shreya Som, Mr. Soumya Dasgupta, Mr. Shivam Tiwari, Ms. Shreya Bansal, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ***("1996 Act")*** seeking to set aside the Arbitral Award ("***Award***") dated 09.06.2021 and Ratification Order dated 27.07.2021 passed by the Arbitral Tribunal ***("AT")*** in the matter titled "***Sara International Pvt. Ltd. v. South Eastern Railways.***"

FACTUAL BACKGROUND

2. The petitioner (respondent before the AT) is South Eastern Division of Indian Railway.

3. The respondent (claimant before the AT) is a company registered under the Companies Act, 1956 which is an Indian conglomerate and operates globally across multiple sectors ranging from mining, bulk commodities, textiles and investment etc.

4. The Central Government, through the Ministry of Railways in exercise of powers conferred by Section 71 of the Railways Act, 1989, promulgated Wagon Investment Scheme ("***WIS***") in the year 2005 pursuant to the railway budget of 2005-2006 and the policy of Central Government with respect to promotion of public private partnership. The scheme was introduced to further various objectives including enhancing the capacity of railway transport. The petitioner is the nodal agency implementing the scheme in the respective zone.

5. Pursuant to the implementation of schemes, the parties entered into a WIS Agreement dated 26.12.2006 which was subsequently modified by Supplementary Agreement I dated 28.11.2013 and Supplementary Agreement II dated 31.07.2015. In terms of the said WIS Agreement, the respondent purchased two rakes for a total consideration of Rs. 28,33,66,686/- to be utilized by the petitioner in a common pool of wagons. As per the Agreement, the petitioner had an obligation to provide uninterrupted supply of six rakes every month to the respondent for a period of 10 years and the respondent was entitled to a 10% freight rebate. After the expiry of 10 years, the ownership of the rakes supplied by the respondent would transfer to the petitioner.

6. The respondent delivered one rake on 20.12.2006 and the second rake on

21.01.2007. The rakes were made commercially operational on 20.12.2006 and 13.02.2007 respectively.

7. It is the case of the petitioner that the respondent commenced operation for transport of its own goods as well as the goods owned by its customers/third parties in terms of the WIS Agreement, which was impermissible. Subsequently, the Circulars dated 27.03.2010, 01.04.2010, 17.04.2010 and 03.02.2011 ("***Circulars***") were issued by the petitioner which were binding upon the parties to the WIS Agreement and were clarificatory in nature. In terms of the above circulars, for registering indent with the railway for supply of rakes, it became mandatory to submit the forwarding note by the consignor of the iron ore duly issued by the authorised officer of mining department of the state government of Orissa. The petitioner also states that the inclusion of the alternate loading stations was maintained due to an oversight and inadvertent error of interpretation.

8. It is the respondent's case that at the time WIS was introduced, the respondent regularly traded in variety of ores. After the said Agreement was signed, the respondent in December 2006, commenced operations for transport of its own goods as well as goods owned by its customers and third parties in terms of contractually agreed upon rebate rates. Post March 2010, the petitioner started disallowing the registration of indents on behalf of third parties and unilaterally altered the terms of the WIS Agreement. Circulars were issued by the petitioner mandating the submission of forwarding note, placing the indents at monthly intervals, cumbersome process for transportation of goods belonging to third party owners which was practically impossible for the respondent to do for

each indent. The respondent was constrained to file a petition before the High Court of Orissa wherein *vide* order dated 11.08.2010, the respondent was allowed to transport the third party goods subject to the permits given by the authorities. Even after communicating the Orders of the High Court, the petitioner continued to wilfully flout the said order and refused to accept the indent of third party owners.

9. Further, the respondent was not permitted to use the alternate stations allotted to it under the WIS Agreement. The respondent through Supplementary Agreement I and II also included several unloading stations which were not permitted to be used and the petitioner subsequently claimed that those were included due to inadvertent error of interpretation. Due to the above-stated conduct of the petitioner, the respondent suffered massive losses.

ARBITRAL TRIBUNAL

10. Since there were disputes between the parties, the respondent was constrained to file a petition under Section 9 of the 1996 Act which was withdrawn with the liberty to file a fresh. The respondent thereafter invoked arbitration *vide* legal notice dated 03.05.2017. Subsequently, since the petitioner did not nominate its Arbitrator, a petition under Section 11 of the 1996 Act was filed by the respondent seeking appointment of the AT in terms of the WIS Agreement. The same was allowed *vide* order dated 04.01.2019 by the High Court of Orissa and a Three Member Tribunal was constituted wherein Justice Devinder Gupta (Retd.) acted as a Presiding Arbitrator with Justice Usha Mehra (Retd.) and Mr. Premananda Mohanty acted as Co-Arbitrators.

AWARD

11. The AT held that the petitioner was in breach of the terms of WIS Agreement as it failed to provide the guaranteed number of rakes to the respondent. The AT allowed some of the respondent's claims to the tune of Rs. 130,00,58,548/- along with *pendente lite* and future interest at 8% per annum. The AT further awarded a sum of Rs. 71,790/- and 60,00,000/- towards the cost of arbitration and AT's fees respectively.

SUBMISSIONS ON BEHALF OF THE PETITIONER

12. Mr. Kumar, learned counsel for the petitioner vociferously opposes the Award and states that the same is patently illegal and is contrary to fundamental policy of Indian law.

AT admitted the respondent's evidence without independent examination

13. He states that the AT has based its Award on the expert report dated 05.11.2019 prepared by Mr. Montek Mayal (CW-2), however the AT failed to do any independent analysis of the same. He relies on ***ONGC v. Western Geco International Ltd., (2014) 9 SCC 263*** to emphasise on the requirement of reasons in support of the decision taken by the judicial or quasi-judicial authority.

14. He further states that even though the petitioner had not cross examined the respondent's witnesses, it was the responsibility on part of the AT to independently analyse the evidence. He relies on ***NHAI v. P. Nagaraju, (2022) 15 SCC 1.***

Award suffers from non-application of mind

15. Independent of the above submissions, he states that the report of the CW-2 could not have been relied upon as the report by the expert as it has several arithmetic errors and the formula adopted for calculation of

additional profit/loss of freight rebate is suffered by the respondent is vague and arbitrary. Further, the formula adopted for computation of losses suffered by the respondent due to loss of premium on two additional rakes and inability to place indents on behalf of third parties is contrary to the WIS policy and WIS Agreement.

16. Computation of loss of freight rebate suffered by the respondent in the expert report of CW-2 is based on various parameters being number of additional rebate and bonus rakes that the respondent would have received, the carrying capacity of each rake, the market price of iron ore etc, which have no basis in the WIS Agreement.

17. It is further contended that the AT has awarded pendente lite and future interest at the rate of 8% per annum on the awarded amount from the date of filing of Statement of Claim ("***SOC***") till realization, without recording any reasons in support thereof. The determination of interest, being devoid of any reasoning, is thus arbitrary and perverse and vitiates the Award to that extent.

Impugned Award is patently illegal and passed unilaterally

18. He states that the Counter Claim of the petitioner was rejected by the AT and the Award was passed unilaterally. The petitioner was denied reasonable opportunity to present its case. He relies on ***State of Chhattisgarh v. SAL Udyog (P) Ltd., (2022) 2 SCC 275*** to emphasise on the point that if the express terms of Agreement governing the parties are ignored, the Award is vitiated by patent illegality.

Impugned Award is passed without consideration of necessary submissions

19. He relies on Clause No. 4.2 of the WIS Agreement and states that as per

the extant policy governing the WIS policy only one loading station was permitted and inclusion of alternate loading station could not be permitted in terms of the Agreement.

20. He states that the AT ignored the fact that CW-2 was an interested witness engaged by the respondent and the opinion of CW-2 lacked independence as the report made by CW-2 was for monetary gain, thus, making him biased.

21. He also points out that the AT did not appreciate the fact that respondent failed to produce any single document in support of the claim of placing indents. The indent process starts with the execution of the forwarding notes which is submitted by the indenter at the loading station.

22. He further states that the petitioner raised objections about the exorbitant fees of the AT and that the same was beyond fees prescribed in the fourth schedule but the AT rejected the prayer to reconsider the fee amount.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Preliminary Submissions

Failure to pay the AT's fees

23. Mr. Gaurav Pachnanda and Mr. Gyanendra Kumar, learned senior counsels for the respondent submit that, even though the petitioner participated in the arbitral proceedings, the petitioner failed to deposit its share of the AT's fees despite the fee structure being determined by the AT with the consent of both parties on 16.07.2019 and the petitioner's challenge thereto before the High Court of Orissa also being dismissed. Consequently, in order to ensure the continuation of the proceedings, the AT directed the respondent to deposit the petitioner's share, with liberty to recover the same from the petitioner at the time of passing the Award.

Accordingly, a sum of Rs. 45,00,000/- towards the petitioner's share of the AT's fees and a further sum of Rs. 15,00,000/- towards the additional fees was paid to the AT.

Petitioner's repeated attempts to scuttle the arbitration

24. It is also submitted that the petitioner consistently adopted a dilatory approach with the sole object of delaying and obstructing the arbitral proceedings. Even the constitution of the AT was substantially delayed on account of the petitioner's failure to file a timely reply in the proceedings under Section 11 of the 1996 Act. During the course of the arbitration, the petitioner repeatedly raised objections regarding the mandate of the AT, despite the parties having agreed to be governed by the amended provisions of the 1996 Act. The AT was constrained to expressly observe that the petitioner was creating unnecessary hurdles in the completion of the proceedings. Out of 16 sittings of the AT, on 11 occasions the proceedings were adjourned on account of the petitioner's requests, non-appearance, or failure to comply with the directions of the AT. It was due to this delay caused by the petitioner, the arbitration took 822 days.

<u>On Merits</u>

25. On merits, learned senior counsels, support the Award and at the outset state that the scope of interference under Section 34 of the 1996 Act is well settled. The petitioner has failed to make out any grounds under Section 34 rather the petitioner has only provided vague objections challenging the Award.

AT is justified in striking off the Counter Claim of the petitioner from the record

26. It is submitted that the petitioner's Counter Claim was struck off solely on account of its own conduct. Despite repeated directions of the AT and assurances given by the petitioner, it failed to deposit its share of the AT's fees in respect of the Counter Claim. The AT, after recording the petitioner's persistent non-cooperation, repeated adjournments, and failure to comply with its directions, was constrained to strike off the Counter Claim and direct the respondent to bear the petitioner's share of fees in respect of the claim proceedings.

27. It is further stated that the said rejection of Counter Claim was fully supported by Section 38(2) of the 1996 Act, which empowers the AT to suspend or terminate proceedings in respect of a Claim or Counter Claim where the requisite fee is not deposited. He places reliance on ***Gammon India Ltd. v. Trenchless Engineering Services (P) Ltd., 2013 SCC OnLine Bom 1720***, wherein it was held that a party whose claim or Counter Claim stands terminated for non-payment of AT's fee cannot subsequently assail the Award on that ground under Section 34 of the 1996 Act. Accordingly, they contend that the petitioner, being solely responsible for the striking off of its Counter Claim, cannot now be permitted to challenge the Award on that basis and seek to take advantage of its own default.

Petitioner was given sufficient opportunity to present its case including the opportunity of cross examination

28. It is argued that the respondent's grievance regarding the denial of opportunity to cross examine witnesses and lead evidence is also without any substance. Whenever the right of the petitioner was closed to lead evidence or to cross examine a witness, the same was due to defaults on

part of the petitioner itself.

29. Insofar as the cross-examination of the respondent's fact witness is concerned, it is stated that despite multiple opportunities being granted, the petitioner failed to proceed with the cross-examination. On the first instance, an adjournment was sought despite the witness having travelled from abroad to attend the proceedings. On the second instance, the petitioner's counsel sought a further adjournment citing lack of instructions. Even on the final opportunity granted by the AT, the petitioner sought another adjournment through a newly engaged counsel. Further, with respect to the Expert Witness too, the petitioner was afforded reasonable opportunity to cross examine, but it was the petitioner who neither appeared nor proceeded with the cross examination. In these circumstances, the AT, having already granted sufficient opportunities, rightly closed the petitioner's right to cross-examine the said witness. He relies on ***Unison Hotels Private Limited v. Value Line Interiors Private Limited, 2021 SCC OnLine Del 3096*** and ***Diwaker Prasad Verma v. HDFC Bank Limited, 2015 SCC OnLine Bom 5672.***

30. Further, the petitioner accepted the closure of its right to cross examination of the respondent's witness and the same was never challenged.

31. Reliance is placed on ***Vidhyadhar v. Manikrao, (1999) 3 SCC 573*** and ***Hemant D. Shah v. Chittaranjan D. Shah, 2019 SCC OnLine Bom 2914,*** to state that in absence of any evidence led by a party, it is permissible for the AT to draw a presumption that the case set up by it was not correct. In the present case, the petitioner did not file any witness

affidavits either in support of his own case or to set up a defence against respondent's case, except one, that too belatedly. Even though a witness affidavit was filed, the petitioner failed to produce the said witness. In the present case the petitioner neither cross examined any witness of the respondent nor rebutted the evidence presented by the respondent. Hence, the entire testimony of the respondent was unrebutted, thus should be construed as admitted.

The compensation awarded is reasonable and is awarded after sufficiently analysing and appreciating evidence.

32. Learned counsels for the respondent submit that the petitioner's contention that the Award was rendered without considering evidence or properly assessing damages is wholly misconceived and amounts to a request to this Court to re-appreciate the evidence as an appellate forum, which is impermissible in proceedings under Section 34 of the 1996 Act. The respondent led both factual and expert evidence in support of its claim for damages. The claim was bifurcated under three heads being damages on account of loss of profit from 2007 to 2010 due to inability to place its own indents, damages for loss of freight rebate in being unable to place third party indents between 2010 to 2017 and damages for loss of premium that the respondent could have charged for use of its bonus rakes for third party indents. The methodology adopted for quantification of losses, the underlying material, and the calculations under each head of claim were duly proved through the respondent's witnesses. An independent expert also examined and verified the calculations and, upon identifying certain arithmetic errors, arrived at a lower figure of damages, which was ultimately awarded by the AT.

33. It is also submitted that the petitioner neither cross-examined the respondent's witnesses nor adduced any evidence of its own to challenge the factual basis, methodology, or quantum of damages. The evidence led by the respondent thus remained wholly unrebutted. The AT has specifically considered such evidence and recorded reasons for accepting the same while awarding damages. It is contended that having failed to challenge the respondent's evidence before the AT, the petitioner cannot, for the first time in proceedings under Section 34, seek to assail the quantification of damages. In the absence of any demonstrated error in the methodology or calculations accepted by the AT, no ground for interference with the Award is made out. Reliance is placed on ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181*** to state that different formulae can be applied in different circumstances.

The AT has considered all material facts

34. It is emphasised that the petitioner's contention regarding non-appreciation of material facts is nothing but an attempt to seek a re-appreciation of evidence and factual findings recorded by the AT. The AT is the final authority on questions of fact and evidence, and unless its findings are shown to be perverse or patently illegal, no interference is warranted. The facts now relied upon by the petitioner in the present petition were duly considered by the AT and have been expressly referred to in the Award. He relies on ***Atlanta Ltd. v. Union of India, (2022) 3 SCC 739***.

The AT decided the issues within the terms of the Agreement

35. It is vehemently argued that the petitioner's challenge is essentially

directed against the interpretation by the AT of the WIS Agreement and specifically with respect to whether the WIS Agreement included the unilaterally issued Circulars by the petitioner and thereby the petitioner seeks a re-examination of the merits of the dispute, which is impermissible in proceedings under Section 34 of the 1996 Act.

36. It is pointed out that the AT interpreted the WIS Agreement by placing reliance on Clause No. 15, which stipulated that any modification to the terms and conditions of the Agreement could only be effected with the mutual consent of the parties. Accordingly, the AT rightly held that the petitioner could not unilaterally alter the terms of the Agreement through Circulars restricting third-party indents. Learned counsels further submit that the interpretation adopted by the AT is consistent with the judicial precedents governing WIS Agreements as well as the law laid down by the Hon'ble Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131,*** which recognizes that unilateral circulars issued by one party cannot bind the other party in the absence of consent. It is thus submitted that the findings of the AT are not only plausible but are also supported by the contractual terms and settled law. No ground for interference under Section 34 of the 1996 Act is, therefore, made out.

37. Lastly, it is stated that the contention of the petitioner that the AT did not assign reasons as to award of cost is also without merits as it is apparent on the face of record that the AT has rendered clear reasoning for awarding of the same.

REJOINDER SUBMISSIONS ON BEHALF OF THE PETITIONER

Absence of pleadings or evidence in support of respondent's claims for a period I

38. Learned counsel for the petitioner states that the respondent failed to put forth necessary facts for its claim of damages pertaining to the period 2007-2010. The SOC, except two paragraphs, does not contain any specific pleading demonstrating that the petitioner failed to supply the guaranteed number of rakes during the said period, resulting in the respondent being unable to place its own indents. The only averment, i.e. paragraph No. 89 (a) is that the respondent was unable to place its own indents due to shortage of rakes remained wholly unsubstantiated and was without any kind of evidence throughout the proceedings. On the contrary, the documents relied upon by the respondent indicated that indents were being accepted and processed during the relevant period. Thus, the claim for damages relating to the period 2007-2010 was unsupported by either adequate pleadings or cogent evidence and, therefore, ought not to have been allowed by the AT.

39. He further states that the respondent's contention that the petitioner failed to specifically deny the pleadings relating to the respondent's inability to place indents, is contrary to the record. No specific case regarding denial of indents on account of shortage of rakes during the period 2007-2010 was pleaded in the SOC and, therefore, no occasion arose for the petitioner to furnish a specific denial thereto. Insofar as the claim under paragraph No. 89 (a) of the SOC is concerned, where the petitioner had specifically pleaded that the respondent itself had failed to place indents in accordance with the terms of the WIS Agreement, the petitioner had placed on record material explaining the procedure governing the placement of indents, which was duly noted by the AT.

AT's finding on claim of period I is patently illegal

40. He states that the petitioner's challenge is not directed towards re-appreciation of evidence but towards the complete absence of any reasoning in support of the findings returned by the AT for Period I. The AT has reproduced the response of the petitioner with respect to period II. Significantly, the respondent has not identified any portion of the Award where the AT examined the pleadings, analysed the evidence or explained the basis on which it concluded that the respondent was unable to place indents during Period I.

41. He further states that the findings recorded by the AT in respect of the claim for the period I are wholly unreasoned and suffer from complete non-application of mind. The AT has neither examined the pleadings nor the evidence pertaining to the alleged shortfall in supply of rakes nor considered whether the respondent had, in fact, placed any indents which were prevented by the petitioner. The Award is completely silent on the reasoning whatsoever for accepting the same. Reliance is placed on ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375*** to contend that an Award bereft of reasons is contrary to the fundamental policy of Indian law and is liable to be set aside.

42. He also states that the findings recorded by the AT in respect of the claim for period I are patently illegal and perverse as it is not based on any evidence whatsoever. The respondent neither pleaded the material facts necessary to establish inability to place indents during the relevant period nor produced any documentary evidence in support thereof. Despite the absence of pleadings and proof, the AT proceeded to allow the claim, effectively shifting the burden of proof onto the petitioner. Reliance in

this regard is placed on ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2023) 15 SCC 781.*** Furthermore, the respondent has failed to answer the petitioner's contention that under Clause Nos. 6.1(c), 7.3 and 7.4 of the WIS Agreement, the obligation to supply rakes arose only upon placement of valid indents. Even assuming without admitting that the Circulars were inapplicable, the AT was still required to determine whether the contractual preconditions governing supply of rakes stood satisfied. Thus, the findings relating to Period I are contrary to the express terms of the WIS Agreement and consequently patently illegal.

Flaws in the case put up by the respondent with respect to quantum of the claims

43. He states that the respondent's claim for loss of profit during the period I is founded on mere assumptions and the respondent failed to produce any material regarding capacity, availability of iron ore, or any actual business opportunity that was lost on account of non-supply of rakes. No document or evidence was produced to show the production of iron ore during the said period. On the contrary, the respondent's own pleadings and documents indicate that it was utilising the rakes supplied by the petitioner for transportation of goods belonging to third parties during the relevant period. Reliance is placed on ***Unibros v. All India Radio, 2023 SCC OnLine SC 1366*** to contend that claims for loss of profit arising from alleged missed opportunities must be supported by convincing evidence, which is absent in the present case.

44. He points out that the respondent failed to establish the basis for computing the profit of Rs.100 per MT while claiming damages towards

loss of premium for the period March 2010 to February 2017, period II. The figure was supported only by a self-serving calculation and was not backed by any independent material. Thus, the claim for loss of premium was unsupported by evidence and ought not to have been accepted by the AT. The figure of Rs. 100 MT was accepted by expert witness without verifying the said figures.

45. Learned counsel for the petitioner further states that the respondent failed to discharge its obligation to mitigate losses, which is a principle embodied in Section 73 of the ICA. Neither the SOC nor the evidence led before the AT discloses any steps taken by the respondent to minimise its alleged losses. On the contrary, the respondent itself acknowledged the availability of road transportation. In the absence of any evidence demonstrating efforts to mitigate losses, the claim for damages could not have been awarded.

Non application of mind to the quantum of the respondent's claim

46. He states that the AT completely failed to independently scrutinise the quantification of damages claimed by the respondent and mechanically accepted the figures furnished by the respondent and its expert witness. Substantial sums under the various heads of claim were awarded solely on the ground that the petitioner had not specifically disputed the calculations, without undertaking any independent examination of the claims.

47. It is further stated that the Award does not disclose any independent reasoning as to how the figures awarded under the different heads of damages were arrived at. Reliance is placed on ***Batliboi Environmental Engineers Ltd. (Supra), Ramesh Chandra Agrawal v. Regency Hospital***

Ltd., (2009) 9 SCC 709 and ***Pepsi Co. India Holding (P) Ltd. v. Nishiland Park Ltd., 2012 SCC OnLine Bom 581*** to contend that an Award which mechanically accepts expert opinion without independent analysis suffers from patent illegality and is contrary to the fundamental policy of Indian law. The evidence given by the expert is of an advisory character and the AT needed to independently verify and examine the same.

ANALYSIS AND FINDINGS

48. I have heard the learned counsels for the parties and perused the material on record.

49. Before delving into the individual contentions and the merits of controversy, it is pertinent to briefly highlight the scope of interference under Section 34 of the 1996 Act. The 1996 Act embodies the principle of minimal judicial interference in the Arbitral Awards. Section 34 prescribes narrow grounds for setting aside an Arbitral Award and a Court adjudicating a Section 34 petition does not sit as a Court of Appeal. It cannot reappreciate evidence and substitute its views to that of an AT, merely on the ground that a different conclusion could have been arrived at or a different interpretation was possible. The Court may only interfere with the findings of the AT on grounds expressly provided under the said Section i.e. unless the impugned Award is shown to suffer from patent illegality, perversity, or contravention of the fundamental policy of law, no interference is warranted. The Hon'ble Supreme Court has discussed the scope of Section 34 of the 1996 Act in catena of judgments. In ***Consolidated Construction Consortium Ltd. v. Software Technology Parks of India (2025) 7 SCC 757,*** the Hon'ble Supreme Court has

observed as under:

> *"46. Scope of Section 34 of the 1996 Act is now well crystallised by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2-A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the Arbitral Tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the Arbitral Tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has per force to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement."*

50. With the above principles in mind, I shall now deal with the contentions of the parties.

51. The AT formed four broad issues in relation to various claims agitated by the respondent. It shall be relevant to reproduce the conclusion arrived at by the AT. The same reads as under:

> *"AWARD*
>
> *230. The Tribunal proceeds to pass the following award:*
>
> ***Whether the Claimant is entitled to a declaration that the title to the two rakes has not passed from the Claimant to the Respondent, if so to what effect?***
>
> ***Whether the Claimant is entitled to damages, alleged to have been suffered, on account of loss of profit from 2007-2010, being unable to place its own indents due to shortfall in the supply of rakes by the Respondent, if so to what amount?***
>
> *The Claimant is held entitled to recover Rs.42,56,24,384/- from the Respondent on account of loss of profit from 2007-2010 being unable to place its own indents due to shortfall in the supply of rakes by the Respondent*
>
> ***Whether the Claimant is entitled to damages, alleged to have been suffered, being unable to obtain the freight rebate on the 6 guaranteed rakes, due to the short supply of rakes by the Respondent for the period March 2010 to February 2017, if so to what amount?***
>
> *The Claimant is held entitled to recover from the Respondent an amount of Rs.74,28,22,864 towards damages suffered by it as it was not able to obtain the freight rebate on the 6 guaranteed rakes, due to the short supply of rakes*

by the Respondent for the period March 2010 to February 2017.

Whether the Claimant is entitled to damages, alleged to have been suffered being unable to obtain the premium on the 2 additional bonus rakes, due to the short supply of rakes for the period March 2010 to February 2017, if so to what amount?

The Claimant is held entitled to recover Rs.13,16,11,300/- from the Respondent as damages suffered by the Claimant being unable to obtain

premium on the 2 additional bonus rakes for the period March 2010 to February 2017.

Whether the Claimant is entitled to the revenue earned by the respondent pursuant to respondent using the Claimant's rakes?

Whether the Claimant is entitled to an award for rendition directing the Respondent to accounts for the revenue earned by utilizing the two rakes of the Claimant, if so for which period?

As transfer of title under the terms and conditions of the agreement being automatic, title in the rakes had passed to the Railways on expiry of the period of 10 years. The Claim thus stand rejected.

Payment of Costs of the Arbitration

The Respondent is held liable to pay to the Claimant an amount of Rs.71,790/- being 50% of the amount of

Rs.1,43,979/-, spent by the Claimant towards administrative and other allied expenses.

Whether the Claimant is entitled to an award for pendent lite interest and future interest, if so at what rate and from which date?

The claimant is held entitled to for pendente lite interest and future interest at the rate of 8% per annum on the awarded amounts of Rs. 130,00,58,548/-from the date of filing of the statement of claim till date of the award and future interest on the awarded amounts of Rs.130,00,58,548/- at the rate of 8% per annum from the date of the award till the date of payment.

Whether the Claimant is entitled to full legal costs in pursuing this arbitration?

The Claimant is held entitled to recover from the Respondent an amount of Rs.60,00,000/- towards Costs of the arbitration proceedings."

Preliminary challenges to the impugned Award

52. The undisputed facts of the present controversy are as follows:

The Central Government promulgated a Wagon Investment Scheme with the objective of augmenting the capacity of railway transport through private investment. Pursuant to the promulgation of the said scheme, the parties to the present dispute entered into a WIS Agreement under which the respondent invested a sum of Rs. 28,33,66,685/- towards purchase of two rakes comprising of 61 wagons each, totalling to 122 wagons,which were to be utilised by the petitioner in its common pool of wagons. In

terms of the Agreement, the respondent was under the obligation to provide an uninterrupted guaranteed supply of 6 rakes every month to the petitioner for a period of 10 years with 10% freight rebate. Additionally, as per the terms of Agreement the petitioner was also entitled to 2 additional rakes, monthly, without any freight rebate. Accordingly, in terms of the Agreement, a total of 1920 rakes were to be supplied by the petitioner to the respondent. The respondent supplied only 586 rakes, thereby creating a shortfall of 1334 rakes.

53. The petitioner has challenged the Award both on preliminary grounds and on merits. The preliminary challenge to the Award is primarily predicated on 3 grounds:

a. *First*, the acceptance of the evidence led by the respondent by the AT without undertaking any independent examination;

b. *Second*, the lack of opportunity granted by the AT to the petitioner to rebut the evidence put forth by the respondent, thereby causing prejudice to the petitioner;

c. *Third*, the failure on part of the AT to accept and consider the counter claim of the petitioner.

54. The first preliminary challenge to the Award is based on the ground that the AT failed to independently examine and analyse the expert report prepared by expert witness of the respondent which is the basis of awarding damages and loss of profit.

55. The contention of the petitioner that the AT accepted the evidence of the respondent without independent examination cannot be accepted. A perusal of the Award shows that, with respect to period I, the AT has provided cogent reasons so as to accept the evidence led by the petitioner.

The initial claim of the respondent was Rs. 44,12,72,960.61 which was reduced to Rs. 42,56,24,384/- after independent examination of the expert report. The AT took note of the detailed calculation for the loss of additional profit suffered by the respondent. The said table reads as under:

	Additional revenues	Additional costs	Additional profits
Guide	[A]	[B]	[C] =[A]-[B]
CY2006	-	-	-
CY2007	Rs. 119,227,468	Rs. 97,685,382	Rs. 21,542,086
CY2008	Rs. 1,414,218,334	Rs. 1,046,229,544	Rs. 367,988,789
CY2009	Rs. 231,310,244	Rs. 195,216,735	Rs. 36,093,509
CY2010	-	-	-
Total	**Rs. 1,764,756,045**	**Rs. 1,339,131,661**	**Rs. 425,624,384**

56. The AT also noted that no evidence has been led by the petitioner to counter the evidence led by the respondent. The AT considered the evidence led by parties and concluded that the respondent was unable to place indents due to shortfall in supply of rakes by the petitioner and further mentioned its reasoning that no error or discrepancy has been pointed out in the report of the expert. The reasoning of the AT reads as under:

> *"210. No evidence has been led on behalf of the Respondent to counter the Claimant's evidence. It may be observed that from 2007 to February 2010, as the Claimant was unable to place its own indents due to shortfall in the supply of rakes by the Respondent, during this period those rakes were not kept idle by the Respondent but the same were utilised by*

the Respondent and it earned full freight by using those rakes and thus deprived the Claimant of the freight rebate to which the Claimant was entitled. The Claimant has examined an expert witness to substantiate its claim for damages. The expert in its report has stated the manner of calculation of damages. No error or discrepancy has been pointed out. According to the Claimant, the calculation of damages has been made as additional revenue, which the Claimant would have earned over the period from 2007 to February 2010, had the Respondent provided the guaranteed number of rakes in terms of the agreement. The manner in which damages have been calculated has remained uncontested. Damages suffered for the aforementioned period being the additional profit are Rs.42,56,24,384/-, to which the Claimant is held entitled to recover from the Respondent."

57. While determining the freight rebate on the 6 guaranteed rakes in the period II, the claim amount was substantially reduced from 77,98,77,961/- to 74,28,22,864/- based on perusal of the calculation of the expert report. The AT also took note of the detailed calculation as provided by the expert report, which is reproduced as under:

Year	**Number of additional Rebate Rakes**	**Carrying capacity of each rake (MT)**	**Total freight (INR per MT)**	**Loss of freight rebate/Additional profits (INR)**

Guide	**[A]**	**[B]**	**[C]**	**[D]= [A]x[B]x[C]x10%**
CY2010	81	3,953	1,723	Rs. 55,174,185
CY2011	65	3,953	2,384	Rs. 61,245,761
CY2011	60	4,012	2,448	Rs. 58,926,634
CY2012	131	4,012	2,254	Rs. 118,469,922
CY2013	144	4,012	2,266	Rs. 130,896,089
CY2014	142	4,012	2,346	Rs. 133,677,099
CY2015	144	4,012	2,106	Rs. 121,654,196
CY2016	117	4,012	1,247	Rs. 58,528,976
CY2017	9	4,012	1,177	Rs. 4,250,002
Total	**893**			**Rs. 742,822,864**

58. The AT again took note of the fact that no error or discrepancy has been pointed out in the manner of calculation of the loss of freight rebate in the expert report. The said observation of the AT reads as under:

> *"214. It may be observed that from March 2010 to February 2017, as the Claimant was unable to place third party indents due to shortfall in the supply of rakes by the Respondent, during this period those rakes were not kept idle by the Respondent but the same were utilized by the Respondent and it earned full freight by using those rakes. Thus the Claimant was deprived of the freight rebate to which the Claimant was entitled. The Claimant examined an expert witness to substantiate its claim for damages. The expert in its report has stated the manner of calculation of*

damages. No error or discrepancy has been pointed out. According to the Claimant, the calculation of damages has been made as additional revenue, which the Claimant would have earned over the period from March 2010 to February 2017, had the Respondent provided the guaranteed number of rakes in terms of the agreement. The manner in which damages have been calculated has remained uncontested."

59. Similarly, the AT also noted reasons to accept the calculation on loss of premium on the two additional bonus rakes. The same reads as under:

"221. It may be observed that from March 2010 to February 2017, due to shortfall in the supply of rakes by the Respondent the Claimant was not in a position to place indents of the third parties on the two additional rakes, to which the Claimant was entitled under the terms and conditions of the WIS and WIS agreement. During this period those rakes were not kept idle by the Respondent. The same were utilised by the Respondent and full freight was earned by it in using those rakes. The Claimant under the terms and conditions of the WIS and WIS agreement was entitled to two bonus rakes per month which were to be supplied to the Claimant by the Respondent without freight concession. The Respondent failed to supply even those rakes. There is enough unrebutted evidence on record that there was shortfall of the rakes in the market during the existence of the term of the WIS Agreement. The demand for the rakes was very high. The Claimant was entitled to utilise

the 2 additional bonus rakes and to place indents on behalf of the third parties and obtain from the third parties freight rebate to which the Claimant was entitled. Due to the shortfall of supply of rakes for the period March 2010 to February 2017, the Claimant suffered losses on account of being unable to obtain the premium on the 2 additional bonus rakes, not being able to place indents on behalf of third parties. The Claimant examined an expert witness to substantiate its claim for damages. The expert in its report has stated the manner of calculation of damages. No error or discrepancy has been pointed out. According to the Claimant, the calculation of damages has been made as additional revenue, which the Claimant would have earned over the period from March 2010 to February 2017, had the Respondent provided the two additional bonus rakes in terms of the agreement. The manner in which damages have been calculated has remained uncontested.

222. The Claimant is thus held entitled to recover from the Respondent damages suffered by it as the Railways failed to provide every month two additional bonus rakes to the Claimant from the month of March 2010 to February 2017. The amount of loss has rightly been calculated as Rs.13,16,11,300/-which the Respondent is liable to pay to the Claimant. Damages suffered by the Claimant on account of being unable to obtain the premium on the 2 additional bonus rakes for the period March 2010 to February 2017."

60. A perusal of the above said reasoning clearly shows that the respondent led evidence of expert witness to arrive at its calculation for period I. The respondent also proved in its evidence of CW-1 that the rakes were not provided by the petitioner. Neither CW-1 and CW-2 were cross examined by the petitioner to disprove their testimony nor any evidence was led by the petitioner to rebut the presumption that despite the rakes being available and provided by the petitioner, were not used by the respondent.

61. It is a trite law that the opinion/report of an expert is only advisory in nature and the AT is not bound by the same. The evidentiary value of the opinion and any report based on that opinion falls within the domain of the AT. In the present case, it is not in dispute that the expert possessed the requisite qualifications and has also provided cogent reasoning to arrive at the relevant conclusions in its report. Furthermore, the report has also been proved by the respondent by examining the expert witness before the AT. The expert witness was neither cross-examined nor the petitioner led any evidence in rebuttal. Keeping in mind such circumstances, this court in a petition filed under Section 34 of the 1996 Act cannot undertake an exercise to revisit and re-analyse the evidence already proved before the AT. The AT being the master of evidence, is competent to decide upon the relevancy and extent of reliance to be placed on the report of the expert. Once the AT has taken a plausible view, this Court cannot interfere with the same. For the above said reasons, I find no infirmity in the approach and the reasoning adopted by the AT.

62. The second challenge on behalf of the petitioner against the Award is that the petitioner was not given reasonable opportunity to present their case.

63. Countering the same the respondent has pointed out various adjournments sought by the petitioner during the arbitral proceedings. He also points out that the AT was constrained to make adverse remarks against the petitioner, that the petitioner was deliberately trying to scuttle the proceedings.

64. The petitioner was non-cooperative and reluctant right from the beginning. The petitioner also refused to pay its contribution of AT's fee as a result of which the respondent had to do so. The same is elaborated upon in subsequent part of the judgment. As regards the testimony is concerned, the case of the respondent was primarily based on the testimony of the fact witness being CW-1, Mr. Gitesh Kumar and the expert witness being CW-2, Mr. Montek Mayal and the expert report. The petitioner was given multiple opportunities to cross examine the fact witness of the respondent. At the first instance, the fact witness, Mr. Gitesh Singh's deposition was to be recorded on 17.02.2020 and 18.02.2020. The petitioner sought adjournment on the said date on account of demise of a close relative. The AT categorically noted that if the petitioner failed to cross examine the witness on the next date, the right to cross examine shall be closed.

> ***"Proceedings of the 6th sitting of the Arbitral Tribunal held on 17.02.2020 at 4.00 p.m. at Narula Chambers. Defence Colony. New Delhi***
>
> *1. The Claimant's witness Mr. Gitesh Singh is present today for his statement. On 14.02.2020, an e-mail was received from Mr. Joydeep Mazumdar, Respondent's Counsel that in a close relation had passed away on 05.02.2020 in Kolkata*

and he being the person responsible for performing her last rites at Kolkata, it was not possible for him to attend the proceedings and for the same reason, it has not been possible to finalize the evidence affidavit of the Respondent. On receipt of e-mail seeking postponement of the two dates fixed for recording the statement of Claimant's witness, the Presiding Arbitrator sent following communication to the parties that there is no likelihood of evidence being recorded.

2. It is informed that by the time e-mail was received from the Presiding Arbitrator, the witness had already boarded the flight from South Africa to Delhi and he is present today. We have enquired from the witness, he state that he can stayed there for couple of days more.

3. The Claimant had already sent copy of evidence affidavit of the witness by e-mail to the Respondent's Counsel. Hard copies being supplied today. Hard copies have also being supplied to the members of the Tribunal.

4. The Respondent will also ensure that its evidence affidavit is filed on or before the next date with advance copy to the Claimant's Counsel.

5. The next sitting will be held on 3rd and 4th March, 2020 at 5.00 p.m. on both days at C-215, Narula Chambers, Defence Colony, New Delhi.

6. During the last sitting, it was noticed that the Claimant had paid only Rs. 3,00,000/- each to each Arbitrator but the

Respondent has not paid or deposited any amount so far. Accordingly, it was directed that both parties will ensure payment of the balance amount of fees before the next date. We reiterate our order. Ld. Counsel for the Claimant state that till date the Claimant has been making payment for fixing venue and due intimation has been sent to the Respondent so as to enable the pay its half share out till date Respondent has not responded. Be it stated that parties have to bear expenses in equal shares. The Respondent will ensure payment of its share to the Claimant before the next date.

7. We may observe that in case for any reason, Respondent's Counsel is not present during the next sittings fixed by us the right to cross-examine the witness shall stand closed."

65. On the next date of hearing i.e. 03.03.2020, the counsel for the petitioner again sought an adjournment on the ground that no instructions have been received on behalf of the petitioner. He sought permission to withdraw. The AT also observed that despite various opportunities being given to the counsel for the petitioner, neither the list of witness nor evidence affidavit was filed by the petitioner. The order dated 03.03.2020 of the 7th sitting of the AT is reproduced below:

"Proceedings of the 7th sitting of the Arbitral Tribunal held on 03.03.2020 at 5.00 p.m. at Narula Chambers. Defence Colony. New Delhi

1. The Claimant's witness Mr. Gitesh Singh is present. He

was also present during the last sitting.

2. At this stage, Mr. Joydeep Mazumdar, Ld. Counsel for the Respondent states that despite his numerous efforts, the Respondents have not Imparted proper instructions to him. Even for today he had asked Mr. S.K. Biswas, Dy. Chief Commercial Manager/SER to depute some responsible officer from Railway to instruct him so that he is in a position to cross-examine the witness. In these circumstances, Mr. Mazumdar states that he may be permitted to withdraw so as to enable the Respondent to make alternate arrangement for conduct of the proceedings. We permit him to do so.

3. It may be noted that during the third sitting held on 20.09.2019, on completion of pleadings the parties were called upon to file evidence affidavits with list of their witnesses on or before 05.11.2019. During the 4th sitting held on 30.11.2019 It was noticed that Claimant was ready with list of witnesses and evidence affidavit but the same could not be filed as the Respondent had failed to file its list of witnesses and evidence affidavits. As hardly there is any sufficient grounds shown to grant further adjournment but in the interest of justice the parties were called upon to file their list of witnesses and evidence affidavits on or before 10.01.2020. The hearing was scheduled to be held on 18.01.2020 for recording the statement of Claimant's witness and two further stings were scheduled for recording

remaining Claimant's evidence on 17.02.2020 and 18.02.2020.

4. During the 5th sitting the Tribunal was informed by Mr. Rohit Dutta, Advocate appearing for the Respondent that former counsel Mr. P.K. Mallick was no more in the panel of Respondent and therefore in his place Respondent had instructed Mr. Mazumdar to appear on its behalf. Again it was noticed that Claimant was ready with evidence affidavits but Respondent had not fifed evidence affidavits. In the interest of justice, one last opportunity was allowed to the Respondent to file evidence affidavits making clear that in case evidence affidavits were not filed on or before 13.02.2020 the right of the Respondent to file evidence affidavits shall stand closed. The case was adjourned to 17.02.2020 and 18.02.2020 for recording Claimant's evidence.

5. During the 6th sitting held on 17.02.2020, Claimant witness was present for his statement. As there was a request from Mr. Mazumdar, Respondent's Counsel on personal grounds the hearing was adjourned. The Claimant's witness was present who has come from Zimbabwe. As per our directions, Claimant has already sent copy of evidence affidavits of the witnesses by e-mail to the Respondent on 14.02.2020 and hard copies were also supplied on the same day i.e. 17.02.2020. The witness stated that he will stay back for his statement during the next

sitting. Accordingly, next sittings were scheduled to be held on 03.03.2020 and 04.03.2020.

6. The Respondent has not filed evidence affidavits and list of witnesses. There is nobody present on behalf of the Railways except Mr. Mazumdar and his associates, who for the reasons stated above has recused himself. Mr. Mazumdar states that Respondent Railway is aware of today's date and was duly informed by him.

7. The Respondent has also not paid any fees so far to the members of the Tribunal.

8. Examination-in-chief of the witness has been recorded. There is hardly any ground to adjourn proceedings today except to close the Respondent's right to cross-examine the witness. However on the request of Mr. Mazumdar the case is adjourned for tomorrow i.e. 04.03.2020, the date already fixed so as to enable him to apprise the Respondent of necessity of Respondent to cross-examine the witness. It is made clear that in case nobody is present on behalf of the Respondent to cross-examine the witness, the right to cross-examine shall stand closed.

9. List on 04.03.2020 at 5.00 p.m. The witness will remain present for cross-examination."

66. On the 8th sitting of the AT held on 04.03.2020, the AT observed the lackadaisical attitude of the petitioner and closed the right of the petitioner to cross examine the fact witness of the respondent. The AT also observed that despite repeated reminders the evidence affidavit has

not been filed by the petitioner and in the interest of justice allowed another opportunity to file the same. The order dated 04.03.2020 of the 8th sitting of the AT is reproduced below:

> ***"Proceedings of the 8th sitting of the Arbitral Tribunal held on 04.03.2020 at 05:00 PM at Narula Chambers. Defence Colony. New Delhi***
>
> *1. The Claimant's Witness Mr. Gitesh Singh is present today for his cross-examination. On behalf of Respondent today Mr. Siddharth Sinha Advocate has put in appearance stating that he has been instructed to appear. He has filed, copy of letter from Chief Commercial Manager (FM & Claims) with the reference to the Minutes of the 7th Sitting held on 03.03.2020 stating that in place of Shri Joydeep Mazumdar, the Railways has instructed Shri Siddhartha Sinha Advocate with instructions to seek adjournment of today's proceedings and cross-examination of CW-1 may be deferred for the next sitting.*
>
> *2. We have heard Ld. Counsel for the Respondent who has submitted that as he is not well posted with facts short adjournment may be granted.*
>
> *3. We have duly considered the submissions but are not inclined to adjourn the matter In view of detailed order which was passed yesterday noting the conduct of the Railways In prosecuting the proceedings. The witness who has come from Zimbabwe was present since 17.02.2020 but proceedings had to be adjourned. He agreed to stay back*

for couple of days and for that reason sitting was scheduled for 03.03.2020 and 04.03.2020, Be it stated that copies of all proceedings and communications were duly sent to the Railways and copy of the proceedings held on 17.02.2020 was also sent to the Railways. Despite that nobody was present on behalf of Railways yesterday. Today a new Counsel has put in appearance. The witness has to go back to Zimbabwe. It reflects total negligence on the part of Railways in conduct of the proceedings. We are not satisfied with that prayer made to grant any adjournment. Accordingly, right to cross-examination of CW-1 stands closed. The witness is discharged.

4. The proceedings have already been scheduled for 23rd & 24th March, 2020. During that sitting Statement of Claimant's second witness will be recorded.

5. The Respondent despite last opportunity has also failed to file its evidence affidavit. in the interest of justice another opportunity is allowed to file evidence affidavit positively in or before 18.03.2020 with advance copy served on Ld. Counsel for the Claimant. In case evidence affidavit is not filed by the said date the right to file shall stand closed without any further orders.

6. Ld. Counsel for the Claimant has handed over cheque for Rs. 24,30,000/-each to the Presiding Arbitrator and Ms. Justice Usha Mehra after deducting TDS. Towards the balance share of the Claimant's as sitting fee. Mr.

Premananda Mohanty has returned his cheque for the same amount with a request to the claimant to send the amount through NEFT. The Respondent has not yet paid its share of fee despite several opportunities. It is stated in the letter handed over today that fee to be paid to the Arbitrator's has already been processed and ready for payment. The Railway requires mandate form of the payee cancelled cheque and copy of PAN card to be furnished for taking further action including GST Certificate. We may observe that GST is not applicable to the Arbitrators. Mr. Mohanty says that his bank particulars are already available with the Railways in its computer system of South Eastern Railway. The other two Arbitrators will send the requisite particulars shortly.

7. In order to facilitate communication to the Respondents Advocate following are his particulars:

Name: Siddhartha Sinha, Advocate

Mob No.: 9717952311

E-mail: sid1sinha@gmail.com

Address: AB-21, Tilak Marg, Delhi-110001.

8. To come up on 23.03.2020 at 04:00 PM at G-215, Narula Chambers, Defence Colony, New Delhi. The Claimant will ensure presence of its witness."

67. The AT further gave various opportunities to the petitioner to cross examine the expert witness of the respondent, Mr. Montek Mayal. On the first opportunity granted to the petitioner on 28.08.2020, to examine the

expert witness of the respondent, nobody appeared on behalf of the petitioner as the petitioner was under the impression that the period for making the Award has been expired even though the parties had expressly agreed to be governed by the amended provisions as amended by the Arbitration and Conciliation (Amendment) Act, 2019. The AT was also constrained to take a note of petitioners conduct to create unnecessary hardships in completion of proceedings. The said order is reproduced as under:

> ***"Proceedings of the 9th sitting of the Arbitral Tribunal held on 28.08.2020 at 4:00 PM through video conference***
>
> *The parties had due notice of today's sitting. Claimant is duly represented. There is no appearance on behalf of the Respondent. The Claimant's witness is also present. It appears that the Respondent is under a mistaken belief that the period to make an award has expired. This objection has been taken by the Respondent only in a letter dated 27.08.2020 received today without sharing it with the Claimants. This impression of the Respondent is not correct. It also appears that the Respondent is unnecessarily trying to create hurdles in completion of the proceedings.*
>
> *In the order of this Tribunal dated 30.11.2019, parties agreed as follows:*
>
> *"Ld Counsel for the parties agree and consent on behalf of the parties that the present proceedings may be governed under the amended provisions of the Arbitration Act, as amended by Arbitration and Conciliation (Amendment) Act,*

2019 and that the period for making the award will be reckoned with from 27.08.2019, the date when pleadings were completed"

Ld. Counsel for the Claimant has also drawn our attention to the order of the Hon'ble Supreme Court dated 06.05.2020 in Suo Moto Writ (Civil) No. 3 of 2020 and other connected matters which is very clear and explicit that due to the corona situation gives automatic extension for the completion of arbitral proceedings. In view of the order of the Hon'ble Supreme Court the period for completion for proceedings already stand extended. As no appearance on behalf of the Respondent, there is no other option left to the Tribunal except to further extend the time for completion inasmuch as the Tribunal will not today close the right of the Respondent to cross-examine the witness. One last opportunity is allowed to the Respondent to cross-examine CW-2: Mr. Montek Mayal on 07.09.2020 at 2:30 PM. In the event of Respondent not appearing, there will be no other option left except to close the right of the Respondent to cross examine the witness.

It may also be recorded that Mr. Mohanty has been paid his fees by the Claimant. The Respondent has not paid its share of fees to the Tribunal in spite of repeated assurance.

The Respondent will ensure that the fee is duly paid before the next date of hearing.

68. Further on subsequent dates being 07.09.2020 and 11.01.2021, nobody

appeared on behalf of the petitioner. The orders dated 07.09.2020 and 11.01.2021 for the 10th and 11th sitting of the AT are reproduced below:

> ***"Proceedings of the 10th sitting of the Arbitral Tribunal held on 07.09.2020 at 2.30 p.m. through Video Conferencing***
>
> *1. In furtherance to the 9th proceeding of the Tribunal held on 28.08.2020, CW-2 Mr. Montek Mayal is present for his cross-examination. The Tribunal had announced to cross-examine the witness and it was made clear that in the event of Respondent not appearing there will be no other option left with the Tribunal except to close the right of the Respondent to cross-examine the witness.*
>
> *2. There is no appearance today on behalf of the Respondent. During the 7th sitting, the statement of CW-1 was recorded. Ld. Counsel for the Respondent had recused himself and it was on his request the cross-examination was deferred for 4th March 2020. During this hearing, the Respondent was duly represented by four Advocates. The next sitting i.e. 8th sitting was held on 4th March 2020, on that day Claimant's witness Mr. Gitesh Singh was present for his cross-examination. Mr. Sidharth Sinha, Advocate had put in appearance on behalf of the Respondent stating that he had been instructed to appear on behalf of the Respondent. He also filed a copy of letter from Chief Commercial Manager (FM & Claims) with reference to minutes of 7th meeting stating that in place of Mr. Joydeep*

Majumdar the Railway has instructed Mr. Sidharth Sinha, Advocate with instructions to seek adjournment of that day's proceeding and accordingly a request was made to defer the cross-examination of CW-1 for the next sitting. Proceeding record that the witness who was under cross-examination had come from Zimbabwe and was present since 14th February, 2020 and the proceedings had to be adjourned due to Respondent's conduct, witness had agreed to stay back for the next sittings scheduled for 3rd & 4th March 2020. Proceedings also record that all copies of orders were duly sent to the Railways and it was negligent conduct on the part of the Railways. Accordingly, right to cross-examination of CW-1 was closed. The witness was discharged. The proceedings were accordingly adjourned for 23rd & 24th March 2020 for recording the statement of Claimant's second witness. It was also recorded that the Respondent had failed to avail the opportunity of filing its evidence affidavits. In the interest of justice, another opportunity was allowed to file evidence affidavits positively on or before 18th March 2020 making it clear that in case evidence affidavit is not filed by the said date the right to file the same stands closed without further orders.

3. On 15th March 2020, all parties were informed by the Presiding Arbitrator that in view of the Corona virus cases in the country and advisory issued by Government of India and the stand taken by the Hon'ble Supreme Court of India

and Delhi High Court, the next dates of 23rd& 24th March 2020 stands cancelled and the next date will be duly notified.

4. The 9th sitting of the Tribunal was then held on 28th August, 2020 through video conferencing after notice to all concerned including Respondent. There was no appearance on behalf of the Respondent. It was under mistaken belief of the Respondent that as the period of making the award had expired, therefore, the Respondent had absentees from the proceedings and this objection was also taken by the Respondent in a letter dated 27 August 2020 addressed to the Presiding Arbitrator without sharing It with the Claimant. The Tribunal on that date put note of the Respondent objection and its conduct that Respondent was unnecessarily trying to create hurdles in completion of the proceedings. A detailed order was passed and the attention of the Tribunal was also drawn to the order of Supreme Court dated 6th May 2020 in Suo-moto Writ (C) No. 3 of 2020 and other connected matters. In this view of the matter, one last opportunity was allowed to the Respondent to cross-examine CW-2 Mr. Montek Mayal on 7th September 2020 making it clear that failure on the part of the Respondent to appear and cross-examine Mr. Montek Mayal then there is no option left except to close right of the Respondent to cross-examine the witness.

5. There is no appearance on behalf of the Respondent

today. As noticed above, Mr. Montek Mayal is present. His affidavit is already on record including his expert report dated 5th November, 2019 which has been tendered in evidence.

6. The Respondent has addressed a letter to the members of the Tribunal dated 4th September 2020 received today requesting to terminate the proceedings on the grounds as stated in the letter.

7. Ld. Counsel for the Claimant states that the stand taken by the Respondent in the letter is contrary to facts and the law. She further states that there is hardly any ground to take cognizance of the stand taken by the Respondent but as a abandoned precaution the Claimant will file an appropriate reply to the said letter and also approach Orissa High Court for appropriate directions in the matter. The proceedings are accordingly adjourned to 9th October 2020 at 11.30 a.m. for further proceedings.

8. Copy of today's proceedings is also being sent to the Respondent.

9. It may be noted that Respondent has not yet paid its share of fees and is directed to pay the same before the next date of hearing."

"Proceedings of the 11th sitting of the Arbitral Tribunal held on 11.01.2021 at 11:30 am through Video Conferencing

1. The Tribunal met at 11:30 am. There was no appearance

on behalf of the Respondent. Mr. Montek Mayal CW-2 was present. His Examination in Chief was recorded who also proved his Expert Report dated 05.11.2019 after mentioning slight typographical corrections in his report. As there was no appearance on behalf of the Respondent inspite of due notice sent to them on 16.12.2020 and the High Court of Orissa has extended the time period for completion of Arbitral Proceedings by only 6 months with effect from 11.12.2020 therefore there was no option left with the Tribunal except to close the right of Respondent's to cross examine the witness.

2. It may be mentioned that till date the Respondent has failed to pay any amount towards the Arbitral fee inspite of undertaking and rejection of their application by order dated 05.10.2019.

3. While the order was being dictated an e-mail was received from the Respondent, which is not marked to the Claimant to the effect that the Respondent intends to challenge the Order of Orissa High Court dated 11.12.2020. It may also be mentioned that the said e-mail has also been marked by the Respondent to its Advocate Mr. Siddhartha Sinha who had been appearing for the Respondent in proceedings till 8th sitting. It is very strange that the Respondent though participated in the proceedings before Orissa High Court but failed to put in appearance before the Tribunal. During the 10th sitting of the Tribunal

held on 07.09.2020 the conduct of the Respondent has been recorded in detail. It appears that the Respondent has no intention to participate in the proceedings except to prolong the same. Thrice the Tribunal had to adjourn the proceedings merely to record the statement of CW-2 on account of the Respondent. It may also be mentioned that till date the Respondent has not paid any amount towards the fee to the members of the Tribunal. The Tribunal in the facts and circumstances has no other option except to reject the counter claims of the Respondent.

4. As the Respondent's fail to pay its share of fee the same will have to be paid by the Claimant. It is directed that in case the Respondent will fail to pay the fee and contest the proceeding, the Claimant will pay such fee to the members of the Tribunal before passing of the award as per provisions of the Act.

5. To come up on for hearing arguments on 17.03.2021 at 11:30 a.m. through Video Conferencing. The Claimant will ensure that written submissions are filed before the said date. The order is may communicated to the Respondent as usual."

69. It is evident from the record that the AT afforded more than adequate opportunity to the petitioner to cross examine the fact witness and expert witness of the respondent and adduce its own evidence. The petitioner was granted not just a single opportunity but multiple opportunities on various occasions. Despite indulgence on several occasions and repeated

reminders the petitioner neither proceeded with the cross examination of the witnesses nor led its evidence. Furthermore, despite notices and directions of the High Court of Orissa to extending the mandate of the AT, the respondent did not participate the in proceedings.

70. The conduct of the petitioner demonstrates a very casual approach towards not only rebutting the case of the respondent but also prosecuting its own case before the AT. Having failed to avail the opportunities granted, the petitioner, at this juncture, cannot be permitted to contend that it was denied a fair opportunity to present its case. The principles of natural justice do require reasonable opportunity be given to the parties to present their case but it does not require that the proceedings be kept in abeyance despite the blatant intent of the petitioner not to effectively participate in the Arbitral proceedings.

71. In my opinion, the AT correctly closed the right of the petitioner to cross examine the fact and expert witness of the respondent. Had any more opportunities be given to the petitioner the same would have infact caused prejudice to the respondent. Thus, the contention of the petitioner that it was denied the reasonable opportunity to present its case is wholly misconceived. For the reasons best known to it, the petitioner elected not to avail any opportunity granted by the AT and has consciously refrained from actively participate in the proceedings. Even in the present petition, no satisfactory explanation has been given by the petitioner for its conduct and/or approach.

72. The last objection is regarding the rejection of Counter Claim by AT. It is previously noted that the AT on not just one occasion, but on various occasions directed the petitioner to deposit the fee. The petitioner did not

comply with the direction of the AT.

73. In this regard, relevant portion of Section 38 of the 1996 Act reads as under:

> *Section 38. Deposits.*
>
> *(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:*
>
> *Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.*
>
> *(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:*
>
> *Provided that where one party fails to pay his share of the deposit, the other party may pay that share:*
>
> *Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.*

(emphasis supplied)

74. Careful examination of the same, makes it evident that the AT is within the power to strike off the Claim/Counter Claim of the party who defaults in payment of fees. It has already been established that the petitioner till date has not paid a single penny towards the AT's fee or expenses

towards the arbitral proceedings. Thus, in light of the discretion given to the AT by Section 38 (2) of the 1996 Act, I find no infirmity in the procedure adopted by the AT to strike off the Counter Claim.

ISSUE I

75. The petitioner while challenging the Award concerning period I, i.e. with respect to the issue 1, makes a 3 fold argument being *firstly*, the SOC contains no pleadings with regards to failure of supply of rakes by the respondent, *secondly*, there is no documentary evidence to support the claimin period I and *thirdly*, the findings of AT with respect to the period I is merely 2 paragraphs and AT has wrongly reproduced the period II's submissions while dealing with period I.

76. While rebutting the same, learned senior counsels have stated that it is an admitted case between the parties that the respondent sought to place indents with the petitioner but the petitioner refused to accept the same. In this regard paragraph 89 (a) of the SOC relevant and same reads as under:

> *"89. The Respondent's failure to supply the agreed number of rakes, and its refusal to provide the Claimant the right to utilize the guaranteed supply of rakes in addition to denying the Claimant its right to use alternate loading/unloading stations in accordance with the terms of the WIS, the WIS Agreement, the Supplementary Agreement I and the Supplementary Agreement II has caused enormous losses to the Claimant, which are calculated asunder:*
>
> *(a) Damages suffered by the Claimant on account of loss of profit from 2007-2010 on being unable to place*

its own indents due to shortfall in the supply of rakes by the Respondent

(i) The Claimant has suffered damages of INR 44,12,72,960.61/- (INR Forty Four Crores Twelve Lakhs Seventy Two Thousand' Nine Hundred Sixty and Thirty Four Sixty One only) towards the short supply of rakes for the period of December 2006 to February 2010, for which the Claimant was unable to even load its own indents which is calculated as below:

Summary of Loss of profit on All Shortfall Rakes (from Dec 2006 to Feb 2010)

Year	Barbil/Benspani rake		Barajamda/ Jaroll rake		Total	
	No of Shortfall In rakes	Loss of Profit (INR)	No of Shortfall In rakes	Loss of Profit (INR)	No of Shortfall In rakes	Loss of Profit (INR
2006	0	0.00	0	0.00	0	0.00
2007	5	120,72,570.92	7	169,01,599.29	12	289,74,170.21
2008	39	1686,13,290.43	50	2080,22,323.22	89	3766,35,613.65
2009	3	88,62,002.43	10	268,01,174.32	13	356,63,176.76
2010	0	0.00	0	0.00	0	0.00
Total	**47**	**1895,47,863.78**	**67**	**2517,25,096.83**	**114**	**44,12,72,960.61**

(ii) The Claimant's year wise profitability for the period December 2006 to February 2010 on the sale of iron ore per MT, is calculated based on its audited books of accounts

and therefore the calculation of damages per year from December 2006 till February 2010 is made as under:

Number of rakes that were not supplied to the Claimant x carrying capacity per rake (MT) Average Profit (Per MT) made by the Claimant in that particular year."

77. The reply of the petitioner with respect to the above contention of the respondent, in its SOD also requires a perusal and reads as under:

"25. In reply to the Para no. 89(a) of the statement of claim, the respondents state that as per Railway rule the prepayment of freight is mandatory prior to issuance of the railway-receipt. In case of placing indents approximate freight should be deposited in Demand Draft failing which the indent shall not be accepted. The claimant further accepted that as per goods tariff No. 46/Pt-1, Vol-II freight payment is compulsory at the time of issuance of Railway receipt in case of Iron Ore and also confirmed thereby to abide by the same rule vide letter No. SIL/20/3-14/138 dtd. 07.02.2014.

As the claimant was a defaulter in making payment of the Railway freight in accordance with the Rules. So the claimant was denied to supply the WIS rakes. So the loss of profit alleged by the Respondent's note on procedure for placing/registration of indents, payment of freight and issuance of railway receipts."

78. A combined reading of both shows that the petitioner had restrained the respondent from placing indents by imposing unilateral conditions being

payment of freight to be deposited by demand draft at the time of placing of indents even though the petitioner himself has accepted that the pre-payment of freight is only necessary for issuance of railway receipts which is a step after the acceptance of indent. The petitioner has not shown anywhere that in terms of the Agreement, the payment of freight charges was a precondition to place indents. Rather, the note on procedure for placing and registration of Indents submitted by the respondent before the AT notes down that the freight charges were only payable after the Indent was accepted. The relevant part of the note provided by the respondent reads as under:

> *"16. Therefore, the payment of freight by any consignor can be done only after indent is accepted and registered by the IR and weighment of the cargo is done and not at the time of placing of indents by the consignee to the CGS/ SM. 3043 4 17. It is pertinent to also mention that the freight charges for certain traffic are recoverable at the time of booking itself i.e. at the loading station. This is called 'paid' traffic as opposed 'to pay' facility by paying 5% extra charges over and above normal freight. This facility enables the party to pay due charges at destination station. It is submitted that iron ore would come under 'Paid Traffic' under the Goods Tariff No. 46 Pt. I (Vol. II)."*

79. The note provided by the petitioner to the AT *vide* email dated 21.05.2021 on the procedure for placing of indents also does not talk about the requirement of payment of freight charges before the acceptance of indents. The relevant part of the petitioner's note as

reproduced by the AT in the Award reads as under:

> ***"Respondent's note on procedure for placing/registration of indents, payment of freight and issuance of railway receipts***
>
> *152. The Respondent also through its email dated 21.05.2021 filed its short note on the procedure for placing/registration of indents, payment of freight and issuance of railway receipts, as follows:-*
>
> ***Issue of calculation of rates & issue of railway receipt:***
>
> *153. The note says that the freight chargeable for a consignment mainly depends on the following three factors:*
>
> *1. Weight- The weight to be charged is as per the notified Permissible carrying capacity of the wagon or actual weight of the consignment, whichever is higher. Punitive charges are also levied for loading beyond the permissible tolerance i.e., Overloading.*
>
> *2. Distance- The minimum distance for charge is 100 kms. The distance between two stations is ascertained with the help of the Distance Tables.*
>
> *3. Classification of the commodity in question, as given in the IRCA Goods Tariff No. 45, Part I, Vol. II.*
>
> *154. These factors being known, the rate is worked out by consulting the Goods Rates Tables FORCA Freight Tariff Part II) provided for this purpose. The total freight is then calculated for the given weight and it is rounded off as per rules given in the Goods Tariff, Part I, Vol. I.*

155. The Freight charges may also differ accordingly as the goods are booked by the consignor at Railway Risk Rate (RR Rate) or Owner's Risk Rate (OR Rate) in cases where OR rate is applicable to the commodity. Most of the commodities, however, are booked at RR rate only.

156. The freight charges for certain traffic are recoverable at the time of booking itself where pre-payment of freight is compulsory. This is called 'paid 'traffic'. In other cases, the party can avail 'to pay' facility by paying extra charges (the percentage is revised from time to time) over and above normal freight. However, this facility has been withdrawn with the introduction of e-payment. Under FOIS (Freight Operations Information System). TMS (Terminal Management System) has been successfully implemented at the terminal (goods sheds/Sidings). RRs are issued through the TMS only and payment is realized through e- payment (under tri-partite agreement - Railways, Party/Consignee and Bank).

Issue of railway receipt

157. Normally, Railway Receipt can be issued of a wagon load consignment, after it has been loaded into the wagon. Separate RR books are supplied to the stations for 'Local' traffic i.e. traffic originating and terminating on the same Railway and for 'through' traffic which terminates on another Railway. Each of these categories also has separate RR books for "To Pay' traffic and 'Paid' traffic. RR is made

out in four foils by using the double-sided carbon paper. The first foil is for record; the second is the Receipt foil to be given to the consignor. The third copy is for Accounts, and the fourth copy is called Invoice, which accompanies the consignments in the wagon.

A RR for 'through' traffic has one additional foil i.e. the 5th, which is called transit invoices. The invoice copy of a 'through' consignment is sent to the destination station by post and the transit Invoice accompanies the consignment in the wagon.

158. The Railway Receipts are serially numbered. They contain name of the booking and destination station, names and addresses of the consignors and consignees, number of wagons used, description of the goods books, number packages, actual weight, chargeable weight, chargeable distance, classification at which charged, freight rate, other charges, total freight etc.. With advent of computerization in the freight system, the manual preparation of RR has been discontinued and E-TRRS (Electronic Transmission of Railway Receipts) are issued to the consignor/consignee.

159. A consignment may be booked in favour of a particular consignee, mentioned by name. It may also be booked to 'self' in which case the delivery of the goods is given to the person in whose favour it may be endorsed by the consignor. The RR is accordingly made out showing the name of the particular consignee or 'self' in his place.

Delivery of goods on production of R.R.

160. The person claiming delivery is required to produce the receipt granted to the sender at the forwarding station. Goods are not to be delivered to any person other than the invoiced or endorsed consignee. If a person claiming goods as the agent of the invoiced consignee presents an unendorsed railway receipt, delivery is withheld in case such person cannot produce a properly prepared and stamp 'Power of Attorney'. After delivering the consignment, the signature of the consignee is taken in the Delivery Book.

Delivery of goods, when RR is not available

161. When an RR is lost, misplaced, or for other reasons is not available the railway can grant delivery on the authority of an Indemnity Note, to be executed on a non-judicial stamp paper of the value chargeable. Indemnity Bond on un-stamped paper may also be accepted in the following cases:-

1. Station Masters may, at their discretion, allow delivery of such articles of trifling value as required, speed delivery, to well-known persons on stomped indemnity note.

2. Station Masters may similarly, at their discretion, allow delivery of perishable articles on unstamped Indemnity Note.

3. When a Government official is the consignee in his official capacity, he need not execute the Indemnity Note on a stamped paper, but he has to execute the same on a

standard unstamped Indemnity Bond.

4. Consignments booked to registered co-operative societies. In case of goods consigned by a sender to 'SELF' when the Railway Receipt is lost or otherwise not forthcoming, delivery may be granted only when the person claiming the consignments produces a stamped Indemnity Note duly executed by the consignor, and countersigned by S.M. of the booking station under his signature and station stamp. The note must also be endorsed by the sender in favour of the person to whom the consignment is to be delivered. It is further incumbent on the person claiming delivery to execute a second stamped Indemnity Note, duly signed by him along with a surety and two witnesses to the satisfaction of the Station Master at the destination station before delivery can be affected."

80. A combined reading of the pleadings as well as the above two notes show that the petitioner had unilaterally imposed a condition of depositing freight through demand draft along with placing of indents which was contrary to the terms of WIS.

81. Further, the witness of the respondent, Mr. Gitesh Singh,who is also the authorised representative of the respondent has stated in paragraph 100 of his affidavit of evidence as to how the figure of 44,12,72,960.61/-was arrived at. He also confirmed that the respondent was unable to place the indents due to the shortfall in the supply in rakes. The relevant paragraphs read as under:

"100. The Claimant has suffered damages of INR

44,12,72,960.61/- (INR Forty Four Crores Twelve Lakhs Seventy Two Thousand Nine Hundred Sixty and Thirty Four Sixty One only) towards the short supply of rakes for the period of December 2006 to February 2010. That during the said period, the Claimant was unable to place its own indents due to shortfall in the supply of rakes by the Respondent. Summary of Loss of profit on All Shortfall Rakes (from Dec 2006 to Feb 2010)

Year	**Barabil/Banspani rake**		**Barajamda/Jaroli rake**		**Total**	
	No. of Shortfall in Rakes	**Loss of Profit (INR)**	**No. of Shortfall in Rakes**	**Loss of Profit (INR)**	**No. of Shortfall in Rakes**	**Loss of Profit (INR)**
2006	0	0.00	0	0.00	0	0.00
2007	5	120,72,570.92	7	169,01,599.29	12	289,74,170.21
2008	39	1686,13,290.43	50	2080,22,323.22	89	3766,35,613.65
2009	3	88,62,002.43	10	268,01,174.32	13	356,63,176.76
2010	0	0.00	0	0.00	0	0.00
Total	**47**	**1895,47,863.78**	**67**	**2517,25,096.83**	**114**	**44,12,72,960.61**

101. The Claimant's year wise profitability for the period from December 2006 to February 2010 on the sale of iron ore per MT is calculated based on its audited books of accounts. The damages per year from December 2006 till February 2010 were calculated multiplying the number of rakes that were not supplied to the Claimant x *carrying capacity per rake (MT)* x *Average Profit (Per MT) made by the Claimant in that particular year."*

82. The petitioner has not led any evidence to show any requirement as per the WIS Agreement to pay freight amount in advance only in the form of Demand Draft, while on the other hand the evidenceled by the respondent regarding the petitioner not permitting the respondent to place indents, remained unrebutted. The respondent has led evidenceand the witness testimony, which has not been rebutted by the petitioner, also proves that the respondent has placed various indents before the petitioner and the petitioner has not accepted the indents. Additionally, the rakes were not provided to the petitioner.

83. The petitioner urges that the Award lacks reasons to substantiate the reliance placed on the expert's report and the conclusion arrived at by the AT with respect to Period I and relies on ***Batliboi Environmental Engineers Limited (Supra)*** and ***PSA Sical Terminals (Supra)***. In the above judgment, the Supreme Court set aside an Award that was entirely silent on the reasoning. In the present case is factually distinguishable. While dealing with the preliminary submissions, I have already held that the Award, read as a whole, records the basis of the respondent's claims under each head, the evidence led by the respondent's witnesses (CW-1 and CW-2), and the AT's conclusion on the unrebutted nature of that evidence. Merely because the findings on Period I are concise does not render them bereft of reasons.

84. The argument of the petitioner that the AT has travelled beyond the terms of the WIS Agreement also does not hold much merit. The petitioner contends that Clause 6.1 (c) read with Clause 7.3 of the WIS Agreement require the petitioner only to supply the rakes in case the respondent places indents. However, petitioner has himself admitted in the paragraph

No. 25 of the SOD of the petitioner filed before the AT, as reproduced above, that the indents placed by the respondent were not accepted by the petitioner due to non-fulfilment of a condition unilaterally imposed. This shows stark contradiction on the stand of the petitioner before the AT and this Court.

85. Therefore, I find no infirmity in the impugned Award with respect to issue No. 1. The AT has considered the evidence on record, the calculation furnished by the respondent and the statement of witnesses and has arrived at the logical conclusion in holding that the respondent is entitled to recover such damages on account of loss of profit from 2007-2010.

ISSUE NO. II and ISSUE NO. III

86. Issue No. II of the Award pertains to freight rebate on the 6 guaranteed rakes due to the short supply of rakes by the petitioner for period II and Issue No. III is with respect to the damages suffered due to inability to obtain premium on 2 additional bonus rakes due to short supply of rakes for the period II.

87. The petitioner has not made any submission with regards to issue No. II before the Arbitrator except that the respondent has not fulfilled the terms of the WIS Agreement. It has also not led any evidence in that regard. The reply to the claim of freight rebate reads as under:

> *In reply to the Para no. 89(b) of the statement of claim, it is submitted that due to non-fulfillment of the terms and condition of the WIS policy and agreement viz. Para 7.1 & 7.3 of the WIS policy and para 2.5 and 5.1 of the WIS agreement, the claimant failed to place indents so the*

allegation for obtaining freight rebate by the claimant under WIS agreement is denied. On the other side the failure on the part of the claimant to reap the benefit of the freight rebate had affected the objective of the Railway to augment the Railway revenue.

88. The AT has relied upon the detailed calculation as provided by the expert witness in its report to arrive at the conclusion that the respondent is entitled to an amount of Rs. 74,28,22,864/- towards the damages suffered by it on account of loss of freight rebate. As already held above, the perusal of the Award demonstrates that the AT has independently analysed the expert report and perused the manner of calculation of damages in order to arrive at their conclusion. The AT noted that there is no discrepancy noted in the expert report. The expert witness was examined and the AT satisfied itself of the contents of the expert report. It is also pertinent to note that the findings of the report were proved by the examination of the expert witness which remained unrebutted by the petitioner. Thus, the AT has not mechanically accepted the conclusions of the expert. The relevant paragraphs of the Award, as reproduced above, shows that the AT has consciously applied its mind.

89. The petitioner has also argued that the indents post March 2010 were not accepted in the light of clarificatory Circulars issued by it. The requirements to place indents as clarified by the Circulars were not fulfilled by the respondent. Another reason afforded for non-acceptance of indents was that the inclusion of the alternate loading station was barred as per Clause No. 4.2 of the WIS Agreement and that it was an

inadvertent error on part of the petitioner to sign the Agreements, with alternate loading stations.

90. It is important to highlight that the fact witness of the respondent in its examination has also pointed out the various impediments imposed by the petitioner. The same has remained unrebutted by the petitioner. The relevant paragraphs read as under:

> *"62. Once again by way of letter dated 13.06.2016, I informed the Respondent authorities that the Claimant had followed all the procedural requirements and had further obtained all the permits required for registration of the third party indents. I was informed by the Respondent authorities that despite following such procedural requirements, the CGS-Jaroli had yet again refused to accept the indents of the Claimant and had also not assigned any reason for such refusal. I was further informed by the Respondent authorities that the WIS rakes of the Claimant have limited validity and that the Claimant is required to maintain equal spacing between placing requests for indents. Copy of the letter dated 13.06.2016 sent by the Claimant is marked as Exhibit C-44.*
>
> *63. I by way of letter dated 23.08.2016 reiterated the Claimant's commitment as a WIS partner to the Respondent authorities and requested the Respondent authorities to accept the Claimant's requests for registration of indents. I say that the Claimant placed various indents dated 10.06.2016, 31.07.2016, 11.08.2016, 20.08.2016 and*

21.08.2016 from Jaroli and Banspani Station. I say that the Respondent refused to accept such indents of the Claimant. Copy of the letter dated 23.08.2016 sent by the Claimant to Respondent authorities is marked as Exhibit C-45.

64. I, once again wrote a letter dated 13.09.2016 to the Respondent authorities requesting that the rakes for carrying the consignments be allotted as the mining permissions and forwarding notes against each consignment has got limited validity. The Claimant also informed the Respondent that the delay in the supply of the rakes has led to a cancellation of the indent of the Claimant resulting in heavy financial losses. Copy of the letter dated 13.09.2016 sent by the Claimant to the Respondent authorities is marked as ***Exhibit C-46.***

65. Vide final order dated 20.12.2016, the High Court of Orissa allowed the Writ Petition WP (C) No. 2.8478/2013 filed by the Claimant and quashed the circular dated 17.09.2013 (which excluded third party consignments under the WIS rakes) in relation the case of the Claimant Copy of the order dated 20.12.2016 in Writ Petition WP (C) No. 28478/2013 by the Hon'ble High Court of Orissa is marked as ***Exhibit C- 47****.*

xxxx

68. The Claimant obtained the requisite permissions and once again vide letter dated 02.02.2017 requested the Respondent through CGS, Banspani to register/ accept the

indents of the Claimant including third party consignments. The, Respondent in violation of the order dated 20.12.2016 refused to register the indents of third parties despite theClaimant obtaining the requisite permissions. Copy letter dated 02.02.2017 is marked as ***Exhibit CW 1/3."***

91. In this regard Clause No. 15 of the WIS Agreement is relevant and is reproduced as under:

"15.0 CHANGE IN TERMS AND CONDITIONS:

Any change in the terms and conditions of the Agreement will be made by mutual consent of both the parties."

92. The said Clause of the Agreement leaves no iota of doubt that any modifications to the terms of the Agreement could only be done with the consent of both the parties. The material on record indicates that the petitioner herein, unilaterally and under the guise of clarificatory circulars, sought to introduce conditions and imposed restrictions thus creating impediments for the respondent to place indents. The Circulars indicate an attempt that the petitioner has unilaterally tried to change the terms of the Agreement. Further, the contention of the petitioner that the inclusion of alternate loading stations was inadvertent error and the same is not allowed by the Agreement also does not cut ice. There is no inadvertent error rather the inclusion of the alternate stations in the Supplementary Agreement was a conscious decision on part of the petitioner.The Supplementary Agreements were signed so as to include the alternate stations. Even if the Agreement does not allow the inclusion of more stations for loading and unloading, the terms of the Agreement could always be changed in terms of Clause 15 of the Agreement. The

petitioner signed the Supplementary Agreements, thus, changing the term of the Agreement, therefore, now at this juncture, having expressly agreed to change the terms, the petitioner cannot plead that it was never the intention of the petitioner to include the alternate loading stations.

93. Insofar as Issue No. III is concerned, the AT has relied on the unrebutted expert witness' report and awarded a sum of Rs. 13,16,11,300/- in favour of the respondent. The grievance of the petitioner is with the approach adopted by the expert particularly the assumption of premium of 100 per MT to calculate the loss suffered by the respondent. It is also stated by the petitioner that the AT has mechanically accepted conclusions of the expert report without independent examination.

94. Having considered the argument of the petitioner, I am of the view that aforesaid objections with respect to the calculations and to the expert report do not merit any acceptance. What requires emphasis here is that the said objections were never raised before the AT. Despite adequate opportunities, the petitioner failed to rebut the expert evidence and adduce its own evidence, thus waiving off the right to question it in the proceedings under Section 34 of the 1996 Act. The objections under Section 34 do not provide fresh opportunity for raising factual disputes, especially the ones never urged before the AT. Reliance in this regard is placed on ***Srishti Infrastructure Development v. Scorpio Engineering Private Limited and Anr.*** passed in ***O.M.P. (COMM.) 246/2022***. The relevant paragraphs read as under:

> ***65.*** *Following the law laid down by the Hon'ble Supreme Court in* ***MMTC Ltd.*** *(supra), a Hon'ble Division Bench of the Bombay High Court in* ***Azizur Rehman Gulam and***

Others v. Radio Restaurant and Others *2023 SCC OnLine Bom 2320 inter alia held as under:*

"27....

B. Additionally, we must note that every ground of challenge to the Arbitral Award in the present Appeal was neither raised as a ground of defense before the Arbitral Tribunal nor was taken as a ground of challenge to the Arbitral Award in the Petition filed under Section 34. The Hon'ble Supreme Court in the case of MMTC Ltd. v. Vedanta Ltd.44 has specifically held as follows, viz.

"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, thisCourt must be extremely cautious and slow to disturb such concurrent findings."

28. What the Appellants have therefore sought to do in the present Appeal is to effectively challenge the Arbitral Award afresh on grounds never taken before. We find that such a course of arguments, apart from being in the teeth of the law laid down by the Hon'ble Supreme Court in the case of MMTC Ltd. (Supra), if allowed, would infact unsettle the entire scheme of Chapters VII, VIII and IX of the Arbitration Act. Thus, equally on this ground alone, the present Appeal must also fail."

66.*Further, the reliance placed by the respondent no. 1 on the judgment of the Hon'ble Supreme Court in* ***Union of India (Railways)*** *(supra) is well placed where the Hon'ble Supreme inter alia held as under:*

"27. If a plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case."

(emphasis supplied)

xxxx

68*. Permitting the petitioner to raise such contentions for the first time in these proceedings would amount to*

bypassing the arbitral process and scuttling the very object and efficacy of arbitration. The petitioner, having chosen not to raise these issues before the arbitrator, cannot now be permitted to turn around and challenge the award on grounds that were never part of the arbitral record. Additionally, none of the issues are such that can hit at the root of the arbitral award."

95. Further, the quantification of damages, the methodology used and the evidence relied upon are matters to be examined by the AT based on the material on record. The AT is the master of evidence and thus, it is a matter falling solely within the domain of the AT as it involves in-depth analysis of the evidence on record. Under Section 34 of the 1996 Act, the Court does not sit in appeal so as to adjudicate upon the merits of the matter merely because an alternative view or a different logical conclusion may be arrived at.

96. This Court under Section 34 cannot adjudicate whether the expert report was correct and whether the methodology adopted in the report was correct, more so when the petitioner has not challenged the report before the AT despite multiple opportunities being granted. Such an exercise is wholly impermissible within the bounds of Section 34 of the 1996 Act.

97. Hence in my considered opinion, the petitioner cannot be permitted to agitate fresh factual grounds before the Court in a petition filed under Section 34 of the 1996 Act. Even otherwise, the AT has recorded a plausible finding with respect to the correctness of the expert report. I do not find any reason to interfere with the same.

98. Independent of the above conclusion, upon examination of the objections of the petitioner, Clause No. 5 of the WIS Agreement is relevant and is reproduced as under:

> *"5.0 BENEFITS ADMISSIBLE TO INVESTOR*
>
> *5.1 For investment made in every BG rake with maintenance spares, investor will be assured of supply of a guaranteed number of rakes every months as follows:*
>
> *5.2 Category BOXN Wagons*
>
> *Freight rebate of 10% shall be granted for 10 years and guaranteed supply of wagons at the rate of 6 (six) rakes per month. In addition, a guaranteed supply of two bonus rakes will be made without freight concession.*
>
> *5.3 The guaranteed supply under Wagon Investment Scheme (WIS) will be in addition to normal supply of rakes to in such investors (supply during the previous financial year shall be reckoned as normal supply).*
>
> *5.4 In addition to the above, a guaranteed supply of two bonus rakes will be made without freight concession to those opting for the Engine on Loan Scheme (EOL)*
>
> *5.5 Lease charges shall be payable under WIS*
>
> *5.6 Ownership of Wagons: Ownership of BOXN wagons procured under Wagon Investment Scheme (WIS) shall get transferred to Indian Railways after 10 years from the date on which full raise has been handed over to JR."*

99. In terms of the said Clause 5, reproduced above, the respondent was entitled to 6 guaranteed rakes with 10% freight concession and two

additional bonus rakes without freight concession which it was unable to obtain due to shortfall in supply of rakes during the relevant time.

100. Thus, it was the contractual liability of the petitioner to supply the 6 guaranteed rakes and 2 bonus rakes. The petitioner states that the respondent has not adduced any evidence so as to prove that the indents were placed. However, the learned counsel for the respondent has placed on record sufficient evidence, as already reproduced above, to support the findings and conclusion that the indents were refused and rejected by the petitioner. The fact witness of the respondent has categorically stated the impediments imposed by the petitioner in accepting the indents of the respondent. It is pertinent to mention that the evidence of the fact witness remains unrebutted.

101. The second objection taken by the learned counsel for the petitioner is basis of figure "*Rs. 100 per MT*". The expert witness in its report has categorically stated the considerations taken into account to arrive at this figure. The relevant portion of the affidavit of expert reads as under:

> *"108. The amount of losses as mentioned in paragraph 107 above were calculated on basis of: No. of bonus rakes not supplied carrying capacity per rake (MT) x Premium amount the Claimant would have made (assuming the same to be INR 100/ MT)=Total Loss in premium. I say that the assumption of INR 100/MT is based on the factors such as demand of rail rakes for transporting bulk commodities such as iron ore vis-a-vis supply of rail rakes; availability of guaranteed rakes with the Claimant, priority to WIS customers as against other customers availing railway*

freight services under the normal allotment of rakes; and availability and applicable costs of alternate modes of transport.

A detailed calculation towards the loss for each month and each year from 2010 till 2017 is marked as ***Exhibit CW1/51****."*

102. The figure of INR 100 per MT is reasonable and plausible and in the absence of evidence to the contrary, acceptable. Thus, the findings of the AT cannot be interfered with. As it can be concluded that the objections on merits, even otherwise are without any merit. There is sufficient evidence to support that the findings of the Arbitrator

103. It is also been stated that the AT has wrongly awarded cost of arbitration and legal cost. The perusal of the discussion shows that the petitioner failed to pay its 50% share towards administrative and other expenses as well as failed to deposit its share of arbitration costs. Since the respondent had made the payments for and on behalf of the petitioner, the AT has correctly awarded the same in favour of the respondent.

104. The petitioner also challenges the grant of the rate of interest at 8% per annum both *pendente lite* and future. The law with regard to grant of interest is settled. The Hon'ble Supreme Court in ***Morgan Securities & Credits (P) Ltd. v. Videocon Industries Ltd., (2023) 1 SCC 602***

"25. Section 31(7)(a) confers a wide discretion upon the arbitrator in regard to the grant of pre-award interest. The arbitrator has the discretion to determine the rate of reasonable interest, the sum on which the interest is to be paid, that is whether on the whole or any part of the

principal amount, and the period for which payment of interest is to be made — whether it should be for the whole or any part of the period between the date on which the cause of action arose and the date of the award. When a discretion has been conferred on the arbitrator in regard to the grant of pre-award interest, it would be against the grain of statutory interpretation to presuppose that the legislative intent was to reduce the discretionary power of the arbitrator for the grant of post-award interest under clause (b). Clause (b) only contemplates a situation where the arbitration award is silent on post-award interest, in which event the award-holder is entitled to a post-award interest of eighteen per cent.

26. The arbitrator has the discretion to grant post-award interest. Clause (b) does not fetter the discretion of the arbitrator to grant post-award interest. It only contemplates a situation in which the discretion is not exercised by the arbitrator. Therefore, the observations in Hyder Consulting [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] on the meaning of "sum" will not restrict the discretion of the arbitrator to grant post-award interest. There is nothing in the provision which restricts the discretion of the arbitrator for the grant of post- award interest which the arbitrator otherwise holds inherent to their authority.

xxxx

28. In view of the discussion above, we summarise our findings below:

28.1. The judgment of the two-Judge Bench in S.L. was referred to a three-Judge Bench in Hyder Consulting on the question of whether post-award interest could be granted on the aggregate of the principal and the pre-award interest arrived at under Section 31(7)(a) of the Act.

28.2. Bobde, J.'s opinion in Hyder Consulting held that the arbitrator may grant post-award interest on the aggregate of the principal and the pre-award interest. The opinion did not discuss the issue of whether the arbitrator could use their discretion to award post-award interest on a part of the "sum" awarded under Section 31(7)(a).

28.3. The phrase "unless the award otherwise directs" in Section 31(7)(b) only qualifies the rate of interest.

28.4. According to Section 31(7)(b), if the arbitrator does not grant post-award interest, the award holder is entitled to post-award interest at eighteen per cent.

28.5. Section 31(7)(b) does not fetter or restrict the discretion that the arbitrator holds in granting post-award interest. The arbitrator has the discretion to award post-award interest on a part of the sum.

28.6. The arbitrator must exercise the discretionary power to grant post-award interest reasonably and in good faith, taking into account all relevant circumstances.

28.7. By the arbitral award dated 29-4-2013, a post-award

interest of eighteen per cent was awarded on the principal amount in view of the judgment of this Court in S.L. Arora. In view of the above discussion, the arbitrator has the discretion to award post-award interest on a part of the "sum"; the "sum" as interpreted in Hyder Consulting. Thus, the award of the arbitrator granting post-award interest on the principal amount does not suffer from an error apparent."

105. It is established from the above precedents that the grant of interest lies exclusively within the domain of the AT and the AT enjoys discretion to award interest, thus, in view of the fact that grant of interest at 8% per annum seems both reasonable and fair, I am not inclined to interfere with the same.

CONCLUSION

106. For the said reasons, I find no reason to interfere with the findings of the AT in the impugned Arbitral Award dated 09.06.2021 and Ratification Order dated 27.07.2021.

107. The petition is disposed of in aforesaid terms, with pending applications if any.

JASMEET SINGH, J.

JULY 01, 2026/(MU)