GP A/W AGK & SSM

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 4466 OF 2020

BOARD OF CONTROL FOR CRICKET IN INDIA,
a society registered under the Tamil Nadu Societies Registration Act 1975 and having its head office at Cricket Centre, Wankhede Stadium, Mumbai 400 020 **... Petitioner**

~ VERSUS ~

DECCAN CHRONICLE HOLDINGS LTD,
a company incorporated under the Companies Act 1956 and having its registered office at 36, Sarojini Devi Road, Secunderabad, Andhra Pradesh **... Respondent**

APPEARANCES

FOR THE PETITIONER "BCCI"

Mr Tushar Mehta, *Solicitor General*,
with
Samrat Sen, Kanu Agrawal, Indranil Deshmukh, Adarsh Saxena, Ms R Shah and Kartik Prasad, Advocates
i/b Cyril Amarchand Mangaldas

FOR THE RESPONDENT "DCHL"	**Mr Haresh Jagtiani,** ***Senior Advocate*****,** *with* **Mr Navroz Seervai,** ***Senior Advocate***, **Mr Sharan Jagtiani,** ***Senior Advocate***, *Yashpal Jain, Suprabh Jain, Ankit Pandey, Ms Rishika Harish & Ms Bhumika Chulani, Advocates i/b Yashpal Jain*

CORAM : GS Patel, J

JUDGMENT RESERVED ON : 12th January 2021

JUDGMENT PRONOUNCED ON : 16th June 2021

JUDGMENT:

OUTLINE OF CONTENTS

This judgment is arranged in the following parts.

For convenience, the soft copy in PDF of this judgment is bookmarked.

A. INTRODUCTION

1. The Board of Control for Cricket in India ("**BCCI**") is the game's governing body in India. It is vastly influential across the cricketing world and is said to be the wealthiest such board globally.

2. In this Petition under Section 34 of the Arbitration & Conciliation Act, 1996, BCCI takes exception to a 17th July 2020 award by a learned Sole Arbitrator.

3. BCCI was the respondent in arbitration. The claimant was Deccan Chronicle Holdings Ltd ("**DCHL**"), the publisher of the *Deccan Chronicle*, an English daily newspaper with eight editions widely circulated across South India. It also publishes the *Asian Age*, an English newspaper with editions in major Indian metros and London, and the *Financial Chronicle*, a financial daily. DCHL also operated a cricketing franchise in the Indian Premier League ("**IPL**") and owned the Deccan Chargers team.

4. By the impugned award, the learned Sole Arbitrator directed BCCI to pay DCHL:

(i) Rs 4814,17,00,000/- (Rupees Four Thousand Eight Hundred and Fourteen Crores and Seventeen Lakhs);

(ii) Interest on this amount at 10% per annum from the date of the arbitration proceedings; and

(iii) Rs. 50,00,000 (Rupees Fifty Lakhs) in costs.

5. Conceived in 2007, the IPL arguably changed the face of cricket in India forever. It is a cricket league in the Twenty20 or T20 format. Eight teams contest. Team players are drawn from across the cricketing world, not just India. It is usually held between March and May of each year. Reportedly, it is the most-attended cricket league ever, anywhere. So far, there have been thirteen seasons; the fourteenth was interrupted by the recent lockdown. The usual format is a round-robin home-and-away format in the league phase. After that are the playoffs, then two qualifying matches and an eliminator match. Participating teams 'acquire' players — for mind-boggling amounts — in different ways. There is an annual player auction — the possibility of 'trading' players during defined time windows (two before the auction, one after but before the tournament) and signing up replacements for unavailable players. At the auction, players sign up and set their base price. They are then 'bought' by the highest-bidding franchise. Some remain 'unsold'. These can be signed up as replacements. Trading happens only with the player's consent (and payment of the differential, if any, between the old and new contracts) — if the new contract has a higher value, the player gets a share in the difference. Other rules operate: each squad must have between 18 and 25 players with a maximum of eight overseas players and only four in the playing eleven. There is a cap to the salary of the entire squad. Under-19 players are eligible only if they have played first-class cricket.

6. There are eight teams in play today, owned by different franchises. Over time, five others fell by the wayside, DCHL's Deccan Chargers among them. It was one of the original eight teams. It debuted in 2008 and was dissolved in 2012. Kochi Tuskers Kerala,

Pune Warriors India, Rising Pune Supergiant and Gujarat Lions all collapsed between 2011 and 2018.

7. BCCI had agreements with every franchise. DCHL's Franchise Agreement is dated 10th April 2008. The reciprocal rights and obligations in this contract are the matters in dispute.

B. THE CHALLENGE IN BRIEF; SUMMARY OF CONCLUSIONS

8. Appearing for BCCI, Mr Mehta, the learned Solicitor-General, assails the Award on several distinct grounds, including—

8.1 Some findings and conclusions in the Award fit the legal definition of 'perversity' as part of 'patent illegality'— it was and is impossible for anyone to arrive at such conclusions;

8.2 Some conclusions are entirely bereft of reasons — again, a dimension of patent illegality.

8.3 The Award takes into account wholly irrelevant material, including material not on record;

8.4 The Award travels well beyond the contract.

8.5 In places, the Award attempts to rewrite provisions of the contract.

8.6 The Award purports to do that which the Arbitration Act says in Section 28(2) no arbitral tribunal can do, in that it decides *ex aequo et bono* or *amiable compositeur*,

although there is no provision in the contract enabling the arbitral tribunal to do this.

8.7 The Award impermissibly imports principles from public law, and especially considerations of Article 14. These, he maintains, are entirely outside the remit of any private law arbitral tribunal. The fundamental policy of Indian law does not permit an arbitral tribunal to invoke these public law principles in deciding private law commercial disputes controlled and constrained by contract. It does this despite there being no pleading. It does not address BCCI's objection regarding an insufficient pleading.

8.8 The Award grants damages without any reasons at all.

8.9 The Award grants damages ostensibly in lieu of specific performance, although this relief was in terms given up and not pressed. DCHL had no prayer for damages in lieu of specific performance, but only for (i) damages in addition to specific performance and (ii) damages if the specific performance relief was *rejected*. The Award impermissibly reads these as prayers for damages in lieu of specific performance. The Award returns no finding at all of DCHL being proved to be entitled to specific performance. It grants compensatory damages — without reasons — and in doing so it rewards DCHL for its inability to perform. This is against the fundamental policy of Indian law regarding damages.

9. Mr Jagtiani, Mr Seervai and Mr Sharan Jagtiani, all learned Senior Counsel, very ably assisted by Ms Rishika Harish, oppose Mr Mehta's formulation root and branch. They defend the Award.

9.1 There is, they submit, no room for interference, especially given the state of the law as it now stands.

9.2 The learned Sole Arbitrator permissibly exercised discretion where necessary. Both facts and law fully supported the views he took. The findings were not merely possible but entirely plausible.

9.3 Throughout, BCCI has acted in a high-handed, capricious and arbitrary manner. The intentions of BCCI were always mala fide, intended to somehow or the other oust the Deccan Chargers team and DCHL's franchise on one pretext or the other. DCHL was driven to financial ruin.

9.4 BCCI acted entirely arbitrarily, singling out DCHL for punitive action and deprivation of due funding.

9.5 That termination, they maintain, was entirely wrongful. It was also premature. The learned Sole Arbitrator correctly so held. Once that finding is undisturbed, as they say it must be, the rest follows and lies in the realm of arbitral discretion, warranting no interference at all.

9.6 Besides, when performance was demanded, DCHL complied, at least substantially; and yet BCCI terminated the Franchise Agreement.

9.7 The policy of arbitration law, in their submission, is to minimize curial interference. A Section 34 court is not a

court of appeal, or first appeal. The Court's remit is exceedingly narrow. Unless it is shown that there is a facial vulnerability, no Section 34 court should interfere. Arbitral awards are not to be set aside lightly or for the asking.

9.8 The Award is fair, balanced and fully considers the rival submissions and all the material on record.

9.9 There are more than sufficient reasons in the Award itself justifying its conclusions.

10. I am mindful of the general principles governing arbitration law: (*i*) minimal curial interference in arbitral proceedings, and only to the extent absolutely necessary; and (*ii*) the limited grounds of challenge to arbitral awards. The documentary material before me is considerable. It runs to 66 digital volumes (with corresponding physical volumes), including material presented to the learned Sole Arbitrator, written submissions, notes and compilations of authorities. The Petition itself was readily amended — on my insistence — to remove certain phrases I found unacceptable when referring to the learned Sole Arbitrator himself. The hearings were entirely online, on several days between 5th and 14th January 2021.

11. Having considered the rival submissions, the documentary material and the decisions cited, I have not been able to accept DCHL's defence of the impugned Award. Within the bounds of what Section 34 permits, I have concluded that the Award cannot be sustained. I believe Mr Mehta is entirely correct in every single one of his submissions. My reasons follow. I have made the petition

absolute and set aside the Award (except to one limited extent). This petition being a matter in the Commercial Division, I have also made an order of costs.

12. I turn first to a brief consideration of the ambit of Section 34.

C. THE AMBIT OF SECTION 34

13. Mr Mehta opened his submissions by straightaway accepting the narrow confines of Section 34 as now finally settled by the Supreme Court in *Ssangyong Engineering & Construction Co Ltd v National Highway Authority of India*.[1] He then cited my own decision in *Union of India v Recon*,[2] where I attempted to summarize and marshal the law as laid out in *Ssangyong Engineering*, and the changes in the law that the Supreme Court noted there.

14. First, Section 34, as amended:[3]

> **34. Application for setting aside arbitral award.—**
>
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if—

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1 (2019) 15 SCC 131.

2 2020 SCC OnLine Bom 2278 : (2021) 1 Bom CR 167 (Bom) : (2020) 6 Mah LJ 509 (Bom).

3 Incorporating the amendments introduced by Act 3 of 2016, with effect from 23rd October 2015. These amendments are shown in square brackets.

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[*Explanation 1.*—**For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if**,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[**(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award**:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

(*Emphasis added*)

15. Next, Mr Mehta relies on the summary in *Recon*:

17.4 This yields the following result:

(i) A lack of a '*judicial approach*', being the *Western Geco* expansion, is not available per se as a ground of challenge.

(ii) A violation of the principles of natural justice is a ground for challenge as one under Section 18 read with Section 34(2)(a)(iii) — that is to say, not under

the 'fundamental policy' head nor the 'patent illegality' head, but distinctly under this sub-section.[4]

(iii) A lack of reasons is a patent illegality under Section 34(2-A).

(iv) **In *interpreting the contract*, the arbitral view must be *fair-minded* and *reasonable*. If the view is one that is *not even possible*, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.**

(v) **'*Perversity*' as understood in *Associate Builders*, is now dishoused from '*fundamental policy*' (where *Western Geco* put it), and now has a home under '*patent illegality*'. This includes:**

(A) **a finding based on no evidence at all;**

(B) **an award that ignores vital evidence; and**

(C) **a finding based on documents taken behind the back of the parties.**

I believe this is not an exhaustive listing.

Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the *Wednesbury* unreasonableness standard (introduced in *Western Geco*) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. **If the *interpretation of the contract* is utterly unreasonable and totally implausible — the view taken is not even possible — a challenge lies. Therefore: an award that was impossible either in its *making* (by ignoring vital evidence, or being based on no evidence, etc) or in its *result* (returning a finding that is not even possible), then**

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4 34(2)(a)(iii): the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings **or was otherwise unable to present his case**.

a challenge on the ground of 'perversity' lies under Section 34(2-A) as a dimension of 'patent illegality'.

18. It is in *Ssangyong Engineering* that we see an explicit acceptance of an underlying principle, one that has long informed thinking globally in the context of international arbitrations: the impermissibility of a merit-based review of an arbitral decision. To put it in a nutshell: the previous expansiveness of judicial interference in challenges to arbitral awards has been eliminated. **Merit-based interference is proscribed. This means, of course, that it is not permissible to set aside an award merely because on the merits another view was possible, or even preferable; or, as we saw, a correctly invoked and stated law was erroneously applied. There can be no re-appreciation of evidence. A reasonable and fair interpretation of the contract will invite no interference.** It therefore now must behove a Section 34 court to say, "Perhaps this award before me is not done as I might have done it. I might have preferred another, or even opposing, view. But neither is in itself a permissible reason to interfere." This is so because the window of recourse, previously being widened, has now shrunk. And that is not only as it should be, but as the statute would now have it. **The entire ethos of arbitration as an alternative dispute resolution mechanism, one essentially private and contract-based, is founded in this quaternion: contractual fidelity; speedy disposal; finality; enforcement**.

(*Emphasis added*)

16. To this, I would only add today paragraph 40 of *Ssangyong Engineering*, regarding the principle set out in paragraph 42.3 of

Associate Builders v Delhi Development Authority,[5] which *Ssangyong Engineering* interpreted. *Associate Builders* said, in paragraph 42.3, that a contravention of Section 28(3) constitutes a patent illegality. An arbitral tribunal must decide in accordance with the terms of the contract, taking into account trade usages applicable to the transaction. The caveat *Associate Builders* entered was that if the arbitral tribunal interprets the contract in a *reasonable manner*, there is no patent illegality. This was reaffirmed in paragraph 40 of *Ssangyong Engineering*. That Court said the statutory amendment to Section 28(3) followed the interpretation in paragraph 48.2 of *Associate Builders*.[6] The words 'decide according to the contract' were replaced with 'take into account the terms of the contract', and 'shall decide' was amended to 'while deciding and making an award'. Therefore, the *Ssangyong Engineering* Court said that contractual interpretation is primarily for an arbitrator to decide, *unless the arbitrator construes the contract in a manner that no-fair minded or reasonable person would* — in short, the arbitrator's view is not even a possible one. Also, the *Ssangyong Engineering* court went on, if the arbitrator wanders outside the contract *and deals with matters not allotted to him*, he commits a jurisdictional error. This falls within the new ground added under Section 34(2-A), i.e. patent illegality.

17. The *Ssangyong Engineering* principles, Mr Mehta submits, have been followed in later decisions, irrespective of whether or not

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5 (2015) 3 SCC 49.

6 Sub-section (3) was amended by the 2015 amendment, Act 3 of 2016, with effect from 23rd October 2015. Originally, it read:

> 3. In all cases, the arbitral tribunal shall decide *in accordance with the terms of the contract* and shall take into account the usages of the trade applicable to the transaction. (*emphasis supplied*)

these refer to *Ssangyong Engineering*:[7] *Parsa Kente Collieries Ltd v Rajasthan Rajya Vidyut Utpadan Nigam Ltd*;[8] *Dyna Technologies Pvt Ltd v Crompton Greaves Ltd*;[9] *South East Asia Marine Engineering & Constructions Ltd v Oil India Ltd*;[10] *Patel Engineering Ltd v North Eastern Electric Power Corporation Ltd*.[11]

18. Mr Mehta places almost the entirety of his case on the foundations of *patent illegality* and *perversity* following the *Ssangyong Engineering* construct. He readily accepts that if he is unable to demonstrate either or both of these, his case must fail.

19. This takes us directly to the Franchise Agreement of 10th April 2008.

D. THE FRANCHISE AGREEMENT OF 10TH APRIL 2008

20. The 52-page 10th April 2008 Franchise Agreement between BCCI and DCHL has several sections.[12] The parties are, of course, BCCI, for and on behalf of its separate Sub-Committee Unit known as the Indian Premier League. This is called "**BCCI-IPL**" in the

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7 *Ssangyong Engineering* was decided on 8th May 2019.

8 (2019) 7 SCC 236; decided on 27th May 2019, citing *Ssangyong Engineering*.

9 (2019) 20 SCC 1; decided on 18th December 2019.

10 (2020) 5 SCC 164; decided on 11th May 2020,

11 (2020) 7 SCC 167; paragraphs 25–27; decided on 22nd May 2020, citing *Ssangyong Engineering*.

12 Vol 10, Ex "B", *pp.* 159–211.

Franchise Agreement. The principal document is from clauses 1 to 22. Then there are several schedules. Schedule 2 has a pro forma player contract.[13] It has its own schedules. For the principal agreement, reference will need to be made to Schedule 3, "*Franchisee Obligations*".[14]

21. I start with some of the relevant definitions.

21.1 "*Central Rights*" was defined to mean those League-related rights (other than under a 'Central Licensing' arrangements)[15] to be exploited in the contractually-defined manner by BCCI-IPL. These were said to comprise the Media Rights, Umpire Sponsorship Rights, Games Rights, etc.

21.2 "*Central Rights Income*" was the amount of income in respect of each year actually received by BCCI-IPL from the exploitation of the Central Rights (excluding service tax) in each case after deducting the relevant 'League Expenses' for the year in question.

21.3 "*Franchisee Income*" was the aggregate of (i) all income accruing to the Franchisee in relation to the operation of the franchise, including under any Franchise Partner Agreement or Gate Receipts or both; and (ii) any payment of Central Rights income made by BCCI-IPL to the Franchisee under clause 8.1 excluding any Franchisee Licensing Income.

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13 Vol 10, Ex B, at *p.* 185.

14 Vol 10, Ex B, *pp.* 201–206.

15 Selling of branded merchandise and products, etc.

21.4 "*League Expenses*" included, for each year of the term of the Agreement, the defined expenses incurred by BCCI-IPL: television and production costs relating to the grant of media rights or broadcasts of matches, out of pocket expenses incurred in servicing, implementing and delivering Central Rights, and the fees paid to the International Cricket Council or ICC in respect of umpires and other league match officials contracted to BCCI-IPL.

22. A few other definitions are also relevant.

22.1 "*Franchisee Group*" meant the ultimate parent company or entity of the Franchisee, and any other company, undertaking or entity controlled by the parent, whether by shareholding, board control, agreement or otherwise.

22.2 "*Insolvency Event*" had the meaning set out in clause 11.6.

22.3 "*League*" means the Twenty20 league established by BCCI-IPL, anticipated to take place in April/May of each year (or whenever notified).[16]

22.4 "*Players*" were each and all of the players 'employed or otherwise contracted' by the Franchisee and who comprised the Squad (the group of players from whom the playing team was selected) periodically.

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16 Thus, BCCI, IPL, BCCI-IPL and 'the League' appear to be interconnected and overlapping expressions.

22.5 "Player Contract" meant the form of the contract in Schedule 2, as amended periodically.

23. Clause 2.1 set out the rights granted to the Franchisee. These were the right to carry on the Franchise in terms of the Agreement; to be the only team in the League with a home stadium in the Franchisee's defined territory for not less than the first three 'seasons' (the period of time in each year of the term of the Agreement during which the IPL would take place); and to stage its home league matches at a stadium to be provided at cost by BCCI-IPL under an agreement between BCCI-IPL and the stadium's owner.

24. The term of the Agreement was without a specific end-date. It was to continue as long as the IPL continued, subject to termination, suspension or renewal.

25. Clause 6 required DCHL to comply fully with the obligations set out in and the provisions of Schedule 3[17] throughout the term. These included in section 2(d) the duty—

> (d) not to breach the obligations relating to the Player salaries as set out in the Operational Rules including in respect of the minimum annual sums payable to each Player (being US$ 20,000 in 2008) and the minimum aggregate sum to be spent on the Squad by way of Player Fees (being US$ 3.3 million in 2008);

26. Section 9(a) of Schedule 3 said:

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17 Vol 10, Ex B, *pp.* 201–206.

9(a) The Franchisee shall not without first obtaining BCCI-IPL's prior written consent to charge, pledge, grant any security over or otherwise encumber the Franchise or any of the rights granted to the Franchisee hereunder whether or not such encumbrance is in the ordinary course of business.

27. Clause 8 dealt with the division of Central Rights Income between BCCI-IPL and the various franchisees. The Central Rights Income from the sale of Media Rights was defined for three period blocks: 2008–2012, 2013–2017 and 2018 onwards. In the first of these, the franchisees' share was higher and BCCI-IPL's lower, which gradually reached some parity level by the third period. A defined percentage was under the 'final league standing payment' head. Other Central Rights Income was for two periods, 2008–2017 and from 2018 onwards. The Franchisees' share of the Central Rights Income was, for each year, to be split equally between the participating franchisees. League expenses were to be allocated to and deducted from the Central Rights Income to which those expenses related unless impracticable, in which case they were to be apportioned equally. Within 30 days of each quarter ending, BCCI-IPL was to give each franchisee a detailed report of the Central Rights Income BCCI-IPL had received. BCCI-IPL was to pay out each franchisee's share of the Central Rights Income within a stipulated period. BCCI-IPL also had to maintain audited accounts and allow inspection (not more than twice a year). If any such review showed that BCCI-IPL had failed to pay any amount due to the franchisee, then BCCI-IPL was to pay the unpaid amount within 30 days of such inspection.

28. This takes us to the all-important clause 11, "Termination". It is set out in full below.

> **11. Termination**
>
> 11.1 **Either party may terminate this Agreement with immediate effect by notice in writing if the other party has failed to remedy any remediable material breach of this Agreement within a period of 30 days of the receipt of a notice in writing requiring it to do so which notice shall expressly refer to this Clause 11.1 and to the fact that termination of this Agreement may be a consequence of any failure to remedy the breach specified in it. For the avoidance of doubt a breach by the Franchisee of its payment obligations under this Agreement or under Clause 22 shall be deemed to be a material breach of this Agreement for the purposes of this Clause.**
>
> 11.2 **Either party may terminate this Agreement with immediate effect by written notice if the other party commits or permits an irremediable breach of this Agreement or if it is the subject of an Insolvency Event.**
>
> 11.3 BCCI-IPL **may** terminate this Agreement **with immediate effect by written notice** if:
>
> (a) there is a Change of Control of Franchisee (whether direct or indirect) and/or a Listing which in each case does not occur strictly in accordance with Clause 10;
>
> (b) the Franchisee transfers any material part of its business or assets to any other person other than in accordance with Clause 10;

(c) **the Franchisee, any Franchisee Group Company and/or any Owner acts in any way which has a material adverse effect upon the reputation or standing of the League, BCCI-IPL, BCCI, the Franchisee, the Team (or any other team in the League) and/or the game of cricket.**

11.4 The termination of this Agreement for any reason will not operate to terminate any provision which is expressly or any implication provided to come into or continue in force after such termination and will be without prejudice both to the accrued rights and liabilities and other remedies of the parties to this Agreement and to any rights and obligations in respect of the period after such termination.

11.5 On the termination of this Agreement for any reason BCCI-IPL may set off against and deduct from any money which would otherwise be payable or owing by BCCI-IPL to the Franchisee under this Agreement all moneys, debts or liabilities due or owing by the Franchisee to BCCI-IPL unless and until the Franchisee has satisfied the same and BCCI-IPL shall be entitled to retain any moneys or amounts to deducted for its own absolute benefit.

11.6 **An "Insolvency Event" shall occur in respect of a party to this Agreement if:**

(a) **any bona fide petition is presented or any demand under the Act is served on that party or an order is made or resolution passed for the winding-up of that party or a notice is issued convening a meeting for the purpose of passing any such resolution.**

(b) any bona fide petition is presented for an administration order or any notice of the

appointment of or of an intention to appoint an administrator of that party is filed in court or an administration order or interim order is made in relation to that party;

(c) any administrative or other receiver or manager is appointed of that party or of all or any material part of its assets and/or undertaking within the meaning of the Act or any other bona fide step is taken to enforce any encumbrances over all or any part of the assets and/or undertaking of that party;

(d) any step is taken by that party with a view to proposing any kind of composition, compromise or arrangement involving that party and any of its creditors, including but not limited to a voluntary arrangement under the Act.

Or anything similar occurs under any analogous legislation anywhere in the world.

11.7 For the purposes of this Agreement "**Control**" means in relation to a person the direct or indirect power of another person (whether such other person is the direct or indirect parent company of the first mentioned person or otherwise) to secure that the first mentioned person's affairs are conducted in accordance with the wishes of such other person:

(a) by means of the holding of any shares (or any equivalent securities or the possession of any voting power; or

(b) by virtue of any powers conferred on any person by the Articles of Association or nay other constitutional documents of any company or other entity of any kind; or

(c) by virtue of any contractual arrangement.

and "**Controlled**" and "**Controller**" shall be construed according and a "**Change of Control**" shall occur if (i) a person who Controls another person ceases to do so; or (ii) a different person acquires Control of such other person (whether before or after or as a consequence of any Listing); or (iii) if any person acquires Control of another person in circumstances where no person previously Controlled such other person. For the purposes of this Clause 11.7 (and in connection with the use in this Agreement of the terms defined in this Clause 11.7) all of the members of any consortium, partnership or joint venture which has any interest (direct or indirect) in the Franchisee shall be deemed to be one person.

11.8 On the termination of this Agreement for any reason and in order to protect BCCI-IPL's intellectual property rights and reputation the Franchisee shall and shall procure that each Franchisee Group Company and Owner shall:

(a) immediately cease its operation of the Franchise;

(b) not at any time thereafter:

(i) disclose or use confidential information relation to BCCI-IPL, the League, BCCI or any Other Franchisee acquired by the Franchisee during or as a result of this Agreement;

(ii) made any use of the League Marks and/or the Franchisee Marks or any trade marks, trade names and/or logos

which are similar to any of the foregoing;

(iii) purport to be a franchisee of or otherwise associated with BCCI-IPL, the BCCI and/or the League;

(iv) sell, licence or otherwise permit the sale of any products bearing the League Marks and/or the Franchisee Marks or any trade marks, trade names or logos which are similar to any of the foregoing:

(c) immediately pay all sums and amounts due to BCCI-IPL under the terms of this Agreement or otherwise.

11.9 The Franchise may by written notice terminate this Agreement with immediate effect if the annual revenue payable under the agreement(s) relating to the grant by BCCI-IPL of the Media Rights is, in aggregate, less than US$59m in any year commencing with effect from the sixth year of the Term provided that:

(a) no such termination right shall be exercised during a Season;

(b) if such termination right is not exercised by the Franchisee within 30 days of the Franchisee becoming aware of the existence of circumstances under which the right may be exercisable then, with respect to the relevant year (but not any future year), such termination right shall cease to be of any further force or effect;

(c) such termination right shall not be exercisable if, in respect of the relevant year, BCCI-IPL agrees to pay to the Franchisee such sum as equals the difference between the amount actually receivable by the

Franchisee under Clause 8.1(a) in the relevant year and the amount the Franchisee would have received under said Clause had the above-mentioned annual revenue from the agreement(s) relating to the grant of the Media Rights been equal to US$ 59m in respect of such year.

(d) said termination right shall be the Franchisee's only remedy in respect of the above-mentioned circumstances to the exclusion of all other rights and remedies;

(e) if the Franchisee chooses to exercise said termination right then:

(i) it shall have no rights to sell or otherwise transfer any share or other interest of any kind in the Franchise, the Franchisee and/or the Team to any other person;

(ii) as a condition of such termination being effective the Franchisee shall immediately take all such steps and execute all such documents as shall be necessary to transfer to BCCI-IPL (or to such person as it shall nominate) all rights, title and interest of any kind in the Franchise, the Franchisee and/or the Team as BCCI-IPL shall request including the benefit and burden of all agreements and arrangements relating to the Franchise, the Team and any Players as is requested by BCCI-IPL (the Franchisee to be responsible for discharging such agreements up to the date of termination of this Agreement). For the avoidance of doubt the

> Franchisee shall remain exclusively responsible for all debts relating to the Franchise, the Franchisee and/or the Team which were incurred and/or arose prior to the date of this termination of this Agreement under this Clause 11.9."
>
> (*Emphasis added*)

29. Clause 21 has the provision for dispute resolution. It requires the reference of disputes to a sole arbitrator, and the venue of the arbitration is Mumbai.

30. On 12th June 2008, BCCI and DCHL executed an addendum to the Franchise Agreement.[18] It substituted entirely clause 8.2 of the Franchise Agreement. The original clause read:

> BCCI-IPL shall within 30 days of 31 March, 30 June, 30 September and 31 December in each year supply the Franchisee with a report which includes full details of all Central Rights Income received by BCCI-IPL in the immediately preceding three month period leading up to 31 March, 30 June, 30 September and 31 December (as appropriate) in each year. Following the later of 40 days from the delivery of each such report and the date falling 30 days after receipt of an invoice for the relevant amount, BCCI-IPL shall pay to the Franchisee the Franchisee's share of the Central Rights Income as determined in accordance with Clause 8.1.

This was now substituted by:

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18 Vol 40, *pp.* 1–2.

"BCCI-IPL shall within 30 days of 30 June, 30 September and 31 December in each year supply the Franchisee with a report which includes full details of all Central Rights Income received by BCCI-IPL in the immediately preceding six month period and two subsequent three month periods leading up to 30 June, 30 September and 31 December respectively in each year. 5 working days from the delivery of each such report, BCCI-IPL shall subject as provided below pay to the Franchisee the Franchisee's share of the Central Rights Income as determined in accordance with Clause 8.1.

The Central Rights Income received by BCCI-IPL in each year in respect of the period 1 January to 31 March shall be treated by BCCI-IPL as an advance in respect of the Central Rights Income referable to such year. Provided that the amount of such advance which has been received by BCCI-IPL is sufficient to enable it to do so (and to make equivalent advance payments to Other Franchisees) BCCI-IPL shall:

(a) within 5 working days of the signature by both parties of this Agreement pay to the Franchisee the sum of US $3m; and

(b) on or before the later to occur of 31 March and five working days after the date of the first match in each of 2009, 2010, 2011 and 2012 pay to the Franchisee the sum of US$ 3.5m

each of which payments shall be treated as an advance against and shall be deducted from the Franchisee's share of Central Rights Income under this Agreement in respect of the relevant or (to the extent not recouped by such deduction) any subsequent year. In respect of each subsequent Season during the Term following 2013 the amount of the above advance shall be notified to the Franchisee in writing (being no less than US$3.5m)."

31. On 1st March 2012, the Operational Rules for the 2012 League were framed. These are part of the Franchise Agreement.[19] There is no dispute that these are to be read as binding. Section 2(1) said that participation or other involvement in the League was a deemed acceptance by each 'Person' (broadly defined to include persons and entities), subject to those Rules, of an agreement with and an obligation owed to BCCI 'and/or IPL' to be bound by and subject to the Regulations, the laws of cricket, the terms of each relevant Player Contract and the jurisdiction of the IPL. Section 2(5) contained a provision for 'set-off', worded thus:

> **2-5 Set-Off**
>
> Whenever any sum of money shall be or in the future become receivable from or payable by any Franchisee to IPL and/or BCCI or to any other franchisee or to any Person subject to these Operational Rules including but not limited fines, costs, awards or decisions made under the Regulations, then the same may be deducted from any sum then due or which at any time thereafter may become due to that Franchisee arising out of the Regulations or any contract between such Franchisee and IPL and/or BCCI including without limitation the relevant Franchise Agreement and BCCI-IPL may pay such sum on to any third party to whom it is owed by such Franchisee including but not limited to any State Association. The exercise by IPL and/or BCCI of its rights hereunder shall be without prejudice to any other rights or remedies available to IPL and/or BCCI.

32. 'Regulations' here was defined as the Operational Rules and IPL Regulations. In the Franchise Agreement, "Regulations" meant

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19 Vol 41, *pp.* 52–81.

the Operational Rules, the Match Staging Regulations and the League Rules; the latter two being independently defined.

33. With this, I move on to a chronology.

E. RELEVANT DATES AND EVENTS

34. In this section, I have attempted to set out the relevant events leading up to the final Award as compactly as possible, but balancing this against the need for some level of detail. Of necessity, I will need to return to a few of the documents again when I assess the rival submissions in the context of the learned Sole Arbitrator's findings. While doing so I will not be re-appreciating the evidence led before the learned Sole Arbitrator. This chronology, therefore, provides the factual context.

35. Deccan Chargers was one of the eight competing teams when IPL began. The team opened the inaugural 2008 season as favourites. It finished last. In the second IPL season of 2009, played in South Africa, Deccan Chargers recovered in a dramatic fashion. It won the tournament finals in Johannesburg, defeating Royal Challengers Bangalore by six runs. In 2010, the team lost the semi-finals and the playoffs for third place. In 2011, it placed seventh in the league standings.

36. This takes us directly to the events of mid-2012. These unfolded with great rapidity.

37. DCHL had to make 50% payment to its players by 1st May 2012. It did not meet this obligation. It seems some other franchisees were in some level of default, too. On 4th June 2012, BCCI's Sundar Raman emailed all franchisees asking for a confirmation that player payments had been made.[20] Raman sent a reminder email to DCHL's E Venkattram Reddy (Deccan Chargers' Chief Operating Officer) on 6th June 2012.[21] DCHL replied on 7th June 2021, saying that all players had been paid 15% on 1st April 2012, and 50% payments would be processed 'in the next week'.[22] Raman emailed back on 7th June 2012, saying that the 50% payment was due on 1st May 2012 and was already five weeks overdue. He said this was non-compliance with the terms of the players' contracts.[23]

38. Earlier, in 2007–2008, BCCI partnered with the International Management Group ("**IMG**"), an events company, for professional-quality running and management of the IPL along the lines of a world-class sporting event.[24] On 26th July 2012, IMG wrote to DCHL on behalf of BCCI regarding player fee payments for the IPL 2012 season.[25] IMG said two instalments of the player fee should have been paid by then: 15% on 1st April and 50% by 1st May. Despite several assurances, IMG said, these payments had not yet been made in full. There had been press comments, and BCCI had received a communication from Cricket South Africa on the matter. IMG

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20 Vol 49, Ex MM, *p.* 1338.

21 Vol 49, Ex MM, *pp.* 1337–1338.

22 Vol 49, Ex MM, *p.* 1337.

23 Vol 49, Ex MM, *p.* 1337.

24 Apparently, this commercial relationship ended in early 2021.

25 Vol 49, Ex NN, *p.* 1339.

pointed out that under the Franchise Agreement, each player contract and the Operational Rules, DCHL was obligated not to bring the League into disrepute. BCCI had requested IMG to seek a formal confirmation that all outstanding player payments would be made by 31st July 2012 while reserving all of BCCI's rights in that regard. In default of confirmation or payment in full by that date, DCHL would be '*in breach of fundamental terms of the Franchise Agreement*', with serious consequences. A copy of this letter also went to DCHL by email.[26]

39. On 27th July 2012 and 31st July 2012, DCHL replied by email asking for an extension of time until 10th August 2012 to make these payments as many of its principal sponsors had still not paid.[27]

40. On 31st July 2012, Darren Lehmann, the Deccan Chargers' team coach, sent out an email to several players also complaining about non-payment.[28] Lehmann asked the team captain to take up the matter. He said that DCHL had promised payment for the sixth time, but that was yet not done. The email referenced a news item that the Industrial Finance Corporation of India Ltd ("**IFCI**") had filed a winding-up petition against DCHL in the Andhra Pradesh High Court in Hyderabad. The value of the DCHL quoted stock had slumped 10% as a result. IFCI's petition was a crucial factor in the present arbitration, as we shall presently see.

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26 Vol 49, Ex OO, *p.* 1340.

27 Vol 49, Ex OO, *p.* 1340.

28 Vol 49, Ex PP, *pp.* 1341–1343, at *pp.* 1342–1343.

41. Between 1st August and 3rd August 2012, several players on the Deccan Chargers team complained to BCCI about not having been paid and expressing concern about DCHL's financial stability.[29]

42. On 1st August 2012, Yes Bank Ltd ("**YBL**") sent a letter to BCCI in Mumbai claiming that it had an exclusive first charge on 'the receivables pertaining to Deccan Chargers', following a hypothecation created in YBL's favour by DCHL on 24th November 2011 — *after* the Franchise Agreement.[30] This hypothecation was, YBL claimed, security for various loans/credit facilities that DCHL took. The exclusive first charge covered the entirety of the DCHL's current assets, including all BCCI receivables. The total claim was over Rs.173 crores. YBL said it was the only secured lender to DCHL and had the first right on all cash flows, including BCCI-receivables. YBL asked BCCI to release all payments due to DCHL by an instrument made out to DCHL's account with YBL.

43. Five days later, on 6th August 2012, BCCI received a letter from ICICI Bank ("**ICICI**").[31] The letter said that DCHL had taken some financial assistance from ICICI for Rs.4,900 million (Rs 490 crores) and had also executed security documents favouring ICICI, which, therefore, sought BCCI's approval for the creation of a charge, security and interest over the Franchise. The letter was

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29 Vol 49, Ex PP, *pp.* 1341–1343, at *pp.* 1341–1342.

30 Vol 41, Ex F, *p.* 82–83.

31 Vol 40, Ex B, *pp.* 3–4 : Vol 57, *pp.* 6–7. It seems there was a sanctioned scheme of amalgamation between DCHL and Deccan Chargers Sporting Ventures between 2008 and 2011, but we are not concerned with this at all.

counter-signed on behalf of DCHL with a corresponding request for BCCI approval.

44. The IPL's Governing Council met on 9th August 2012.[32] Item 6 on the agenda related to Franchisee matters. The first of these was about another franchise, Royal Challengers Bangalore ("**RCB**"). Here, again, player payments were overdue. RCB said it was undergoing financial restructuring and the payment of Rs. 35 crores to players would be done by 30th September 2012. It also said it would get a no-objection from the players to pay the balance by October 2012 and December 2012. The Governing Council unanimously decided that RCB should get this no-objection from the players. BCCI would not be responsible for any delay or default. RCB should make payment in two weeks.

45. Then the Governing Council took up the matter of DCHL. It noted 'crucial developments' after IMG's letter (similar to one sent to RCB). First, it took note of media reports about the 'financial condition of DCHL' and the letters from YBL and ICICI. Both, it noted, spoke of an 'exclusive charge' on the assets and receivables. The ICICI representative was called in. She told the Governing Council that ICICI was a lender to DCHL in the amount of Rs.490 crores and that there was a mortgage or security over DCHL's assets and property favouring ICICI. She presented the letter seeking BCCI's approval to create the charge. She was told this could not be done because BCCI also had a letter from YBL saying that it had an existing exclusive charge. A decision would be taken vis-à-vis ICICI

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32 Vol 57, *pp.* 8–13; Minutes : Vol 41, Ex G, *pp.* 84–89.

after assessing the extent of DCHL's default. Then N Srinivasan, the President of BCCI at the time ("**Srinivasan**"), told the Governing Council that T Venkattram Reddy ("**Reddy**")[33] had requested a meeting. Reddy was called in. The minutes indicate that Reddy asked for permission to hive off the Deccan Chargers entity from DCHL (the word used is 'demerge') and set it up as a separate entity — a wholly-owned subsidiary of DCHL — "which will give comfort to the lenders/bankers". The Governing Council said it would consider the matter.

46. The Governing Council then took up matters relating to two other teams: Rajasthan Royals and Pune Warriors India (Sahara).

47. As I have noted, DCHL had sought time until 10th August 2012 to pay its players. It did not. It sought no further extension.

48. On 11th August 2012, BCCI wrote to DCHL's Reddy,[34] calling him to a meeting on 14th August 2012 at the Taj Palace, Delhi. He was to bring details of overdue payments, including to international boards, support staff and players of the 2012 squad, and copies of any winding-up notices and petitions. He was also to explain in writing why the IFCI winding-up petition would not constitute an 'Insolvency Event' under clause 11.6 of the Franchise Agreement, inviting action under clause 11.2. He was also to submit a written explanation why the hypothecation by DCHL in favour of ICICI

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33 Described as 'Deccan Chargers' owner'. He was the Chairman of DCHL.

34 Vol 57, *pp.* 14–15 : Vol 40, Ex C, *pp.* 5-6.

would not infringe clause 9(a) of Schedule 3 of the Franchise Agreement.

49. DCHL's Reddy replied on 13th August 2012.[35] He submitted some documents regarding payments. Reddy claimed that the IFCI petition was not a bona fide petition and, therefore, not an insolvency event within the meaning of the Franchise Agreement. He said IFCI claimed a debt due of Rs 25 crores, but Rs Six crores had been paid to discharge part of that liability. There was so far no order by the High Court against DCHL, which was contesting the proceeding. It had not even been admitted. Reddy claimed that DCHL was in a position to clear the debt. The mere filing of the petition, therefore, was not an insolvency event, he wrote. Interestingly, he mentioned that IFCI had also taken proceedings before the Debt Recovery Tribunal in Delhi and the Company Law Board, Chennai. Therefore, according to Reddy, the IFCI action was an abuse of the process of law, was mala fide and a pressure tactic. As to the ICICI hypothecation, Reddy claimed that it was subject to BCCI approval. It did not constitute a violation of the Franchise Agreement without that approval, and no charge was created. A copy of the IFCI petition was enclosed with this letter.[36]

50. The minutes of the 14th August 2012 meeting are important for additional aspects.[37] *First*, there was a reiteration of more or less what had gone before. Reddy was asked to come in and give his

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35 Vol 57, *pp.* 16–60 : Vol 40, Ex D, *pp.* 7–51.

36 Vol 57, *pp.* 26–44 : Vol 40, Ex D, *pp.* 7–51 at *pp.* 18–35.

37 Vol 57, *pp.* 61–62 : Vol 41, Ex J, *pp.* 124–125.

explanation. He submitted a handwritten statement of expected recoveries against anticipated expenses.[38] *Second*, there was now a question raised of a charge said to have been created by DCHL in favour of another bank, Kotak Mahindra Bank Ltd ("**Kotak**"). Reddy denied that DCHL had created any such charge over the franchisee, said there was no charge in favour of ICICI and sought another two weeks' time to effect the player payments. Then the Governing Council decided that BCCI had to protect 'the integrity of the league'. They expressed much apprehension and unanimously resolved to take recourse in terms of the Franchise Agreement:

> to put the Deccan Chargers on a notice of a curative period of 30 days to enable Deccan to cure all the instances of default.

As we shall see, this was to be central to at least one of the key issues in the arbitration that followed.

51. On 15th August 2012, Kotak wrote to BCCI referencing a telephone conversation with Srinivasan the day before.[39] Kotak confirmed that a charge had indeed been created by DCHL in favour of Kotak by hypothecation of all the rights, title, interest, benefit, claims and demands whatsoever of DCHL *in the Franchise Agreement* and on Deccan Chargers Sporting Ventures Ltd.[40] Indeed, Kotak had registered the charge under the Companies Act; a copy was enclosed.[41]

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38 Vol 57, *p.* 50.

39 Vol 57, *p.* 63–64 : Vol 49, Ex QQ, *pp.* 1344–1345.

40 The entity that was part of the scheme of amalgamation and to which ICICI, too, had made reference.

41 Vol 57, *p.* 63–64, at *p.* 64 : Vol 49, Ex QQ, *pp.* 1344–1345, at *p.* 1345.

52. This brings us to the critical document of 16th August 2012, BCCI's notice to DCHL.[42] Both sides had much to say on this document. It is best reproduced in full.

SANJAY JAGDALE
HONORARY SECRETARY

Honorary Secretary's Office

6-334 16 August, 2012

To
Deccan Chronicle Holdings Ltd
Hyderabad

For the attention: Mr. T. Venkattram Reddy, Chairman

Subject: 1) Franchise Agreement dated 10th April 2008
2) Letter from IMG on our behalf dated 26th July 2012
3) Your replies to the IMG letter dated 27th and 31st July 2012
4) Request from ICICI bank and you for consent from BCCI to the creation of a Charge on the Deccan Charges Franchise dated 06th August 2012
5) Your meeting with the IPL Governing Council on 9th Aug 2012
6) Notice from BCCI to you dated 11th August 2012
7) Your response to the notice dated 13th August 2012

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42 Vol 57, *pp.* 65–69 : Vol 10, Ex C, *pp.* 212–216.

8) Your meeting with the IPL Governing Council on 14th August 2012.

Dear Sirs,

We appreciate your early response to your request to attend the emergency meeting of the IPL Governing Council held on 14th August 2012 in New Delhi. From the explanation given by you in response to our notice dated 11th August 2012, we can gather that you have confirmed the following dues:

USD 3.5 Mn – Foreign players
USD 0.41 Mn – Foreign Boards
Rs. 90 Mn Indian Players
Rs. 7 Mn Indian State Associations and
Support Staff payments

You have also sought to explain that the charge created in favor of ICICI Bank was really only a proposal to create a charge which was subject to BCCI's approval and, since approval was not granted by BCCI on 9th Aug 2012 or at any time thereafter, there is no infraction of the Franchise Agreement. On the issue of the winding-up petition filed by IFCI in the Hyderabad High Court, we have noted (but not approved) your contention that the action was not bona fide. We do not find your explanation in respect of either of the above issues satisfactory. Please note that in connection with the above mentioned winding-up petition you are held to be in breach of clause 11.2 of the Franchise Agreement, since it constitutes an "Insolvency Event" under clause 11.6 of the Franchise Agreement.

Nevertheless, without prejudice to any of our rights and subject to further information, for the moment we do not propose to take any immediate action on the hypothecation agreements with ICICI Bank based upon your assurance that

there was no intention to create a charge on the franchise and based upon that bank's representation at the last IPL GC meeting (9th Aug) that the charge contemplated by said hypothecation agreements cannot be created without BCCI's approval.

At the IPL GC Meeting held on 14th August 2012, it was explained to you that while YES Bank officials have confirmed that it has no charge on the Deccan Chargers franchise itself, it appears that on 8th August 2012 (a day prior to your joint request with ICICI Bank to create the charge referred to in the previous paragraph), Kotak Mahindra Bank registered a charge on the Deccan Chargers franchise (DCSVL) in the office of the Registrar of Companies (ROC). We fear that you have attempted to create multiple charges on the same asset (viz., the Deccan Chargers franchise). Please note that these acts may constitute material breaches of the Franchise Agreement and/or have the potential to adversely affect the image and reputation of the IPL, which we cannot allow.

In light of the apparent conflict between two different banking organizations about the existence or otherwise of a valid charge on the Deccan Chargers franchise and without further information regarding the charge created by the Kotak Mahindra Bank, we are afraid we cannot grant approval to any charge in favor of ICICI Bank as requested by the said bank and yourself.

In the course of our discussions on 9th and 14th August you were explicitly informed that the only interest of BCCI to protect the integrity of the Indian Premier League ("League") and not be drawn into a situation where the credibility of the League be brought in to question due to player payment issues or due to the inability of a franchise to manage its team due to lack of funds. **You were also told of our apprehension that your Franchise may be dragged**

into a long drawn litigation which would create uncertainty. As you are aware, the last date for registration of current players for the IPL 2013 season is 31st October 2012. Thereafter certain milestones including but not limited to the payment of 30% of the 2013 franchise fee on or before 02nd January 2013 have to take place. It was explained to you that, apart from the charge on all receivables created in favor of Yes Bank, there appeared to be several other creditors **and the interest of BCCI-IPL, particularly in relation to outstanding players' and foreign boards' payments, would therefore not be saved if the current sums representing central rights income are released to you. The retention of these amounts by BCCI is of course a right under the IPL 2012 Operational Rules in light of the current situation.**

You have sought to address all these fears on the part of BCCI by seeking a period of 2 weeks to comply with the issues of outstanding payments and regularize your overall operations.

We have given careful thought to your representations. **We have decided that we will give you notice as per the Franchise Agreement of a curative period to enable you to cure all the Instances of default and regularize your operations. However, We will not be able to continue the franchise beyond the curative period without risking the credibility, integrity and value of the League itself and hence non compliance during this curative period will have to result in a cessation of your Franchise Agreement.**

Accordingly please treat this letter as:

(a) Formal notification pursuant to clause 11.1 of the Franchise Agreement that your failure to pay all sums currently due and owing to your players referred to above under their respective IPL Player Contracts

("Outstanding Sums") is a breach of your obligation under paragraph 2(e) of Schedule 3 of the Franchise Agreement and that such breach is material;

(b) A formal demand to remedy the said material breach of the Franchise Agreement referred to in paragraph (a) above by 15th September 2012, being 30 days from the date of this letter and to confirm in writing to BCCI that you have done so and notification that, as provided in clause 11.1 of the franchise agreement, any failure to remedy said breach may result in termination of the Franchise Agreement;

(c) A formal notification that your failure to pay the Outstanding sums has had a material adverse effect upon the reputation and/or standing of the IPL, BCCI, your franchise and/or your team and that all rights under clause 11.3 (c) and paragraph 2 (j) of Schedule 3 (in which you agree to comply with the "Regulations" which includes paragraph 4 of Section 4 of the Operational Rules) in each case of the Franchise Agreement are hereby expressly reserved;

(d) A formal demand to make payments by 15th September 2012 of all sums due to any of your players under any relevant buy-out agreements and to confirm in writing to BCCI that you have done so;

(e) A formal demand by 15th September 2012 to cancel the charge created on the Deccan Chargers Franchise in favour of Kotak Mahindra Bank in the Registrar of Companies (ROC) and any other charges, encumbrances or other security interest of any kind over the Deccan Chargers Franchise and to confirm in writing to BCCI that you have done so and that no other such charges or encumbrances subsist.

(f) A formal demand by 15th September 2012 to show acceptable proof that the winding-up petition filed by

M/s IFCI in CP 146 of 2012 in the High Court of Hyderabad stands withdrawn / dismissed.

(g) If you fail to comply with the demand made in paragraph (f) above, BCCI reserves the rights to take action under clause 11.2 of the Franchise Agreement.

If you fail to remedy the breaches referred to in paragraph (a), (e) and (f) above on or before 15th September 2012 then BCCI hereby reserves the right, in addition to its various above-mentioned rights under clauses 11.1, 11.2, 11.3 and paragraph 2(e)and (j) and 9 (a) of Schedule 3 of the Franchise Agreement and without prejudice to all other rights and remedies available to BCCI including under the Franchise Agreement and without BCCI accepting that any breach is remediable or otherwise, to terminate the Franchise Agreement with immediate effect by written notice to you.

All other rights and remedies available to BCCI are hereby reserved.

Yours faithfully,

Sd/-

Sanjay Jagdale,
Hon. Secretary.

(*Emphasis added*)

53. On 17th August 2012, Infrastructure Development Finance Company Ltd ("**IDFC**") wrote to the IPL Governing Council / BCCI, informing them that on 2nd July 2012, DCHL had charged in favour of IDFC—

> "all its right, title, interest, benefit and claims under the Franchise Agreement entered into between BCCI and

> DCHL as amended and supplemented from time to time (for IPL Team — Deccan Chargers), as security for repayment of financial assistance granted by IDFC Limited to DCHL."

IDFC said large amounts were due. This charge was stated to be registered. IDFC requested BCCI to note the charge and not allow or approve any transfer of the franchisee without IDFC's prior approval.[43] This was now the fourth institutional lender to claim a charge or security over the franchise.

54. On 29th August 2012, DCHL replied to BCCI's letter of 16th August 2012.[44] This is another critical document. Its existence and execution are not denied. But, as we shall see, DCHL in arbitration insisted this letter was procured under duress and coercion. I will address the learned Sole Arbitrator's finding on that issue a little later. What is undeniable is that DCHL's letter was on its letterhead. Reddy, DCHL's chairman, signed it. It referred to (1) the request to permit a charge to be created in favour of ICICI; (2) BCCI's letter of 11th August 2012 and the representation Reddy made in New Delhi on 14th August 2012; and (3) BCCI's letter of 16th August 2012.

54.1 In the first paragraph, DCHL / Reddy said that the demands in BCCI's 16th August 2012 letter were justified and that DCHL was trying its best to meet the deadline. There were several offers to purchase the franchise, but these did not reflect 'even a fraction of' its actual value. Hence, DCHL had decided that unless BCCI took up the Deccan Chargers franchise for sale to

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43 Vol 49, Ex RR, *p.* 1346.

44 Vol 57, *pp.* 70–71 : Vol 10, Ex C, *pp.* 217–218.

genuine buyers, DCHL would not be in a position to meet its liabilities nor enable banks to restructure the loan commitments.

54.2 Next, DCHL said that in advance of the 30-day deadline, it had to inform BCCI that DCHL did not have the wherewithal to comply with the commitments to the players 'and such like'. This situation was unlikely to change in the next few days. Therefore, DCHL had no choice but to seek BCCI's help and support in finding a genuine buyer. That decision had been made by DCHL's Board of Directors, fully conscious of the fact that it would be entirely in BCCI's discretion to accept or reject any offer. DCHL undertook to cooperate in this process.

54.3 DCHL confirmed that it knew that various creditors had been writing to BCCI claiming hypothecations over all receivables.

54.4 DCHL and Reddy authorised BCCI to identify a suitable buyer at a price BCCI determined to be the best bid, and DCHL unconditionally undertook to accept such a bid. It also authorised BCCI to implement this sale by public tender or private treaty, at its discretion.

54.5 Finally, DCHL indicated that this sale option would not impede BCCI's right to terminate the franchise if no buyer was found. It then sought an early decision so that a formal agreement, if necessary, could be drawn to give BCCI the required authority.

55. There was a meeting on 31st August 2012 at the Hotel ITC Park, Chennai. Reddy was there for DCHL. Srinivasan, Sundar Raman and others were there to represent BCCI, IPL and IMG. Also present were the representatives of a large number of financial institutions: ICICI, IDFC, YBL, SREI Infrastructure, Religare, Canara Bank and Axis Bank among them. A handwritten attendance sheet with names, mobile numbers, email ids, signatures and the organisations represented is on record.[45] The list shows the lenders' representatives' names. It also seems to show, at Sr No 15, Reddy himself. The minutes appear to be somewhat informal.[46] They have the signatures at the foot of the lenders' representatives in acceptance of the contents. BCCI participated on a without prejudice basis. DCHL's letter of 29th August 2012 — suggesting a sale of the franchise — was read out. No one objected. All the financial institutions supported it. They assured BCCI of their cooperation in passing clean title to any purchaser of the franchise, should BCCI accept the responsibility of finding a buyer. BCCI told the lenders they would have to address two issues immediately: (a) the pending winding-up petition against DCHL in the Andhra Pradesh High Court; and (b) charges said to have been created by other banks or creditors. BCCI said DCHL's request would be put to its Working Committee and a decision conveyed subject to these points, (a) and (b). Those present finally decided that there need not be a reserve price for any sale.

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45 Vol 49, Ex SS, *p.* 1349 : Vol 57, *p.* 77.

46 Vol 57, *pp.* 75–76 : Vol 49, Ex SS, *pp.* 1347–1348.

56. On 3rd September 2012, YBL wrote to BCCI referring to DCHL's sale proposal and protesting at DCHL's suggestion that sale proceeds be credited to the ICICI account. YBL insisted it was the only bank with a perfected first exclusive charge on the present and future receivables of the Deccan Chargers franchise.[47]

57. BCCI's Working Committee met on 4th September 2012, apparently at the Taj Mansingh, New Delhi. It decided to accept DCHL's proposal for sale, subject to specific terms, conditions and timelines, with the process ending by 5 pm on 13th September 2012. BCCI's Honorary Secretary, Sanjay Jagdale, set out these details in his letter of 4th September 2012 to DCHL.[48] These included that the sale would be by an advertised tender process. Jagdale asked Reddy to countersign the letter in acceptance of its terms. Reddy did so.

58. On 5th September 2012, YBL wrote to BCCI again. It now said that YBL would pay all players, support staff and boards for and on behalf of DCHL if BCCI confirmed in writing that it would remit 'the entire outstanding amount' to DCHL's account with YBL. The letter was said to have been 'confirmed' by Reddy.[49] It specifically refers to the meeting held the previous day, 4th September 2012, at the Taj Mansingh in New Delhi.

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47 Vol 49, Ex TT, *p.* 1350. Alternatively, YBL suggested an escrow mechanism.

48 Vol 10, Ex E, *pp.* 219–221.

49 Vol 11, Ex H, *pp.* 265–271.

59. The very next day brought forth yet another lender, this time Ratnakar Bank Ltd ("**RBL**").[50] By now, there were more than half a dozen banks or financial institutions in the fray: ICICI, YBL, Kotak, IDFC, Canara Bank, Axis Bank, SREI Infrastructure and Religare; and one financial institution, IFCI, had initiated recovery proceedings. But now RBL too claimed to be a secured lender to DCHL for Rs 55 crores as a short-term loan. RBL referred explicitly to the tender process for the sale of the Deccan Chargers Franchise. RBL claimed that its prior permission was needed before DCHL could hive off the franchise. RBL demanded that the sale proceeds be deposited in a no-lien account with a bank that did *not* have exposure to DCHL. It then said that its own representative or one for IndusInd Bank (said to represent smaller lenders) should be allowed to remain present when bids were opened. Clearly, this meant that there were even more lenders and creditors.

60. On 6th September 2012, YBL's solicitors, M/s Crawford Bayley & Co sent a notice to BCCI and DCHL, reiterating YBL's claim to an exclusive first charge on DCHL's present and future receivables.[51]

61. On 7th September 2012, DCHL issued a public advertisement (under Reddy's signature as chairman of DCHL) inviting bids for the franchise. This was said to be 'under the aegis of BCCI'.[52] It seems that DCHL then followed this with an Invitation to Tender, which

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50 Vol 49, Ex UU, *pp.* 1351–1352.

51 Vol 49, Ex VV, *pp.* 1353–1354.

52 Vol 49, Ex WW, *p.* 1355.

said that DCHL would relinquish its rights under the Franchise Agreement in favour of a buyer which or who met BCCI's eligibility criteria.

62. On 8th September 2012, BCCI replied to YBL's solicitors' notice.[53] BCCI's Jagdale set out some of the facts. He clarified that BCCI had nothing to do with the selection of the bid or the collection or remittance of sale proceeds, these being DCHL's responsibility. No part of the sale proceeds was to go to BCCI, which was, therefore, not concerned whether or not YBL had a paramount charge on receivables or sought legal recourse. YBL's action, BCCI maintained, indicated that a termination of the Franchise Agreement was inevitable and a consequent erosion of any value in the franchise.

63. The reply from YBL's solicitors on 10th September 2012,[54] was to suggest that the sale proceeds be deposited in a no-lien escrow account with Punjab National Bank (not a lender to DCHL), so that the proceeds could be distributed among 'other creditors/charge holder in the order of priority' after that priority was determined. Clearly, this indicated that there were even more lenders who held or claimed security over the franchise.

64. Canara Bank wrote to BCCI on 11th September 2012, referring to the Chennai meeting on 31st August 2012 (when all lenders supported the franchise sale proposal). It said that it had insisted that the franchise sale proceeds be deposited in DCHL's account with

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53 Vol 43, Ex U, *pp.* 340–342.

54 Vol 43, Ex V, *pp.* 343–344.

Canara Bank because Canara Bank had a first charge on all present and future assets, receivables etc of DCHL (and on the Deccan Chargers Sporting Ventures Ltd subsidiary, since amalgamated with DCHL). It opposed the deposit of any proceeds with ICICI. Admittedly, it said, DCHL had debts of Rs 4000 crores to various lenders.[55]

65. Now IndusInd Bank weighed in by a solicitors' letter also dated 11th September 2012.[56] It also claimed to be a secured lender in the amount of Rs.100 crores. IndusInd was representing itself, RBL and Karur Vysya Bank. It claimed that no sale was possible without IndusInd Bank's prior approval. It, too, demanded that the sale proceeds go into a no-lien escrow bank account with a nationalised bank that was not a lender to DCHL.

66. The floodgates had opened. On 12th September 2012, Religare Finvest wrote to BCCI saying it had a first and exclusive charge on DCHL's receivables.[57] In parallel, YBL's solicitors' claimed they had priority and had a legal opinion saying so.[58]

67. There then occurred, also on 12th September 2012, an event that was to have a significant impact on the award. DCHL and IFCI entered into a Compromise Agreement before the Debt Recovery Tribunal-I, New Delhi.[59] DCHL agreed to pay IFCI a little over Rs.25

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55 Vol 49, Ex XX, *p.* 1356.

56 Vol 49, Ex YY, *pp.* 1357-1359.

57 Vol 49, Ex ZZ, *p.* 1360.

58 Vol 43, Ex W, *pp.* 345–355.

59 Vol 57, *pp.* 78–93 : Vol 10, Ex F, *pp.* 222–226.

crores with interest. Rs 12 crores or so had already been paid. The remainder (said to be about Rs.15.17 crores) was to be paid in four instalments, on or before 10th October 2012, 10th November 2012, and 10th December 2012 (of Rs.3.5 crores each) and the last instalment for about Rs.5.43 crores was to be paid before 10th January 2013. Reddy and DCHL's vice-chairman (T Vinayak Ravi Reddy) were to give personal guarantees. Then clause (d) said:

> (d) Applicant IFCI shall keep all the proceedings including criminal cases filed under section 138 NI Act, **winding-up proceedings** and matters pending etc **on hold and shall withdraw the same only after the terms of the settlement are complied with and the entire amount is paid by the Defendants**. Also IFCI shall withdraw matters pending with the Ministry of Company Affairs.
>
> (*Emphasis added*)

68. Around 13th September 2012, DCHL received a bid for Rs.900 crores from one PVP Ventures Ltd. The bidder met BCCI's eligibility criteria. DCHL rejected the bid.

69. Even as the bidding process was underway, BCCI got another letter from YBL.[60] This was dated 13th September 2012. YBL now said it was willing to extend the entire additional financial support required exclusively to DCHL for managing its IPL franchise. But, YBL said, this offer was conditional:

> "Given the incremental funding assistance, **YES Bank would need complete cashflow ring-fencing and upfront indemnity** against (present and future) claims/suits from

60 Vol 42, Ex M, *pp.* 131–132.

> lenders/creditors/others, **besides recognizing its superiority of charges** on entire receivables of Deccan Chargers division of DCHL, and for the incremental infusion of funds as well."
>
> (*Emphasis added*)

YBL also asked that BCCI be a confirming party to any such agreement or understanding. The letter makes it plain that YBL's offer was predicated on bids not being from acceptable bidders or the highest received bid being below Rs 750 crores.

70. There was a bidding process for the sale of the Deccan Chargers franchise. It was publicly known. That cannot be doubted.

71. That very day, 13th September 2012, there was a second letter from YBL.[61] Here, YBL spoke of 'the evolving situation and suggestions from some of the lead Banks', clearly suggesting multiple claims by lenders. YBL suggested that sharing of charges up to IPL 5 be determined in court in line with the statutory register of charges with the Registrar of Companies, Hyderabad. It said it would fund the full extent of Deccan Chargers' banking needs for IPL-6, but with counter-guarantees from some of the other banks. Finally, it said to ensure 'ring-fencing of the receivables / cash flows' of Deccan Chargers, the team should be hived off and housed in a wholly-owned subsidiary of DCHL. What these two suggestions proposed, therefore, was the abandonment of the Franchise Agreement and its substitution by an entirely different contractual relationship, one that

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61 Vol 42, Ex N, *p.* 133.

would include YBL and BCCI in addition to DCHL (and any subsidiary).

72. We come now to the critical events of Friday, 14th September 2012 and Saturday, 15th September 2012. On Friday, 14th September 2012, BCCI received three separate letters by or on behalf of DCHL.

(a) *Letter from DCHL's attorneys*: This was the first in the sequence.[62] The material part is DCHL's statement that YBL had (by its letters of 5th September 2012 and two letters of 12th September 2012) offered to provide funds to clear all dues. DCHL also claimed that BCCI had withheld Rs.41 crores from the central pool funds. DCHL said that it 'decided' to take a finance facility from YBL. It claimed that Kotak, Religare and IDFC had agreed to have their claimed charges vacated or cancelled; proof would follow. DCHL therefore contended that it had taken immediate steps — and this is important — to "**substantially** cure and remedy any alleged breach" of the Franchise Agreement. DCHL asked that BCCI not take any precipitate action.

(b) *Letter from DCHL's Chairman, Reddy*: This did not refer to DCHL's attorneys' letter of the same date at all. Reddy referenced BCCI's letter of 16th August 2012.[63] He claimed that the defaults — again, this is important — "**have been cured**". The letter says that documents

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62 Vol 10, Ex G, *pp.* 238–240.

63 Vol 11, Ex H, *p.* 241.

from DCHL's lenders (there was no longer any pretence that there were none or that charges were yet to be created) showed how the defaults "**have been cured**". Documents undertaking to finance DCHL in IPL 6 were enclosed. Reddy said that "since the defaults **have been cured**", BCCI should not terminate the Franchise Agreement. The enclosed documents from financial institutions were all identical. Each spoke of YBL's letter of 5th September 2012, by which YBL '**had agreed**' to pay the players' fees. They did not say that the fees had actually been paid. These lenders also claimed that the DCHL's defaults had been cured.

(c) *Second letter from DCHL's attorneys*: This made no reference to the DCHL's attorneys' earlier letter of the same date or to DCHL's own letter also of 14th September 2012. Here, DCHL's attorneys now denied that DCHL had ever committed any breaches at all, invoked arbitration, and called on BCCI not to terminate.[64] DCHL's attorneys referred to YBL's letter of 13th September 2012 and said DCHL was—

> "**expecting further funding** from YES bank and therefore alleged defaults if any are **expected to be remedied**."
>
> (*Emphasis added*)

73. BCCI convened an emergency meeting of the IPL Governing Council at 9:30 pm on 14th September 2012. The Council decided to

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64 Vol 11, Ex I, *pp.* 272–273.

terminate the Franchise Agreement 'with immediate effect'. Accordingly, BCCI issued a termination notice of 14th September 2012.[65] This termination notice and its timing are central to the arguments before me and in arbitration.

74. On 15th September 2012, DCHL filed an Arbitration Petition 1089 of 2012 in this court under Section 9 of the Arbitration Act.[66] It inter alia sought a stay of the termination. DCHL sought an urgent hearing on that very day, Saturday, 15th September 2012.[67] The matter was heard for a while and stood over to Monday, 17th September 2012. BCCI said it was willing to reconsider the termination on DCHL making a representation showing how it had met all the 'objections' in BCCI's letter of 16th August 2012.

75. The weekend of Saturday, 15th September 2012 and Sunday, 16th September 2012 was, by all accounts, very hectic. On one side, BCCI's legal team was putting together a hefty affidavit in reply to DCHL's petition. But other events were also taking place in parallel. BCCI received emails from ICICI and Axis Bank on 15th September 2012 requesting BCCI to keep its termination in abeyance. ICICI's email also forwarded a letter from Videocon Industries Ltd asking for 15 days to cobble together a consortium to acquire the Deccan Chargers franchise for Rs.250 crores.[68]

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65 Vol 11, Ex J, *pp.* 274–282.

66 Vol 49, Ex AAA, *pp.* 1361-1369.

67 Before SJ Kathawalla J.

68 Vol 49, Ex BBB, *pp.* 1370–1377.

76. BCCI's Working Committee had a meeting scheduled at 5:30 pm on Saturday, 15th September 2012. Just before it began, two DCHL representatives arrived with 45 demand drafts favouring Deccan Chargers' players, support staff, the boards and others, under cover of a YBL letter.[69] YBL said it could not make international or foreign exchange wire transfers on weekends due to RBI regulations and restrictions; and the demand drafts were a demonstration of YBL's commitments. YBL said it would make the wire transfers on Monday, 17th September 2012 against the drafts being returned to YBL.

77. BCCI's Working Committee confirmed the IPL Governing Council's decision to terminate the Franchise Agreement with DCHL with immediate effect.

78. At 5:58 pm on Saturday, 15th September 2012, BCCI received a letter from DCHL saying that IDFC, Kotak, ICICI and Religare Finvest had all released their charges on the Deccan Chargers franchise and that DCHL had filed the relevant charge modification forms with the Registrar of Companies.[70]

79. On Sunday, 16th September 2012, BCCI's Treasurer got a conference call from YBL's senior officers, saying that BCCI was not to encash the demand drafts until there was a 'clear method established' to pay the amounts due to DCHL from BCCI only into DCHL's account with YBL. If this was not possible, BCCI should not

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69 Vol 59, Ex CCC, *pp.* 1378–1379.

70 Vol 43, Ex T, *pp.* 294–339.

encash or present the demand drafts. BCCI's Treasurer put this conversation on record in an email.[71]

80. At about 10 pm on Sunday, 16th September 2012, BCCI's treasurer got another call from YBL reiterating that if BCCI could not release DCHL's dues (from BCCI) into DCHL's YBL account, then BCCI should not release or deposit the drafts. Again, BCCI's Treasurer sent out an email on 17th September 2012 recording this.[72] The trailing mail shows that YBL's Senior President had sent an email to BCCI's treasurer saying just this. Paragraph 2 of YBL's email said that it had made these payments (i.e., supplied the demand drafts) against an expectation of receiving the common pool funds that BCCI had withheld, and receiving those in DCHL's account with YBL.

81. On Monday, 17th September 2012, DCHL's arbitration petition was taken up again. The order of that day records what transpired on 15th September 2012 and the statement BCCI made to Court.[73] Now, on 17th September 2012, BCCI said it stood by the termination. It filed a substantial affidavit in reply. DCHL sought time, and asked that status quo be maintained until the next day of hearing. The matter was stood over to 24th September 2012 with a status quo ordered as of 17th September 2012.

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71 Vol 41, Ex K, *pp.* 126–127.

72 Vol 41, Ex L, *pp.* 128–130.

73 Vol 11, Ex K, *pp.* 283–284.

82. Kathawalla J heard parties on 24th September 2012. On 26th September 2012, in DCHL's first Section 9 petition, the parties agreed on the name of the learned Sole Arbitrator.

83. On 1st October 2012, Kathawalla J handed down a detailed order in DCHL's petition.[74] YBL was before the court. The order opens with a narrative of the events up to Sunday, 16th September 2012 and then notes the arguments on 17th and 24th September 2012. The Court held that DCHL had made out a prima facie case. It made a conditional order of stay: it required DCHL to furnish an unconditional bank guarantee of a nationalised bank in the amount of Rs. 100 crores to BCCI before 9th October 2012. This bank guarantee was to be kept valid for one year. DCHL was to meet all expenses for IPL-VI. In default, BCCI could invoke the bank guarantee. YBL agreed to make the foreign currency wire transfers by 3rd October 2012 (against proof of which BCCI would return the corresponding demand drafts). The remaining demand drafts were to be disbursed by BCCI immediately. Against the bank guarantee and the wire transfers, BCCI was to deposit in Court the amounts due to DCHL and which it had withheld. Subject to this, BCCI was not to act on the termination pending arbitration and for a period of seven days after that if the award went in favour of BCCI. But the stay would immediately cease to operate if DCHL did not furnish the bank guarantee of Rs.100 crores. The order also did not preclude BCCI from adding another franchise for and after IPL-VI. The order

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74 Vol 52, Ex GGG, *pp.* 1502–1539. 2012 SCC OnLine Bom 1453 : (2012) 114 (5) Bom LR 3301 : (2013) 7 Bom CR 132.

clarified that the view was prima facie and the arbitral tribunal was to make its award uninfluenced by any of the observations in that order.

84. 9th October 2012 came and went. DCHL did not furnish the bank guarantee ordered by the court. It sought an extension. It also wanted to substitute the issuing bank by replacing a nationalised bank with ICICI. The extension application was permitted on 9th October 2012, allowing DCHL time until 5 pm on 12th October 2012. As to the application to substitute the issuing bank, DCHL was given liberty to file an appropriate application for modification of the 1st October 2012 order. That would be decided on merits. rejected on 12th October 2012.

85. On 11th October 2012, BCCI appealed against the 1st October 2012 order.

86. On that day, DCHL entered into an MoU with Kamla Landmark Real Estate Holdings Pvt Ltd for the sale of the Deccan Chargers franchise (referencing BCCI's letter of 4th September 2012).

87. On 12th October 2012, DCHL made an oral application before Kathawalla J seeking a further extension of time. That application was rejected.

88. Resultantly, on 12th October 2012, BCCI's attorneys wrote to DCHL's attorneys saying that there was no stay of BCCI's

termination of the Franchise Agreement given DCHL's failure to furnish a bank guarantee.[75]

89. On the same day, 12th October 2012, DCHL moved the learned Sole Arbitrator under Section 17 of the Arbitration Act for a stay of the termination. DCHL made this application before any pleadings were filed in arbitration. It made this Section 17 application after having failed to get an extension of time to furnish the bank guarantee, and, consequently, an extension of the stay on termination or a continuance of the status quo order. The application was served on BCCI's lawyers at the hearing before the learned Sole Arbitrator in the evening of 12th October 2012. BCCI sought time to file a reply in opposition. It argued that the Section 17 application effectively sought an ad-interim mandatory injunction. The arbitral meeting was scheduled for procedural directions, not a substantive Section 17 application for an ad-interim order of status quo. The learned Sole Arbitrator passed an ad-interim order of status quo and gave a short time to BCCI to file a reply. BCCI filed an Arbitration Appeal under Section 37. This Court stayed the arbitral tribunal's order on 13th October 2012.[76]

90. On 14th October 2012, BCCI issued a tender notice inviting bids for a new IPL franchise.[77]

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75 Vol 52, Ex HHH, *p.* 1540.

76 Vol 52, Ex III, *pp.* 1541–1552.

77 Vol 52, Ex JJJ, *p.* 1553 (typed copy at 1554).

91. On 16th October 2012, DCHL filed a second Section 9 petition for stay of the termination. It joined Kamla Landmark as a respondent to this petition. On 18th October 2012, RD Dhanuka J refused ad-interim relief to DCHL.[78]

92. Also on 18th October 2012, by a separate order, Dhanuka J allowed BCCI's Arbitration Appeal against the Section 17 ad-interim arbitral order of 12th October 2012. He held that the learned Sole Arbitrator had acted without jurisdiction. He quashed the arbitral tribunal's ad-interim order of 12th October 2012.[79]

93. A Special Leave Petition by DCHL to the Supreme Court against the 18th October 2012 order in BCCI's arbitration appeal failed on 19th October 2012.[80]

94. Between December 2012 and July 2015, the parties completed pleadings (including amendments) before the learned Sole Arbitrator. These included a counter-claim by BCCI and a reply and a rejoinder to that. Copies without annexures are included in the papers. The original pleadings were filed earlier.

95. DCHL's prayers were essentially in the nature of a claim for specific performance of the Franchise Agreement, with declarations sought that BCCI's termination was invalid and illegal; for a money decree of Rs.41 crores, DCHL's entitlement from the Central Rights

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78 2012 SCC OnLine Bom 1570.

79 2012 SCC OnLine Bom 1572 : 2013 (2) ALLMR 353

80 Vol 52, Ex KKK, *pp.* 1555–1557. SLP (C) No 33218 of 2012, Diary No 35149 of 2012.

Income and which BCCI was said to have withheld; compensation for losses suffered in the amount of Rs.630 crores; and an alternative claim, should specific performance be rejected, for compensation of Rs.6046 crores.[81] Since I will have reason to return to the specific wording of some of these prayers later in this judgment, I am not setting them out here.

96. BCCI's counter-claim ran to a little over Rs. 204 crores with interest on a claimed principal of about Rs. 179 crores. This included 'unpaid franchise consideration' under the Franchise Agreement, plus periodical interest, plus amounts paid by BCCI to third parties on DCHL's behalf, less DCHL's share of the Central Rights Income and Central Licensing Income.[82] DCHL filed a response pleading.[83]

97. The learned Sole Arbitrator drew 16 issues on 11th December 2014.[84]

98. In that time, a Section 16 challenge by BCCI failed on 31st January 2014. On 3rd March 2015, so did a later application by BCCI for striking out some part of DCHL's pleadings. Final arguments concluded in 2017. Both parties filed detailed written submissions (copies are also included in the papers). There followed a brief hiatus caused by proceedings against DCHL in the National Company Law Tribunal, Hyderabad under the Insolvency and Bankruptcy Code,

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81 Vol 11, Ex L, *pp.* 285–318; prayers at *pp.* 315–317.

82 Vol 12, Ex M, *pp.* 319–393; prayers at *pp.* 389–390; particulars of Counter-Claim at *p.* 391.

83 Vol 12, Ex N, *pp.* 394–434.

84 Vol 9, Ex "A", Award, *pp.* 94–95.

2016 filed by one of its creditors. The consequent moratorium was not lifted until as late as 7th August 2019. The parties presented refresher arguments on two dates in November 2019.

99. The learned Sole Arbitrator made and published the impugned Award on 17th July 2020.

F. OPERATIVE PORTION OF THE AWARD

100. Issue 16 was: *what should be the Final Award?* The learned Sole Arbitrator answered the issue thus:

> "**FINAL AWARD : ISSUE NO. 16**
>
> For the reasons recorded hereinbelow, the following directions are issued by the Tribunal:
>
> 1. Statement of Claim filed by the Claimant is partly allowed.
>
> 2. Likewise, Counterclaim raised by the Respondent is also partly allowed.
>
> 3. By this Final Award, the Claimant is entitled to receive from the Respondent and the Respondent is liable to pay to the Claimant an amount of Rs. 4814,17,00,000 (Rupees Four Thousand Eight Hundred Fourteen Crore and Seventeen Lakhs only) and cost of Rupees 50,00,000 (Rupees Fifty Lakh only) i.e. in all a sum of Rupees 4814,67,00,000 (Rupees Four Thousand Eight Hundred Fourteen Crore and Sixty Seven Lakh only).
>
> 4. Such payment of Rupees 4814,67,00,000 (Rupees Four Thousand Eight Hundred Fourteen Crore and Sixty Seven Lakh only) with interest at the rate of 10% p.a. from

the date of Arbitration Proceedings till realization shall be made by the Respondent to the Claimant on or before 30.9.2020.

5. Rest of the Claimant's claims are dismissed.

6. Rest of the counter-claims of the Respondent are also dismissed.

7. Arbitration proceedings are finally disposed of."

101. BCCI's counter-claim was allowed only to the extent of Rs.1.83 crores that it said it had paid to third parties on behalf of DCHL.

102. The amount awarded to DCHL had distinct components:

Sr No	**Claim No**	**Amount (Rs in crores)**
1	Claim No 1	630
2	Claim No 2	36
3	Claim No 3	4150
	Sub-Total	4816
4	*Less* Counter-Claim allowed	1.83
	TOTAL AWARDED	**4814.17**

103. Claim No 3 was for Rs 6,046 crores. There is, however, an admitted typographical error in totalling its seven elements.

(a)	Loss of profit discounted to 15 years	Rs. 3000 crores
(b)	loss of value of franchise (calculated at contract value of on fire sale of Deccan Charges franchise	Rs. 1250 crores
(c)	Actual expenditure over revenue incurred for running the franchise for last five years	Rs. 150 crores
(d)	Loss of "Deccan Chargers" brand, along with damage to business reputation, loss to licensing and merchandising and trademark registration	Rs. 650 crores
(e)	Payment due from the Respondent	Rs. 41 crores

(f)	Loss of business opportunity	Rs. 50 crores
(g)	Legal expenses and advisory fees	Rs. 5 crores
	TOTAL :	**Rs. 6046 crores**

104. The total is not, in fact, Rs 6046 crores. It is Rs 5,146 crores. The learned Sole Arbitrator awarded Rs 4150 crores.

105. As we shall presently see, in written submissions before me, DCHL conceded that Claims Nos 1 and 2 were wrongly granted. They were subsumed in Claim No 3 and could not have been separately ordered.

G. BRIEF ANALYSIS OF THE AWARD

106. The Award opens with a very brief factual background. Some of the key dates find mention here, but the Franchise Agreement is not separately analysed. Instead, some of its provisions are examined a little later in the Award. Finally, the pleadings are broadly summarized.

107. The sixteen issues the arbitral tribunal framed and their answers are:

Sr No	Issue	Answered
1.	Whether the claim petition filed by the Claimant is maintainable?	In the affirmative
2.	Whether the termination of Franchise Agreement dated 10.04.2008 is illegal, unlawful and contrary to law?	In the affirmative
3.	Whether the Claimant proves that the Respondent had no right to grant or allot	Not pressed by the Claimant

Sr No	Issue	Answered
	Franchise Rights by notice dated 14.10.2012 to Sun T.V. Network and the said action was illegal and contrary to law?	
4.	Whether the Claimant is entitled to specific performance of Franchise Agreement dated 10.04.2008 and the Respondent is liable to perform its obligations under the Agreement?	Not pressed by the Claimant
5.	Whether the Claimant is entitled to Rs.630 Crore or any other amount on account of wrongful termination of Franchise Agreement by the Respondent?	In the affirmative
6.	Whether the Claimant is entitled to Rs.41 Crore or any other amount on account of its shares from the Central Rights Income in respect of IPL-5?	Partly in the affirmative
7.	Whether the Claimant is entitled to Rs.6046 Crore or any other amount on account of loss of profit and compensation?	Partly in the affirmative
8.	Whether the Claimant proves that the Counter-Claim lodged by the Respondent is not maintainable?	Counter-claim is maintainable.
9.	Whether the Claimant proves that the Counter-Claim lodged by the Respondent is not arbitrable?	Counter-Claim is arbitrable
10.	Whether the Claimant proves that the Counter-Claim lodged by the Respondent is an afterthought, counterblast to the claim raised by the Claimant and is thus mala fide in nature and abuse of process of law?	In the negative
11.	Whether the Respondent proves that the Claimant is not entitled to specific performance of Franchise Agreement dated 10.04.2008?	Does not survive
12.	Whether the Respondent is entitled to Rs.204,41,70,698.06/- or any other amount	Partly in the affirmative

Sr No	Issue	Answered
	towards Counter-Claim from the Claimant?	
13.	Who is entitled to recover and from whom?	As per Final Award
14.	What order as to Interest?	As per Final Award
15.	What order as to Costs?	As per Final Award
16.	What should be the Final Award?	Directions issued

108. As we can see, DCHL ultimately did not press for specific performance (and, therefore, Issue No.11 did not survive).

109. Issue No 6 (for the Central Rights Income of Rs. 41 crores) also forms part of Issue No 7 (item (e) of that claim, as set out above). This was never noticed or reconciled. In written submissions filed before me and referenced below, Mr Jagtiani on instructions gave up Claim 1 (for Rs 630 crores) and Claim 2 (for Rs 41 crores). He accepted that both were duplications. They could not have been separately granted. Both stood subsumed in Claim No 3 (for Rs. 6046 crores).[85]

110. The learned Sole Arbitrator first considered and decided the preliminary objections, viz., Issues Nos. 1, 8, 9 and 10.

111. He then proceeded to a consideration on merits, beginning with an analysis of the Franchise Agreement of 10th April 2008.

112. Next, the learned Sole Arbitrator took up Issue No.2: *whether BCCI's termination of the Franchise Agreement on 14th September 2012 was illegal or unlawful*. Clearly, this was central to the entire dispute. If the termination was found to be lawful and proper, DCHL was

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85 Vol 53, *pp.* 46–47, paragraphs 70–71.

bound to fail — Issues Nos. 5 and 7 were in the nature of damages or compensation, and given that specific performance was not being pressed, these remained the only other reliefs DCHL sought. These issues could be decided in favour of DCHL only if BCCI's termination was found to be illegal or unlawful.

113. Issue No 2 was central. If DCHL failed on that, its claim for damages would not survive. DCHL placed its arguments on Issue No 2 on several grounds. Some are interlinked or overlap. Though there are not distinct headings (or even paragraph numbering), by my count, there seem to have been 11 grounds under Issue No 2.

113.1 **Requirement of a Show-Cause Notice**:[86] DCHL argued that the Franchise Agreement required BCCI to issue a 'show-cause notice' to DCHL to cure all noted defaults in 30 days. Without it, there could be no termination. Therefore, if BCCI's notice dated 16th August 2012 was *not* a show-cause notice, then the termination that followed on 14th September 2012 was bad precisely for want of such notice.

113.2 **Premature Termination**:[87] DCHL then argued that if BCCI's 16th August 2012 notice was indeed the show-cause notice with the 30-day cure period the Franchise Agreement required, BCCI's termination of 14th September 2012 was 'premature'. For it was issued one

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86 Vol 9, Ex A, Award, *pp.* 109–114, at *p.* 114.

87 Vol 9, Ex A, Award, *pp.* 109–114, at *p.* 114.

day before the 30-day cure period ended on Saturday, 15th September 2012.

113.3 **Substantial Compliance by DCHL**:[88] DCHL argued that there was no ground for termination since it had demonstrated 'substantial compliance' in curing all the noticed defaults and had cured the alleged breaches and defaults. For instance, as to unpaid player fees, DCHL argued that it had 'virtually' made the necessary payments. Moreover, international payments could not be made on the weekend due to RBI restrictions, but BCCI had been given demand drafts for all amounts due. It also argued that all competing charges by other lenders had been vacated, so there was no room for complaint on that score either.

113.4 **No Insolvency Event**:[89] DCHL urged that there was, in fact, no insolvency event as defined in the Franchise Agreement. IFCI's winding-up petition had been successfully compromised. In any case, the petition was not bona fide, and there was no order of winding-up.

113.5 **Unfair Discrimination**:[90] DCHL submitted that BCCI had unfairly and arbitrarily discriminated against it in terminating the Franchise Agreement and withholding the disbursement of DCHL's share of the Central Rights Income. Other teams/franchises were also in default of

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88 Vol 9, Ex A, Award, *pp.* 114–119.

89 Vol 9, Ex A, Award, *pp.* 119–120.

90 Vol 9, Ex A, Award, *pp.* 120–136.

players' fees, but their franchises were not terminated. The other teams received their shares of the Central Rights Income — only DCHL did not. Other franchisees' defaults were far more grave and even criminal. Yet, BCCI did not terminate their franchise agreements. If the other franchises were not terminated for non-payment of players' fees, etc., then BCCI could not have terminated only the Deccan Chargers Franchise Agreement. Article 14 of the Constitution forbade DCHL from following a 'pick-and-choose' approach. Similarly, if other teams/franchises had received their shares of the Central Rights Income, BCCI was bound to pay DCHL its share too. Had BCCI done so, there would have been no cash flow issue and no default, and hence no occasion for a show-cause notice, let alone a termination. Alternatively, DCHL said, BCCI could — and should, and indeed was bound to — have used DCHL's share of the Central Rights Income (which it had withheld) to pay off the players and meet other dues. The word 'may' in the relevant contractual clause had to be read as 'shall'. The Franchise Agreement itself had a provision permitting BCCI to do just this. There was no cause for BCCI to precipitate the situation and leave everyone in the lurch.

113.6 **Reddy's Letter of 29th August 2012 obtained by duress:**[91] DCHL argued that Reddy's letter of 29th August 2012 was one obtained by compulsion, coercion

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91 Vol 9, Ex A, Award, *pp.* 126–130.

and duress. It was one that no reasonable or prudent man would suggest. Consequently, Reddy's endorsement on BCCI's letter of 4th September 2012 was a mere corollary to the 29th August 2012. Therefore, BCCI could place no reliance on it.

113.7 **Termination mala fide and malicious**:[92] DCHL contended that BCCI's action was mala fide and malicious. BCCI singled out DCHL when other franchisees' defaults were even more egregious, including match-fixing, illegal betting and so on. Yet, these other franchisees suffered no termination or stringent action by BCCI. Therefore, BCCI's action was irrational, unreasonable, unjust and inequitable, apart from being grossly disproportionate. This may actually have been part of point 5 above.

113.8 **Termination triggered by arbitration invocation notice**:[93] DCHL said that the real cause for the termination by BCCI was DCHL's invocation of arbitration by its attorneys' letter of 14th September 2012. BCCI apprehended that DCHL would move court for interim relief against termination. It was to pre-empt this that BCCI prematurely terminated the Franchise Agreement.

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92 Vol 9, Ex A, Award, *pp.* 130–132.

93 Vol 9, Ex A, Award, *pp.* 132–133.

113.9 **BCCI 'reputation' concern a façade**:[94] DCHL said that BCCI's claim that it was only protecting its (and IPL's) 'reputation' was a sham and a façade or smokescreen to cover up the illegality of its termination. BCCI had no such concerns with other franchisees who stood accused of far more serious offences and defaults, even amounting to criminal acts. BCCI did not apply to others the same standard it applied to DCHL. Again, this is a submission to be read with points 5 and 7 above.

113.10 **BCCI witness' evidence unreliable**:[95] Tenth, DCHL submitted that the evidence of BCCI's only witness, RW1, its Chief Operating Officer, Sunder Raman, was evasive and untrustworthy.

113.11 **Quantum of punishment disproportionate**:[96] DCHL said that the 'punishment' (of termination) imposed on it by BCCI was excessive and disproportionate. At best, its defaults were irregularities, not illegalities. As against that, other franchisees had broken the law, and even committed criminal acts. These were ignored. This submission, too, is linked with points 5, 7 and 9 above.

114. On all these points, the learned Sole Arbitrator held in favour of DCHL and decided Issue No. 2 in the affirmative.[97] In particular, the learned Sole Arbitrator returned a finding that since BCCI,

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94 Vol 9, Ex A, Award, *pp.* 133–134.

95 Vol 9, Ex A, Award, *pp.* 134–135.

96 Vol 9, Ex A, Award, *pp.* 135–137.

97 Vol 9, Ex A, Award, *p.* 137.

though not an instrumentality of the State, is yet a 'public body' or 'public functionary' that performs 'public functions'. It was, therefore, the learned Sole Arbitrator held, bound to treat all franchisees alike. It could not deny benefits to one franchisee but extend them to others. It had to disclose all information and did not need to await a formal demand or a disclosure order. At a minimum, BCCI had to demonstrate 'fair play in action'.

115. Issues Nos. 3, 4 and 11, relating to specific performance were taken together. The learned Sole Arbitrator held that once it was found that the termination was invalid, DCHL would have to be held to be entitled to a decree for specific performance. But at the hearing, DCHL did not press this relief because of changed circumstances and, instead, sought only compensation or damages in lieu of specific performance. BCCI contended that not only was DCHL not entitled to specific performance at all, but also that once it gave up the claim to specific performance, it could not claim damages or compensation without amending its statement of claim. The learned Sole Arbitrator held that there was sufficient pleading for the claim for damages or compensation, that this was contemplated by law, and that it would be reasonable to consider those claims.

116. Then the learned Sole Arbitrator took up Issues Nos. 5, 6 and 7, the individual claims for compensation or damages.

116.1 **Issue No 5 — Claim No 1 — "Wrongful termination of the franchise agreement" — Rs.630 crores**:[98] This

98 Vol 9, Ex A, Award, *pp.* 143–146.

had five components: loss of share of central revenue (Rs 125 crores), loss of local sponsorship income (Rs 50 crores), loss of licensing revenue (Rs 15 crores), loss of gate receipts, hospitality and prize money (Rs 50 crores), loss of Champions League money distribution (Rs 20 crores), and loss of 'brand value' computed at 66.67% of the total brand value (Rs 370 crores). The tribunal considered the auction value of two new entrants, Pune Warriors and Kochi Tuskers. There is a reference to some experts' reports. The learned Sole Arbitrator allowed the claim in its entirety.

116.2 **Issue No 6 — Claim No 2 — Central Rights Income — Rs 41 crores**:[99] DCHL said it had a right to this amount that BCCI had wrongfully withheld. It was entitled to the amount with interest at 18% per annum. BCCI denied this claim. But, without prejudice, it said that an amount of a little over Rs.36 crores was due under the Central Rights Income for the 2012 season. This, BCCI said, had been adjusted in partial satisfaction of the amounts due from DCHL to BCCI under the Franchise Agreement. The learned Sole Arbitrator awarded DCHL Rs 36 crores.

116.3 **Issue No 7 — Claim No 3 — Loss and Damages — Rs 6046 crores**:[100] As we have seen, the total is incorrect and should be Rs 5146 crores. There is another error.

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99 Vol 9, Ex A, Award, *pp.* 146–147.

100 Vol 9, Ex A, Award, *pp.* 147–150.

> This total includes a claim for Rs.41 crores, but that is already part of Issue No 6 (against which Rs 36 crores was awarded). There is no noting of either discrepancy in the Award. Considering a valuation report relied on by DCHL and the auction values of Pune Warriors and Kochi Tuskers, and holding that DCHL had lost goodwill, the learned Sole Arbitrator awarded a lump sum of Rs. 4150 crores. There is no discussion on the reasons for the individual components bundled in this money claim.

117. As noted above, before DCHL accepted that Claims Nos 1 and 2 (Issues Nos 5 and 6) were wrongly granted and were part of Claim No 3 (Issue No 7).

118. As to Issue No 12 and the counter-claim, the learned Sole Arbitrator accepted BCCI's case that it had paid Rs. 1.83 crores to third parties on behalf of BCCI.[101]

119. Issue No. 13 need not detain us.

120. As to interest, Issue No. 14, the learned Sole Arbitrator awarded 10% per annum from the date of institution of the arbitral proceedings until realization.[102]

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101 Vol 9, Ex A, Award, *pp.* 150–155.

102 Vol 9, Ex A, Award, *p.* 156.

121. Then the learned Sole Arbitrator awarded Rs. 50 lakhs in costs to DCHL.[103]

122. The final Issue No 16 has already been set out earlier as the operative part of the Award.

H. THE AWARD'S FINDINGS ON THE VALIDITY OF THE TERMINATION: RIVAL ARGUMENTS CONSIDERED

123. In this section, I consider the rival contentions. Rather than set out the submissions of each side serially and then revisit them to render a finding on each, I have endeavoured to marshal the competing submissions under distinct heads. These heads of challenge (and response) broadly follow the analysis I have set out in the previous section. I have provided sub-headings for easier identification. I have not considered it necessary to take every single one of the findings returned in the Award under different heads.

(1) Necessity of a "show-cause notice"

124. Mr Mehta submits that the learned Sole Arbitrator wholly and impermissibly misread the Franchise Agreement's provisions for termination in Clause 11. That provision, he says, does not contemplate a 'show-cause notice' at all. A 'show-cause notice' has a

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103 Vol 9, Ex A, Award, *pp.* 157.

precise meaning in law: on the basis of an alleged default, illegality breach or failure to perform, the party issuing the show-cause notice calls upon the other party to explain why a particular action ought not to be taken. Clause 11 operated at two levels and made a distinction between two types of breaches. *One*, breaches that could be cured or remedied. *Two*, incurable or irremediable breaches. For the first, the provision required not a show-cause notice properly so called, but a notice calling on the franchise to cure or remedy the default in the contractually stipulated time. For the second, the default was incapable of being cured or remedied. Termination would be immediate after giving notice that the event of default had occurred. There was no question of 'curing' such an irremediable breach.

125. I have set out Clause 11 fully above, but in the context of this submission, the relevant parts merit reproduction again:

> **11. Termination**
>
> 11.1 **Either party may terminate this Agreement with immediate effect by notice in writing if the other party has failed to remedy any remediable material breach of this Agreement within a period of 30 days of the receipt of a notice in writing requiring it to do so which notice shall expressly refer to this Clause 11.1 and to the fact that termination of this Agreement may be a consequence of any failure to remedy the breach specified in it**. For the avoidance of doubt a breach by the Franchisee of its payment obligations under this Agreement or under Clause 22 shall be deemed to be a material breach of this Agreement for the purposes of this Clause**.**
>
> 11.2 **Either party may terminate this Agreement with immediate effect by written notice if the other**

party commits or permits an irremediable breach of this Agreement or if it is the subject of an Insolvency Event.

11.3 BCCI-IPL **may** terminate this Agreement **with immediate effect by written notice** if:

(a) there is a Change of Control of Franchisee (whether direct or indirect) and/or a Listing which in each case does not occur strictly in accordance with Clause 10;

(b) the Franchisee transfers any material part of its business or assets to any other person other than in accordance with Clause 10;

(c) **the Franchisee, any Franchisee Group Company and/or any Owner acts in any way which has a material adverse effect upon the reputation or standing of the League, BCCI-IPL, BCCI, the Franchisee, the Team (or any other team in the League) and/or the game of cricket.**

11.6 **An "Insolvency Event" shall occur in respect of a party to this Agreement if:**

(a) **any bona fide petition is presented or any demand under the Act is served on that party or an order is made or resolution passed for the winding-up of that party or a notice is issued convening a meeting for the purpose of passing any such resolution.**

(*Emphasis added*)

126. Purely as a matter of construction and without regard to any other acts or events, Mr Mehta is correct. Those breaches that could be remedied (non-payment of players' and other fees and dues being

one such) fell under Clause 11.1 and required that BCCI give DCHL 30 days to cure any such default. This stands to reason. Mr Jagtiani accepts that non-payment of player fees would fall under Clause 11.1. But other defaults would not. Specifically, an 'insolvency event' under Clause 11.2 read with Clause 11.6 did not require a cure period. It provided for immediate termination after notice. That notice only had to say that an insolvency event had occurred and, therefore, the Franchise Agreement stood terminated; no question of 'curing' such a default could arise.

127. Then there is the problematic wording of Clause 11.3(c). This, too, allows immediate termination. It allows BCCI to effect an immediate termination after notice (of the kind described above) if the franchisee, its group or its owner act in a way that has a 'material adverse effect' on the 'reputation or standing' of league, BCCI, the team, or the franchisee.

128. As we have seen, BCCI charged DCHL with several defaults. Some, by their very nature, were curable. Others were not, and fell in the contract's incurable-default class.

129. Mr Mehta argues that there was, thus, a clear segregation between remediable and irremediable breaches. The former needed a cure notice. The latter did not. Hence, it was not possible to 'flatten' the contract by saying that *all* breaches required a 'cure' notice. The contract made a clear distinction between those breaches that could be remedied, and called for a 30-day cure notice, and those that were irremediable and called for no cure period, but only a notice that the

irremediable breach had occurred, triggering an *immediate* termination. This distinction, Mr Mehta is at pains to clarify, has nothing at all to do with the events that transpired or the nature of the notice BCCI gave on 16th August 2012. It has only to do with what the contract mandated, i.e., a matter of contractual interpretation. Consequently, even if BCCI did gave DCHL 30 days to 'cure' the insolvency event (the IFCI winding-up petition), this could make no difference to the interpretation of the contract. This was not a case where the 'conduct of the parties' could be used to interpret the contract.

130. The learned Sole Arbitrator was, he submits, in complete error in holding that Clause 11 of the Franchise Agreement:[104]

> enjoined BCCI to issue notice before the Agreement is terminated. **Such notice must grant thirty (30) days "cure period" to DCHL**.
>
> (*Emphasis added*)

Only Clause 11.1 required a 30-day cure notice. Clause 11.2 did not. The learned Sole Arbitrator returned no finding at all on whether any of the breaches were remediable or not, and, given the clear distinction in the contract, which breach fell in what class.

131. BCCI argued that the 16th August 2012 notice was not a 'show-cause notice' at all (as DCHL urged), but was only in fairness an opportunity to DCHL to remedy breaches. The learned Sole Arbitrator rejected this argument by holding:[105]

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104 Vol 9, Ex "A", *p.* 114.

105 Vol 9, Ex "A", *p.* 114.

> Hence, if the contention of the Respondent is accepted (though on the facts and circumstances of the case, such contention cannot be accepted, and it is not accepted), that it is not a show-cause notice, then it must be held that before termination of Franchise Agreement, **notice, which is sine qua non and is required to be given/issued to the franchisee - Claimant**, had not at all been issued and on that ground alone, the termination of Franchise Agreement on 14.9.2012 must be held bad, illegal and against the provisions laid down in the Agreement.
>
> (*Emphasis added*)

132. In my judgment, Mr Mehta is correct. It was impossible to read the contract as *requiring* a 'show-cause notice'. The contract plainly required a cure notice for one class of breach, viz., a breach that could be remedied. For the other class, i.e. breaches that were incurable and self-triggered a termination, it only required a notice of termination. An "insolvency event" fell in the latter class. It was impossible to bundle the two default classes and the two distinct types of notices into one amorphous 'show-cause notice'.

133. But the contract was not the only document to which the learned Sole Arbitrator turned while arriving at this conclusion. He looked at the BCCI notice of 16th August 2012. I have set this out fully above. The relevant part, at the cost of repetition, is:[106]

> Accordingly please treat this letter as:
>
> (a) Formal notification pursuant to clause 11.1 of the Franchise Agreement that your failure to pay all sums currently due and owing to your players referred to above

106 Vol 57, *pp.* 65–69, at *pp.* 67–69.

under their respective IPL Player Contracts ("Outstanding Sums") is a breach of your obligation under paragraph 2(e) of Schedule 3 of the Franchise Agreement and that such breach is material;

(b) A formal demand to remedy the said material breach of the Franchise Agreement referred to in paragraph (a) above by 15th September 2012, being 30 days from the date of this letter and to confirm in writing to BCCI that you have done so and notification that, as provided in clause 11.1 of the franchise agreement, any failure to remedy said breach may result in termination of the Franchise Agreement;

(c) A formal notification that your failure to pay the Outstanding sums has had a material adverse effect upon the reputation and/or standing of the IPL, BCCI, your franchise and/or your team and that all rights under clause 11.3 (c) and paragraph 2 (j) of Schedule 3 (in which you agree to comply with the "Regulations" which includes paragraph 4 of Section 4 of the Operational Rules) in each case of the Franchise Agreement are hereby expressly reserved;

(d) A formal demand to make payments by 15th September 2012 of all sums due to any of your players under any relevant buy-out agreements and to confirm in writing to BCCI that you have done so;

(e) A formal demand by 15th September 2012 to cancel the charge created on the Deccan Chargers Franchise in favour of Kotak Mahindra Bank in the Registrar of Companies (ROC) and any other charges, encumbrances or other security interest of any kind over the Deccan Chargers Franchise and to confirm in writing to BCCI that you have done so and that no other such charges or encumbrances subsist.

(f) A formal demand by 15th September 2012 to show acceptable proof that the winding-up petition filed by M/s

IFCI in CP 146 of 2012 in the High Court of Hyderabad stands withdrawn / dismissed.

(g) If you fail to comply with the demand made in paragraph (f) above, BCCI reserves the rights to take action under clause 11.2 of the Franchise Agreement.

If you fail to remedy the breaches referred to in paragraph (a), (e) and (f) above on or before 15th September 2012 then BCCI hereby reserves the right, in addition to its various above-mentioned rights under clauses 11.1, 11.2, 11.3 and paragraph 2(e)and (j) and 9 (a) of Schedule 3 of the Franchise Agreement and without prejudice to all other rights and remedies available to BCCI including under the Franchise Agreement and without BCCI accepting that any breach is remediable or otherwise, to terminate the Franchise Agreement with immediate effect by written notice to you.

134. The demands and the references to the Franchise Agreement were distinct. Demands (a), (b) and (d) were under Clause 11.1, the provision for a 30-day cure notice for a remediable breach. Demand (c) was clearly and unambiguously positioned under Clause 11.3(c), relating to the reputation and standing of BCCI etc, and the adverse impact on those of DCHL's defaults. This required no cure period and none was provided. Demand (e) was presumably under Clause 11.1, though it may have been under 11.3(c), too: we do not know. Demand (f), read with (g) is the troublesome area. Here, BCCI invoked the insolvency event under Clause 11.2, which speaks of its right to an immediate termination on account of an incurable breach, *but yet gave DCHL 30 days to rectify this breach* (i.e., the IFCI winding-up petition). Sub-para (g) made it clear that BCCI reserved its right to invoke Clause 11.2, i.e. to terminate immediately if there was non-

compliance. The concluding para makes this clear. This notice also invoked Schedule 3 of the Franchise Agreement[107] and paragraph 4 of Section 4 of the Operational Rules.[108]

135. BCCI's 16th August 2012 notice was no aid in interpreting Clause 11 of the Franchise Agreement. That Clause is unambiguous about the kind of breaches that required a 30-day cure notice and those breaches that did not but entitled BCCI to terminate immediately after merely stating in a notice that such an incurable breach had occurred. There was no scope for a 'show-cause notice' at all.

136. There is also no discussion in the Award about the use of the word 'may' in every single governing sub-clause: Clauses 11.1, 11.2 and 11.3 all use that word. Neither party is *required* to terminate on any of these grounds, and that is in correct conformity with the general law of contract. A party may condone the breach or not; that is the party's choice and entitlement. To hold, therefore, that a notice of any kind was *mandatory* or *necessary* is not a possible view. BCCI was not *bound* to immediately terminate on the occurrence of an insolvency event. It could, or it could always take a 'softer' line and give some time, reserving to itself the right to fall back on the right of immediate termination in default. This is what BCCI says it did, and

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107 Vol 10, Ex B, *pp.* 201–206.

108 Vol 41, *pp.* 52–81, at *p.* 71: "**4. Conduct**. Each Person subject to these Operational shall not, whether during a Match or otherwise, act or omit to act In any way which would or might reasonably be anticipated to have an adverse effect on the image and/or reputation of such Person, any Team, any Player, any Team Official, the BCCI, IPL, the League and/or the Game or which would otherwise bring any of the foregoing into disrepute."

there is nothing exceptionable about it. But this does not and cannot by itself mean that a 'show-cause notice' was *necessary*. Nothing in the contract so suggests.

137. In my judgment, Mr Mehta is completely correct when he says that the failure to make the distinction and to return a finding on breaches that can be remedied and those that cannot is a fatal defect that goes to the root of the matter. That failure renders the Award patently illegal. The view the learned Sole Arbitrator took is not a possible view.

138. Mr Mehta is, therefore, also correct in saying that the learned Sole Arbitrator's finding that a show-cause notice was necessary is contrary to the contract. It is also a view on interpretation that was not remotely possible.

(2) Premature Termination

139. The learned Sole Arbitrator accepted DCHL's submission that BCCI's termination of 14th September 2012 was 'premature' because it came one day ahead of the expiry of the 30-day cure period on 15th September 2012.

140. It seems to me that the finding is entirely unsustainable and not even a possible one, for one paramount reason. The finding entirely elides vital evidence before the tribunal. There is undisputed documentary evidence. It emanated from DCHL. This evidence is, first, in the form of the first two letters of 14th September 2012, the

first from DCHL's attorneys,[109] and the second from DCHL itself.[110] DCHL's attorneys said, as we have seen, that substantial steps had been taken to cure the defaults or breaches — thus accepting that there were breaches but saying that *these no longer existed*. If there was any doubt about what DCHL intended, this was surely put to rest by DCHL's own letter, repeatedly saying that the defaults "have been cured". Now if this was correct — and, as we shall see, DCHL *continues* to maintain that it was, in fact, correct — then there was simply no question of the termination being 'premature'. For, according to DCHL itself, it had cured (or 'substantially cured'), all defaults. There was nothing left to cure. DCHL did not need the extra day for any reason at all, on its own stand. This could only mean that the termination by BCCI could not possibly be held to have been premature.

141. By definition, 'premature' means not just waiting for a calendar day to pass for the sake of it, but to give the fullness of opportunity to the noticed party to comply with the demand. If, therefore, according to DCHL itself, it had cured all defaults on 14th September 2012, there is simply no possibility of it sustaining a claim that the termination had been effected a day before it *could* comply, depriving it of an opportunity of compliance.

142. Curiously, DCHL makes much of the fact that in another context, viz., Reddy's letter of 29th August 2012, BCCI's written submissions failed to account for these two very letters. That can only

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109 Vol 10, Ex G, *pp.* 238–240.

110 Vol 11, Ex H, *p.* 241.

mean that DCHL stood by the letters. Any finding of the termination being premature without considering this evidence, undoubtedly vital, vitiates the finding. Indeed, in this section of the Award,[111] I find no discussion at all about these two letters.

143. In addition, there is the *third* letter of 14th September 2012 from DCHL's attorneys.[112] This, too, finds no mention at all in the relevant portion of the Award dealing with premature termination, and it is undoubtedly vital and relevant evidence. Here, DCHL's attorneys — making no reference at all to the other two letters — said there was no default *at all*. That could only mean that there had *never been* a default by DCHL. If that was so, then, too, there was no question of the termination being 'premature'. DCHL's attorneys did say that 'funds were expected from YBL', but this furnishes no ground, for the previous letter from DCHL said specifically that all defaults had been cured.

144. The Award does note the last portion of BCCI's termination letter of 16th August 2012:[113]

> If you fail to remedy the breaches referred to in paragraph (a), (e) and (f) above on or before 15th September 2012 then BCCI hereby reserves the right, in addition to its various above-mentioned rights under clauses 11.1, 11.2, 11.3 and paragraph 2(e)and (j) and 9 (a) of Schedule 3 of the Franchise Agreement and without prejudice to all other rights and remedies available to BCCI including under the Franchise Agreement and without BCCI accepting that any

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111 Vol 9, Ex A, *pp.* 109–114.

112 Vol 11, Ex I, *pp.* 272–273.

113 Vol 57, *pp.* 65–69 : Vol 10, Ex C, *pp.* 212–216.

> breach is remediable or otherwise, to terminate the Franchise Agreement with immediate effect by written notice to you.
>
> All other rights and remedies available to BCCI are hereby reserved.

This is only noted. We find no discussion on this at all in the Award.[114] Mr Mehta argues that this express reservation of rights by BCCI allowed it to terminate the Franchise Agreement either under Clause 11.2 or Clause 11.3, or both, even before the expiry of the 30-day cure period. But this submission, and the document on which it is based, received no consideration at all.

145. Mr Mehta also urges that in the context of the submission that BCCI's termination was premature, the learned Sole Arbitrator ought to have considered the other material, viz., Reddy's letter of 29th August 2012 and everything that followed it. The learned Sole Arbitrator has considered that separately, so it is best addressed then.

146. But Mr Mehta does urge, again, in my view, correctly, that there was an undisputed subsequent event that completely altered the scenario between 14th and 15th September 2012. It is one that eradicates any possibility of returning a finding of the termination by BCCI being premature. The reason is this. DCHL moved the High Court on 15th September 2012, specifically seeking a stay on termination. Counsel for BCCI made a statement to Court that if DCHL made a representation to BCCI showing how it had cured all breaches, BCCI would reconsider its decision to terminate the

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114 Vol 9, Ex A, *pp.* 109–114 at *p.* 113.

Franchise Agreement. This statement is recorded in the Court's order of 17th August 2012.[115] That order goes on to note that "*today, the learned Senior Advocate for BCCI informs the Court that BCCI has confirmed the termination of the Franchise Agreement*". There is no ambiguity about this. It can only mean one thing: that, to this Court, BCCI agreed to hold its termination *in abeyance* pending a demonstration of compliance by DCHL by the end of the day on 15th August 2012. Whether or not there was compliance is a separate matter. But, after this, there remained no possibility at all of holding that the termination was 'premature'. The Award does not even refer to this statement BCCI made or the judicial order. There is no question of the order being prima facie or not. The order recorded events as they transpired and a statement made to the Court. That was a fact. It was a relevant fact, squarely within the meaning of the Evidence Act. Indubitably, it was vital evidence. How it could have been totally ignored is inexplicable. Mr Mehta is correct, therefore, in saying that the learned Sole Arbitrator could not possibly have arrived at the finding he did, viz.:[116]

> "Once it is held that the action of termination of Franchise Agreement dated 14.9.2012 was 'premature' and bad in law, it goes without saying that the action of the Working Committee of BCCI's confirming the act of termination vide decision dated 15.9.2012 must also be held illegal and unlawful."

The finding wholly overlooks the evidentiary fact that BCCI's confirmation was *subsequent* to its statement to Court allowing DCHL precisely the one additional day, and holding the termination in

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115 Vol 11, Ex K, *pp.* 283–284.

116 Vol 9, Ex A, *pp.* 109–114 at *p.* 114.

abeyance for that time specifically to allow DCHL an opportunity to demonstrate that it had cured all breaches. Therefore, any infirmity (of being premature) was rectified in Court itself. The confirmation followed because, according to BCCI, DCHL had not cured its defaults *even by 15th September 2012*, i.e., by the end of the entire curative period. As a result, the issuance of the termination notice on 14th September 2012 became entirely irrelevant. That was the only possible view. No other view was even remotely possible, let alone plausible. Put differently: DCHL complained (in arbitration) of 'short time' of a day. But DCHL was given the additional day. Nothing remained of the complaint that the termination was premature.

147. Mr Jagtiani's task is to show that this evidentiary material, and, specifically, DCHL's and its attorney's letters, were irrelevant to the point of the termination being premature. He cannot add to the Award. He cannot supply reasons. At best, he can show that this evidence was *not* vital and was therefore rightly ignored. Clearly, he cannot do that.

(3) Substantial Compliance

148. Of necessity, the discussion on this finding splits into two components: (1) players' fees, and (2) bank charges. There is a third aspect, one of doctrinal relevance. I will consider that separately. DCHL's submission to the learned Sole Arbitrator was that it had 'substantially cured' the defects on both, i.e., it should be held (or deemed) to have paid off all overdue players' fees, or that it had

'virtually' made payment to all players,[117] and had cleared all bank charges. It also argued that the Franchise Agreement did not apply to pre-existing bank charges, or to charges created on assets other than the franchise itself or the amounts due to the franchise.

149. It is important to remember that the case was that by *15th September 2012*, i.e., a day after the termination notice, DCHL had 'substantially cured' all defects. The irreconcilable conflict between this submission and the submission that the termination was 'premature' is immediately apparent.

150. The learned Sole Arbitrator held for DCHL on both grounds.[118]

(a) Players' Fees

151. DCHL's obligation to pay players' fees cannot be disputed. It was one of the obligations under the Franchise Agreement itself: Clause 6 required DCHL to comply with the obligations in Schedule 3; and paragraphs 2(d) and 2(e) required timely payment of these

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117 Vol 9, Ex A, *pp.* 117.

118 Vol 9, Ex A, *pp.* 114–119.

fees.[119] Further, Schedule 2 to the Franchise Agreement had a format of a player's contract, and this, too, made the payment of each player's fees a DCHL obligation.[120] There is no dispute that DCHL was to pay its players in the Deccan Chargers team on 1st April 2012 and 1st May 2012.

152. Nothing in the Franchise Agreement or any of its schedules creates any contractual privity between BCCI and any player on any team. The reason is obvious. The player's contracts were all with, and only with, the respective franchisees. It follows, therefore, that the obligation to pay off the players was of each franchisee, never BCCI.

153. BCCI's notice of 16th August 2012 specifically noted the non-payment of players' fees as a breach and gave 30 days to DCHL to

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119 Clause 6, Vol 10, Ex B, *p.* 170:

> "**The Franchisee's Obligations**. The Franchise agrees with and shall comply fully with provisions and obligations set out in Schedule 3 throughout the Term."

Paragraphs 2(d) and 2(e) of Schedule 3, Vol 10, Ex B, *pp.* 201–202:

> "**The Franchisee agrees**:
>
> (d) not to breach the obligations relating to the Player salaries as set out in the Operational Rules including in respect of the minimum annual sums payable to each Player (being US$ 20,000 in 2008) and the minimum aggregate sum to spent on the Squad by way of Player Fees (being US$ 3.3 million in 2008);
>
> (e) to comply with its obligations under each signed Player Contract;

120 Clause 2.1 to Schedule 2, Vol 10, Ex B, *p.* 186, read with paragraph 1 of Schedule 1 to Schedule 2, Vol 10, Ex B, *p.* 192.

rectify this.[121] Its termination notice of 14th September 2012 noted the failure to do so.[122]

154. The case in arbitration, and before me, was that since YBL had, on 15th September 2012 furnished demand drafts to BCCI in favour of the players, etc.,[123] there was 'substantial compliance' with the requirement of paying/clearing players' fees. It is an accepted position that *actual* payment had not been made.

155. The reason given was that 15th September 2012 was a Saturday, and RBI regulations or restrictions at the time did not permit foreign exchange remittances to be done on the weekend by wire transfer. The learned Sole Arbitrator accepted this argument in its entirety when he held that there was substantial compliance. The RBI restrictions were a good justification for not making the wire transfers or direct payment. Therefore, delivering cheques to BCCI was 'substantial compliance' with the demand.

156. There are far too many problems with this approach and conclusion. First, the finding posits that 15th September 2012 being a Saturday came as a total surprise to DCHL and YBL. That is hardly credible. That 15th September 2012 was a Saturday was an immutable truth. It was known with utter certainty, and it was so known since the adoption of the Gregorian calendar — circa October 1582.[124]

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121 Vol 10, Ex C, *pp.* 212–216, at *pp.* 214–215.

122 Vol 11, Ex J, *pp.* 274–282 at 278–279.

123 This includes support staff, other cricket boards, and so on.

124 By Pope Gregory XIII (hence 'Gregorian'), in a minor modification of the earlier 'Julian' calendar.

Everybody knew it. Everybody knew it from the date the clock began ticking against DCHL. The RBI regulations, too, cannot have come as a surprise. It is nobody's case that those restrictions sprang into being or operation unexpectedly, or close to the deadline. Thus, if DCHL and its commercial comrade, YBL, knew both these facts beforehand (and both were facts of which 'judicial notice' could be taken under the Evidence Act, obviating the need for formal proof), there was simply no possibility of accepting YBL's ostensible reason for issuing demand drafts rather than making the wire transfers before the Saturday. This seems to have entirely escaped the learned Sole Arbitrator's notice and attention. It could not have.

157. The learned Sole Arbitrator held that the players' payments were fully 'ensured'. But surely this is not even remotely possible, either on a reading of the contract or the documents in evidence. The contractual requirement was not to 'ensure' payment or provide security or anything of the kind. It was to make *actual* payment of the amounts already overdue. Therefore, as soon as the learned Sole Arbitrator concluded that the players' payments had not actually been made, there was no possibility of his returning a finding that the requirement achieved 'substantial compliance'.

158. Could the delivery of demand drafts by YBL to BCCI on 15th September 2012 ever have constituted satisfaction of or compliance with the demand and the contractual requirement? There are two components to this. *First*, the requirement — both in the Franchise Agreement and BCCI's notice — was for *payment* to be made to the *players*. Delivering demand drafts to BCCI did not meet the brief. It was not BCCI's responsibility to pay anyone or to deliver payment

instruments to anyone. *Second*, if those drafts were tendered subject to a condition sought to be imposed on BCCI — which had no privity with any of the players — then it was no payment at all.

159. Mr Mehta submits that YBL's tender of the drafts was, in fact, conditional. YBL had made this clear much earlier, by its letter of 5th September 2012, when it said it would make payments subject to BCCI's written confirmation that it would remit DCHL's undisbursed share of the Central Rights Income to DCHL's account with YBL alone.[125] YBL's position on this was evident right through that weekend — and, as we shall presently see, for about a month after. There is material to indicate that YBL told BCCI's Treasurer not to encash those demand drafts until it was confirmed that BCCI would release amounts due to DCHL into DCHL's account with YBL. This was said not once, but twice on Sunday, 16th September 2012.[126]

160. But there is even more material, and this is indeed very serious, because it takes the form of a *Court* record. I refer to Kathawalla J's elaborate order of 1st October 2012.[127] YBL was the 'intervenor', represented by Senior Counsel. The condition YBL insisted on in its letter of 5th September 2012 is noted in paragraph 10.[128] Then paragraph 17 notes this:[129]

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125 Vol 11, Ex H, *pp.* 265–271.

126 Vol 41, Ex K, *pp.* 126–127; Vol 41, Ex L, *pp.* 128–130.

127 Vol 52, Ex GGG, *pp.* 1502–1539. 2012 SCC OnLine Bom 1453 : (2012) 114 (5) Bom LR 3301 : (2013) 7 Bom CR 132.

128 Vol 52, Ex GGG, *pp.* 1502–1539, at *pp.* 1507–1508.

129 Vol 52, Ex GGG, *pp.* 1502–1539, at *pp.* 1511–1512.

> 17. On 16th September 2012 (Sunday), YES Bank forwarded a letter dated 15th September, 2012 to BCCI, inter alia, requesting BCCI to forthwith release payments which are due and payable by BCCI to DCHL, and credit the same in the account of DCHL maintained by YES Bank. **The Bank also requested BCCI to instruct it to release the wire transfer, and also release the demand drafts to Indian Players on 17th September 2012, *if the arrangement was acceptable to BCCI*.**
>
> (*Emphasis added*)

161. In other words, until 16th September 2012, YBL was insisting on its condition being met — *by BCCI*, with which it had no privity at all. YBL was clear that its demand draft payments to the players were subject to this conditionality.

162. Paragraph 20 of Kathawalla J's order says this:[130]

> 20. By its email dated 17th September 2012, YES Bank urged BCCI to withdraw the termination proceedings initiated against DCHL as they had materially and substantially cured all possible defects on 15th September, 2012 by 5.00 p.m. **YES Bank requested BCCI to deposit the amounts payable to DCHL by BCCI in the account of DCHL with YES Bank and requested BCCI not to release the 45 demand drafts issued by the Bank on behalf of DCHL, if the request made by YES Bank was not acceptable to BCCI.**
>
> (*Emphasis added*)

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130 Vol 52, Ex GGG, *pp.* 1502–1539, at *p.* 1513.

163. Again, the same condition was sought to be imposed. And then come paragraphs 21 to 23:[131]

> 21. The learned Advocate appearing for DCHL advanced his submissions on 24th September 2012 **when Mr. Milind Sathe, Learned Senior Advocate representing YES Bank, was also present in Court. However, on the next day i.e. 25th September 2012, Mr. Sathe tendered a Chamber Summons praying that YES Bank be joined as a party Respondent to the above Petition, or in the alternative permitting Yes Bank to intervene and be heard in the matter, and for directions to BCCI to return the demand drafts in the event of BCCI being opposed to withdrawal of the impugned termination of the Franchise Agreement executed by and between DCHL and BCCI.** In the affidavit in support of the Chamber Summons, **YES Bank has contended that the demand drafts are given to BCCI on the basis that the impugned termination would not be effectuated, and BCCI would deposit the IPL receivables of DCHL, in DCHL's Bank Account maintained by YES Bank. YES Bank has further stated in the affidavit that in the event BCCI was not agreeable to withdraw the impugned termination and/or make payment of the DCHL's IPL receivables into the DCHL's Bank account maintained with YES Bank, YES Bank is entitled to seek return and/or refund of the demand drafts enclosed at Annexure1 to the Petition.**
>
> 22. *Being surprised by the said Chamber Summons filed on behalf of YES Bank, DCHL sought an adjournment* to respond to the said Chamber Summons. In view thereof, the proceedings were adjourned to 26th September 2012.
>
> **23. On 26th September 2012, Mr. Sathe, learned Senior Advocate appearing for YES Bank, informed the**

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131 Vol 52, Ex GGG, *pp.* 1502–1539, at *pp.* 1513–1515.

Court that he has instructions not to press the Chamber Summons any more. He submitted that the said Chamber Summons was taken out by YES Bank since YES Bank felt that despite DCHL having substantially cured the defects set out in the notice dated 16th August 2012 issued by BCCI, BCCI cannot continue to take an unfair stand that it will hand over the demand drafts deposited by DCHL through YES Bank, to the players, support staff, Cricket Board/s, Association/s, etc. and also terminate the Franchise Agreement with DCHL. **Mr. Sathe informed the Court that YES Bank has now realised that they have unconditionally deposited the demand drafts on behalf of DCHL with the BCCI, by their first letter dated 15th September 2012,** and in view thereof the breach as regards payment of the players dues (both Indian and Foreign), support staff, Cricket Board (s)/Association (s), stands cured and YES Bank now cannot have any say qua the said payments and it is only DCHL who is free to make its own submissions before the Court in the above Application. Mr. Sathe further submitted that the demand drafts were deposited by YES Bank with BCCI on instructions from DCHL and that the said deposit of demand drafts was unconditional and YES Bank has no objection if this Court allows BCCI to hand over the said demand drafts to the players, support staff, Cricket Board/s, Association/s, etc. **Mr. Sathe also submitted that he has instructions from YES Bank to withdraw the second letter dated 15th September 2012 received by BCCI from YES Bank on 16th September, 2012 and the email dated 17th September 2012 addressed by YES Bank to BCCI.**

(*Emphasis added*)

164. This puts the matter beyond the pale. From 15th September 2012 to 26th September 2012, YBL *maintained* that its tender of the

demand drafts was conditional on acceptance of its terms. It even filed a Chamber Summons and a supporting affidavit saying so. It was not until 26th September 2012 that YBL withdrew its Chamber Summons and its letter and email demanding acceptance of its conditions. Therefore, as of the end of the day on 15th September 2012, the last day of the curative period, there was simply no unconditional payment, nor even an unconditional tender of the demand drafts.

165. This is not a matter of re-appreciating evidence. Had the Award contained any reflection at all of this material being considered, there was no room for interference. But the Award is entirely silent on all this, and all of it is undoubtedly vital evidence. The Court record, in particular, is not a finding, let alone a prima facie finding. It is a record of events *as they transpired in Court*. How this could have been so entirely ignored is impossible to understand.

(b) Bank Charges

166. The second part of the 'substantial compliance' aspect relates to the charges and claims by banks and financial institutions. The general contractual provision in Clause 6 required DCHL to adhere to all obligations in Schedule 3. Paragraph 9(a) of that Schedule, entitled 'General', read:[132]

> "**9. General**
>
> (a) The Franchisee shall not without first obtaining BCCI-IPL's prior written consent to

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132 Vol 10, Ex B, *pp.* 201–206, at *p.* 206.

> charge, pledge, grant any security over or otherwise encumber the Franchise *or any of the rights granted to the Franchisee hereunder* **whether or not such encumbrance is in the ordinary course of business**."
>
> (*Emphasis added*)

167. The learned Sole Arbitrator held that there was *no* charge (as on 14th/15th September 2012) on the franchise. He also accepted DCHL's case that (*i*) all charges existed before the Franchise Agreement and (*ii*) were on the newspaper division. Therefore, these charges did not constitute a breach of the Franchise Agreement. The relevant passage of the Award says: [133]

> As regards charge by Yes Bank, it was further submitted by the Learned Counsel for the Claimant that the charge was not on Franchise but on the receivables by the Claimant which would fall within the definition of "Franchisee Income'' under the Agreement.
>
> In my opinion, the submission is well-founded. There was no charge on Franchise Agreement.
>
> It was also submitted that the charges said to have been created and were in existence before the execution of Franchise Agreement dated 11.4.2008 on the business of Newspaper Publication carried on by the Claimant could not be considered as a breach of Agreement.
>
> I also find considerable force in the said submission of the Claimant. It, therefore, cannot be said that there were charges which were created by the Claimant on the Franchise. All charges alleged to have been created no more

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133 Vol 9, Ex A, *p.* 119.

remained inasmuch as during the "cure period", they stood cleared, vacated or withdrawn within the "cure period".

168. A mere acceptance of a submission advanced by one of the parties does not fall within the accepted definition of 'reasons'. The 'reasons' in any judgment or award demand a consideration of the rival arguments, and then a statement why one side's submission ought to prevail over the other's. It also demands, of necessity, a consideration of the evidentiary material.

169. There are two factual findings and one on contractual interpretation returned here. On facts, *first*, that all charges were cleared. *Second*, that all charges pre-dated the Franchise Agreement and related only to DCHL's newspaper business. The interpretation adopted is that the Franchise Agreement only forbade a charge on the franchise, not on its receivables.

170. Mr Mehta's argument runs likes this. First, he maintains that the evidence on record does *not* show that "*all*" banks and financial institutions had confirmed the withdrawal, vacating or clearing of their claims to have charges over DCHL's present and future assets and receivables by 15th September 2012. In particular, YBL itself had not done so. Neither, he submits had Canara Bank. The status for IndusInd bank was unclear. He also says that Ratnakar Bank had not either. The point is that there is absolutely no assessment in the Award whether, *as a matter of evidence on record*, DCHL's assertions that *all* bank claims stood withdrawn or vacated was or was not correct. Indeed, I am unable to find a single document showing that Canara Bank or YBL had given up their claims.

171. Mr Mehta relies on this tabulation:

Date & reference	Name of Bank / institution	Nature of charge	Status as on 15.09.2012
01-08-2012	YES Bank Ltd.	Charge over 'receivables' pursuant to a deed of hypothecation. The deed of hypothecation provided for exclusive first charge over the entire current assets of DCHL	**Not released / withdrawn**
06-08-2012	ICICI Bank	Charge / security interest over the Franchise and the rights and interests therein	Charge released
15-08-2012	Kotak Mahindra Bank	Charge over the Franchise	Charge released
17-08-2012	IDFC Ltd.	Charged all right, title, interest, benefit and claims under the Franchise Agreement	Charge released
03-09-2012	YES Bank Ltd.	Perfected first exclusive charge on the present and future receivables of the Franchise	**Not released / withdrawn**
06-09-2012	Ratnakar Bank	Secured creditor of DCHL	**Not released / withdrawn**
11-09-2012	Canara Bank	First charge on all present and future assets, movable, tangible, stocks, receivables etc	**Not released / withdrawn**
11-09-2012	IndusInd Bank	Letter states that sale of the franchise could not be completed without the prior written permission from IndusInd Bank.	——
12-09-2012	Religare Finvest	First and exclusive charge on the receivables	Charge released

172. Nowhere in the Award do we find an examination of the documents relating to these charges. If the finding to be returned was that:[134]

> "all charges alleged to have been created no more remained inasmuch as during the "cure period", they stood cleared, vacated or withdrawn within the "cure period",

then, at a minimum, the law requires an arbitral tribunal to consider the evidence for each of these claims. Without that, it is impossible to conclude that *all* charges 'no more remained'.

173. To be clear, if it was DCHL's case that *all* charges and claims had been withdrawn or cleared, then it was for DCHL to establish this. Given the number of bank claims, there could be no presumption of any kind about this. If anything, this could well be said to be a matter within DCHL's knowledge. It could not have been within BCCI's knowledge because BCCI did not have any privity with any of these banks. Only DCHL knew which charges had been cleared and which had not, and what the fate of those uncleared charges was. The Award does not even note an attempt by DCHL to establish this. Pointing to a general letter making a wide claim is insufficient. Mr Jagtiani's written submissions do not explain what is to be made of Canara Bank's claim.

174. DCHL argued that (*i*) charges created prior to the agreement and (*ii*) those that pertained only to DCHL's non-franchise assets

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134 Vol 9, Ex A, *p.* 119.

stood excluded. DCHL's submission before the learned Sole Arbitrator was:[135]

> the charges said to have been created and were in existence before the execution of the Franchise Agreement dated 11.4.2008 on the business of Newspaper Publication carried on by the Claimant could not be considered a breach of the Franchise Agreement.

175. The learned Sole Arbitrator held:[136]

> "I also find considerable force in the said submission of the Claimant. It, therefore, cannot be said that there were charges which were created by the Claimant on the Franchise …"

176. But the question is not whether the arbitral tribunal found considerable force, but *why* it did so, and on what material. There are simply no reasons at all. The Award has no indication of any documents or evidence considered to lead to any such conclusion.

177. The Award also does not indicate that DCHL led any evidence that any of the charges were created prior to the execution of the Franchise Agreement. But the mere date of a charge was not enough for DCHL. It had to show that the charge did not creep into the assets and receivables *after* the Franchise Agreement. If DCHL was, after the Franchise Agreement, entitled to certain assets and receivables as a result of that agreement, and even a single charge covered all *future* assets and receivables (i.e., after the Franchise Agreement), then

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135 Vol 9, Ex A, *p.* 119.

136 Vol 9, Ex A, *p.* 119.

there was no safety valve for DCHL. The bank letters on record, and to which I have referred in the chronology, indicate that each claimed rights over all *present and future assets and receivables* under the Franchise Agreement. The Award does not identify a single charge as being restricted to DCHL's newspaper division or arm. The Award has no examination of the rival claims and charges — none at all. Instead, it simply assumes that all charges were created before the Franchise Agreement, and must, therefore, be deemed to be limited to DCHL's newspaper division (as the franchise did not then exist). But which charges were prior to the Franchise Agreement and which were after? The Award does not care to say. What if some were created *after* the Franchise Agreement? Surely the finding (that all charges 'no more remained') would collapse. There was no possibility of sweeping such post-Franchise Agreement claims under the rug of the pre-Franchise Agreement claims. What is to be made of a claim over all present *and future* assets and receivables of *DCHL*? Such a charge — made by Canara Bank, which I note only because it was not shown to have withdrawn its claim — was, *first*, over the assets of the corporate entity, not any particular division; and, *second*, the claim extended, as such claims often do, indefinitely into the future to cover all *future* assets and receivables of *the corporate entity*. Why and on what basis should such a claim be limited to DCHL's newspaper division? What document says any particular charge or claim was, in fact, so constrained? The tabulation I set out earlier in fact points to the contrary, and this is only a summary of what the evidentiary record showed.

178. As to Ratnakar Bank's claim, Mr Jagtiani argued that that bank's letter of 6th September 2012[137] was a charge on DCHL, the corporate entity, and had nothing to do with the franchise or the Franchise Agreement. I do not know what, if anything, this is supposed to mean. A charge is always on an asset or an asset class; to charge the corporate entity but not its assets is meaningless. Ratnakar Bank's letter asserts that DCHL could not sell 'its unit' or any 'major property' without Ratnakar Bank's prior consent. Whatever be the implications of this, it could not have been dismissed without any consideration by saying all charges had been removed and no longer existed. Of course they did. On DCHL fell the burden of showing otherwise. That required (*a*) evidence; and (*b*) an appreciation of that evidence. The one thing that was not permissible was to ignore the existing evidentiary material on record.

179. For Canara Bank, the situation is even worse, for it clearly said, as late as 11th September 2012, that it continued to have a first charge *on all present and future assets of DCHL*, which included the assets of Deccan Chargers Sporting Ventures Ltd, in which initially the franchise was housed.[138]

180. What can possibly be made of such a finding except to say that it has been arrived at by a wholesale ignoring of direct, cogent and vitally relevant evidentiary material on record? Surely this must fall squarely within the jurisprudential meaning of perversity and patent illegality.

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137 Vol 57, *pp.* 194–195 : Vol 49, Ex UU, *pp.* 1351–1352.

138 Vol 57, *p.* 196 : Vol 49, Ex XX, *p.* 1356.

(c) Charge on franchise vs charge on its receivables

181. DCHL said that YBL's charge was not 'on the franchise' but on its receivables, and therefore not forbidden by the Franchise Agreement. Again, without any examination of the relevant contractual provisions, the learned Sole Arbitrator directly accepted this submission as well-founded. But paragraph 9(a) of Schedule 3 of the Franchise Agreement forbids a charge or encumbrance on the franchise *or any of the rights granted to the franchisee under the Franchise Agreement*. This has been entirely ignored or overlooked. It receives no consideration or reasoning in the Award. A 'receivable' is nothing but an entitlement or a right. In any case, this discussion relates only to YBL. But YBL's own claim was indeed over the receivables. That is why it demanded that DCHL's undisbursed share of the Central Rights Income be paid into DCHL's account with YBL. This is nothing but a claim to have a charge on the receivables. Other banks too, notably Canara Bank, which did *not* withdraw its claim, also asserted rights over the 'receivables'. The Award gives no reasons at all for its finding that only a charge on the franchise was prohibited, not a charge on the receivables. Again, like the argument on the charge being on a 'corporate entity' and not on its 'assets', it is impossible to understand what this is supposed to mean. Every single thing about a franchise is an asset — from its receivables to its goodwill and reputation. All of it can receive a monetary value — which is exactly what DCHL claimed. This finding is not a possible view (apart from being bereft of reasons).

(d) The concept of 'substantial compliance'

182. A more fundamental problem is this. The Award proceeds on the a priori assumption that, notwithstanding what a contract says, contract law contemplates that the terms of a contract need not be exactly complied; 'substantial' compliance is enough. I find no authority in private law in India for such a proposition. Indeed, it seems to me that in any envisioning of obligations law, such a proposition is virulent and dangerous. It injects unacceptable uncertainty and subjectivity to precisely stated contractual obligations. Specifically, it opens a Pandora's box of substantiality. How much is enough compliance? When is *some* compliance 'substantial' and when is it 'insubstantial'? If contracting parties agree on an amorphous or ambiguous level of compliance, they will say so. Usually, this will take the form of specifying compliance within a range: it could be a range of dates, or a scale of amounts. For instance, a contract may say that a particular action is to be done within a set number of days of a given event. Or the parties may agree that a minimum amount is to be paid within a fixed period of time. A contract may even say that of a certain amount, if a specified amount is paid, then the performing party will be deemed to have 'substantially performed' its obligations. But that needs to be a contractual provision. It cannot be introduced into a contract where such a provision does not exist.

183. As a generalized principle, 'substantial compliance' may have some significance in public law matters, but, by definition, those would fall outside the purview of contract-constrained arbitration law, and would be the remit of courts empowered to issue high

prerogative remedies. In the realm of private law, this concept has no role to play at all unless it is part of the contract. If it is not, then there is either compliance, or there is not. There is, as far as I can tell, simply no principle of 'substantial compliance' in private contract law unless the contract itself allows for it. Indian law does not seem to contemplate such a generalized principle, and its invocation, especially unanchored to any jurisprudence, renders the Award's finding entirely perverse and unsustainable.

184. Let me assume for a moment that such a principle exists, or that commercial expediency demands it. For, obviously, the task is to lend contract construction some degree of commercial common sense. That, in turn, means that if there is to be 'substantial compliance', so much of the contract as is left unperformed must be shown to be trivial or immaterial. In every case, this would be a question of fact. It would require a specific finding to be returned on what it was that was left out, and why it is said to be immaterial or inconsequential. Merely using an umbrella epithet serves little purpose. When it is shown, however, that matters of moment and consequence have been left uncured and unresolved, there can be no question of 'substantial compliance'.

185. Therefore, as a corollary to this, the finding that 'the course suggested by' DCHL and YBL was 'much more appropriate and preferable' is entirely outside the realm of the contract in question. The arbitral tribunal was not called on to decide any such thing. It could not have been. It was asked to decide whether BCCI's termination conformed *to the contract*; not what it ought generally, preferably, more appropriately to have done. Interestingly, the Award

does *not* return a finding that BCCI was *contractually bound* to accept DCHL's and YBL's offer or suggestion. To bring (and confine) the dispute within the contractual frame, and that is what constrains every arbitral tribunal, such a finding was necessary. Without it, the finding of something being 'preferable' or 'more appropriate' travels beyond the contract. The question was whether BCCI's termination was lawful according to the contract and the law. It was emphatically *not* about what might or should have been or what was preferable. The finding introduced an entirely extraneous and irrelevant element without any attempt at contractual interpretation. The finding falls foul of the jurisprudential interdiction against extra-contractual arbitral peregrinations.

186. The finding that it was 'much more appropriate and preferable' for BCCI to have accepted the course suggested by DCHL and YBL necessarily involved an abandonment of the Franchise Agreement and wholesale rewriting of the contract. It suggested a preferability of an entirely new contract, one to which YBL would have to be a party, thus establishing for the first time contractual privity between BCCI and YBL. How any arbitral tribunal could suggest this and, worse yet, return it as a finding of wrongdoing on BCCI's part is inexplicable.

187. Finally, there is the irreconcilable conflict between finding that the termination notice was 'premature' and that there was 'substantial compliance'. Logically, the two cannot co-exist. It is one or the other. The Award returns both findings. The resultant view is not possible. It is perverse.

(4) No Insolvency Event

188. We have already seen that Clause 11.2 of the Franchise Agreement permits either party to terminate immediately by written notice if the other party commits an 'irremediable' breach of the Agreement or if it is the subject of an Insolvency Event. An 'Insolvency Event' is defined in Clause 11.6, also noted above, as occurring when any bona fide petition is presented or any demand under the Act is served (we are not concerned with the rest of the clause).

189. That IFCI filed a winding-up petition against DCHL in the High Court at Hyderabad is undisputed. BCCI's notice of 16th August 2012 called on DCHL to provide proof that IFCI's winding-up petition had been withdrawn or dismissed. BCCI reserved its right, in default, to terminate under Clause 11.2. One of the grounds for BCCI's termination on 14th September 2012 was that DCHL had failed to do so.

190. In the Award there is no discussion at all as to whether or not IFCI's Petition was 'bona fide'. Instead, the learned Sole Arbitrator went on to say:

> "I, however, do not wish to enter into larger questions in the light of the fact that IFCI also filed a suit against Claimant – DCHL for recovery of dues which formed subject matter of Winding-up Petition. The matter was settled before Debts Recovery Tribunal – 1, Jhandewalan, New Delhi. Consent terms had been arrived at on 12.9.2012 and the matter was finally disposed of.

> **Thus, in any case, "Insolvency Event" was no more in existence on 15.9.2012 and was over within the "cure period". Hence, the allegation as to "Insolvency Event" did not remain. Hence, it was not open to the Respondent to rely upon the event for terminating the Franchise Agreement.**"
>
> (*Emphasis added*)

191. This is a finding of fact and it is reached without the slightest attempt to examine how and on what terms the 'matter was settled' before the DRT-I. The compromise agreement before that tribunal was very much part of the evidentiary record.[139] Only three clauses need to be noted:

> b) The balance amount of Rs. 15,17,28.944.00 (RUPEES FIFTEEN CRORES SEVENTEEN LACS TWENTY EIGHT THOUSAND NINE HUNDRED FORTY FOUR ONLY) plus the Interest thereon **shall be payable in four installments. The first three installments of RS. 3.50 crore each shall be payable on or before 10.10.2012, 10.11.2012 and 10.12.2012 respectively and the final installment of Rs. 5,43.28,201 .00 shall be paid on or before 10.01.2013.** The aforesaid amounts are arrive, considering payment of these installments on the stipulated dates and after taking into account the appropriation of interest @11 25% p.a till the dates of payment, on each date of payment, as per the calculation sheet annexed (Annexure I). The final amount of Rs 5,43,28,201.00 may vary if there is a variance in the dates of payment. It is also agreed that the Defendant No. 1 Company shall give post dated cheques to Applicant FI in respect of the said agreed payments.

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139 Vol 57, *pp.* 78–93 : Vol 10, Ex F, *pp.* 222–226.

> d) **Applicant IFCI shall keep all proceedings including criminal cases filed under section 138 NI Act, winding-up proceedings and matters pending etc. on hold and shall withdraw the same only after the terms of the settlement are complied with and the entire amount is paid by the Defendants**. Also IFCI shall withdraw matters pending with Ministry of Company Affairs.
>
> f) **That this Hon'ble Tribunal will issue a Recovery Certificate, if a request is made by the Applicant FI for the same on committing of default in payment of monies or any terms of the settlement by the Defendants.**
>
> (*Emphasis added*)

192. Taken together, as they must be, these clauses point to only one thing: that the IFCI winding-up petition was *not* disposed of by 14th September 2012. It was merely held in abeyance. Indeed, the first of the four instalments was not due until a month later, on 10th October 2012, and the last of the four not until 10th January 2013. A single default would revive or re-trigger the winding-up petition. It was not to be withdrawn until the *full* amount was paid. Clause (f) puts this beyond doubt. It said that a single default would result in the DRT-I issuing a Recovery Certificate, i.e., in IFCI's claim before the DRT being made absolute. Inevitably, that would result in an order on the winding-up petition. Even if clause (f) is ignored for a moment as not being directly related to a winding-up petition (the compromise being before the DRT), there can be no ambiguity about the fact that the winding-up petition itself was emphatically not withdrawn on the filing of this compromise agreement.

193. It is difficult to comprehend how this document could have been so totally ignored by the arbitral tribunal. There is not even an attempt to address its terms or their implications. The finding that the Insolvency Event *was no more in existence* and *did not remain* is not even a possible view. Notably, the Award accepts that the IFCI winding-up petition was indeed an Insolvency Event: it declines to go into this supposedly 'larger question' because IFCI had also filed a suit in the Delhi High Court for recovery of the same amount. DCHL does not assail this finding. Consequently, no question survives of the IFCI winding-up petition not being bona fide. Therefore, this leaves only the question of whether the petition — bona fide, and admittedly an Insolvency Event — existed on 14th September 2021. On that, the finding in the Award is directly contrary to the material on record, which it totally ignores and fails to take into account or even consider. Instead, the award proceeds on the wholly incorrect basis that since there was a compromise agreement, therefore the IFCI petition *was no more in existence*. The finding is entirely unsustainable and falls within the legal definition of perversity, i.e. a view that was not even possible.

194. I confess I do not follow Mr Jagtiani's submission that with the filing of the compromise agreement the 'substratum' of IFCI's winding-up petition had gone. The Franchise Agreement did not speak of a qualitative analysis of each winding-up petition beyond saying that it had to be bona fide. That it was bona fide is established by the compromise agreement itself (and the Award does not go into this). With that out of the way, there was no question of looking to the 'substratum'; and indeed the submission appears to me to be plainly wrong. That substratum or basis of the winding-up petition would not

go until the last rupee was paid. Until then, the winding-up petition was merely in abeyance, capable of being revived upon a single default. If the last instalment was not due for several months, as we have seen, the result could only have been that the winding-up petition remained, albeit temporarily dormant, until then. Effectively, therefore, as on 14th-15th September 2012, the winding-up petition remained. The reasoning simply does not fit the bill: it is not proper, intelligible or adequate.[140] It is without reasons. It is not a possible view. The finding is both perverse and patently illegal.

(5) Unfair Discrimination

195. This is a very contentious area. In summary, the learned Sole Arbitrator found that BCCI had invidiously discriminated against DCHL, especially in comparison with other franchisees and their owners. Specifically, the learned Sole Arbitrator held that for far more egregious defaults, even criminal acts, BCCI took no action against other franchisees, yet proceeded to the extent of a termination against DCHL. Then the learned Sole Arbitrator held that although the relevant contractual provision used the word '*may*', entitling BCCI to 'set off' any amounts due from it against amounts due by DCHL to players, this had to be construed as '*shall*'. Consequently, the learned Sole Arbitrator said that BCCI was *bound* to pay off DCHL's players from DCHL's share of the Central Rights Income (which BCCI had 'wrongfully' and in a 'discriminatory manner' withheld). The Award also says that BCCI's response that Article 14 of the Constitution of

140 See: *Dyna Technologies Pvt Ltd v Crompton Greaves Ltd*, 2019 SCC OnLine SC 1656, paragraph 37.

India had no role to play failed to impress.[141] Mr Mehta assails the entire finding on several grounds.[142]

(a) No pleading

196. This is how the learned Sole Arbitrator noted DCHL's case:

> It was vehemently contended on behalf of the Claimant that the Respondent had also adopted discriminatory treatment terminating Franchise Agreement as well as in making payment of Franchisee Income.
>
> It was stated that though the Players' Fees were not paid by Rajasthan Royals (RR) as well as Chennai Super Kings (CSK), their Franchisees were not terminated. Moreover, under the Franchise Agreements, all Franchisees were entitled to Franchisee's Share from BCCI. Such payment was made by BCCI to RR, CSK and others but no such payment was made to the Claimant.
>
> It was, therefore, submitted that BCCI ought to have adopted and applied one and the same standard while dealing with all Franchisees. If the Franchise Agreement of RR and/or CSK were not terminated on account of non-payment of Players' Fees, it was not open to BCCI to terminate Franchise Agreement of the Claimant on that ground. Again, if BCCI had made payment of Franchise Income to RR and/or CSK or any other Franchisee, it was incumbent on BCCI to make such payment to Claimant as well. In fact, under the Franchise Agreement, it was the right of the Claimant and every Franchisee to receive such income

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141 Vol 9, Ex A, *pp.* 120–126.

142 The discussion later in this section of the Award, Vol 9, Ex A, *pp.* 131–132, is a conceptual overlap of the 'unfair discrimination' finding. I do not think it is necessary to deal with it separately.

and it was incumbent on the Respondent to pay the amount to DCHL. It was also submitted that even according to the case of BCCI, the amount payable by DCHL towards Players' Fees was Rs. 13 Crore (approximately), while the amount receivable by the Claimant from the Respondent - BCCI was Rs.36 Crore (approximately) which was more than double the amount payable by the Claimant towards Players' Fees.

It was submitted on behalf of the Claimants that had such payment been made by BCCI to DCHL to which the Claimant was entitled (and BCCI had made such payment to other Franchisees), the Claimant could have easily paid Players' Fees and other dues and there would have been no occasion for BCCI to terminate Franchise Agreement of the Claimant which was not terminated by BCCI for RR and CSK though the ground was one and the same (non-payment of Players' Fees) in respect of those Franchisees also. It was stated that some of the Franchisees had not paid even first instalment of Players' Fees.

197. BCCI objected, saying there was no pleading to this effect at all by DCHL in its Statement of Claim. Even if the Code of Civil Procedure, 1908 and the Evidence Act, 1872 did not apply with their full rigour, fundamental and general principles nonetheless governed. If DCHL did not have a pleading, BCCI had no opportunity to meet this particular case, leading to a failure of natural justice and fair play. DCHL said it was only after arbitration was invoked that it learnt that other teams had defaulted on players' payments, despite which BCCI had not terminated those franchise agreements. Some had not even paid the first instalment. In fact, BCCI had paid the franchise income to other franchisees, but not to DCHL, though similarly situated. When DCHL demanded information, BCCI refused. DCHL filed a

formal application for disclosure on which the arbitral tribunal made an order on 18th July 2016. The learned Sole Arbitrator held that DCHL learnt of these matters from the affidavit evidence of RW1, Sunder Raman, BCCI's only witness.

198. The learned Sole Arbitrator held that BCCI, a body that performs 'public functions', was bound to make a complete disclosure. It could not pick and choose. It had to disclose these matters even without a formal order. It had to satisfy the tribunal that its acts were 'legal, valid and in consonance with the law' and that the same treatment was shown to all franchisees without any discrimination. For this reason *alone*, the learned Sole Arbitrator rejected BCCI's threshold objection.

199. But this does not even begin to answer the question BCCI raised. An insufficient pleading is fundamental. It goes to the root: it is the basis of our system of jurisprudence, which demands that the opponent must know the case to be met. Nothing stopped DCHL from applying for an amendment. If it had indeed come upon or been given additional information at a late stage, then, at a minimum, it had to *set out its case in pleadings* relating to that information so that BCCI could address it. Very many things may emerge in a trial. Not all can form the basis of a decision. No amount of evidence can substitute for a necessary pleading, nor can evidence travel beyond the case pleaded.

200. DCHL's necessary pleading on unfair discrimination was a ground for invalidating the termination. This needed to be both

pleaded and proved. Whatever may have been the evidence, without an underlying pleading, no finding could have been returned against BCCI. Had DCHL sought to amend, BCCI would have had an opportunity to oppose. Had the amendment been allowed, BCCI would have been entitled to file a supplementary Statement of Defence. Then, and then only, could an issue like this been struck. This would have allowed BCCI an opportunity to explain in pleadings (and not just oral arguments) its stand on the matter. This is a fundamental procedural illegality: a claim by one party is allowed to be fully explored, while the other side is denied even the most basic opportunity of meeting the case against it. Indeed, the finding on BCCI's so-called duty to disclose puts the cart firmly before the horse. There was no such requirement because there was simply no such pleading. Conceivably, extending the logic, BCCI might just as well have been asked to disclose every single thing relating to all seven of the other franchisees. That is unthinkable.

201. Mr Jagtiani's submission is that every little thing need not be pleaded. It is sufficient to allege a state of facts. Evidence is never required to be pleaded.[143] While this is elementary and requires no supporting authority, it again begs the question. A party must set out its case precisely so that the other side is not taken unawares. DCHL's case on unfair discrimination was not something that could be inferred, given that this was a commercial arbitration dispute confined by the contract. That argument fell entirely outside the contract. For such a case to be mounted, it needed to be set out, however briefly, with some specificity. It could not have been

143 *Mohan Rawale v Damodar Tatyaba & Ors*, (1994) 2 SCC 392.

conjured up like this at trial and then in arguments. Indeed, *Kali Prasad Agarwalla v Bharat Coking Coal Ltd & Ors*,[144] on which Mr Jagtiani relies, is conceivably against him. There, the Supreme Court said a ground of insufficient pleading could not be raised if parties went to trial knowing full well what they were required to prove and adduced evidence of their choice to support their respective claims. That is not the case here. Indeed, as we have seen, BCCI's threshold objection was not answered at all in the Award; and certainly there is not a word in the Award to suggest that parties went to trial knowing what they had to prove and adduced evidence accordingly. True, the substance and not the form of the pleadings is to be considered.[145] But this only meant that the Award ought to have returned a finding of sufficiency of pleading. The relevant portion of the Award contains not a single line of examination of the pleadings.[146] The only observation is this:

> As far as pleading is concerned, it is the case of the Claimant that it had come to know of the fact regarding non-payment of Players' Fees by other franchisees also like RR, CSK, etc. later on and also from the Affidavit of RW1 Sunder Raman. Similarly, it came to know that Franchisee Payment had been made to other Franchisees but the same treatment was not shown to the Claimant. As soon as the Claimant came to know about these facts, a demand was made to BCCI to provide information and supply documents. The Respondent, however, refused to provide information sought or to supply documents demanded contending that

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144 1989 Supp (1) SCC 628.

145 *Ram Sarup Gupta v Bishun Narain Inter College & Ors*, (1987) 2 SCC 555; *Bhagwati Prasad v Chandramaul*, AIR 1966 SC 735.

146 Vol 9, Ex A, *pp.* 123–124.

> such information or documents were not relevant to the issue raised by the Claimant.

From there, the Award segues straightaway into a discussion of Article 14 and public law. It returns no finding at all on the sufficiency of the pleading and points to not one part of the Statement of Claim. The learned Sole Arbitrator's finding is not a possible view. It is entirely beyond the contract. It addresses a case never pleaded. And it is most certainly not for Mr Jagtiani to show me now that there was such-and-such a pleading. The answer to that is simply: "Does the Award say so? Does it so find? Is this reflected in the Award?" This is not a question of examining the sufficiency of reasons in the Award. In fact, there are no reasons at all for this finding, simply because the question raised by BCCI was never answered.

(b) Finding outside the contract

202. Mr Mehta submits that what BCCI did vis-à-vis other franchisees could not have been dragged into the present dispute. The reciprocal obligations of BCCI and DCHL were confined by their inter se contract. This kind of expansiveness was and is entirely impermissible. DCHL had to show that BCCI was not entitled to effect any retention and that it was bound to make payment to DCHL. What BCCI did or did not do vis-à-vis other teams was immaterial. DCHL could demonstrate no such contractual obligation that BCCI had no power of retention and had to disburse the amounts withheld to DCHL (leaving aside the question of whether BCCI was bound to make payments to DCHL's players from the retention). All that DCHL could point to was what it alleged BCCI had done vis-à-vis the other teams. That fell outside the contract between BCCI and

DCHL; and the Award thus travels beyond the contract. The entire finding is beyond jurisdiction and in excess of it.

203. Mr Mehta relies on *Rajasthan State Mines and Minerals Ltd v Eastern Engineering Enterprises*[147] to say that it is only if the contract permits that an arbitrator can examine matters that lie outside its boundaries, factual and legal. Otherwise, he cannot. There can be no award disregarding the terms of the contract, for the arbitrator is not a conciliator. He must decide the disputes according to the law and the contract between the parties.

204. Mr Mehta then cites *Associated Engineering Co v Government of Andhra Pradesh*[148] in support of his submission that an arbitrator cannot act independently of the contract. His sole function is to arbitrate *in terms of the contract* and with regard to its terms. *Ssangyong Engineering* reaffirms this position. The arbitrator is a creature of the contract. He has no powers other than those the parties confer on him by their contract. If he ventures beyond those boundaries or acts in disregard to the contract, he acts without jurisdiction. He has no power to widen his jurisdictional remit by deciding a question not referred to him or deciding otherwise than according to the contract. Again: *Ssangyong Engineering*. This is also the ratio of *Bharat Coking Coal Ltd v Annapurna Construction*.[149]

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147 (1999) 9 SCC 283.

148 (1991) 4 SCC 93.

149 (2003) 8 SCC 154. See also: *Food Corporation of India v Chandu Construction*. (2007) 4 SCC 697.

(c) The contract required BCCI to pay DCHL's players' dues

205. As part of the discussion on 'unfair discrimination', the learned Sole Arbitrator considered Clause 20.3 of the Franchise Agreement and Rule 5 of the Operational Rules to hold that BCCI was *bound* to pay off DCHL's players' dues from DCHL's share of the Central Rights Income that BCCI had withheld.[150] The two provisions read thus:

> **Clause 20.3**
>
> BCCI-IPL **shall be entitled to deduct** from any sum which has become due and payable to the Franchisee under this Agreement **any amount which has become due and owing by the Franchisee to BCCI-IPL under this Agreement but which remains unpaid**.
>
> **Rule 5: Set Off**
>
> **Whenever any sum of money shall be or in the future become recoverable from or payable by any Franchise to IPL and/or BCCI or to any other Franchisee or to any person subject to these Operational Rules** including but not limited to fines, costs, awards or decisions made under the Regulations **then the same *may* be deducted from any sum then due or which at any time thereafter may become due to that Franchisee arising out of the Regulations or any contract between such Franchisee and IPL and/or BCCI** including without limitation the relevant Franchise Agreement **and BCCI-IPL *may* pay such sum onto any third party to whom it is owed by such Franchise** including but not limited to any State Association. The exercise by IPL and/or BCCI of its rights

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150 Vol 9, Ex A, *pp.* 124–126.

hereunder shall be without prejudice to any other rights or remedies available to IPL and/or BCCI.

(*Emphasis added*)

206. The Award returned a finding that '*may*' had to be read as '*shall*'. But where the language of a contract is unambiguous, there is no scope whatever for embarking on this kind of interpretative expedition. Holding that BCCI was *bound* to pay DCHL's players from the retention effectively re-wrote the terms of the contract. More to the point, it totally upended the entire obligation-entitlement framework. DCHL's — or any franchisee's — obligation to pay its players their fees was not dependent or contingent on the franchisee receiving money from BCCI. The contract between the franchisee and the player was not a back-to-back contract with the Franchise Agreement. Nobody even suggested that. Yet, this is the result of the finding. It creates a wholly new obligation directly between BCCI and every single player, a situation totally beyond the contemplation of the Franchise Agreement.

207. Indeed, the only possible view was that any franchisee's right or entitlement to the Central Rights Income depended on it *not* being in default or breach. Were it in default or breach, BCCI could (but did not have to) withhold any payment due to the franchisee. The converse of the finding that BCCI was *bound* to pay the franchisee's players from the amount retained was, inevitably, that BCCI was also *bound to effect such a retention* the moment there was a breach or a default. Nothing in Clause 20.3 or Rule 5 can be read even remotely to suggest this. In turn, this means that no franchisee could ever be in breach or be required to be given a curative notice for a remediable

breach. For, immediately on such a payment default, BCCI would be '*bound*' to effect a retention and then '*bound*' to cure the breach by paying off the debt from the withheld amount, though this was always the obligation of the franchisee.

208. Indeed, it was always the other way around: upon the defaulting franchisee curing the breach, the amount would have to be paid out to it by BCCI. Of course, to avoid third-party carnage, BCCI *could*, in its discretion, make payment to the third-party creditor; but it is impossible to read the contract to say that BCCI was duty-bound to do so. The retention power was to ensure that there were no defaults by the franchisees in the performance of their obligations vis-à-vis third parties with whom each franchisee had a separate and distinct contract. The default, especially in payment of players' fees and dues, was the matter that fell in the area of BCCI-IPL being brought into disrepute.

209. No contract can be read in the manner the Award suggests. Its interpretation is an unacceptable rewriting of express and unambiguous contractual terms without heed to the implications of the interpretation. This is not a question of a curial intervention on a matter of interpretation. It is a question of an arbitral tribunal rewriting a major contractual term to arrive at a view that is not even possible.

210. Interestingly, contemporaneous material also shows that even DCHL did not read the clause like this. Until 15th September 2012,

there was no demand from DCHL that BCCI should pay the players from the retention amount.

211. It is impossible to accept Mr Jagtiani's submission that the BCCI retention was purpose-specific. Nothing in the contract suggests this.

212. Then Mr Jagtiani presents a startling submission: that the moment BCCI retained any amount, DCHL's obligation to its players disappeared. This has only to be stated to be rejected. It is far outside any reasonable reading of the contract. Again, as is true throughout, this is an attempt to embellish the award by adding to it something that is simply not there. There is no evidence of it either.

(d) Public law principles in arbitral decision-making

213. Mr Mehta's submission is that the learned Sole Arbitrator's introduction and use of public law principles in what is an entirely private law dispute resolution process was wholly impermissible and illicit. An arbitrator possesses none of the broader powers of a constitutional court or one exercising a power of judicial review. No question could have arisen of a private dispute resolution tribunal invoking, for instance, Article 14 of the Constitution. Actions based on contract and seeking contractual remedies do not allow the introduction of broader questions of public law, such as those based on Article 14.[151]

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151 *Indian Oil Corporation Ltd v Amritsar Gas Service*, (1991) 1 SCC 533.

214. Do different considerations arise when one of the parties is 'the State' within the meaning of Article 12? Here, the learned Sole Arbitrator held that BCCI is not the State, but held that it nonetheless performs 'public functions'. Would that make a difference in arbitration, a dispute resolution constrained by private law? It would appear not. Certainly, the *public law duty* to act fairly cannot be imported into a contract by a private law arbitral tribunal to effectively alter its terms so as to create an obligation on the so-called public-duty party that the contract does not envisage: *Assistant Excise Commissioner v Issac Peter*.[152] This is true even of a statutory contract. In *Issac Peter*, the Supreme Court held that in case of contracts freely entered into with the State, there is no room to invoke the public law doctrines of fairness and reasonableness 'to alter or add to the terms of the contract, i.e. to cast on the State a contractual burden that the contract itself does not contemplate.' A Division Bench of the Delhi High Court went so far as to say that there is no scope for applying the doctrine of arbitrariness in a private law field.[153] That remedy is a public law remedy. Its avenue is different. A Division Bench of this very court took the same view in *ONGC Ltd v Streamline Shipping Co Pvt Ltd*.[154] It had no hesitation in setting aside the order under appeal, which held that a particular clause was unconscionable and against public policy. Another Division Bench of the Delhi High Court also took a similar view.[155]

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152 (1994) 4 SCC 104.

153 *Kesar Enterprises v Union of India & Ors*, 1994 SCC OnLine Del 337.

154 2002 SCC OnLine Bom 303.

155 *Mic Electronics Ltd v Municipal Corporation of Delhi & Anr*, 2011 SCC OnLine Del 766.

215. I find Mr Jagtiani's reliance on the decision of the Delhi High Court in *KSL & Industries v National Textile Corporation Ltd*[156] to be entirely inapposite. The court had before it three Section 9 petitions. A Section 9 court's powers are not constrained by Section 28. The arbitral tribunal is so constrained. Section 9 specifically uses the words 'just and convenient', a possible jurisprudential or statutory riff on the *ex aequo et bono* principle (discussed below). The learned single Judge, from paragraph 89, took the view that a fight between the citizen *and the government* is not to be viewed as an ordinary litigation. BCCI is not the government. The entire discussion that followed in *KSL & Industries* was about what *courts* had done in one proceeding or the other, the form of that action being immaterial. But this cannot and does not mean that the same principle can be extrapolated to the narrowly tailored confines of an *arbitral tribunal*, an adjudicatory body of a very special stripe: one not brought into being by the Constitution or law but only by a binding contract between the parties, and constrained by the terms of that contract. If this view is to be imported into arbitration, we face a fundamental problem: no arbitrator is any longer a creature or creation of contract. He is an alternative *curial* authority, not a private alternative *dispute resolution* entity. An arbitrator's canvas is rigidly limited by the parties' agreement. A court's canvas is not.

216. Besides, the *KSL & Industries* decision — if viewed as Mr Jagtiani would have me do — is directly contrary to the Delhi High

156 2012 SCC OnLine Del 4189.

Court Division Bench's decision in *MSTC Ltd v Jain Traders*,[157] from which I find support for the view I have taken.

217. There can be no answer at all to Mr Mehta's submission. There is no quarrel with the proposition that a *court*, especially a Constitutional court, is not constrained in the same way as an arbitrator. Public law actions demand public law remedies. The suggestion is not that a public authority can play Jekyll and Hyde or that it is required to demonstrate fairness only in a public law action. The question is what is it that the *decision-making body* is empowered in law to do. A writ court may well hold against a public body on a public law principle or by invoking Article 14; but an arbitrator, constrained as he or she is by the contract, has no such power. A careful reading of the relevant authorities, from *Shrilekha Vidyarthi v State of UP*[158] to *ABL International Ltd v Export Credit Guarantee Corporation of India Ltd*[159] and, more recently, *Kailash Nath v Delhi Development Authority*,[160] shows that courts have indeed demanded Article 14 compliance (fairness and non-arbitrariness) — *in exercise of unquestionable public law judicial powers*. I find absolutely no authority for the proposition that a private-law-bound tribunal has recourse to such power.

218. Indeed, in *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd*,[161] the Supreme Court said this:

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157 2011 SCC OnLine Del 3304.

158 (1991) 1 SCC 212.

159 (2004) 3 SCC 553.

160 (2015) 4 SCC 136.

161 2020 SCC OnLine SC 656.

> 34. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. **The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.**
>
> (*Emphasis added*)

219. *Avitel* was also a matter under the Arbitration Act, and this is, therefore, the clearest possible enunciation of the separation between private law considerations and those in public law.

220. At a minimum, one would have expected an arbitral tribunal asked to decide on a question of 'unfair discrimination' to address itself to the private law/public law interface. The Award has none. It simply assumes the investiture in it of those powers,[162] and the power to invoke public law principles, in aid of an astonishing conclusion — that a party making out a case need not put in a sufficient pleading. There is so thorough a logical disconnect here that the finding is not

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162 Vol 9, Ex A, *p.* 126: "I am also not impressed by the argument of the learned Senior Advocate that the provision of Article 14 of the Constitution would not apply to the case on hand with regard to non-termination of Franchise Agreement in favour of some Franchisees."

even stateable: "because a public law principle is invoked, therefore the objection as to lack of pleading is rejected". The finding is not implausible. It is impossible.

(e) The Arbitrator as '*amiable compositeur*': decision *ex aequo et bono*

221. Sections 28(2) and 28(3) of the Arbitration Act say:

> (2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* **only if the parties have expressly authorised it to do so**.
>
> (3) While deciding and making an award, **the arbitral tribunal shall, in all cases, take into account the terms of the contract** and trade usages applicable to the transaction.[163]
>
> (*Emphasis added*)

222. We also find both these provisions reflected in Article 28 of the UNCITRAL model law and the UNCITRAL 2010 Rules.[164]

223. Mr Mehta points out that the terms *ex aequo et bono* and *amiable compositeur* have a specific legal connotation. The first means 'according to what is equitable (or just) and good'. A decision-maker (especially in international law) who is authorized to decide *ex aequo*

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163 Sub-section (3) was amended by the 2015 amendment, Act 3 of 2016, with effect from 23rd October 2015. Originally, it read:

> 3. In all cases, the arbitral tribunal shall decide *in accordance with the terms of the contract* and shall take into account the usages of the trade applicable to the transaction. (*emphasis supplied*)

164 See also: Webster, Thomas H; Handbook of UNCITRAL Arbitration, 3rd Ed., Sweet & Maxwell.

et bono is not bound by legal rules and may instead follow equitable principles. An *amiable compositeur* in arbitration law is an arbitrator *empowered by consensus* of parties to settle a dispute on the basis of what is 'equitable and good'.[165]

224. Given the wording of the Arbitration Act, a longer examination of the antecedents of these concepts is unnecessary. The statute itself is clear and unambiguous; and in *Associate Builders*,[166] the Supreme Court in paragraph 42.3 extracted Section 28 and said that a contravention of it is a sub-head of patent illegality. *Ssangyong Engineering* does not change this position.[167] Given this now-settled position in law, it is unnecessary to examine the additional authorities on which Mr Mehta relies, all to the same effect.[168] They also say this: commercial arbitrators are not entitled to settle a dispute by applying what they conceive is 'fair and reasonable,' absent specific authorization in an arbitration agreement. Section 28(3) also mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Section 28 is applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award. Under Section 28(2), the

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165 Black's Law Dictionary.

166 (2015) 3 SCC 49.

167 See paragraph 40 of *Ssangyong Engineering*, (2019) 15 SCC 131. I have discussed this at the head of this judgment in Part C above, paragraph 16.

168 *ONGC Ltd v Saw Pipes*, (2003) 5 SCC 705; *Edifice Developers & Project Engineers Ltd v Essar Projects (India) Ltd*, 2013 SCC OnLine Bom 5; *MSTC Ltd v Jain Traders*, 2011 SCC OnLine Del 3304; *Prakash Atlanta (JV) v National Highways Authority of India*, 2016 SCC OnLine Del 1648; *Ramkishan Singh v Rocks Buildcon Pvt Ltd & Anr*, 2017 SCC OnLine Del 6471 (SJ); *National Highway Authority of India v Sheladia Associates*, 2009 SCC OnLine Del 2541; *Bharat Sanchar Nigam Ltd v Optel Telecommunication Ltd*, 2018 SCC OnLine MP 202.

Arbitral Tribunal is required to decide *ex aequo et bono* or as *amiable compositeur* only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide based on his notions of equity and fairness, unless the contract permits it.[169]

225. The Award's finding that BCCI's termination was unfairly discriminatory is, resultantly, a patent illegality.

(6) Reddy's letter of 29th August 2012 obtained by duress

226. The learned Sole Arbitrator held that Reddy's signed letter of 29th August 2012, on DCHL letterhead, was not written by Reddy of his free will. He held it ought to be disregarded.[170]

227. Mr Mehta contends that the finding is perverse. He points to the various factors that the learned Sole Arbitrator took into account while assessing the letter and explains each. I cannot go into this: that would be merit-based review, clearly impermissible.

228. However, what is more significant is not what the Award says, but what it does *not* say and especially what it does not even consider. There is not even an attempt to explain — as a matter of appreciation

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169 Indeed, in *Prakash Atlanta*, the learned single Judge of the Delhi High Court described the award in question, which ad hoc declared a sharing f responsibility 50:50, as a 'panchayati solution'. The Division Bench in appeal approved.

170 Vol 9, Ex A, *pp.* 126–130.

of evidence — how it could ever have come to pass that BCCI had access to DCHL's letterhead. DCHL's case in evidence was that BCCI's lawyer prepared the letter in question (agreeing to a sale of the franchise).[171] The Award does not address this at all.

229. Worse, with one solitary exception, the Award *entirely* ignores everything that followed, all of it a matter of record. The chronology I have set out above should make this clear, and I will only summarize some of the most relevant aspects here.

(a) There is a *second* letter with Reddy's signature, and this is the one dated 4th September 2012.[172] This is a letter from BCCI letter to DCHL accepting Reddy's franchise sale proposal in his letter of 29th August 2012. The Award finds that the second letter was merely consequential to and corollary to Reddy's/DCHL's letter of 29th August 2012. I do not pretend to understand what, if anything, this is supposed to mean. The question was whether DCHL's letter of 29th August 2012 was obtained by coercion or without Reddy's free will. If it was, then, logically, so was his counter-signature on the second letter of 4th September 2012. *But there is no such finding.*

(b) In fact, there is no case at all that Reddy's signature on the second letter was *also* obtained by coercion or without his free will. If so, this was a statement of fact. It needed both pleading and proof. The Award

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171 Vol 9, Ex A, *p.* 128.

172 Vol 10, Ex E, *pp.* 219–221.

references the second letter, but brushes it aside as being a corollary. But this is logically inconsistent. Reddy's signature on the document is an admitted fact. It is, indeed, a form of admission. It needed to be explained — the law on that is clear: an admission, unless explained, furnishes the best evidence.[173] It is substantive evidence, though not conclusive proof of the matter admitted.[174] Given the case put up on the 29th August 2012, the only possible explanation for Reddy's signature on the 4th September 2012 letter was that it was *also* obtained by coercion or duress. There is no such case at all, and no such finding. Saying it was a 'corollary' means precisely nothing. If the signature of acceptance was not coerced, then it stands; and once it stands, it wholly dislodges the case that the earlier letter of 29th August 2012 was coerced. Simply put: the signature on the second letter, if not specifically found to be coerced, is a reaffirmation of the first letter. There is no other way to see it. The view the learned Sole Arbitrator took was simply not possible, absent other evidence. This is not a matter of reappreciation of evidence or a merit-based review. It is an indicator of a complete failure to even consider the second letter and the consequences of Reddy's undisputed signature on it. I do not believe the interdiction against curial intervention is a license to an arbitral tribunal to fail to

173 *Ramji Dayawala & Sons (P) Ltd v Invest Import*, (1981) 1 SCC 80.

174 *Bharat Singh and Anr v Bhagirathi*, AIR 1966 SC 405; *Murlidhar Sapuji Valve v Yallapa Lalu Chougule*, AIR 1994 Bom 358.

even consider the evidence on record, and to merely to brush it aside with some jejune epithet.

(c) What is worse is that there is evidence to the contrary, i.e. multiple instances of express and implicit reaffirmations by DCHL and Reddy himself of the 29th August 2012 proposal for sale of the franchise. All of it is wholly ignored. For instance, there is no mention at all in the Award of the joint public tender sale process. That there was a joint lenders meeting on 31st August 2012 at ITC Park Sheraton, Chennai, finds no mention. Reddy was present himself at this meeting. So were many lenders. Reddy's letter of 29th August 2012 was read out — and no one said it was coerced. Reddy never objected.[175]

(d) On 3rd September 2012, YBL — apparently DCHL's most ardent (or most desperate) supporter — wrote to BCCI specifically referencing the sale proposal.[176] The Award is studiously silent.

(e) BCCI's letter of 4th September 2012 — which the Award, eagerly accepting DCHL's submission, brushes aside as an inconsequential 'corollary' — was *after* all these events. All are matters of record. All are in evidence. How these could have been so thoroughly ignored is baffling.

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175 Vol 57, *pp.* 75–76 : Vol 49, Ex SS, *pp.* 1347–1348.

176 Vol 49, Ex TT, *p.* 1350. Alternatively, YBL suggested an escrow mechanism.

(f) Then, on 7th September 2012, DCHL itself issued a public tender advertisement. Reddy signed it.[177] It said it was 'under the aegis of BCCI'. It invited bids for DCHL's IPL franchise. There is not a single mention of this in the Award in this context. If Reddy's letter of 29th August 2012 was coerced, then this document remains wholly unexplained. It was entirely ignored.

(g) Some financial institutions also referenced the proposed tender sale in writing. One example is Ratnakar Bank's letter of 6th September 2012.[178] The whole of it relates to the tender process for the sale of the Deccan Chargers franchise, starting with the subject line. Again, there is not a mention of this in the Award.

(h) The list of evidence ignored goes on and on. There was YBL's solicitors' letter, for instance, of 10th September 2012, referencing the franchise sale and the proceeds of the sale. YBL wanted the sale proceeds to be credited to, and only to, DCHL's account with YBL. Again, in the Award, this is not considered. Canara Bank's letter of 11th September 2012,[179] referencing the joint lenders' meeting in Chennai on 31st August 2012 also receives no consideration in the Award.

(i) The Award also makes no mention of ICICI Bank's email of 15th September 2012 forwarding a request from

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177 Vol 49, Ex WW, *p.* 1355.

178 Vol 49, Ex UU, *pp.* 1351–1352.

179 Vol 49, Ex XX, *p.* 1356.

Videocon Industries Ltd for some time to put together a proposal to acquire the franchise for Rs. 250 crores.[180]

(j) Finally, DCHL used the BCCI letter of 4th September 2012, which Reddy counter-signed, and which the Award held to be inconsequential and to be disregarded, when it entered into a sale transaction in respect of the franchise on 11th October 2012 with Kamla Landmark. This was just a little over a month after the 4th September 2012 letter. It is incomprehensible how the 4th September 2012 document could on the one hand be 'inconsequential' and yet its use for effecting a sale to a third party about five weeks later could be so totally ignored — and for which it was clearly consequential.

(k) There is not a whisper about any of this clearly vital and relevant evidence in the Award. Mr Jagtiani's submissions also do not explain this void. They cannot. This is not a matter of reappreciating the evidence in isolation, i.e. merely the letter of 29th August 2012 by Reddy. The follow-up signature is dismissed as an irrelevant corollary, without any finding that it, too, was coerced. For the rest, there is only total silence.

230. The learned Sole Arbitrator's finding on this aspect is not a possible view. It ignores vital and relevant material. The finding is perverse.

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180 Vol 49, Ex BBB, *pp.* 1370–1377.

(7) Remaining findings on termination

231. The finding that BCCI's actions were malicious and mala fide[181] conceptually overlaps the discussion regarding unfair discrimination, because it impermissibly positions DCHL in relation to other franchisees vis-à-vis BCCI. I have considered this aspect sufficiently earlier, and found the approach to be impermissible, beyond the contract and weighing entirely irrelevant matters.

232. The Award then introduces the doctrine of proportionality in assessing BCCI's termination notice[182] and what it describes as 'the quantum of punishment'.[183] This is wholly outside the contractual frame. It conceivably introduces a dimension dangerously similar to the *Western Geco*[184] and *Saw Pipes*[185] expansions of the 'public policy' concept for setting aside awards, something that *Ssangyong Engineering* says is no longer good law, and a thing of the part.[186] Whether or not the doctrine of proportionality is overtaking

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181 Vol 9, Ex A, *pp.* 131–132.

182 Vol 9, Ex A, *pp.* 136, 137.

183 Vol 9, Ex A, *p.* 135.

184 *ONGC Ltd v Western Geco International Ltd*, (2004) 9 SCC 263. This said the concept of *Wednesbury* unreasonableness could be applied as a test. It was drawn from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223, a decision relating to judicial review of administrative action. That was clearly a public law issue, and an instance of the equitable discretionary power of judicial review and the power of a Court to issue a high prerogative remedy.

185 *ONGC Ltd v Saw Pipes Ltd*, (2003) 5 SCC 705.

186 *Ssangyong Engineering*, paragraph 18.

Wednesbury unreasonableness principle[187] is immaterial in the context of a private law arbitration dispute. Both are public policy aspects, and following *Ssangyong Engineering*, and the amendments to Section 34, neither is a permissible ground of challenge. This necessarily means that no arbitral tribunal can return a finding that something contravenes public policy unless the contract permits such a course of action. To venture into that is again to venture impermissibly into the realm of public law. An arbitrator cannot, for instance, return a finding that a particular rule or regulation is 'bad in law'. That is exclusively the domain of a court. An arbitrator has to apply the law as it stands. The fact that it is misapplied is not a ground for challenge, but there is not the slightest possibility of an arbitrator sallying forth to hold that an action or a rule violates a public policy standard. Proportionality lies squarely within the public policy realm. The task of the arbitrator is to see if the impugned action is or is not valid having regard to *terms of the contract*, nothing more; i.e. to see if the termination conformed to the contract. Whether or not the termination was onerous, or had severe consequences, was entirely irrelevant and beyond the contract. Again, it was an impermissible invocation of the forbidden *ex aequo et bono principle*, given that there is no such stipulation in the contract. As to the 'quantum of punishment', I will let that pass as merely unfortunate phrasing.

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187 See, among others: *State of UP v Sheo Shanker Lal Srivastava & Anr*, (2006) 3 SCC 276; *Coimbatore District Central Cooperative Bank v Coimbatore District Central Cooperative Bank Employees Association & Anr*, (2007) 4 SCC 669; *Sandeep Subhash Parate v State of Maharashtra & Ors*, (2006) 7 SCC 501; *MP Gangadharan & Anr v State of Kerala & Ors*, (2006) 6 SCC 162; *Jagmohan Singh v State of Punjab*, (2008) 7 SCC 38.

Strictly speaking, termination is a contractual entitlement, not a 'punishment'.

233. The findings that DCHL's arbitration invocation notice was the 'real trigger' for the termination has no sequitur. It is simply met: therefore what? The discussion on whether BCCI's concern with its reputation was or was not a 'façade' does have some goes reasons. Mr Mehta correctly does not address himself to this, beyond saying it goes nowhere.

I. DAMAGES AWARDED: RIVAL ARGUMENTS CONSIDERED

234. If the Award's findings and conclusion on BCCI's termination cannot be sustained, the matter ends. But since both sides have addressed me extensively on the question of damages awarded, I will deal with the rival contentions on that aspect, but only to the extent permissible.

(1) Specific performance & damages in lieu of specific performance

235. In arguments before the tribunal, DCHL did not press its claim for specific performance. The award notes this.[188] The arbitral tribunal's finding that, despite DCHL giving up and not pressing its claim for specific performance, it was nonetheless entitled to

188 Vol 9, Ex A, *p.* 138.

damages *in addition to* or *in lieu of* specific performance is, in my view, entirely unsustainable and not even a possible view.

236. To appreciate how this unfolded, one has to look at how DCHL set its monetary claim. This was, as I have noted, in three parts. Claim 1 (Issue No 5) was for Rs.630 crores. Claim 2 (Issue No 6) was for Rs. 41 crores (the amount BCCI was said to have withheld from the Central Rights Income). Claim 3 (Issue No 7) was for Rs 6046 crores (ignoring the arithmetical or totalling error). Claims 1 and 3 were in the nature of damages.

237. Claim 2 may be taken to be a simple recovery claim for amounts due, sought like this:

> (d) The Respondent be directed to pay an amount of Rs. 41 crore or such other amounts as Claimant is entitled in terms of the share from the Central Rights income in respect of IPL-5 to be paid to the Claimant along with interest @ 18% p.a from the date when such amounts became due and payable by the Respondent.[189]

238. Claims 1 and 3 were the subject of two specific prayers in the Statement of Claim:[190]

> (e) **In addition to the specific performance** of the Franchise Agreement dated 10th April 2008 the Claimant **be granted additional compensation for losses suffered by it** on account of wrongful termination of Franchisee Agreement dated 10th April 2008 for an amount of Rs. 630 crores or such other amounts as the Hon'ble Tribunal deems

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189 Vol 11, Ex L, *pp.* 285–318 at *p.* 316.

190 *Id*.

fit and proper along with interest @ 18% p.a from the date of illegal termination of the franchisee.

h) In the **alternative if the claim for specific performance of Franchisee Agreement dated 10th April 2008 is rejected** by the Hon'ble Tribunal then it be directed that **the Claimant is entitled to a compensation of Rs. 6046 crores** and the Respondent be directed to pay to the Claimant an amount of Rs. 6046 crores as described in paragraph 74 above or such other amount as the Hon'ble Tribunal deems fit and proper.

(*Emphasis added*)

239. The Award finds that DCHL sought damages compensation '*in addition to or lieu of specific performance*'; and that DCHL was justified in seeking damages or compensation *in lieu of specific performance.*[191] Prayer clause (e) was for damages *in addition* to specific performance. Prayer clause (h) was for damages if the claim for specific performance *failed* and was *rejected*. There was no prayer at all for damages *in lieu* of specific performance.

240. It seems to me self-evident that damages 'in lieu' of specific performance could only have been granted if the claim for specific performance was pressed; a specific finding was returned that DCHL was entitled to specific performance; then, that specific performance was rendered impossible in light of certain factors; and *resultantly* damages 'in lieu of' — that is to say, *instead of* — specific performance were granted. In this chain, one that seems to me to immutably correct, if the first step itself failed — whatever the reason

191 Vol 9, Ex A, *p.* 141.

— the rest simply could not follow. If specific performance was rejected or not pressed, there could be no question of awarding damages instead of it. Similarly, damages in *addition* to specific performance could be granted only if specific performance was found to be a relief capable of being granted; and that required the relief to be pressed. The learned Sole Arbitrator impermissibly read DCHL's prayer — seeking damages if the relief for specific performance was *rejected* — as being equivalent to a prayer for damages in lieu of specific performance.

241. Mr Mehta correctly relies on the decision of the Calcutta High Court in *Gopi Nath Sen & Ors v Bahadurmal Dulichand & Ors*.[192] The learned single Judge placed reliance on the Privy Council decision in *Ardeshir Mama v Flora Sassoon*.[193] The following passage is instructive:

> 22. **The words "in addition to, or in substitution of such performance" in Sub-Section (1) mean that compensation can be given by Court in case where specific performance could have been given either in addition to specific performance or in lieu of it.** Thus, under Sub-Section (1), the power and jurisdiction of the Court to give damages arise in two cases, viz., either in addition to, or in substitution of specific performance. The learned Judge, in the instant case has granted damages in lieu of specific performance. The circumstances under which the Court would award damages in lieu of specific performance are laid down in Sub-Section (2) of Section 21. **Damages in lieu of specific performance can be given in case where specific performance could have been granted but in the**

192 1978 SCC OnLine Cal 270.

193 55 IA 360 : AIR 1928 PC 208.

circumstances of the case the Court in its discretion considers that it would be better to award damages instead. It follows, therefore, that in those cases where specific performance would have been feasible and proper, but there were reasons why it would be better to give damages in lieu the Court would decree the latter form of relief.

23. The above principle of law was stated by Chitty, J. in *Lavery v. Pursell*, (1888) 39 Ch D 508 at page 519 in a very simple language. I think I shall quote the same here:

> "**It was suggested after Lord Cairns' Act the Court of Equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance. It did not give the old Court of Chancery a general jurisdiction to give damages whenever it thought fit, it was only in that kind of case where specific performance would have been the right decree and there were reasons why it would be better to substitute damages, but that could not apply to a case where you should not have given specific performance.**"

24. The principle of law stated above is well settled. It was embodied in Section 19 of the Specific Relief Act, 1877 and the same principle is stated by Section 21 of the Specific Relief Act, 1963 by which the former is repealed. I accept the principle of law as laid down by Chitty, J. in that case.

25. I shall now turn to the leading case *Ardeshir Mama v. Flora Sassoon*, 55 Ind App 360 : (AIR 1928 PC 208) relied on by Mr. Sen. In that case the plaintiff filed a suit for specific performance of a contract and claimed compensation in addition to or in substitution for such performance.

Subsequent to the filing of the suit, by the Solicitor's letter the plaintiff gave notice that he would not claim specific performance but would claim damages. At the trial objection was taken that the plaintiff could not recover damages without an amendment of the plaint. Thereafter by leave the plaint was amended by a claim in the alternative for the return of the money advanced with interest as damages. Delivering the judgment of the Privy Council Lord Blanesburgh discussed the English and Indian Law on points both historically and with reference to specific Relief Act, 1877. At page 372 of the report the Privy Council observed:

> "… in relation to a contract to which the equitable form of relief was applicable, a party thereto had two remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. **He might either institute a suit in equity for specific performance, or he might bring an action at law for the breach.** But — and this is the basic fact to be remembered throughout the present discussion — his attitude towards the contract and towards the defendants differed fundamentally according to his choice."

26. The Privy Council further observed:

> "Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if

> the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part."

27. **Thus it is an election of the plaintiff whether to sue for specific performance and claim for damage in addition to or in substitution for it, or to sue for damages for breach of contract.** If by his election the plaintiff precludes himself from making the averment of readiness and willingness to perform his part of the contract and prove the same which is essential to the success of the suit for specific performance the question for damages in lieu of specific performance would not arise. At page 374 of the report Privy Council observed:

> "In the present instance, their Lordships are disposing of a case in which the plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages — the Court could award none — the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages : See per Lord Selborne, *Hipgrave v. Case* : 28 Ch D 356 362. In other words, the plaintiff's rights in respect of the contract were at an end."

28. Following the judgement of the Privy Council and the principle of law discussed above there is no doubt in my mind that Mr. Sen is fully justified in his submissions. In the fact of this case, at the trial the witness for the plaintiff did not prove readiness and willingness on the part of the plaintiff to take the monthly tenancy from the defendants and he wanted damages only. **Although the plaintiff filed a suit for**

specific performance and the defendants stated that the defendants were ready and willing to give tenancy as and when the building would be constructed, but the plaintiff stated at the trial of the suit that the plaintiff was claiming only damages. Therefore, the plaintiff was no longer interested in taking the tenancy, bat instead claimed damages at the trial without amending the plaint. What follows then? On the principle of law laid down by the Privy Council in *Ardeshir Mama. v. Flora Sasoon*, 55 Ind App 360 : (AIR 1928 PC 208) and under Section 16 of the Specific Relief Act, 1963 specific performance cannot be enforced in favour of a person who fails to prove that he has always been and still is ready and willing to perform the essential part of the contract which are to be performed by him. ***The claim for specific performance was not pressed at the trial. It was really abandoned. The plaintiff contended at the trial that he was entitled to damages. The suit for specific performance must, therefore, fail. Once a suit for specific performance fails by reason of the fact that claim for specific performance was not pressed or abandoned at the trial, the question of damages for specific performance in substitution also fails.*** **The question of claiming damages for breach of contract under Section 73 of the Contract Act is an entirely different cause of action on the principle laid down in *Mama v. Sassoon*.** It is also clear from Section 24 of the Specific Relief Act, 1963 that the dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract.

29. In the above view of the matter, the learned trial Judge could not have allowed Rs. 25,000/- as damages in lieu of specific performance. It appears that the case was conducted before the learned trial Judge on misapprehension of law and in disregard of the principles discussed above. In the argument advanced before the learned trial Judge, the

> attention of the learned trial Judge was not drawn to the points of law discussed above. The observation of the learned trial Judge that the only real issue to be decided in the suit is whether the plaintiff is entitled to compensation and if so, on what basis, cannot arise on the plaint as framed.
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> (*Emphasis added*)

242. Mr Jagtiani's response on law is to seek support from the Supreme Court decision in *Jagdish Singh v Nathu Singh*,[194] to say that a plaintiff seeking specific performance may always seek damages in lieu of specific performance. That is unexceptionable, and nobody quarrels with that proposition — but for the small fact that DCHL did not, in point of fact, pray for damages *in lieu* of specific performance. Indeed, *Jagdish Singh*, correctly read, supports Mr Mehta more than it does Mr Jagtiani:

> 16. So far as the proviso to sub-section (5) is concerned, two positions must be kept clearly distinguished. **If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked.** This amendment is under the discipline of Rule 17 Order 6, CPC. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act

194 (1992) 1 SCC 647.

for the principles of quantification and assessment of compensation does not obliterate this distinction.

21. Support for these conclusions was sought from the oft-quoted, but perhaps a little misunderstood, case of *Ardeshir H. Mama v. Flora Sassoon* [AIR 1928 PC 208 : 55 IA 360 : 52 Bom 597] . The passage in Sassoon case [Id. p. 217] relied upon by the Nagpur High Court is this: (AIR p. 256, para 10)

> "In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, **so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible**.
>
> The case of *Sassoon* [AIR 1928 PC 208 : 55 IA 360 : 52 Bom 597] fell within the first category of cases described above under the alternative relief of damages. This case falls within the second part where the relief of specific performance has become impossible."
>
> (*emphasis supplied*)

22. The second part of the observation of the Nagpur High Court, with great respect to the learned Judges **proceeds on a fallacy** resulting from the non-perception of the specific departure in the Indian law. In Lord Cairn's Act, 1858 damages could not be awarded when the contract had, for whatever reason, become incapable of specific performance. But under the Indian law the explanation makes a specific departure and the jurisdiction to award damages remains unaffected by the fact that without any

fault of the plaintiff, the contract becomes incapable of specific performance. Indeed, *Sassoon* case [AIR 1928 PC 208 : 55 IA 360 : 52 Bom 597] is not susceptible of the import attributed to it by the Nagpur High Court. *Sassoon* case [AIR 1928 PC 208 : 55 IA 360 : 52 Bom 597] itself indicated the departure made in Indian law by the Explanation in Section 19 of the 1877 Act, which is the same as the Explanation to Section 21 of the 1963 Act. The Judicial Committee, no doubt, said that Section 19 of the 1877 Act "embodies the same principle as Lord Cairn's Act and does not any more than did the English statute enable the court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff debarred himself by his own action from asking for a specific decree". But what was overlooked was this observation of Lord Blanesburgh: (AIR p. 218)

> "except as the case provided for in the Explanation — as to which there is introduced an express divergence from Lord Cairn's Act, as expanded in England…."

24. **When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages.** That position is common to both Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act, 1963. **But in Indian law where the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables award of compensation in lieu and substitution of specific performance**.

(*Emphasis added*)

243. Similarly, the Supreme Court decision in *Urmila Devi & Ors v Deity, Mandir Shree Chamunda Devi & Ors*[195] is of no assistance to

195 (2018) 2 SCC 284.

DCHL. The *Urmila Devi* court followed *Jagdish Singh*. It too said that where specific performance has become impossible for no fault of the plaintiff, the Court can grant compensation in lieu of specific performance. It did not consider a case where a plaintiff *gave up* its prayer for specific performance.

244. DCHL never amended its prayers. It never sought any such amendment. It never sought damages in lieu of specific performance — that is only the reading that the *Award* puts on a completely unambiguous wording of DCHL's prayer clauses.

245. To grant damages in lieu of specific performance, there had to be—

(a) A prayer for specific performance;

(b) A prayer for damages in lieu of specific performance;

(c) A finding returned that DCHL was entitled to specific performance;

(d) A further finding returned that specific performance was rendered impossible, though sought; and

(e) Therefore, damages were awarded in lieu of specific performance, *as sought in the claim*.

246. Item (b) does not exist, and no amendment was sought to that effect. All that the Award does is (d). It does not address the lack of a prayer (item (b) above), nor does it consider items (c) or (e). There is no finding of readiness and willingness, and no discussion of any proof of it. The Award does not return a finding of DCHL being entitled, on any reasoning or appreciation of evidence, to specific

performance. If (b) did not exist, no damages could be granted in those terms, i.e. *in lieu* of specific performance. Even if (b) existed, once (a) was given up and not pressed, (b) could not be granted; and no Court or arbitrator could proceed to (c), (d) or (e). That is the only reading of the decisions I have just noted. In other words, what The Award grants is compensatory damages, not damages in lieu of specific performance; yet it says to the contrary. Absent a specific finding returned of readiness and willingness, this amounts to a grant of compensatory damages for a party's inability or failure to perform. That appears to me to fall within the frame of a violation of the fundamental policy of Indian law.

247. The arbitral tribunal may have misinterpreted or wrongly applied the law. That is not a ground for curial intervention.[196] The *Ssangyong Engineering* principles forbid it. Whatever may be Mr Mehta's submissions on the correct interpretation of Section 21 of the Specific Relief Act, I cannot possibly upturn the Award on that ground. The point, however, is different. The learned Sole Arbitrator could not possibly have returned a finding that the claim was for damages in lieu of specific performance when there was simply no such prayer. In holding so, the Award proceeds to grant a relief that was never sought. The failure here is fundamental and jurisdictional, granting a relief not sought, and for which no amendment was ever moved.

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196 *Shon Randhawa v Ramesh Vangal & Ors*, FAO (OS) (Comm) 95/2020, decided on 5th November 2020 (Delhi High Court, Division Bench)

(2) Damages awarded

248. But I will proceed, instead, on the footing that, no matter what the wording, the Award granted damages for compensation for breach (though that is not the wording of either prayer (e) or prayer (h) of the Statement of Claim).

249. There is an evident error of duplication in the claim. The unpaid or undisbursed amount (withheld by BCCI) is claimed twice: first, as DCHL's share of the Central Rights Income, Rs 41 crores, Claim 2;[197] and again as item (e) of the larger Claim 3 ("*Payment due from the respondent*").[198] Mr Jagtiani accepts that this is a duplication. Mr Mehta points out that this is so obvious an error that it could hardly have gone unnoticed. At the same time, in its Counter-Claim, BCCI has admitted that some amounts are due to DCHL.[199] The total admitted is Rs 36,21,20,649/-. The learned Sole Arbitrator found that an amount of Rs.1.83 crores had indeed been paid by BCCI on behalf of DCHL. The learned Sole Arbitrator awarded DCHL Rs. 36 crores under Claim No 2 for Rs 41 crores, and then cross-awarded BCCI Rs.1.83 crores. About this there can be no controversy.

250. This leaves Claim 1 and Claim 3, Issues Nos 5 and 7 for Rs 630 crores and Rs 4150 crores respectively.

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197 Vol 9, Ex A, *p.* 143.

198 Vol 9, Ex A, *p.* 147.

199 Vol 12, Ex M, *p.* 391, particulars of claim, Item 2 (Rs 36,08,14,955) and Item 5 (Rs 13,05,694).

251. In his written submissions, Mr Jagtiani concedes that Claims Nos. 1 and 3 were wrongly granted and were both part of Claim No.3. The precise statement is this:[200]

> 70. It is respectfully submitted that while each of the aforesaid claims has been considered independently and distinctly by the Ld. Arbitrator, the claims in respect of items (a) and (b) above, i.e. Rs. 630 crores towards wrongful termination of the FA and Rs. 41 crores towards Central Rights Income for IPL V have been incorrectly awarded. This is because the said amounts are subsumed within item (c) above, i.e. Rs. 4150 crores for loss of profit and compensation. Thus, items (a) and (b) above could only have been awarded in the alternative to item (c) above and not in addition thereto.
>
> 71. In the circumstances, DCHL is not pressing claims 1 and 2 for Rs. 630 crores and Rs. 41 crores. However, it is submitted that the awarding of claims 1 and 2 is an independent portion of the Award, having been dealt with as distinct issues with separate analysis and reasoning and on the basis of distinct material, and thus this portion is clearly severable from the rest of the Award, which is well-founded and ought to be upheld by this Hon'ble Court.

252. What this in effect says is that both Claims Nos. 1 and 2 were *rightly* granted, but were granted twice, and are part of Claim No. 3.

253. But this only makes matters worse. For that concession firmly puts both Claims Nos 1 and 2 under prayer clause (h), a Claim 3-specific prayer — and that prayer seeks damages if the prayer for

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200 Vol 53, *pp.* 46–47, paragraphs 70–71.

specific performance is *rejected*, i.e. as a monetary claim for compensatory damages for breach.

254. On the claim for Rs 630 crores, Mr Mehta submits that the learned Sole Arbitrator erroneously and mistakenly relied on a valuation report produced by DCHL.[201] According to him, the report showed the entire DCHL enterprise valuation at only Rs. 590 crores, with projected income for IPL 2013 at only Rs.26.05 crores,[202] and therefore it was inconceivable that this enterprise could have suffered a 'loss' of Rs 630 crores. But this requires a re-appreciation of evidence and a merit-based review. That cannot be done. The claim may fail for other reasons, but not on a re-appreciation of evidence.

255. Claim No 3 is on a different footing. This is the claim for Rs 4150 crores. As we have seen, it has several sub-components. I am leaving aside the duplication for Claim Nos 1 and 2, which I noted above, though the Award wholly fails to differentiate or separate this overlap.

256. This is what the Award says regarding this claim:

> **CLAIM NO. 3: Rs.6,046 CRORE : ISSUE NO. 7**
>
> In the Statement of Claim, the Claimant has demanded an amount of Rs. 6046 Crore under the following heads:

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201 Vol 15, Ex T, *pp.* 750–777.

202 Vol 15, Ex T, *pp.* 750–777 at *p.* 771; Table, Col 2, last row.

(a)	Loss of profit discounted to 15 years :	Rs. 3000 crores
(b)	loss of value of franchise (calculated at contract value of on fire sale of Deccan Charges franchise :	Rs. 1250 crores
(c)	Actual expenditure over revenue incurred for running the franchise for last five years :	Rs. 150 crores
(d)	Loss of "Deccan Chargers" brand, along with damage to business reputation, loss to licensing and merchandising and trademark registration :	Rs. 650 crores
(e)	Payment due from the Respondent :	Rs. 41 crores
(f)	Loss of business opportunity :	Rs. 50 crores
(g)	Legal expenses and advisory fees :	Rs. 5 crores
	TOTAL :	Rs. 6046 crores"(?)

The Claimant has stated that brand name of the Claimant in the market has been totally and completely destructed and destroyed by illegal acts of Respondent - BCCI. In view of order of Termination of Franchise Agreement, reputation and goodwill of the Claimant is being questioned by public at large, by players as well as by International Boards of Cricket.

CW 1 Mr. Reddy, in his Affidavit in lieu of examination-in-chief asserted that Deccan Chargers is a very valuable brand. He further stated that Claimant DCHL had played a vital role in building and adding brand value of IPL. According to him, had the Franchise Agreement not been illegally terminated by BCCI, the Claimant had plans to launch Sports City by the name of "The Deccan Chargers Sports City" which would have included world-class Sports Infrastructure.

The Claimant also stated that Franchise was permanent and perpetual. Taking into consideration 15 (Fifteen) years' profit, the Claimant had claimed Rs. 3000 Crore towards Loss of Profit. For value of Franchise, Claimant has

demanded Rs. 1,250 Crore. According to the Claimant, it has spent an amount of Rs. 550 Crore towards expenses for running the Franchise. Contract Value on Fire Sale of Franchise was Rs. 1,250 Crore towards Trademark Registration, Licensing and Merchandising Cost had gone upward of Rs. 100 Crore. Thus, the Claimant would be entitled to claim more than Rs. 6000 Crore.

The Claim is refuted by the Respondent. It was contended that breaches of Franchise Agreement had been committed by the Claimant which compelled the Respondent - BCCI to terminate the Franchise Agreement. Hence, the Claimant is not entitled to claim anything from the Respondent.

The Respondent had also denied so-called reputation and Goodwill of the Claimant. It was contended that with intention or otherwise, default had been committed by the Claimant which resulted in termination of Franchise Agreement. In any case, quantification and calculation made by the Claimant is without any basis and thus ipse dixit and it is not open to the Claimant to make such a demand.

I have heard the rival contentions of both the sides. In the earlier part of the Award, I have held that Franchise Agreement was not for a fixed period. It was executed in 2008 and had it not been terminated prematurely, it would have continued. I have also held that apart from the fact that the Franchise Agreement could not have been terminated before 15.9.2012, by 15.9.2012, the Claimant had remedied alleged defects/defaults. Hence, even on merits, BCCI was not justified in terminating the Franchise Agreement. In my opinion, termination of Franchise Agreement would certainly have had an adverse effect on Reputation and Goodwill of the party against whom such an action is taken. Hence, it must be held that Termination of Franchise Agreement of the Claimant had adversely affected the Reputation and Goodwill of the Claimant.

I have also considered the deposition of CW 4 and the "Comprehensive Valuation Report along with its Annexures" produced by him. From the report, it becomes clear that the Franchise of the Claimant was ever growing year to year. The projection of growth is based on the past performance and the future prospects of the Franchise. It cannot be disputed that the growth of the Franchise was good and the prospects of further growth was existing.

It has also come on record that after the illegal termination of the Franchise Agreement of the Claimant, the same was sold to Sun TV Network. Two fresh entrants by the name of Pune Warriors and Kochi Tuskers entered the League who had paid Rs. 1513 Crore and Rs. 1681 Crore respectively. From this fact, the value of the Franchisee of the Claimant can be reasonably assessed. Considering the growth potential of the Franchisee and the subsequent sale of Franchise Agreement to two new entrants at Rs.1513 Crore and Rs. 1681 Crore, the figure of compensation / damages payable to the Claimant - DCHL can be reasonably assessed.

It cannot be disputed that the 'goodwill' of the Claimant was lost because of the illegal act of Termination of the Franchise Agreement by Respondent. The Claimant would also be entitled to compensation for loss of 'goodwill'.

It could also not be doubted that the Claimant would have suffered loss of reputation because of the illegal Termination of the Franchise Agreement. The Claimant was subjected to litigations by various lenders and Financial Institutions. There could hardly be any accurate method to compute compensation / damages for loss of reputation of a business venture. Be that as it may, loss of reputation because of illegal Termination of the Agreement has to be compensated and the same is considered by this Tribunal while deciding Issue No.7.

> Having considered all the facts and circumstances, in my opinion, ends of justice would be served if I grant the claim of the Claimant in part and direct the Respondent to pay to the Claimant an amount of Rupees 4150 Crore (Rupees Four thousand One Hundred and Fifty Crore Only) under this claim.

257. Given the break-up provided by DCHL, this kind of omnibus and undifferentiated award was not possible without reasons under each head. I do not suggest that separate *computations* were required; a lump-sum award is certainly permissible.[203] But the *reasons* for each component were different and had to be dealt with and parsed. It will be noticed that the Award references the comprehensive valuation report produced by DCHL.[204] This gave an enterprise value of Rs 590 crores. But it also took into account projections for future income and cash flows,[205] the business plan,[206] the bid for Kochi Tuskers,[207] and the bid for Pune Warriors.[208] Even the claim for Rs.41.6 crores as the amount withheld is part of this very valuation report.[209] With all these, the report returned an enterprise value of Rs.590 crores. Yet the learned Sole Arbitrator awarded Rs 4150 crores. Even if Rs 630 crores (Claim No.1) is 'subsumed' in this, we do not know how or under what precise component of Claim No. 3 this falls.

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203 *State of Rajasthan v Puri Construction Co Ltd & Anr*, (1994) 6 SCC 485.

204 Vol 15, Ex T, *pp.* 750–777.

205 Vol 15, Ex T, *pp.* 750–777, at *p.* 759.

206 Vol 15, Ex T, *pp.* 750–777, at *p.* 762.

207 Vol 15, Ex T, *pp.* 750–777, at *p.* 767, paragraphs 5.14 to 517.

208 Vol 15, Ex T, *pp.* 750–777, at *p.* 768, paragraphs 5.18 to 5.21.

209 Vol 15, Ex T, *pp.* 750–777, at *p.* 758, paragraph 2.4.3.

258. Now if we look at the components, we find there is no discussion at all of any evidence, *and there are no reasons at all* for accepting any of the amounts under any of the components. We do not know, for instance, if the entirety of the 'loss of profits' claim for Rs 3000 crores was granted and was a component of the award of Rs.4150 crores. The same applies to the claim component for loss of the value of the franchise, item (b), for Rs 1250 crores. The total of these two claim components is Rs. 4250 crores. If we add to this the subsumed claim No. 1 of Rs.630 crores, we get Rs.4880 crores, *not* the amount awarded. Therefore, some amount was reduced. But from where? Why? On what evidence? And what precisely is the difference between item (a) a 15-year discounted loss-of-profit claim and item (b), loss of the 'value' of the franchise computed on a 'fire-sale' of the DCHL franchise? If the award of Rs. 4150 crores covers claim components (a) and (b), then nothing could have been granted under the component heads of (c), (d), (f) and (g). Item (g) could only have been a claim on actuals. What evidence was led? Were the costs and expenses reasonable? Were they proved? The sale to the Sun TV network has no discussion at all of its parameters, timings or what happened to it after the sale, and how it could relate back to a loss of franchise value. How did item (b) (loss of value of franchise) and item (d) (loss of the Deccan Chargers brand and damage to business reputation) differ? What was the evidence of this loss?

259. Mr Jagtiani suggests that the award of Rs.4150 crores was computed by multiplying Rs.200 crores by 15 years to yield Rs. 3000 crores (loss of business and profits) and then adding in Rs. 1250 crores of loss of contract value. That is most emphatically not for him to say. The Award must say it. It does not. It does not even suggest it.

And the total is *not* Rs. 4150 crores, but Rs. 4250 crores. I do not see how Mr Jagtiani can start supplying reasons where the Award does not. No canon of arbitral law permits this.

260. Even if there is no accurate method to compute damages for loss of reputation, this does not mean that there can be a total disregard of the principles underlying Section 73 of the Contract Act. On the question of loss of reputation, for instance, there were clearly two aspects. *First*, proof of reputation (its existence) and its loss. This was a question of fact, and had to be proved. *Second*, damages for this proven loss of reputation, and which might have been an approximation or an estimate. The first was indispensable. The Award has no reasons and points to no evidence. It simply assumes that there was a reputation and it was lost. Neither the reputation nor the loss are matters of presumption. They are matters of fact and demand some level of proof. That requires some discussion of evidence, and reasons.

261. A loss of reputation is also a matter of causality — of showing that *because* of BCCI's termination, DCHL lost a reputation it otherwise had. That required DCHL to show the reputation it had and then show damage to it. And this had to be reflected in the Award itself.

262. It is non-contentious that any award of general damages for breach requires some level of estimation or guesswork once a breach is proved. There is no reason to multiply authorities, and here I had the benefit of Mr Seervai's admirably (I will not say uncommonly)

concise intervention on behalf of DCHL. He relied inter alia on *EMCO Ltd v Malvika Steel Ltd & Ors*[210] to say that the learned Sole Arbitrator was well within his remit to make an honest estimation, even guesswork, of damages once a breach had been proved. But that very decision says that the assessment of damages must be a fair one. That, in turn, means that there must be reasons. Specifically, the area that is left to guesswork or estimation must be clearly identified and the basis of that estimation must also be returned as a finding. Simply plucking a number out of thin air will not do.

263. Similarly, the decision of SC Gupte J of this Court in *Union of India v Vaman Prestressing Co Ltd & Anr*[211] held that a broad evaluation of loss of profits is possible. But the figure must be reasonable. This authority might have lent some support to Mr Seervai's proposition had the Award even indicated what, of the amount of Rs 4150 crores, was attributable to loss of profits. A 'broad view of loss of profits' does not permit the entire defenestration of reasons. No one expects loss of profits to be adjudged on minute details;[212] but it is not unreasonable to expect the Award in question to at least identify the loss-of-profit component, render some analysis and reasons and then state that a broad view is being taken. The mistake here is to assume that the broad-view jurisprudence eliminates the need for reasons altogether, and permits a wholly undifferentiated Award across many component claims without stated basis or reasons.

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210 2012 SCC OnLine Del 5673. Also: *Dwarka Das v State of Madhya Pradesh*, (1999) 3 SCC 500; *Sineximco Pte Ltd v MMTC Ltd*, 2009 SCC OnLine Del 1394.

211 2019 SCC OnLine Bom 192.

212 *AT Brij Paul Singh v State of Gujarat*, (1984) 4 SCC 59; *MSK Projects India (JV) Ltd v State of Rajasthan & Anr*, (2011) 10 SCC 573.

264. We do not even know from this Award why DCHL's own valuation report's figures were jettisoned in favour of some other parole evidence, all of it unspecified and unidentified in the Award. Indeed there may have been much to be said on both sides regarding the valuation report's methodology. Nothing was considered or discussed, and there is no reflection of any of it in the award. Is a discounting to be applied to a projection of future income? After all, the Award grants to DCHL today what might be an income over a considerable time-spread (15 years). Discounting methods for future projections are common in any accounting system. We find no discussion, analysis or reasons at all.

265. Merely referencing the entirety of the evidence is insufficient. Indeed, I would venture to suggest that by its very nature, an arbitral award demands far greater attention to minutiae and detail than even a civil trial court. After all, a statutory first appeal lies against a decision of a trial court. Not so in arbitration. The principle of minimal curial intervention cannot be a license to an arbitral tribunal to take shortcuts and render unreasoned awards on the purest speculation, leaving reasons to the imagination. Possibly, arbitral awards are far more demanding than curial judgments.

266. Mr Jagtiani's submissions say the learned Sole Arbitrator could have taken one of four approaches to an assessment of damages. There may have been ten approaches, or twenty, or one hundred. That is not for Mr Jagtiani to say today. It requires me to speculate and to feed material into the Award's deafening silence on any of this. He suggests, for instance, that one approach would be to take comparative franchise bid instances in a three-year period after IPL

launched: Rs 1500 crores or Rs. 1700 crores, or some mean of these two numbers. But the Award does not say this at all, and there is no disclosed basis for the amount awarded. Why not the mean of the highest and lowest, or the mean of the two lowest, or the two highest? Or, he suggests, one could take a valuation from known sources of income and expenditure; use the testimony of CW4, DCHL's expert witness, or the testimony of CW2 (who put it at Rs 550 crores). Again, the Award is entirely silent on any of this. There is no discussion. There are no reasons. And I fail to understand the direction of this submission, except to say that the highest or the most that might have been awarded was Rs. 1700 crores. If so, whence Rs. 4150 crores?

267. I bear in mind that I am assessing this in the context of it being an award for compensation under Section 73 of the Contract Act, something that demands some level of proof — and therefore cogent reasoning. The only figures we have here are three: Rs 630 crores on the valuation report, Rs 1513 crores and Rs 1681 crores (the bids of the two new entrants, Pune Warriors and Kochi Tuskers). The total is Rs.3824 crores, not Rs 4150 crores. Where did the rest come from? Under what head? Was the whole of the Pune Warriors bid taken and awarded? As also for Kochi Tuskers? On what reasoning? We just do not know. How can this possibly be said to meet the requirements of *Ssangyong Engineering* and *Dyna Technologies Pvt Ltd v Crompton Greaves Ltd*?[213] There are no proper reasons. What exists is unintelligible and leaves us to speculation as to what the learned Sole Arbitrator might or might not have seen. The reasons are far from adequate.

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213 2019 SCC OnLine SC 1656.

268. The law requires that the Award must have reasons, not the claimant; and the reasons must be proper, intelligible and adequate.[214] Mr Jagtiani's efforts to show me the evidence and the documents that he says the arbitral tribunal saw, therefore, serve no purpose. It is entirely impermissible for a party to supply the reasons an award is supposed to have. Either the award under challenge has reasons, in which case a Section 34 court will not enter into a merit-based review of the correctness of those reasons, or it does not, in which case the award fails.

269. The entire award of damages under Claim 3 is, therefore, without reasons. It is not even a possible view. It is patently illegal and perverse. I exclude from this Claim No 2 (said to have been subsumed in Claim No. 3, but without any specific differentiation).

270. This is, of course, on the footing that the Award is correct in its finding that BCCI's termination was bad and cannot be sustained. If that finding fails, as I believe it must, no question arises of any award of damages, under whatever head or whatever reading of the law.

271. Again, I exclude from this the 'recovery' aspect of Claim No 2, for the reasons I have indicated earlier. The Award for Rs 36 crores against BCCI, less the amount of Rs.1.83 crores, cannot be disturbed in any view of the matter.

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214 *Dyna Technologies Pvt Ltd v Crompton Greaves Ltd*, (2019) 20 SCC 1.

272. In view of this discussion, I do not find it necessary to address questions of severability or the court's power to modify an award. Claim No 2 can be severed, but that is all.

J. DCHL'S ATTEMPT TO FURNISH REASONS FOR THE AWARD IS IMPERMISSIBLE

273. DCHL's arguments and submissions fall in two parts. First, there is an attempt to have me glean some reasons from the Award. The Award speaks for itself. The submission is — correctly — that a Section 34 court will not assess the sufficiency of reasons. I have not. I have indicated the areas where reasons are necessary but are *absent*; and I have accepted Mr Mehta's submission based on *Dyna Technologies* that the reasons must be proper, intelligible and adequate. For now, I will leave aside the question of what is or is not proper. The reasons must nonetheless be intelligible and adequate.

274. But the one thing that is entirely impermissible is for a party to supply reasons that the award in question does not contain. This has been Mr Jagtiani's most strenuous endeavour, and while I applaud his assiduousness, I do not believe it is remotely possible to accept *his* reasons as the Award's. For instance, there is a volume that attempts to 'corelate' the findings against the evidence. There, I find this passage (twice):[215]

> On 27th June 2012, BCCI paid Rs.15 Crores to each of the franchisees except DCHL who was paid nil towards Central

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215 Vol 54, *pp.* 16, 22.

> Rights Income. Even RCB received an amount of Rs.8 Crores towards Central Rights Income though admittedly it was in default of Rs.35 crores in respect of payment to its players). [Pg 828, Pdf 46 and questions 290-316, 333-335 of RW-1 @ Pg 542 – 545 & 548, Pdf 45]. DCHL was in default of players payment only to the tune of Rs. 13 crores.

Nowhere in the Award do we find any reference to this material. The chart and table Mr Jagtiani relies on are not even referenced in the Award. Neither is the oral testimony.

275. Similarly, in relation to the charges, in DCHL's 'co-relation' — but not in the Award — there are references to evidence and documents.[216] I am asked to accept that this evidence and material was considered by the learned Sole Arbitrator. I have no means of knowing that if the Award itself does not so indicate. For instance, the submission says:[217]

> d. By 15th September 2012 the charge created in favour of Kotak was released/modified. [@ Pg 325, Pdf 43]. As a precaution DCHL also vacated/modified the charges created in favour of some other lenders as well. [See letters dated 14th September 2012 and 15th September 2012 at Exhibit H @ Pg 241, Volume III of the Petition, Pdf 11 and @ Pg 294, Pdf 43].
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> e. The Ld. Arbitrator had considered the above and held that the charges stood withdrawn. [Exhibit A @ Pg 118-119, Volume I of the Petition, Pdf 9].

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216 Vol 54, *p.* 19.

217 Vol 54, *pp.* 19–20.

But the Award does not mention Kotak's letter at all, nor any of the others. Again, the submission demands that I assume that the learned Sole Arbitrator considered all this.

276. Incidentally, the co-relation submission does not make any mention of the banks that had *not* withdrawn their claims, including Canara Bank and Ratnakar Bank. This lacuna in the reasoning and the failure to see this evidence — given that there was evidence to the contrary — remains unexplained.

277. Later, the same submission document asserts:[218]

> d. **The Ld. Arbitrator had considered that the substratum of the proceedings before the DRT and the winding-up petition filed by IFCI was the same. Hence, filing of consent terms between the same parties on the same dispute before one court would not leave the matter pending in any other court.** The Ld. Arbitrator therefore held that as on 15th September 2012 there was no dispute pending between IFCI and DCHL and no insolvency event existed as on 15th September 2012.
>
> (*Emphasis added*)

This is the purest invention. There is not a hint of this in the Award. Consider the next paragraph:[219]

> e. BCCI's contention that consent terms filed would not amount to withdrawal of winding-up petition is contrary to substantive law of India. Under the consent terms DCHL got time to pay to IFCI under installments till January 2013. If

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218 Vol 54, *pp.* 20–21.

219 Vol 54, *p.* 21.

> DCHL would have failed in honouring the consent terms then BCCI could have then either re-issued another show-cause notice or terminated the franchise as the case may be. However, the Ld. Arbitrator's finding that as on 15th September 2012, no insolvency event exists is based on appreciation of evidence and application of sections 27 and 28 of the Indian Contract Act. [Exhibit A @ Pg 120, Volume I of the Petition, Pdf 9]

Certainly, these are reasons. But I expect them in the Award, right or wrong. If they are not there, I cannot impute them. And DCHL's argument borders on the bizarre — requiring *BCCI* to issue a fresh curative notice if *DCHL* reneged on its payment obligations under the compromise agreement with *IFCI*. BCCI had no privity with IFCI. It was not concerned with IFCI's actual claim. Its only concern was that IFCI's legal action constituted an Insolvency Event. As long as that remained pending, in whatever form, the Insolvency Event continued. The submissions do not even attempt to address the key point: that IFCI's winding-up petition was *not* disposed of by the compromise agreement.

278. This pattern of injecting reasons into the Award reaches its zenith in the section on damages.[220] The entire argument by DCHL is set out. Reference after reference to the record is set out. There are cross-references to oral testimony, the valuation report and so on to the end of the chapter. All of it to no purpose unless it can be shown to be part of the Award. There is, for instance, this nugget:[221]

> The Ld. Arbitrator whilst considering other claims such as legal expenses and advisory fees and loss of business

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220 Vol 54, *pp.* 24–31.

221 Vol 54, *p.* 30.

> opportunities has taken into account the pending litigation by various lenders and financial institutions.

The Award says nothing of the kind. It points to no evidence (neither do the submissions, even if that mattered, which it does not) of costs, expenses, proceedings or anything else in this context.

279. This is the reason that the entire discussion in arguments and written submissions about the effect of the failure to put a case, or the failure to cross-examination, becomes entirely immaterial. Citing numerous decisions[222] cannot cover up the fact that throughout the Award, barring naming this or that witness, there is not one single line discussing any oral testimony at all. Not one word of any witness's deposition and cross-examination is considered. All that we have are generalities in the Award, and an attempt in arguments and written submissions to somehow shore up the Award by pointing to the oral testimonies. I cannot reappreciate any finding on evidence. But I can point to an Award's wholesale failure to assess any part of the oral evidence. The arguments and submissions only show what might have been, not what is.

280. It is settled that a Section 34 court cannot and will not examine the reasonableness of reasons in the Award.[223] But a Section 34 court

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222 *Muddasani Venkata Narsaiah v Muddasani Sarojana*, (2016) 12 SCC 288; *Arvind Singh v State of Maharashtra*, 2020 SCC OnLine SC 400; *AEG Carapiet v AY Derderian*, 1960 SCC OnLine Cal 44 : AIR 1961 Cal 359. I considered *Carapiet* in *Harish Loyalka & Anr v Dileep Nevatia & Ors*, (2015) 1 Bom CR 361 : 2014 SCC OnLine 1640.

223 *Municipal Corporation of Delhi v Jagan Nath Ashok Kumar & Anr*, (1987) 4 SCC 497, though before the 1996 Act; *Oswal Woollen Mills Ltd v Oswal Agro* Mills Ltd, (2018) 16 SCC 219.

can, will and must examine whether reasons exist. That is a requirement of arbitration law and the Arbitration Act.

281. The written submissions follow the companion co-relation closely.[224] The same observations will apply.

282. I have separately dealt with these submissions here rather than under each head because of this commonality: the impermissibility of feeding reasons into what ought to have been a *reasoned* Award, one that should — and could — have had all these reasons. Instead, I am left to speculate that 'it must have been so'. That is not possible.

K. INTEREST

283. Mr Mehta complains that that interest at 10% per annum could not have been awarded interest pendent lite on damages. DCHL has not even sought interest on damages. I need not examine that aspect of the matter, in the view that I have taken on the Award itself. However, the amount of Rs 36 crores less Rs.1.83 crores must carry interest if seen as a recovery claim. There is no contractual provision shown to me barring pendent lite interest. Therefore the provisions of Section 31(7)(a), as interpreted by a three-Judge bench of the Supreme Court in *Jaiprakash Associates Ltd v Tehri Hydro Development Corporation Ltd*,[225] will apply.

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225 (2019) 17 SCC 786, per Dr AK Sikri, J, as he then was.

L. FINAL ORDER & COSTS IN THESE PROCEEDINGS

284. Taking a step back, what emerges is this. At the broadest level, there were three defaults — not paying players and others, creating charges on assets, and the insolvency event (the IFCI winding-up petition). The contract said the first two were curable; if uncured, they invited termination. The third could trigger immediate termination (leaving aside the fact that BCCI gave time to DCHL to have this resolved as well). Not one of the three is convincingly shown to have been cured or not to exist. All three continued. The Award proceeded in places without reasons, in others by ignoring evidence, in yet others by wandering far afield from the contract, and in taking views that were not even possible. In doing so, it brushed aside objections about insufficient pleadings. It granted reliefs not even prayed for, and took views that were not possible, i.e. that no reasonable person could have done. Effectively, it rewarded the party in unquestionable breach of its contractual obligations. That is inconceivable and not even a possible view.

285. There is no cogent answer to this Petition. It succeeds. Except to the limited extent of the award in favour of DCHL for Rs 36 crores less Rs.1.83 crores, and interest on that amount, the Award dated 17th July 2020 is set aside. Obviously, the arbitral award of costs of Rs 50 lakhs must also be set aside.

286. This is a matter in the Commercial Division, governed by the Commercial Courts Act, 2015. That Act amended, inter alia, Section

35 of the Code of Civil Procedure, 1908 on the matter of costs. The general principle in section 35(2) is that costs must follow the event. The losing party should generally be ordered to pay costs; if not, reasons are required. But that is discretionary. I can see no reason to refuse an order of costs. Mr Mehta leaves the question of costs to my discretion. He declines to submit a statement of costs. That is his and his attorneys' prerogative. In fact, Mr Mehta says that costs may be a token amount. Perceptions on that will differ. Having regard to the expenses, the number of days of hearing, and the enormous volume of documentation BCCI has had to put together, I believe an order of costs of Rs 10 lakhs is reasonable. BCCI will, of course, deducted this from the amount payable by it to DCHL, as above.

287. One final issue remains. I believe DCHL has since faced insolvency proceedings under the Insolvency and Bankruptcy Code, 2016. If BCCI cannot make payment to DCHL directly on account of any statutory embargo or order of a court or authority, BCCI will be required to make payment to DCHL's successor-in-title or the authority or entity entitled in law to receive the amount, viz., Rs 36 crores, less Rs.1.83 crores and less Rs 10 lakhs (which I have awarded in costs in this order), making a net total (without interest), in my reckoning, of Rs 34.07 crores. The costs of Rs 10 lakhs for this matter will not carry interest. The remainder, Rs.36 crores less Rs.1.83 crores, i.e. Rs 34.17 crores, will carry interest as per the Award.

288. The Petition is disposed of in these terms.

289. I must convey my gratitude to Mr Mehta, Mr Jagtiani, Mr Seervai, Mr Sharan Jagtiani, Ms Rishika Harish for their invaluable

assistance and their patience. Both sides were meticulous in compiling this record digitally in an organized, methodical and accessible form. It should serve as a template in all matter. I must, in particular, make special mention of Ms Rishika Harish for her quite astonishing mastery of this voluminous record.

290. For statistical purposes, the Petitioners' attorneys will get the petition finally numbered, with all filing defects cured, within three weeks from today.

291. All concerned will act on production of an ordinary copy of this order.

(G.S. PATEL, J.)