

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

+ **O.M.P. (COMM) 30/2018 & IA 4862/2018(stay)**

Reserved on: 6th September, 2018
Date of decision :25th September, 2018

INDIAN POTASH LIMITED

..... Petitioner

Through: Mr. Arvind Minocha, Adv.

versus

M/S. EMMSONS GULF DMCC

..... Respondent

**Through: Mr.Sanjeev Puri, Sr. Adv. with
Mr.Tejas Parashar, Adv.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 30th November, 2017 passed by the majority of the Arbitrators, awarding a sum of Rs.11,74,39,806/- in favour of the respondent alongwith interest @12% per annum from 8th December, 2011 to 30th November, 2017 and further directing that if the awarded sum is not paid within one month from the date of the Award, the petitioner shall pay interest @18% per annum from the date of the Award till the date of payment.

2. The disputes between the parties are in relation to the Agreement dated 30th August, 2011 by which the respondent had agreed to supply a quantity of 1,90,000 MTs (+/-) 10% (shipping tolerance) Prilled

/Granular Urea(in bulk) under the terms and conditions set out therein.

Clause II of the Agreement provides as under:-

“II. Shipment Schedule : Arrival by November 07th, 2011 at Indian discharge Port.”

3. The dispute between the parties is confined only in relation to the supply of a quantity of 30,000 MTs +/- 10% Urea, which was supplied admittedly beyond the contractually stipulated date, as provided in clause II of the Agreement read with the Addendum No.2 dated 25th November, 2011 executed between the parties.

4. The respondent by its e-mail dated 21st November, 2011, that is much after the expiry of the contractual period of supply, informed the petitioner of nomination of Vessel MV ADVENTIST for supply of the above noted quantity of Urea with a laycan of 23rd - 26th November, 2011.

5. The petitioner on 25th November, 2011, addressed an e-mail to the respondent giving its acceptance to the nomination of Vessel MV ADVENTIST with a laycan of 23rd - 26th November, 2011, *inter alia* subject to the following condition:

“SELLERS SHALL BE LIABLE FOR LIQUIDATED DAMAGES AS PER THE TERMS OF SUBJECT CONTRACT FOR DELAY IN SHIPMENT /ARRIVAL AT DISCHARGE PORT IN INDIA, BEYOND THE CONTRACTUAL DATE.”

6. On the same day, the parties entered into the Addendum No.2 to the Agreement, which is rather short and is reproduced hereinbelow:

“At the request of the seller the last date of shipment under Clause No.II (Shipment Schedule of Contract No.- IPL/EMMSONS/UREA/2011-12/27 DATED August 30, 2011, is being revised as under:

“Shipment from load port latest by 30th November, 2011

The same is subject to terms & conditions under Clause XIV and other provisions of the subject contract.”

7. Admittedly, the vessel did not sail till 30th November, 2011 and the respondent vide its letter dated 9th December, 2011 informed the petitioner that the loading could be completed only on 8th December, 2011 and that the vessel had sailed on 9th December, 2011 with the estimated time of arrival at the delivery port being 12th December, 2011.

8. Clause XXI of the Agreement between the parties clearly recorded the fact that the petitioner was purchasing the Urea on behalf of the Government of India. Therefore, on receipt of the letter dated 9th December, 2011 from the respondent, the petitioner promptly wrote to the Department of Fertilizers on 9th December, 2011 itself, informing the Department regarding the sailing of the vessel and made the following request:

“We request you to inform the all concerned and issue the DOF nomination letter.”

9. The Department of Fertilizers, however, by an e-mail dated 9th December, 2011 informed the petitioner that as the shipment period under the contract had been extended only upto 30th November, 2011, late shipment was not acceptable to it.

10. The petitioner in turn, vide its letter dated 12th December, 2011 informed the Vessel's agent that the shipment of the Urea has not been

accepted by the Government of India and hence no handling agent has been appointed.

11. By a separate e-mail dated 12th December, 2011, the petitioner informed the respondent that “due to abnormal delay in shipment and steep down fall in international Urea prices, we are not in a position to accept the above shipment at the prices agreed in contract dated 30th August, 2011.” The petitioner further stated that it would accept the shipment only incase the respondent agrees to the prices being reduced from USD 520 PMT to USD 444.50 PMT, which according to it was the current price equivalent. At this stage I may note the following finding of the majority of Arbitrators in their Award, to which there is no challenge made by the counsel for the petitioner:-

“Nothing has been brought on record nor is there any pleading to the effect that the Claimant was aware of the trend of falling prices and delayed placing its order till 14.11.2011 for procuring urea so as to benefit from the falling international prices.”

12. On 22nd December, 2011, the Department of Fertilizers issued a ‘Nomination Message’ addressed *inter-alia* to the Commissioner Customs, Kandla Port, *inter alia* informing that the value of cargo was USD 444.50 PMT. It also appointed M/s Rashtriya Chemicals and Fertilizers Ltd. (RCF) Mumbai as its handling agent and receiver of the Cargo.

13. By the communication dated 23rd December, 2011, the respondent accepted the Nomination Message under protest. It further stated that in terms of the contract between the parties, the petitioner was only entitled to recovery of liquidated damages of 2% of the contract value for each

month or part thereof of delay and therefore, unilateral alteration in the contract price by the petitioner was not in terms of the contract. It further stated that in view of the fact that the vessel has already reached India and Urea being a perishable item, it cannot be diverted to any other customer and the vessel was incurring huge demurrage, it had no option but to accept the Nomination.

14. The petitioner paid the respondent for the Urea so supplied at USD 444.50 PMT only, leading to a dispute between the parties with the respondent claiming the balance payment.

15. As noted above, the majority of the Arbitrators have passed an Award in favour of the respondent allowing the claim of the respondent for the balance payment, however, subject to a deduction of liquidated damages @4%, that is, 2% per month or part thereof of the contract value, in terms of clause XIV of the contract.

16. Counsel for the petitioner submits that the Majority Award does not give reasons in support of its finding. He submits that the Majority Award has merely recorded the submissions of the parties and thereafter given its conclusion without giving any reasons in support of the conclusion. Relying upon the judgment of the Supreme Court in *M/s Som Datt Builders Ltd. vs. State of Kerala* AIR 2009 SC (Supp) 2388 and of Bombay High Court in *Vashdev Morumal Sawlani vs. Yogesh Mehta & Anr.* 2002 (2) Arb. LR 380 (Bombay), he submits that as no reasons have been given, the Award is liable to be set aside on this ground itself.

17. He further submits that in terms of clause XIV of the Agreement, the petitioner, for the default of the respondent in making the delivery

within the stipulated time, had a choice to either levy liquidated damages or to purchase the Urea from a third party at the risk and account of the respondent or to cancel the contract or a portion thereof. In the present case, the petitioner had exercised the third option by proceeding to cancel the contract. He submits that by unilaterally making the shipment beyond the contractual date, the respondent could not have denuded the petitioner of its right to terminate the Agreement once the stipulated date for shipment had passed. He submits that, in fact, there was no challenge made by the respondent to the rejection of the goods.

18. It is further submitted by the counsel for the petitioner that the finding of the Arbitrator that the respondent had accepted the reduced rate due to economic duress is ill-founded inasmuch as the respondent could not only have diverted the cargo to other countries like Sri Lanka and Pakistan, but could also have supplied the same to an Indian party for non-agricultural use. He further submits that the Arbitral Tribunal seems to have been swayed by the submission made by the counsel for the respondent before it that the Urea is a perishable item due to which the respondent was under undue pressure and economic duress to accept the lower price offered by the petitioner. Relying upon the judgment of the Supreme Court in *ONGC vs. Western Geco International Ltd.* AIR 2015 SC 363, he submits that the Arbitrators have failed to draw correct inference from the facts placed before them and therefore, the Award is liable to be set aside.

19. It is further contended that even otherwise, the rate of interest awarded in favour of the respondent is exorbitant and no reasons for grant of the same have been given.

20. On the other hand, learned senior counsel for the respondent submits that the Award given by the Majority Arbitrators is well reasoned and has discussed the submissions made before it in detail. He further submits that this Court cannot sit as a court of appeal to re-appreciate such reasons given by the Arbitral Tribunal. On merits, he submits that the e-mail dated 25th November, 2011 addressed by the petitioner itself had stipulated that in case the shipment is made beyond the contractual date, the respondent shall be liable to pay liquidated damages, therefore, time for shipment was never of essence and the only consequence of late shipment was the liability of the respondent to pay liquidated damages; such liquidated damages have been awarded by the Arbitral Tribunal right from the date of the first default, which is 7th November, 2011, until 12th December, 2011, when the vessel arrived at Kandla. He further submits that in any case, the petitioner had not exercised its option to terminate the Agreement before the shipment of the goods by the respondent and therefore, cannot be allowed to do so once the shipment had been made. He submits that the conduct of the petitioner itself would show that it had accepted the late shipment of the goods as it addressed an e-mail on 9th December, 2011 itself to the Department of Fertilizers calling upon the Department to issue the Nomination Letter. Even after the receipt of the e-mail from the Department of Fertilizers recording its refusal to accept the late delivery of Urea, the petitioner did not immediately act on it but communicated its decision to refuse the delivery of the cargo to the respondent only by its e-mail dated 12th December, 2011, by which time the cargo had almost arrived at Kandla port.

21. In rejoinder, learned counsel for the petitioner submits that as the goods had been ordered only for the Government of India, the petitioner had written to the Government of India to seek their instructions to receive the goods; the same cannot be said to be an acceptance of the late shipment of the goods. He further submits that the Addendum read with the Agreement itself stipulates that the terms of the Agreement shall bind the parties unless any modification/waiver/discharge is made in writing and signed by both the parties. Therefore, in any case, the letter dated 9th December, 2011 addressed by the petitioner to the Department of Fertilizers cannot amount to a waiver. Relying upon the judgment of the Supreme Court in *M/s Sonell Clocks and Gifts Ltd. v. The New India Assurance Co.Ltd.*, JT 2018 (8) SC 289, he submits that waiver has to be specific.

22. I have considered the submissions made by the learned counsels for the parties. The disputes between the parties would require an examination of clause XIV of the Agreement and therefore, the same is reproduced hereinunder:-

“XIV. Default

In the event of failure of delivery of the material within the time stipulated for delivery in the contract, it is agreed that the Buyer shall have the option.

a) To recover as liquidated damages and not by way of penalty for the period after this material was due until actual delivery or until the Buyer secures the material from other sources, a sum equivalent to 2% of the contract value of the undelivered material for each month, or part of month's delay;

b) To purchase from other sources without notice to the sellers at the risk and account of the sellers the material not delivered or other material of similar description

(where material exactly complying with the particulars are not in the opinion of the buyers, readily procurable, such option being final) without cancelling the contract in respect of the consignment(s) not yet due for delivery; or

c) To cancel the contract or a portion thereof and, if so desired, to purchase the material at the risk and cost of the Sellers.”

23. A reading of the above provision would show that though clause II of the Agreement provided for a firm date by which the shipment was to arrive at the Indian Port, clause XIV provided for *inter-alia* levy of liquidated damages in the case of delay.

24. Section 11 of the Sale of Goods Act, 1930 is reproduced hereinbelow:

“11. Stipulations as to time - *Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.”*

25. Section 55 of the Indian Contract Act, 1872 is reproduced hereinbelow:

“55. Effect of failure to perform at fixed time, in contract in which time is essential.—*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

26. The law is now well settled that where the parties have themselves provided for extension of time albeit on levy of damages, even an express provision relating to time being of the essence of the contract would be rendered ineffective.

27. In *Hind Construction Contractors v. State of Maharashtra*, (1979) 2 SCC 70, the Supreme Court had expressed the law relating to time being an essence of a contract as under:

"It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken

remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union, Webb v. Hughes and Charles Rickards Ltd. v. Oppenheim.”

28. In **Arosan Enterprises Ltd. v. Union of India and Anr.**, (1999) 9 SCC 449, the Supreme Court reiterated that:

“Incidentally the law is well settled on this score on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise.”

29. The Supreme Court in the above cited case, *inter-alia* relying upon the provision in the contract which provided that the buyer may extend the delivery period at a discount to be mutually agreed to between the buyer and the seller, held that time was not the essence of the contract.

30. The reliance of the petitioner on the judgment of **M/s Sonell Clocks and Gifts Ltd.** (Supra) is ill-founded as the same will have no application to the facts of the present case. Once it is held that the time of shipment was not the essence of the contract, the question of waiver loses all significance. Even otherwise, the inaction of the petitioner from 30.11.2011 to 12.12.2011 would be relevant to determine whether the

petitioner can be allowed to reject the goods once they have arrived at the Discharge Port.

31. In the present case, not only does clause XIV of the Agreement give an option to the petitioner to extend the delivery period, albeit on levy of liquidated damages, but in fact, the delivery period stipulated in the original Agreement dated 30.08.2011 was extended by the petitioner vide its letter dated 25.11.2011 and the Addendum No.2 was executed between the parties. The Addendum provided that the shipment from the Load Port must be done latest by 30.11.2011. Clause VIII(b) of the Agreement provided that immediately on sailing of the vessel, the sellers shall advise the buyer by fax/cable, the name of the vessel, date of sailing, quantity shipped alongwith sending the documents mentioned in the said clause. As the petitioner had not received any such information between 30.11.2011 to 08.12.2011, it was well aware that the respondent had committed a default of the shipment schedule. However, the petitioner did not choose to exercise its right, if any, under Section 55 of the Indian Contract Act, 1872 and instead, even on receipt of the belated intimation of the shipment from the respondent on 09.12.2011, immediately addressed a communication to the Department of Fertilizers calling upon it to issue the necessary 'Nomination Letter'. This clearly shows that even the petitioner, till that date, did not consider the time of shipment to be of the essence of contract or the contract having been rescinded and it is only on the rejection of the goods by the Department of Fertilizers, that for the first time, by its communication dated 12.12.2011, rejected the late shipment of the goods. However, by this time the vessel had almost arrived at Kandla Port.

32. The majority of the Arbitral Tribunal has considered this issue in detail and has held as under:

“63. We have perused the pleadings and, in fact, have noted their contents in detail. We have gone through and examined the evidence; both oral and documentary; and have considered and noted the arguments on behalf of the parties elaborately. We have already decided above that the preliminary objection of the Respondent, about the legality of the reference and maintainability of the arbitration proceedings based on the provision of Section 230 of the Contract Act, is without merit and have, therefore, rejected the same. In the written submissions of the Respondents, it has been fairly stated that the Respondent exercised the option under Clause XIV(a) in e-mail dated 25.11.2011 with regard to the payment of liquidated damages. The contention of the Respondent thereafter in the written submissions that the option was exercisable after the breach and not before the breach is contradictory. The wording of the e-mail dated 25.11.2011 states that the Seller shall be liable for liquidated damages for delay in shipment/arrival at discharge port. We cannot accept the argument of Mr. Grover, that the wording in the e-mail of 25.11.2011, regarding the Seller being liable for liquidated damages for delay in shipment/arrival, relates to the past liability for delay from 7.11.2011. This is because firstly, the past liability was covered by the original contract and secondly, because the delay in arrival of the shipment can only relate to the future. We are of the view that the Respondent had already exercised its option under default Clause XIV(a) for liquidated damages. No breach had occurred but the aforesaid option was already exercised.

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66. We are unable to accept the ingenious argument raised in the written submissions that on account of the second breach on 30.11.2011, the contract ceased to exist. It has been submitted that no extension of time was sought by the Claimant; which is true. But that does not mean that the

contract came to an end. The contract was not abrogated but was amended whereby the date of shipment was changed. It was also stipulated, as already noticed, that delay will entail the consequence of the Claimant having to pay liquidated damages to the Respondent. We are not in agreement with the interpretation given in the written submissions that consequence of the breach on 30.11.2011; when the shipment did not start sailing, was that the contract itself came to an end. Again, this was not even argued orally by the learned Advocate for the Respondent. The new terms incorporated in the contract by the Addendum which amended the contract by the two documents dated 25.11.2011, one of which is an e-mail, show that the amendment dovetailed into the main parent contract.

67. There is merit in the argument of Mr. Sanjeev Puri that the conduct of the Respondent right from 30.11.2011 upto 12.12.2011 shows that the Respondent had opted for levying liquidated damages under Clause XIV(a). They did not cancel the contract on 30.11.2011 when the vessel did not sail from the load port to India. They did not cancel the contract during the next 8-9 days till the vessel sailed on 9.12.2011. They could have cancelled the contract even on 9.12.2011 when they received intimation regarding shipment inspite of being informed about this vide e-mail dated 9.12.2011. From 9.12.2011 to 12.12.2011 also, i.e. for 4 days, they did not exercise the option of cancelling the contract. It is true and the Respondent is right in contending that the Claimant did not seek any extension of time and made the vessel to sail and confronted the Respondent with fait accompli. However, that does not detract from the fact that on innumerable occasions, the Respondent could have cancelled the contract as noticed herein and they chose not to do so. Therefore, we find merit in the submission made by Mr. Puri that this was because the Respondent had already exercised the option of imposing liquidated damages. There is also merit in the submission of Mr. Puri that Clause XIV

does not give the right or the option to the Respondent to reject the goods, more so after they had arrived at the discharge port. There is difference between cancellation of the contract and the rejection of the goods and material.

68. Under the contract, shipping intimation was required to be given as per Clause VIII (b). There was no intimation required to be given by the Claimant to the Respondent that the vessel had not sailed. A fortiori since no intimation of sailing of vessel was given, it was obvious that the vessel had not sailed. There is no concealment of the breach when the vessel did not sail on 30.11.2011 and the intimation of sailing of the vessel given on 9.12.2011 which was as per Clause VIII (b). There is no explanation by the Respondent for inaction and silence from 30.11.2011 to 9.12.2011 and even from 9.12.2011 to 12.12.2011. We are of the view that the Respondent exerted pressure on the Claimant to sell the urea after it had arrived in Kandla at a price lower than the agreed contract price. It is incorrect on the part of the Respondent to urge that the Claimant 'chose' to accept the lower price offered; which was not the offer made by the Respondent but it was the stand taken by the Department of Fertilizers."

33. The above being finding on facts arrived at by the Arbitral Tribunal upon appreciation of the evidence led before it as also the interpretation of the various terms of the contract, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

34. In **Arosan Enterprises Ltd.**(supra) the Supreme Court, albeit in relation to the Arbitration Act, 1940, has held that the issue whether time is of the essence of contract is one of fact and the Arbitrators are within their jurisdiction to decide the same as they deem it fit. The Courts have no right or authority to interdict an Award on a factual issue. It was held

that the Court will not have jurisdiction to interfere with the Award unless there exists a total perversity in the Award or the same is based on a wrong proposition of law. I may hasten to add that in the Arbitration and Conciliation Act, 1996, the second exception is even narrower.

35. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court had again emphasized that:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

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42.3. (c) *Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

“28. Rules applicable to substance of dispute. (1)-(2)

(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.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003

Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

36. In the present case, the finding of the majority of the Arbitral Tribunal can neither be said to be perverse or so contrary to the facts established on record so as to shock the conscience of this Court and warrant an interference.

37. As far as the issue of acceptance of the reduced price of USD 444.50 PMT by the respondent is concerned, the respondent by its communication dated 23.12.2011 had accepted the same without prejudice to its contentions and under protest. The fact that the goods had already arrived in India and Urea being a canalized item has been noted by the Arbitral Tribunal in support of its finding that the respondent had accepted the reduced price under economic duress. The plea of the petitioner that the respondent could have diverted the cargo to neighboring countries like Pakistan, Bangladesh or Sri Lanka was rejected on the ground that this was taken only in the written submissions and there was nothing on record to indicate the cost that may have to be incurred to take the vessel from Kandla Port to other countries and the price that the Urea could fetch in those countries. Equally, the plea of the petitioner that the respondent could have sold the goods to other customers including for non-agricultural purpose, was held to be not borne from the pleadings or evidence on record and in fact, not even argued during the oral arguments before the Arbitral Tribunal. Clearly

therefore, the respondent had no option but to agree to the reduced price offered by the petitioner, so as to mitigate its losses. However, by such mere acceptance, it cannot be said to have waived its rights to seek the balance price.

38. In view of the above, findings of the Arbitral Tribunal cannot be said to be contrary to the record or perverse in any manner. I do not find any merit in the contentions raised by the learned counsel for the petitioner in challenge to such findings.

39. As far as the submission made by the learned counsel for the petitioner that the Award does not give any reason in support of the conclusion, the same is only stated to be rejected. The majority Arbitrators have given detailed reasons in paragraphs 63 to 69 of the Award for their conclusion. The same have been noted by me herein above. The majority Award is, in fact, a well reasoned Award.

40. As far as the rate of interest awarded by the Arbitral Tribunal is concerned, I do not find the same to be unreasonable or perverse in any manner.

41. In view of the above, I find no merit in the present petition and same, along with pending application, is dismissed with no order as to cost.

NAVIN CHAWLA, J

SEPTEMBER 25, 2018 (RN/Arya)