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## **Regus South Mumbai Business Centre Private Limited vs. Marie Gold Realtors Private Limited**

### **Facts of the Case:**

Regus South Mumbai Business Centre Pvt Ltd ("Regus" / Petitioner) and Marie Gold Realtors Pvt Ltd ("Marie Gold" / Respondent) entered into a Management Agreement on the 20th of December 2010 for a commercial space in Ismail Building, Hutatma Chowk, Fort, Mumbai. The Agreement was subject to the following conditions:

1. Regus would run a business centre on the premises and would share 75% of net sales with Marie Gold.
2. The premises were supposed to be refurbished by Marie Gold itself at its own expense, as per Regus's specifications.
3. The agreement contained a Business Plan with indicative revenue forecasts, dependent on market conditions, annexed to the Management Agreement.
4. A Bank Guarantee for ₹2.25 crores was given by Regus in favor of Marie Gold.
5. The first period was three years from the practical completion of the work, after which a performance review followed to decide on continuation or termination.

Possession of the property was transferred to Regus in 2011-12. In late 2013, Regus asserted that it had discovered errors of Multiplication in the Business Plan and submitted a revised Business Plan to Marie Gold. However, in January 2014, Marie Gold relied upon the Bank Guarantee because of losses incurred due to Regus' failure to realize projected revenues and terminated the Management Agreement.

Regus then filed for arbitration on the grounds of wrongful application of the Bank Guarantee and other damages against Marie Gold, while Marie Gold Counter Claimed for damages on account of shortfall of revenue and other losses suffered by the Company. The Arbitrator passed an Award on 18/10/2019, finding that there was a breach of the undertaking to make all reasonable endeavors to realize the projections of the Business Plan and awarded ₹10,10,01,000 to Marie Gold as damages with interest and costs to Marie Gold on all the above claims and Counter Claims. All other claims and Counter Claims were dismissed by the Arbitrator. The Award was challenged by the Regus invoking the provisions of section 34 of the Arbitration and Conciliation Act of 1996.

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## Core Issues

The Bombay High Court was called upon to decide the following principal issues:

1. Whether the Arbitrator's decision that Regus breached its contractual obligation to endeavour to achieve the Business Plan projections is liable to be interfered with under Section 34 of the Arbitration Act.
2. Whether the award of damages of ₹10,10,01,000 by the Arbitrator was against contract, repugnant to public policy, or illegal/perverse.
3. Whether the Business Plan constituted a binding commercial undertaking at the expense of Regus or was only an indicative document without any legal consequence that can be invoked other than for its termination or conversion to a license.

## Arguments by the Plaintiff

1. This is plausibly because the Arbitrator incorrectly placed the onus on Regus to establish that it made reasonable effort to ensure achievement of the Business Plan targets, against both policy and fairness. Regus argued that the requirement of 'endeavour' did not transform the Business Plan target into a guarantee.
2. The Arbitrator's decision on breach of the Management Agreement by Regus was in contradiction to the provisions of the agreement itself, as the Business Plan was only an indicative basis. Regus also argued that the Arbitrator's decision was in conflict with other aspects of the award, in which the Business Plan was not a warranty or an actionable representation.
3. Awarding damages was not justified and was in breach of contract in that the terms of Clause 21 of the Management Agreement stipulated only two remedies in the event of a shortfall in the form of the contract being terminated or licensed. Both parties claimed that the award was tantamount to rewriting a contract contrary to public policy.
4. Arbitrator ignored the revised Business Plan and disregarded factual evidence. Damage calculation was made on an assumption with no evidentiary basis.

## Arguments by the Defendant

Marie Gold responded to this challenge with the following contentions:

1. The Arbitrator properly construed the contractual undertaking to "endeavour" to attain and surpass projections in the Business Plan as binding rather than merely hortatory. Marie Gold thus contended that Regus's best-efforts undertaking was a binding obligation within the context of the whole agreement.
2. The Arbitrator had acting reasonably, placed the burden of proof under Section 106 of the Indian Evidence Act, 1872, as the details of efforts to achieve projections were exclusively within the knowledge of Regus, which it had failed to prove.

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3. The damages awarded were the difference between projected revenues and actual earnings, less the Bank Guarantee encashed, which, without exception, represents a valid measure of the loss and damage suffered by Marie Gold on account of breach. Marie Gold contended that no further evidence as to loss causation was required.
  4. The award did not offend public policy, nor did it rewrite the contract, but rather reflected just consequences for failure to make contractual endeavours, particularly in light of the substantial investment Marie Gold had made in refurbishing the premises.

### **Judgement of High Court**

While dismissing the challenge of the petitioner, Regus, and upholding the arbitral award, the Bombay High Court gave elaborate reasoning:

1. The Court held that the Arbitrator properly construed the word “endeavour” against the backdrop of the whole Management Agreement. The obligation to use best efforts was enforceable, and absence of evidence on the part of Regus of such efforts justified the finding of breach.
2. The defence of Regus that the Business Plan was indicative and non-binding was rejected because the contract explicitly included obligations to attain projections. The interpretation by the Arbitrator did not introduce a new term but gave effect to the parties' contract as intended.
3. The Court affirmed the applicability of Section 106 of the Evidence Act in imposing the onus on Regus to prove the making of reasonable endeavours. Since Regus failed to adduce oral and documentary evidence to prove endeavours, the onus was rightly placed on it.
4. On the issue of damages, the Court stated that the notional difference between projections and actuals, deducting the recovery on the Bank Guarantee, rightly assessed the loss suffered by Marie Gold on the contract. There was no violation of public policy, and the award was not perverse, contradictory, and in absence of the jurisdiction of the Arbitrator.
5. The Court held that the interference allowed in Section 34 is restricted in nature and should not readily interfere with an arbitral award on the commercial assessments of reasonable persons.