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

% *Judgment reserved on: 25.04. 2018*

Judgment Pronounced on: 30.05.2018

+ **FAO(OS) (COMM) 76/2016**

STATE TRADING CORPORATION OF INDIA Appellant

Through: Mr.Sandeep Sethi, Senior Advocate (ASG) with Mr.Tarkeshwar Nath, Ms.Sumati Anand, Mr.Saurabh Kumar Tuteja and Mr.Onkar Nath Advocates.

versus

HELM DUNGEMITTEL GMBH & ANR Respondents

Through: Mr.Rahul P. Dave, Mr.Amit Dhingra, Mr.Bhaskar Tiwari, Mr.Rohit Mahajan and Mr.Shivam Kumar Raheja, Advocates for respondent no.1.
Mr.Pradeep Dewan, Senior Advocate with Ms.Anupam Dhingra, Advocate for respondent no.2/Canara Bank.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial

Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 10 of Delhi High Court Rules (*hereinafter referred to 'the Act'*).

2. The challenge in this appeal is to the judgment of the learned Single Judge dated 10.08.2016 by which the objections to the Award filed by the appellant herein stand dismissed.
3. Some necessary facts which are required to be noticed for the disposal of this appeal are that the appellant had floated a tender for supply of bulk prilled/granular Urea on 17.09.2008. The tender of the respondent no.1 herein was accepted being the lowest. A Letter of Intent was issued on 25.09.2008 for supply of 3,00,000 Metric Tons (*in short 'MTs'*) of Urea. As noticed by the learned Single Judge, State Trading Corporation (*hereinafter referred to as 'STC'*) sought confirmation from Department of Fertilizers, Government of India (*hereinafter referred to as 'DOF'*) for permitting STC the flexibility to place orders and receive shipment of 3,00,000 +/- 10% MTs of bulk prilled/granular Urea. The parties signed a Contract dated 01.10.2008 (*hereinafter referred to as 'the Contract'*) for purchase of 3,00,000 +/- 10% MTs of bulk prilled/granular Urea. The agreed rate was US\$ 685.50 PMT CFR. The goods were to be supplied latest by 15.10.2008. It is not in dispute that in terms of the Contract, the respondent furnished an irrevocable performance bank guarantee (*hereinafter referred to as 'PBG'*) for a value of 3% of the total Contract value. Accordingly, the respondent no.1 furnished PBG to

the tune of US\$ 6,169,500/- which was subsequently increased to US\$ 6,786,450 in order to include the tolerance quantity of +/- 10%.

4. It is also the case of the appellant herein that the price of the Urea had fallen to the extent that a tender was opened by STC on 15.10.2008 for US\$ 359 PMT arising out of another independent tender. It is in this backdrop *i.e.* a fall of the price of the Urea, that certain discussions took place between the agent of the respondent no.1 and the appellant herein, including a representation by the agent of the respondent no.1 to the Minister of Chemical of Fertilizers to call upon STC to perform its contractual obligations.
5. It is the case of the appellant that pursuant to the discussions, a communication dated 24.10.2008 was addressed by the STC to the respondent no.1 wherein a request for accepting the price equivalent to the independent tender finalized on 15.10.2008 for the excess quantities loaded *i.e.* beyond 3,00,000 MTs of Urea was made. It is the case of the appellant that the agent of the respondent *i.e.* Everest Fertilizers confirmed and accepted the proposal and, thus, the parties *i.e.* the appellant and the respondent no.1 agreed for varying the conditions of the Contract and the Urea in addition to 3,00,000 MTs of Urea was, thus, to be shipped @ US\$ 359 PMT.
6. The consistent stand of the respondent no.1 before the Arbitrators as has been reiterated before this Court has been that the Contract between the parties could not have been varied except in writing. The agent of the respondent no.1 had on the same date withdrawn the consent so given. The parties were *ad-idem* that Urea in excess of

3,00,000 MTs was to be supplied at the fixed rate in terms of the Contract which is evident upon the fact that the goods including the quantity over and above 3,00,000 MTs were shipped and they were accepted without any protest and demur. The terms of the letter of credit as agreed were neither varied nor amended and the amounts stood released in favour of the respondent no.1. In short, the terms of the Contract stood fulfilled and any attempt on part of the appellant to change the conditions of the Contract post conclusion of the Contract was unacceptable.

7. Additionally, it is the stand of the respondent no.1 that the communication dated 24.10.2008 was merely an invitation to offer and in case, invitation to offer was accepted, it was for the appellant to accept the same which the appellant did not. It is also the contention of the respondent no.1 that the offer so made was only conditional in nature as the appellant at no stage had the approval of DOF which is apparent from reading of the communication.
8. In this backdrop, Mr.Sandeep Sethi, learned Additional Solicitor General has laboured hard to contend that the Majority Award (*hereinafter referred to as 'the Award'*) is liable to be set aside and the order of the learned Single Judge suffers from errors on the face of the record. The Award and the Judgment are contrary not only to the statutory provision of Indian Contract Act, 1872 but also to the principles of law laid down in various judgments passed by this Court. It is contended by Mr.Sethi that the learned Single Judge failed to appreciate that the communication dated 24.10.2008 was, in fact, an

offer/proposal made by the appellant to the agent of respondent no.1 proposing a price of US\$ 359 PMT for the shipping quantity of fertilizer in excess of 3,00,000 MTs.

9. Mr.Sethi, learned ASG appearing for the appellant contends that STC had made a firm offer to the agent of the respondent no.1 which was accepted and, accordingly, the terms of the Contract stood modified. Mr.Sethi further submits that the learned Single Judge has completely lost track of the fact that in view of falling price of the Urea, disputes had arisen between the parties regarding the tolerance quantity of +/- 10% which led to negotiations between the parties and with a view to resolve the matter, a meeting was held on 13.10.2008, two (2) days before the completion of delivery. This meeting was attended by the Managing Director of the respondent and pursuant to the discussions during the meeting, STC had faxed the letter on 15.10.2008 to the respondents to cap the quantity of 3,00,000 MTs. Despite receipt of the communication, the respondent continued to load the vessels thereby resulting in excess delivery.
10. Mr. Sethi, learned ASG has also laboured hard to clarify that the DOF had no role to play in the entire transaction which is evident from the fact that admittedly DOF was not a party to the Contract. Thus, DOF had neither competence or *locus standi* nor had any control to grant or refuse the acceptance of the Contract between the appellant and the respondent no.1. Mr. Sethi, learned Senior Counsel for the appellant has placed reliance on Clause 18 of the Contract which is reproduced below:

“18.NO LIABILITY/OBLIGATION OF GOVT. OF INDIA UNDER THIS CONTRACT.

It is expressly understood and agreed by and between the Seller and STC that STC is entering into this agreement solely on its own behalf and not on behalf of any other person or entity. In particular, it is expressly understood and agreed that Government of India is not a party to this agreement and has no liabilities; obligations or right hereunder. It is expressly understood and agreed that STC is an independent legal entity with power and authority to enter into contracts, solely on its behalf under the applicable laws of India and general principles of contracts laws. The Seller expressly agrees, acknowledges and understands that STC is not an agent representative or delegate of the Govt. of India. It is further understood and agreed that Govt. of India is not and shall not be liable for any acts, omission, commission, breaches or other wrongs arising out of the contract. Accordingly, STC hereby expressly waives, releases and foregoes any and all actions on claims including cross claims, impleader claims or counter claim against the Government of India arising out of this contract and covenants not to sue Govt. of India as to any manner, claim, causes of action or thing whatsoever arising out of or under this agreement.”

11. Mr.Sethi, learned ASG further contends that learned Single Judge has placed undue weightage and misread the communication to hold that the consent of Ministry of Fertilizer was required prior to change of the Contract. It is also contended by the learned ASG that reference to Ministry of Fertilizer in the communication was an internal issue between the appellant and the Ministry of Fertilizers and the same had little or no relevance to the terms of the Contract between the appellant and respondent no.1. It is also the contention of the learned ASG that the conclusion of the Tribunal and the learned Single Judge that the letter of 24.10.2008 of STC was not a proposal or an offer but

merely an invitation to treat or solicit an offer from respondent no.1 is contrary to the Contract Act. It is also contended before us that the finding of the learned Single Judge and the Tribunal are perverse to the extent that the final acceptance was to be made by DOF while losing sight of the fact that neither Union of India was a party to the Contract nor any liability was fastened on DOF. It is also contended by learned ASG appearing for the appellant that the respondent no.1 was the first to approach the Ministry of Chemicals and Fertilizers with a view to resolve the matter and the price was reduced in the form of a solution and it is for this reason that the agent of the respondent had accepted the reduced price to US\$ 359 PMT. It is also contended that once the parties had agreed to reduce the rate, the respondent no.1 cannot raise a plea that the amendment to the Contract could be carried out only in writing as there was no bar between the parties to resolve the matter amicably between them.

12. Mr.Sethi, learned ASG also contends that the Arbitrators while giving the Majority Award had the benefit of the Minority Award but they failed to give any reason for not accepting the minority view. Mr.Sethi has relied on the observations of a learned Single Judge of this Court in the case of ***Union of India vs. Niko Resources Limited & Anr.***, reported as 191 (2012) DLT 668, more particularly para 43 and 51 which read as under:

*“43. One of the first objections raised by Mr. A.S. Chandhiok, learned ASG appearing for the UOI was that the undue delay in the majority in pronouncing its Award vitiated the Award. He placed reliance on the decision of this Court in **Harji Engg. Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd.**, 153 (2008) DLT 489. He submitted that the explanation offered regarding the health problems of the two Arbitrators, could*

*not satisfactorily account for the extraordinary delay of over four years in pronouncing the Award. Further, there was no satisfactory explanation for not dealing with the findings of the third Arbitrator who had dissented. He relied on the decision in **M/s Subhash Chugh & Co. v. M/s Girnar Fibres Ltd.**, 2000 (3) RAJ 461 (P&H) to urge that it was incumbent for the two Arbitrators who delivered the majority Award to have discussed the draft Award of the third Arbitrator by holding a meeting after conclusion of the final arguments. He also referred to the observation of the Supreme Court in **P.H. Pandian v. P. Veldurai JT**, 2001 (9) SC 10.*

51. *Therefore, one factor that weighed with this Court in PEAK was that notwithstanding the delay, the impugned Award had comprehensively dealt with all the submissions made by the parties and the issues that arose. However, in the present case on this aspect, for the reasons discussed hereafter, the majority Award does not inspire confidence. While it has dealt with the submissions of the parties in detail, it did not deem it appropriate to deal with the findings of Justice Wadhwa in his dissenting Award. The majority acknowledges that the draft Award of Justice Wadhwa was received by them in good time. They found that "there were basic differences in our approach and reasoning and it could hardly be expected that we all would be able to agree upon a common Award". Yet, the reasons given by the majority for not meeting with him "although he was willing to have a meeting" are not satisfactory. It was incumbent in such circumstances, for the majority to have discussed the points raised by Justice Wadhwa in the dissenting Award. How the failure to do this has vitiated the majority Award is evident from the discussion that follows. Consequently, while in the present case the delay in pronouncement of the Award per se does not vitiate it, the delay appears to have led to the Award being vitiated by patent illegality for reasons discussed hereafter.*

13. Per contra, Mr.Dave, learned counsel for the respondent no.1 submits that there is no infirmity in the Award passed by the Tribunal neither there is any infirmity in the order passed by the learned Single Judge which would require interference in the present proceedings. It is

further contended that the scope of interference in an appeal under Section 37 is even narrower than while deciding the objections to the Award under Section 34 of the Arbitration and Conciliation Act, 1996. It is further contended by the learned counsel for the respondent no.1 that the Arbitrators had examined the Contract and relied upon evidence recorded before them and correctly applied the law to the facts of the present case. Mr.Dave reiterates his submissions made before the Arbitrators and before the learned Single Judge to submit that the communication dated 24.10.2008 was not a proposal which is evident upon reading of the aforesaid communication which was merely an offer which was withdrawn prior to acceptance and, thus, there was no contract whereby the respondent no.1 could be forced to accept a lower price for the goods not only supplied but accepted by the appellant without any protest or demur and in fact, the payments have also been released. Learned counsel for respondent no.1 further contends that after the goods were received and the payments were released in favour of the respondent, the appellant illegally invoked PBG. Mr.Dave further submits that once the payments were released against letter of credit, there was no occasion for the STC to invoke the PBG which stood discharged.

14. In simple terms, Mr.Dave contends that the respondent no.1 had complied with the terms of the Contract by shipping the goods. The goods were accepted and payments released. In the absence of any complaint with regard to the quality and quantity of the goods, invocation of the PBG was illegal. Mr. Dave also contends that there was no occasion for the parties to vary the terms of the Contract on the

ground that price of Urea had dropped for the reason that in case, the price of Urea had increased, would it have been open for the parties to increase the rate of Urea as per international market to which the answer obviously would be in the negative. It is further submitted that as a gesture of goodwill, the respondent no.1 did not ship 9,436 MTs of Urea but the cargo which had already been loaded and for which the price stood paid, could not have been recalled. Mr.Dave submits that the Court cannot lose track of the fact that the goods were to be supplied within a fixed period of 15 days and to comply with the terms of the Contract, the seller was bound to make arrangement and to purchase the cargo in advance which was also done in the present case. Mr.Dave further explains that once the goods had been procured at a higher price the respondent no.1 could not have agreed to sell the same at a much lower price, else fixing the price at the time of signing the agreement would be of no value.

15. We have heard the learned counsels for the parties and given our thoughtful consideration to the matter.
16. The basic facts are not in dispute that STC had floated a tender for supply of bulk prilled/granular Urea on 17.09.2008. The bid of respondent was accepted. Letter of Intent was issued on 25.09.2008 for supply of 3,00,000 +/- 10% MTs of Urea based on a Contract dated 01.10.2008. It is also not in dispute that the respondent had furnished a performance bank guarantee in the sum of US\$ 6,786,450/-.
17. The submissions of Mr.Sethi, learned ASG can be summarized as under:

- (i) Post falling of price of Urea discussions took place between the parties and firm offer was made to reduce the price;
 - (ii) The offer was accepted by the agent of the respondent no.1;
 - (iii) Ministry of Fertilizers was not a party to the Contract. Reference is made to Clause 18 of the Contract. Accordingly, Ministry of Fertilizers had no role in the offer so made.
18. The arguments of Mr.Dave, learned counsel for respondent can be summarized as under:
- (i) There is no infirmity in the Award and the order of learned Single Judge;
 - (ii) Scope of interference is narrower while deciding an Appeal under Section 37 of the Act;
 - (iii) Goods were received by the appellant without any protest or demur and the payments made to the respondent no.1;
 - (iv) Communication dated 24.10.2008 of the appellant did not result in a concluded contract.
19. To appreciate the rival submissions made by counsels for the parties, it would be useful to reproduce the letter dated 24.10.2008:

“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 officials 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”

20. It would also be useful to reproduce the response of the agent of the respondent no.1 dated 24.10.2008 and another communication also issued on 24.10.2008 by the agent of the respondent. The said communications read 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 23012.208 MT i.e 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 qty of 20,563.011 PMT on board vessel MV JIA HUA.

Kindly confirm same at the earliest.

Thanking you

Yours truly

Sd/-

Rajiv Kapur

Stamp Everest Fertilisers”

Letter dated 24.10.2008 issued by the Agent of respondent No. 1 to the appellant 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”

It has been submitted before us that the above communication from the Agent by which the earlier communication was withdrawn was received by STC on 27.10.2008. Appellant has contended that in the meanwhile, appellant 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 2008 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 space, shipping tolerance of +- 10% was offered based on tender terms. We had also written letter dated STC/UREAIMP/2008 dated 30 September 2008 to Department of Fertilizers seeking their formal approval for this +- 10% flexibility which is a standard international norm.

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 15.10.2008. 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”*

On 27.10.2008, appellant replied to the letter dated 24.10.2008 issued by the Agent (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.r.t. 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”

21. The only question which arises for reconsideration is as to whether the communication of 24.10.2008 by STC is an offer or an invitation. The learned Single Judge in paras 37 and 38 has observed as under:

“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”.*

22. The communication of 24.10.2008 issued by STC allows the respondent the possibility of accepting the last tender-cum-order price for the IPL tender which was finalized on 15.10.2008 for the excess

quantities loaded. In the concluding paragraph of this communication STC writes:

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

23. The effect of paragraph 3 of this communication is that STC could not take a final decision in the matter as upon receipt of a response, they were to approach DOF to find a solution. Thus, it cannot be said that the communication was final offer or proposal. In paras 39 & 40 of the judgment of the Single Judge, this aspect has been well analyzed which we are reproducing below:-

“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”.

24. The Arbitrators have also rightly analyzed this issue in paras 72 to 75:

“72. The question whether a statement is an offer or an invitation to treat depends primarily on the intention with which it was made. A statement is only an offer if the person making it intends to be bound as soon as the person reasonably believes that it was made with this intention. It follows that a statement is not an offer, if it expressly provides that the person making it is not to be bound merely by the other party's notification of assent, but only when he himself has signed the document in which he statement is contained.

*73. The letter of Respondent No.1 to the claimant "you may like to look into the possibility of accepting the price in IPL tender finalized on 15.10.2008 for the quantity beyond 3,00,000 MTs." The response thereto by the Claimant was not to take effect until and unless it was accepted/approved by the Department of Fertilizer, who according to Respondent No.1 had to find "a solution to the issue about acceptance of the total quantity on board". Department of Fertilizer had the absolute discretion whether to accept or reject the response of the Claimant. The claimant by letter of Respondent No.1 had to give its response to the **possibility of accepting the price in IPL tender finalized on 15.10.2008 for the quantity beyond 300,000 MTs**" so that the same may be considered by the Department of Fertilizer.*

*74. This suggests that the response of the Claimant would be an offer which could be considered by the Department of Fertilizer. There is no assurance in the letter of Respondent No.1 that the response of the Claimant, one way or the other, would be accepted by Respondent No.1. The letter said that the Department of Fertilizer had to find "a solution to the issue about acceptance of the total quantity on board". This recital in the letter is crucial, in view of the fact that therein the acceptance or rejection of the Claimants response was dependent on the Department of Fertilizer's decision, whether to accept or reject **the quantity beyond 300,000 MTs**.*

75. We, therefore, have no hesitation in coming to the conclusion that the letter of Respondent No.1 dated 24.10.2008 was not a proposal or an offer at all but merely an invitation to treat or soliciting an offer from the Claimant.

It was the response from the Claimant thereto, sent by fax on the same day, that constituted an "offer" or a "proposal". Acceptance of this proposal from the Claimant was not sent or conveyed by Respondent No.1 and before it could be so accepted; the offer itself stood revoked and admittedly conveyed to Respondent No.1”.

25. Additionally, we may note that in case, the parties had agreed to vary the terms of the Contract as has been urged before us today and even without formally doing so in writing, the conduct of the appellant should have established that the terms of the Contract stood varied. The first opportunity available before the appellant was when the goods were received, however, the appellant chose to accept the goods without any protest, demur or any endorsement. Secondly, by their conduct they could have varied the terms of the Letter of credit and not in the form of a late reaction to have invoked the PBG which they could not have done post the performance *i.e.* the acceptance of goods without any protest with regard to the quality or quantity not having done so to say that the terms of the Contract stood varied, is not acceptable. The view of the Arbitrators is a plausible view. It is not unreasonable, it is neither perverse.
26. Mr Sethi has contended that since the Arbitrators had the benefit of the Minority Award but they failed to give any reasons for not accepting the minority view. He has also relied on the observations made in the case of Union of India vs. Niko Resources Limited & Anr. (*supra*). We are unable to accept the contention of Mr Sethi. Reading of para 43 of the aforesaid judgment would show that the observations so made were in the light of the facts of the aforesaid matter. The Court had observed that the Majority Award did not inspire confidence. It

was also observed that the majority has dealt with the submissions of the parties but did not deem it appropriate to deal with the findings of the dissenting Award rendered by Justice Wadhwa although the draft Award of Justice Wadhwa was received by them in good time but the Arbitrators did not meet for the reason that there was basic difference in the approach of the Majority Award and the Minority Award and in those circumstances, the Court observed that it was incumbent in such circumstances for the majority to have discussed the point raised by Justice Wadhwa in the dissenting Award.

In the present case, we find that not only the Majority Award inspires confidence but the same has been upheld by the Single Judge and we have also not found any reason to disagree with the same.

27. It is no longer *res integra* that the scope of judicial interference in an application under Section 34 of the Arbitration and Conciliation Act, 1996 is limited in nature. It has further been held that the scope of interference while deciding an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is even more restrictive in nature. The Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (*See Renusagar Power Co. Ltd. v. General Electric*, (1994) Supp. 1 SCC; *ONGC v. Saw Pipes*, (2003) 5 SCC 705, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; and *Associate Builders v. DDA*, (2015 3 SCC 49).
28. While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit

interference under Sections 34 or 37 of the Act. In the case of **P.C.L Suncon (JV) v N.H.A.I., 2015 SCC Online Del 13192**, in para 24, it was held that:

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

29. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted in comparison to deciding objections to the Award under Section 34 of the Act. In the case of **State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.**, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India (2011) 123 DRJ 724 (DB) and Shree Vinayaka Cement Clearing

Agency Vs. Cement Corporation of India (2007) 142 DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

30. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited**, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.
31. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

“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 score¹. 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 and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating 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."

32. For the reasons aforesaid, we find no grounds to entertain this appeal. The same is, accordingly, dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

May 30th 2018 / ssc/su