IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.282 OF 2024
WITH
INTERIM APPLICATION NO . 7232 OF 2025

SIGNPOST INDIA PRIVATE LIMITED ...Petitioner

V/s.

BRIHAN MUMBAI ELECTRIC SUPPLY
AND TRANSPORT UNDERTAKING ...Respondent

Mr. Harshvardhan Kotla with Mr. Dhanesh Dhotre & Ms. Shruti Bedekar i/b Mr. Ajay Basutkar, for Petitioner.

Mr. Nirav Shah with Ms. Aprajita Mahto & Ms. Shraddha Nagaonkar i/b Mr. Sagar Shetty, for Respondent.

CORAM : SANDEEP V. MARNE, J.
Reserved On : 25 NOVEMBER 2025.
Pronounced On : 04 DECEMBER 2025.

Judgment:

1) Petitioner has filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)** challenging the Award dated 2 January 2024 passed by the learned sole Arbitrator. By the impugned Award, the learned sole Arbitrator has rejected all the claims made by the Petitioner. The counterclaim filed by the Respondent is allowed to the extent of sum of Rs. 49,60,063/- towards interest on delayed payment charges, Rs. 46,78,000/- towards RTO fees and Rs. 37,29,000/- towards defacement charges. The learned sole Arbitrator has also awarded

costs of arbitral proceedings of Rs. 48,20,000/- in favour of the Respondent. The Arbitral Tribunal has awarded interest @ 18% per annum from 5 December 2022 i.e. date of filing of counterclaim till the date of Award and post Award interest @10% p.a.

2) Brief facts leading to filing of the Petition as pleaded by the Petitioner are stated thus :-

Petitioner is engaged in the business *inter-alia* of advertising. The Respondent -Brihanmumbai Electric Supply and Transport Undertaking (**BEST)** is a civic transport and electricity provider in Mumbai. Respondent-BEST operates a large fleet of buses in Mumbai city and neighbouring areas outside the city limits.

3) The Respondent floated a tender on 9 November 2018 for allotment of advertisement rights for 3121 buses in its fleet for a period of three years. Petitioner participated in the tender process and submitted bid/offer of Rs.95.5 crores. Petitioner was declared as a successful bidder and contract was awarded vide allotment letter dated 23 January 2019 granting advertisement rights for a period of three years from 11 February 2019 to 10 February 2022. Petitioner was directed to deposit Rs.4,78,00,000/- being 30% cash security deposit and Rs.11,14,00,000/- in the form of Bank Guarantee towards 70% security deposit and Rs.1 crore for defacement/repainting of advertisements. The Petitioner communicated its acceptance of allotment letter vide its letter dated 30 January 2019. Petitioner provided the requisite bank guarantee towards security deposit and amount of defacement charges and also paid 30% security deposit in cash. An Agreement dated 4 November 2020 was executed between the parties.

4) After commencement of the contract, the Petitioner came across several buses, which were unfit for display of advertisements and upon its survey, it claimed that 966 buses were found to be majorly damaged. The Petitioner accordingly requested Respondent for grant of rebate in November-2019. A physical inspection was completed by both the parties where 753 buses were found to be majorly damaged. Relying on the report of the joint survey, Petitioner requested Respondent to grant rebate in respect of 753 damaged buses from the date of commencement of the contract till the buses were repaired. By letter dated 23 December 2019, Respondent contended that 672 out of 753 buses were damaged which needed to be attended to and 81 damaged buses needed workshop attendance /major repairs.

5) After Covid-19 outbreak and imposition of nationwide lockdown, the buses of the Respondent were not operational from 24 March 2020 onwards. The Petitioner claimed rebate in respect of lockdown period. In July-2021 Second joint survey was conducted, in which 175 buses were allegedly found to be damaged. Petitioner sought rebate in respect of damaged 175 buses which was denied by the Respondent. On 28 June 2021 Respondent granted partial rebate in display charges by granting 100% rebate for 1 April 2020 to 30 September 2020 due to Covid-19 and 100% rebate for the period from 1 October 2020 to 31 December 2020 due to display of campaign of Municipal Corporation and 50% rebate from 1 January 2021 to 31 March 2021. The Petitioner requested for grant of further rebate. By letter dated 15 March 2022 Respondent granted further rebate in display charges in following terms:-

(i) 75% rebate on display charges on 1 January 2021 to 28 February 2021.

(ii) Adjustment of payment of display charges amounting to Rs.5,63,73,558/- for 672 buses from 11 February 2019 to 23 December 2019 and time for payment of outstanding dues of Rs.25,06,78,641/- within 7 days.

6) According to the Petitioner, certain excess payments were made by it to the Respondent in respect of buses not actually plying and on account of wrongful application of calculation formula. The contract between the Petitioner and the Respondent expired on 10 February 2022. However, the Petitioner kept on raising various demands with the Respondent. Petitioner thereafter sought consent of the Respondent for reference of the disputes to arbitration. With the consent of the Petitioner letter dated 23 March 2022 was addressed by the Petitioner to the learned sole Arbitrator and this is how Arbitral Tribunal was constituted. Petitioner raised 8 claims in its Statement of Claim. In support of its 8 claims, Petitioner raised following prayers in its Statement of Claim :-

a. Directing the Respondent to provide the Claimant, rebate on damaged buses amounting to a total of Rs. 4,67,42,372/- (the amount is inclusive of interest charged as per the Request for Proposal) (Indian Rupees Four Crores Sixty Seven Lakhs Forty Two Thousand Three Hundred and Seventy Two Only) and consequently order and direct the Respondent to pay the said amount to the Claimant.

b. Directing the Respondent to provide the Claimant, rebate on the said Not-Out buses and on average available buses in the fleet during the tenor of the subject Tender, the rebate on rental fees for the said Not-Out buses comes to a total of Rs. 18,65,481/- (the said amount is inclusive of the interest calculated as mentioned under the Request for Proposal) (Indian Rupees Eighteen Lakhs Sixty Five Thousand Four Hundred and Eighty One).

c. Directing the Respondent to provide the Claimant, rebate on the 08 day period from 24th March 2020 to 31st March 2020 in view of the Covid-19 pandemic, the total rebate comes to total of Rs. 99,42,444/-

(the said amount is inclusive of the interest calculated as mentioned under the Request for Proposal)

d. Directing the Respondent to provide the Claimant, rebate calculated on the basis of pay-per-use buses during the period 01st April 2021 to 10th February 2022, the total calculation comes to a total of Rs. 16,07,33,593/- (the said amount is inclusive of interest calculated as per the Request for Proposal) (Indian Rupees Sixteen Crores Seven Lakh Thirty Three Thousand Five Hundred and Ninety Three)

e. Direct the Respondent to refund the amount paid by the Claimant to the Respondent, under protest and without prejudice to its rights and contentions, amounting to a total of Rs. 14,45,33,204/- (Indian Rupees Fourteen Crores Forty Five Lakhs Thirty Three Thousand Two Hundred and Four Only)

f. For the purposes aforesaid necessary directions be given and enquires be made and Award be passed.

7) The Respondent appeared before the learned Arbitrator and filed statement of defence. Additionally, Respondent also filed counterclaim with the following prayers:-

A. Directing the Claimant to pay to Respondent a sum of INR 4,13, 69,016 along with further interest thereon at the rate of 18% per annum as agreed between the parties and as set out in Particulars of Claims being Exhibit -A hereto from the date of the filing of the Counter Claim till payment and/or realization;

B. Directing the Claimant to pay to Respondent a sum of INR 49,60,063 along with further interest thereon at the rate of 18% per annum as agreed between the parties and as set out in Particulars of Claims being Exhibit - C hereto from the date of the filing of the Counter Claim till payment and/or realization;

C. Directing the Claimant to pay to Respondent a sum of INR 46, 78, 000 along with interest thereon at the rate of 18% per annum as agreed between the parties and as set out in Particulars of Claims being Exhibit- D hereto from the date of the filing of the Counter Claim till payment and/or realization;

D. Directing the Claimant to pay to Respondent a sum of INR 37,29,000 along with interest thereon at the rate of 18% per annum as agreed between the parties and as set out in Particulars of Claims being Exhibit-F hereto from the date of the filing of the Counter Claim till payment and/or realization;

8) Based on the pleadings, the Arbitral Tribunal framed following 15 issues:-

(1) Does the Claimant prove that its claims have arisen under the 2019 Tender and not under the Contract dated January 23, 2019, entered into between the Claimant and Respondent?

(2) If the answer to Issue No. 1 is in negative, then does the Claimant prove that all their claims, as sought for by them under the Statement of Claim ought not to be rejected?

(3) Does the Claimant prove that it has not committed any breach(es) of any of the provisions of the 2019 Tender?

(4) Does the Respondent prove that it has not committed any breach(es) of any of the provisions of the 2019 Tender?

(5) Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate to the Claimant of damaged buses for an amount of Rs.4,67,42,372/-, as alleged or otherwise?

(6) Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate to the Claimant due to not out I non - operational buses for an amount of Rs.18,65,481/-, as alleged or otherwise?

(7) Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate for the 8 day period from March 24, 2020 to March 31, 2020 in view of COVID - 19 pandemic for an amount of Rs.99,42,444/-, as alleged or otherwise?

(8) Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate for the pay-per-use buses during April 1, 2021 to February 10, 2022, for an amount of Rs.16,07,33,593/-, as alleged or otherwise?

(9) Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide refund of amount of Rs.14,45,33,204/-,paid under protest by the Claimant, as alleged or otherwise?

(10) Does Respondent prove that the Claimant is liable to pay Respondent a sum of Rs.4,13,69,016/- along with further interest at the rate of 18% p.a. for the delayed payment charges, as set out in the Respondent's Counter Claim?

(11) Does the Respondent prove that the Claimant is liable to pay the Respondent a sum of Rs.49,60,063/- along with further interest at the rate of 18% p.a. for the interest on the delayed payment charges, as set out in the Respondent's Counter Claim?

(12) Does the Respondent prove that the Claimant is liable to pay the Respondent a sum of Rs.46,78,000/- along with further interest at the rate of 18% p.a. for the RTO Fees, as set out in the Respondent's Counter Claim?

(13) Does the Respondent prove that the Claimant is liable to pay the Respondent a sum of Rs.37,29,000/- along with further interest at the rate of 18% p.a. for the defacement charges incurred by Respondent, as set out in the Respondent's Counter Claim?

(14) What Order?

(15) What Costs?

9) Petitioner filed application under Section 17 of the Arbitration Act for injunction against the Respondent from invocation of Bank Guarantees and forfeiture of security deposit. During the course of hearing Petitioner filed Application under Section 17 of the Arbitration Act, Respondent filed Application under Section 16 challenging jurisdiction of Arbitral Tribunal contending that non-payment of requisite stamp duty on the contract had a reflection on jurisdiction of Arbitral Tribunal. The Arbitral Tribunal rejected Section 16 Application by order dated 28 July 2022. Thereafter Application filed by Petitioner under Section 17 of the Arbitration Act was withdrawn by the Petitioner.

10) Parties led evidence in support of their respective cases. Arbitral Tribunal has made Award dated 2 January 2024 rejecting all the claims of the Petitioner and allowing some of the claims raised by the Respondent in counterclaim. Operative part of the Award reads thus:-

A) All the Claims made by the Claimant are rejected.

B) The Claim of the Respondent is allowed to the extent given below:

i) In terms of prayer clause 'B' of Counter Claim of the Respondent, the Respondent is entitled to an Award in the sum of Rs. 49,60,063 (Rs. Forty Nine Lakh Sixty Thousand Sixty Three Only) along with interest@ 18% p.a. from 5-12-2022 i.e filing of the Counter Claim till the date of this Award Accordingly, The Claimant is directed and ordered to pay to the Respondent the total sum of Rs Rs. 49,60,063 (Rs. Forty Nine Lakh Sixty Thousand Sixty Three) along with interest @18%

p.a from 5-12-2022 i.e filing of the Counter Claim till the date of this Award.

ii) In terms of prayer clause 'C' of Counter Claim of the Respondent, the Respondent is entitled to an Award in the sum of Rs. 46,78,000 (Rs. Forty Six Lakh Seventy Eight Thousand Only) along with interest @ 18% p.a. from 5-12-2022 i.e filing of the Counter Claim till the date of this Award Accordingly, The Claimant is directed and ordered to pay to the Respondent the total sum ofRs. 46,78,000 (Rs. Forty Six Lakh Seventy Eight Thousand Only) along with interest@ 18% p.a. from 5-12-2022 i.e filing of the Counter Claim till the date of this Award On realization of this mount the Respondent shall pay the required outstanding RTO fee as per the RTO rules applicable, to the concerned RTO authorities .

iii) In terms of prayer clause 'D' of Counter Claim of the Respondent, the Respondent is entitled to an Award in the sum of Rs.37,29,000(Rs. Thirty Seven Lakh Twenty Nine Thousand only) along with interest @ 18% p.a. from 5-12-2022 i.e. filing of the Counter Claim till the date of this Award. Accordingly, the Claimant is directed and ordered to pay to the Respondent the total sum Rs.37,29,000 (Rs. Thirty Seven Lakh Twenty Nine Thousand only) along with interest @ 18% p.a. from 5-12-2022 i.e. filing of the Counter Claim till the date of this Award.

iv) The Claimant is directed and ordered to pay to the Respondent further interest@ 10% p.a. on the total sums as detailed in i), ii) and iii) above, from the date of this Award till realization.

C) The Respondent is also entitled to costs as are held payable by the Claimant as mentioned earlier and as such the Claimant is directed and ordered to pay to the Respondent a sum of Rs. 48,20,000 (Rs. Forty-Eight Lakh Twenty Thousand only) towards such costs together with interest @ 10% p.a. from the date of this Award up to the date of payment and/or realization.

D) The Arbitral proceedings are accordingly terminated by this final Award.

11) Aggrieved by the Award dated 2 January 2024, Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

SUBMISSIONS

12) Mr. Harshavardhan Kotla, the learned counsel appearing for the Petitioner has canvassed following submissions in support of the Arbitration Petition:-

(a) That the Tribunal's finding that Petitioner is not entitled to rebate for damaged buses is recorded in ignorance of vital evidence and is contrary to the stipulations of the contract, which expressly imposes an obligation on the Respondent and further provides for rebate towards reduction of fleet. That the finding is therefore contrary to public policy of India and is also patently illegal.

(b) Finding of the Tribunal that Clause-4.1 is not applicable to the present dispute is patently illegal since the finding is in derogation of terms of that clause. That under Clause-4.1 it was the contractual obligation of the Respondent to provide required support for each bus to carry out advertisement in good condition. That by making available damaged buses for display of advertisement, the Respondent committed breach of obligation under Clause 4.1 making the Petitioner entitled to seek rebate in the fees.

(c) That the learned Arbitral Tribunal has erroneously rejected Petitioner's argument of waiver raised on the basis of Respondent's conduct of making available rebate in respect of several buses on which advertisement could not be displaced. That after granting rebate in respect of partial number of damaged buses, Respondent was estopped from questioning rebate entitlement of the Petitioner in respect of all identified damaged buses in the joint inspection.

(d) That the Arbitral Tribunal has erroneously treated the claim of Petitioner for rebate towards damaged buses as claim for damages /compensation. On such erroneous assumption the Tribunal committed further error in expecting the Petitioner to adduce evidence to support

cause of loss. Without prejudice he would submit that the Tribunal failed to appreciate that liability to pay fees in respect of the damaged buses is the loss caused to the Petitioner.

(e) That the Arbitral Tribunal has failed to interpret and construct various clauses of the contract without reading them harmoniously.

(f) That the contract envisaged rebate in the fees payable by the Petitioner if there was reduction in the number of buses for any reason.

(g) That the Arbitral Tribunal erred in not appreciating the position that Clause-1.3 of the contract is an overarching provision dealing with rebate /concession and Clause-4.1 is only one of the eventualities in which the rebate was admissible and that therefore it was necessary to separately deal with entitlement of rebate in Clause-4.1 of the contract.

(h) That the Arbitral Tribunal has not even considered the stipulations under Schedule-IX of the contract dealing with 'Terms of Payment' under which fleet of buses, which were made available for display of advertisement on first day of each previous month was an important factor in the formula for determination of monthly rentals. That thus, payment of monthly fees was not static and was in fact dynamic depending on the number of buses made available for display of advertisements. That therefore if certain number of buses were not made available for any reason, including damaged buses, the amount of monthly rentals would automatically become liable for reduction.

(i) That the Arbitral Tribunal has egregiously erred in not sanctioning the claim for refund of excess amount paid by the Petitioner by ignoring the formula under Schedule-IX of the contract.

(j) That the Petitioner produced chart of buses actually deployed by the Respondent every day before the Arbitral Tribunal and that therefore the actual number of buses deployed by the Respondent on first day of previous month was required to be taken into consideration while determining monthly rentals payable by the Petitioner. However, no finding is recorded by the Arbitral Tribunal on this vital aspect and the claim for refund of excess payment is erroneously rejected by taking into consideration reasons for rejection of claim towards damaged buses.

(k) That the Tribunal's finding that the Petitioner is not entitle to rebate for 8 days from 23 March 2020 to 31 March 2020 is in contravention of terms of contract and hence contrary to public policy in India and is in conflict with basic principles of natural justice. That the Tribunal erred in rejecting claim for rebate for 8 days of Covid-19 period by ignoring a specific stipulation under Clause-19 of the contract relieving the Petitioner from obligation to pay monthly display charges due to occurrence of *force majeure* event.

(l) That the Tribunal erroneously rejected waiver plea raised by the Petitioner by invoking reasons for rejection of claim for rebate for damaged buses.

(m) That the Arbitral Tribunal has erred in awarding interest on interest in favour of the Respondent, which is clearly

contrary to fundamental policy of Indian law. That the Arbitral Tribunal failed to consider that delayed payment charges are in themselves penal interest on delayed charges of monthly display charges.

(n) That no computations were produced by the Respondent and vague figure of Rs.49,60,063/- was presented before the Arbitral Tribunal *sans* any particulars. That Petitioner paid the entire outstanding dues towards display charges by clearing all the arrears and by paying contractual delayed payment charges on 9 December 2022, 24 December 2022, 8 January 2023 and 24 January 2023.

(o) That under the contract, the delayed payment charges were in the form of interest @18% p.a. for first six months, 24% p.a. for next six months and 30% p.a. beyond one year. That it is otherwise unjust to direct Petitioner to pay further interest of 18% on such hefty amount of interest already paid.

(p) That the Arbitral Tribunal has erroneously sanctioned claim for RTO fees in the sum of Rs.46,78,000/- alongwith interest which is contrary to the terms of the contract. That the Arbitral Tribunal only considered terms of stipulation in letter dated 23 January 2019 ignoring Clause-14.2.1 of the Schedule- III (General conditions of contract) which gave an option to the Petitioner to pay RTO fees of Rs.62,42,000/- for first year or actual RTO fees for every subsequent years. That during the period from March-2020 to October 2020, buses of the Respondent were admittedly not plying and that therefore RTO fees were not payable in respect of that period. That Petitioner had paid advance RTO fees for the period from February-

2020 to January 2021 and therefore it was entitled to adjust the said fees in the third year period.

(q) That there is nothing on record to indicate that the Respondent actually paid fees to the RTO. That the words '*or at actual'* occurring in sub-clause (b) of Clause-14.2.1 would mean payment by the Petitioner of only '*actual fees paid by BEST to RTO*'. That in absence of no proof being produced by the BEST about payment of fees to RTO, it would amount to unjust enrichment for BEST to claim fees from the Petitioner.

(r) That Tribunal's conclusion that the Respondent is entitled to defacement charges alongwith interest @ 18% is patently illegal and contrary to fundamental policy of Indian Law.

(s) That while awarding claim towards defacement charges, the Arbitral Tribunal ignored the ratio of the judgment in ***Kailash Nath Associates V/s. Delhi Development Authority and Anr.***[1] in which it is held that if penalty is stipulated in the contract, the same represents the maximum cap upto which damages can be awarded subject to proof of cause of loss. That the Respondent did not lead any evidence to prove cause of loss on account of alleged non-removal of advertisement by the Petitioner after expiry of the contract.

(t) That there is no evidence to indicate that the advertisement were actually removed by the Respondent or that it incurred any expenditure towards such removal.

(u) That in any case contract for the next term is also awarded to the Petitioner and that therefore no eventuality

1 2015 (4) SCC 136

occurred for removal of advertisements of previous contract.

(v) That the Arbitral Tribunal has erred in awarding hefty cost of arbitration at Rs.48,20,000/- with further interest @10%. He would also rely on judgment of Division Bench of this Court in ***Anila Gautam Jain. V/s. Hindustan Petroleum Corporation Ltd. through the Chief Regional Manager***[2].

(w) That the interest awarded by the Arbitral Tribunal is unreasonable. That pre-Award interest of 18% and post-Award interest of 10% awarded by the Arbitral Tribunal is unjust and contrary to the contractual term.

13) On above broad submissions, Mr. Kotla would pray for setting aside the impugned Award.

14) The Petition is opposed by Mr. Shah, the learned counsel appearing for the Respondent-BEST. He would raise following submissions:

(a) That the Award made by the Arbitral Tribunal is strictly in conformity with contractual terms agreed between the parties. That the Arbitral Tribunal has acted strictly in accordance with contract clauses and none of the findings recorded by it contravenes any particular contractual stipulations. That the findings recorded by the Arbitral Tribunal are based on evidence on record and that there is no element of perversity in those findings. That the Arbitral Tribunal has taken plausible

2 2018 SCC Online Bom 917

view, if not correct view. That therefore, none of the grounds enumerated in Section 34 of the Arbitration Act are made out by the Petitioner warranting dismissal of the Arbitration Petition.

(b) That the claim of the Petitioner for rebate in respect of damaged buses was contrary to the contractual provisions. That there is no stipulation in the contract under which Petitioner could be granted any rebate in respect of buses which are damaged. That on the contrary, Clause-1.1.1 of Schedule-VI specifically reserves right for BEST to increase or decrease the number of buses without affecting obligation of the Petitioner to pay display charges. That Clause-1.1.1 of Schedule-VI specifically provides that 100% buses need not be on road and that no claims could be raised by the Petitioner in respect of the buses which could not be deployed on road.

(c) That Tender document contained specific provision for disclaimer under which the Petitioner was required to satisfy itself about the fleet of buses available with the Respondent. That the Petitioner was supposed to inspect and investigate the fleet of buses and thereafter quote the Tender price. Though the Petitioner conducted such inspection, it did not raise any queries in respect of the alleged damaged buses. Even in pre-bid meeting he did not raise any query about damaged buses. Clause-4.1 of Schedule-III of the contract contemplated provision of only support by BEST for the purpose of display of advertisement in good condition, which cannot be confused with a guarantee that

undamaged buses would only be made available for display of advertisement to the Petitioner. That the words '*good condition*' applies to advertisement and not to buses.

(d) That Petitioner's claim for rebate of 8 days for Covid-19 period was *ex-facie* baseless and rightly rejected by the Arbitral Tribunal by recording cogent evidence, which do not suffer from vice of perversity.

(e) That Petitioner's claim for refund of excess payment was made out of misreading of contractual provisions. That number of buses actually deployed on the road had no corelation to Petitioner's obligation to pay display fees. That Schedule-IX contemplated '*fleet'* of buses '*available for display*' of advertisement on first day of previous month. This would mean the number of buses available in the fleet and not number of buses actually deployed on the road. That Clause-1.1.1 of Schedule-VI provides that BEST had necessary flexibility to increase or decrease the buses and not to deploy 100% buses on the road. The Petitioner agreed not to raise any claim in respect of undeployed buses.

(f) That evidence led by the Respondent in respect of the fleet size has remained uncontroverted and that therefore claim raised by the Petitioner in respect of refund of the alleged excess payment was totally baseless and rightly rejected by the Arbitral Tribunal.

(g) That the Arbitral Tribunal has rightly allowed the claim for interest on delayed payment charges as parties had agreed on clear contractual stipulation of payment of '*additional interest*' on delayed payment charges, if the

contractor failed to pay delayed payment charges within a period of three months. That therefore, award of claim for interest on delayed payment charges was perfectly as per the contractual stipulations.

(h) That the learned Arbitrator has rightly allowed claim of the Respondent for RTO fees and indemnified Respondent of obligation to pay the same to RTO. That it is well settled law that contract of indemnity becomes enforceable the moment RTO's claim *qua* the Petitioner gets fructified and also proof of actual payment of fees to RTO is not necessary for enforcing indemnity against the Respondent. That the Tribunal has rightly relied on four judgments cited by the Respondent in this regard.

(i) That the Arbitral Tribunal has rightly allowed the claim towards defacement charges of Rs.37,29,000/- as the said claim clearly flows out of contractual stipulations under Clause-21of Schedule-III . That Petitioner did not dispute the amount of defacement charges calculated by the Respondent and is now estopped from questioning the award of the said claim. The Respondent had obligation to provide advertisement on buses to the new contractor, which is a reason why obligation was imposed on the Petitioner to remove all its advertisements from buses or to bear expenses for such removal in addition to payment of penalty of Rs.1,000/- per bus per day. That Petitioner admittedly breached the contractual stipulation in Clause-21 of Schedule-III and failed to remove its advertisements from the buses. That since the Petitioner agreed to pay penalty of Rs.1,000/- per bus per day it cannot now

expect the Respondent to lead evidence to prove loss caused to the Respondent. That the Petitioner is misreading the ratio of the judgment in ***Kailas Nath Associates*** (supra) which recognises right to recover the entire amount of stipulated penalty /damages upon breach of contract.

(j) That mere award of contract to the Petitioner for further period of three years does not absolve its responsibility of paying defacement charges sans penalty directed under Clause-21 of Schedule-III. The Respondent could not have envisaged award of next contract to the Petitioner and there was wide gap between tenures of two contracts. That in any case award of claim for defacement is directly in conformity with Clause-21of Schedule-III of the contract.

15) On above broad submissions, Mr. Shah would pray for dismissal of the Arbitration Petition.

REASONS AND ANALYSIS

16) Petitioner is an advertisement contractor engaged by Respondent-BEST for display of advertisements on its municipal buses. Respondent-BEST operates one of the largest fleets of municipal buses in the city of Mumbai and surrounding areas. It appears that initially the fleet of BEST was declared as 3121 buses on which Petitioner was to exploit advertisement rights for a period of 3 years from 11 February 2019 to 10 February 2022 after paying display charges to the Respondent. Petitioner was selected by Respondent-BEST through competitive bidding process and the

Petitioner had bid for amount of Rs.95.50 crores for exploitation of advertisement rights on buses of the Respondent for a period of 3 years. Under Clause-7 of the letter of allotment, Petitioner was under obligation to pay monthly display charges in advance to the Respondent in the prescribed formula which was, multiplication of bid price by 36 months by fleet of buses of 3121 which was to be further multiplied by the fleet as on the first day of previous month. Clause-7 of the letter of allotment reads thus :-

> **7.Payment of monthly rentals:** You shall pay to the Undertaking the monthly display charges in advance as per the formula given below on or before the first day of every month through RTGS/NEFT/DD/PO under intimation to AGM(TE)'s office.
>
> Amount of monthly rentals for the month= Rs. 95,50,00,000/ (36 X 3121) X Fleet as on first of previous month.

17) After commencement of the contract tenure, disputes arose between the parties as Petitioner initially raised the issue of large number of damaged buses and claimed significant rebate. According to the Petitioner as many as 966 buses out of total fleet of 3121 buses were damaged which were incapable of being used for display of advertisements. Initially, Respondent-BEST refused to accede to the demand of the Petitioner for rebate in respect of 966 buses but subsequently acceded partially to the request in respect of 672 buses by letter dated 15 March 2022. Petitioner still remained unsatisfied and continued claiming rebate in respect of the balance damaged buses. Though Petitioner was granted rebate in respect of the Covid-19 period, it continued demanding rebate in respect of 8 additional days. Petitioner claimed that the formula prescribed in the agreement for computation of monthly display charges was erroneously applied without taking into consideration the actual buses plying on the road each month and contended that the

Respondent had recovered excess monthly display charges from it. The disputes raised by the Petitioner were referred to resolution by arbitration. By filing of Statement of Claim, the Petitioner raised following 8 claims.

> Claim No. 1 Claim on Rebate of damaged buses.
>
> Claim No.2 Claim on rebate due to Not Out buses. (Non operational buses as per the data provided by the Respondent.
>
> Claim No.3 Rebate from 23rd March 2020 to 31st March 2020 in the wake of COVID-19 pandemic.
>
> Claim No.4 Loss of business sentiments and limited opportunities.
>
> Claim No.5 Rebate on the RTO fees paid to the Respondent.
>
> Claim No.6 Claim on payment of Rs. 2,31,204/- paid to the Respondent under protest.
>
> Claim No.7 Payment of Rs. 12,14,00,000/- paid to the Respondent under protest.
>
> Claim No.8. Rebate on incorrect interest levied on outstanding dues since the inception of the subject Tender.

18) Respondent, in addition to resisting the statement of claim, filed its own counterclaim and raised claims *inter alia* for interest on delayed payment charges, RTO fees, defacement charges, etc against the Petitioner. The Arbitral Tribunal has rejected all the claims of the Petitioner and has sanctioned 3 Counterclaims of Respondent-BEST in addition to award of costs and interests in its favour.

19) Petitioner is aggrieved by rejection of all its claims and by grant of three claims in favour of the Respondent, in addition to direction for payment of costs and interests. Though several claims were raised by parties against each other, the Petitioner has not canvassed submissions before me with regard to the findings

recorded by the Arbitral Tribunal in respect of each of its claims and counterclaims of the Respondent. The scope of the present Petition is thus restricted in respect of rejection of three claims of Petitioner and grant of three counterclaims of the Respondent which are as under:

REJECTION OF CLAIMS OF PETITIONER		
1	Rebate for damages business amounting to Rs.4,67,42,372/-	Rejected
2	Rebated for 8 days' Covid-19 period amounting to Rs.99,42,444/-	Rejected
3	Refund of excess amount paid by the Petitioner to Respondent of Rs.14,45,33,204/-	Rejected
COUNTERCLAIMS AWARDED IN FAVOUR OF THE RESPONDENT		
4	Interest on delayed payment charges of Rs.49,60,063/- alongwith further interest at 18% p.a.	Allowed
5	RTO fees of Rs.46,78,000/- alongwith interest @ 18% p.a.	Allowed
6	Defacement charges of Rs.37,92,000/- alongwith 18% interest	Allowed
7	Costs of arbitration proceedings of Rs.48,20,000/- with future interst @ 10% p.a.	Allowed
8	Interest @ 18% p.a. on three counterclaims granted in favour of the Respondent from the date of the Award till realisation	Allowed

20) Now I proceed to examine whether any ground is made out by the Petitioner for interference in rejection of its claims and sanctioning counterclaims of the Respondent.

REJECTION OF CLAIM FOR DAMAGED BUSES

21) Petitioner has raised claim of 4,67,42,372/- towards rebate for damaged buses on which it allegedly could not display

advertisements during the relevant period. The Arbitral Tribunal framed Issue No.5 for deciding this claim of the Petitioner, which was as under :-

> **Issue No.5.** Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate to the Claimant on damaged buses for an amount of Rs.4,67,42,372/-, as alleged or otherwise?

22) Petitioner's claim for rebate in respect of damaged buses was premised essentially on the alleged joint survey conducted by the parties in November 2019 in which 753 buses were found to be majorly damaged. A further joint survey was apparently conducted in July 2021 in which it was found that 131 buses were consistently damaged since 2019 and 175 buses were identified to be damaged after 2019. Petitioner accordingly pressed for de-notification of 966 buses from fleet of 3121 buses for computing the monthly display charges. Initially the request was rejected by BEST vide letter dated 13 May 2019. However, subsequently Respondent-BEST partially accepted the request for rebate in respect of damaged buses by letter dated 15 March 2022 by adjusting payment of display charges of 5,63,73,558/- for 672 buses for the period from 11 February 2019 to 23 December 2019 due to inability in displaying advertisements on damaged/dented buses. The relevant portion of letter dated 15 March 2022 reads thus :-

> ii) To adjust payment of display charges amounting to Rs.5,63,73,558/-for 672 buses for the period from 11th February 2019 to 23rd December 2019 (316 days) due to inability to display advertisement on damaged/dented Buses.

23) Based on letter dated 15 March 2022, Petitioner pressed into service the theory of waiver for claiming that since the claim for 672 damages buses was accepted, the objection of absence of

contractual obligation for rebate for damaged buses must be treated as having waived by the Respondent. The Arbitral Tribunal has however rejected the contention of waiver by recording following findings:-

> 16.4 Both the above authorities relied on by the Claimant are also taken shelter of by the Respondent in order to counter the arguments advanced on behalf of the Claimant as to 'Waiver'. On this issue defence of the Respondent is that said rebate/concession given to the Claimant was subject to the fulfilment of other conditions mentioned in the letters dated 28th June 2021 and 15th March 2022. Moreover, the said rebate was not granted as a matter of right vested in the Claimant but it was the gratuitous act of the Respondent. Considering the rival submissions on this aspect of Waiver in the considered view of this Tribunal said arguments on behalf of the Claimant shall not sustain, in as much as grant of rebate for Covid period as detailed in the letter dated 28 June 2021 was conditional and was on certain conditions as detailed therein Moreover, such conditional rebate is required to be looked into along with various terms and conditions of the Tender document and specially 'Disclaimer' mentioned therein, so also is the case with respect to letter dated 15th March 2022.
>
> 16.5 In the considered view of this Tribunal conditional grant of rebate on damaged buses is clinching material in order to hold that there is nothing expressed by the Respondent to abandon its rights to challenge the claim of the Claimant on damaged buses. More over conditions in iii) and v) in this letter are admittedly not complied by the Claimant. Furthermore this 'Waiver' issue is put to rest by the clinching provision in the Contract dated 4-11-2020 (Exhibit UUU to SOC) entered into between the parties and filed on record of this Tribunal on 4-7-2023. Clause 38. 'b' of this Contract reads thus, which is self-explanatory.

24) I am in full agreement with the above findings recorded by the learned Arbitrator. Mere extension of gratuitous act by Respondent-BEST in granting rebate in respect of 672 damaged buses cannot be used by Petitioner to advantage for claiming rebate for balance alleged damaged buses contrary to the contractual covenants. The advertising rights were granted in respect of 'fleet' of buses available with BEST. While computing the monthly advertisement charges, actual number of buses available in the fleet

was taken into consideration for each month and Petitioner had agreed for computation of charges in accordance with the formula. It had inspected the buses before quoting the bid price. The contract clauses specifically provided for payment of display charges even in respect of buses rendered inoperational due to maintenance work. Petitioner agreed for a comprehensive contract not connected with actual number of buses plying on the road or actual number of buses fit for display of advertisements. It quoted the bid price accordingly. After commencement of contract, it could not have turned around and contended that the gratuitous act of BEST in granting rebate for few buses would constitute as admission of liability or waiver of objection about absence of contractual clause for rebate in respect of damaged buses. In any event, Mr. Kotla has not raised a very serious objection in respect of findings on waiver, and in my view, rightly so.

25) After debunking the theory of waiver, the Arbitral Tribunal has also considered contractual stipulations for rejecting Petitioner's claim for rebate for damaged buses.

26) Turning to the contractual stipulations, the sheet anchor of Petitioner is Clause-4.1 of Schedule-III of General Conditions of Contract, which reads thus:-

> 4.1 The Contractor shall maintain the advertisements in good condition and shall take responsibility of getting the work of defacing/replacing/repairs or repainting done at their own cost. The General Manager agrees to provide at its own cost such support as may be required on each bus to carry out the advertisements in good condition. Further, the painting or repainting of advertisements directly on buses and pasting of vinyl stickers will have to be done by the Contractor with proper care. The Contractor shall ensure that the bus is repainted in the area within three days as per the specification of BEST.

27) Under clause-4.1, the General Manager of BEST agreed to provide, at its own cost, such support as may be required by each bus to carry out advertisements in good condition. The clause does not stipulate that every bus must be provided in good condition for display of advertisement. The words 'good condition' is attached to the word 'advertisement' and not to the word 'bus'. Furthermore, Clause-4.1 does not provide for any rebate in the event of any bus being not made available for advertisement due to damage.

28) Faced with the difficulty of absence of provision in the contract Clause-4.1 for rebate in respect of buses which were not in condition to display advertisements in 'good condition', Mr. Kotla has submitted that Clause-4.1 identifies one of the eventualities where display charges became non-leviable and the overarching provision for rebate is to be found in Clause-1.3 of Schedule-VI. According to him, the moment there is reduction in number of buses available for display of advertisements, pro-rata rebate was automatic under Clause-1.3 of Schedule-VI.

29) Schedule-VI under heading 'Scope of Work' stipulated that the display charges were to be paid in lumpsum in accordance with the schedule of prices in Schedule-VII under which bidders were expected to quote net display lumpsum charges in respect of 3121 buses. Schedule-VI under heading 'Scope of Work' stipulated following conditions:

> **1. SCOPE OF CONTRACT**
>
> 1.1 This contract is for the sole right for display of advertisement on Undertaking's buses on payment of monthly installments based on lumpsum display charges offered for a given period, as offered

by the tenderer as per Schedule of Prices, Schedule-VII and according to the conditions given below:

1.1.1 The Undertaking shall have the right to increase and / or reduce the number of depots, number of buses in a depot, scheduled turnout and fleet composition at different depots, subject to the total number of buses as mentioned below being made available and to change the route/s of the buses displaying advertisements at its sole discretion. The 100% buses may not be on road considering their repair and maintenance. No claims shall be raised by the Contractor against upkeep and maintenance of buses.

1.1.2 The Undertaking reserves right to vary number of buses allotted for display of advertisement out of its total fleet for specific/entire period of contract.

1.2 Initially 3121 buses of different seating capacity, make, model etc. of the BEST Undertaking would available to the contractor. However buses already under Public Private Partnership (PPP), Electric buses, Hybrid buses, donated buses and buses given to BEST in lieu of advertising rights or similar such considerations will not be covered in this contract. Further, buses which are specified (new Tata buses) for non-display during part/entire contract period, will also be excluded from the scope of this tender.

1.3 The rebate / concession shall be granted to the contractor for reduction in the fleet by way of pro-rata relief in the payment of monthly rentals. If the fleet increases over the fleet allocated, the contractor shall be charged on pro-rata basis. The Undertaking reserves the right to allocate spaces other than those specified in the attached tender documents, to any other contractor by issuing a separate contract. The Undertaking may offer these spaces to the highest bidder of this tender on pro-rata basis.

1.4 The area available for advertising purpose on buses is as per the drawing attached.

30) It is the contention of Mr. Kotla that Schedule-VI stipulations are overarching agreed conditions for rebate without specifying the exact eventualities and that Clause-4.1 Schedule-III of dealt with one such eventuality under which rebate was required to be granted if the bus was not in good condition. I am unable to agree. Under Clause-1.1.1 of Schedule-VI , BEST not only had right to increase or decrease the number of buses, but it was also specifically agreed between the parties that '*100% buses may not be on road considering their repairs and maintenance*' and that '*No claim shall*

be raised by the contractor against upkeep and maintenance of buses.'

31) Clause-1.3 of Schedule-VI provided for rebate/concession in respect of '*reduction in the fleet*'. Clause-1.3 is in consonance with Schedule-IX 'Terms of Payment' which prescribed following formula under Clause-1.1:-

> **Payment of Monthly Rentals:**
>
> 1.1 The contractor shall pay to the Undertaking the display charges quoted by it in the "Form of Offer" by way of monthly installment in advance on or before the first day of every month, by demand draft or pay order or through RTGS/NEFT to be submitted to the Asst. General Manager (Transportation Engineering).
>
> The amount of monthly rentals shall be calculated as under:
>
> Amount of monthly rental for the month=A
> Total display charges quoted for 3121 [excluding new Tata buses (185), Hybrid buses (25) & Electric buses (6) from current fleet of 3337 Buses] buses = B
> No. of months in a contract=36
> Total fleet of the Undertaking before commencement of contract = 3121 Buses
> Fleet of the Undertaking available for display of advertisement as on first of the previous month = C
>
> $$A = \frac{B}{36 \times 3121} \times C$$
>
> On failure to do so, besides other remedies open to the Undertaking under this contract and at law, the contractor shall be required to pay to the Undertaking interest as specified in clause no 24 of General Conditions of Contract for the period from the due date of payment till the date the payment is actually received (both days inclusive) by the Undertaking. In case the payment is withheld beyond the period of 30 days from the due date of payment, the Undertaking shall be at liberty to terminate the contract without any claim or compensation / refund by contractor under the provisions of clause no. 26 of General Conditions of Contract.

32) Thus, 'fleet' of the undertaking available for display of advertisement as on the first day of previous month' was the only

determinative factor for variance in monthly display charges since other figures of overall fleet size of 3121, tenure of 36 months of contract and price quoted by the Petitioner remained static throughout the contract. The words '*fleet of the undertaking available for display*' did not mean number of buses actually plying on the road. If in the event, BEST decided to reduce the fleet by 500 buses, the monthly display charges would automatically get reduced under the formula. Because in such event the fleet size reduces and those number of buses go out of purview of contract. Petitioner has misconstrued the word 'fleet' with the word 'buses'. The eventuality of reduction in the number of buses in a fleet on particular day/month is taken care of under Clause-1.1.1 of Schedule-VI wherein no claim was to be raised by the Petitioner if the buses were not available for plying due to 'upkeep' and 'maintenance'.

33) The Arbitral Tribunal has rightly construed the interplay between the terms and conditions under Schedule-VI and Clause-4.1 of Schedule-III for holding that there was no provision in the tender document or the contract for seeking de-notification of 966 buses. The interpretation made by the learned Arbitrator in respect of various contractual clauses upon their holistic reading is sound. Even otherwise, interpretation of terms of contract is in exclusive domain of the Arbitral Tribunal. Even if the interpretation suffers from any error, it is an error within the jurisdiction of the Arbitral Tribunal not warranting any interference in exercise of power under Section 34 of the Arbitration Act. In the present case, however no error is traced in the interpretation of contractual clauses by the Arbitral Tribunal even upon a detailed scrutiny undertaken by this Court on account of contentions raised by the Petitioner. In my view,

therefore the Arbitral Tribunal has rightly rejected the claim of 4,67,42,372/- for rebate on damaged buses.

REJECTION OF CLAIM FOR REBATE OF Rs.99,42,444 FOR 8 DAYS COVID PERIOD

34) The Arbitral Tribunal has discussed this claim by framing Issue No.7 which reads thus :-

> **Issue no. 7:** Does the Claimant prove that under the 2019 Tender, Respondent is obliged to provide rebate for the 8 day period from March 24, 2020 to March 31, 2020 in view of COVID 19 pandemic for an amount of Rs.99,42,444/-, as alleged or otherwise?

35) Respondent granted rebate in favour of the Petitioner on account of Covid-19 pandemic vide two letters dated 28 June 2021 and 15 March 2022. The rebate was 100% from 1 April 2020 to 30 September 2020. It was again 100% from 1 October 2020 to 31 December 2020 as health-related advertisements were displayed by MCGM on buses during that period. From 1 January 2021 to 28 February 2021, the rebate was 75%, and from 1 January 2021 to 31 March 2021 onwards the rebate was 50%.

36) Despite grant of substantial rebate, the Petitioner has raised further claim for rebate for period of 8 days from 24 March 2020 to 31 March 2020 for Rs.99,42,444/-. The Arbitral Tribunal has rejected this claim by referring to Clause-19(a) of the contract, under which the obligation for Petitioner to pay monthly advertisement charges remained continuous even on occurrence of a force majeure event. The rejection of claim is thus in accordance with contractual stipulations, and I do not find any reason to

interfere in the findings recorded by the Arbitral Tribunal while rejecting the claim for rebate in monthly display charges for 8 days. Again, considering that the claim is only in respect of 8 days, the rejection is not seriously challenged during the course of oral submissions. It is therefore not necessary to delve deeper into this aspect.

REJECTION OF CLAIM FOR REFUND OF EXCESS AMOUNT PAID BY PETITIONER OF Rs.14,45,33,204

37) This was a curious claim raised by the Petitioner by misreading of contractual stipulations by mixing the concept of 'total fleet of undertaking' with 'buses made available for plying'. According to the Petitioner, the Respondent made available the details of operational buses on each day to the Petitioner during the contract period, which reflected that the actual number of operational buses were far lesser than the fleet size considered by Respondent while computing monthly display charges under formula envisaged in Schedule-IX. According to Petitioner, actual number of buses which plied on first day of a month was substantially lesser than the number of fleet size considered for computation formula. Petitioner therefore believed that it was charged excess monthly advertisement charges by BEST. According to the Petitioner, the information supplied to it vide email by Respondent showed substantial difference in the actual buses plying on the road as compared to the fleet size considered for determination of monthly display charges.

38) The above contention raised on behalf of the Petitioner deserves rejection for the reasons which have been recorded for

discussing the claim for rebate in respect of damaged buses. The formula under Schedule-IX prescribed the method of computation of monthly advertisement display charges, under which the contract price of Rs.95.5 crores quoted by the Petitioner was required to be divided by a number '36 x 3121' and the figure so arrived was further required to be multiplied by the 'fleet of undertaking available for display for advertisement' as on the first day of previous month. Here the contract did not stipulate that the figure 'C' was to represent number of buses plying on the road. The number 'C' represented the size of the fleet made available for advertisement by the Petitioner every month. This is because though Petitioner had quoted contract price of Rs.95.5 crore for 3121 buses, the Petitioner had right to reduce or increase the fleet size. The contract was to run for 3 years. In the contract period, Respondent-BEST could have reduced the fleet size on account of various reasons such as discarding of buses and non-replacement thereof by new buses, non-giving of business to the Petitioner for display of advertisements, etc Therefore, the actual number of buses made available on the road on a particular day has no significance for computing monthly display charges. The Arbitral Tribunal has rightly rejected the claim for alleged excess payment by adopting the reasonings in respect of rejection of claim for rebate on damaged buses. Petitioner's criticism of the Award by contending that separate reasons are not recorded for rejecting claim for excess payment is clearly misplaced. The reasons for discussing the claim for rebate for damaged buses and claim for refund of excess payment in bound to be similar. Therefore, no fault can be found in the Award of Arbitral Tribunal rejecting the claim for excess payment.

COUNTERCLAIM FOR INTEREST ON DELAYED PAYMENT CHARGES OF Rs.49,60,063

39) This claim has been discussed by the Arbitral Tribunal while answering Issue No.11. However, answer to Issue No.11 also depended on answer to Issue No.10, which related to counterclaim raised by the Respondent in respect of delayed payment charges of Rs.4,13,69,016/-. Issue Nos.10 and 11 were as under:-

> **Issue No.10:** Does Respondent prove that the Claimant is liable to pay Respondent a sum of Rs.4,13,69,016/- along with further interest at the rate of 18% p.a. for the delayed payment charges, as set out in the Respondent's Counter Claim?
>
> **Issue No.11:** Does the Respondent prove that the Claimant is liable to pay the Respondent a sum of Rs.49,60,063/- along with further interest at the rate of 18% p.a. for the interest on the delayed payment charges, as set out in the Respondent's Counter Claim?

40) While answering Issue No.10, the Tribunal noticed that during pendency of arbitral proceedings, the outstanding amount towards delayed payment charges were paid by the Petitioner. Para-46 of the Affidavit of Evidence of RW1 reads thus :-

> 46. During the pendency of these proceedings, the three post dated cheques of Rs. 1,00,00,000/- each have been provided by the Claimant to the Respondent which have since been deposited on December 9, 2022, December 24, 2022, and January 8, 2023, respectively. A further cheque for INR 1,06,75,543 was also provided on January 24,2023 which has also been encashed. Accordingly, after giving credit for the amount of those cheques, further delayed payment charges, as also a further rebate of INR 36 Lakh given for buses which had gone for bodybuilding, the total amount due from the Claimant to the Respondent on this count is nil.

41) Thus, the claim for recovery of delayed payment charges was recorded as satisfied. However, the amounts were paid on different dates as indicated in para-46 of affidavit of evidence of

RW1. Therefore, the Respondent continued pressing its claim for interest of Delayed Payment Charges (**DPC**).

42) The contract did not provide for any fixed sum to be paid towards delayed payment charges. The delayed payment charges by itself represented interest at stipulate rates. It would be apposite to reproduce clause-24 of Schedule III, which reads thus :-

> **24. Non-payment of charges :** The GST is payable on accrual basis after raising invoices/bills to the parties to avoid non compliance of statutory provisions. The delayed payment charges on any sum due and payable by the contractor to the Undertaking, shall be payable @ 18% p.a. for the first six months, 24% p.a. for the next six months and 30% p.a. for delay beyond one year irrespective of the fact whether the said condition is mentioned hereinabove or not. Moreover, if the contractor fails to pay interest on delayed payment within three months then the additional interest @ 18% p.a. will be levied on such outstanding interest.

43) Thus, under Clause-24 of Schedule-III, delayed payment charges in respect of any sum payable to BEST was fixed @ 18% p.a. for first 6 months, 24% p.a. for the next 6 months and 30% p.a. for delay beyond one year. There is no dispute to the position that delayed payment charges as per agreed rate of interest is actually paid by the Petitioner to the Respondent. However, Respondent claimed interest on delayed payment charge which virtually tantamounts to 'interest on interest'.

44) Clause-24 of Schedule-III of the contract provided that '*moreover if the contractor fails to pay* ***interest*** *on the delayed payment within 3 months, then the additional interest @ 18% p.a. will be levied on the outstanding* ***interest***'. Clause-24 itself makes it clear that what is claimed by the Respondent is interest on interest. This is because Clause-24 made the Petitioner liable to pay interest

at the rate of 18% p.a. on '*outstanding interest'*, if Petitioner failed to pay 'interest' on delayed payment charges.

45) Clause-24 of Schedule-III, so far as it relates to stipulation for 'interest on interest' provision, appears to be a bit confusing. The first part of Clause-24 of Schedule-III makes the contractor liable to pay delayed payment charges at hefty rates i.e. @ 18% p.a. for first 6 months, 24% for next 6 months and 30% beyond one year. The second part of Clause-24 applies when contractor fails to pay interest on delayed payment within 3 months, in which eventuality additional interest of 18% was leviable.

46) Thus, under the first part of Clause-24, liability to pay interest continues for delay in paying monthly display charges. To illustrate, if monthly display charges of Rs.1 crore are due and payable on 1 January 2020, the Contractor is liable to pay interest @ 18% p.a. upto 30 June 2020 which increased to 24% from 1 July 2020 and thereafter 30% from 1 January 2021. However, second part of Clause-24 makes it mandatory to pay further interest on amount of interest which becomes leviable within a period of 3 months. This would mean that if Rs.1 crore payable on 1 January 2020 is not paid by 31 March 2020, interest of Rs.4,50,000/- for months of January, February and March becomes due and payable. If by 1 April 2020 also, due amount of Rs.1 crore is not paid, in addition to liability to pay 18% interest on amount of Rs.1 crore, additional interest on unpaid interest of Rs.4,50,000/- would become payable under the second part of Clause-24. This dual method of charging interest appears to be confusing and assumes character of absurdity when due amount is not paid within the first three months. There thus appears to be some ambiguity in Clause-24 of

the contract and considering the facts and circumstances of the case, it would be appropriate to relieve Petitioner of responsibility of paying interest on interest under Clause-24.

47) The Learned Arbitrator has not entered into the realm of interpretation or construction of Clause-24. Therefore, the award of claim cannot be upheld by granting leeway to the learned Arbitrator in the matter of interpretation of contractual clause. It is not that Clause-24 is plain and unambiguous. There is an ambiguity in Clause- 24, which the learned Arbitrator has failed to resolve. Not undertaking the exercise of understanding the exact import of Clause-24 by the learned Arbitrator would constitute a ground for interference in the award. Awarding 18% interest on hefty delayed payment charges of 18%, 24%, 30% is actually contrary to the first part of Clause-24 and even otherwise in conflict with public policy of India and in contravention with fundamental policy of Indian law. In my view, therefore award of claim for interest on delayed payment charges of Rs. 49,60,063/- in favour of Respondent is invalid and liable to be set aside.

AWARD OF RESPONDENT'S COUNTERCLAIM FOR RTO FEES OF Rs.46,78,000

48) This counterclaim is discussed in Issue No.12 by the learned Arbitrator. The learned Arbitrator took into consideration para-3 of letter dated 23 January 2019 which reads thus :-

> You shall pay Rs. 1,87,26,000/- through RTGS/NEFT/DD towards RTO advertisement fees for three years before commencement of contract or pay Rs. 62,42,000/-through RTGS/NEFT/DD towards RTO advertisement fees for first year before commencement of contract. For each subsequent years you shall make the payment atleast three months in advance from due date, subject to the revision of advertisement fees by the RTA.

49) Petitioner accuses the learned Arbitrator of ignoring contractual Clause-14.2.1 of Schedule-III which reads thus :-

> **14.2.1** The RTO's present advertisements fees are ₹2000/- per bus per year. For this purpose, the contractor shall:
>
> a. deposit 1,87,26,000/- by Demand Draft or through RTGS / NEFT, towards RTO advertisement fee for 3 years for 3121 buses or at actual for entire fleet, before commencement of contract. OR
>
> b. deposit 62,42,000/- or at actual by Demand Draft or through RTGS / NEFT, towards RTO advertisement fee for 1st year before commencement of contract and deposit RTO advertising fee of 62,42,000/-, or at actual for every subsequent years by way of DD, NEFT/RTGS payment for each year atleast 3 months in advance from due date of payment. The deposit towards RTO fees shall carry no interest.
>
> c. The contractor shall not be allowed to display advertisement on buses unless and until deposit towards RTO fees is paid as mentioned above.

50) The difference between para-3 of letter dated 23 January 2019 and Clause-14.2.1 of Schedule-III of general conditions of contract is that the words '*or at actual for every subsequent years*' are missing in para-3 of letter dated 23 January 2019. In my view, even if it is accepted that the Arbitral Tribunal has not taken into consideration the above quoted words '*or at actual for every subsequent years*' appearing in Clause-14.2.1, the same would not have any effect on the outcome of the award. So far as counterclaim for recovery of RTO charges is concerned, the expression '*or at actual for every subsequent years*' would mean the applicable RTO charges for subsequent years. The Petitioner had an option of depositing the entire RTO charges of Rs.1,87,26,000/- for 3 years upfront computed at the rate of Rs.2000 /- per bus per year. If Petitioner either did not have such amount or did not desire to deposit the entire amount of Rs.1,87,26,000/- upfront, it could

exercise the option of depositing amount of Rs.62,42,000/- for first year and take the risk of paying the actual charges as determined by RTO for subsequent years. The words 'at actual' would mean the rates determined by RTO during subsequent years. If RTO was to revise the charges and increase it beyond Rs.2000/- per bus per year, the contractor would take the risk of paying the same to RTO. This is the true purport of Clause-14.2.1 of the contract. The words 'or at actual' did not mean payment of RTO charges depending on number of buses. RTO was not supposed to verify as to how many buses were made operational each year for the purpose of determination of charges. Petitioner undertook to pay RTO charges of Rs.2,000/- per bus per year in respect of the entire fleet of 3121 buses under the contract. It cannot now turn around and contend that the RTO charges in respect of actual number of buses plying alone would be payable. It cannot contend that since buses did not ply during COVID pandemic, no RTO fees were payable.

51) Similarly, Petitioner cannot demand proof of payment of RTO charges by Respondent to RTO. The learned Arbitrator has rightly considered the indemnity offered by the Petitioner for holding that obligation to indemnify the Respondent in respect of RTO fees comes into play immediately upon fructification of obligation to pay RTO fess by the Petitioner by enforcing contract of indemnity. It is not necessary to prove that the sum in respect of which indemnity is offered is actually paid or not. For holding so, the Arbitral Tribunal has relied upon judgments in the case of ***Gajanan Moreshwar Parelkar Versus Moreshwar Mandan Manti***[3] , ***Khetarpal Amarnath Versus. Madhukar Pictures*** [4], ***Jet Airways***

3 ILR 1942 Bom 672
4 AIR 1956 Bom 106

(India) Limited Versus. Sahara Airlines Limited and Others [5] and *Reliance Industries Limited Versus. Balasore Alloys Limited* [6].

52) Having expressly agreed to pay the RTO fees either at Rs.62,42,000/- per year or as per actual rates charged by RTO, Petitioner cannot now turn around and seek an escape from contractual obligation by citing pretext of COVID pandemic or non-production of proof of actual payment of fees by Respondent to RTO. I therefore do not find any reason to interfere in the award of counterclaim in respect of RTO fees in favour of the Respondent.

AWARD OF CLAIM FOR DEFACEMENT CHARGES OF Rs.37,29,000

53) Under Clause-21 of Schedule-III of the contract, Petitioner had agreed for withdrawal of all the advertisements from buses upon expiry of the contract. Clause-21 of the contract reads thus :-

> 21. Withdrawing of advertisements from buses on expiry of the Contract:
>
> The contractor shall deface / remove all the advertisements displayed on the buses prior to the expiry or premature termination of the contract. On default of the contractor, the said advertisements shall be removed / defaced by the Undertaking and the cost of such departmental work shall be borne by the contractor in the manner as mor specifically explained in Clause No. 5 of General Conditions of Contract. In addition, the contractor shall be liable for a penalty of 1000/- per day, per bus till the day the advertisements is actually defaced / removed.

54) Thus, under Clause-21, Petitioner was under obligation for defacement/removal of advertisements displayed on the buses prior to expiry or on premature termination of the contract. If Respondent was to remove the advertisements, the same were to be

5 2011 SCC Online Bom 576
6 2014 14 SCC Online Bom 43

defaced/removed at the costs of the Petitioner. In addition to bearing the costs of removal of advertisements, the Petitioner was made liable for penalty of Rs.1,000/- per day per bus till the advertisements were actually defaced/removed.

55) There is no dispute to the factual position that the advertisements on the buses were actually not removed by the Petitioner. This was not done possibly because the Petitioner had participated in the fresh tender. There is also no dispute to the position that the Petitioner emerged as successful bidder even in the fresh tender and has been awarded the very same contract once again vide work order dated 12 May 2022. There appears to be a gap of about 3 months between the two contracts. In anticipation of award of new contract, possibly, Petitioner did not remove all the advertisements from the buses. Respondent applied penalty clause of Rs.1,000/- per day per bus and raised counterclaim of Rs.37,29,000/-. The particulars of counterclaim filed by the Respondent in support of its claim for defacement charges are absolutely vague. Respondent filed following particulars in support of its claim for defacement charges :-

PARTICULARS OF CLAIM FOR DEFACEMENT CHARGES

SR. NO.	Particulars of Claim	Amount (Rs.)
1.	Penalty payable for Defacement Charges as on November 25, 2022	37,29,000

The Claimant is liable to pay Rs. 37,29,000 (Rupees Thirty Seven Lakhs Twenty Nine Thousand only) along with further interest at 18% from November 25, 2022 till payment and / or realization.

56) Thus, no particulars were given as to how the figure of Rs.37,29,000/- was worked out.

57) The learned Arbitrator has awarded entire claim of Rs.37,29,000/- towards defacement charges. Petitioner argued before the learned Arbitrator that penalty for defacement stipulated in the contract could not be awarded without first proving legal injury in the form of loss suffered by the Respondent. Reliance was placed by the Petitioner on judgment of the Apex Court in ***Kailash Nath Associate*** (supra).

58) In ***Kailash Nath Associate*** the Apex Court has held that in para-43.1 as under :-

> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

59) In ***Anila Gautam,*** (supra) the Division Bench of this court has held in paras-25 to 27 as under :-

> 25. The learned Arbitrator acted contrary to the basic requirement of law when more particularly when one of the claims being of a penalty for breach of the contract which was surely required to be proved as per the requirement of Section 73 of the Contract Act. Admittedly, on this claim of penalty the respondent did not lead any evidence. On the other hand, the appellant not only disputed the documents on the basis of which the respondent had made the claim for penalty but also had filed her affidavit of evidence and was ready and willing to be cross-examined. In this situation, it would have been prudent as also a requirement of law for the learned Arbitrator to consider whether the respondent either on oral and/or documentary evidence, proved its claim for penalty/damages as also the other claims. Further when there was a dispute on reconcilliation of accounts, then, the learned arbitrator

himself ought to have gone into the issue of reconcilliation and on the basis of evidence, the monetary liability could have been fastened on the appropriate party to the dispute.

26. This is a case where the respondent asserted breach of contract (dealership agreement) on the part of the appellant and as a consequence of a breach of contract, the respondent made a counter-claim inter-alia seeking penalty and other claims which pertain to variation of stock, debit balance of the account between the parties. Once a claim for penalty is made, then necessarily the provisions of Chapter VI of the Contract Act which deal with consequence of breach of contract and the provisions of Sections 73 and 74 of the Contract Act which deal with award of compensation when a party suffers on account of breach of contract and compensation for breach of contract when penalty is stipulated in the agreement itself respectively, are attracted. It cannot be disputed that a liability to pay damages must arise under the contract and not otherwise. The Arbitrator has power to decide the question of liability for a particular amount as damages. In the assumption of damages, the arbitrator was required to consider the legal obligations the law would confer on the parties to prove such claims. Once there was no evidence on record, oral or documentary, which could prove the damages suffered by the respondent, then, certainly it can be said that there was a patent illegality on the face of the award. All these requirements have been completely overlooked by the learned Arbitrator.

27. In our opinion, the learned arbitrator has gravely faltered in overlooking the fundamental provisions under Section 73 of the Contract Act, namely unless the party proves the damages suffered by it on account of breach of contract, it is not entitled to any damages on compensation. If the counter claims of the respondent are to be seen in the context of clauses 5, 6, 10, 11, 12, 24(a), 28B(a) and B(k), B(g), B(h), these are claims which can be only proved on evidence and in event any claim for damages/penalty on these breaches has to be on the proof of damages suffered in the absence of any liquidated damages agreed between the parties. Even if the parties were to agree on a quantum of liquidated damages, the party claiming such damages was required to prove the actual damage suffered by it. (See "Kailash Nath Associates v. DDA" 1).

60) Thus, under the contract, where an amount is fixed in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stipulated. However, though the submission is noted, the learned Arbitrator has not decided the same. Petitioner had specifically contended before the learned Arbitrator that Rs.1,000/- per day per bus stipulated in Clause-21 of

Schedule-III of the contract was not agreed genuine pre-estimate of damages. In ***Kailash Nath Associates***, the Apex Court has held that a sum named in the contract as liquidated damages can be claimed as a reasonable compensation only if it is genuine pre-estimate of damages fixed by both the parties and found to be such by the Court. Clause-21 of Schedule-III of the contract does not stipulate that Rs.1,000/- per day per bus is a genuine pre-estimate of damages agreed by both the parties. The learned Arbitrator has completely glossed over this vital aspect and has erroneously awarded the counterclaim for defacement charges by recording following findings in para-22.3 and 22.4 :-

> 22.3 In the written arguments it is mentioned by the Claimant that the Respondent cannot be permitted to make a case for the imposition of defacement charges in the form of liquidated damage, without first proving the legal injury in the form of loss suffered by it. In support of these submissions Claimant placed reliance on the following Judgments:
>
> 1) (2015) 4 SCC 136.
> Kailash Nath Associates v Delhi Development Authority
>
> 2) 2023 SCC OnLine Del 6097.
> Sudershan Kumar Bhayana (Deceased) v Vinod Seth (Deceased),
>
> Applying the the principles of the above authorities to the present matter following submissions were made by the aimant in its written arguments.
>
> 7.22. The Respondent has not placed anything on record to demonstrate that there was a delay in defacing the buses.
>
> 7/23. The Respondent has neither pleaded nor proved that the Respondent has suffered any damages or incurred any loss on account of delay in defacing the buses. In this regard, it is submitted that the Claimant was also awarded the subsequent tender to display advertisements on the Respondent's buses, and as such, no loss could have been caused to the Respondent.
>
> 7.24. In the Tender, it does not state that the liquidated damages of Rs 1000/- per bus per day as stipulated in Clause 21 of the Tender is a genuine pre-estimate of damages likely

> to be suffered by the Respondent in case of delay in defacement of the buses upon expiry of the Contract. The Respondent has neither pleaded nor proved that it is difficult or impossible of to prove the loss.
>
> 7.25. Therefore, it is submitted that the Respondent is not entitled to the defacement charges in the form of liquidated damages.
>
> 22.4 The submissions on behalf of the Claimant are required to be analyzed in juxtaposition of pleadings of the parties and specifically pleadings of the Claimant on this Issue and overall effect of the substantive evidence of RW-1 including his cross examination. More over the factual position cannot be lost sight of as to terms and conditions of Tender document, Contract document and other correspondence between the parties. Further it must be understood that imposing of 'penalty' which is quantified and agreed as per the terms of the Tender document is factually a part of the contractual arrangement between the parties. In the result the submissions advance by learned counsel on this aspect shall not sustain. Accordingly, it is held that Respondent has proved this Issue No.13 and the same is accordingly answered in the affirmative.

61) Admittedly, no evidence is led by the Respondent to prove cause of any loss to it on account of non-removal of advertisements. Since the sum named in Clause-21 of the contract was not agreed as genuine pre-estimate of damages by the parties, it was incumbent on Respondent to prove the cause of loss. In my view, therefore award of counterclaim for defacement charges by the Arbitral Tribunal is contrary to contractual Clause-21 and provisions of Section 74 of the Contract Act,1872 **(Contract Act)**.

62) Even otherwise, the Respondent has not actually faced any loss on account of non-removal of advertisements by the Petitioner since the Petitioner was awarded the contract for next tenure. Therefore, merely because some advertisements remained on the buses after expiry of earlier contract, it cannot be presumed that any loss was caused to the Petitioner. There is nothing on record to indicate that Respondent got the advertisements removed by incurring of any expenditure. Therefore, in the peculiar facts and

circumstances of the case, claim of defacement charges by the Respondent from the Petitioner would actually constitute unjust enrichment.

63) In my view, therefore the award of defacement charges of Rs.37,29,000/- by the Arbitral Tribunal cannot be sustained and the same is liable to be set aside.

AWARD OF COSTS

64) The Arbitral Tribunal has awarded costs of Rs.48,20,000/- in favour of the Respondent under Section 31A of the Arbitration Act. Thus, the Arbitral Tribunal has applied the yardstick of Respondent being the successful party and has accordingly awarded entire costs claimed by the Respondent. However, two of the counterclaims awarded in favour of the Respondent are found to be invalid. In my view therefore, Respondent is not completely successful in the arbitration proceedings. In that view of the matter, it would be appropriate to restrict the amount of costs at Rs.25,00,000/-, which can be awarded in favour of the Respondent.

POST AWARD INTEREST @ 10% P.A.

65) The Arbitral Tribunal has awarded interest @ 10% p.a. on the sums awarded in favour of the Respondent from the date of the award. This Court has already set aside the award relating to interest on delayed payment charges and defacement charges. This would mean that award in respect of RTO fees of Rs.46,78,000/- alone is confirmed. Therefore Petitioner would be liable to pay 10%

interest from the date of the award only on counterclaim relating to RTO fees. I find no reason to interfere in the said direction.

SEVERANCE OF BAD PART FROM GOOD PART

66) The Constitution Bench in ***Gayatri Balasamy Versus ISG Novasoft Technologies Ltd.***[7] has ruled that the court exercising power under Section 34 of the Arbitration Act can modify the award by severing the good part of the award from the bad part. In the present case, award of only two claims relating to interest on delay payment charges and defacement charges is being set aside. Rest of the award is being confirmed. Bad part of the Award relating to interest on delayed payment charges and defacement charges is not inseparably intertwined with the good part of the award. Therefore, bad part of the Award can be separated from good part by modifying the Award.

ORDER :

67) I accordingly proceed to pass the following order :

The Award dated 2 January 2024 passed by the Arbitral Tribunal is modified to the following extent :

(i) The Award of counterclaim in favour of the Respondent towards interest on delayed payment charges of Rs.49,60,063/- with interest @ 18% p.a. is set aside.

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(ii) Award of counterclaim in favour of the Respondent towards defacement charges in the sum of Rs.37,29,000/- alongwith interest @ 18% p.a. is set aside.

(iii) Amount of costs awarded by the Arbitral Tribunal are reduced to Rs.25,00,000/- which shall be payable by the Petitioner to the Respondent along with interest @ 10% from the date of the Award.

(iv) Rest of the Award is confirmed.

68) Arbitration Petition is partly allowed to the above extent. Considering the facts and circumstances of the present case, I consider it appropriate not to award any further costs in the present Arbitration Petition.

69) With disposal of the Petition, nothing would survive in the Interim Application taken out for stay of the impugned order. The same also stands disposed of.

[SANDEEP V. MARNE, J.]

NEETA SHAILESH SAWANT

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