

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.306 OF 2018

Zorba Logistics Private Limited ... Applicant
Vs.
M/s. Permansteelisa (India) Private Limited ... Respondent

Mr. G. S. Godbole, Senior Advocate with Mr. M. S. Topkar and
Ms Vaishali Bhilare for Petitioner.
Mr. Zubin Behramkamdin, Mr. Rishabh Dhanuka and Mr. Taneesh Shah
i/b. INDUSLAW for Respondent.

CORAM : R. G. KETKAR, J.
Reserved on : JUNE 18, 2019
Pronounced on : JUNE 26, 2019

P.C. :

Heard Mr. Godbole, learned Senior Counsel for the petitioner and
Mr. Behramkamdin, learned Counsel for the respondent at length.

2. By this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), the petitioner - Zorba Logistics Private Limited (for short 'Zorba Logistics'), have challenged the award dated 14.12.2017 made by Mr. J. P. Sen, Senior Advocate and the Sole Arbitrator. The Arbitral Tribunal has made the following Award:

- (a) Zorba Logistics shall pay over to respondent herein- M/s. Permansteelisa (India) Private Limited (for short 'Permansteelisa'), a sum of Rs.17,99,982.91/- being amounts paid in excess by Permansteelisa to Zorba Logistics under the terms of the Principal Agreement along with interest thereon @ 12% per annum from 11th September 2012 till payment and / or realisation;
- (b) Zorba Logistics shall pay over to Permansteelisa a sum of Rs.90,49,777.38/- on account of payments made by Permansteelisa to various third parties and to Zorba Logistics along with interest thereon @ 12 % per annum from 23.10.2012 till payment and / or realisation;

- (c) Zorba Logistics shall pay to Permansteelisa a further sum of Rs.15,25,613/- incurred by Permansteelisa as costs for issuing and maintaining the Bank Guarantee required to be furnished in terms of the order dated 01.03.2013 of this Tribunal;
- (d) Zorba Logistics shall pay over to Permansteelisa a further sum of Rs.30,78,600/- on account of warehousing and handling expenses and other miscellaneous charges incurred by Permansteelisa in respect of the 15 containers withheld by Zorba Logistics along with interest thereon @ 12% per annum from 25.10.2013 till payment and / or realisation;
- (e) Permansteelisa shall be entitled to costs in the sum of Rs.40,82,500/-;
- (f) The Bank Guarantee furnished by Permansteelisa pursuant to the order dated 01.03.2013 and renewed from time to time shall stand discharged.

3. Zorba Logistics is a company registered under the Companies Act, 1956 and is engaged inter alia in providing global air and ocean forwarding services. Permansteelisa is also a company registered under the Companies Act, 1956 and engaged in the business of design, supply and installation of external facade system for buildings. Permansteelisa was awarded the contract for the design, supply and installation of the external facade for the project "Oberoi Commerz II" (for short the 'project') in Goregaon (East), Mumbai (for short 'project site'). The parties entered into a service agreement for transportation and shipping dated 27.12.2011 (for short 'Principal Agreement'). Under this agreement, Zorba Logistics agreed to render services for management of the shipments for the external facade system including loading, transportation and shipping from the loading point [being the factory premises of one of the respondent's (Permansteelisa) group companies, M/s. Global Architectural Company Limited situate at 700/379, Moo 6, Amata Nakorn Industrial Estate, Tumbon Don Hua Lor, Amphur

Muang, Chonburi 20000, Thailand] to the point of delivery i.e. the project site.

4. It is the case of Zorba Logistics that the Principal Agreement does not record the complete understanding between the parties. The Principal Agreement must be read along with an email dated 27.12.2011 sent by Rajesh Salve, representative of Zorba Logistics at 6:03:40 p.m. to Mohammed Hakeem, representative of Permansteelisa. The said email modified the commercial terms in some important respects. Permansteelisa, on the other hand, has disputed this position. It is common ground between the parties that the Principal Agreement was subsequently modified by the supplementary agreement dated 04.09.2012 (for short 'supplementary agreement'). There is a serious dispute between the parties as to what constituted a contract between them.

5. Permansteelisa came with the case that from the very outset, Zorba Logistics raised inflated bills in excess of the Schedule of Rates stipulated in the Principal Agreement. This was brought to the notice of Zorba Logistics from time to time. Zorba Logistics contended that the invoices raised by it were in order and in line with the Principal Agreement as modified by email dated 27.12.2011. The respondent in fact acted upon this modification and cleared the invoices raised by it although belatedly. Thus, the disputes raised by Permansteelisa were merely an after-thought. The disputes between the parties as to what Zorba Logistics was entitled to led to Permansteelisa withholding payment as per the invoices raised by it and Zorba Logistics in turn withholding 58 containers, which had been brought to India and were awaiting clearance. This impasse was resolved by entering into supplementary agreement on 04.09.2012 by the parties. The supplementary agreement inter alia provided for a phase wise release of

containers against certain payments to be made by Permansteelisa. The supplementary agreement further provided for outstanding amount, if any, to be jointly evaluated by the parties. Whereas 43 containers were released in terms of the supplementary agreement, disputes arose between the parties with regard to the last 15 containers with Zorba Logistics contending that a sum in excess of Rs.1.3 crores was due and payable by Permansteelisa and Permansteelisa contending that in fact no amounts were due at all. The correspondence was exchanged between the parties. Zorba Logistics threatened to sell the goods contained in the 15 containers to recover their dues, which led to filing Arbitration Application (L) No.1536 of 2012 in this Court seeking interlocutory reliefs under Section 9 of the Act. By order dated 14.01.2013, this Court referred the disputes between the parties to arbitration with a direction that application under Section 9 of the Act shall be treated as an interlocutory application under Section 17 before the Arbitral Tribunal.

6. The application under Section 17 was disposed of by the Tribunal initially on 01.03.2013. The order was modified on 07.08.2013. Against these orders, Arbitration Petitions were filed, which were disposed of by common order dated 21.12.2013. Against these orders, Appeals (L) No.399 and 400 of 2013 were filed by Zorba Logistics. It is not necessary to deal with the orders passed in those proceedings. In its Statement of Claim, Permansteelisa sought a declaration that the agreement between the parties consisted of the Principal Agreement as modified by the supplementary agreement alone. Permansteelisa also sought consequential directions, inter alia, for refund of amounts alleged to have been paid in excess by it to Zorba Logistics as well as for damages on account of losses suffered as a result of alleged breaches committed by Zorba Logistics of the terms of the agreement between the parties.

7. Zorba Logistics in its Statement of Defence and Counter-claim disputed Permansteelisa's contention that the agreement between the parties consisted solely of the Principal Agreement read with supplementary agreement. Zorba Logistics contended that the Principal Agreement stood modified by and in terms of email dated 27.12.2011 sent on its behalf to Permansteelisa. On that basis, Zorba Logistics claimed an amount alleged to be outstanding from Permansteelisa as well as storage costs alleged to have been incurred by it till the date of filing of the counter claim.

8. On the basis of the pleadings, the Arbitral Tribunal framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the Arbitral Tribunal recorded findings against the issues. As indicated earlier, the Arbitral Tribunal made an award directing Zorba Logistics to make the payment. It is against this award, Zorba Logistics have instituted present Petition under Section 34 of the Act.

9. In support of this Petition, Mr. Godbole submitted that the award made by the Arbitral Tribunal is vitiated by patent illegality appearing on the face of the award as contemplated by sub-section (2-A) of Section 34. He further submitted that the award made by the Arbitral Tribunal is in conflict with the public policy of India as contemplated by Section 34(2)(b)(ii) read with explanation I(ii), namely, it is in contravention with the fundamental policy of the Indian Law.

10. Mr. Godbole submitted that the Principal Agreement was executed on 27.12.2011. Thereafter, on the same day i.e. 27.12.2011 at 6:03:40 p.m., Rajesh Salve, representative of Zorba Logistics sent email to Mohammed Hakeem calling upon the latter to make the necessary changes in the Principal Agreement. The Principal Agreement stood

modified in terms of email sent on 27.12.2011 at 6:03:40 p.m. by Zorba Logistics to Permansteelisa. In fact invoices were raised on the basis of the modified contract in terms of email dated 27.12.2011. The invoices so raised from 27.12.2011 till June 2012 were verified and scrutinized by Permansteelisa and after due verification and scrutiny, the amounts were paid. Thus, by conduct also, the Principal Agreement stood modified in terms of email dated 27.12.2011 sent on behalf of Zorba Logistics. He submitted that as per clause 5.6, exchange rate was considered US \$/INR=50. Email dated 27.12.2011 sent by Zorba Logistics modified the Principal Agreement. It was agreed between the parties that payments were to be made at the prevailing exchange rate rather than the fixed rate, 1\$ = INR 50. On that basis, invoices raised by Zorba Logistics between December, 2011 and June, 2012 were paid.

11. Mr. Godbole has invited my attention to the supplementary agreement dated 04.09.2012, and in particular following clause:

“3rd agreed payment

After the clearance of the 1st and the 2nd agreed clearance of 43 containers, The Contractor and The Forwarder shall together evaluate with high accuracy, the balance amount due to be paid to The Forwarder. The Forwarder shall prove their claims with all necessary documentary evidence. It is clearly agreed that The Contractor is not liable to pay any GRI or Forex fluctuation or any D & D charges incurred after 4th Sept to not agreed upon either in the Principal Agreement or this Supplementary Agreement BUT will consider the Forwarder's request as favourably as possible. The amount evaluated will be paid by The PISA Contractor to The Forwarder by way of a post-dated cheque (to be dated around the date of delivery of materials on site. After receiving the 3rd & Final Agreed Payment, The Forwarder shall clear all the remaining containers at the port. For the avoidance of doubt, the free ground rent for the said containers shall be 3 days and the free detention period for the said containers shall be 14 days.

In the event The Forwarder fails to comply with the delivery of the containers on the said dates then The Contractor shall levy penalty on the Forwarder for the cost incurred and any additional / associated costs.

g) The exchange rate shall be fixed for all movement from Thailand upto 31st August 2012 and any movement after 31st August 2012 the exchange rate shall be re-negotiated.”

12. Mr. Godbole submitted that a perusal of the above clause shows that it was agreed that Permansteelisa is not liable to pay any General Rate Increase (for short 'GRI') or Forex fluctuation or any D & D Charges, incurred after 4th September to not agreed upon either in the Principal Agreement or the supplementary agreement but will consider the Zorba Logistic's request as favourably as possible. Clause (g) thereof laid down that the exchange rate shall be fixed for all movements from Thailand upto 31.10.2012 and for any movement after 31.08.2012, the exchange rate shall be re-negotiated. Thus, the payment made by Permansteelisa on the basis of Principal Agreement as modified by email dated 27.12.2011 sent by Zorba Logistics at 6:03:40 p.m. between December 2011 and June 2012 were not to be re-opened. This also indicates that the Principal Agreement stood modified.

13. Mr. Godbole submitted that it is nobody's case that the Principal Agreement was executed on 28.12.2011. He invited my attention to the relevant portion of evidence of C.W.3 Mohammed Hakeem, and in particular paragraphs 18, 20 and 21 thereof. In paragraph 17, C.W.3 stated that he had called Ms Vaishali Shah to fix a meeting. It was decided between them that she will come to Permansteelisa's office on 28.12.2011 at about 11.30 a.m. In paragraph 18, C.W.3 stated that on 28.12.2011, Ms Vaishali Shah along with Mr. Rajesh Salve reached their office at 11.30 a.m. as agreed. On that day, Ms Vaishali Shah requested to consider changes suggested vide email dated 27.12.2011 sent at 6:03:40 p.m. However, C.W.1, Mr. Ranjit Singh made it clear that he was not interested in any further negotiations of any of the terms of the Principal Agreement. Ms Vaishali Shah did not get into any further

discussion on the issues mentioned in the email dated 27.12.2011 and agreed to sign the Principal Agreement as per the draft circulated by him vide email dated 27.12.2011 at 4.30 p.m. (exhibit C-84). In paragraph 20, C.W.3 stated that before execution of the Principal Agreement on 28.12.2011, he had given the final printout of the Principal Agreement to Ms Vaishali Shah for her to read it carefully before signing. In paragraph 21, he stated that the Principal Agreement was signed at about 1.30 p.m. on 28.12.2011. In paragraph 22, he stated that on 28.12.2011, immediately after execution of Principal Agreement, he had informed Ms Vaishali Shah that she and he (Hakeem) need to visit the Loading Point to meet the staff there and also to see the material to be shipped by Zorba Logistics. Thus, C.W.3 Mohammed Hakeem deposed that the Principal Agreement was executed on 28.12.2011.

14. Mr. Godbole invited my attention to paragraph 2.11 of the award where the Arbitral Tribunal recorded a finding that “While the claimant's (Permansteelisa) vacillations on the issue are troubling, I am convinced that the version of the events offered by Mr. Hakeem is the most credible one and certainly more credible than the one offered by Ms Shah and in turn the respondent (Zorba Logistics). The Arbitral Tribunal also relied upon email dated 27.12.2011 sent at 4.30 p.m. by Mohammed Hakeem on behalf of Permansteelisa forwarding the draft of Principal Agreement. Relying upon this part of finding, Mr. Godbole submitted that the Arbitral Tribunal held that the Principal Agreement was in fact signed and executed on 28.12.2011 which is nobody's case. Thus, the award is vitiated by patent illegality appearing on the face of the award as contemplated by sub-section (2-A) of Section 34 of the Act. Thus, the finding recorded by the Arbitral Tribunal is arrived at on no evidence and no reasonable person would act upon it. He submitted that if the Arbitral Tribunal wanders outside the contract and deals with the matter not allotted to him, he commits the jurisdictional error. Even

on this ground, the award is vitiated and as such, is liable to be set aside.

15. Mr. Godbole further submitted that the purported email dated 27.12.2011 (exhibit C-84) sent by Mohammed Hakeem at 4.30 p.m. to Ms Vaishali Shah of Zorba Logistics was not pleaded in application made under Section 9 of the Act as also application under Section 17 of the Act. That email was also not pleaded in the Statement of Claim and was for the first time, introduced in the evidence of C.W.3 Mohammed Hakeem. The Arbitral Tribunal also accepted that the email was produced on record for the first time during the course of evidence of C.W.3 Mohammed Hakeem. Mr. Godbole has taken me through cross-examination of C.W.3 to contend that from the perusal of his cross-examination, it would be evident that Zorba Logistics had established that the said email is a forged and fabricated document. Mr. Godbole submitted that email dated 27.12.2011 sent at 4.30 p.m. (exhibit C-84) is not duly proved in evidence as per the provisions of the Indian Evidence Act, 1872, more particularly Section 65-B thereof.

16. Mr. Godbole submitted that interpretation of a contract raises a substantial question of law as contemplated by Section 100 of the Code of Civil Procedure, 1908. The Petition, therefore, requires consideration.

17. On the other hand, Mr. Behramkamdin supported the impugned award. He submitted that on 27.12.2011 at 4.30 p.m. C.W.3 Mohammed Hakeem sent email (exhibit C-84) to Ms Vaishali Shah of Zorba Logistics attaching therewith a draft agreement. Thus, till 4.30 p.m. of 27.12.2011, Principal Agreement was not executed. After receipt of the draft agreement, email dated 27.12.2011 was sent at 06:03:40 p.m. by Rajesh Salve, representative of Zorba Logistics to Mohammed Hakeem of Permansteelisa suggesting changes. He submitted that a perusal of this email does not indicate that any changes were suggested in respect

of clause 5.6 of the draft agreement dealing with the Schedule of Rates - Exchange Rate considered US \$ = INR 50. He submitted that it would also be evident that Principal Agreement was not signed by the time email was sent on 27.12.2011 at 06:03:40 p.m. by Zorba Logistics. Zorba Logistics suggested to add paragraph 5.16 as also requested to make the necessary changes suggested and to revert to them accordingly. Zorba Logistics also awaited for soonest reply from Mohammed Hakeem. Thus, the reading of email dated 27.12.2011 clearly suggests that by the time email was sent, Principal Agreement was not executed.

18. He invited my attention to evidence of C.W.1 Ranjit Singh. C.W.1 filed his affidavit dated 02.07.2014 in lieu of examination in chief. He stated that after receipt of email dated 27.12.2011 at 06:03:40 p.m., Zorba Logistics abandoned the additions / alterations demanded by it and through Ms Vaishali Shah executed Principal Agreement late in the evening on the very same day i.e. 27.12.2011. He submitted that Mohammed Hakeem had sent email to Zorba Logistics at 4.30 p.m. attaching therewith draft agreement (exhibit C-84). This was followed by email dated 27.12.2011 at 06:03:40 p.m. by Zorba Logistics suggesting modifications. Suggestions / modifications were discussed and C.W.1 Ranjit Singh made it clear that he was not interested in any further negotiations of any of the terms of the Principal Agreement. It was thereafter agreement was executed. The contention of Zorba Logistics that the email dated 27.12.2011 sent at 4.30 p.m. by Mohammed Hakeem (exhibit C-84) is a fabricated document is dealt with the Arbitral Tribunal and the said contention is in terms overruled.

19. Mr. Behramkamdin submitted that respondent was constantly raising objections to the invoices raised contrary to the Principal Agreement. This aspect is also dealt by the Arbitral Tribunal.

20. Mr. Behramkamdin submitted that the submission of Mr. Godbole that as the Arbitral Tribunal held that the version of the events offered by C.W.1 Mohammed Hakeem is the most credible one and certainly more credible than the one offered by Ms Vaishali Shah, the Arbitral Tribunal recorded a finding that the contract was executed on 28.12.2011, is wholly misconceived. He submitted that the discussion in paragraph 2.11 is in respect of issues No.1 and 2. Issue No.1 was whether Permansteelisa proves that the contractual relationship between Permansteelisa and Zorba Logistics is governed solely by the Principal Agreement read with the supplementary agreement. Issue No.2 was whether Permansteelisa proves that the Principal Agreement between the parties was modified in terms of an email dated 27.12.2011 alleged to have been addressed by Zorba Logistics to Permansteelisa. That apart, nowhere the Arbitral Tribunal has recorded a finding that the Principal Agreement was executed on 28.12.2011.

21. Mr. Behramkamdin relied upon the following decisions:

(i) ***Mcdermott International INC. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** to contend that the construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face

of the award; and

(ii) ***Associate Builders Vs. DDA, (2015) 3 SCC 49*** to contend that when any of the heads / sub-heads of test of 'public policy' is applied to an arbitral award, court does not act as court of appeal. Interference is permissible only when findings of arbitrator are arbitrary, capricious or perverse, or when conscience of Court is shocked, or when illegality is not trivial but goes to root of the matter. Arbitrator is ultimate master of quantity and quality of evidence while drawing arbitral award. The award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid. Once it is found that arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. The award can be said to be against fundamental policy when it is: (i) not in compliance with statutes or judicial precedents, or (ii) violates the principle of judicial approach, or (iii) not in compliance with principles of natural justice, or (iv) violates the principle of Wednesbury reasonableness i.e. the award is perverse.

22. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. On one hand, Zorba Logistics have contended that Principal Agreement was executed prior in point of time on 27.12.2011. Thereafter, on the same day i.e. 27.12.2011 at 6:03:40 p.m., Rajesh Salve, representative of Zorba Logistics sent email to Mohammed Hakeem calling upon the latter to make the necessary changes in the Principal Agreement. The Principal Agreement stood modified as per the email sent on 27.12.2011 at 6:03:40 p.m. by Zorba Logistics to Permansteelisa. It is further case of Zorba Logistics that the purported email dated 27.12.2011 allegedly sent by Mohammed Hakeem at 4.30

p.m. attaching draft agreement is a forged and fabricated document and was never received by Zorba Logistics.

23. On the other, it is the case of Permansteelisa that on 27.12.2011 at 4.30 p.m., Mohammed Hakeem sent email to Ms Vaishali Shah of Zorba Logistics attaching therewith draft agreement. The email dated 27.12.2011 sent at 06:03:40 p.m. by Rajesh Salve, representative of Zorba Logistics is in response to the draft agreement sent by email dated 27.12.2011 at 4.30 p.m.

24. In order to appreciate this controversy, it is necessary to deal with email dated 27.12.2011 sent at 06:03:40 p.m. by Zorba Logistics to Permansteelisa. A perusal of this email shows that it does not refer to execution of the contract on 27.12.2011. The email suggested changes in certain paragraphs of the Agreement:

(I) Paragraph 2.1.2 of the Agreement was to the following effect:

“2.1.2 A) Offered free storage time at receiving port: 14 days
B) Offered free time container detention : 21 days.”

As against this, the changes proposed by email are to the following effect:

“2.1.2 A) Offered free storage time at receiving port: 2-3 days
B) Offered free time container detention: 14 days.”

(II) Paragraph 2.1 of the Agreement was to the following effect:

“2.1 Forwarder's Obligations

The Forwarder is responsible for the management of the shipments from the loading point Ex Chounburi to the point of delivery at Goregaon site.”

As against this, the changes proposed by email are to the following effect:

“Paragraph 2.1 --- Please add below mentioned point

Shipment related documents for Import clearance purpose.”

(III) Clause 5.3(iii) of the Agreement was to the following effect:

“(iii) No booking cancellation fee is recognized (Cargo schedule will be provide).”

As against this, the changes proposed by email are to the following effect:

“5.3 (iii) No booking cancellation fee is recognized, subject to provided schedule of cargo readiness and equipment required before 15 days.”

(IV) Clause 5.13 of the Agreement was to the following effect:

“5.13 Contractor shall provide the delivery schedule in 7 days advance to the forwarder to facilitate the arrangement of Container.”

As against this, the changes proposed by email are to the following effect:

“5.13 Contractor shall provide the delivery schedule in 15 days advance to the forwarder to facilitate the arrangement of container.”

25. Suggestion was also made for adding paragraph 5.16, which was not in the Principal Agreement, which is to the following effect:

“5.16 The above mentioned unit rates are excluding of GRI / PSS / PCS / CIC / EIS etc.... as per shipping norms. The shipping line surcharges will be intimated to contractor by forwarder time to time as per shipping declare the surcharges.”

26. Request was made to Mr. Mohammed Hakeem, representative of Permansteelisa to make the necessary changes as suggested and revert to them accordingly. Zorba Logistics also awaited for soonest reply of Permansteelisa on the same.

27. As noted earlier, clause 5.6 of the Principal Agreement dealt with Schedule of Rates. It reads as under:

5.6 Schedule of Rates - exchange rate considered US\$/INR=50

28. A perusal of the email dated 27.12.2011 sent at 06:03:40 p.m. does not refer to this clause at all. In other words, no changes were suggested in respect of clause 5.6 of the Principal Agreement.

29. In this regard, it is pertinent to refer to clauses 13.1 and 15.6 of the Principal Agreement dated 27.12.2011, which are as under:

13.1 Modification

The Contractor (Permansteelisa) reserves the right to modification of contract as per the performance of the forwarder (Zorba Logistics).

15.6 Entire Agreement

All oral and written promises, negotiations, quotations, proposals, representatives, and / or agreements (other than this Agreement) between the Forwarder (Zorba Logistics) and Pisa that predate the date of the Agreement shall be superseded by this Agreement.”

30. The Arbitral Tribunal has considered this point from paragraphs 2.2 to 2.12. In paragraph 2.6, the Arbitral Tribunal referred to affidavit in lieu of examination-in-chief of C.W.1 Ranjit Singh dated 02.07.2014. In paragraph 2.11, the Arbitral Tribunal referred to email dated 27.12.2011 addressed by Permansteelisa to Zorba Logistics at 4.30 p.m. (exhibit C-84). In paragraph 2.12, the Arbitral Tribunal held that the email dated 27.12.2011 signed by Zorba Logistics at 06:03:40 p.m. is a response to the draft agreement forwarded by Permansteelisa. The Arbitral Tribunal observed that it is not clear as to how any changes could have been made in the Principal Agreement once executed. The Tribunal also noted that

after email dated 27.12.2011 sent at 06:03:40 p.m., Zorba Logistics made no attempt to secure any changes in the Principal Agreement as executed or even to procure from the claimant - Permansteelisa, a written confirmation of the changes allegedly agreed upon between Mohammed Hakeem and Ms Vaishali Shah. The Tribunal also considered that if at all conversation between Hakeem and Ms Shah had preceded the email dated 27.12.2011, there would have been a reference in the email to the issue of Foreign Exchange fluctuation on which aspect as well, an agreement is alleged to have been reached.

31. Mr. Godbole submitted that in paragraph 2.11, as the Arbitrator held that the version of the events offered by Mohammed Hakeem is the most credible one and certainly more credible than the one offered by Ms Shah, he accepted the evidence of Mohammed Hakeem on the point of execution of Principal Agreement on 28.12.2011. He submitted that it is nobody's case that the award was executed on 28.12.2011. The Award, therefore, suffers from patent illegality on the face of the record. It is not possible to accept this submission. The Arbitral Tribunal was answering issues No.1 and 2 and it is in that context, the finding is recorded by the Arbitral Tribunal.

32. Mr. Godbole submitted that apart from this, the conduct of the parties clearly shows that the Principal Agreement stood modified by email dated 27.12.2011 sent at 06:03:40 p.m. by Zorba Logistics. The Arbitral Tribunal considered this aspect from paragraphs 2.13 to 2.21. The Arbitral Tribunal has minutely considered each and every circumstance and has appreciated evidence on record. For the reasons recorded therein, I do not find any merit in the submission of Mr. Godbole that the conduct post-execution of the Principal Agreement suggested that it stood modified in pursuance of Zorba Logistics email dated 27.12.2011 sent at 06:03:40 p.m. In view thereof, it has to be

concluded that on 27.12.2011, Mohammed Hakeem sent email at 4.30 p.m. to Ms Vaishali Shah (exhibit C-84) attaching therewith draft agreement. The email dated 27.12.2011 sent by Rajesh Salve, representative of Zorba Logistics at 06:03:40 p.m. was response to the email sent at 4.30 p.m. (exhibit C-84). The Principal Agreement was thereafter executed. I, therefore, do not find any merit in the submission of Mr. Godbole that Principal Agreement was executed on 27.12.2011 and thereafter, Zorba Logistics sent email on 27.12.2011 at 06:03:40 p.m. I do not find any merit in the submission of Mr. Godbole that email dated 27.12.2011 sent by Mohammed Hakeem at 4.30 p.m. (exhibit C-84) is a forged and fabricated document.

33. Mr. Godbole advanced submission on the supplementary agreement dated 04.09.2012 executed between the parties. The Arbitral Tribunal considered this aspect in paragraphs 2.23, 2.24 and 2.26. For the reasons recorded therein, I do not find any merit in the submission of Mr. Godbole that prior to entering into the supplementary agreement on 04.09.2012, Permansteelisa was liable to pay GRI or Forex Fluctuations or any DD Charges in view of the Principal Agreement dated 27.12.2011 stood modified as per their email dated 27.12.2011 sent at 06:03:40 p.m.

34. Mr. Godbole submitted that interpretation of a contract raises a substantial question of law as contemplated by Section 100 of C.P.C. As the interpretation put by the Tribunal on the Principal Agreement is perverse, the Arbitration Petition deserves consideration. It is not possible to accept this submission. In the case of **Mcdermott International INC.** (*supra*), the Apex Court held that interference on the ground of patent illegality is permissible only if the same goes to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. The construction of the

contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in making the award by taking into consideration the conduct of the parties. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator has the jurisdiction, no further question can be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar of the face of the award.

35. In the case of **Associate Builders** (*supra*), the Apex Court held that when any of the heads / sub-heads of test of 'public policy' is applied to an arbitral award, court does not act as court of appeal. Interference is permissible only when findings of arbitrator are arbitrary, capricious or perverse, or when conscience of Court is shocked, or when illegality is not trivial but goes to root of the matter. Arbitrator is ultimate master of quantity and quality of evidence while drawing arbitral award. The award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid. Once it is found that arbitrator's approach is neither arbitrary nor capricious, the Court cannot interfere on facts. The Apex Court further held that the award can be said to against fundamental policy of Indian Law when it is: (i) not in compliance with statutes or judicial precedents, or (ii) violates the principle of judicial approach, or (iii) not in compliance with principles of natural justice, or (iv) violates the principle of Wednesbury reasonableness i.e. the award is perverse. The Apex Court also explained in detail when the award can be said to be patently illegal. The Apex Court held that the award can be said to be patently illegal when it contravenes the Act itself, contravenes terms of contract, etc. Applying the principles laid down by the Apex Court to the facts of the present case, I do not find that Zorba Logistics has succeeded in establishing that

award made by the Tribunal is vitiated by patent illegality on face of the award as contemplated by sub-section (2-A) of Section 34 of the Act. Zorba Logistics has also failed to establish that the award made by the Arbitral Tribunal is in conflict with the public policy of India as contemplated by Section 34(2)(b)(ii) read with explanation I(ii), namely, it is in contravention with the fundamental policy of the Indian Law.

36. The contention of Mr. Godbole that interpretation on contract raises a substantial question of law as contemplated by Section 100 of C.P.C. also cannot be accepted in view of the law laid down by the Apex Court in respect of powers of the High Court under Section 34 of the Act while dealing with the award made by the Arbitral Tribunal. Hence, Petition fails and the same is dismissed.

37. Pending Motions, if any, stand disposed of accordingly.

(R. G. KETKAR, J.)

Minal Parab