

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL UNDER ARBITRATION ACT NO.1 OF 2015**

1. M/S. TRIMURTI EXPORTS,
through its Authorized
representative, office at C/F
1 and 3, J.B. Apartments,
Near Pandav Church, Aquem
Alto, Margao, Salcete,
Goa 403601
2. MR. RASHID KHAN (PARTNER)
M/s. Trimurti Exports,
s/o late Abdul Rashid Khan, of
Majeure age, Indian National, r/o
14/B/1, Chawaddo, Plot No.14,
Davorlim, Margao, Salcete,
Goa 403 601
3. MR. DEVENDRA N. KAMAT (PARTNER)
M/s. Trimurti Exports,
s/o late Shri Narayan Kamat, of Majeure
age, Indian National, r/o S/5, Pitul
Kamat Plaza, Aquem, Alto, Margao,
Salcete, Goa 403 601.
4. MR. BALCHANDRA S. BAKHLE
(PARTNER)
M/s. Trimurti Exports, s/o late
Shri Shrinivas B. Bhakle, of Majeure age,
Indian National, r/o H.No.5/857,
Acquem, Alto, Margao, Salcete,
Goa 403601.

Respondent Nos. 2 to 4 also at
C/F 1 and 3, J.B. Apartments, Near
Pandav Church, Aquem Alto,
Margao, Salcete, Goa 403601.

.. Appellants

V/s

M/S. MODELAMA EXPORTS LIMITED
having its Registered Office
at B-57, Okhla Industrial Area,

Phase-I, New Delhi 110020
ALSO AT 184, Udyog Vihar,
Phase-I, Gurgaon, Haryana,
represented by its Director
Shri Gaurau Gulati

.. Respondent

Mr. Nitin Sardessai, Senior Advocate with D. Shirodkar and Ms. Gautami Kakodkar, Advocates for the appellants.

Mr. Raja Wadhwa and Mr. A. Batheja, Advocates for the respondent.

CORAM :- C. V. BHADANG, J.

Reserved on : 4th August, 2015.

Pronounced on : 7th August, 2015

JUDGMENT :

Admit. Learned Counsel for the respondent waives service. Heard finally with consent of the learned Counsel for the parties.

2. By this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act, for short), the appellants (original respondents before the Arbitrator) are challenging the judgment and order dated 24/09/2014 passed by the Principal District and Sessions Judge, Panaji, by which, the application under Section 34 of the Act, filed by the appellants, has been dismissed, confirming the award passed by the Arbitrator on 18/04/2013.

3. The brief facts, necessary for the disposal of the appeal, may be stated thus :

M/s. Madelama Exports Limited, (claimant before the Arbitrator), is a Company incorporated under the Companies Act, engaged in the business of manufacturing and export of garments. The appellant no.1, M/s. Trimurti Exports, (respondent no.1 before the Arbitrator), is a partnership firm, of which the appellant nos.2 to 4 are the partners. There was a mining concession of Iron ore and Manganese ore known as Aili Vagurbem Mines, situated at Sancordem, Sanguem Taluka of South Goa, admeasuring 100 Hectares (Concession Property 1/1937) granted by erstwhile Portuguese Government. The appellants were holding rights in respect of the said mining concession/ lease. The respondent and the appellants entered into an agreement dated 17/07/2009, wherein the respondent had agreed to advance an amount of Rs.9 Crores to the appellants towards purchase of 3 Lakhs Metric Tones of Iron ore from the said mining lease as the sole and exclusive buyer. The appellants had agreed to sell the Iron ore on the terms and conditions as contained in the said agreement. The said agreement which contained an arbitration clause, provides that the appellants shall repay the amount of Rs.9 Crores in six

instalments of Rs.1.5 Crores each. In addition to this, the appellants had agreed to pay an amount at the rate of 4 \$ per Metric Tone to the respondent by way of interest/ profit from the sale of the Iron ore. The appellants had also agreed to arrange for the overseas buyers, securing their irrevocable and unconditional letter of credit in favour of the respondent. By the said agreement, the appellants professed to have exclusive rights over the said mines in view of the agreement entered into between the appellants and the mine owners/ concessionaires. The Iron ore was to be exported in six shipments or more. This agreement was to be performed within a period of 10 months or till the amount of 9 crores along with the amount at the rate of 4 \$ per Metric Tone of Iron ore was paid to the respondent. Indisputably, the respondent had paid an amount of Rs 1 Crore by way of an advance to the appellants and the appellants had passed four post dated cheques of Rs.1 Crore each in favour of the respondent as a security. The remaining amount of Rs. 8 Crores was to be advanced by the respondent on obtaining a letter of credit of the overseas buyers.

4. The parties entered into a supplementary agreement on 01/09/2009, whereby the appellants had acknowledged the receipt of the remaining amount of Rs.8 Crores. The appellants,

by way of security, issued 32 post dated cheques of Rs. 1 Crore each to the respondent as an additional security.

5. It appears that on 29/05/2010, the parties entered into a third agreement styled as additional agreement. The recitals of the said agreement would show that the appellants had acknowledged that it has neither been able to sell the Iron ore to the overseas buyer nor has been able to repay fully the amount due and payable to the respondent under the agreement dated 17/07/2009. It also acknowledges that an amount of Rs.14.76 Crores (comprising of Rs. 9 Crores towards the principal sum and remaining towards interest/ profit) was due and payable to the respondent. The agreement also recites that the appellants have paid and the respondent had received an amount of Rs.2.50 Crores out of Rs. 14.76 Crores, leaving a balance of Rs.12.26 Crores payable to the respondent as on 29/05/2010. It appears that by the said additional agreement, the parties had kept two options open namely either to perform the obligations (to sell Iron ore to overseas buyers) under the sale agreement and the supplementary agreement or to pay an amount of Rs.12.26 Crores on or before 31/12/2010 along with interest at the rate of 36 % p.a. with effect from 01/06/2010. It appears that by the additional agreement, the parties had ratified and reaffirmed their commitments made in the

sale agreement and in the supplementary agreement dated 17/07/2009 and 01/09/2009 respectively. By the additional agreement, the appellants had also furnished a security of property known as Acamol near Cuncolim Industrial Estate, village Ambaulim of Quepem Taluka. It, however, appears that in spite of the execution of additional agreement, the appellants were not able to perform either of the commitments. Hence, the respondent issued a notice on 10/03/2012 to the appellants, intimating that the cheques furnished by way of security, have been dishonoured. By the said notice, the appellants were called upon to pay a sum of Rs.19.71 Crores as on March 9, 2012 with interest at the rate of 36 % p.a. The appellants issued a reply on March 22, 2012, claiming that a sum of Rs.5.65 Crores has already been repaid to the respondent. The appellants also disputed the rate of interest, being illegal. As the parties were unable to resolve the dispute, the matter was referred to the sole arbitrator. The respondent filed a statement of claim in which, a claim of Rs.21,01,67,539/- along with interest @ 3 % per month was made, along with Rs. 35 Lakh, being legal expenses and costs of litigation.

6. The appellants filed their reply, opposing the claim.

7. On the basis of the rival pleadings, the learned Arbitrator framed the following issues :

“(a) Whether the Agreements dated 17/9/2009 & 1/9/2009 are void as alleged by the respondent in its reply ?

(b) Whether the agreement dated 29/5/2010 is not enforceable in eyes of law as alleged by the respondent in its reply ?

(c) Whether the relief prayed in the Statement of Claim cannot be granted in view of clause 17 of the agreement dated 17/7/2009 as alleged by the respondent ?

(d) Whether the claimant is entitled to recover the amount as claimed ?

(e) Whether the Claimant is entitled to recover the cost of legal proceedings as prayed ?”

8. Thereafter, the Director of the respondent filed an affidavit in lieu of Chief-Examination. It is, at this stage, that on 17/10/2012, the respondent filed an application, with a prayer to pass an award based on the admissions and acknowledgment made by the appellants in the following documents, which were not disputed :

(a) Sale Agreement, Supplementary Agreement and Additional Agreement.

(b) Reply of the appellants to the application of the

respondent under Section 9 of the Act, being CMA No.60/2012 before the learned District Judge, Goa.

(c) Petition filed by the appellants before the Delhi High Court under Section 482 of the Code of Criminal Procedure, for quashing of the complaint under Section 138 of the N. I. Act, 1881.

9. The appellants filed a reply, opposing the application.

10. The learned Arbitrator, on hearing the parties, passed an award on 18/04/2013, with an addendum to the award dated 18/04/2013. The learned Arbitrator held that the respondent was entitled to Rs.14.76 Crores. The learned Arbitrator, however, refused to award interest at the rate of 36 % p.a., finding that the rate was in the nature of threat in terrorem and thus reduced the interest to 8 % p.a. with effect from 31/12/2010 until realisation. Feeling aggrieved, the appellants challenged the award in an application under Section 34 of the Act, in Arbitration Petition No.10/2013. The appellants filed Arbitration Petition No.9/2013, taking exception to the grant of interest at the rate of 8 % p.a., claiming that it should have been awarded at the rate of 36 % p.a. as agreed. The learned District Judge has dismissed both these applications. Feeling aggrieved, the original respondents are

before this Court. The respondent has not persisted further, in claiming interest at the rate of 36 % p.a., as they appear to be content with the grant of interest at the rate of 8 % p.a..

11. I have heard Shri Sardessai, the learned Senior Counsel appearing for the appellants and Shri Wadhwa, the learned Counsel appearing for the respondent (original claimant). With the assistance of the learned Counsel for the parties, I have perused the record.

12. It is submitted by Shri Sardessai, the learned Senior Counsel for the appellants that the additional agreement cannot be said to be a standalone agreement. It is submitted that the additional agreement has to be read along with the sale agreement and the supplementary agreement. The learned Senior Counsel has referred to the contents of the additional agreement, in order to submit that it makes profuse reference to the sale agreement as well as the supplementary agreement and thus, the additional agreement cannot be read in isolation. It is submitted that the mine is situated in the midst of a reserved/ protected forest and required permissions from forest/ environmental authorities. The parties had no reason to believe or even to suspect that a separate permission would be required for using

the forest road for carrying the Iron ore from the mine. It is submitted that the parties were all along under a belief that such a permission to use the forest road is implicit in the permission to conduct the mining operations. He submitted that thus, both the parties to the agreement were labouring under a common mistake of fact as to the necessity of the permission to use the forest road. It is submitted that on account of the absence of such a permission, the contract became unenforceable and not capable of being performed. The learned Senior Counsel has then placed reliance on clause 17 of the sale agreement, which incorporates a term in the nature of Force Majeure, in which the parties had agreed that if the obligation becomes unenforceable on account of Force Majeure or the act of God/ natural calamity, etc., the aggrieved party shall have no claims whatsoever against the other party for breach of the agreement. It is submitted that the appellants were unable to perform the obligation under the agreement regarding sale of Iron ore, on account of the reasons beyond their own control and thus, clause 17 stood attracted. It is submitted that the finding by the learned District Judge (in para 118) to the effect that the additional agreement being silent about Force Majeure clause, it was the intention of the parties not to enforce clause no.17 of the original agreement, is clearly misconceived, in as much as, the additional agreement has to be

read along with the earlier two agreements. It is submitted that thus, both the Arbitrator as well as the learned District Judge fell into error while appreciating the terms of the agreement. It is submitted that the Force Majeure clause, would come into play and no liability would arise against the appellants.

13. It is next submitted that the Hon'ble Supreme Court had appointed a committee under the Chairmanship of Justice M. B. Shah (better known as Shah Commission) with the following terms of reference :

“2. The terms of reference of the Commission shall be-

(i) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;

(ii) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the

same;

(iii) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the persons responsible for such tampering; and

(iv) to inquire into the overall impact of such mining, trade transportation and export done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and State Governments.””

14. It is submitted that the Commission had accordingly submitted its interim report on 15/03/2012. Shah Commission, *inter alia*, had recommended the prohibition of all mining activities after 2007. The report was submitted to the Hon'ble Supreme Court. In the case of **Goa Foundation Vs. Union of India**, reported in (2014)6 SCC 590, the Hon'ble Apex Court had held in para 87 as under :

“87. *In the result, we declare that:*

87.1 *The deemed mining leases of the lessees in Goa expired on 22.11.1987 and the maximum of 20 years renewal period of the deemed mining leases in Goa expired on 22.11.2007 and consequently mining by the lessees after 22.11.2007 was illegal and hence*

the impugned order dated 10.09.2012 of Government of Goa and the impugned order dated 14.09.2012 of the MoEF, Government of India are not liable to be quashed.”

15. On the basis of the judgment in the case of **Goa Foundation** (supra), it is submitted that all the mining activities after 2007 became illegal. Thus, the agreement entered into by the parties in the year 2009 would be void. The learned Senior Counsel would submit that in such circumstances, no award could have been passed on the basis of any such agreement as the very purpose/ object of the agreement was rendered illegal. The learned Senior Counsel fairly submitted that in terms of Section 65 of the Contract Act, 1872, the appellants would be liable to restore the advantage, which the appellants have received. It is submitted that the appellants have admittedly received Rs.9 Crores out of which, an amount of Rs.5.65 Crores has been repaid. It is submitted that thus, the appellants would be liable to pay an amount of Rs.3.35 Crores along with interest at the rate of 8 % p.a. from the commencement of the Arbitration Proceedings. It is submitted that the obligation to restore advantage under a void agreement would only extend to the refund of the balance amount of the original consideration and cannot extend to the claim of profits/ interest. It is submitted that the provisions of Section 65

envisage two situations, which are disjunctive in nature. It is submitted that the person is either liable to restore the advantage or to make compensation for it. It is submitted that the later part of Section 65 to make compensation can only come into play, when the advantage as such cannot be ascertained or restored. The learned Senior Counsel was at pains to point out that Section 65 employs the word 'or', which would show the liability to restore advantage or to make compensation is disjunctive. The learned Senior Counsel would submit that even so far as the interest is concerned, the same can be granted *pendente lite* i.e. from the date of initiation of the Arbitration Proceedings. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of ***The Life Insurance Corporation of India Vs. Rajmata Saheb Chowhanji and others***, reported in (1978)3 SCC 244 and a decision of the Allahabad High Court in ***Mt. Rani Kunwar Vs. Mahbub Baksh***, reported in AIR 1930 All 252. He, therefore submitted that the impugned award to the extent it directs payment of Rs.9.11 Crores along with interest from 31/12/2010 is illegal and deserves to be set aside.

16. On the contrary, it is submitted by Shri Wadhwa, the learned Counsel for the respondent that the appeal would not be maintainable in the absence of the appellants depositing the part

of the amount, which the appellants do not dispute. In other words, it is submitted that unless and until the appellants deposit the amount of Rs.3.35 Crores which they admit, the appeal cannot be entertained.

17. It is next submitted that the Arbitration Act envisages minimum supervisory role to the Court over the umpire chosen by the parties consensually. It is submitted that under Section 28(3) of the Act, the Arbitral Tribunal shall be bound by the contract. Under Section 28(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. In this case, there is no agreement to show that the parties had authorised the Arbitrator to decide as an amiable compositeur. It is submitted that the view taken by the Arbitrator is a plausible view, which has been confirmed by the learned District Judge. It is submitted that the scope of interference available under Section 34 of the Act is limited and would be further restricted in an appeal under Section 37 of the Act.

18. It is next submitted that this would be a case of *novation* of the contract under Section 62 of the Contract Act in as much as the parties had substituted the additional agreement in

the place of the earlier two agreements. It is submitted that thus, the additional agreement would prevail. It is submitted that the appellants have paid a further amount of Rs.3.15 Crores in terms of the said additional agreement. Thus, the appellants having acted in furtherance of the said additional agreement, cannot now turn around and claim that the agreement is unenforceable or has become void on account of any Force Majeure or the prohibition / ban on mining. It is submitted that the decision in the case of **Goa Foundation** (supra), came after the award was passed by the Arbitrator. However, the ground based on the said decision, was not raised before the District Judge. It is next submitted that this was a case, in which the appellants had practised fraud and deceit in as much as the appellants had no rights in respect of the mining concession. The learned Counsel has referred to an agreement between M/s. Elray Minerals, which is the Concessionaire and M/s. Ambika Minerals, to submit that the mining rights were with M/s. Ambika Minerals. He, therefore, submitted that the impugned judgment, which is based on the admission of the appellants of the liability to pay Rs.12.26 Crores along with interest, cannot be faulted on any count.

19. At the outset, it may be mentioned that the objection to the maintainability of the appeal on account of non-payment/

deposit of the admitted liability to the extent of Rs.3.35 Crores, cannot be accepted. Rule 1(3) of Order XLI of C.P.C. only says that where the appeal is against the decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit. It is difficult to understand as to how on the basis of this provision, it can be inferred that unless and until the appellants deposit the amount, which may, in a given case, be admitted or undisputed, the appeal cannot be entertained. In the case of **Kayamuddin Shamsudduin Khan Vs. State Bank of India**, reported in (1998)8 SCC 676, while considering the provisions of Order XLI, Rule 1(3) of C.P.C.(as per the Bombay amendment and Rule 5(5)), it has been held that non-compliance with the direction given under Rule 1(3) to deposit the amount, cannot result into dismissal of the appeal. It is held that it can only result into dismissal of an application for stay of the execution. In the present case, there is no direction to deposit any such amount. Even where there is such a direction which if not complied, will not result into dismissal of the appeal as such. In view of this, the objection raised to the maintainability of the appeal has to be refuted.

20. Coming to the merits, the execution of three agreements is not in dispute. It is also not in dispute that the respondent has paid an amount of Rs.9 Crores to the appellants and as per the terms, the said amount was repayable in six instalments along with an amount at the rate of 4 \$ per Metric Tone towards the interest/ profits. It is further undisputed that the concerned mine, in respect of which, the appellants were holding the mining rights, is situated in the midst of a forest and requires permission/ clearance from the Forest Authorities. It is further undisputed that the Forest Authorities had insisted for permission to use the road, which is passing through forest, for carrying the Iron ore. It is further an admitted position that no mining activity was carried out and eventually that part of the contract, which envisages sell of 3 Lakhs Metric Tones of Iron or to overseas buyers never materialised. The parties had entered into the additional agreement on 29/05/2010, in which the parties had kept both the options open, namely a situation, where the appellants had agreed to perform their part under the sale agreement and the supplementary agreement and/ or to pay an amount of Rs.12.26 Crores to the respondents on or before 31/12/2010. It is true that the additional agreement refers to the sale agreement and the supplementary agreement and clause (g) thereof also says that none of the rights of the respondent under

the sale agreement and the supplementary agreement are in any way affected. However, it has to be appreciated in the context of the overall recitals in the additional agreement, which would show that the parties had kept either of the options open. As stated earlier, the reason for inability to perform their part of the contract by the appellants, is that none of the parties visualised that a separate permission from the Forest Department for use of the road to carry the Iron ore would be required. The parties had kept the option open, possibly with the hope that the permission may come through. The intention appears to be loud and clear. In the event the parties are able to abide by the original contract, the same would be open. Otherwise, the appellants would pay the amount of Rs.12.26 Crores, which comprises of the original consideration of Rs.9 Crores and an amount towards profit/interest.

21. The submissions on behalf of the appellants before the Arbitrator were essentially based on clause 17 of the agreement dated 17/07/2009 which reads thus :

“17. In the event both or either of the parties is unable to fulfill the terms and conditions of this Agreement due to force majeure or acts of God/ natural calamity or by reason of any Civil Commotion,

riots, local agitations, combination of workmen, war or by reason of strikes or lockouts affecting the establishments of the SELLER or his Contractor(s) or due to non-availability or restrictions of supplies of fuels, oils, lubricants, explosives and such other supplies and materials, insubordination and usurped power or due to any statutory or Government Restrictions, Court Orders including the results of the Special Leave Petition filed before the Supreme Court of India against the judgment and order dated 20/06/1997 passed in writ petition No.171 of 1990 by the High Court of Bombay, Panaji Bench, any lawful/legal claim made by any person including by a holder or surface rights, or on account of any fault of the SELLER arising on account of any act of omission or commission on the part of the SELLER, the aggrieved party shall have no claim whatsoever against the other party for breach of this Agreement and if through force majeure or for any reasons herein stated in this clause, the fulfillment by either party of any or all the terms and conditions of this Agreement be delayed, then the terms of this Agreement shall be automatically extended to the extent of such delayed period subject to the BUYER having the right to forthwith demand back and recover the amount remaining unpaid. It is specifically understood that under these circumstances this Agreement will not come to an end but however, subject to the Right of the BUYER, the reciprocal obligations and acts hereunder shall remain suspended during the period

of such condition of force majeure including the conditions listed above, continue to exist.”

22. It is submitted that clause 17 has to be read into the additional agreement, as the additional agreement cannot be said to be a standalone agreement. I would tend to disagree. In this regard, the learned Arbitrator in paragraph 25(a) of the award has held thus :

“25(a). Though, the Additional Agreement may not be a standalone agreement, but it will prevail to the extent it makes a departure from the earlier agreements and sets out a date for either payment of the amount or accomplishing the task of extraction of the iron ore, sale thereof to the Claimant, and thereafter its export to the foreign buyer after arranging a Letter of Credit in favour of the Claimant. Either of the obligations were to be performed by December, 31, 2010. Since the later part of the obligation was not fulfilled by the Respondents, therefore they were bound to pay the outstanding amount that admittedly remained due and remained unpaid by the aforesaid date. As already pointed out according to the Additional Agreement a sum of Rs.12.26 Crore was outstanding from the Respondents and admitted to be due from them to the claimant. Subsequently, a sum of Rs.3.56 Crore was paid by the Respondents to the Claimant, leaving a balance of Rs.8.70 Crore as unpaid.”

23. The learned Arbitrator has also negated the contention on behalf of the appellants that this was a case of common mistake of fact as to the permission of the Forest Department for using the forest road. It has been found in paragraph 23 of the award that the appellants before entering into the additional agreement must have known that the road, namely 'Durgini Sangod road' cannot be used for transportation, as it passes through forest/ Government land. The learned Arbitrator has referred to a letter dated 08/03/2010 of Tukaram Prabhu, a Constituted Attorney of M/s. Elray Minerals and Company, the concessionaire and partner of M/s. Ambika Minerals to the Deputy Conservator of Forests, North Goa, Forest Division in which, a permission was sought to transport the Iron ore from the road, claiming that it was away from human settlement and could be used, without causing any disturbance to anybody. Thus, in my considered view, the arguments based on any common mistake of fact, cannot be accepted. It has rightly been held by the learned Arbitrator that even though the additional agreement may not be a standalone agreement, it will prevail to the extent it makes departure from the earlier agreements and sets out a date for either payment of the amount or performing the contract as agreed, namely extraction, export and sale of the Iron ore to

overseas buyers. From the perusal of the award of the Arbitrator and the judgment of the learned District Judge, it does not appear that the provisions of Section 65 of the Contract Act were pressed into service. In my considered view, the same cannot be allowed at this stage. Secondly, because the additional agreement envisages both the situations, namely the sale agreement and the supplementary agreement being performed as per the terms agreed or payment of an amount of Rs.12.26 Crores and interest. In this regard, it may be mentioned that the learned Arbitrator has referred to a tripartite agreement dated 27/10/2009 between M/s. Elray Minerals, M/s. Ambika Minerals and the appellants, in which the appellants had claimed that they have mining rights. Although this agreement was relied upon to counter the case of fraud and deceit set up by the appellants, the fact remains that the constituted attorney of M/s. Elray Minerals and M/s. Ambika Minerals, with whom the respondent has tripartite agreement of mining, had sought permission from the Forest Department to use the road for carrying of the Iron ore. At any rate, when the additional agreement was entered into, it cannot be said that the parties were labouring under any common mistake of fact. As noticed earlier, the appellants are not disputing the liability to pay an amount of Rs.3.35 Crores as admittedly, they have repaid Rs.5.65 Crores out of Rs.9 Crores advanced. It is submitted on the

basis of Section 65 of the Contract Act that the contract being void, the appellants would only be liable to restore the benefits and not to any interest or profit. Once it is held that there was no common mistake of fact, which can be inferred when the additional agreement came to be executed, the provisions of Section 65 would not be attracted. Thus, reliance placed on the decision of the ***The Life Insurance Corporation of India*** and ***Mt. Rani Kunwar*** (supra), would not come to the aid of the appellants.

24. This takes me to the ground based on the decision of the Hon'ble Supreme Court in the case of ***Goa Foundation*** (supra). At the outset, it needs to be mentioned that this ground is for the first time raised before this Court. The decision of the Hon'ble Supreme Court in the case of ***Goa Foundation*** (supra) came on 21/04/2014 when the application under Section 34 was pending before the learned District Judge. As noticed earlier, the additional agreement envisages two options namely of enforcement of the contract as originally agreed or payment of Rs.12.26 Crores. The second part about agreement to pay Rs.12.26 Crores with interest is clearly segregated even assuming that the first part becomes unenforceable on account of the mining ban. The Arbitrator has also noticed that the appellants have paid

an amount of Rs.3.15 Crores in pursuance of the additional agreement and has thus, arrived at a figure of Rs.9.11 Crores, which is due and payable. Thus, the view taken by the learned Arbitrator appears to be a plausible view.

25. With the limited scope of interference available in an appeal under Section 37 of the Act, I do not find that any case for interference is made out. In the result, the appeal is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA