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

Reserved on: 24th May, 2019

Date of decision: 10th October, 2019

+ **O.M.P. 708/2012 & CCP(O) 10/2017, I.A. 2317/2018, I.A. 8691/2018**

RATHI ISPAT LTD

..... Petitioner

Through Mr. Shiv Khurana, Advocate (M. No.9810006115)

versus

INOX AIR PRODUCT LTD

..... Respondent

Through Mr. Atul. S. Mathur, Ms. Priya Singh & Mr. Prabal Mehrotra, Advocates (M. No.9811022261)

AND

+ **O.M.P.(I) (COMM.) 161/2017 & I.A. 2320/2018**

INOX AIR PRODUCTS PRIVATE LIMITED

..... Petitioner

Through Mr. Atul. S. Mathur, Ms. Priya Singh & Mr. Prabal Mehrotra, Advocates

versus

RATHI ISPAT LIMITED

..... Respondent

Through Mr. Tanmaya Mehta, Mr. Siddhant Kr. Singh, Mr. Anurag Sahay & Mr. Raghav Wadhur, Advocates (M. No.9999255931)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The above proceedings arise out of an award dated 14th March, 2012 passed by the Ld. Sole Arbitrator which has been challenged before this Court in OMP 708/2012. The second petition, OMP (I) (COMM.) 161/2017

seeks enforcement of the said award.

2. Rath Ispat Ltd. (*hereinafter 'Rathi'*) entered into an agreement dated 17th December, 2003 with Inox Air Products (*hereinafter 'INOX'*) for supply of gas and related equipment for a period of seven years. Rathi took a loan of Rs.3 crores from Punjab National Bank for setting up of the gas supply equipment for its steel plant. INOX commenced supply of oxygen and nitrogen. On 16th May, 2005, a second agreement was entered into starting January, 2006 which was for a period of seven years. Various disputes arose between the parties in respect of provision of drawings of the plant, drawings for the chiller plant, providing of various specifications, leakage of pipe lines, layout of oxygen plant, faulty meters, etc. INOX had disputes with Rathi in respect of the outstanding payments. In August, 2006, INOX stopped its operations and withdrew the manpower from the plant until Rathi paid the money for the previous supply of gas. On 7th September, 2006, INOX terminated the agreement. Rathi alleged that the termination was illegal.

3. INOX then filed a civil suit against Rathi, before the Delhi High Court being CS(OS) 7706/2006 which was decreed in favour of INOX. Another suit being CS(OS) 1786/2005 was also filed by INOX against Rathi. On 29th September, 2006, the said suit was returned due to lack of territorial jurisdiction. The said order was challenged in FAO(OS) 704/2006. Vide order dated 16th March, 2007, the Division Bench appointed Justice V.N. Khare (former Chief Justice of India) as the Sole Arbitrator to adjudicate certain issues. The relevant part of the said order reads as under:

“5.learned Counsel for the parties submitted that the parties were not averse to referring all disputes between them in relation to their claims and counter claims to an agreed Arbitrator in terms of the arbitration clauses found in the agreements executed between them which as noticed earlier are in similar terms. The case was, Therefore, adjourned to enable the parties to come up with a formal statement for a reference to an Arbitrator agreeable to both the sides. When the matter came up before us today, learned Counsel for the parties submitted that the parties were agreeable to refer all disputes, claims, counter claims against each other arising out of 'Plant and Equipment Lease Agreements' dated 17.12.2003 and 16.5.2005 and 'Plant and Equipment Operation and Maintenance Agreements' dated 17.12.2003 and 16.5.2005 to the sole arbitration of Justice V.N. Khare, former Chief Justice of India. In the light of that submission we see no reason why a reference cannot be made to the agreed sole arbitrator for adjudication of the disputes between the parties. We accordingly appoint Justice V.N. Khare, former Chief Justice of India as sole arbitrator to adjudicate upon the following disputes:

(i). All disputes, claims, counter claims raised by the parties against each other in relation to and arising out of Plant and Equipment Lease Agreements dated 17.12.2003 and 16.5.2005 and Plant and Equipment Operation and Maintenance Agreements dated 17.12.2003 and 16.5.2005.

(ii). All issues/controversies involved in the suit for injunction filed by the plaintiff/appellant out of which this appeal arises as also those arising out of Suit No. 1744/2006 for declaration, injunction filed by the respondents against the appellant and pending in the Court of Civil Judge, Senior Division, Ghaziabad (U.P).

6. The Arbitrator shall be entitled to make a common

award in regard to all the above disputes. He shall also be free to fix his fee which shall be paid by the parties in equal proportion. The question regarding the territorial jurisdiction of the Courts in Delhi to entertain suits or other proceedings in relation to the agreements or the arbitration under them is left open. The parties shall be free to seek such interim and final directions as may be available to them in law from the sole Arbitrator.

7. The suit filed by the plaintiff and the present appeal shall stand disposed of in terms of the above directions. As a consequence of this order Suit No. 1744/2006 pending in the Court of Civil Judge, Senior Division, Ghaziabad (U.P.) shall be deemed to have been disposed of in terms of this order. The parties shall be free to place a copy of this order before the said court for passing a formal order to that effect. ”

4. Thus, the question of territorial jurisdiction was left open. The Id. Sole Arbitrator considered the matter and award dated 14th March, 2012 was passed. Various issues were framed by the Id. Arbitrator which are as under:

1. Whether the two agreements of the plant and lease required registration and are properly valued under the Indian Stamp Act? If so, its effect

5. The Id. Arbitrator held that the lease agreement relating to plant and equipment was only a right to use the goods. Thus, since only a lease of movable goods was entered into, no stamping was required;

2. Whether the first and second plants of the claimant were capable to give guaranteed production as per the terms and if so whether it provided so;

3. Whether the Claimant had installed meter giving correct recording and if so on what dates and bills raised by Claimant were as per actual supply? If not its effects.

4. Whether the third plant dated 16.05.2005 installed gave full production, if so on what date?

5. Whether the Claimant had suspended the production and subsequently terminated the agreements in accordance with the agreed terms of Lease Agreements?

6. Whether Claimant after suspending the supply still can claim the lease and maintenance charges under the Maintenance Agreements, if so for what period?

7. Whether the Claimant is entitled to the claims as prayed for in the Statement of Claim?

6. The Id. Arbitrator framed issues no.2 to 6 on the basis of the pleas taken by Rathi in its reply to the statement of claim. Thus, Rathi ought to have led evidence to prove these aspects. In fact, no evidence was led by Rathi and hence the Ld. Arbitrator held that Rathi had failed to discharge the onus of issues no.2 to 6. The Id. Arbitrator further held that INOX is entitled to claim lease and maintenance charges and for settlement of claims. The Id. Arbitrator finally concluded as under:

- The plant and machinery were never contemplated to be made into a permanent fixture. The equipment belonged to INOX and was only attached with nuts and bolts;
- The lease period was for a fixed period of time. The equipment was not permanently fastened to the earth;
- Since the plant and equipment could be dismantled and in view of the various clauses of the agreements, the same were not required to be stamped under Article 35 of the Stamp Act;
- The lease of the plant and equipment also constituted lease of

movable goods and did not require registration;

- On issues no. 2, 3 and 4, the Id. Arbitrator held that the onus was on Rathi, since no oral evidence was led by Rathi in support of the facts pleaded in the written statement, the witnesses on behalf of INOX have confirmed that the plant worked in the manner it was meant to work;
- That the witnesses of INOX have further deposed that two of the plants and equipment leased to Rathi were functional and were in fact being operated by INOX. The third plant and equipment as per the second lease was also functional w.e.f. 2nd April, 2006;
- That INOX was able to show that the guaranteed production as per the agreement could be generated from the plants;
- Rathi's contention that the three plants did not give the guaranteed production, was not established on record by Rathi. Issues no. 2, 3 and 4 were accordingly decided in favour of INOX.
- On issue no. 5, the Id. Arbitrator held, on the basis of the correspondence and the clauses of the agreement, that the reasons of termination were in consonance with the terms of the agreement and hence, there was no illegality in the same;
- On issue no. 6, the Id. Arbitrator held on the basis of clause 3.1(v), that since Rathi had failed to make payments to INOX, the right to use the plant could be denied;
- Finally, the Id. Arbitrator held that INOX is entitled to reliefs no.1 and 2 which read as under:

(i) grant prohibitory injunction restraining the Respondent from interfering with the Claimant in taking back the plant and machinery situated at the factory premises of the Respondent at Ispat nagar, Ghaziabad;

(ii) that the Respondent pay to the Claimant the principal sum of Rs.2,44,57,950/- (Rupees two crore forty four lacs fifty seven thousand nine hundred fifty only) towards dues owed by the Respondent to the Claimant till March, 2007;

- Insofar as the lease amount of Rs.17,95,500/-, the Id. Arbitrator held that INOX is not entitled to the said amount. As it is not clear as to whether Rathi used the equipment after termination by INOX. The Id. Arbitrator further held that INOX had not prayed for liquidated damages and thus, nothing could be awarded;
- Interest of 1%, was awarded in favour of INOX as per the agreement. The Id. Arbitrator also granted *pendente lite* and future interest @ 12% p.a. till date of payment;
- Insofar as territorial jurisdiction is concerned, the Id. Arbitrator records that it was the case of Rathi itself in the counter statement that the appointment of the Id. Arbitrator was made by the parties with mutual consent.
- The operative portion of the award reads as under:

“A. The Claimant is entitled to remove the plant and equipment leased out to the Respondent and installed at Respondent's factory premises at Ispat Nagar, Ghaziabad after 30 days' notice to the Respondent. The Respondent is directed to permit the Claimant to dismantle and take back the plants and machineries installed at Respondent factory premises at Ispat

Nagar, Ghaziabad without creating any hindrances. B. Respondent shall pay to the Claimant the principal sum of Rs.2,44,57,950/- (Rupees Two Crore Forty Four Lakhs Fifty Seven Thousand Nine Hundred Fifty Only) within 30 days from the date of pronouncement of this Award, towards dues owed by the Respondent to the Claimant till March, 2007.”

Submissions on behalf of parties

7. Mr. Shiv Khurana, Id. counsel has addressed submissions on behalf of Rathi. The first submission of Mr. Khurana is that on the issue of territorial jurisdiction and as to whether the agreements related to immovable property, the same were decided by the Id. Single Judge who had rejected the suit, vide judgment dated 29th September, 2006. It is his submission that this judgment constitutes *res judicata* and the Id. Arbitrator could not have taken a different view. It is thereafter submitted that the judgment of Id. Single Judge was not set aside by the Division Bench and hence, the Single Judge's judgment was binding in respect of the conclusions arrived therein. He further submits that since the property i.e. the plant and equipment was installed after construction being carried out spending crores of rupees, it had to be treated as immovable property and not movable property. Thus, the agreements required registration and stamping.

8. It is further argued by Mr. Khurana that material documentary evidence was ignored by the Id. Arbitrator including the submission that there were defective meters installed by INOX and the joint meter recording was not signed. Even though, no oral evidence was led, the documentary evidence was liable to be considered, especially in respect of non-supply, defective supply and inflated bills raised by INOX. The Id. Arbitrator has

failed to consider the true and correct statement of accounts and has incorrectly awarded the entire claim of INOX and that the impugned award is contrary to public policy. He further submits that various debit notes were issued, as there was admitted non-supply of gases and even these have been ignored by the Id. Arbitrator. The counter claims could not have been rejected for non-payment of fee of the Arbitrator.

9. On the other hand, Mr. Atul. S. Mathur, Id. counsel appearing for INOX submits that the appointment of the Id. Arbitrator was by consent and the Single Judge's order had merged with the order of the Division Bench. Before the Division Bench, Rathi had agreed for appointment of the Arbitrator. Thus, the Single Judge's judgment was no longer operative between the parties. Reliance is placed on ***Kunhayammed and Ors. v. State of Kerala and Anr., (2000) 6 SCC 359***. It is further submitted by Mr. Mathur that the impugned award is a detailed award, considering the evidence and the documents on record. Despite repeated opportunities, Rathi failed to lead evidence and finally vide order dated 5th October, 2009, the Id. Arbitrator closed the right of the Rathi to lead evidence. The ground that the Id. Arbitrator has ignored the documents on record would not be a valid objection as per the judgment of the Supreme Court in ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49***. If two views are possible and the view taken by the Id. Arbitrator is not perverse, no interference is called for. Four witnesses were examined by INOX and the repeated opportunities given to Rathi were not availed of, thus, the Id. Arbitrator proceeded in accordance with law.

Findings

10. The first and foremost question is the status of the judgment of the Id. Single Judge dated 29th September, 2006. The Id. Single Judge arrived at a finding that the machinery was embedded in the earth. The machinery consisted of air separation plants for the production of oxygen and nitrogen to be used in the production of steel, which was held to be immovable property. Before the Id. Single Judge, neither party relied on the arbitration agreement and Rathi had pleaded lack of territorial jurisdiction. Thus, the Id. Single Judge had rejected the plaint both on the ground that the machinery/equipment constituted immovable property and in view thereof, the property being situated in Ispat Nagar, Ghaziabad, the Delhi High Court did not have the territorial jurisdiction. In the Division Bench however, the Court recorded that the parties were not averse to referring all disputes to arbitration and accordingly it directs as under:

“5. The defendant/respondent herein appeared on caveat before the learned Single Judge and raised a preliminary objection as to the territorial jurisdiction of the Court to entertain the suit. That objection found favor with the learned Single Judge who by the order impugned in this appeal held that it had no jurisdiction to entertain the suit and directed the plaint to be returned to the plaintiff/appellant for being presented to the competent Court. The present appeal filed by the plaintiff assails the correctness of that view. When the appeal initially came up before us on 29.11.2006, learned Counsel for the parties submitted that the parties were not averse to referring all disputes between them in relation to their claims and counter claims to an agreed Arbitrator in terms of the arbitration clauses found in the agreements executed between them which as noticed earlier are in similar

terms. The case was, Therefore, adjourned to enable the parties to come up with a formal statement for a reference to an Arbitrator agreeable to both the sides. When the matter came up before us today, learned Counsel for the parties submitted that the parties were agreeable to refer all disputes, claims, counter claims against each other arising out of 'Plant and Equipment Lease Agreements' dated 17.12.2003 and 16.5.2005 and 'Plant and Equipment Operation and Maintenance Agreements' dated 17.12.2003 and 16.5.2005 to the sole arbitration of Justice V.N. Khare, former Chief Justice of India. In the light of that submission we see no reason why a reference cannot be made to the agreed sole arbitrator for adjudication of the disputes between the parties. We accordingly appoint Justice V.N. Khare, former Chief Justice of India as sole arbitrator to adjudicate upon the following disputes:

(i). All disputes, claims, counter claims raised by the parties against each other in relation to and arising out of Plant and Equipment Lease Agreements dated 17.12.2003 and 16.5.2005 and Plant and Equipment Operation and Maintenance Agreements dated 17.12.2003 and 16.5.2005.

(ii). All issues/controversies involved in the suit for injunction filed by the plaintiff/appellant out of which this appeal arises as also those arising out of Suit No. 1744/2006 for declaration, injunction filed by the respondents against the appellant and pending in the Court of Civil Judge, Senior Division, Ghaziabad (U.P).

6. The Arbitrator shall be entitled to make a common award in regard to all the above disputes. He shall also be free to fix his fee which shall be paid by the parties in equal proportion. The question regarding the territorial jurisdiction of the Courts in Delhi to entertain suits or other proceedings in relation to the agreements or the arbitration under them is left open.

The parties shall be free to seek such interim and final directions as may be available to them in law from the sole Arbitrator.

11. Insofar as territorial jurisdiction for entertaining the suits or other proceedings arising out of the agreement was concerned, the said question was left open. A perusal of the above directions by the Division Bench leaves no doubt that the doctrine of merger applies in the present case. Before the Id. Single Judge, INOX had filed a civil suit and sought various reliefs. Rathi had then sought rejection of the plaint on the ground of territorial jurisdiction. However, before the Division Bench, the parties consented for appointment of an Arbitrator. Thus, the disputes under the two agreements, namely, Plants and Equipment Lease Agreement and Plant and Equipment Operation and Maintenance Agreement dated 17th December, 2003 and 16th May, 2005 respectively, were referred, on a clean slate to arbitration. The Id. Arbitrator was not held as being bound by any findings of the Id. Single Judge. Further the issues arising in the suit were also to be decided by the Id. Arbitrator. In effect, the judgement of the Id. Single Judge no longer holds good. The Id. Arbitrator had to decide the matter afresh, on the basis of claims and counter claims raised by the parties. As held in ***Kunhayammed and Ors. v. State of Kerala and Anr., (2000) 6 SCC 359***, the decision of the Division Bench would be the operative decision in law. Only the question of territorial jurisdiction *qua* suits and other proceedings relating to the agreements, was left open. This by itself clearly implies that the rest of the findings of the Id. Single Judge no longer operate.

12. Insofar as the question as to whether the equipment was movable or immovable property – a perusal of the findings of the Id. Arbitrator make it

clear that though some civil works were carried out for installing the equipment, they were in the nature of plant and machinery which was leased out by INOX to Rathi. The said equipment and machinery were to be returned to INOX after the culmination of the lease. Thus, the equipment and machinery were not permanently fixed to the ground and were clearly movable. Moreover, as would be revealed in the facts leading to the contempt petition, it will become clear that the equipment was actually removed and that too, without being noticed. This proves that the equipment was in the nature of movable property. The findings of the Id. Arbitrator on this aspect are purely factual and do not call for any interference. Moreover, the obligation to register the agreement and pay the stamp duty was primarily upon the lessee i.e. Rathi and they cannot be allowed to take advantage of their own wrong. The agreements themselves are admitted. It was in view of the clause in the agreement that Rathi agreed for appointment of the Id. Arbitrator before the Division Bench. The reference of the disputes to arbitration was also with the consent of Rathi. The terms and conditions of the agreements are thus, binding on Rathi, irrespective of whether they were registered or stamped or not.

13. Insofar as the objection that material documents were ignored is concerned, the primary ground raised was in respect of defects in the meter and the meter continuing to run even after the plant was closed. These disputes are beyond the scope of interference under Section 34 and the High Court cannot re-appreciate the evidence on record. The conduct of Rathi before the Id. Arbitrator, has not been co-operative to say the least. The Id. Arbitrator specifically records all the terms of the agreement. Clause 4.1 of

the lease agreement provided for the term of the lease. Interest was also liable to be paid as per Clause 3.4.3 of the lease agreement. If there was a delay of more than 75 days in making the payment, under Clause 3.1(v), INOX could deny Rathi the right to use the plant and equipment. The ownership of the plant and machinery always vested with INOX. Clause 6 of the agreement reads as under:

“6. Ownership

6.1 The ownership of the plant during the term of this lease or any renewal thereof shall vest with the LESSOR and the LESSEE will have no ownership rights in the plant. The LESSOR will have the right to affix its or its bankers name plate, serial number or a mark on the Plant to identify its ownership of the Plant or the interest of such bankers in the Plant at its own costs and expenses. LESSEE shall pay all rent, rates taxes charges and impositions payable in respect of the premises whereon the Plant is situated and- shall protect the Plant against attachment or seizure enforceable against lessee.”

14. Thus, apart from raising extremely trivial grounds in respect of non-running of a meter, there is no justification given by Rathi for non-payment of the amounts under the agreements. Since there was clear non-payment, INOX initially suspended operations and thereafter, terminated the agreements. There is not a whisper in the objection petition as to how Rathi justified the non-payment of the amounts which were due under the agreements. Though there is reliance on a statement of account in the objection petition, there is absolute lack of any clarity on how the amount awarded in favour of Rathi ought not to have been awarded and what amount if any was in fact due. It is clear that Rathi does not wish to take a

clear stand on this issue. Under such circumstances, the finding of the Id. Arbitrator in respect of the amounts due is valid and justified. A mere furnishing of statement of account without explaining the entries therein through evidence, cannot entitle a party to rely on the same. The entries in the statement of account ought to have been proved by adducing evidence. Simple filing of a statement of account cannot serve the purpose.

15. There is no evidence to show as to who prepared the statement of account and what is the effect of each of the entries contained in the statement of account. A statement of account by itself does not constitute any evidence. Thus, the Id. Arbitrator has awarded the amounts claimed by INOX on the basis of the terms of the agreements and in view of the breaches by Rathi of the same. A perusal of paragraph 17 of statement of claim clearly states that INOX, has, while arriving at the amount of Rs.2,44,57,950/- taken into the account the part payments made by Rathi and has added interest of 1% in terms of clause 3 of the agreement. The explanation given in para 16 of the quantification of the said sum, is set out below:

“16. That after adjusting Rs.2,50,000/- (Rupees two lacs fifty thousand only) from adjustable EMD for the month of July Lease Rent of Plant III, another sum of Rs.23,56,000/- (Rupees twenty three lacs fifty six thousand only) as lease rent for the months of July and August, 2006 pertaining to Plants I, II and III upto 31st August, 2006 are also payable by the Respondent. The operation and maintenance charges payable are after adjusting a credit note for Rs. 22,701/- (Rupees twenty two thousand seven hundred one only) issued against short supply during August 2006.

That after adjusting Rs.17,50,000/- (Rupees seventeen

lacs fifty thousand only) from adjustable EMD @ Rs.2,50,000/- (Rupees two lacs fifty thousand only) per month, for the period September, 2006 till March, 2007 of Lease Rent of Plant III, another sum of Rs.1,08,18,500/- (Rupees one crore eight lacs eighteen, thousand five hundred only) as lease rent for the period September, 2006 till March, 2007 pertaining to Plants I, II and III are also payable by the Respondent.

Thus as on 31st March, 2007, a total sum of Rs. 2,44,57,950/- (Rupees two crore forty four lacs fifty seven thousand nine hundred fifty only) is payable vide invoices/debit notes raised till the filing of the present Claim Petition.”

16. In response thereto, para 16 of the counter statement merely reads as under:

“16. Each and every allegation contained in para 16 of the statement of claim are false, incorrect, misconceived and the contents of the same are specifically denied. The respondent had cleared all dues and demanded the amount as payable by the claimant under the agreement but the claimant had failed to make the payment of amount due and payable to the respondent. The claimant has not provided gases since 22.8.2006 and is raising its claim for it also. None of the claims of the claimant is sustainable.”

17. Even going by Rathi's own stand, its stand was that no gases were supplied after 22nd August, 2006, the calculation by INOX of the amounts due has been till March, 2007. Until and unless, Rathi establishes the non-supply of gases on record and gives proper reasons as to why no payment is made after that, a mere plea in para 16 is not sufficient. The Id. Arbitrator fully justifies the grant of the claims made till March, 2007, in the following manner:

“54. As mentioned above, though the Respondent has submitted that the first, second and third plants did not give the guaranteed production as per terms of the Lease Agreement and the installed meter did not give the correct recording of actual supply and hence bills raised by the Claimant were incorrect, the burden of proof as to the existence of such facts was on the Respondent which they have failed to discharge.

55. In the absence of any evidence to the contrary and/or document duly proved to the contrary, I am unable to find any reason to disbelieve the oral evidence led by the Claimant and their Exhibits on record in this matter. I am therefore inclined to decide the Issue Nos. 2 to 4 against the Respondent and in favour of the Claimant.”

18. The settled legal position is that unless there is perversity, an arbitral award ought not to be interfered with. Moreover, none of the grounds in Section 34 have been made out in the present case. In view thereof the award of the Id. Arbitrator dated 14th March 2012, is upheld and the objection petition is dismissed.

CCP (O)10/2017

19. The present contempt petition has been filed by Inox Air Products Pvt. Ltd. (Petitioner) against Mr. Arun Rathi who is the Respondent (*hereinafter ‘contemnor’*).

20. The contempt alleged is of orders dated 6th August, 2012, 9th November, 2016 and 22nd December, 2016 passed in O.M.P. No.708/2012. The said O.M.P. has been disposed of on merits by the order contained hereinabove.

21. In brief, in O.M.P. No.708/2012 vide award dated 14th March, 2012, the Id. Sole Arbitrator had held that INOX is entitled to remove all its plant, machinery and equipment which was leased out to Rathi under the lease

agreement dated 17th December, 2003 and 16th May, 2005. The direction of the Id. Arbitrator is set out below:

“A. The Claimant is entitled to remove the plant and equipment leased out to the Respondent and installed at Respondent's factory premises at Ispat Nagar, Ghaziabad after 30 days' notice to the Respondent. The Respondent is directed to permit the Claimant to dismantle and take back the plants and machineries installed at Respondent factory premises at Ispat Nagar, Ghaziabad without creating any hindrances.”

22. Rathi had then filed O.M.P. No.708/2012 challenging the said arbitral award dated 14th March, 2012. During the course of hearing of the said O.M.P., the issue relating to removal of the plant, machinery and equipment of INOX was dealt with by this Court. On 6th August, 2012, the plant, machinery and equipment was directed to be released in favour of INOX. The relevant portion of the said order dated 6th August, 2012 is set out herein below:

“OMP No. 708 of 2012 & I.A. No. 14064 of 2012 (for delay)

1. Notice. Mr. Shankar Mathur, learned counsel accepts notice on behalf of the Respondent. Reply be filed within four weeks. Rejoinder thereto, if any, be filed before the next date.

2. One of the reliefs granted by the learned Arbitrator in the impugned Award dated 14th March 2012 is permitting the Respondent/Claimant to remove the plant and machinery leased out to the Petitioner and installed at the factory of the Petitioner's premises at Ispat Nagar, Ghaziabad. The Petitioner was directed to permit the Respondent to dismantle and take back the plant and machinery installed at Petitioner's factory premises without creating any hindrances.

3. As far as the above relief granted to the Respondent

is concerned, Mr. Shiv Khorana, learned counsel for the Petitioner states that the plant and machinery have not hypothecated to any financial institution and therefore, they would have no objection to the Respondent taking them back provided however that no damage is caused to the civil and other infrastructure works in the factory premises.

4. Having regard to the above submission of Mr. Khorana, this Court considers it appropriate to appoint Mr. A.K. Singhal, Director General (retd.), CPWD, r/o Flat No. B-2012, Gaur Green City, Vaibhav Khand, Indirapuram, Ghaziabad (Mobile No. 9910444589) as Court Commissioner to be present at the factory premises of the Petitioner on any date or dates between 21st and 31st August 2012 at the time mutually convenient to both the parties and supervise the removal of the plant and machinery by the Respondent. His fee is fixed at Rs. 1.50 lakhs which will be paid by the Respondent to him within ten days. This is independent of the conveyance expenses and incidentals which will be paid to him by the Respondent separately. Mr. Singhal is requested to submit a report to this Court before the next date.

5. If there is any difficulty in carrying out the above task, it will be open to the Respondent to apply to the Court for further directions.

6. It is made clear that the scope of the present petition is confined to the other reliefs granted by the learned Arbitrator to the Respondent.

7. List on 3rd December 2012. Order be given dasti to learned counsel for the parties. A certified copy of this order be sent to the learned Arbitrator forthwith.”

23. As per the above order, the Local Commissioner visited the factory premises of Rathi on 27th August, 2012. The Local Commissioner found that the premises was locked and no one present at the site could give any information about the keys of the lock and the party who had put the lock.

The relevant portion of the report is set out below:

“Based on the order of the Hon’ble Delhi High Court in respect of OMP 708/2012; I had fixed 27/08/2012 at 11.00 A.M. as date and time of meeting at the factory premises to decide the further course of action regarding removal of Plant & Machinery from the Factory premises. The intimation of this date was given by me to the advocates of both the parties vide letter No. LC/HC/1 dated 21 /08/2012. This letter was sent to both the parties through Speed Post.

On 27/08/2012 at 11:00 A.M. the Defendant attended the site. No responsible person from Plaintiff side came to attend the site meeting. After some time a person came to the site and told that the inspection can be done and opened the side entrance of the locked premises. At the site a Guard of the security agency engaged by the Bank was also present. But the person who had come to the site, to allow the team to enter inside the premises, refused to sign the attendance sheet. However it came to the notice that the name of the person was Qadir (Mob.-9350875886)

The team took the round of the premises and found that the entrance gate of the premises was sealed. But who had sealed the entrance gate could not be ascertained. It was also found that shed where the plant was installed by the Defendant was also locked. Nobody present at site could tell about the keys of this lock and the party who had put this lock. Further it was found that the shed where the plant of the Defendant was installed has been completely closed. The walls of this shed have been raised to the full height and windows have been blocked with brick work. Therefore it was not possible to see the machinery lying inside the shed. Further it was observed that some obstructions have been created in front of the tanks. Some of these obstructions will have to be removed for lifting and transportation of tanks relating Defendant.

After discussion with the Defendant and inspection of premises, I find that it will take nearly a month to dismantle the plant & machinery and take the same out from the premises. Further to remove the plant & machinery from the shed 15 to 20 feet length of wall will have to be dismantled. A portion of the roof of the shed may also have to be dismantled to accommodate crane for lifting plant & machinery from the shed. Similarly there is no proper approach to bring crane and trailers inside the premises for lifting plant, machinery and tanks etc. Therefore a katcha road will have to be made to remove Plant & Machinery belonging to the Defendant.

In view of the above mentioned facts, Defendant is directed to approach the Hon'ble Court to get necessary orders, so that directions issued by the court on 6/08/2012 can be implemented. Copy of attendance sheet and eight photographs of the premises are also enclosed."

24. INOX thereafter acquired knowledge that a confiscation order had been passed by the Excise Department, Ghaziabad against the said plant and machinery. The CESTAT finally passed an order on 6th September, 2016 whereby it directed the Excise Department to release the said assets to INOX within a period of four weeks.

25. Thereafter, on 9th November, 2016, this Court directed that the keys of the premises would be collected from the Id. Arbitrator and the locks of the main gate would be opened. The relevant portion of the order dated 9th November, 2016 is set out below:

"IA No.18811/2012

8. It is agreed between the parties that the keys of the premises where the machinery is kept will be collected from the Arbitrator and brought to the premises at the time of removal of the goods and the representative of

both the Petitioner and Respondent No.1 will remain present at the time of removal.

9. Learned counsel for Respondent No. 1 states that once the Department opens the lock of the main gate, then the above steps will follow.

10. The application is disposed of with liberty to the parties to apply to the Court, if they have any difficulty in complying with the order dated 6th August, 2012.”

Since the keys of the premises could not be obtained from the Id. Arbitrator, an I.A. was preferred being I.A. No.16017/2016 wherein directions were sought for breaking open of the locks in order to give complete effect to the order dated 6th August, 2012. The said application was disposed of vide order dated 22nd December, 2016 which reads as under:

“IA No. 16017 of 2016 (for direction)

1. Notice. Mr. Shiv Khorana, learned counsel for the non-Applicant accepts notice.

2. This is an application by the Respondent/Applicant explaining certain difficulties in the way of the implementation of the order dated 9th November, 2016 passed by this Court.

3. It is pointed out that there are two doors/gates in the premises. As far as the outer door/gate is concerned, there are three locks placed by the Nagar Nigam, Ghaziabad, Punjab National Bank (‘PNB ’) Ghaziabad Branch as well as office of the Assistant Commissioner, Central Excise Division-IV, Ghaziabad. A copy of the letter dated 14th December, 2016 written by the Assistant Commissioner to both the Nagar Nigam as well as PNB, Ghaziabad Branch has been produced in the Court. Both the said parties have been requested by the Commissioner of Central Excise to remain present on 23rd December, 2016 at 10 am.

4. However, as regards the inner door/gate of one of the rooms where some of the plant and machinery of the Applicant is located, it is stated that the learned

Arbitrator has not been able to send the keys and, therefore, the said lock will have to be broken. Learned counsel for the non-Applicant points out that while there is no objection to the locks being broken, the Respondent must produce the inventory prepared during the course of arbitral proceedings to enable the comparison of the machinery now found inside the room of which lock will have to be broken.

5. Learned counsel for the Applicant assures the Court that the said inventory will be produced on 23rd December, 2016 at the time of breaking open of the lock.

6. On the above understanding, the Court permits the lock of the inner room as mentioned above to be broken.

7. The application is disposed of. If for some reason the above steps are unable to be completed on 23rd December, 2016, another mutually convenient date will be fixed by the parties for completing the steps.

8. Order dasti.”

26. On 9th January, 2017, when the Local Commission was executed for the second time, it was found that all the plant, machinery and equipment were missing from the factory premises of Rath. The Local Commissioner gave a detailed report dated 20th January, 2017 in which he gave the following findings:

- It was found that the wall of the shed from various sides was broken from various sides till the roof;
- The windows and other openings including the gate of the shed were completely broken;
- The plant, machinery and equipment was not there;

- The inventorised list of the plant, machinery and equipment which was prepared under the orders of the Arbitral Tribunal and sealed on 17th September, 2007 was found to be completely missing;
- Out of the four installed gas storage tanks, only one tank was found;
- All the three installed Vacuum Insulated Storage Tank (VIST) were also not found.

27. The Commissioner concluded as under:

“ ...

On reaching the shed where the plant and machinery as installed by the Respondent was located, it was found that the wall of the shed from various sides was completely broken till the roof. All the windows and other openings including the gate of the shed were completely broken. When we entered inside, it was seen that the plant and machinery installed by the Respondent was not there at all. The plant and machinery which was fitted through concrete foundations was found to be removed alongwith its complete fitment. Various instances of the floor and / or the wall been broken for removal of the plant and machinery were also seen.

From the naked eye it could be clearly seen that whatever parts of the plant and machinery could be removed, were done so and whichever parts could not be removed were cut and taken away. As per my previous report dated 27th August, 2012, it was recorded by me that the entire shed is completely closed and the walls of the shed have been raised to the full height.

The Counsel for the Respondent also gave to me a list of plants and machineries which was installed in the factory premises and was sealed on 17th September 2007 as per the orders of the Hon'ble Arbitral Tribunal. The affidavit to that effect which was filed

*before the Hon'ble Arbitral Tribunal is enclosed as **ANNEXURE-A**.*

*After opening the locks of the premises attempts were made to find out the position of the plants and machineries which was mentioned as sealed as per ANNEXURE-A it was found that all the plants and machineries which was mentioned in ANNEXURE-A was missing. The present status of the entire plants and machineries which was sealed on 17th September 2007 is give in **ANNEXURE-B**, enclosed herewith.*

*Since the affidavit dated 17th September 2007 mentioned only the major equipments, therefore, the representative for the Respondent handed over a complete list of plants and machineries which were installed in the premises of the Petitioner. The detailed list of such plants and machineries, as installed, mentioning various details such as make, serial number, manufacturing year type, capacity, job number etc., is enclosed herewith as **ANNEXURE-C**. The Representative explained that this list also included the plants and machineries which were installed in the premises of the Petitioner but not included in the list mentioned in ANNEXURE-A.*

*Further, the representative for the Respondent also gave an exhaustive list of such plants and machineries which are now not there in the factory premises of the Petitioner when compared with the given as ANNEXURE-C. A detailed list of the such plant and machinery, which is now not present, mentioning various details such as make, serial number, manufacturing year type, capacity, job number etc., is enclosed herewith as **ANNEXURE-D**.*

.....

Since most of the plant and machinery installed by the Respondent could not be found inside the factory premises of the Petitioner, the Commission ended at about 05:00 p.m. with the Bank Officials and the Nagar Aayukt, locking the front main gate of the

factory premises of the Petitioner. The entire Commission was photographed as well as video graphed and the video recording on a CD is duly enclosed alongwith the report with the necessary photographs.”

28. According to INOX, the removal of this equipment which was inventorised and the non-release of the same to INOX constituted contempt. It is alleged that the contemnor has no fear for the law and deserves severe punishment.

29. On behalf of the contemnor, it is contended in the reply that Sh. Arun Kumar Rathi is a respectable businessman having the highest regard for the Court. The basic crux of the reply is that the contemnor has no role in removal of the plant, machinery and equipment and that he came to know only in 2017 that the same had gone missing from his own factory. It is his submission that he rarely visited the premises and that too for limited occasions. In fact, he claims that he is not aware of the number of locks which are fixed in the premises and whom they belong to. It is further alleged that on the outer gate, the Excise Department, the Nagar Nigam, Ghaziabad and the Punjab National Bank have fixed their locks. There was also a lock fixed by the Id. Arbitrator. Guards of Punjab National Bank were stationed outside the premises 24 hours a day since 2007. The Bank had taken the possession of the property under Section 13(4) of the SARFESI Act. It is also claimed that the Bank had also placed its own locks and that he is not responsible. Since, there is nothing to show as to who had taken out the plant, machinery and equipment, the burden of proof being high in a contempt petition, the contemnor cannot be held to be blamed. The contemnor admits that the dues of the Nagar Nigam are approximately

Rs.4.72 crores, dues of the Banks are to the tune of approximately Rs.123 crores and dues of the tax authorities are approximately Rs.715 crores as per the last available records of Rath. There are sundry creditors for Rs.19.88 crores.

30. The Punjab National Bank filed its reply stating that it did not have physical possession of the leased machinery and only symbolic possession of the factory had been taken over. The stand of the Punjab National Bank in its letter dated 25th May, 2017 is set out below:

“Dear Sirs,

Sub: Plants & Equipments situated at the factory premises of M/s Rath Ispat Ltd. situated at Ispat Nagar, Ghaziabad

This has reference to your letter dated 20.04.2017, received at ours on 03.05.2017. We submit as under:

1. The property, where the leased machinery claimed stolen, was not in the physical possession of the Lead Bank. It may be added that the banks had taken only symbolic possession of the factory premises of M/s Rath Ispat Ltd. by affixing a notice under the provisions of SARFESI Act. Moreover, the front gate of the factory premises was locked by the Ghaziabad Municipal Corporation, which is also recorded in the Punchnama dated 09.01.2017, prepared in the presence of your officials.

2. You have also admitted the fact vide para no.6 of your letter cited above that P & M installed inside the factory was wrongly confiscated by the Excise Deptt. Ghaziabad.

Keeping in view the abovementioned facts, the liability of the Lead Bank & other lender banks does not arise and the alleged absence of P & M from the factory premises cannot be answered by the Bank and / or consortium Banks.

Thanking you

*Yours Sincerely
Chief Manager.”*

31. In its reply, Punjab National Bank also stated that it had deployed a guard at the outer main gate of premises. The Excise Officer had confiscated the land, building, plant and machinery. Proceedings had been commenced under the SARFESI Act, 2002. Reliance is placed by Punjab National Bank on the copy of the *Punchnama* dated 9th January, 2017 which was prepared in presence of all the parties. An additional affidavit was also filed by Punjab National Bank that the dispute between the Excise Department and Rathi is still pending before the Supreme Court. That Punjab National Bank had deployed guards, retained from one of the security agencies for the period of 28th December, 2007 to 5th July 2017 and they never reported any moving out of the plant, machinery and equipment.

32. On behalf of Nagar Nigam, it is stated that Rs.3.91 crores was due as property tax and warrants were issued against the company and Mr. Arun Kumar Rathi, which had increased to Rs.5.13 crores by the year 2017-18. That the Nagar Nigam had not sealed the main gate of the factory nor had it confiscated the plant, machinery and equipment. Only the small side door of the premises was locked from the outside. No physical possession of the property or the plant, machinery and equipment was taken by the Nagar Nigam. Thus, it is submitted that the plant, machinery and equipment was not under the watch and guard of the Nagar Nigam.

33. On behalf of the Commissioner of Central Excise, it is stated that demands were raised against Rathi for various amounts towards excise duty, disallowance of MODVAT credit and an order of confiscation was passed against the company. Personal penalty was also imposed on Mr. Anil Rathi,

Mr. Pradeep Rathi and Mr. Arun Kumar Rathi. It is submitted that investigations were conducted into Rathi's affairs and it was found that the company had indulged in clandestine removal of goods without payment of duty under the Central Excise Act, 1944. Despite the orders of confiscation having been passed, no actual possession of the plant, machinery and equipment was taken by the Excise Department. The confiscation is a proceeding *in rem*. The Excise Department relied upon the affidavit filed by Rathi to state that all the assets are in the custody of Punjab National Bank. The CESTAT had passed a conditional order for the deposit of Rs.40 lakhs. This order was also not complied with by Rathi. Rathi thereafter made a reference before the Board for Industrial and Financial Reconstruction (BIFR). The reply of the Excise Department concludes as under:

“15. In light of the above, it is most humbly submitted that the premises were not under the control, custody or possession of the Central Excise/Respondent No. 4 and hence the same cannot be held liable for any clandestine removal of any plant and machinery owned by Inox Air Products Pvt Ltd. Respondent No. 4 had not installed any locks on any of the gates of the premises. It is further most humbly submitted that Respondent No. 4 has not indulged in any conduct which amounts to willful disobedience of the orders of this Hon'ble Court.”

Submission of ld. counsels

34. The petition has been heard from time to time. On behalf of Mr. Arun Kumar Rathi, Mr. Tanmaya Mehta, ld. counsel submits that a contempt petition is like a criminal case wherein the guilt of the contemnor has to be established beyond reasonable doubt. He submits that at the time when Mr.

A.K. Singhal - the Local Commissioner executed the commission in 2012, it is not clear if the machinery was actually there because the walls were raised till the roof and the windows and doors were all sealed. The Bank, Nagar Nigam and the Excise Department had possession of the property. It is irrelevant whether the possession was symbolic, constructive or physical. In fact, the contemnor himself has raised concerns of security in Ghaziabad in one of his letters. Since multiple claimants had possession of this property and the plant, machinery and equipment, the blame cannot be put only on Mr. Arun Kumar Rathi. Even when the Local Commission was executed, the officials of the Bank had opened the main gate. The premises was under the lock of the Bank and the Nagar Nigam. The letter dated 27th December, 2016 from the Excise Department clearly showed that the premises was locked by the Nagar Nigam and the Bank. INOX has filed the contempt only on assumptions in order to implicate Mr. Arun Kumar Rathi. Since there can be several hypotheses as to how the machinery went missing, there cannot be any contempt. He relies on the *Ram Kishan v. Tarun Bajaj and Ors., (2014) 16 SCC 204* and *Satish Nirankari v. State of Rajasthan, AIR 2017 SC 3051* to argue that circumstantial evidence cannot be the basis for civil contempt as there are many disputed questions of fact. The Bank has in fact approached the NCLT, however, no IRP has been appointed. The security guards of the Bank were there since 2007. Even if it is presumed that Mr. Arun Kumar Rathi had possession, at best, it could have been a case of negligence, but not of him taking away the machinery.

35. On behalf of INOX, it is submitted that the entire machinery was removed clandestinely as the plant, machinery and equipment had been inventorised during the proceedings before the Id. Arbitrator. The Id.

Arbitrator had the keys. Before the Id. Arbitrator, an affidavit had been filed in October, 2007 that pursuant to the Tribunal's order dated 17th September, 2007, in presence of counsels and a representative of Rathi, alongwith representatives of INOX, the sealing of the plant, machinery and equipment had been carried out. The equipment was tied with iron chains and was also locked by means of several locks. The details of the equipment which was inventorised was also placed on record before the Id. Arbitrator. The equipment which was missing was also mentioned in the said affidavit. Thus, it was only during the arbitral proceedings and the proceedings before the Court, that the equipment went missing. Photographs of the equipment which were seized were also taken at that time. Even as recorded in *Punchnama* dated 9th January, 2017, Mr. J.D. Kaul from the Tax Department had the keys of the small side door which was used to open the locks. However, the gate was still found locked from the inside which was thereafter broken. Thus, it is submitted by Mr. Mathur, Id. Counsel appearing for INOX that the locking by the Government Departments was merely symbolic and it was the employees of Mr. Arun Kumar Rathi who had locked the gate/doors from the inside and who continued to retain the possession of the property. It is further submitted by him that the plant was shut in October, 2007. In fact, in the Local Commissioner's report of the visit on 27th August, 2012, the Local Commissioner who was a PWD Engineer had observed that it would take at least a month to dismantle the plant, machinery and equipment and take the same outside the premises. A person by the name of Mr. Qadir with the mobile no. 9350875886 was a representative of Mr. Arun Kumar Rathi who had allowed the Commissioner and the other representatives inside the premises. He, however, refused to

sign the attendance sheets. In view of these facts, it is submitted by Mr. Mathur that the actual physical access to the plant, machinery and equipment was with Mr. Arun Kumar Rathi, despite the various Governmental Authorities having taken symbolic possession or the Bank having deployed security guards outside. Since Mr. Arun Kumar Rathi is the person who had control over the plant, machinery and equipment which were heavy-duty in nature and would have taken a large amount of time for being dismantled and removed from the premises, he should be held to be guilty of contempt. It is submitted that not only was the plant, machinery and equipment removed from the premises, but various steps were taken to ensure that the same goes unnoticed. For example, the walls were raised and sealed, no window, door was kept open as recorded in the Commissioner's report. In fact, brick work was undertaken to close all the windows and doors, making it impossible to see if the machinery was lying inside the shed. On 27th August, 2012, Mr. Qadir was present on behalf of Mr. Arun Kumar Rathi, though he refused to sign the proceedings. All this goes to show that Mr. Arun Kumar Rathi is guilty of contempt.

36. On behalf of the Excise Department, Ms. Vibhuti Malhotra, Id. Counsel submitted that the Department never had physical possession of the plant, machinery and equipment. On behalf of the Punjab National Bank, it was again reiterated that though security guards were deployed at the outer periphery of the factory, the Bank did not have physical possession of the plant, machinery and equipment.

Findings and Conclusions

37. A perusal of the pleadings in the contempt and the documents

attached thereto shows that the last physical inspection of the plant, machinery and equipment was carried out when the same was inventorised pursuant to the orders of the Arbitral Tribunal. The said affidavit of Mr. K.K. Kapur, who is the General Manager of INOX states that on 23rd September, 2007, the sealing of the plant, machinery and equipment was done in the presence of Mr. Sanjeev Kumar and Mr. Shiv Khorana, Id. counsel for Rathi. The said inventorization was quite detailed and reads as under:

“I, K.K. Kapur, son of Late Shri J.C. Kapur, aged about 59 years, C/o 612, 18, Narain Manzil, 6th Floor, 23, Barakhamba Road, New Delhi - 110001, do hereby solemnly affirm and declare as under:

1. That I am Deputy General Manager (Marketing) of the Claimant in the present matter, am conversant with the facts of the present case and competent to affirm this affidavit on behalf of the Claimant.

2. That as per the Order dated 17th September, 2007 of this Hon'ble Tribunal, the Claimant's representatives namely Mr. D.K. Choudhary, Mr. Tapan K. Datta alongwith Deponent had assembled at the factory gate of the Respondent at 11 :00 a.m. on 23rd September, 2007 for sealing of the plant and machinery of the Claimant.

3. That Mr. Sanjeev Kumar and Mr. Shiv Khorana were also present on behalf of the Respondent. That the sealing of the plant and equipment was carried out and the below mentioned equipments were tied with iron chains duly covered with one piece of cotton sleeve without any joint and Mr. D.K. Choudhary had put his signatures on the said cotton sleeve along its length. The said iron chains were thereafter locked by means of several locks. The name of the equipment locked mentioned hereinbelow:

Name of the Equipment

Air Compressor Plant No: 1, 200m³/hr

Expansion Engine Plant No: 1, 200m³/hr

Air Compressor plant No: 2, 200m³/hr

Expansion Engine Plant No: 2, 200m³/hr

Air Compressor No: 1, 600m³/hr plant

Air Compressor No: 2, 600m³/hr plant

Air Compressor No: 3, 600m³/hr plant

Expansion Engine No: 1600m³/hr plant

Expansion Engine No: 2600m³/hr plant

4. That all the locks as abovementioned were covered with medical adhesive tape and sealed.

5. That the said cover over the locks were dully signed by Mr. D.K. Choudhary on behalf of the Claimant and Mr. Maheshwari on behalf of the Respondent.

6. That the flywheel and V belts of Expansion Engine No: 2 of 600m³/hr plant was also sealed with adhesive tape and signed.

*7. That it was also noticed by the Claimant that
(a) Electrical energy meter of both the 200m³/hr plant found missing and bypassed.*

(b) Out board bearing, flywheel and pedestal for out board bearing of Air compressor for plant No: 2(200m³/hr) found in dismantled condition.

(c) First stage suction and discharge valves of Air compressors No: 2 & 3 of 600m³/hr plant was found in dismantled condition.

(d) One of the two Ammonia compressors for chilling

plant of 600m³/hr plant was found in totally dismantled condition.

(e) Store cum office room found in Pen condition which was locked while leaving the plant on 22.8.2006. Also 2 cupboards inside which costly spares and instruments along with records were kept found in open condition.

8. Mr. Girish Kumar of the Respondent was not available and Mr. Shiv Khorana had informed Mr. Maheshwari is deputed in place of Mr. Girish Kumar.

9. That the sealing as abovementioned was completed by about 1:20 p.m.”

38. The inventory before the Id. Arbitrator was prepared in September-October, 2007. The access to the plant, machinery and equipment was given at the time of preparation of inventory in the presence of Id. Counsel for Rathi and Mr. Maheshwari. On 4th April, 2008, Mr. Arun Kumar Rathi gave two affidavits before the Id. Arbitrator to the following effect:

“AFFIDAVIT/UNDERTAKING OF MR. ARUN KUMAR RATHI, MANAGING DIRECTOR OF RESPONDENT COMPANY.

I, Arun Kumar Rathi, Managing Director of the respondent Company, son of Late Shri G D Rathi, aged 54 years, resident of 24, Sadna Enclave, New Delhi do hereby state and solemnly affirm and confirm as under:

1) That I am filing this undertaking on behalf of the respondent company.

2) That I give this undertaking on the affidavit as per the directions of the learned Tribunal by order dated 11.01.2008 and on 06.02.2008.

3) That I say in case any proceedings are commenced hereinafter by any authority/tribunal/and/or courts against the respondent company to lift these plants and machineries. I will apprise to the said

authority/tribunal/and/or courts as the case may be about the proceedings pending before this tribunal and order made by your Honour in these arbitration proceedings.

AFFIDAVIT/UNDERTAKING OF MR. ARUN KUMAR RATHI, MANAGING DIRECTOR OF RESPONDENT COMPANY.

I, Arun Kumar Rathi, Managing Director of the respondent Company, son of Late Shri G D Rathi, aged 54 years, resident of 24, Sadna Enclave, New Delhi, do hereby state and solemnly affirm and confirm as under:
1) That I am filing this undertaking on behalf of the respondent Company.

2) That I say in case if the matter is finally decided by the Courts against the respondent Company by holding that these machineries & plants are liable to be handed over to the claimant Company will follow the Order in accordance with the law

3) That respondent Company further undertake that the company will not sell the plant & machineries and if required Company will take necessary steps to protect the plants and machineries by informing the police/authorities/Ld. Arbitrator as the case may be.

The above undertakings were given by Mr. Rathi in terms of order dated 11th January, 2008 and 6th February, 2008.

39. The initial order of the Id. Arbitrator was passed in an application under Section 17 of the Arbitration Act wherein INOX had sought the following reliefs:

*“(a) restrain the Respondent from using the plant and equipment of the Claimant installed at the factory premises of the Respondent at Ispat Nagar, Ghaziabad, Uttar Pradesh in any manner whatsoever;
(b) allow the Claimant to seal the plant and equipment of the Claimant installed at the factory premises of the*

Respondent at Ispat Nagar, Ghaziabad, Uttar Pradesh and allow the Claimant to inspect the plant and equipment on a regular basis

(c) allow the Claimant to take any further and necessary steps for enforcement of Prayers (a) and (b) as mentioned above;

(d) restrain the Respondent from obstructing the Claimant from dismantling and removing the plant and equipment installed at the premises of the Respondent at Ispat Nagar, Ghaziabad, Uttar Pradesh;

(e) to pass such other and/or further Orders as the Hon'ble Sole Arbitrator may deem necessary or proper on the facts and in the circumstances of the case.”

40. It is pursuant to the said application and the orders passed therein that the inventory came to be prepared and Mr. Arun Kumar Rathi had given the undertakings as set out above. Thus, there was a clear understanding on behalf of Rathi that there was no hypothecation of the machinery. The machinery was intact. The same was preserved and protected during the course of the arbitral proceedings.

41. Subsequent to this preparation of inventory, the keys were deposited with the Id. Arbitrator. However, from 2007 to 2012, no physical inspection was ever carried out. For the first time, on 27th August, 2012, the Local Commissioner appointed by this Court visited the premises and found that the walls of the shed were completely closed, they were raised to full height and the windows were blocked from brick work. Thus, it was not possible to see if the machinery was lying inside. Even the water tanks were obstructed in some manner. The only persons who could have carried out construction were those of Rathi Ispat Limited. The bank and excise department or Nagar nigram have no interest to carry out construction in the property. The Commissioner on the basis of information gathered, came to the conclusion

that it would take a month to dismantle the plant, machinery and equipment which would require dismantling of a wall which is 15 to 20 feet long. Cranes would be required for lifting the plant, machinery and equipment and a *kaccha* road will also have to be made. The Commissioner did not physically see the equipment. The observations of the Commissioner reads as under:

“The team took the round of the premises and found that the entrance gate of the premises was sealed. But who had sealed the entrance gate could not be ascertained. It was also found that shed where the plant was installed by the Defendant was also locked. Nobody present at site could tell about the keys of this lock and the party who had put this lock. Further it was found that the shed where the plant of the Defendant was installed has been completely closed. The walls of this shed have been raised to the full height and windows have been blocked with brick work. Therefore it was not possible to see the machinery lying inside the shed. Further it was observed that some obstructions have been created in front of the tanks. Some of these obstructions will have to be removed for lifting and transportation of tanks relating Defendant.

After discussion with the Defendant and inspection of premises, I find that it will take nearly a month to dismantle the plant & machinery and take the same out from the premises. Further to remove the plant & machinery from the shed 15 to 20 feet length of wall will have to be dismantled. A portion of the roof of the shed may also have to be dismantled to accommodate crane for lifting plant & machinery from the shed. Similarly there is no proper approach to bring crane and trailers inside the premises for lifting plant, machinery and tanks etc. Therefore a kaccha road will have to be made to remove Plant & Machinery

belonging to the Defendant.”

42. Thus, between 2007 and 2012, clearly, an attempt was made to somehow ensure that the plant, machinery and equipment would be unnoticed and no third party could even view the same. In 2012, the Commissioner could not see the plant, machinery and equipment. At the relevant point of time in 2012, when the Commissioner went to execute the Commission, Mr. Qadir, who counsels clearly admit was an employee of Mr. Arun Kumar Rathi had the keys to the premises and had allowed the team to enter the premises. Thus, on the said date, despite the Bank, the Excise Department and the Nagar Nigam having passed various orders on paper confiscating or taking possession of the property, the real possession was with Mr. Arun Kumar Rathi. The submission of Mr. Mehta that Mr. Qadir only had the keys to the side gate and the machinery could not have been removed from there does not disprove the fact that Mr. Qadir was in possession or had access to the plant, machinery and equipment. The Local Commissioner's report is clear that though the security agency was present at the time when he inspected, the person who allowed the team to enter inside the premises was Mr. Qadir.

43. During the course of the arguments, a specific query was put to the counsel appearing for Mr. Arun Kumar Rathi as to who Mr. Qadir was, to which, the response was that he was an employee of Mr. Arun Kumar Rathi.

44. The manner in which the plant, machinery and equipment which were inventorised in 2007, could not be seen in 2012 and subsequently in 2017, the entire premises was in a broken condition shows that a deliberate attempt has been made to remove the plant, machinery and equipment from the premises. Between 2012 and 2017, when the same Local Commissioner

again visited the premises on 9th January, 2017, the status of the property had completely changed. The commission was executed in the presence of various Governmental Authorities including representatives of the Bank and the parties. In this report, the Commissioner has clearly informed the Court that now the shed was broken till the roof, all the windows and other openings were broken. None of the plant, machinery and equipment were seen. The plant, machinery and equipment which were fitted through concrete foundations were found to be removed. The floor and the wall had been broken for removing the plant, machinery and equipment. Thus, in the span of 2007 to 2012 and thereafter from 2012 to 2017 heavy-duty plant, machinery and equipment for production of gas, which was on lease with Rathi and was provided by INOX had gone completely missing. This chain of events transpired literally under the supervision of the Arbitral Tribunal and this Court.

45. The matter was pending before the Tribunal till the passing of the award on 14th March, 2012. There is no doubt that there has been flagrant, deliberate and contumacious violation of the orders of the Court and of the Tribunal. The purpose of preparation of inventory of the plant, machinery and equipment, as directed by the Id. Arbitrator on 17th September, 2007 was to ensure that the same is preserved during the pendency of the arbitral proceedings. The said order has been completely set at naught. The order dated 6th August, 2012 clearly records Mr. Arun Kumar Rathi's consent for releasing the plant, machinery and equipment to INOX. However, the same could not even be found as deliberate difficulties had been caused by persons who were acting under the behest of Mr. Arun Kumar Rathi. There was no reason as to why Mr. Arun Kumar Rathi's representatives, who were

clearly aware of the order dated 6th August, 2012, were not present during the execution of the commission, to give cooperation to the Commissioner for inspecting the plant, machinery and equipment. Despite the order dated 6th August, 2012, it took five years before the order for opening of locks could be obtained and physical inspection could be conducted. The order dated 6th August, 2012 was clear i.e. Mr. Arun Kumar Rathi was represented before the Court. His counsel categorically stated as under:

“.....

3. As far as the above relief granted to the Respondent is concerned, Mr. Shiv Khorana, learned counsel for the Petitioner states that the plant and machinery have not hypothecated to any financial institution and therefore, they would have no objection to the Respondent taking them back provided however that no damage is caused to the civil and other infrastructure works in the factory premises.”

46. When the Court directed the removal of the plant, machinery and equipment by INOX, there was no reason whatsoever for Mr. Rathi, to not ensure that complete cooperation was extended to the Commissioner for removal of the plant, machinery and equipment on 27th August, 2012. This was not done by Mr. Rathi. During the execution of the said commission, the Commissioner took a video of the status of the premises. The court has viewed the video which is in a CD and which reveals that when the commission was executed on 9th January, 2017, there were fresh tyre marks on the ground. The tall walls which were reflected in the earlier commissioner's report were broken. The entire *malba* from the broken walls was also there. Enough space has been created for a crane to go in, the entire machinery was also dismantled. A comparison of the images of the wall taken on 27th

August, 2012 and on 9th January, 2017 clearly shows that initially a wall was constructed to stop access to the property and once the locks were directed to be broken and the machinery was directed to be released to INOX, the walls were dismantled in a hurry and the machinery had been removed around the date of execution of the date i.e. 9th January, 2017.

47. On 19th April, 2017, in the contempt, Mr. Arun Kumar Rathi was directed to be presented in person in Court. This order was reiterated on two or three occasions. On 8th January, 2018, this Court expressed surprise as to how the plant, machinery and equipment could go missing by breaking the walls of the premises. Thereafter, submissions were heard on the contempt. On 11th July, 2018, while the matter was part heard, the following order was passed:

“.....

Arguments heard in part in CCP(O) 10/2017. The counsels have taken the court through the three inventory reports that were made. Counsel for contemnor is directed to find out as to whether Mr. Qadir who is mentioned at page 35 with mobile no.9350875886 was an employee of M/s Rathi Ispat Limited or any group company or of any of the promoters. Counsel for the contemnor shall also take instructions as to which was the last date when products were manufactured in this plant.”

48. Ld. Counsel for Rathi had thereafter sought instructions and on 27th August, 2018, it was stated as under:

“...

Mr. Mehta submits, on instructions, that Mr. Qadir was an employee of Rathi Ispat Ltd. and the manufacturing was carried out in the unit till October, 2007.”

49. From the above, two facts are clear i.e. Mr. Qadir was an employee of Rathi. The last manufacturing in the unit was in October, 2007.

50. In the above chronology of events, the contempt is evident from the following facts:

i) Inventory was prepared in 2007 followed by affidavits of Mr. Arun Kumar Rathi to not sell the plant and machineries as also take all necessary steps to protect the same;

ii) The Id. Arbitrator's award dated 14th March, 2012 to release the plant, machinery and equipment to INOX was within the knowledge of Mr. Arun Kumar Rathi as well as the company;

iii) Order dated 6th August, 2012 by which consent was given on behalf of Mr. Rathi was well within his knowledge. On the said date, no submission was made that Mr. Rathi or the company does not have physical possession of the plant, machinery and equipment. In fact, a positive assertion was made before the Court that the plant, machinery and equipment were not hypothecated to any financial institution and they would not have any objection in the plant, machinery and equipment being taken by INOX. Further submission was made that the civil and other infrastructure work should not be damaged during the said process. This proves that on the said date, Mr. Rathi represented to the court that the plant, machinery and equipment was lying in the premises;

iv) On 27th August, 2012, when the Commissioner visited the premises, it was Mr. Rathi's employee – Mr. Qadir who gave access to the Commissioner and his team;

v) On that date, for whatever reason, not a single representative of Mr.

Rathi was present at the premises. This shows complete non-cooperation in the execution of the commission. Even his counsels were not present. The employee – Mr. Qadir who was present refused to sign the proceeding sheet, though he had given access. The intention was to simply avoid any responsibility.

vi) All these facts go to prove that the actual physical status of the plant, machinery and equipment was well within the knowledge of Mr. Arun Kumar Rathi / the company and the defenses raised in the contempt that the Bank, the Excise Department or the Nagar Nigam had physical possession of the plant, machinery and equipment are an afterthought.

51. All the pleadings filed on behalf of these authorities and the submissions made shows that the authorities had only symbolic possession of the premises, but the real access was with Mr. Arun Kumar Rathi including through his employees. Even when the commission was executed in 2017, only the main gate was opened by the official of the Nagar Nigam and the Bank. At the site, where the plant, machinery and equipment was located, the same was completely dismantled in 2017.

52. In view of the above, there is no doubt that the conduct of the contemnor has not been *bona fide* and there has been clear over-reaching of the Court. In fact, the contemnor and the company have not come clean with the Court and have deliberately misled the Court even at the time of passing of the order dated 6th August, 2012. The manner in which the plant, machinery and equipment was removed continues to remain a mystery. However, the contumacious conduct of the Respondent/contemnor is not in doubt in any manner whatsoever. Throughout this process, the only person

who was aware of the arbitral proceedings, the orders passed therein and the orders passed by this Court dated 6th August, 2012, 9th November, 2016 and 22nd December, 2016 was the contemnor. Until the contempt came to be filed in March, 2017, the Punjab National Bank, the Nagar Nigam or the Excise Department may not have had detailed knowledge of the arbitral proceedings. In fact, the consent given by Mr. Rathi on behalf of the company, as recorded on 6th August, 2012 itself shows that the Court was made to pass an order directing release of the plant, machinery and equipment when clearly the company/Mr. Rathi had no intention of ensuring that the same was released to INOX. It is for this reason that no one was present at the time of execution of the commission on 27th August, 2012.

53. The manner in which the whole premises was sealed with brick work is evident from the photographs filed by the Commissioner. The petition challenging the award of the Id. Arbitrator itself was filed by Rathi with the affidavit of Mr. Arun Kumar Rathi. In respect of the direction to release the plant, machinery and equipment as directed by the Id. Arbitrator, no objection has been raised in the petition. On the first date itself i.e. 6th August, 2012, consent was given and it was represented to the Court that the plant, machinery and equipment was not hypothecated to any bank or financial institution. Thus, the contemnor is guilty of disobedience of the orders of this Court, as he has, by his conduct ensured that the plant, machinery and equipment is not released to INOX, despite the orders of the Arbitral Tribunal as also orders passed by this Court on 6th August, 2012, 9th November, 2016 and 22nd December, 2016.

54. In view of the orders of the Id. Arbitrator as well as the affidavits tendered by Mr. Rathi dated 4th April, 2008, he had an absolute obligation to

handover the plant, machinery and equipment and to take steps to protect the plant, machinery and equipment. He was also under a personal obligation to ensure that if any proceedings are commenced before any authority, Tribunal or Court to lift the said the plant, machinery and equipment, he would apprise the said authority about the orders passed by the Tribunal.

55. Thus, from the date of preparation of inventory in 2007, till 2012 when Mr. Qadir allowed access to the Local Commissioner to the premises, the possession of the inner portion of the premises continued to remain with Rathi. Thereafter, in 2017, during the proceedings of the O.M.P., no submission was ever made on behalf of Rathi that the plant, machinery and equipment is missing. Under these circumstances, there is no doubt that Mr. Arun Kumar Rathi not only had possession of the plant, machinery and equipment, but also failed to honour the undertakings given before the Id. Arbitrator. At no point of time until the execution of the commission on 9th January, 2017, did Mr. Arun Kumar Rathi inform the Court of the plant, machinery and equipment having gone missing. He had given his undertaking to the Tribunal and is bound by the same. It is therefore not open for him to raise frivolous objections to the effect that some other authority was in control of the plant, machinery and equipment or to even make a submission before this Court that he was not aware and that he became aware of the missing nature of these equipment only when the commission was executed in January, 2017. He had an obligation to protect the plant, machinery and equipment which he failed to do. The egregious violations by Mr. Rathi are:

- i) to mislead the Court into passing various orders including orders dated 6th August, 2012, 9th November, 2016 and 22nd

December, 2016;

ii) in not fairly informing the Court that Mr. Qadir who had control of the inner locks and keys of the premises was an employee of Rathi until a pointed question was put by the Court;

iii) of not adhering to the undertakings given to the Id. Arbitrator in affidavits dated 4th April, 2008. He thus is clearly guilty of civil contempt and wilful disobedience of various orders passed by this Court which have resulted in INOX not getting possession of the plant, machinery and equipment.

56. Whenever there is contempt which is wilful and egregious, the person liable deserves to be punished in accordance with law. The contempt is visible on the face of this case and the conduct of Mr. Rathi does not brook any sympathy inasmuch as after having given an undertaking before the Id. Arbitrator to protect the plant, machinery and equipment, the said undertaking ought to have been honoured.

57. In the judgement of ***Kapildeo Prasad Sah v. State of Bihar, (1999) 7 SCC 569***, whenever there is a wilful disobedience, the Courts ought to punish for contempt. The Supreme Court observed as under:

“9. For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of the court. Power to punish for contempt is to be resorted to when there is clear violation of the court’s order. Since notice of contempt and punishment for contempt is of far-reaching consequence, these powers should be invoked only when a clear case of wilful disobedience of the court’s order has been made out. Whether disobedience is wilful in a particular case depends on the facts and

circumstances of that case. Judicial orders are to be properly understood and complied with. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the court's orders and its implications. Disobedience of the court's order strikes at the very root of the rule of law on which our system of governance is based. Power to punish for contempt is necessary for the maintenance of effective legal system. It is exercised to prevent perversion of the course of justice.

11. No person can defy the court's order. Wilful would exclude casual, accidental, bona fide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of the court's order must allege deliberate or contumacious disobedience of the court's order."

From the above observations, it is clear that orders are not only to be understood or complied with but even negligence and carelessness can amount to civil disobedience. Mr. Arun Kumar Rathi while making statements before this Court repeatedly which are misleading and by not adhering to the undertakings given before the Id. Arbitrator has not only displayed contumacious conduct but has also been negligent and careless in protecting and preserving the plant, machinery and equipment. Such disobedience has been further compounded by making submissions in the Court to the effect that some Government Authorities were responsible. This has been proved to be incorrect by the two reports of the Local Commissioners who found that Mr. Arun Kumar Rathi's representatives were in control of the inner part of the premises where the plant, machinery and equipment was located.

58. This is clear contempt on the face of the Court and the Court is not

powerless in dealing with such contempt. Recently in ***Dinesh Tanwar and Ors. v. Kunwar Singh Tanwar and Ors.***, 260 (2019) DLT 39, this Court has held as under:

“61. In Suman Chand v. Central Bank of India MANU/DE/3573/2018 : (2018) 254 DLT 29 (DB), a Division Bench of this Court, considering the various uses of contempt jurisdiction has held that making a false statement, willful disobedience, persistent and continuous disobedience with an intention to violate an undertaking made to the Court, non-adherence of promises and representations made to the Court are in inexcusable and constitutes contempt. The relevant portion of the said judgment is set out herein below:

52. The decision in Rita Markandey (supra) would be squarely applicable to the facts of the present case, even if we were to assume that the appellants had not given any "undertaking" to the Court. The observations made in the said case are significant and refer to another facet when contempt jurisdiction can be invoked, different and distinct from cases where parties have given undertaking to the court and have thereafter willfully refused to abide and comply with the same. However, we must caution that where a party has given a statement and made a promise and representation to the court with the intent and purpose to comply with the same but due to subsequent events and for bonafide reasons compliance could not be made, it would not be a case of willful disobedience. In such cases, the party aggrieved must ask for execution of the decree or implementation of the order and the court would not exercise its discretion in the contempt jurisdiction.

53. Facts of the case, as noticed by the

learned single Judge, are glaring and disclose the cavalier attitude, scorn and abuse of the process of the Court by the appellants, not on one occasion but several occasions, and demonstrate the intent of the appellants to deceive and procure interim orders by giving undertaking and making promises on solemn assurance to the Court, notwithstanding the true intent and knowledge that the undertaking to the Court would not be complied with.

54. It is stated and observed in several cases that the contempt is between the Court and the contemnor and the aggrieved party cannot insist that the Court should exercise such jurisdiction. The discretion is exercised by the Court for maintenance of Court's dignity and majesty of law. However, it would not be entirely correct to state that punishment under the contempt jurisdiction is granted to uphold the dignity of the Court. Contempt jurisdiction is invoked and punishment is imposed to uphold the authority of the Court to punish the contemnor and to act as a deterrent to others. This deterrent is motivated in the interest of the public in order to prevent future incidents of willful disregard and disobedience of the Court orders by a party. Further, contempt jurisdiction may even invoke belated compliance, which is in public interest and when such compliance is made, the contemnor may seek reduction or discharge of the sentence in view of subsequent conduct to purge the contempt by complying with the order. Contempt jurisdiction is invoked when breaches are of the highest level of culpability in the sense that they are willful. Further, persistence and continuous damage and

disobedience could in a given case reflect no remorse from the person against whom action is taken.

62. Considering the settled law, as contained in the above judgments, there is no doubt that Mrs. Pratibha is liable to be punished for contempt of Court. Her initial non-disclosure of her brother's illness and his missing status is a deliberate concealment. Thereafter, filing of the application and affidavit praying for her to be appointed as her brother's next friend without disclosing the missing status of her brother, is again willful misrepresentation and deliberate concealment. The initial statement made by her that her brother is missing since 2013 was recorded by the Court. She resiled from it when she got cornered into a piquant situation, which revealed that in subsequent documents and bank account transactions money has been transferred to her account from her brother's account. She then changed her statement and stated that her brother is missing from 2016. The status report filed by the police reveals that the brother, Mr. Devender Kumar was last residing with his sister. Some relatives, however, claim that he was missing since 2017. Mr. Devender Kumar owned various properties, all of which have been sold and money has been taken by Mrs. Pratibha. She has repeatedly appeared before the Court along with her husband Mr. Sunil Arya, who is a BSES employee. Despite repeated enquiries, they have not revealed the true facts."

59. Under these circumstances, Mr. Arun Kumar Rathi is held guilty of contempt and of violating orders of this Court as also the undertaking given to the Id. Arbitrator vide his affidavits dated 4th April, 2008. Since, Mr. Rathi has made a statement in his reply that he holds the Court's orders with utmost dignity and does not ever intend to commit contempt, it is directed that a sum of Rs.5.05 crores, which is the value of the machinery and

equipment, which has gone missing would be liable to be paid by Mr. Arun Kumar Rathi to INOX. If the said amount is not paid within six weeks from today, Mr. Arun Kumar Rathi would be liable to undergo civil imprisonment for a period of three months. Petition is disposed of.

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60. The present petition seeks deposit of a sum equivalent to the value of the missing plant, machineries and equipment i.e Rs.5.05 crores. The same has been directed to be paid to INOX within a period of six weeks from today. The objections raised under Section 34 have also been dismissed by orders passed above. Mr. Arun Rathi has also been held guilty of contempt and payment of the sum of Rs. 5.05 crores has been directed. Petition is disposed of in the above terms.

OCTOBER 10, 2019

Rahul

**PRATHIBA M. SINGH
JUDGE**