

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 29 of 2018

1. Bhilai Steel Plant Steel Authority Of India Limited Through Its Chief Executive Officer, Incorporated Under The Companies Act, 1956, Bhilai Steel Plant, Bhilai, District Durg, Chhattisgarh, District : Durg, Chhattisgarh
2. Deputy General Manager Bhilai Steel Plant, Steel Authority Of India Limited Marketing And Business Planning Department, Bhilai Steel Plant, Bhilai, District Durg, Chhattisgarh

---- Applicants

Versus

International Commerce Limited Through Its Managing Director Mr. Shri Kumar Lakhotiya, S/o Late R.L. Lakhotiya Aged About 44 Years R/o 13-14/ J, Light Industrial Area, Bhilai District Durg, Chhattisgarh, District : Durg, Chhattisgarh

---- Respondent

For Appellants	:	Shri Maninder Singh, Senior Advocate with Dr. Saurabh Kumar Pande and Shri Prabhas Bajaj Advocates
For Respondent	:	Shri Naman Nagrath, Senior Advocate with Shri Kshitij Sharma and Shri Jubin Prasad, Advocates

D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgment

01/10/2020

Per Manindra Mohan Shrivastava, J.

1. This Arbitration Appeal is directed against order dated 27th June, 2018 passed by learned Commercial Court in Arbitration Case No.02A/16 arising out of Award dated 12.4.2016 passed by learned Sole Arbitrator in the matter of dispute between the appellants and the respondent. Vide impugned order, learned Commercial Court has rejected appellants' application under Section 34 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as “the Act of 1996”).

2. The factual backdrop giving rise to dispute between the parties, briefly stated, with reference to relevant facts, is that the appellant -BSP issued the Request For Quotation (RFQ) inviting tenders for sale of rejected/broken Ingot Mould and Bottom Stool Scrap on 29.2.2012, in response to which, respondent submitted his quotation which was eventually accepted leading to issuance of sale order on 7.6.2012 for sale of 1,20,000 tons of the scrap at the price of Rs.24,850/- per ton, excluding taxes, duties, charges and levies. As per sale offer, it was to remain in force for a period of one year from 7.6.2012 to 6.6.2013 and the respondent- ICL was required to lift the contracted quantity of material under the contract within a period of one year. The respondent submitted bank guarantee for a sum of Rs.14.91 crores towards security deposit on 18.6.2012 and on the request of the appellant to substitute bank guarantee with another bank guarantee in the proper format, respondent furnished corrected bank guarantee on 23.6.2012.
3. The appellant required the respondent to deposit payment towards the cost of 10,000 tons of material with taxes, in response to which, respondent deposited Rs.29.64 crores towards lifting of 10,000 tons of material in July, 2012. The delivery order was issued by the appellant for lifting of 10,000 tons of material in the month of July, on 30th June 2012 which was followed by amended delivery order at the request of the respondent, issued on 16.7.2012. Thereafter, respondent commenced lifting of the material w.e.f. 2.7.2012.
4. On 25.7.2012, the appellant requested the respondent to make advance payment towards cost of another 10,000 tons of material to be lifted in the month of August, 2012, in response to which, respondent prayed for extension of lifting period for the left over quantity against delivery order issued for the month of July 2012, for at least 15 days as 100% material could not be received due to reasons beyond their control. In response to this letter dated 31.7.2012 of the respondent, appellant vide its letter dated 31.7.2012 extended the period of lifting of the left over quantity up to 31st

August 2012.

5. The appellant, however, issued letter on 3.8.2012 followed by another communication dated 6.8.2012 repeating its demand for advance payment towards cost of next lot of 10,000 tons of material with taxes etc. for the month of August 2012, which according to the appellant was required to be deposited in terms of Clause 12 of RFQ, latest by 7.8.2012.

The dispute between the parties started surfacing when respondent sent its communication on 7.8.2012 that against the first delivery order, only 5016.230 MT of material could actually be delivered though it had deposited the entire cost for 10,000 tons of material. On such statement, respondent requested the appellant to allow it to deposit payment for purchase of further 10,000 ton of material only on the completion of 100% delivery of the material as per the extended delivery order. Respondent also started extending request for revision of price. Another letter was sent by respondent on 8.8.2012 seeking extension of advance payments. In response to this, the appellant, referring to Clause 12 of the RFQ, suspended dispatches of material stating that respondent had failed to deposit advance payment for second lot of 10,000 tons of material which was required to be lifted in the month of August 2012 and in respect of which, 100% advance payments were to be made on or before 7th August 2012. On 24.9.2012, the appellant required the respondent to deposit Rs.59,29,76,424/- towards amount due for the month of August and September 2012, within 15 days, stating that only upon fulfillment of such requirement, suspension of dispatches may be revoked and respondent may be permitted to lift material against quantity allotted in the month of July 2012. Another letter dated 29.9.2012 was issued by the appellant for depositing payment of Rs.29,64,88,212/- for the month of October, 2012 in the first week of October. Respondent vide its reply dated 1st October 2012 protested that such demands were against the terms of contract. Appellant again sent letter dated 3.10.2012 for making payment of the aforesaid amount for month of October 2012, latest by 6.10.2012. In response, the respondent vide its letter dated 5th and 6th October 2012, raised grievance that such demand was against terms of contract.

6. Finally, appellant vide its letter dated 15.10.2012, terminated the contract, stating to be in terms of Clause-16 of the special terms and conditions of contract and EMD of Rs.1 crore, security deposit of Rs.14.91 crores in the form of bank guarantee, balance quantity of material valued of Rs.10.66 crores which was against the balance quantity for the delivery order of July 2012, were eventually forfeited.

Dispute having arisen between the parties, Arbitrator was appointed to adjudicate the dispute, with the consent of the parties. The Arbitrator, after allowing the parties to file their respective pleadings of claim and reply as also oral and documentary evidence, passed the Award on 12.4.2016 by which, claim of respondent-claimant was allowed to the extent of Rs.28,07,88,848/- towards refund of security deposit, EMD, value of balance material and loss of business/profit. The Arbitrator also awarded simple interest @9% per annum in case appellant fails to satisfy the Award within three months from the date of the Award. Cost of Rs.10 lakhs towards arbitration proceedings were also quantified and awarded in favour of the claimant.

7. Aggrieved by the said Award, an application under Section 34 of the Act of 1996 for setting aside Award was filed before the Commercial Court, though unsuccessfully. Vide impugned order, the application was rejected giving rise to this appeal.
8. Learned Senior Counsel appearing for the appellants argued in extenso, referring to terms and conditions of agreement, communications and large number of documents, to submit that the Award suffers from patent illegality, perversity, settled legal principles in the matter of interpretation of terms of contract, time being essence of contract. Elaborating submissions, learned senior counsel, referring to Sale Offer dated 7.6.2012 and Clause 12 of the contract contended that it was the contractual obligation on the part of the respondent-contractor to make advance payment every month for the projected quantity to be lifted in a particular month and 100% advance payment was to be made before expiry of 1st week of that month. It was further contended that the terms of the

contract, unambiguously provided the consequence that in case of failure to so deposit the advance amount within the stipulated period, the appellant was entitled to refuse permission to lift material from the stipulated sites. He would further contend that it is not in dispute and an admitted position that advance payment for the month of October 2012, despite repeated demands, was not made and on the contrary, the contractor, through his communication admitted that it was not able to remove the left over material of the month of July 2012 and had requested for extension. He would further highlight that in none of the communications, there was any request for adjustment of the value of material not lifted by the contractor for the month of July to be adjusted in the advance payment for the next month of August, 2012. The contractor/respondent, it is argued, never disputed that though it was ready and prepared to lift balance quantity of material for the month of July 2012, there was non availability of material. Despite having knowledge and admitted its unequivocal obligation to make advance payment, seeking extension of seven working days amounted to unilaterally altering the contractual terms. Seeking revision of rates, extension of time for lifting of quantity and making of payment, amounted to not only breach of contract but also an attempt on the part of the respondent -contractor to unilaterally alter terms and conditions of agreement. Even though the appellant repeatedly requested the respondent contractor vide communications dated 25.7.2012, 3.8.2012, 6.8.2012 and 7.8.2012 for deposit of advance payment as per Clause -12 for the month of August 2012, no payment was made in terms of Clause 12 which clearly amounted to breach of contract. The stoppage of lifting of material was necessary consequence of non-payment of 100% advance towards lifting of projected material of 10,000 tons for the month of August 2012 and it was strictly within the terms and conditions of the contract. The appellant also extended time for payment by issuing letter dated 24.9.2012 giving last opportunity but the respondent did not avail this opportunity also. In this manner, the respondent neither lifted the balance quantity of July 2012 within the stipulated period, nor deposited 100% advance payment for the month of August and September and, thereafter, October despite repeated

communications and thus committed breach of contract and, therefore, the appellants were left with no option but to terminate the contract vide its letter dated 15.10.2012.

9. According to learned senior counsel for the appellant, the Award suffers from those defects which are permissible ground of interference under Section 34 of the Act of 1996. He would firstly submit that present is a case of purely contractual dispute between two parties and the dispute between the parties, arising out of commercial contract, was required to be adjudicated in accordance with the law of contract but the learned Arbitrator adopted an erroneous approach as if it was exercising writ jurisdiction under Article 226 of the Constitution of India by holding that the action of the appellant in terminating contract was arbitrary. Such an approach has been deprecated by the Supreme Court in **Indian Oil Corpn. Ltd. Vs. Amritsar Gas Service** (1991) 1 SCC 533, **Excise Commr. Vs. Issac Peter** (1994) 4 SCC 104, **Puravankara Projects Ltd. Vs. Hotel Venus International** (2007) 10 SCC 33 and **M/s. Orissa Concrete & Allied Industries Ltd. & Anr. Vs. Union of India & Ors.** 2012 (2) C GBC LJ 273. He would submit that learned Arbitrator, while holding that terms and conditions of contract was illegal, completely ignored and acted perversely in giving due weight to communication made from time to time, which unequivocally reflected that the respondent, at no point of time, ever communicated to the appellant that the reason for non-lifting of the balance quantity allotted for month of July 2012 was non-availability of material. Applying principle of *contemporanea expositio*, learned senior counsel vehemently contended that in the absence of any such grievance raised in any of its communications, there was no occasion for the Arbitrator to assume that there was non-availability of material and that was the reason for non-lifting of the balance quantity of the month of July 2012. This was raised for the first time by the Contractor only after termination of contract and while taking recourse to legal remedy and not before that at any point of time. Therefore, it is argued, the Award suffers from lack of fundamental broad approach and, therefore, suffering from patent illegality.

10. Relying upon decision in the case of **Saradamani Kandappan Vs. S. Rajalakshmi** (2011) 12 SCC 18, it is contended that learned Arbitrator and Commercial Court, while arriving at the conclusion that appellant committed breach of contract, failed to take into consideration the legal position that the extension granted by the contracting party in one stream of provision under the contract, would not have any bearing on the time stipulations fixed in another stream of provisions under the contract and where there is breach of such time stipulation fixed in the other stream of provision, it would constitute breach of contract. The claimant- respondent committed breach of agreement. According to him, on rational interpretation of Clause 12 of the contract, irrespective of whether or not entire material of the previous months was lifted and whether or not further extension for lifting was granted under Clause 2 therein, under no circumstances, the contractor denies contractual obligation to pay cost of the material projected to be supplied under a given month. He would submit that extension of time for lifting balance quantity of previous month has nothing to do with the obligation of the contractor to deposit the cost of estimated quantity to be lifted for the next month. His pointed contention is that once the contractor failed to pay the cost of estimated quantity of the next month within seven working days, a breach has been committed because under the scheme of the contract, there is no contingency under which this obligation would either be suspended or deferred and therefore, it has been vehemently argued that according to this term, time was essence of the contract.
11. It is next contended that the findings of learned Arbitrator and learned Commercial Court that notice dated 24.9.2012 is not in terms of Clause-16 of the contract, suffers from patent illegality and perversity because it was clearly stipulated therein that if the contractor neglects or fails to comply with any of the stipulation of the letter, the contract shall be terminated with forfeiture of security deposit besides other remedial action available under the contract law. The finding that notice dated 24.9.2012 is not merely a proposal given by the appellant to respondent for suspension of dispatches is patent misleading of unequivocal and crystal clear language

of the notice.

12. Learned senior counsel for the appellant next submitted that learned Arbitrator and Commercial Court both have recorded a finding suffering from patent illegality as far as time being the essence of the contract is concerned and while examining this issue, decision in the case of **Hind Construction Contractors Vs. State of Maharashtra** (1979) 2 SCC 70 and **Claude- Lila Parulekar Vs. Sakal Papers (P) Ltd.** (2005) 11 SCC 73 has been completely misconstrued.
13. Next contention is that the approach of the learned Arbitrator and Commercial Court to hold the termination illegal on perceived ground of fairness/reasonableness is such that it must shock the conscience of the Court as present is a contractual dispute and rights and obligations have to be determined on the basis of terms of the contract and, therefore, finding contained in the Award in this regard is patently illegal.
14. It is next submitted that as far as finding with regard to availability of material is concerned, Arbitrator has recorded perverse finding with regard to availability of material by ignoring clear stipulation in various disclosures made in RTI response from time to time and without taking into consideration the true import of clauses in Section 2 of RFQ. Referring to RTI response dated 6.2.2013, 9.1.2013, 15.2.2013, 14.3.2013, 5.4.2013 and 3.7.2013, he would submit that there is overwhelming material on record to show that huge quantity of the material was available at NSBY depot and it was stated so in letter dated 8.8.2012 also and even then learned Arbitrator ignored this and recorded a perverse finding .
15. Next submission is on the inconsistency of Award by submitting that while rejecting Claimant's claim of loss due to idling of equipment/machinery, learned Arbitrator rejected the claim on the ground that there was no idling of the machinery because material was being delivered by SAIL and no complaint was raised by the contractor regarding any idling of the equipment/machinery. Having held so, the Arbitrator could not have recorded finding that it was non-availability of material at NSBY. This

amounts to legal misconduct as held in **Union of India Vs. V. Pundarikakshudu & Sons** (2003) 8 SCC 168.

16. Another contention is that the Award suffers from patent illegality and perversity in so far as Award of Rs.1.5 crores towards loss of profit inasmuch as the Arbitrator having rejected the evidence adduced by the Contractor for claiming loss of profit could not have awarded such monetary benefits on the assumption of reasonable loss of profit without any proof and in doing so, the Arbitrator has not only ignored specific clause 9.2 of the Contract but also the legal principle laid down in **P. Radhakrishna Murthy Vs. NBCC Ltd.** (2013) 3 SCC 747. The approach of the Arbitrator must shock conscience to the Court because the decision relied upon dealt with power of Arbitrator to award reasonable escalation even in the absence of any escalation clause. But once there is no evidence to prove it, there was no occasion to settle such claim.

17. Per contra, learned senior counsel for the respondent argued that the Award passed by the Sole Arbitrator in favour of the respondent-contractor is a well reasoned Award passed on elaborate appreciation of all the material evidence led by both the parties, oral and documentary and based on the reasonable and possible interpretation of terms of contract in the setting of context and conduct of the parties. The Arbitrator is the master of fact and once the material before it has been considered, evaluated and finding arrived at, the scope of interference under Section 34 of the Act of 1996 would be extremely limited and merely because another view is also possible, no interference would be warranted by the Court. Learned senior counsel for the respondent elaborating his submissions, contended that while from the beginning, there was delay occasioned when delivery order itself was issued on 30.6.2012 and later on, as material more than what was already lifted by the Contractor was not available, time was extended. He would submit that Arbitrator has interpreted Clause 12, Clause 18 and other terms and conditions of contract and taken a possible view. Even if the interpretation as based on Clause 12, as contended by the appellant is accepted, which, in fact, has been done by the Arbitrator and Commercial

Court, the corresponding obligation on the part of the appellant to correspondingly adjust from the cost of next lot of 10,000 tons, being the cost of the material which could not be lifted for non-availability, exceeded which required the appellant to make demand of deposit of cost after due adjustment but it was never done and acting against the specific contractual obligation and in denial thereof, under Clause 12 of the contract, the appellant illegally insisted on demand of deposit of the cost of entire quantity of 10,000 tons for the month of August, 2012 without offering any adjustment of cost against non-available quantity for the month of July 2012. Therefore, it is argued, the very demand for the month of August, 2012 was not in accordance with contract and as such, the action of suspension of supply followed by further demand for future month without any adjustment render the action of the appellant in terminating the contract, illegal and against the terms of contract and, therefore, it is the appellant and not the respondent who had committed breach of contract.

18. Relying upon Clause 16 of the agreement it has been highlighted that if it could have been a case of failure on the part of the contractor to lift the balance quantity despite availability at NSBY depot, the appellant would have declared left over quantity as abandoned rather than taking recourse under Clause 22.11 of the contract providing for extension of delivery schedule as para -2 thereof makes it clear that extension for delivery may be granted when there is non-availability of material. In the present case, since it was a case of non-availability of material and not failure to lift the available material, instead of taking action under Clause 16, time extension was granted under clause 22.11. Learned senior counsel further argued that as far as finding with regard to non-availability of material at NSBY is concerned, this is based on a very elaborate and detailed scrutiny of material and documentary evidence led by both the parties, particularly taking into consideration the contents of various RTI responses and statement of the appellant's own witness. He would contend that the learned Arbitrator has specifically and pointedly referred to specific clause of the RTI response to come to the conclusion that at NSBY, there was no

material available for the respondent to lift more than what was already lifted by the contractor and this essentially being the finding of fact based on material on record, is beyond the scope of interference under Section 34 of the Act because this Court would not substitute its own finding by another possible view once it is found that the finding of fact is possible view based on material on record.

19. Next contention is that the argument that as the respondent did not specifically state in any of its communications regarding non-availability of material but only sought extension of time to lift left over quantity, on this basis only, it cannot be assumed that despite availability of material, the contractor failed to lift balance quantity of material under the first delivery order for the month of July 2012. He would submit that in none of the communications, the appellant has emphatically stated till the end of 31st July 2012 that the respondent failed to lift balance quantity of material at NSBY despite availability of material and for the first time vide its communication dated 8.8.2012, it has been stated regarding availability of balance quantity of material that too not at NSBY depot but at Boriya depot. This has been elaborately examined by learned Arbitrator and therefore, a finding of fact in this regard has been recorded which warrants no interference.

20. Next contention of learned counsel for the respondent is that recourse to Clause 18 of the agreement to suspend removal of material is patent illegality and rightly held so by learned Arbitrator because occasion to invoke clause 18 would arise only upon quarterly review and not before that. The only condition under which appellant could have stopped further removal was that despite availability of material and without any extension having been granted, material was not lifted within the stipulated time and despite demand of payment for projected quantity in the next month, payment was not made within the stipulated time. In the present case, as the demand was itself illegal and in breach of terms of contract because there was no material available for lifting, recourse to clause 18 and the very action for suspension of supply itself at that stage amounted to breach of contract. Learned counsel for the respondent would further

contend that the finding of learned Arbitrator that time was not the essence of contract, which essentially is an issue of fact, has been arrived at by taking into consideration that time and again the appellant had extended time for dispatch and vide letter dated 24.9.2012 itself, time was extended and therefore, the view which has been taken, relying upon settled legal position cannot be said to be either perverse or suffering from patent illegality much less shocking the conscience of the Court..

21.Next contention of learned senior counsel for the respondent is that Arbitrator and Commercial Court have closely scrutinized the language and contents of the notice dated 24.9.2012 to come to the conclusion that it could not qualify as notice of termination of contract under the terms and conditions. The basis for taking such view is that by the said letter, time was extended for deposit of money and therefore any other stipulation coupled therewith, may not qualify as a notice in absolute terms that contract would be terminated after stipulated period. He would submit that such a view is a plausible one and therefore, does not warrant any interference. Learned counsel for the respondent would further argue that mere request for variation of price could not be treated to be an act of repudiation of contract or breach of contract because there is nothing on record to suggest that respondent has refused to execute contract until price revision was allowed.

22.It is next submitted that as far as argument based on inconsistency in Award is concerned, it deserves to be rejected because the Arbitrator while rejecting claim against idling has only stated that supply were being made which means it only referred to the first part of the supply made and thereafter does not proceed any further to record any categorical finding regarding availability of balance quantity of material against delivery order dated 30th June 2012 at NSBY depot. Therefore, there is no contradiction as such.

23.Lastly, learned senior counsel for the respondent would contend that the authority of the Arbitrator to allow monetary benefit to compensate despite there being no escalation clause has been judicially recognized. In

support of his submission as aforesaid as also that the scope of interference is limited to the ground enumerated under Section 34 of the Act, that the Court while entertaining Section 34 of the Act would not act as a Court of appeal and that the Arbitrator has authority to interpret the contract and except for compelling reason, the Award needs to be upheld, reliance has been placed on **McDermott Inc Vs. Burn Standard Co. Ltd.** (2006) 11 SCC 181, **Bank of India Vs. K. Mohandas** (2009) 5 SCC 313, **Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Corporation Ltd.** (2010) 11 SCC 296, **Satya Jain Vs. Anis Ahmed Rushidie** (2013) 8 SCC 131, **K.N. Sathyapalan Vs. State of Kerala** (2007) 13 SCC 43, **Fiza Developers Vs. AMCI (India) Pvt. Ltd.** (2009) 17 SCC 796, **J.G. Engineering Vs. Union of India** (2011) 5 SCC 758, **P.R. Shah Vs. BHH Securities** (2012) 1 SCC 594, **Rashtriya Ispat Nigam Ltd. Vs. Deewan Chand** (2012) 5 SCC 306, **Sutlej Construction Vs. Union Territory of Chandigarh** (2018) 1 SCC 718 and **P.M. Paul Vs. Union of India** 1989 Supp. (1) SCC 368.

24. We have considered the rival submissions made by learned counsel for the parties and perused the records of the case.
25. Before advertng to the Award, which was challenged by the appellant by filing an application under Section 34 of the Act of 1996, it is necessary to state the legal position with regard to scope of interference by the Courts against an award passed by the Arbitrator chosen by the parties, in the light of statutory scheme engrafted under the Act of 1996.

It needs no authority to state the well settled legal position that while entertaining challenge to the legality and validity of Award passed by the Arbitrator, the Court entertaining application under Section 34 of the Act of 1996 does not act as a Court of appeal much less Court of appeal on facts. The scope of interference against an Award is expressly limited by the provisions contained under the Act of 1996. The approach of the Court would not be to undertake an independent assessment of the oral or documentary evidence led by the parties to dispute before the Arbitrator, to arrive its own independent conclusion and finding on facts. The law is

settled that while entertaining an application under Section 34 of the Act of 1996, the Court is required to see whether the Award suffers from those defects which have been specifically enumerated as ground of challenge to Award. The grounds, on which, the Award can be challenged have been exhaustively enumerated in Section 34 itself. If any of such grounds or more than one grounds are made out, it would be permissible for the Court to interfere with the award. However, in a case where none of the grounds as mentioned in Section 34 are made out, then the hands of the Court are tied and no interference against the award would be permissible, even if there is an error of fact or even mere error of law.

26. In one of the recent decisions in the case of **Associate Builders vs. Delhi Development Authority** (2015) 3 SCC 49, the legislative scheme engrafted under Section 34 of the Act of 1996 was examined by the Hon'ble Supreme Court and the grounds, on which, interference against the Award would be permissible in the Court of law were considered. Examining the scope and extent of Section 34 sub section (2)(a) of the Act of 1996, as it stood prior to amendment, it was observed thus:-

“17. It will be seen that none of the grounds contained in sub-section(2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.”

However, the provisions contained in Section 34 of the Act of 1996 underwent amendment and radical changes were made by the Arbitration and Conciliation (Amendment) Act of 2015 (For short 'the amendment Act of 2015'), with effect from 23-10-2015.

27. As far as applicability of the amended provisions is concerned, in the case of **Ssangyong Engineering & Construction Co. Ltd. Vs. National Highway Authority of India (NHAI)** (2019) 3 ARBLR-152, it was held that Section 34, as amended, will apply only to Section 34 applications, that

have been made to the Court on or after 23-10-2015. Since in the present case, application under Section 34 of the Act of 1996 was filed before the Commercial Court after 23-10-2015, while examining the correctness, legality and validity of the award, the scope of interference as mandated vide Amendment Act of 2015 will have to be kept in view.

To begin with, the effect and impact of the Amendment Act of 2015, was considered by the Hon'ble Supreme Court, in a recent decision in the case of *Ssangyong Engineering & Construction Co. Ltd.* (supra), clarifying that the extension of "Public policy of India" in Oil & Natural Gas Company Limited vs. Saw Pipes Limited and Oil & Natural Gas Company Limited vs. Western GECO International Limited, (supra), has been done away with and a new ground of "Patent illegality" with exception, has been introduced. The development of law, effect of Amendment act of 2015 and the permissible grounds of challenge as also what is impermissible for the Courts while entertaining challenge to an award was interpreted and stated as below:-

"23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as

principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

24. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment

Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator’s view is not

even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of *Associate Builders (supra)*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.”

28. In one of its earlier decision in the case of *P. R. Shah, Shares and Stock Broker (P) Ltd.* (supra), , no case of interference against award was made out, irrespective of whether or not, the view taken by the Arbitrator is totally correct view.

29. In the case of *P. R. Shah, Shares and Stock Broker (P) Ltd.* (supra), it was held:-

14. “A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act. The arbitral tribunal has

examined the facts and held that both second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

30. In yet another judgment in the case of *Sutlej Construction Limited* (supra), it was observed, as below:-

"11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice." (Associate Builders v. Delhi Development Authority).

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with.

(Sudarsan Trading Co. v. The Government of Kerala; Harish Chander & Co. v. State of U.P. and Swan Gold Mining v. Hindustan Copper Limited)."

31. The approach of the Court undertaking exercise of re-appreciation of evidence and acting like Second Appellate Court, was deprecated, as below:-

13. "The learned single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case the learned single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court."

32. The settled legal position that if there are two possible view, interpretation of the terms of the contract, interpretation of the Arbitrator has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view, was re-stated in the case of **Madhya Pradesh Power Generation Company Limited and another Vs. Ansaldo Energia Spa and Anr., NHA I Vs. BSC-RBM-PATI Joint Venture** (2018) 1 ARBLR 570 (Delhi), as below:-

25. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of *Associate Builders v. Delhi Development Authority*. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act have been analyzed and enumerated in *Associated Builders (supra)* which are as follows:

(a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of “public policy” to an arbitral award and consequently errors of fact cannot be corrected.

(b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence.

(c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34 (2) of the Act.

(d) An award can be set aside only if it shocks the conscience of the Court.

(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted.

(f) If there are two possible interpretations of the terms of the contract, the arbitrator’s interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator’s view.

33. Keeping in forefront the limited scope of interference by this Court, in view of the provision contained under Section 34 of the Act of 1996 and the principles stated and re-stated by the Hon'ble Supreme Court in aforementioned decisions, we undertake the scrutiny of the award

challenged by the appellant.

34. A close scrutiny of Award passed by learned Arbitrator reveal that the learned Arbitrator has elaborately dealt with the factual matrix culminating in dispute between the parties. Having dealt with the factual background and the context of the dispute in para -3 of the Award, learned Arbitrator has noted the issue framed for adjudication which are five in number as below :

“03. On the basis of pleadings of the respective parties and documentary evidence adduced by them, the following issues have been framed for adjudication :

A. Whether the action of the respondents vide their communication of Annexure A/14 dated 8.8.2012 suspending the dispatches of rejected/broken Ingot Mould and Bottom Stool Scrap (BSIM) were illegal , arbitrary & contrary to the terms & conditions of the contract ?

B. Whether the termination of the contract of Sale-Offer No.40016723 dated 7.6.2012 for supply of rejected/broken Ingot Mould and Bottom Stool Scrap (BSIM), 1.2 lacks MT vide Annexure A/30 dated 15.10.2012 was illegal, arbitrary & contrary to the terms & conditions of the contract ?

C. If the answer to the above issue No.A & B is in affirmative, then whether the claimants are entitled for award of Rs.34,44,93,848/- (Rupees Thirty Four Crores, Forty Four Lacs Ninety Three Thousand Eight Hundred Forty Eight) with interest under various heads as detailed in summary of claim of the statement of the claim ?

D. If the answer to the issue No. A and B is in the negative, then whether the respondents are entitled for counter claim of Rs.94,32,99,771/-

(Rupees Ninety four Crores, Thirty Two Lacs Ninety Nine Thousand Seven Hundred Seventy One) under various heads as quantified in the counter claim ?
E. Reliefs and costs ?”

35. Thereafter, the learned Arbitrator has noted down the submission made from the side of the claimant and respondent with reference to various judgments relied upon by the respective parties in paragraph 4.4. to 4.6 and 5.1 to 5.10. Paragraph -7 onwards, the Arbitrator has examined the material and recorded its own finding and in that process, it has dealt with clause 12, clause 16, clause 18, clause 22.11 of the terms of contract (RFQ).

36. The Award broadly deals with the interpretation of various clauses and rights and obligation of the parties, particularly one under clause 12 of the RFQ. It has also dealt with the oral and documentary evidence on record dealing with specific issue regarding availability of the material at NSBY where-from the respondent-claimant was required to lift stated quantity of 10,000 tons of the material as per delivery order dated 30.6.2012. A specific issue as to whether time was the essence of contract, has also been dealt with. Upon examination of material on record, a finding of fact has been recorded that there was no sufficient quantity of material available at NSBY depot which the contract could have lifted by 31st July 2012, as per delivery order. On such finding of fact, and that time was not the essence of contract, learned Arbitrator has concluded that the appellant was not justified in requiring the claimant to deposit cost of 10,000 tons within seven working days of the month of August.

37. The learned Arbitrator has specifically referred to clause 12 of the RFQ in para-13 of its Award which is as under :

“13. Clause 12 of RFQ deals with payment, which reads as under :

“Purchaser shall deposit 100 % advance payment towards cost of material, taxes and duties for the quantity projected to be sold in one month, in the first week of the month itself,

before loading and dispatch of the material for the month is started. If 100% quantity is lifted before completion of the month period, further amount corresponding to the expected additional quantity to be lifted in that month is to be deposited by the buyer before lifting the next consignment. That is , in no case loading and dispatch of material is allowed without pre-deposit of the cost material every month. In case of non-availability of material, amount to that extent will be adjusted in the next month.”

38.A bare reading of the aforesaid clause certainly cast an obligation on the purchaser that it shall deposit 100% advance payment towards cost of material, taxes and duties for the quantity projected to be sold for one month for which advance payment is to be made in the first week of the month itself. It further clarifies that such advance payment has to be made before loading and dispatch of the material for the month starts.

39.It further stipulates that if 100% quantity is lifted before completion of the month period, further amount corresponding to the expected additional quantity to be lifted in that month is to be deposited by the buyer before lifting the next consignment. It clarifies that in no case, loading and dispatch of material would be allowed without pre-deposit of the cost of material every month.

40.However, it has been clearly stated thereafter in unequivocal terms that in case of non-availability of material, amount to that extent will be adjusted in the next month.

41.That would mean that where in a particular month, material is either not at all available or not available to the extent of the quantity projected for that month, as and when occasion arises for dispatch, advance payment for the projected quantity for the next month, adjustment would be provided.

42.For illustration, if for a given month, out of estimated quantity of 10,000

tons only 5,000 tons could be lifted and remaining quantity could not be lifted in that month on account of non-availability of material, though the purchaser would be under obligation to deposit advance money for the estimated quantity of the next month, he would be entitled to appropriate adjustment equivalent to cost of un-lifted quantity i.e. 5,000 tons.

43.The last part of clause 12 provides for consequence that in case the purchaser fails to make full payment against the stipulated monthly quantity in any month within the specified dates as mentioned, the BSP may, at its discretion, terminate the contract and forfeit the security deposit.

44.In a situation where in a given month projected quantity could not be lifted due to non-availability, on just, fair and logical interpretation, it would require proper adjustment referred to in that clause.

45.Learned Arbitrator understood clause 12 of the RFQ in that manner only and recorded a finding that non-adjustment while raising demand was not just and proper as below:

“22. On the basis of aforesaid discussions, it is held that the respondents were not justified in raising demand towards cost of 10000 tons of material to be deposited by 7th August 2012 by reference to Clause 12 of RFQ vide Ex A-11. The respondents ought to have considered the request of the claimant for adjustment of cost of balance quantity towards total payment of 10,000 tons of material vides Ex.A-17. It is also found from the record that the claimant vide his application Ex.A-15 dated 8th August, 2012, received by the respondents on 9th August, 2012, had requested for seven working days time for payment of the demanded sum excluding Sunday and Holidays. This application deserved consideration and prompt decision by the respondents in the interest of the said contract;

however, it appears that the same has been simply ignored by the respondents.”

46. In view of above consideration, as far as adjustability part is considered, it is found that the contractor could not lift the entire quantity because of the non-availability of material. Even if it is held that he was under an obligation to deposit advance money towards the cost of projected quantity of the next month within one week/seven days, the demand for deposit would require suitable adjustment equivalent to cost of quantity which could not be lifted due to non-availability of material and that being the reason for non-lifting the balance quantity under delivery order dated 30.6.2012, for the month of July, it has to be now examined whether the finding of learned Arbitrator in this regard suffers from patent illegality or perversity or suffers from such legal defect which would warrant interference by the Court in exercise of its jurisdiction under Section 34 of the Act of 1996. If it is held that the finding of learned Arbitrator on that count are unsustainable in law, certainly it would be a case of breach of obligation on the part of the claimant. However, if the finding of the Arbitrator on this aspect do not warrant any interference in exercise of jurisdiction under Section 34 of the Act, the demand of advance deposit towards cost of 10,000 tons of material for the month of August 2012, within seven days/week would be against the terms of the contract and consequently termination on such ground would also become illegal.

47. As far as the aspect with regard to non-availability of material is concerned, it is essentially a finding of fact. The said finding of the Arbitrator has not been challenged on the ground that the appellant was not afforded full opportunity to lead oral and documentary evidence but the challenge to the finding is that it suffers from patent illegality and perversity. To appreciate this submission, it is necessary to look into the Award to find out as to how the Arbitrator has dealt with this issue. This approach has to be necessarily adopted because while entertaining challenge to an Award, the Court exercising jurisdiction under Section 34 of the Act is not required to carry out independent assessment of the material and documentary

evidence on the pleading of the parties and then test whether the finding of the Arbitrator is correct or not. As per settled judicial precedent referred to herein-above, the Award is to be looked into to find out whether it suffers from defect of the nature as to make out a ground expressly enumerated in Section 34 so as to warrant interference by the Court against the Award. This Court would not be examining the Award as a Court of regular appeal but as a Court exercising supervisory jurisdiction on limited ground expressly mentioned in Section 34 of the Act of 1996, as amended and enumerated by the Apex Court in various decision referred to herein-above.

48. The crux of the dispute between the parties lies in stated failure on the part of contractor -claimant in making advance deposit of the cost of 10,000 tons of material within 7 days/first week of the month of August despite notice sent to that effect by the appellant. In fact, the dispute emerged only when the appellant started raising a demand and kept on sending reminder but the payment was not made by the respondent claimant which ultimately led to termination of contract by the appellant.

49. The case of the claimant before the Arbitrator was that it was not his failure to lift the balance quantity despite availability of material, but non-availability of balance quantity of material at NSBY depot which entitled it to suitable adjustment for the next month, which was never acceded to by the appellant and the appellant insisted on payment of 100% deposit towards cost of 10000 tons for the month of August, 2012. But the case of the appellant before the Arbitrator was that the balance quantity required to be lifted in the month of July from NSBY depot under delivery order dated 30.6.2012 was very much available but the contractor failed to lift it. This factual dispute has been dealt with by the Arbitrator. In para-9 of the Award, it was clearly adverted to as below:-

“09. Availability of the material under the sale offer with the respondents and its infrastructural capacity to load the same in the vehicles of the claimant has been seriously disputed by the claimant.”

50. Learned Arbitrator closely examined the terms and conditions with specific reference to tender/contract document with regard to quantity of material which was to be loaded from two different depots, one being Boriya (MRD-2) and other NSBY (MRD-3). Further the Arbitrator also noted that the entire quantity of 1,20,000 tons was not available but it was likely to be generated in future that means that the contract was not only for certain quantity of actual lot but also virtual lot. It also noted that the contractor was to lift the quantity of material as and when made available to it on "as is where is basis and no complaint basis". It observed as below.

"10. The tenders were invited for sale of material and the claimant quotation being the highest at Rs.24,850/- (Twenty four thousand eight hundred fifty) per ton, excluding taxes etc, sale offer for 1,20,000 tons was issued. Out of 120000 tons of material, 21000 tons was to be loaded from Boriya (MRD-2) and 99000 tons was to be loaded from NSBY (MRD-3). The responsibility of loading was of BSP. The bidders were advised to inspect the material available on ground before offering their prices. (Clause 2 of SAIL S 1, General Terms and Conditions of Sale, Page 100-101). It is specifically mentioned in clause 2.3 that quantity mentioned in the sale offer is merely indicative and no claim for compensation for any shortfall in the quantity shall lie. Materials were also offered for sale, which were likely to be generated in future on "No compliant basis". The material could be provided either from the existing stock or future arising or both. (Clause 3.2, page 100-101)

11. Similar provisions are reiterated in General Terms & Conditions of SAIL from Plants/Units for sale through online auction/forward auction (FA) at page No.117, Clause 3, whereby bidders were advised to inspect the material available on ground

before offering their bid prices. It is stipulated in this clause that materials offered for sale are on "As is where is and no complaint basis", SAIL does not give any warranty or guarantee about the quantity as the quantity is mere indicative and no claim for compensation is admissible for delay or any shortfall in the quantity.

12. Clause 4 (page-117) reiterates that materials offered for sale are likely to be generated also in future and the same can be provided either from stock or future arising, subject to availability. Clause 8 of RFQ which deals with material, again mentions that materials offered for sale in Annexure 1, which is to be supplied in one year, is on "As is where basis and no complaint basis". The bidders were asked to satisfy themselves about the nature, condition, quality and quantity of material and BSP did not give any guarantee or warranty as to quality and quantity or size etc. of material. Similar condition is stipulated in Clause 9.2, which says that if BSP is not able to supply the indicated quantity due to any constraint or any unforeseen factors beyond the control of BSP, it shall not be liable for any compensation whatsoever."

51. The factual aspect with regard to availability of material at NSBY depot where from the claimant contractor was required to lift 10,000 tons of material for the month of July 2012 and in respect of which he had admittedly deposited full amount, was closely examined, with reference to material and documentary evidence led by the parties, as below :-

"15. Though sale offer of 120000 tons has been issued to the claimant, however, it is not mentioned in the sale offer that any particular quantity of material is available on ground at the time of

issuance of sale offer or RFQ. The respondents in their counter reply as also the respondents' witnesses in their deposition have claimed that 60000 tons of material was available in stock at the time of issuance of tender. RW-1 Rajendra Kumar Panigrahi in para-8 of his affidavit has referred and proved Ex.R/5 at page 954, which is a letter written by DGM (MRD) on 18.2.2012, which mentions availability of more than 1 lac tons of Broken Bottom Stool and Ingot Mould lying in mixed condition as on date causing safety problem in MRD and requested for settling the entire stock to a single party through auction. This letter, however, does not mention that the material in question was available in MRD-2 or MRD-3. This witness has admitted in para-3 of his cross-examination that Ex.R/5 does not refer to the location of availability of any specific quantity of Ingot at a particular yard. This witness has further admitted that there is no specific reference in the sale offer that the purchaser is to lift 10000 tons of scrap every month. However, referring to clauses 12 & 18 of RFQ, he has deposed that purchaser had to lift particular quantity of scrap every month, failing which penalty is imposable. He has also admitted that lifting of 400 MT of material every day mentioned in his affidavit does not find place in the sale offer.

Mr. S.S. Parida, who issued the order of suspension (Ex.A-14) has also deposed (para-48) about availability of 60000 tons of scrap at the time of floating of tender, though he has admitted that no document has been filed by the respondents showing availability of 60000 tons of scrap at the time of floating of tenders.

16. The claimant, in rejoinder to the reply filed by the respondents, has categorically pleaded that as per information furnished by the first appellate authority vide Ex.A-41 (page 82), breaking and shifting from NSBY yard to Boriya in the months of July and August was NIL. It is also informed (page 83) that NSBY yard has three EOT cranes, Crane No.3 was not operative till 30th July 2012, there is no generation of BSIM at MRD and only 5434 tons and 4759 tons of BSIM were received in the month of July and August, 2012. Details of trucks returned or halted at NSBY (MRD) have also been furnished which shows that 18 trucks were returned or halted at this location due to reasons - late loading, crane break-down, vehicle break-down, incomplete loading and material not available as per delivery order. However, vide reply dated 14.3.2013, the authorities of the respondent amending their earlier reply informed that material was not available as per delivery order on 7.8.2012, is not correct and returned three trucks were loaded as per delivery order and emptied in the evening as per instructions of MNBS department and cancellation of delivery order. This information was further amended vide information furnished on 5.4.2013 vide Ex.A-45 at page 408, which mentions that ten trucks were loaded with broken BSIM and three trucks could not be loaded and were taken out empty as no more broken BSIM stock was available on that day .Through this information, it has also been informed that BSIM was being broken and loaded in the truck of the buyer on day to day basis leaving no further stock for loading inside the yard during July and August, 2012.

The claimant has further pleaded and proved

information obtained from the respondents under RTI vide Ex.A-42 (page 401) according to which there were only 2399 tons of material available at NSBY as on 8.8.2012 whereas more than 30000 tons of broken BSIM on the same location was available.

Vide reply of Ex.A-46, it has been informed that 16 trucks of the claimant have been returned in July, 2012 and 11 trucks were returned in August, 2012 due to crane break-down, vehicle break-down, ERP problem, incomplete loading and the respondents confirmed that only 2399 tons of material was available in NSBY which could not be supplied as material to be loaded was beyond the reach of EOT cranes.

17. The sale offer is for 1,20,000 tons of rejected /broken Ingot Mould and Bottom Stool Scrap. The claimant's contention is that it was the responsibility of the respondents to break Ingot Mould rejected for any other reason than broken and then only it could be delivered and loaded in its vehicles. On the other hand, the respondents have disputed this contention and argued that there is no necessity to further break the already broken Ingot Mould Scrap and the Ingot Mould rejected for any other reason could be delivered without breaking the same. However, the above fact is belied from the information furnished under RTI (Ex.A-42), page 402A, Ex.A-46 page 412) which mentions that Ingot Mould and Bottom Stool are sold by marketing division in broken condition only to avoid chances of resale after partial repair and polishing.

The claimant, in its rejoinder, has specifically pleaded that shortfall in lifting material in July 2012 was due to non-availability of sufficient material with

BSP and lack of infrastructural capability by reference to information received under RTI duly proved and not denied by the respondents.

Section 2, Annexure 1, sub-clause 4 of Clause 3 (page 64) of RFQ clearly envisages that number of vehicles to be deployed in location of loading shall be finalized on day today basis in consultation with Executive In charge of Operative Authority. Sub-clause (5) further mentions that the lot being virtual, quantity available may vary. Clause 18 of General Terms and Conditions of Lifting by Road (Annexure F of RFQ) mentions that arrangement for placement of trucks will have to be made by the buyer in consultation with the operating authority before 24 hours of placement of truck."

52.A perusal of the aforesaid finding of learned Arbitrator would show that in order to arrive at a finding that non-lifting of the balance quantity of material was not the fault of contractor but it was attributable either to non-availability of material or lack of necessary infrastructure for lifting through cranes which was to be provided by appellant, was based on consideration of material evidence, both oral and documentary on record. The learned Arbitrator has noted that the sale offer of 1,20,000 tons has been issued to the claimant, does not mention in the sale offer that any particular quantity of material is available on the ground at the time of issuance of sale offer or RFQ.

53.The stand taken by the appellant in the counter reply and what has been stated by their witnesses that 60,000 tons of material was available in the stock at the time of issuance of tender has also been considered and rejected, for reason contained in para-15 and reproduced above.

54.Further, while examining the factual issue of non-availability of material, the Arbitrator has also taken into consideration various responses under RTI. It has looked into Ex.A-41, RTI response that breaking and shifting

from NSBY yard and Boriya yard in the months of July and August was NIL. It also took note of the content of RTI response that NSBY yard has three EOT cranes and Crane No.3 was not operative till 30th July 2012, there is no generation of BSIM at MRD and only 5434 tons and 4759 tons of BSIM were received in the month July and August 2012. Learned Arbitrator has specifically adverted to the evidence with regard to details of trucks returned or halted at NSBY (MRD) which shows that trucks were returned and halted at this location due to reasons "late loading, crane break-down, vehicle break-down, incomplete loading and material not available as per delivery order". It also took note of the fact that the authority amended their RTI response. The Arbitrator has specifically adverted to RTI response (Ex.A-42) placed before it by the claimant which reflected that there were only 2399 tons of material available at NSBY as on 8.8.2012. Another RTI response (Ex.P-46) was also referred to in which it was informed that 16 trucks of the claimant were returned in July 2012 and 11 trucks were returned in August 2012 due to crane break-down, vehicle break-down, ERP problem, incomplete loading and the confirmation that only 2399 tons of material was available in NSBY which could not be supplied as material to be loaded was beyond the reach of EOT cranes.

55. One of the contention of the claimant that the appellant was under an obligation to ensure loading of broken Ingot Mould was denied by the appellant that there was no necessity to further break the already broken Ingot Mould scrap of the Ingot Mould rejected for any other reason could be delivered without breaking the same. This particular contention of the parties was examined with reference to RTI response (Ex.A-42 and Ex.A-46) which mentions that Ingot Mould and Bottom Stool are marketed in broken condition only to avoid chances of resale after partial repair and polishing.

56. In this manner, learned Arbitrator minutely examined the aspect of availability of material with reference to oral and documentary, placing more reliance upon RTI response given by none other than the appellant. On this issue, learned senior counsel made elaborate submission with reference to number of RTI response to establish that there was clear evidence of availability of material for supply but what he has submitted

with reference to various document only lead to another possible view and nothing more that. The finding of fact which has been recorded by the Arbitrator, with reference to specific oral and documentary evidence, cannot be substituted by this Court through a process of re-appreciation of evidence on record as has been submitted by learned Senior Counsel for the appellant. Interference would not be permissible because that would amount to usurping jurisdiction like a regular Court of appeal on fact and not a Court exercising supervisory jurisdiction to interfere with the Award on limited ground expressly enumerated in Section 34 of the Act of 1996, explained and interpreted through judicial precedents referred to herein-above. The weight of evidence cannot be re-appreciated to substitute the finding of Arbitrator in these proceedings.

57.It is important to note that there is no admission on the part of the claimant that it could lift balance quantity of material even though it was available. However, learned senior counsel appearing for the appellant, referring the principle of *contemporanea expositio* would submit that in all communications made between the parties, the claimant never stated, while seeking extension of time for lifting, that there was no availability of material. Learned senior counsel was quite vehement on this aspect that if at all the reason for non-lifting and prayer for extension was non-availability of material, the claimant in its request letter would have clearly stated and it was only when the contract was terminated and the claimant moved the Arbitrator, it invented a new ground which really did not exist.

58.Vide letter dated 3.8.2012 (Ex.A-11), the appellant requested the contractor that the payment for 10,000 tons of rejected/broken Ingot Mould and bottom stool scrap (BSIM) for loading during August 2012 may be deposited on or before 7.8.2012. This was followed by two reminders also. Vide its communication dated 7.8.2012 (Ex.A-13A), the contractor stated that in the month of July 2012 he has been delivered 5106.23 tons against demand of 10,000 tons.

59.It has to be noted that till 31st July 2012 the appellant never issued any letter to the claimant that despite availability of material in the balance

quantity under the first delivery order, the claimant/contractor is failing to lift the balance quantity. For the first time vide letter dated 8th August 2012 (Ex.A-14) that the appellant claimed that despite availability of huge quantity of material at Boriya (MRD-2) which material was acceptable for lifting, it could not be lifted by the contractor in the month of July 2012. It also mentions that delivery order were extended till 31st July 2012 so that the balance 4899.94 tons could be lifted. From this letter, it is clear that it was not the stand of the appellant that the material was available at NSBY depot. On a bare perusal of delivery order dated 30.6.2012, it is clearly discernible that the contractor was required to lift 10,000 tons of material from NSBY depot only and not from Boriya.

60. Learned counsel for the respondent has brought to the notice of this Court clause 18 of the Annexure -E of the contract which provides for entry passes to the plant to submit that claimant could have lifted material only from NSBY and not from Boriya and therefore availability at Boriya is of no consequence. Further more, the claimant vide its letter dated 9th August 2012 (Ex.A-17) clearly stated that it could not get the entire balance quantity and in this manner also there is nothing to indicate that the contractor, though having admitted availability of material, expressed its inability on any ground to lift the balance quantity.

61. Learned Arbitrator also took into consideration a very important aspect of the matter which lends support to claimant's case that the operative reason for non-lifting of the balance material was non-availability of material, yet an order of extension for lifting the balance quantity up to 31st August 2012 was issued. Learned Arbitrator, with reference to provision contained in clause 22.11 of the contract recorded following finding:

“19. It is not in dispute that the claimant had deposited the entire cost for 10000 tons of material to be lifted by 31st July 2012 as per stipulation in the delivery order. He could lift only 5100 tons till 31st July and his application for permission to grant additional 15 days time for

lifting material was graciously allowed by the respondents and he was granted time up to 31st August 2012 for lifting without reserving their right to impose penalty under Clause 18. Under Clause 13 of RFQ, the purchaser has to lift material under sale offer within the period as mentioned in the sale offer/delivery order and in case of non-lifting of lot; Clause 16 of Annexure -E for "abandoned goods" was to be applied. Clause 16 of Annexure -E provides that where the purchaser fails to remove complete material from the site within the date specified in the delivery order, the leftover quantity is to be treated as cancelled and abandoned goods and the management shall have full right over the same to resale or dispose of in any manner it deems fit without any reference to the purchaser and the buyer shall have no claim on material declared as abandoned goods. In addition to the above, the initial deposit including security deposit and balance amount, if any, paid by the purchaser shall also be forfeited.

Under Clause 26 of SAIL (page 108), the same provision is further reiterated. However, under Clause 22.11 of SAIL S1, BSP management may, on consideration of the merit of the case, allow suitable extension of delivery period, particularly when the material could not be delivered to the customer for reasons attributed to SAIL within the stipulated time, either in full or in part due to any reason SAIL may extend the date fixed for removal of goods for a period as deemed fit by the concerned plant/unit. In the instant case, the respondents allowed additional time of one month up to 21st August 2012 for lifting of

material which was to be lifted by the claimant by 31st July 2012 on their own volition, which clearly suggests that the claimant was not responsible for short lifting and extension of the delivery period was granted by exercising discretion under Clause 22.11 of SAIL S1 by BSP management as material could not be delivered for the reason attributable to SAIL. This fact is further buttressed by the information furnished by the authorities of the respondents under RTI, referred to in detail in the foregoing paragraphs.”

62. Another aspect with reference to provision contained in clause 16 of the Annexure -E of the contract was also taken into consideration to accept the version of the claimant and reject the version of the appellant with regard to aspect of availability of material at NSBY depot. This was based on provision of clause 16 according to which, where purchaser fails to remove complete material from the site within the date specified in the delivery order, the left over quantity is to be treated as cancelled and abandoned goods and the management gets full right over the same to re-sale or dispose off in the manner which deems fit without any reference to the purchaser and that buyer shall have no claim on material declared as abandoned goods. The approach of the Arbitrator has been that if the contractor would have failed to lift the material despite availability, the appellant would have taken recourse to clause 16 to declare left over material as abandoned rather granting extension under clause 22.11 which is resorted to in circumstances where contractor is not responsible for short lifting. Moreover, learned Arbitrator also observed as below:- :

“20. In the instant case, the respondents have held the claimant responsible for not engaging adequate number of vehicle for lifting in the month of July 2012 due to which the entire quantity could not be lifted. However, no document has been placed on record to establish that the respondents were

unsatisfied with the efforts of the claimant to lift 10000 tons of material in the month of July. There is nothing on record to show that during any consultation process as envisaged in sub-clause (4) of Clause 3 of Annexure 1 and Clause 18 of Annexure E, this fact was discussed by Executive In charge of Operating Authority with the claimant. The argument of the respondents that the claimant never complained about non-availability of material in the month of July and the same has been raised as an afterthought after suspension of dispatches vide Ex.A-14, has no substance because as per express conditions in the auction documents referred to in detail in the foregoing paragraph, the quantity of material to be delivered by BSP was subject to its availability and the claimant could not complain against non-delivery of adequate quantity of material, that too at the initial stage of contract for sale. That apart, the note-sheet initiated for termination of the contract (Annexure A-16, back of page 171) filed by the respondents themselves clearly mentions that although quantity of 10000 tons of BSIM scrap was available during July 2012 at MRD, the vehicles were detained with night permission on eight occasions due to incomplete loading owing to crane break-down/lack of infrastructural support.

63. It is also relevant to note that the finding of fact recorded by learned Arbitrator regarding non-availability of material at NSBY depot finds support not only from the recital of appellant letter dated 8.8.2012 but also from letter dated 10.8.2012 in which alleging that the contractor could not lift the entire quantity of 10,000 tons during July 2012, it has been vaguely recorded that entire quantity of material was available at MRD

without mentioning which MRD. Since the delivery order dated 30.6.2012 allowed the claimant to lift material only from NSBY depot and it was not permissible for the claimant contractor to keep on searching for availability of material at any other depot despite availability of material, therefore, blaming contractor that it would lift balance quantity despite availability of material at Boriya depot, was wholly unjustified and on facts, this aspect was gone into by the learned Arbitrator as has been discussed herein-above. It is also relevant to note that in none of the communications made by the appellant to the claimant/respondent, it was emphatically stated that any particular quantity of material remained available for lifting at NSBY depot and despite repeated reminder, the contractor was not lifting. On the contrary, the context and tenor of the letter given by the appellant were regarding availability of material at Boriya depot and insisting the contractor to lift balance quantity from that place, without there being any fresh delivery order amending the delivery order. In fact, the appellant suspended further removal of goods on the allegation that the contractor, despite availability of material at Boriya failed to lift and thereby committed breach of its obligation under Clause 12 and thus made itself liable for situation where further removal were to be suspended.

64.It would thus be seen that learned Arbitrator has not only minutely examined the evidence on record, oral and documentary both, but has also given cogent reason why it considers proper to uphold the case of the claimant that non- lifting was due to non-availability of material as well as lack of infrastructural support of loading by crane. There is no perversity or patent illegality in recording a factual finding on this aspect much less any fundamentally flawed approach, to say that it shocked the conscience of the Court.

65.The combined result of the finding of learned Arbitrator, both on the aspect of interpretation of Clause -12 of the contract and non-availability of balance material for being lifted at NSBY depot is the foundation, to reach to the conclusion that there was no breach on the part of the contractor in non-deposit of the demanded advance towards cost of 10,000 tons material within one week in respect of supplies to be made in the month of August

2012. The appellant insisted throughout for payment of advance towards cost of entire 10,000 tons of material projected for supply in the month of August, without fulfilling its own obligation under clause -12 of providing appropriate adjustment equivalent to cost of material which could not be removed in the month of July due to non-availability of material at NSBY depot. Therefore, the reliance placed on **Saradamani Kandappan** (supra) is of no help because the decision would help the appellant if it was found that the contractor has actually breached one of the stipulation in the contract and sought to justify such breach on the ground that extension was granted to the contractor under any other stream of provision. In view of consideration as above, on the contrary, very extension under clause 22.11 has been made one of the basis for the learned Arbitrator to support its finding in favour of the contractor that the contractor version regarding non-availability of balance quantity of material at NSBY should be accepted and case of availability of material at NSBY as putforth by the appellant should be rejected.

66. The communication made between the parties and the letter written by the contractor in response to notice dated 8.8.2012 and the action of suspension of further removal on account of non-availability of advance for the month of August 2012, leading to invocation of Clause 18 towards suspension was not justified. We find that clause 18 of the contract makes it very clear that the occasion to invoke this clause would arise only upon quarterly review and not before that. This situation had not arrived. The first delivery order was issued on 30.6.2012 and therefore occasion for quarterly review would have arisen only after 3 months i.e. after delivery order and supply for the month of July, August and September. The only provision under which suspension of further removal could be done was Clause 12 itself and not any other clause of the contract. Under clause 12, further supply could be discontinued provided demand for advance payment towards supply of material of the projected quantity for next month, in the first week of month was not done. But since, as has been found herein-above, the demand itself was illegal that it was without proper adjustment, the consequence of non- deposit could not follow nor it

gave the appellant a right to suspend loading and dispatch of material. Therefore, the very occasion of suspension of supply was dehors the terms of contract and it was the appellant who committed breach of its obligation. That is what has been held by the learned Arbitrator.

67. One of the argument raised by learned senior counsel for the appellant is that the learned Arbitrator committed patent illegality in not appreciating that the contractor unilaterally altered the terms and condition as far as the price is concerned. It has been contention that the contractor was writing letters for variation of price on the ground that open market price were falling. This aspect has been given due consideration by the learned Arbitrator. The argument in this regard made from the side of appellant-BSP was duly noted by learned Arbitrator as below :-

“27. Dr. Shukla, learned counsel for the respondents referring to claimant's application submitted at the initial stage of the contract (Ex.A-13) and claimant's response dated 1st October 2012 (ExA-27) to respondents' letter dated 24.9.2012 (Ex.A-25) and 29th September 2012 (Ex.A-26), vehemently argued that the claimant was unilaterally setting new conditions for review of price of the material, adjustment of value of undelivered material for the month of July etc. which was not permissible as per terms and condition of the sale offer and the respondents were left with no option but to terminate the contract on failure of the claimant in depositing the demanded cost of the material for the month of August and September .

68. The learned Arbitrator considered in elaborate details and came to the conclusion that claimant claim for price variation vide its letter dated 1st October 2012 cannot be termed to be beyond the terms and condition of sale offer. Learned Arbitrator adverted to clause 10.3 of the contract providing for price variation and it concluded that price revision could not

be effected till December 2012. However, held that letter dated 1st October 2012 cannot be termed beyond the terms and condition of sale offer. Consideration on this aspect is as under:-

“28. It is true that the claimant, through the referred letters, requested for revision of price as per Clause 10.3 of RFQ vide his above response dated 1st October 2012. The price was to be subject to price variation formula linked to the price of prime mixed grade of pig iron. Price was to be fixed quarterly on the basis of average NSR (Net Sales Realization). Price of prime mixed grade of pig iron sold in Chhattisgarh from BSP will be as intimated by the Branch Sales Office (BSO), Bhilai.

Clause 10.3 provides for price variation according to which price was to be firm for the first month of issue of sale offer {(i.e. successful H-1 price quoted by the party (P))} and price for subsequent every three months period will be linked to average NSR price of prime mixed grade of pig iron sold in Chhattisgarh from BSP to be calculated according to given formula. In the present case, since the sale offer was issued in the month of June, price was to be firm for June. It further provides that if in average NSR price of prime mixed grade of pig iron sold in Chhattisgarh from BSP is not available in any month, the prices shall be subject to price variation with respect to wholesale price index for pig iron (as published by the office of Economic Adviser, to the Government of India, Ministry of Commerce & Industry for that particular quarter). In such a situation, the base wholesale price index for pig iron would be

average index prevalent for the previous quarter.

29. From the above, it is clear that the exercise of price revision became due after first quarter in the month of October 2012. RW1 in para 10 of his affidavit under Order XVIII Rule 4 CPC, referring to Clause 10.3 has averred that prime mixed grade pig iron was not sold by the respondents company at the relevant time whereas the wholesale price index of pig iron for the latest two months were provisional as per wholesasle price index for pig iron as appearing in the website of the office of Economic Adviser and therefore, actual data for wholesale price index for pig iron for August and September, 2012 could be available only in December 2012 and thus, price revision could not be effected till December 2012 and the claimant was asked to deposit the price as quoted by him in H-1 @ Rs.24,850/- (twenty four thousand eight hundred fifty) per ton.

30. Be that as it may, the claimant's application for price revision vide his letter dated 1st October 2012 cannot be termed to be beyond the terms and conditions of the sale offer and the respondents have not rejected his prayer for price revision on the aforesaid ground and the sale offer itself has been terminated only on the ground of non-payment of the demanded sum.

69. We have also perused the letter dated 1st October 2012 and there is nothing in this letter to show that price variation has been put as condition precedent for performance of further obligation under the contract. May be that the contractor was not entitled to price variation at that particular stage, but that does not mean that the contractor breached the contract unless the contractor refused to perform further part of contract on its part

until price revision take place. Therefore, the finding of learned Arbitrator on this ground also does not suffer from any patent illegality or perversity so as to warrant any interference by this Court.

70. One of the main contention of learned senior counsel for the appellant has been that the finding recorded by learned Arbitrator that time was not the essence of contract is patently illegal and suffers from gross perversity as such finding completely disregarded the very essence and spirit of provision contained in Clause -12. He would argue that the specific stipulation in clause -12 regarding deposit of advance in full was within specific period stating first week of the month and it also provided consequence that failure to deposit would amount to breach entitling the appellant to even terminate the contract in its discretion and as immediate measure, stoppage of further loading and dispatch. He has argued that learned Arbitrator has failed to apply settled principle of law in the matter of determination as to whether time was the essence of the contract between the parties.

71. Learned Arbitrator framed specific issue on this aspect as to whether time was the essence of contract. The finding in this regard are contained in para 25, 26 of the Award. It is not a case where the Arbitrator has completely omitted to take into consideration Clause -12 of the contract to arrive a finding that time was not the essence of contract. The consideration itself has been made in the context of Clause 12 of the RFQ. In order to hold that time was not the essence of the contract, it has taken into consideration that though, as per the terms and condition of sale offer, successful bidder was required to furnish bank guarantee by 18th June 2012, as per clause -11, which provide that bank guarantee has to be submitted within 10 working days from the date of issue of sale offer and in case of failure to deposit within the stipulated date, the offer will stand cancelled and EMD forfeited, bank guarantee submitted by the claimant on 14th June 2012 though was not found to be in prescribed format, the claimant was permitted to furnish bank guarantee in prescribed format on 23rd June 2012 and further that contract was flexible with regard to quantity as well as time in view of what was stated by its witness (RW1) in the cross-

examination that on failure of the purchaser to lift the entire quantity of scrap every month under the sale offer, penalty is imposable. Granting additional time for furnishing bank guarantee in proper format, extending validity of delivery order for delay and ultimately allowing claimant to deposit the entire cost of material to be lifted in the month of August and September vide letter dated 24.9.2012 were taken into consideration. While arriving at such finding, learned Arbitrator has relied upon decision in the case of **Arosan Enterprises Ltd. Vs. Union of India** (1999) 9 SCC 449, **M/s. Hind Construction Contractors** (supra) and **MP Housing Board Vs. Progressive Writers & Publishers** (2009) 5 SCC 678. It also relied upon judgment in the case of **Sumitomo Heavy Industrial Ltd.** (supra). This finding has been assailed as perverse on the submission that while holding so, observations made in para-10 of **Hind Construction Contractors** (supra) has not been dealt with by the learned Arbitrator or the Commercial Court. What has been contended is that the aforesaid judgment was distinguishable on facts because in para-7 and 8 of the said decision deals with clause providing for extension of time and those observation are not applicable in the present case where clause 12 does not provide for any extension of time. He would submit that what has been held in para-52 of **Claude- Lila Parulekar** (supra), makes out clear that even if originally, the time was not the essence of contract, a party could, by notice served upon other, call upon him to complete the transaction within the time fixed and intimate that in default of compliance with the requisition, the contract itself would be treated as cancelled. This argument has been raised with specific reference to letter dated 24.9.2012 wherein it has been stipulated so.

72. The finding of learned Arbitrator on the issue as to whether time was the essence of contract, is not only based on the conduct of the parties but also interpretation of the terms of contract, extension of time for submission of bank guarantee, deposit of advance money etc. The broad principle laid down in **Hind Construction Contractors** (supra) were applied by learned Arbitrator. A fine distinction has been carved out that even when by using a waiver, time ceased to be essence of contract, fixation of new time limit

could again bring in time as the essence of the contract. On this count certainly, learned counsel senior counsel for the appellant has made out a case on the basis of notice dated 24.9.2012, it is not a case where the Arbitrator has not examined the legal position or has omitted to take into consideration the documentary evidence or oral evidence but it is a case where the learned Arbitrator taking into consideration of relevant material and various judgments of the Supreme Court has recorded a finding that the time was not the essence of the contract, which essentially is a finding of fact and the argument of learned senior counsel for the appellant carving out fine distinction based on para-10 of **Hind Construction Contractors** (supra) and para-52 of **Claude- Lila Parulekar** (supra) is accepted, perhaps it would be a case of legal error having crept in the finding of the learned Arbitrator.

73. On the next issue as to whether the learned Arbitrator's finding that notice dated 24.6.2012 could be held to be a notice of termination in accordance with provision contained in Clause -16 of the RFQ, learned Arbitrator has dealt with this issue also in an elaborate manner in para-31 as below:-

"31. The argument that the occasion for review of performance of the claimant did not arise at the end of the quarter as the contract did not last, cannot be accepted particularly when the respondents themselves allowed 15 days time for depositing cost of material for the month of August and September, 2012 and the contract was finally terminated on 15.10.2012. Vide letter Ex.A-25 the respondents had given an opportunity to the claimant to deposit amount due for the months August and September 2012 within 15 days of receipt of this letter in terms of the contract with further stipulation that if deposits are made as directed, suspension on lifting imposed on 8.8.2012 shall stand vacated and further advised the claimant to withdraw the legal proceedings initiated

by him in the civil court, Durg. This letter is definitely a proposal given by the respondents to the claimant for lifting suspension of dispatches imposed on 8.8.2012 and the same cannot be considered to be a notice under Clause 16.1 of RFQ before termination of the contract simply because the letter also mentions termination of contract in the event of non-compliance of the directions. Similarly, in the admitted premises that the order of suspension of dispatches passed on 8.8.2012 was passed by an unauthorized authority on the oral instructions of the higher authorities and the order itself nowhere mentions that it is being issued with the approval of the higher authorities under oral instructions, the order of suspension of dispatches cannot be sustained on this ground also.

The basis of such finding that the notice dated 24th September 2012 contained many stipulation, one of it being opportunity to the claimant to deposit amount due for the month of August & September 2012 within 15 days of receipt of the letter as also stipulation that if deposit are made, suspension of lifting imposed on 8.8.2012 shall stand vacated . Learned Arbitrator also took into consideration a specific stipulation also that the claimant was advised to withdraw legal proceedings initiated by him in the Civil Court Durg. Taking into consideration all these aspects and the contents of the notice learned Arbitrator has arrived at the conclusion that the letter is more in the nature of proposal given by the appellant to the claimant for lifting suspension of dispatches imposed on 8.8.2012 and therefore it does not qualify to be notice of termination under clause 16.1 of the RFQ before termination of contract merely because it also contain stipulation of termination of contract in the event of non compliance of decision.

74.Learned senior counsel for the appellant emphasized on the recital of the

notice that the notice clearly stated that if the condition stated therein are not complied with within 15 days, termination of contract shall follow, was, by itself, sufficient to clarify and categorize the notice as that of termination in the spirit of clause 16.1 of RFQ and other stipulation would not alter its nature.

75.As against this stipulation, submission of learned counsel for the respondent claimant has been that the Arbitrator, while taking this view, has rightly interpreted it as proposal and not a notice for termination in terms of Clause 16.1 because the notice contains so many stipulation and in the background of dispute going on between the parties where the appellant was extending time earlier also, the finding in the context could not be termed to be suffering from any patent illegality.

76.Even if the argument of learned senior counsel for the appellant were to be accepted, it would be in the nature of an error of fact but certainly it was within jurisdiction of the Arbitrator to arrive at factual finding based on interpretation of notice of termination of contract. Learned Arbitrator has chosen to treat the letter dated 24.9.2012 not as termination notice in that strict sense of the term but predominantly an offer/proposal because of various stipulation including advice to withdraw civil proceedings.

77.The question that arises for consideration is whether such error committed by the Arbitrator both with regard to issue as to whether the time was the essence of the contract and whether notice dated 24.9.2012 amounted to notice of termination suffered from legal defect which would permit interference in view of limited scope of interference by this Court under Section 34 of the Act of 1996. As has been discussed, error if any committed by the Arbitrator on the aforesaid two issues cannot be said to be an error of jurisdiction because apparently the Arbitrator decided this issue within four-corners of the terms of dispute referred to it for adjudication and for which it had jurisdiction to deal with. Secondly, it is not a case where the Arbitrator has completely omitted for consideration relevant oral and documentary evidence or has completely ignored to look into legal position and the principles of law. The Arbitrator has not only

elaborately discussed the evidence available on record, as led by both the parties but has also examined the legal position with reference to several judgments of the Court and then arrived at its own finding.

78. In the case of **Ssangyong Engineering** (supra), Their Lordships in the Supreme Court, in the light of amendment in Section 34 under the Amendment Act of 2015 have clearly stated legal position, referring to its earlier decision in the case of **Associate Builders** (supra) i.e. the fundamental policy of Indian Law would be relegated to the “Renu Sagar” understanding of this expression.

79. It was clearly enunciated in the aforesaid judgment that the amendment in Section 34 has the effect that the **Western Geco** expansion has been done away with and therefore **Western Geco** as explained in para -28 and 29 of the **Associate Builders** would no longer be applicable, as under the guise of interfering with an Award on the ground that the Arbitrator has not adopted a judicial approach, the Court intervention would be on the merits of the Award, which cannot be permitted post amendment.

80. It was also highlighted in the aforesaid decision that the ground for interference on the basis that the Award is in conflict with justice or morality, is now to be understood as in conflict with “most basic notions of morality or justice”. This again would be in line with the paragraph 36 to 39 of the **Associate Builders** as only such arbitral award that shocks the conscience of the Court can be set aside by this Court.

81. Aspect of patent illegality as one of the grounds added by way of amendment was also explained in the manner that there must be patent illegality appearing on the face of the Award, with reference to such illegality which goes to the root of the matter and which does not amount to mere erroneous application of law. In short what is not subsumed within “the fundamental policy of Indian Law” namely the contravention of statute not linked to public policy or public interest, cannot be brought in by the back-door when it comes to setting aside an award on the ground of patent illegality.

82.It was made clear that re-appreciation of evidence, which is what the appellate Court is permitting, cannot be permitted under the ground of patent illegality appearing on the face of the Award. It was made clear that mere contravention of substantive law of India by itself is no longer ground available to set aside arbitral award though clarifying that if an Arbitrator have no reason for an award and contravenes Section 31 (3) of the Act of 1996 Act, that would certainly amount to a patent illegality on the face of the Award.

83.In the aforesaid decision, explaining the scope of interference in the light of change in law by amendment it was further propounded that the construction of the term of a contract is for the Arbitrator to decide and unless the Arbitrator construes the contract in a manner that no fair minded or reasonable person would do, in short, when the Arbitrator's view is not even a possible view to take.

84.A further enunciation of law in the aforesaid judgment is that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

85.If the finding recorded by the Arbitrator on the aspect of interpretation of terms of contract particularly clause 12, 18, 22.11 and 16, its finding on the issue of non-availability of material, as to whether time was the essence of contract, on the issue whether notice dated 24.9.2012 is in accordance with Clause 16 of RFQ, the submission of learned senior counsel and the examination of material on record with reference to various decision may at the most, an error of law or fact but does not qualify to be a defect of the nature which would warrant interference under Section 34 of the Act of 1996, giving limited scope of interference as delineated with reference to recent judicial pronouncement, in the case of **Ssangyong Engineering** (supra).

86.Importantly, the Arbitrator's finding on the issue of notice of termination and time being the essence of contract would have gone to the root of the

matter had there been a case that despite availability of material at NSBY, the claimant contractor failed to lift balance quantity for month of July 2012. Once the Arbitrator finding regarding non-availability of material is beyond permissible ground of interference, it automatically follows that the first demand vide letter dated 8.8.2012 for advance payment of 10,000 tons without adjustment, itself was illegal being in breach of appellant own obligation under Clause -12 of the contract. Therefore, even if it were to assumed that time was the essence of the contract and notice dated 24.9.2012 amounted to notice of termination in terms of Clause 16 of RFQ, the termination itself would be illegal therefore the ultimate result will not change and so also the ultimate conclusion by learned Arbitrator regarding termination being illegal.

87. Learned senior counsel for the appellant attacked the award on two more ground as also with regard to approach of the Arbitrator that the Arbitrator swayed on consideration of arbitrariness, reasonableness, rendered the finding rather adjudication on the right and obligation of the parties arising under the contract and secondly that Arbitrator committed legal misconduct as much as Award itself is contradictory and inconsistent on the issue of availability of material. Learned senior counsel has relied upon **Amritsar Gas Service** (supra), **Issac Peter** (supra), **Puravankara Projects Ltd.** (supra), as also **M/s. Orissa Concrete & Allied Industries** (supra) to submit that learned Arbitrator ought to have confined itself to adjudication based on rights and obligation under the contract, it being a purely contractual dispute and merely because the appellant is a public sector undertaking, the Arbitrator could not have assumed to itself the jurisdiction of the High Court under Article 226 of the Constitution of India and could not judge the legality of action on the anvil of Article 14 by declaring the action as arbitrary or unreasonable.

88. On principles and what was held by the Supreme Court in the aforesaid decisions, submission of learned counsel for the appellant has to be accepted. But then, in the present case, the finding of the Arbitrator on various issues is independently sustainable even if the observation regarding arbitrariness or unreasonableness are kept aside. It is not a case

where the Arbitrator, only on its own inference of arbitrariness or unreasonableness, jumped to the conclusion that termination of contract was illegal. Therefore, such observation in the arbitral award do not have vitiating effect on the finding of Arbitrator which is clear from the detailed consideration which we have dealt with on issues arising for consideration.

89. Much emphasis has been laid in the argument of senior counsel that Arbitrator has committed legal misconduct, referring to its finding on the issue of claim for losses due to idling. Highlighting that claimant's claim on account of idle equipment /machinery was rejected on the ground that there was no idling of machinery because material was being delivered by SAIL and no complaint was raised by the complainant regarding any idling of equipment/machinery, as contained in para-39 of the Award which bears apparent inconsistency in Award bringing into application, the principle laid down in **Pundarikakshudu** (supra) that if one part of the Award is inconsistent with the other, the Arbitrator must be held to have committed a legal misconduct.

90. Though at first blush, the argument appears to be attractive, on a closer scrutiny, particularly reading of Para-39 of the Award, this Court finds that the learned Arbitrator dealt with this issue quite reluctantly and has made sweeping remark that in the absence of any specific complaint in this regard by the claimant when the materials were being delivered by the appellant, no amount can be awarded to the claimant. This part of the Award would not render the entire Award vitiated. The Arbitrator while observing that material was being supplied, obviously refers to majority part of more than 5,000 tons delivered to the claimant and that it is not a case of there being absolutely no supply so as to say that the equipment/machines remained completely idle. For rejection of the claim on idling charges, learned Arbitrator has also taken note of absence of any specific complaint in this regard by the claimant and has also recorded finding on the basis of oral evidence and MOU with AMR Iron Steel Pvt. Ltd. that amount under such heading cannot be awarded to the claimant that too in the absence of any amount actually paid by the claimant as damages to the said AMR Iron and Steel Pvt. Ltd., Thus, on more than one

consideration the claim for idling charges was rejected and therefore, this could not be made a basis to make out a ground of interference against a detailed finding of fact on the issue of non availability of material at NSBY nor would render the Award liable to be interfered with on the touchstone of principle laid down in **Pundarikakshudu** (supra) .

91.In the case of **Associate Builders** (supra), Their Lordship in the Supreme Court have laid down a fundamental principle as regard the approach of the Court while entertaining challenge to the Award that all attempt should be made to save the Award rather than invalidate it. Award has been given by the Arbitrator chosen by the parties and unless it becomes imperative, the Award should be given effect to.

92.Long line of decisions relied upon by learned senior counsel for the respondent pre and post amendment of the Act of 1996 settled the aforesaid view. In **Fiza Developers** (supra), it was held that there should be minimal interference by the Court in matters relating to arbitration and that proceeding under Section 34 of the Act of 1996 defer from regular civil suit in a significant aspect.

93.In **J.G. Engineering** (supra), it was held that to hold an Award to be opposed to the policy, the patent illegality it should go to the very root of the matter and not a trivial illegality. Settled legal position that a Court does not sit in appeal over the Award or arbitral jurisdiction by re-assessing or re-appreciating the evidence and in any case where the view taken by the Arbitrator was clearly a plausible one, interference would not be possible was also highlighted in **J.G. Engineering** (supra), **P.R. Shah** (supra), **Rashtriya Ispat Nigam** (supra) and **Sutlej Construction** (supra). Their Lordships in the Supreme Court observed that dispute had resulted in an Award and there was not a case where the Arbitrator had not appreciated evidence and where the Arbitrator has taken possible view interference would not be warranted and the Court are to restrain themselves from getting into meanderings of evidence appreciation and acting like a second appellate Court.

94.However one of the aspect of the Award, in so far as Arbitrator has

awarded Rs.1.5 crores towards loss of profit, is liable to be interfered with as it fails to satisfy the test as stated herein-above and is in the teeth of patent illegality. The claim towards loss of profit which led to Award of Rs.1.5 crores was based on no evidence.

95. Learned Arbitrator having rejected the evidence adduced by the contractor for claiming loss of profit proceeded to award Rs.1.5 crores on the finding that even if there is no escalation clause, such claim could be awarded. While holding so, as has been rightly pointed by learned senior counsel for the appellant, learned Arbitrator has completely ignored to take into consideration clause 9.2 of the contract which is reproduced as below:

“9.2) In case, Bhilai Steel Plant is not able to supply the indicated quantity due to any constraints and or any other unforeseen factors beyond the control of the BSP, the BSP shall not be liable for any compensation whatsoever”

96. The award of loss of profit of Rs.1.5 crores was clearly contrary to Clause 9.2 of the RFQ. Learned Arbitrator has relied upon two decisions **K.N. Sathyapalan** (supra) **P.M. Paul** (supra). In the aforesaid cases, on facts, the claimant had in fact proved its claim for loss by adducing evidence in support thereof and that was not a case of absence of evidence but absence of clause for escalation and in that background, on the basis of proof, even though there was no escalation clause, same was allowed. But in the present case, where claimant could not prove such losses, award of Rs1.5 crores towards loss and profit clearly amount to patent illegality on its face and contrary to principles laid down in **Radhakrishna Murthy** (supra).

97. The Award of Rs.1.5 crores towards loss of profit is clearly severable from rest part of the award in respect of which this Court has found that termination of contract was illegal. Thus, though the Arbitrator's award in so far as award of 1.5 crores towards loss of business /profit cannot be sustained in law, as far as award of Rs.14,91,000/- towards refund against

forfeiture of security deposit, award of Rs.1 crore towards refund of forfeiture of EMD as also award of Rs.10,66,88,848/- towards value of balance material against delivery order for the month of July 2012 is concerned, no interference is called for.

98. In the result, this appeal is partly allowed in the manner and to the extent indicated above.

99. No orders as to costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge