

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.08.2016

+ **O.M.P. (COMM) 352/2016 & IA No.9050/2016**

**THE STATE TRADING CORPORATION OF
INDIA LTD.**

..... Petitioner

versus

HELM DUNGEMITTEL GMBH & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Maninder Singh, ASG, Senior Advocate
with Ms Sumati Anand.

For the Respondents : Mr A. S. Chandhiok, Senior Advocate with
Mr Rahul P. Dave, Mr Bhaskar Tiwari, Mr Rohit
Mahajan and Mr Sumit Chopra for Respondent
no. 1.
Ms Anupam Dhingra for Respondent no.2
alongwith Ms Ruchi Sharma, Manager (Legal)
of Respondent no.2.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. State Trading Corporation of India Ltd. (hereafter 'STC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the award dated 29.04.2016 (hereafter 'the impugned award') passed by the Arbitral Tribunal (by majority). The Arbitral Tribunal was constituted by Justice A.P. Shah

(Retd.), Justice B.A. Khan (Retd.) and Justice Devinder Gupta (Retd.) (presiding). The impugned award was made by Justice Devinder Gupta (Retd.) and Justice A.P. Shah (Retd.); Justice B.A. Khan (Retd.) passed a dissenting award dated 07.04.2016.

2. The Arbitral Tribunal considered the disputes that had arisen between STC and Helm Dungemittel GmbH (hereafter 'HDG') - a company incorporated in Germany - in respect of a contract dated 01.10.2008, entered into between the said parties for sale and purchase of bulk prilled/granular Urea CFR India. By the impugned award, the Arbitral Tribunal, *inter alia*, held that HDG was entitled to receive the consideration for the urea supplied at the contracted price - US\$ 685.5 PMT. STC's claim that HDG had accepted the reduced price of US\$ 359 PMT for 20,563.01 MTs of Urea -being the quantity in excess of 3,00,000 MTs - was rejected.

3. Justice B.A Khan (Retd.) did not concur with the majority and delivered a dissenting award dated 07.04.2016. He held that there was a concluded contract, which could be inferred from the communications dated 24.10.2008, whereby HDG had agreed to the reduced price of US\$ 359 PMT for 20,563.01 MTs. He, accordingly, awarded a sum of US\$

73,82,117/- along with interest at the rate of 18% p.a. from the date of receipt, in favour of STC.

4. The principal controversy involved in the present petition is whether HDG had entered into a binding contract to accept a reduced price of US\$ 359 PMT - instead of US\$ 685.5 PMT - for 20,563.01 MTs being the quantity in excess of 3,00,000 MTs.

Factual Background

5. STC is a trading house owned by the Government of India. On 17.09.2008, STC floated a tender for supply of bulk prilled/granular Urea. The said tender was opened and HDG's bid was accepted as it was the lowest. STC confirmed the same by issuing a Letter of Intent on 25.09.2008 for supply of 3,00,000 MTs of Urea; it was specified that under no circumstances the quantity was to exceed 3,00,000 MTs.

6. Thereafter, STC sought confirmation from Department of Fertilizers, Government of India (hereafter 'DOF') for permitting STC the flexibility to place orders and receive shipment of 3,00,000 +/- 10% MTs of bulk prilled/granular Urea. On receipt of such confirmation, STC and HDG signed a contract dated 01.10.2008 (hereafter 'the Contract') for sale and

purchase of 3,00,000 +/- 10% MTs of bulk prilled/granular Urea at the rate of US\$ 685.50 PMT CFR. The shipment of cargo was latest by 15.10.2008. In terms of the Contract, HDG was obliged to furnish an irrevocable performance bank guarantee (hereafter 'PBG') for a value of 3% of the total Contract value of the maximum guaranteed quantity to be shipped under the Contract, including tolerance quantity.

7. HDG submitted the PBG in the sum of US\$ 6,169,500/-, which was increased to US\$ 6,786,450/- so as to include the tolerance quantity of +/- 10%. The PBG was issued by Canara Bank at the request of HDG's banker, Hypo-Vereins Bank; Hypo-Vereins in turn issued a counter guarantee in favour of Canara Bank.

8. STC claims that on 13.10.2008 certain discussions were held between representatives of HDG and STC and it was decided that the maximum delivery of Urea be capped to 3,00,000 MTs. On 15.10.2008, STC sent a message to HDG indicating its decision to cap the delivery of Urea at 3,00,000 MTs. However, prior to that six out of nine vessels had already been loaded and sailed; two had completed loading (MV Habibe Ana and MV Lindos) and only one vessel, that is, MV Jia Hua was under loading which was ultimately loaded with 23,011 MTs as against the

intended quantity of 32,447 MTs. HDG claims that it withheld loading of 9,436 MTs of Urea in good faith, although it was not obliged to do so in terms of the Contract.

9. Thereafter, on 22.10.2008, STC informed HDG that it would accept only 3,00,000 MTs of Urea. STC claimed that it had agreed to the tolerance of +/- 10% in good faith for efficiency in shipments but HDG had continued loading even though the vessels carrying the contractual quantity of 3,00,000 MTs had been loaded.

10. The controversy arose in the context of a sharp decrease in the price of Urea; the lowest tendered price pursuant to a tender that opened on 15.10.2008 was US\$ 359 PMT.

11. On 23.10.2008, HDG's Agent made a representation to the Minister of Chemicals and Fertilizers requesting the Minister to instruct STC to perform its contractual obligations. On 24.10.2008, STC wrote a letter to HDG wherein it was stated that HDG *“may like to look into the possibilities of accepting the last tender/ordered price in IPL tender which was finalized on 15 October 2008 for the excess quantities loaded”*. This was responded to by Everest Fertilizers (HDG's Agent and hereafter

referred to as 'Everest') *inter alia* stating that “*we confirm our acceptance to your proposal and agree to the ordered price of US\$ 359 PMT CFR Pipavav in the IPL tender which closed on 15.10.08 for the additional quantity of 20,563.01 PMT on board vessel MV Jia Hua*”. This letter was subsequently withdrawn. It is STC's case that the above communications resulted in a binding contract; HDG disputes this.

12. STC was notified about the arrival of the vessel(s) and their readiness to discharge the Cargo. The representatives of STC also accepted the notices of readiness. The entire cargo of all the three aforesaid vessels was received by STC without demur. HDG received payment for the said quantity under a Letter of Credit dated 01.10.2008. Thus, both the parties, notwithstanding the aforesaid controversy, discharged their obligations under the Contract.

13. Hypo-Vereins Bank by a letter dated 12.11.2008 put STC on notice of due performance of Contract. However, STC by a letter dated 10.02.2009 invoked the PBG wherein it stated that HDG “*has failed to perform their contractual obligations*”.

14. HDG challenged such invocation before this Court in CS(OS) 313/2009. By order dated 13.02.2009, this Court granted an ad-interim injunction restraining Canara Bank from releasing the amount of the PBG and STC was restrained from encashing the same. Canara Bank applied to vacate the injunction which was allowed by an order dated 11.03.2011. HDG appealed against the aforesaid order before a Division Bench of this Court (in FAO (OS) 170 of 2011). The Division Bench, by an order dated 28.03.2011, directed HDG to deposit the amount stated in the PBG with the Registrar General of this Court which was duly complied with. As per the directions of this Court in its order dated 16.05.2011, HDG also deposited an additional amount of ₹3,04,37,228/-.

15. On 31.05.2011, this Court directed that the amount deposited with this Court be kept with Canara Bank. On 12.09.2011, this Court further directed that the sum of ₹3,04,37,228/- lying with this Court would continue to remain so till a decision is rendered in CS(OS) 313/2009. Thereafter, in the order dated 30.09.2011, this Court recorded that Canara Bank was willing to go for arbitration on certain terms of reference and granted HDG and STC time to examine the same. On 10.01.2012, this Court expressed its anguish in respect of the unreasonable stand taken by

Canara Bank for not agreeing to resolution of disputes by arbitration. HDG carried the matter to the Supreme Court by way of a Special Leave Petition (being SLP (Civil) No.8589 of 2012) against the orders dated 12.09.2011 and 10.01.2012, which was dismissed by an order dated 10.05.2012 but HDG was granted liberty to move this Court for review of its order.

16. Pursuant to the above order, HDG filed a review petition (being RP No.356 of 2012) in this Court. This Court, vide order dated 02.11.2012, referred the disputes between HDG and STC along with Canara Bank to arbitration.

Proceedings before the Arbitral Tribunal

17. Before the Arbitral Tribunal, HDG filed a Statement of Claim as under:-

“A. For a sum of US\$6,786,450 (United States Dollars Six Million Seven Hundred Eighty Six Thousand Four Hundred and Fifty), payable to the claimant by the respondents jointly and severally as both parties acted in collusion with each other;

B. Interest at the rate of 18% per annum from the Award amount from 15th April, 2011 till realization payable jointly and severally by the respondents;

C. For a sum of US\$ 676,910 (United States Dollars Six Hundred Seventy Six Thousand Nine Hundred and Ten) along with interest calculated at the rate of 8.5% per annum from 23rd

May, 2011 till realization and direct respondent No.1 to make good any deficiency in view the exchange rate fluctuation besides interest at the rate of 18% per annum minus the interest that would have accrued on the fixed deposit made with the Hon'ble High Court of Delhi (Registrar General of Hon'ble High Court of Delhi);

D. For a sum of US\$ US\$ 2,763,710 (United States Dollars Two Million Seven Hundred Sixty Three Thousand Seven Hundred Ten) from respondent No.1 along with interest calculated at the rate of 18% per annum from 15th October, 2008 till realization;

E. *Pendente lite* and future interest jointly and severally payable by the respondents at the rate of 18% per annum;”

18. It is HDG's case that the Contract was for the supply of 3,00,000 +/- 10% MTs quantity of Urea and HDG was not obliged to cap the quantities at 3,00,000 MTs as messaged by STC on 15.10.2008. However, in good faith, it did not load a quantity of 9,436 MTs onto the vessel MV Jia Hua – the only vessel under loading. HDG claimed that it had incurred heavy losses on dead freight, due to cancellation of the quantities already bought.

19. STC claimed that its communication dated 24.10.2008 to HDG and Everest's response thereto resulted in a binding contract, whereby STC's obligation to pay for 20,563.01 MTs of Urea stood reduced to US\$ 359 PMT. As indicated earlier, this was stoutly disputed by HDG.

20. In respect of invocation of PBG, it was HDG's stand that once the payments were released against the letter of credit under which the documents were negotiated and accepted, there was no occasion for STC to have invoked the PBG; the PBG stood discharged on delivery of the cargo. Further, it was submitted that Hypo Vereins Bank by its communication dated 12.11.2008 had conveyed to Canara Bank that HDG had "*duly delivered goods as per the related contract*". HDG submitted that it had shipped the entire quantity of goods within the time stipulated, that is, 15.10.2008 and STC had taken the delivery without any protest. There was no allegation as to the quality of the goods supplied. Therefore, encashment of PBG by STC by wrongly alleging that it was invoked due to non-performance of the Contract was fraudulent.

21. Insofar as STC's contention that HDG had agreed to accept the reduced price is concerned, HDG contended that Everest did not have the authority to alter or modify the Contract entered into between STC and HDG and, therefore, HDG was not bound by Everest's communication to accept reduced price for the excess quantity of 20,563.01 MTs. In the alternative, HDG also contended that Everest's communication dated 24.10.2008 did not result in a concluded contract as STC's letter could not

qualify to be an offer, the acceptance of which could lead to a binding contract.

22. Whilst the Arbitral Tribunal rejected the contention that STC could not bind Everest as HDG's agent, the Arbitral Tribunal (by majority) accepted HDG's contention that STC's letter dated 24.10.2008 was not an offer, the acceptance of which could result in a binding contract between the parties.

23. The Arbitral Tribunal referred to the decision given by the Supreme Court in **Bank of India and Ors. v. O.P. Swarnakar: (2003) 2 SCC 721** and held that the question whether a statement is an offer or an invitation to treat, would depend primarily on the intention with which it was made. It observed that a statement would be an offer if the person making the said offer intends to be bound by it upon the other party communicating its assent thereto.

24. In the given facts of the present case, the Arbitral Tribunal held that STC's communication of 24.10.2008 calling upon HDG *“to look into the possibilities of accepting the last tender/ordered price in IPL Tender which was finalized on 15 October, 2008 for the excess quantities loaded”* was

essentially in the nature of eliciting a response and did not bind HDG on Everest confirming its willingness to accept the lower price.

25. With regard to the issue of encashment of the PBG, the Arbitral Tribunal observed that HDG had performed its obligation under the Contract and therefore, there was no occasion for STC to utilize the PBG to avail of price reduction.

Submissions

26. Mr Maninder Singh, learned Additional Solicitor General appearing for STC submitted that the impugned award was contrary to the provisions of the Indian Contract Act, 1872 (hereafter 'the Contract Act'). He submitted that having held that Everest was authorized to accept a reduced price on behalf of HDG, the Arbitral Tribunal had grossly erred in holding that Everest's fax dated 24.10.2008 did not result in a binding contract between HDG and STC. He submitted that the Arbitral Tribunal's conclusion that STC's communication dated 24.10.2008 did not amount to offer under Section 2(a) of the Contract Act was untenable. He emphasized that the fax dated 24.10.2008 sent by Everest in response to STC's letter, clearly referred to STC's letter as a 'proposal'. He contended that, therefore, there could be no dispute that STC's communication of the said date was a

proposal since the parties had always understood that to be so. He further contended that the Arbitral Tribunal's reasoning that the communications between the parties did not result in a binding contract since the same had not been approved by DOF was also perverse and contrary to the terms of the Contract.

27. Mr Singh referred to clause 18 of the Contract, which expressly recorded that Government of India was not a party to the Contract and had no liability, obligation or rights under the Contract. Further, it was expressly stated that STC was an independent legal entity with power and authority to enter into contracts on its behalf. He submitted that in view of clause 18 of the Contract, the reasoning that since the approval of DOF had not been received, there was no binding contract, was *ex facie* flawed.

28. Mr Singh relied strongly on the dissenting award dated 07.04.2016 passed by Justice, B.A. Khan (Retd.), wherein the Arbitrator had held that STC's letter dated 24.10.2008 was a proposal within the meaning of Section 2(a) of the Contract Act. In his view, the said letter had to be read in the context and the background in which it was addressed by STC to HDG. He observed that STC had refused to accept the surplus quantity above 3,00,000 MTs and in this context HDG had made a representation to the

Minister of Chemicals and Fertilizers requesting him to instruct STC to accept the excess quantity. He observed that STC's communication of 24.10.2008 must be evaluated in the context of the efforts being made by the parties to resolve the disputes through meetings and negotiations. In his view, STC's letter dated 24.10.2008 encapsulated the sum and substance of the negotiations and in that context it must be read to be an offer which was duly accepted by HDG (through Everest), resulting in a binding contract.

29. Mr A.S. Chandhiok, learned Senior Advocate countered the arguments advanced by Mr Singh. He referred to the communications of 24.10.2008 and submitted that the said communications clearly indicated that STC's letter dated 24.10.2008 was not a proposal. Therefore Everest's fax dated 24.10.2008, at best, could be read as an offer and since the same was withdrawn prior to its acceptance, there was no contract whereby HDG could be bound to accept a lower price for the goods already supplied and accepted by STC.

Reasoning and Conclusion

30. As rightly noticed by the Arbitrator (Justice, B.A. Khan (Retd.)) in his dissenting opinion/award, the central controversy revolves around issues No.3 and 20 struck by the Arbitral Tribunal, which read as under:-

“3. Whether the Claimant agreed for price reduction from USD 685.5 PMT to USD 359 PMT for the quantity supplied above 3,00,000 MT?

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20. Whether acceptance of the proposal of STC by the Claimant vide communication dated 24.10.2008 resulted in / or amounted to novation/amendment of the contract? If so, what is the effect of novation/amendment?”

31. The decision on the aforesaid two issues depends on the interpretation of the communications exchanged between Everest (on behalf of HDG) and STC and HDG. The same are set out hereafter.

32. On 24.10.2008, at 07:35 PM, STC addressed a letter to HDG which reads as under:-

“Dear Sir,

This has reference to letter dated 23 October 2008 addressed by your resident agents in India, M/s Everest Fertilizers, Mumbai to Hon'ble Minister for Chemicals & Fertilizers, Government of India. Department of Fertilizers, Ministry of Chemicals & Fertilizers, has forwarded a copy of the above letter to us for necessary action on our part.

2. The issue regarding tolerance of the total quantities was discussed in a series of meetings with the official of Department of Fertilizer (DOF) with a view to resolve the impending issue of quantities loaded beyond 3.00 Lakh MT. Based on our discussion with DOF, you may like to look into

the possibilities of accepting the last tender/ordered price in IPL tender which was finalized on 15 October 2008 for the excess quantities loaded.

3. We would request you to kindly let us have your written confirmation at the earliest, preferably by early next week so that we can approach DOF with a view to find a solution to this issue.

Thanking you,

Yours truly,
For STC of India Limited

(Samir Kaul)
Chief General Manager”

33. The aforesaid letter was responded to by HDG's agent, Everest, on the same date and reads as under:-

“Dear Sir,

Sub.: Supply of urea against contract No. STC/UREA/HELM/1/2008-09 dt. 01.10.08

Kindly ref your letter dated 24.10.08 on the above mentioned subject MV JIA HUA which was nominated and accepted for discharging of Pipavav was under loading at the time of receipt of your letter of 15.10.08. We immediately restricted the quantity in this vessel and loaded 23012.208MT to MV JIA HUA is carrying the alleged additional quantity of 20563.011 MT.

Keeping in view our relationship with STC and DOF we confirm our acceptance to your proposal and agree to the ordered price of US\$ 359 PMT CFR Pipavav in the IPL tender which closed on 15.10.08 for the additional quantity of 20,563.01 PMT on board vessel MV JIA HUA.

Kindly confirm same at the earliest.

Thanking you

Yours truly
Sd/-
Rajiv Kapur
Stamp Everest Fertilisers”

34. On the same date, that is, 24.10.2008, Everest sent another letter to
STC which reads as under:-

“Dear Sir,

Sub.: Supply of urea against contract No.
STC/UREA/HELM/1/2008- 09 dt. 01.10.08

In continuation to our letter dated 24.10.08, we have been
advised by our principals M/s Helm Dungemittel GmbH that
their Board of Directors have not approved the proposal and
accordingly, our letter dated 24.10.08 may kindly be treated as
withdrawn.

Thanking you

Yours truly
Rajiv Kapur
Stamp Everest Fertilisers”

35. STC claims that the above-mentioned communication from Everest
withdrawing its earlier letter was received by STC on 27.10.2008. STC
claims that in the meanwhile, STC sent a letter dated 24.10.2008 to DOF

seeking confirmation for accepting the quantity of 20,563.01 MTs at a price of US\$ 359 PMT. The said letter reads as under:-

“Dear Sir,

Kindly refer to the tender by STC on 17 September 2004 for import of Urea on Government account which opened on 23 September 2008. Based on the tender results, M/s Helm Dungemittel GmbH, Hamburg, Germany(L-1 bidder) was awarded the contract on the basis of their CFR quotation, Department of Fertilizers had asked STC for releasing order for 3,00,000 MT and accordingly L/C was opened on M/s Helm Dungemittel, Hamburg. Since these were CFR contracts and M/s Helm Dungemittel was required to arrange for the shipping speed, +- 10% was offered based on tender terms. We had also written letter dated STC/UREA/MP/2008 dated 30 September 2008 to Department of Fertilizers seeking their formal approval for this +-10% flexibility which is a standard international notion.

In view of the delivery schedule, M/s Helm Dungemittel were required to complete the shipping on an urgent basis and the details of shipment undertaken by them against STC's order is given in the Annexure attached herewith.

Having regard to the drastic fall in Urea prices in the international market, M/s Helm Dungemittel was asked in writing to cap the quantity to be shipped within 3,00,000 MT on 15.10.2009. Since by that time most of the vessels were already loaded and had sailed, M/s Helm Dungemittel reduced the quantity on the last vessel which was under loading for discharge at Pipavav port. However, the total Urea shipment affected by M/s Helm Dungemittel under this contract stands at 320,563.01 MT which is within the standard shipment tolerance level.

Since Urea prices were perpetually falling, discussion were held with M/s Helm Dungemittel and accordingly they have proposed, in writing, that for the quantities shipped (sic) beyond 3,00,000 MT they are willing to accept the price of L-1 bid for CFR Pipavav port finalized by IPL in their tender which closed on 15 October 2008, since the last vessel which was loaded on 15 October 2008 by M/s Helm Dungemittel was for discharge of cargo at Pipavav port.

Accordingly, we would request you to kindly let us have your confirmation for accepting the quantity of 20,563.01MTs (which is the quantity shipped beyond 3,00,000 MT) per MV JIA HUA destined to discharge Urea cargo at Pipavav may be paid @ L-1 price of US\$ 359 PMT CFR Pipavav, which was the rate ordered by IPL on 15 October 2008 for the cargo destined for discharge at Pipavav port.

Kindly consider our request favorably and let us have your confirmation on the above at the earliest.

Thanking you,

Yours sincerely
Sd/-
(S.S. Roy Burman)
Director –Marketing”

36. On 27.10.2008, STC responded to Everest's letter dated 24.10.2008 (stated to have been received by fax on 27.10.2008). The said letter dated 27.10.2008 is reproduced as under:-

“Dear Sir,

We write w.e.f. your letter dated 24.10.2008 relayed on 27th October, 2008 over fax to us at around 14:21 hrs. The letter refers to the captioned matter. Be that as it may, we hasten to

inform you that based on your letter of 24 October, 2008, which was received by us the same day, we have since submitted our proposal to the Department of Fertilizers during early hours on 27th October, 2008 conveying your willingness to supply the quantities of Urea in excess of 3,00,000 MT @ US\$ 359 PMT CFR i.e. the L-1 bid received against IPL tender which closed on 15.10.2008.

We are therefore, unable to act on your letter received a while ago at this juncture.

Thanking You,

Yours truly,
Sd/-(Samir Kaul)
Chief General Manager”

37. There can be no quarrel to the question as to whether a statement is an offer or an invitation to treat, would depend primarily on the intention with which it was made. Indisputably, a statement would be an offer if the person making the said offer intends to be bound by it upon the other party communicating its assent thereto. Further, the statement would be an offer if acceptance of it by the offeree would result in a binding contract.

38. Thus, the principal question that needs to be addressed is whether on Everest confirming to accept the lower price of US\$ 359 PMT for the additional quantity of 20,563.01 MTs by its communication dated 24.10.2008, STC became bound to pay the aforesaid price. Plainly, the

answer to the aforesaid question would have to be in the negative. There was no confirmed offer by STC agreeing to pay US\$ 359 PMT in its communication dated 24.10.2008. It is also relevant to note that STC had requested HDG to give its written confirmation in order that STC “*can approach DOF with a view to find a solution to this issue*”. This clearly indicated that STC was seeking the confirmation only to find an amicable solution.

39. This communication by no stretch confirmed that STC would be bound to pay the price as was finalized on 15.10.2008 under the IPL's tender (that is, US\$ 359). It is amply clear that the confirmation by Everest did not bind STC as STC's communication to HDG was clearly not an unequivocal offer or proposal. In the present case, STC is pursuing its contention that HDG is bound by its confirmation - made through Everest - to accept a lower price of US\$ 359 PMT; however, the question to ask is whether HDG could - on the basis of STC's letter of 24.10.2008 - compel STC to pay the price of US\$ 359 PMT if STC did not want to pay that price? The answer is obviously in the negative because STC's letter dated 24.10.2008 cannot by any stretch be held to be STC's firm offer.

40. On 24.10.2008, STC also sent a letter to DOF seeking confirmation for accepting the quantity of 20,563.01 MTs at US\$ 359 PMT. This also clearly indicated that STC's letter to HDG to look into the possibility of accepting the lowest price tendered in a tender finalized on 15.10.2008 (that is, US\$ 359 PMT) was not a confirmed offer at the material time since, at that time, STC had not got the confirmation from DOF as requested by it.

41. Mr Singh's contention that communication between STC and DOF were internal matters and are not relevant, is wholly bereft of any merit. The reliance placed by him on clause 18 of the Contract which clarifies that Government of India was not a party to the contract, is also completely misplaced. The issue is not whether there was any contractual relationship between DOF and HDG or whether HDG was bound by any decision of DOF. The point in issue is whether STC's letter dated 24.10.2008 to HDG constituted a proposal/offer within the meaning of Section 2(a) of the Contract Act. In order to address that issue, it is relevant to refer to the correspondence between STC and HDG. The aforesaid letter of STC to HDG did not, on the face of it, indicate that it was an offer; on the contrary, the letter reads as eliciting HDG's willingness to accept the L-1 price of the 15.10.2008 tender, so as to enable STC to take up the matter with DOF.

The communication between STC and DOF is, thus, material and relevant as it clearly indicates the reason as to why STC's letter could not be considered as its firm offer. It clearly, indicates that STC had not committed to be bound as according to it, it still required the confirmation from DOF for proceeding ahead. The question whether STC required any confirmation from DOF is not relevant but the fact that STC was seeking confirmation from DOF does provide the reason as to why the letter addressed by STC to HDG was worded the way it was.

42. I find the dissenting view recorded by Justice B.A. Khan (Retd.) unsustainable. HDG had approached the Minister of Chemicals and Fertilizers by its letter dated 23.10.2008 requesting him to instruct STC to honour its contractual commitments. Learned Arbitrator has held that STC's letter to HDG that followed on 24.10.2008 must be read in the context of the negotiations and the representation made by HDG and this itself indicates STC's letter to contain a firm offer to which STC would be bound by immediately on its acceptance by HDG. As I see it, the communications between STC and DOF as well as the background of negotiations adverted to by the learned Arbitrator are indicative of an exercise to find an amicable solution. It does not indicate the formation of a binding contract.

43. Although, this Court has examined the decision of the Arbitral Tribunal on merits, that is not the scope of Section 34 of the Act. It is well settled that a Court while considering a petition under Section 34 of the Act does not sit as an Appellate Court to re-appreciate the evidence and the conclusions arrived at by the Arbitral Tribunal.

44. The substratal rationale of restricting the interference by a Court is to hold the parties to their bargain and the parties having committed to accept the decision of the Arbitral Tribunal as final and binding cannot be permitted to assail the same except on the limited grounds as specified in Section 34 of the Act. STC seeks to place its challenge within the scope of Section 34(2)(b)(ii) of the Act, that is, it contends that the impugned award is in conflict with the public policy of India.

45. In order for STC to succeed, it would be necessary to conclude that the Arbitral Tribunal's view is not a plausible one and could not have been arrived at on the basis of the evidence on record. In other words, no reasonable person instructed in law could not have, on the basis of the aforementioned communications of 24.10.2008, come to the conclusion that there was no binding contract between STC and HDG. In the facts of the present case, such conclusion is not possible.

46. In *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.*:

(2009) 10 SCC 63, the Supreme Court held as under :-

“(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

In that case, the arbitrator had taken a view that refusal on the part of Steel Authority of India to supply material did not fall within the ambit of the relevant terms in the compensation clause (7.2). In that context the Supreme Court observed that:

“27...Whether this is or is not a totally correct view is really immaterial but such view is a possible view that flows from reasonable construction of Clause 7.2....

28...Once the arbitrator has construed Clause 7.2 in a particular manner, and such construction is not absurd and appears to be plausible, it is not open to the courts to interfere with the award of the arbitrator...”

47. A similar view was expressed by the Supreme Court in *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India*:

(2010) 11 SCC 296. In that case the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at

the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

48. Although, the aforesaid judgments were in context of the Arbitration Act, 1940, the above view expressed by the Supreme Court is still good law since the scope of interference in an arbitration award has been further restricted under the Act. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*: (2012) 5 SCC 306, the Supreme Court referred to the above quoted passage from the decision in *Sumitomo Heavy Industries Limited* (*supra*) as instructive.

49. In view of the above, the petition is dismissed. The pending application also stands disposed of.

VIBHU BAKHRU, J

AUGUST 10, 2016
RK/pkv