MANU/DE/0993/2019

IN THE HIGH COURT OF DELHI

O.M.P. (COMM) 297/2016

Decided On: 15.03.2019

Appellants: **Cimmco Ltd.**
Vs.
Respondent: **Union of India**

Hon'ble Judges/Coram:
Rajiv Shakdher, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Sandeep Sethi, Sr. Adv., Ashish Verma and Aditya Gupta, Advs.

For Respondents/Defendant: V.S.R. Krishna, A.S. Dateer and Indra Pratap Singh, Advs.

Case Note:
Arbitration - Validity of Award - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal in respect of claim no.1 liable to be interfered by court in petition - Held, it appeared from record that arbitral tribunal read variation in lease rentals given in Table 2 of Annexure to SLA in light of what was stated in Schedule I keeping in mind fact that said table nowhere provided that change in rate of corporate tax had to be based taking into account rate which prevailed in preceding year - In order to align this interpretation with fact that variation in lease rentals was shown as 'Nil' in 8th, 9th and 10th year even when there was change in rate of tax, it concluded that best course would be that for those years i.e. 8th, 9th and 10th year, there would be no change in lease rentals with respect to base year - In court view, conclusion reached by majority of arbitral tribunal was plausible view, which was both logical and reasonable and hence ought not to be interfered with - Petition dismissed. [16.5], [16.6],[27] Arbitration - Validity of Award - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal in respect of claim no.2 liable to be interfered by court in petition - Held, in respect of claim no.2 court was of view that one could not find fault with approach adopted by majority of arbitral tribunal - Argument advanced on behalf of CIMMCO that issuance of amendment order no. 5 was unilateral act was not quite accurate in view of provisions of Clause 2.3.1 of SLA - Said clause required UOI to pay quarterly lease rentals in advance based on acquisition cost of equipment i.e. wagon - Fact that amendment order no. 5 not only discussed cost of 414 wagons but also enhanced acquisition cost of 336 wagons was something which CIMMCO had chosen to ignore while advancing this argument - Court find no merit in this submission - Same was, accordingly, rejected - Petition dismissed. [17.4], [27] Arbitration - Validity of Award - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal in respect of claim no.3 and 4 liable to be interfered by court in petition - Held, it appeared from record that both these claims were made by CIMMCO for grant of interest on delayed payment by UOI - Insofar as claim no. 3 was

concerned, CIMMCO had claimed interest on payments delayed on account of lease rental variation being calculated having regard to base year - Arbitral tribunal, to court mind, rightly rejected claim for interest on delayed payments on this score as it had concluded that such approach adopted by UOI was correct - Since, this view of majority of arbitral tribunal had been sustained by court, no interference was called for on this count - , As regards claim no. 4, arbitral tribunal, in court view, had correctly rejected claim for interest at rate of 22% on ground that there was no such provision in SLA - Court find nothing wrong in view taken by majority of arbitral tribunal in that behalf - Petition dismissed. [19], [20],[27] Arbitration - Validity of Award - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal in respect of claim no.5 liable to be interfered by court in petition - Held, in respect of claim no. 5, finding of fact had been returned by arbitral tribunal that additional claim in sum of Rs. 27.89 lakhs was made by CIMMCO which was incorporated in its rejoinder - Arbitral tribunal had also noted that qua this claim CIMMCO had not advanced arguments on merits when oral submissions were heard in matter and further that no supporting documents had been provided vis-a-vis said claim - In view of said finding of fact which had not been dislodged by CIMMCO, court was not inclined to interdict view taken by majority of arbitral tribunal on this aspect of matter - Petition dismissed. [21], [22],[27] Arbitration - Validity of Award - Section 31 of the Arbitration and Conciliation Act, 1996 - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal liable to be interfered by court in petition on ground that one member of arbitral tribunal chose to withdraw from arbitration proceedings just prior to pronouncement of award - Held, it appeared from record that in case majority members of arbitral tribunal have given their reasons as to why one member had not appended his signatures to Award - Court was satisfied that award meets with criteria stipulated in section 31 of Act and that no interference was called for with award in given facts and circumstances of case on ground that one member of arbitral tribunal chose to withdraw from arbitration proceedings just prior to pronouncement of award - Thus, court find no reason to interfere with award - Petition dismissed. [25.4], [27] Arbitration - Validity of Award - Petitioner challenged validity of majority award passed by arbitral tribunal - Whether majority award passed by tribunal liable to be interfered by court in petition on ground that scheme sanctioned by Board of Industrial and Financial Reconstruction was not taken into account by majority members of arbitral tribunal - Held, it appeared from record that argument advanced on behalf of CIMMCO that scheme sanctioned by Board of Industrial and Financial Reconstruction was not taken into account by majority members of arbitral tribunal - This plea, in court view, was not sustainable for two reasons - First, this plea was not taken by CIMMCO in its statement of claim - Plea was sought to be introduced by way of application dated 7 September 2015 after matter had already been reserved for rendering Award - Second, in any event, all that sanctioned scheme required UOI to did was to consider adjustment on capitalised valued of wagons i.e. cost of acquisition - There was no binding direction issued by Board of Industrial and Financial Reconstruction, as was evident on bare perusal of Clauses 11.6(c) and (d) of sanctioned Scheme - Thus, court find no reason to interfere with award - Petition dismissed. [26], [27]

JUDGMENT

Rajiv Shakdher, J.

Prefatory Facts

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act") to assail the majority Award dated 3 February 2016.

1.1 Shorn of verbiage, the instant petition has been filed in the background of the following facts:

2. On 27 July 1995, the respondent i.e. Union of India (hereafter referred to as 'UOI'), had floated a tender for procurement by way of financial lease, 4000 wagons under a Build-Own-Lease-Transfer Scheme (in short 'BOLT Scheme'). The wagons, which were to be supplied, consisted of two types i.e. open and covered wagons. The petitioner i.e. CIMMCO LTD. (hereafter referred to as 'CIMMCO'), submitted its bid against the aforementioned tender. CIMMCO's bid having been found suitable was accepted by UOI.

3. Accordingly, a Letter of Intent dated 18 March 1996 (in short 'LOP) was issued in favour of CIMMCO for leasing 1000 open wagons and 200 covered wagons under the BOLT Scheme at the rates and on the terms stipulated therein.

4. In order to fund the manufacture of the wagons as stipulated in the LOI, CIMMCO tied up with four Financial Institutions(FIs)/Banks to provide funds, albeit, via a lease finance arrangement.

4.1 Consequently, CIMMCO entered into four separate Principal Lease Agreements (PLA) with the following FIs/Banks:

(i) Industrial Development Bank of India Limited (in short 'IDBL');

(ii) SBI Capital Markets Limited (in short 'SCML');

(iii) Development Credit Bank Limited (in short 'DCBL'); and

(iv) State Bank of India (Leasing Group) (in short 'SBI').

4.2 The details of the PLAs executed between CIMMCO and the aforementioned FIs/Banks, albeit, in a tabular form, are given hereafter:

S. No.	Name of FI/bank	Date of PLA
1	IDBI	21 May 1997
2	SCML	08 September 1997
3	DCBL	09 October 1997
4	SBI	17 October 1997

5. Given the aforesaid arrangement arrived at between CIMMCO and the FIs/Banks, CIMMCO and UOI entered into, in the first instance, a Sub-Lease Agreement dated 28 May 1997 (in short 'SLA'), This was followed by UOI placing an order dated 16 September 1997 CIMMCO for sub-leasing wagons. Besides this, CIMMCO and UO executed between themselves three more Sub-Lease Agreements. The details of these Sub-Lease Agreements including the number and type of wagons are given as under:

S.no.	Date	Lessor	Equipment / BG Wagon	Quantity of wagons
1.	20 October 1997	SBI	BCNA bogie (Covered wagons)	200
2.	20 October 1997	SCML	BOXN bogie (Open wagons)	206
3.	20 October 1997	DCBL	BOXN bogie (Open wagons)	107

5.1 By virtue of the SLA, UOI sought sub-lease of 687 wagons; the cost of acquisition qua which was pegged at Rs. 11,50,000/- per wagon.

5.2 It appears that UOI enhanced its requirement and, accordingly, an amended order was issued in that behalf on 17 November 1997.

5.3 In terms of the aforementioned amendment order, UOI sought to take on sub-lease 1000 open wagons and 200 covered wagons. The cost of acquisition for open wagons, though, remained identical to what was communicated earlier i.e. Rs. 11,50,000/- per wagon.

5.4 Insofar the covered wagons were concerned, the cost of acquisition was pegged at Rs. 12,50,000/- per wagon.

6. It may be relevant to note at this stage itself that for manufacturing 1200 wagons, CIMMCO required 4800 wheel sets (as each wagon would require four wheel sets) of requisite specifications as provided in the contract obtaining between itself and UOI. Notably, out of the 4800 wheel sets, CIMMCO, on its own, was able to arrange only 1800 wheel sets. There was, thus, a shortfall of 3000 wheel sets.

6.1 CIMMCO, it appears, sought UOI's help in that behalf. According to CIMMCO, UO loaned 3000 wheel sets from its own stock.

6.2 This apart, CIMMCO, apparently, also entered into a High Seas Sale Agreement dated 17.03.1999 ("HSSA") with the UOI for supply of 3000 wheel sets.

6.3 According to UOI, the HSSA was executed between itself and CIMMCO as the latter was desirous of obtaining 3000 wheel sets at the price prevailing at the High Seas, which was cheaper, as compared to the price which it would have to pay once the consignment landed ashore.

6.4 It may be relevant to note, at this juncture, and qua which there is no dispute, that CIMMCO had paid a sum of Rs. 15.61 crores as security deposit to UOI against supply of 3000 wheel sets. Pertinently, on this aspect, the dispute between CIMMCO and UOI is with regard to whether the security deposit was received by the latter toward wheel sets which were to be loaned or those that were purchased under the HSSA.

7. Be that as it may, the record does show that CIMMCO did in fact receive 3000 wheel sets from UOI during the period spanning between 24 July 1997 and 24 June 1998.

7.1 What has also emerged from the record qua which, there is, once again, no dispute is that out of the 3000 wheel sets received by CIMMCO, it returned only 1344 wheel sets to UOI, albeit, after two years.

7.2 Thus the given the fact that 1656 wheel sets, were not returned, propelled UOI to reduce the cost of acquisition qua a commensurate number of wagons i.e. 414 wagons; a figure which one can easily arrived at by dividing 1656 wheel sets by four

(4). This adjustment was, however, made by UOI only at the end of the year 2000.

7.3 As a matter of fact, UOI had issued, in that behalf, a specific Amendment Order No. 5 dated 29 November 2000 (in short "Amendment Order No. 5"). Via this Amendment Order, the cost of 414 wagons involved was reduced by a sum of Rs. 3,45,426/- per wagon.

8 . It is in the background of these broad facts that disputes arose between the parties herein.

9. The disputes between the parties, essentially, veered around two principal issues:

9.1 First, the alleged shortfall in the payment of sub-lease rental by UOI by wrongly calculating the impact of change in corporate tax.

9.2 Second, the adjustment in cost of acquisition made by UOI vis-a-vis 414 wagons on account of failure on the part of CIMMCO to return the 1656 wheel sets.

9.3 Predictably, the aforementioned two principal issues translated into claims. Besides claims on these two counts, CIMMCO lodged three more claims. Out of the three claims, two claims (i.e. Claim no. 3 and 4) were on account of interest while the last claim (Claim no. 5) was an additional claim.

9.4 Thus, in all, CIMMCO had lodged five (5) claims.

10. UOI, on its part, had lodged five (5) counterclaims. Counterclaim No. 1 was, in effect, a counterblast to claim No. 2 whereby the CIMMCO had taken a stand that UOI could not have adjusted the cost of acquisition vis-a-vis the 414 wagons.

10.1 Insofar as counterclaim No. 2 is concerned, it relates to demand for pendente lite and future interest at the rate of 22% per annum on funds sought to be recovered towards lease rental wrongly paid vis-a-vis 414 wagons.

10.2 Counterclaim No. 3 referred to the cost for recovery of 1656 wheel sets quantified at Rs. 14.04 crores with interest at the rate of 22% from 01 April 1999 to 30 June 2000.

10.3 Counterclaim No. 4 was claim for pendente lite and future interest at the rate of 22% per annum on the amount claimed under claim No. 3 after 30 June 2007.

10.4 Under counterclaim No. 5, UOI demanded cost of arbitration.

11. The majority of the Arbitral Tribunal, however, via the impugned Award has not only rejected both the claims as well counterclaims but also directed the parties to bear their own costs. The disconcerting and somewhat jarring aspect of the Award was the nth hour withdrawal from the arbitration proceedings by the third Arbitrator. This is an aspect which I will deal with in the latter part of my judgment. Suffice it to say, at this juncture, as mandated in law, the majority comprising the presiding Arbitrator and one of the Co-Arbitrators have recorded their reasons as to why the other Co-Arbitrator, who incidentally was the nominee of CIMMCO, did not sign the Award.

Submissions of Counsel:

12. It is in this background that CIMMCO has assailed the Award. The charge in this behalf was led by Mr. Sandeep Sethi, Senior Advocate, instructed by Mr. Ashish

Verma, Advocate. In defence of the Award, the arguments on behalf of UOI were advanced by Mr. V.S.R. Krishna, Advocate, instructed by Mr. A.S. Dateer, Advocate.

13. Mr. Sethi has, broadly, made the following submissions:

(i) UOI, as the sub-lessee, was required to pay lease rental as per the amounts specified in Schedule I of the SLA. The only variation that could be brought about was that which was provided in Clause 2.4 of the SLA. In other words, the SLA not only fixed the quarterly lease rentals payable by UOI but also explicitly set out the variation in the lease rentals, if any, brought about by virtue of change in corporate tax.

(ii) It was not open to UOI to unilaterally vary the quarterly lease rentals payable by it based on a plea that there had been a change in corporate tax, otherwise than, in the manner in which it was stipulated in the SLA.

(iii) The decision as to the variation in the lease rentals which could be brought about on account of corporate tax was within the domain of the lessor i.e. the FIs/Banks. Their decision, in this behalf, was both final and conclusive.

(iii)(a) The decision of the FIs/Banks, in effect, was that the change in the rate of corporate tax in percentage terms as reflected in paragraph 5 of Schedule I should be compared with the corporate tax which prevailed as on 2 November 1995.

(iii)(b) In other words, the effective corporate tax rate which was 46% on 2 November 1995 could not be taken as a base for calculating the change brought about in the lease rentals as per the table given in paragraph 5 of Schedule I of the SLA.

(iii)(c) The Arbitral Tribunal was required to adhere to the plain words of Clause 2.4 of the SLA and not go by its intent.

Therefore, the finding rendered in paragraph 7.7 of the award by the majority of the Arbitral Tribunal was perverse.

(iv) The majority of the Arbitral Tribunal had contradicted itself inasmuch as while for the first seven years (7), it disregarded the price with respect to variation of corporate tax rates by basing it on the preceding year, it did not apply the same yardstick for the 8th, 9th and 10th year, in which period, as per the very same table, impact of lease rentals was shown as 'Nil'.

(v) The majority of the Arbitral Tribunal also, perversely, denied CIMMCO's claim for interest at the contractual rate of 22% in respect of defaults qua payments made by UOI based on a specious plea that the contractual tenure was only for a period of 120 months. The rationale provided by the Arbitral Tribunal that for payments made by UOI beyond 120 months a lesser rate of interest was applicable and not the contractual rate was perverse.

This reasoning of the Arbitral Tribunal, which is contained in paragraphs 7.12 and 7.13 is contrary to the plain terms of Clause 2.4 of the SLA.

(vi) The majority of the Arbitral Tribunal had wrongly accepted the claim of CIMMCO that acquisition cost of 414 wagons could be adjusted and, consequently, a proportionate reduction could be brought about in the lease rentals. The Arbitral Tribunal has, in this behalf, erroneously dovetailed the

rights and obligations, which emanate from the HSSA with those which emerges from the SLA. The fact that the majority rejected the counterclaim filed by UOI in respect of 1656 loaned wheel sets only brings to fore the inconsistency in the Award.

(vii) The majority of the Arbitral Tribunal ought to have appreciated that UOI could not unilaterally have amended the SLA by issuing Amendment Order no. 5. What is worse is that the Arbitral Tribunal has, while accepting UOI's right to adjust the cost of acquisition and thereby the lease rentals, failed to direct refund of the security amount of Rs. 15.61 crores deposited by CIMMCO with UOI. By adopting this approach, UOI had exposed CIMMCO to a double jeopardy.

(viii) The rejection of claim No. 3 by the majority of the Arbitral Tribunal was also erroneous. UOI had wrongly set off and, therefore, withheld a sum of Rs. 26.97 lakhs against lease rentals after the same had been paid, based on the variation clause and a calculation made thereupon, by taking into account the rate as prevailing in the preceding year as against base rate followed subsequently.

(ix) The majority of the Arbitral Tribunal had wrongly disregarded the provisions of the sanctioned Scheme dated 11.03.2010, in particular, the provisions contained in Clause 11.6(c) and Clause 11.6(d). As per these provisions, UOI was required to consider restoration of capital cost with retrospective effect and thereby pay the differential lease rentals amounting to Rs. 45.63 crores plus interest after adjusting the cost of wheel sets amounting to Rs. 14.07 crores. The approach adopted by the Arbitral Tribunal, which was, to not consider an application made in that behalf by CIMMCO, on the ground that it was an afterthought and a development which had taken place in the intervening period was erroneous and against the public policy. Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 was paramount and therefore, reflective of public policy which could not have been overridden by the majority of the Arbitral Tribunal, especially, in the circumstances that the order sanctioning the Scheme had been sustained right up till the Supreme Court.

(x) Last but not the least, the impugned Award deserved to be set aside as only two out of three Arbitrators had signed the Award; the third Arbitrator having withdrawn from the proceedings. In view of the third Arbitrator i.e., one, Mr. R.K. Bhansali, having intimated to the other two Arbitrators, on 19 January 2016, that he was withdrawing from the arbitration proceedings on account of medical reasons, the remaining Co- Arbitrators could not have proceeded to render the Award.

(x)(a) In this behalf, reliance was placed on the minutes of meeting of the Arbitral Tribunal dated 07 and 08 September 2015 and the observations made in that behalf in paragraph 17.6 of the Award.

(x)(b) Given these circumstances, the impugned Award was liable to be set aside under the provisions of Section 34(2)(v) of the 1996 Act as the composition of the Arbitral Tribunal was not in accordance with the agreement obtaining between the parties.

(xi) Once an Arbitrator withdraws from the arbitration proceedings, the mandate of the Arbitrator terminates automatically and, therefore, such a situation can only be remedied by immediate substitution of the Arbitrator.

There can be no adjudication qua the reasons given for withdrawal by an Arbitrator from the arbitration proceedings. In this behalf, reference was made to the provisions of Sections 14 and 15 of the 1996 Act.

14. On the other hand, on behalf of UOI, Messrs Krishna and Dateer made the following submissions and while doing so took head on the last objection first. The reason being obvious, which was, that if this objection was sustained, the Award would not survive irrespective of UOI's defence on merits.

14.1 The Award could not be set aside merely on the ground that one of the members of the Arbitral Tribunal had withdrawn from the arbitration proceedings prior to the pronouncement of Award. The nth hour withdrawal from the arbitration proceedings by an Arbitrator had to be tested and, therefore, examined in the background of the facts and circumstances obtaining in the case.

14.2 In this behalf, it was contended that a perusal of the record would show that Mr. R.K. Bhansali had not participated in the proceedings held on 07 and 08 September 2015.

14.3 In view of this situation obtaining, a draft award was sent to Mr. R.K. Bhansali, which was prepared by the Presiding Arbitrator and other member under the cover of letter dated 22 September 2015.

14.4 Mr. R.K. Bhansali, after becoming aware of the contents of the draft award, sent an e-mail dated 19 January 2016 whereby he indicated that he wished to withdraw from the arbitration proceedings on account of ill health. Curiously, though despite such an e-mail having been sent, Mr. R.K. Bhansali responded to an e-mail sent by counsel for CIMMCO on 21 January 2016. In response to the e-mail dated 21 January 2016, Mr. R.K. Bhansali wrote to the counsel for CIMMCO on 1 February 2016 that he should provide legal justification and citation(s) in respect of what was stated in the e-mail dated 21.01.2016 and that, this information should also be supplied to UOI as well as CIMMCO.

14.5 Thus, the submission made was that if Mr. R.K. Bhansali had already taken a decision to withdraw from the proceedings on 19 January 2016, there was no reason for him to interact or respond to the e-mail of counsel for CIMMCO in the manner in which he did via his written communication dated 1 February 2016. In sum, the contention was that Mr. R.K. Bhansali, who was the nominee of CIMMCO, having become aware of the contents of the draft award decided to put a spanner in the wheel.

14.6 Insofar as the merits of the case are concerned, the learned counsel for UOI relied largely upon the contents of the Award. In effect, the submission was that this Court ought not to interfere with the Award as its conclusions were based on terms of the contract i.e. the SLA obtaining between the parties and the material placed before the Arbitral Tribunal.

14.7 Consequently, insofar as Claim No. 1 was concerned, it was argued that as correctly concluded by the majority of the Arbitral Tribunal, contrary to the contentions advanced on behalf of CIMMCO, the conclusion reached was in consonance with the explicit terms of the contract. The argument being that if Clause 2.4 and provisions of paragraph 5 of Schedule I and Table 2 of the Annexure to the SLA are read together, one would necessarily reach the conclusion that the change in the rate of corporate tax had to be measured taking into account the base rate and not the rate which was prevailing in the preceding year as submitted on behalf of CIMMCO.

14.8 Furthermore, learned counsel says that insofar as the adjustment of acquisition cost of 414 wagons was concerned, the same was deemed necessary in view of the admitted failure on the part of CIMMCO in discharging the obligation of returning 1656 wheel sets.

14.9 The contention was that since CIMMCO had delayed returning the wheel sets and given the fact that it had finally returned wheel sets numbering 1344, UOI ought to have paid lesser lease rentals after adjusting the cost of acquisition for the period for which wheel sets had not been returned. The argument being, if this recourse was not adopted, CIMMCO would stand to gain, albeit, unjustly.

15. As regards the remaining wheel sets, which were 1656 in number and which were not returned, the UOI had two options: first, to treat the wagons on which 1656 wheel sets were fitted as incomplete. Second, to treat those wagons on which 1656 wheel sets had been fitted as complete and to reduce the cost of acquisition. In order to soften the blow of a possible severe financial impact, which CIMMCO would have to suffer if the first option was exercised, UOI decided to take recourse to the second option. Accordingly, the Amendment Order No. 5 was issued concerning 414 wagons on which 1656 wheel sets were fitted. The Amendment Order No. 5, thus, treated the wagon sets complete in all respects even while reducing the cost. The rationale being that since UOI had loaned 1656 wheel sets to CIMMCO, it could not be called upon to pay lease rentals on that component of the cost of wagons on which no amount had been defrayed by CIMMCO.

15.1 Insofar as the adjustment of security deposit of Rs. 15.61 crores was concerned, the stand taken by CIMMCO was incorrect as that money was taken to secure performance by CIMMCO and its obligations under the HSSA. Despite the fact that imported wheel sets had been secured by CIMMCO, it did not deem it fit to return the wheel sets against loaned wheel sets supplied to CIMMCO by UOI for manufacture of wagons.

15.2 Insofar as the claims No. 3 to 5 were concerned, learned counsel for UOI relied upon the observations and findings returned by the majority of the Arbitral Tribunal in paragraphs 11 to 13 of the Award.

Reasons:

16. I have heard the learned counsel for the parties and perused the record. Insofar as the dispute with regard to claim No. 1 is concerned, it centres around the calculation of the variation in the lease rentals on account of change in corporate tax. According to CIMMCO, the variation ought to have been made keeping in mind the rate of corporate tax for the preceding year while according to UOI, as rightly found by the majority of the Arbitral Tribunal, it had to be rooted in the base year.

16.1 Having perused the record, to my mind, the Arbitral Tribunal has come to the correct conclusion by melding the provisions of Clause 2.4 along with paragraph 5 of Schedule I and Table 2 of Annexure to the SLA.

16.2 For the sake of convenience, the said provisions are extracted herein:

> **2.**4. Variation on lease rental:
>
> If the eligibility of the lessor to claim depreciation is decreased/increased due to any change in the rate of depreciation allowance and/or in case of any change in the corporate tax rates whether wholly or partly in any year during the period of the lease, installments of rental in that year or in any

subsequent year(s) shall accordingly be increased or decreased. Such increase or decrease in the installments shall be calculated in the manner as provided in the annexure hereto the extent of increase or decrease in the corresponding tax benefit to the lessor.

XXXXXXXXXXXXXXX

Schedule-I

5. Base rate for variation of lease rentals as on 02.11.1995 the date of submission of tender 03.11.1995 date of opening of commercial Bid and 18.03.1996, the date of Letter of Intent are as under:

Depreciation rate : *25% per annum*
Corporation Tax rate: *Effective corporate Tax rate*

(40% corporate Tax plus 15% surcharge thereon)

XXXXXXXXXXXXXXX

2. Changes in the rate of Corporate Tax will change the Per Thousand Per Month (PTPM) lease rental as follows:

Year	*Change in rate of Tax (%)*	*Impact in PTPM lease rentals*	*Change in rate of Tax (%)*	*Impact in PTPM lease rentals*
1	*(-) 1*	*(+) Rs. 0.03*	*(+) 1*	*(-) Rs. 0.03*
2	*(-) 1*	*(+) Rs. 0.01*	*(+) 1*	*(-) Rs. 0.01*
3	*(-) 1*	*(-) Rs. 0.02*	*(+) 1*	*(+) Rs. 0.02*
4	*(-) 1*	*(-) Rs. 0.06*	*(+) 1*	*(+) Rs. 0.06*
5	*(-) 1*	*(-) Rs. 0.10*	*(+) 1*	*(+) Rs. 0.10*
6	*(-) 1*	*(-) Rs. 0.15*	*(+) 1*	*(+) Rs. 0.15*
7	*(-) 1*	*(-) Rs. 0.15*	*(+) 1*	*(+) Rs. 0.15*
8	*(-) 1*	*Nil*	*(+) 1*	*Nil*
9	*(-) 1*	*Nil*	*(+) 1*	*Nil*
10	*(-) 1*	*Nil*	*(+) 1*	*Nil*

(emphasis is mine)

16.3 A bare perusal of the aforesaid provisions would show that the increase and decrease in the lease rentals is required to be co-related with the change in corporate tax rates. Paragraph 5 of Schedule I and Table 2 of the Annexure to the SLA clearly sets out that the base rate for variation of lease rentals is that which obtained on 2 November 1995. The said clause further goes on to set out the effective corporate tax rate on that date which was 46%.

16.4 The Arbitral Tribunal, having regard to this provision, has, in my view correctly concluded that increase and decrease in lease rentals had to be related with the change in corporate tax rate brought about in a particular year keeping the base rate as 46%.

16.5 The Arbitral Tribunal, thus, read the variation in lease rentals given in Table 2 of the Annexure to the SLA in light of what was stated in paragraph 5 of Schedule I keeping in mind the fact that the said table nowhere provided that the change in rate of corporate tax had to be based taking into account the rate which prevailed in the preceding year. In order to align this interpretation with the fact that the variation in lease rentals was shown as 'Nil' in the 8th, 9th and 10th year even when there is change in rate of tax, it concluded that the best course would be that for those years i.e. 8th, 9th and 10th year, there would be no change in the lease rentals with respect to the base year.

16.6 In my view, the conclusion reached by the majority of the Arbitral Tribunal is a

plausible view, which is both logical and reasonable and hence ought not to be interfered with.

Claim No. 2

17. As noted hereinabove, claim No. 2 is a claim made by CIMMCO based on what it perceives as erroneous reduction in the capitalized value of 414 wagons. CIMMCO, under this head, has claimed a sum of Rs. 19.18 crores towards resultant short fall in lease rentals in addition to interest amounting to Rs. 18.17 crores. The majority of the Arbitral Tribunal has returned a finding of fact that out of 3000 wheel sets loaned by UOI only 1344 wheel sets were returned that too after a delay of nearly two years. The Award also returns a finding of fact qua which there is no dispute that CIMMCO had not returned the 1656 wheel sets and that these wheel sets had been used to complete 414 wagons.

17.1 The facts pertaining to this, as gleaned from details provided by the parties, are set out in a tabular form in the Award. For the sake of convenience, the same are extracted hereafter:

Sl. No	*Date of supply of wheel sets*	*Qty. allowed (in nos)*	*Letter ref. of Claimant*	*Letter ref. of Respondent*	*Nos of wheel sets returned – date of return*
1	*24.07.1997*	*400*	*21.07.97*	*24.07.97*	*240 - Sept.'99*
2	*02.12.1997*	*800*	*05.10.97*	*02.12.97*	*800 - Feb '2000.*
3	*29.01.1998*	*1000*	*09.01.98*	*29.01.98*	*304 - June '2000*
4	*30.04.1998*	*228*	*25.04.98*	*30.04.98*	*Not returned*
5	*20.05.1998*	*272*	*15.05.98*	*20.05.98*	*Not returned*
6	*24.06.1998*	*300*	*15.06.98*	*24.06.98*	*Not returned*
	Total	*3000*	*---*	*---*	*1344 nos.*

17.2 The majority of the Arbitral Tribunal having noticed the aforesaid state of affairs found that the Amendment Order No. 5 did not alter the basic structure of the SLA. In other words, the Arbitral Tribunal came to the conclusion that it was within the domain of UOI to adjust the lease rentals based on the actual cost of acquisition. The rationale, which the majority of the Arbitral Tribunal adopted is that CIMMCO could not enrich itself at the cost of UOI by forcing it to pay the entire lease rentals which would include the costs of 1656 wheel sets.

17.3 The relevant observations made by the Arbitral Tribunal in that behalf are set out hereafter:-

> *"In the present case, claimant has manufactured certain wagons for the purpose of giving lease to the respondent at a pre-determined cost which included the cost of wheel sets. Where 3000 nos. wheel sets have been received by the claimant from the respondent who is the user of wagon itself, the claimant cannot demand leasing charges on such wheel sets which is the property of respondent itself.*
>
> *Therefore, Tribunal finds it logical for respondent to issue the amendment No. 5 which was the only course left to the respondent to determine the actual cost of acquisition in terms of Letter of Intent as well as sublease agreement. Further, clause 2.3 of the sub-lease agreement defines the sub-lease rentals*

to be computed based on actual acquisition cost/asset cost. Same was determined by excluding the cost of wheel set which belonged to the respondent (Ministry of Railways).

Tribunal is also of the firm view that Amendment No 5 dated 29.11.2000 for determining the actual asset cost/asset value for appropriate leasing charges, does not alter basic structure of SLA and is considered valid.

9.12. Tribunal finds that the claimant (M/s. Cimmco Birla) has realized obtained the full cost of wagons including the cost of wheel sets (which is quite substantial of about Rs. 3.56 lakhs per wagon) from financial institutions. Since M/s. Cimmco Birla Ltd. got full cost of wagons i.e. Rs. 11.5 lakhs/Rs. 12.5 lakhs per wagon, including the cost of wheel sets from IDBI and other financial institutions even without incurring the cost of wheel sets. Therefore, the onus of payment of sub lease rental, if any, corresponding to the apportioned cost of wheel set to the Lessor, i.e. (Financial Institution) should lie to the claimant (M/s. Cimmco Birla Ltd.-manufacturer of wagon and also lessee) and not with the respondent (sub-lessee).

9.13. From the above, Tribunal is of the firm view that claimant (M/s. Cimmco Birla Ltd.) cannot be allowed to be richer at the cost of the respondent (sub-lessee, Ministry of Railways) to pay entire lease charges even on the cost of wheel sets which were pertaining to the respondent (Ministry of Railways) themselves.

9.14. In terms of above paras, it is clear that claimant (M/s. Cimmco Birla Ltd.) is not entitled to claim Lease Rentals from the respondent (Ministry of Railways) on the portion of the equipment (wheel sets), which is the property of sub lease i.e. Ministry of Railways. In fact, transaction of sale of 750 wagons (involving 3000 wheel sets belonging to Ministry of Railways by claimant) to financial institutions is also considered erroneous in as much as the property of wheel sets was that of respondent (Ministry of Railways).

9.15. In view of the above circumstances, Arbitral Tribunal concludes that Amendment No. 5 dated 20.11.2000 is the only proper approach available under the Leasing Contract as lease charges on the cost of wheel sets (belonging to Ministry of Railways) is not admissible to the Claimant.

Therefore, Tribunal concludes that the claim of Claimant of Rs. 19.18 crores + interest charges of Rs. 18.17 crores on account of reduction in capitalized value of wagons due to wheel sets is unjustified and not maintainable and therefore, rejected."

(emphasis is mine)

17.4 To my mind, one cannot find fault with the approach adopted by the majority of the Arbitral Tribunal. The argument advanced on behalf of CIMMCO that the issuance of Amendment Order No. 5 was a unilateral act is not quite accurate in view of the provisions of Clause 2.3.1 of the SLA. The said clause required UOI to pay the quarterly lease rentals in advance based on the acquisition cost of the equipment i.e. wagon. The fact that Amendment Order No. 5 not only discussed the cost of 414 wagons but also enhanced the acquisition cost of 336 wagons is something which CIMMCO has chosen to ignore while advancing this argument. I find no merit in this submission. The same is, accordingly, rejected.

17.5 The argument advanced on behalf of CIMMCO that the majority members of the

Arbitral Tribunal have returned an inconsistent finding inasmuch as while they have sustained UOI's action of reducing the acquisition cost of 414 wagons (and thereby lease rentals for the reason that it had not been returned 1656 wheel sets), they have at the same time failed to direct refund of the sum of Rs. 15.61 crores (which was given as security to ensure the return of these very wheel sets), on first blush, seems attractive but on a closer look it would be evident that the submission is untenable.

17.6 A perusal of the record would show that the stand of UOI is that CIMMCO was asked to deposit a sum of Rs. 15.61 crores to ensure that it complied with its obligations in respect of 3000 wheel sets, which it had purchased pursuant to the execution of HSSA between them.

17.7 Furthermore, UOI has also taken a stand before the Arbitral Tribunal that despite CIMMCO having received the consignment of imported wheel sets, it chose not to return 1656 wheel sets that it had loaned to CIMMCO in order to enable the manufacture of wagons within the contractual time frame set forth in the contract.

17.8 Thus, given this background, the majority members of the Arbitral Tribunal, in my view, rightly did not rule on this aspect of the matter as they would, then, have to decide as to whether CIMMCO was entitled to refund of the entire amount or a part of the amount deposited as security. Nothing evidently was shown to the Arbitral Tribunal or even to me which would suggest that the sum of Rs. 15.61 crores was deposited by CIMMCO as security towards 3000 wheel sets loaned to it out of the local stock available with UOI.

17.9 Needless to say, if CIMMCO were to raise a separate dispute before an appropriate forum with regard to refund of the sum of Rs. 15.61 crores by UOI, the same would have to be adjudicated upon after taking into account the respective stand of the parties.

18. The other submission which was vigorously put forth is that the majority of the Arbitral Tribunal had relied upon the view of an expert entity i.e., one, M/s. Vinod Kothari & Co. I have carefully gone through the Award. In my view, while the majority of the Arbitral Tribunal has noticed the view taken by M/s. Vinod Kothari & Co., engaged by UOI, they have carried out an independent analysis of the issue at hand. The argument is, therefore, a mere red herring and, hence, cannot be sustained.

19. This brings me to the submission made on behalf of CIMMCO with regard to claims No. 3 and 4. Both these claims were made by CIMMCO for grant of interest on delayed payment by UOI. Insofar as claim No. 3 is concerned, CIMMCO had claimed interest on payments delayed on account of lease rental variation being calculated having regard to the base year. The Arbitral Tribunal, to my mind, rightly rejected the claim for interest on delayed payments on this score as it had concluded that such an approach adopted by UOI was correct. Since, this view of the majority of the Arbitral Tribunal has been sustained by me as well, no interference is called for on this count.

20. As regards claim No. 4, the Arbitral Tribunal, in my view, has correctly rejected the claim for interest at the rate of 22% on the ground that there is no such provision in the SLA. I find nothing wrong in the view taken by the majority of the Arbitral Tribunal in that behalf.

21. Likewise, in respect of claim No. 5, a finding of fact has been returned by the Arbitral Tribunal that an additional claim in the sum of Rs. 27.89 lakhs was made by CIMMCO which was incorporated in its rejoinder. The Arbitral Tribunal has also noted that qua this claim CIMMCO had not advanced arguments on the merits when oral

submissions were heard in the matter and further that no supporting documents had been provided vis-a-vis the said claim.

22. In view of the aforesaid finding of fact which has not been dislodged by CIMMCO, I am not inclined to interdict the view taken by the majority of the Arbitral Tribunal on this aspect of the matter.

23. This brings me to the last, perhaps, the most important objection raised by CIMMCO. It has been contended on behalf of CIMMCO that since Mr. R.K. Bhansali, who was its nominee, had withdrawn from the arbitration proceedings, the remaining members of the Arbitral Tribunal (which included the Presiding Arbitrator) could not have proceeded to pronounce the instant Award.

23.1 Relevant procedural orders of the Arbitral Tribunal placed before me demonstrate the following:

> **22.**2 On 2 May 2015, the Arbitral Tribunal had, more or less, concluded hearing arguments in the matter and, accordingly, granted time to the counsel for the parties to submit their written submissions by 31 May 2015. Via the very same order, it fixed 6, 7, and 8 July 2015 as the dates for making and publishing the Award. While order-sheets of 6, 7, and 8 July are not available, what is available on record is the order sheet of 7 September 2015. On this date, only the Presiding Arbitrator, one, Mr. N. Sahu and Mr. P.C. Sharma, the other Arbitrator, appeared to have convened for a hearing. Mr. R.K. Bhansali, CIMMCO's nominee was not available and, therefore, the proceeding was adjourned to 8 September 2015.
>
> **22.**3 On 8 September 2015, Mr. R.K. Bhansali was, once again, not available which led to the Presiding Arbitrator Mr. N. Sahu and the other Arbitrator Mr. P.C. Sharma making the following recording:
>
> > "Mr. R.K. Bhansali, Joint Arbitrator has not been able to make up even today, i.e., 08.09.2015. The date of hearing, i.e., 09.09.2015 stands adjourned. The next date of publishing award will be intimated later."
>
> **22.**4 Apparently, thereafter, as noted by the majority of the Arbitral Tribunal in paragraph 17.6 of the Award, under the cover of a registered letter dated 22 September 2015, the Presiding Arbitrator had intimated to both Arbitrators that after completion of discussion and arguments in the arbitration matter on 2 May 2015, a draft award had been prepared by him along with the other Arbitrator Mr. P.C. Sharma at the meetings held during 07 to 09 September 2015. As is obvious, the communication of 22 September 2015, which the Presiding Arbitrator had sent to both Mr. P.C. Sharma and Mr. R.K. Bhansali, clearly revealed that Mr. R.K. Bhansali was aware of the contents of the draft award.
>
> **22.**5 The sequence of events, as brought on record, show that on 12 January 2016 Mr. P.C. Sharma issued a notice indicating therein that the Award would be published on 3 February 2016. Mr. R.K. Bhansali, within a week of this communication i.e. on 19 January 2016 via an e-mail of even date, informed the Presiding Arbitrator and Mr. P.C. Sharma that since he was unwell, he was unable to perform the functions of an Arbitrator and, hence, was withdrawing from the proceedings. For the sake of better appreciation, the relevant part of e-mail dated 19 January 2016 is extracted hereafter:

> "I am suffering with Cardiac health complication with breathing problem. I am therefore unable to perform the function of arbitrator refer S. 14(1)(a).
>
> I hereby withdraw from the office of arbitrator in terms of S. 14(1)(b).
>
> The mandate to act as Arbitrator shall therefore terminate as per Section 14 of THE ARBITRATION AND CONCILIATION ACT, 1996."

24. Given these facts, the argument advanced on behalf of CIMMCO that with the withdrawal of Mr. R.K. Bhansali from the arbitration proceedings, the mandate of the Arbitral Tribunal came to an end and, therefore, the remaining members of the Arbitral Tribunal, which included the Presiding Arbitrator could not have rendered the Award, in my opinion, in the instant fact situation, is a submission which cannot be accepted.

24.1 The reason why I say so is this: Quite clearly Mr. R.K. Bhansali brought about a logjam by seeking to withdraw from the arbitration proceedings at the nth hour when discussions and arguments had already been heard in the matter. At that point in time all that the Arbitral Tribunal was required to do thereafter was to render an Award.

24.2 This aspect clearly emerges upon the perusal of the procedural order dated 2 May 2015. On that date, learned counsel for the parties were only given an opportunity to file their written submissions in the matter. Last date for the said purpose was fixed as 31 May 2015.

24.3 The record also shows that to discuss the matter further inter se the constituents of the Arbitral Tribunal, 7, 8 and 9 September 2015 were fixed as dates for this purpose.

24.4 Despite the Presiding Arbitrator Mr. N. Sahu and the other Arbitrator Mr. P.C. Sharma convening on 7 and 8 September 2015, Mr. R.K. Bhansali did not join in the proceedings. According to the Presiding Arbitrator, a draft Award was framed, which was forwarded to Mr. R.K. Bhansali under the cover of a letter dated 22 September 2015.

24.5 There is nothing on record to show that Mr. R.K. Bhansali had reached out to other members of the Arbitral Tribunal. What, in fact, happened was that on 12 January 2016, Mr. P.C. Sharma issued a notice which informed other members of the Arbitral Tribunal that the Award would be published and pronounced on 3 February 2016.

24.6 It is at this juncture that Mr. R.K. Bhansali decided to inform the other members of the Arbitral Tribunal vide communication dated 19 January 2016, that he is withdrawing from the proceedings on account of ill health.

24.7 What is curious is that Mr. R.K. Bhansali, thereafter, on 1 February 2016 responded to the e-mail dated 21 January 2016 sent by, one, Mr. Rahul Malhotra, counsel for CIMMCO. In this email, Mr. R.K. Bhansali, inter alia, stated the followings:

> "Pl quote the legal justification and citation if any informing the other party and your client. (Annexure P56 at page 1743)"

24.8 Clearly, Mr. R.K. Bhansali seems to have dithered on whether or not he should

to withdraw from the arbitration proceedings. Even if I were to assume, for the moment, that the letter dated 19 January 2016 conveyed that Mr. R.K. Bhansali had withdrawn from the proceedings and this circumstance had resulted in the termination of his mandate, to my mind, that would not necessarily lead to the conclusion that his substitution by another Arbitrator under Section 15(2) of the 1996 Act was mandatory as argued on behalf of CIMMCO.

25. A careful perusal of the provisions of Sections 14 & 15 would show that if circumstances, as provided in Subsection (1) of Section 14 or Subsection (1) of Section 15 arise then the mandate of the concerned Arbitrator would stand terminated. In this case, as per the position taken by Mr. R.K. Bhansali, the circumstance fell both under Sections 14(1)(a) and 14(1)(b). It may possibly be argued on behalf of CIMMCO it falls under Section 15(1)(a) as well.

25.1 However, these circumstances, in my view, would have led only to termination of the mandate of an Arbitrator not necessarily the termination of arbitration proceedings compelling the Court to appoint a Substitute Arbitrator in place of Mr. R.K. Bhansali.

25.2 The difference between the two is evident, as indicated above, upon a close reading of the language of Sections 14 and 15 and provisions of Section 32 and even Clause (a) of Section 25 of the 1996 Act. In circumstances, such as one, that obtains in this case, if I were to accept the argument advanced on behalf of CIMMCO, then, any party which is unhappy with the manner in which the Arbitral Tribunal is proceeding in a given matter can, for want of a better expression, inspire its nominee-Arbitrator on the Arbitral Tribunal to withdraw from the arbitration proceedings at the nth hour and, thus, frustrate the entire effort put in up till that stage to have a fairly adjudicated Award delivered in the matter.

25.3 It is for this reason that the Legislature appears to have provided in Section 31(2) of the 1996 Act that where the Arbitral Tribunal comprises more than one Arbitrator, the signatures of the majority of all members of the Arbitral Tribunal would be sufficient for framing an Award, so long as reasons are given for any omitted signature. In other words, while Subsection (1) of Section 31 provides that the Arbitral Award should be in writing and should bear signatures of all members of Arbitral Tribunal, Subsection (2) of the very same Section envisages a situation where majority of the Arbitral Tribunal signs the award and the remaining member(s) chooses not to sign the same. The only caveat entered in Subsection (2) of Section 31 is that the majority members comprising the Arbitral Tribunal should give reasons for omission of the signature(s) of the remaining member(s).

25.4 In the instant case, as adverted to above, the majority members of the Arbitral Tribunal have given their reasons as to why Mr. R.K. Bhansali has not appended his signatures to the Award. I am satisfied that the Award meets with the criteria stipulated in Section 31 of the 1996 Act and that no interference is called for with the Award in the given facts and circumstances of the case on the ground that Mr. R.K. Bhansali chose to withdraw from the arbitration proceedings just prior to pronouncement of the Award.

25.5 None of the judgments which have been cited on behalf of CIMMCO in support of its objection deal with the circumstance which arose in this particular case. The judgments cited are therefore, to my mind, clearly distinguishable.

26. Before I conclude, I must also deal with the argument advanced on behalf of CIMMCO that the scheme sanctioned by the Board of Industrial and Financial Reconstruction (in short 'BIFR') was not taken into account by the majority members

of the Arbitral Tribunal. This plea, in my view, is not sustainable for two reasons. First, this plea was not taken by CIMMCO in its Statement of Claim. The plea was sought to be introduced by way of an application dated 7 September 2015 after the matter had already been reserved for rendering an Award. Second, in any event, all that the sanctioned Scheme required UOI to do was to consider the adjustment on capitalised valued of the wagons i.e. cost of acquisition. There was no binding direction issued by BIFR, as is evident on a bare perusal of Clauses 11.6(c) and (d) of the sanctioned Scheme.

27. For the foregoing reasons, I find no reason to interfere with the Award. The petition is, accordingly, dismissed.