

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1097 of 2013

Steel Authority of India Ltd. –IISCO Steel Plant

Versus

Balaji Industrial Products Ltd.

Mr. Anindya Mitra, Sr. Adv.

Ms. Supriya Dubey

Ms. Sneha Dutta

Ms. Debolina Chakraborty

.....For the Petitioner

Mr. Jishnu Saha, Sr. Adv.

Mr. Sandip Agarwal

Ms. Sulagna Mukherjee

Ms. Surobhi Banerjee

Mr. Sourojit Dasgupta

Mr. T. Ganerjwala

Ms. Shristi Sharma

Mr. Shivam Bhimasania

.....For the Respondent

Hearing Concluded On : 06.07.2023

Judgment on : 08.08.2023

Krishna Rao, J.:

1. The petitioner, Steel Authority of India Limited has filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the learned sole Arbitrator dated 19th June, 2013 between (Balaji Industrial Products Limited -vs- Steel Authority of India).
2. A Tender Notice was published by the Steel Authority of India inviting offers for sale of 60,000 Metric Tonnes of Run of Mines (Iron Ore), from the mining face of Ranichua Bench of Gua Ore Mines. The respondent had participated in the said tender process. The respondent being the highest bidder and as such the petitioner issued a Letter of Intent dated 26th February, 2005 to the respondent offering the material at the rate of Rs. 807/- per MT exclusive of excise duty, sale tax and other taxes and duties.
3. On acceptance of the letter of intent, the respondent has deposited security deposit of Rs. 24,21,000/- on 16th March, 2005. The contract period was 90 days from the date of issuance of first delivery order. On 16th March, 2005, the first delivery order was issued for lifting 30,000/- MT of materials and the respondent has paid an amount of Rs. 2,52,26,760/- towards the value of 30,000/- MT of the Run of Mines (ROM) in advance in terms of the clauses of the contract contained in the terms of conditions.

4. As per the Notice Inviting Tender and the contract entered between the parties, payment for the second instalment of 30,000/- MT of the said material was to be paid within 45 days from the issue of the first delivery order and only on such receipt of second instalment by the petitioner, the second delivery order would be issued to the respondent.
5. The delivery will be by road from Mining face Ranichua Bench of Gua Ore Mines and the petitioner will arrange mechanical loading from the located site to truck/dumper. The delivery of the materials in terms of delivery order issued shall be taken up by the respondent within the stipulated period mentioned in the delivery order.
6. A dispute was cropped up between the parties on the allegation and counter allegation to the effect that the petitioner had the knowledge about the labour unrest at the site of delivery and it would be impossible for the petitioner to give delivery of the materials within the stipulated time to the respondent, suppressing the said fact of labour unrest, the petitioner incorporated the force majeure conditions clause with the object of protecting the petitioner against the loss and damages and the petitioner has not delivered the material of first delivery orders as per schedule and even after extension of time some quantity was undelivered. The further dispute is that the respondent has not paid the balance amount of the balance quantity of the materials within 45 days from the date of receipt of the first delivery order.

- 7.** By an order dated 24th October, 2005, the petitioner had terminated the contract by forfeiting the security deposit and leftover quantity was treated as abandoned goods by applying the provisions of Clause 11 of the special terms and conditions of the contract.
- 8.** Mr. Anindya Mitra, learned Senior Advocate representing the petitioner submitted that as per contract term, if loading or dispatch was affected due to any reason attributable to the petitioner, respondent will get suitable extension of time. He submits that the respondent complained that loading was affected due to labour unrest at the mine site for 71 days and dispatch by breakdown of weighbridge of the petitioner was affected for 5 days. The respondent had applied for extension of time and the petitioner had granted more than 76 days till 29th August, 2005. He submits that the respondent had lifted only 28,435.230 MT and had left 1564.780 MT un-lifted. He submits that the respondent had not applied for further extension for delivery of unlifted item and thus the balance 1564.780 MT of the first lot stood abandoned as per clause 11 of the contract.
- 9.** Mr. Mitra submitted that the respondent did not deposit any part of the price of the remaining second lot of 30,000 MT of Iron Ore within scheduled time or even within the extended time for payment. Accordingly, the respondent was not entitled to receive delivery of the second lot of 30,000 MT of Iron Ore and thus the respondent is not entitled to make any claim for damages for non-delivery of second lot.

- 10.** Mr. Mitra submitted that the respondent had committed breach of contract by not paying the price of balance quantity of 30,000/- MT and accordingly by a letter dated 24th October, 2005, the contract was terminated and security deposit was forfeited.
- 11.** Mr. Mitra submitted that in case of loading of Iron Ore is affected due to any reason attributable to the petitioner, the only remedy of the respondent under the contract was to obtain suitable extension of delivery period, which the respondent did by its letter dated 7th June, 2005 and the petitioner has granted extension from 26th May, 2005 to 23rd August, 2005. He submits that in the said letter, the respondent did not claim for any interest and damages.
- 12.** Mr. Mitra submitted that taking the advantage of the extension period, the respondent has taken delivery of 26321.695 MT of Iron Ore during the extended period. He submits that the respondent had further asked for extension of delivery period for the first lot by 5 days on the ground of Weigh Bridge of the petitioner was not functional and the same was allowed till 29th August, 2005 and the respondent has lifted further quantity of 2113.525 MT Iron Ore during the extended period. The respondent had took delivery of total 28,435.220 MT out of first lot of 30,000 MT and the balance of 1564.780 MT was not lifted by the respondent.
- 13.** Mr. Mitra submitted that the learned Arbitrator had not given any finding that the respondent wanted to lift the balance materials and the

respondent failed to provide the balance quantity of 1564.780 MT of Iron Ore to the respondent.

14. Mr. Mitra submitted that though the learned Arbitrator had discussed about the news paper reports with regard to the labour unrest but had not considered that the respondent had availed 71 days extended period and had lifted only 26321.695 MT out of the first lot of 30,000 MT leaving the remaining portion. He submits that the award for reimbursement or refund of the remaining portion of Iron Ore on account of non-delivery by the petitioner is contrary to the contract and thus the award is in violation of Section 28(3) of the Arbitration and Conciliation Act, 1996.
15. Mr. Mitra relied upon the judgment reported in **(2006) 4 SCC 445 (Hindustan Zinc Ltd vs. Friends Coal Carbonation)** and submitted that an award contrary to the substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the Court under Section 34(2) of the Act of 1996.
16. Mr. Mitra submitted that the award passed by the learned Arbitrator for refund of security deposit to the respondent is contrary to Clauses 5, 6 and 10 of the Letter of Intent and Clause 4 of the Special Terms and Conditions of the Contract. He submits that the respondent has not deposited the price of second lot of 30,000 MT Iron Ore out of the total

quantity of 60,000 MT which the respondent was obliged to take delivery upon deposit of price in advance under the specific terms and conditions of contract within the time fixed under the contract. Mr. Mitra submitted that the learned Arbitrator has passed an award for refund of security deposit without assigning any reasons.

17. Mr. Mitra submitted that the award passed by the learned Arbitrator for payment of Rs. 1,67,56,163/- to the respondent is alleged to have been spent for purchase of 31564.78 MT of Iron Ore from the market is shocking, perverse, bereft of reasons and contrary to the contract. Mr. Mitra submits that learned Arbitrator could not and has not held that the respondent was entitled to delivery of second lot of 30000MT of Iron Ore without payment of price thereof in advance or the petitioner failed to give delivery of remaining portion of 1564.780 MT out of the first lot. He submits that the petitioner has not received the amount of Rs. 2,52,26,760/- for the second lot of 30,000 MT in advance as per the terms of contract and thus had not issued the delivery order for the second lot.

18. Mr. Mitra submitted that Clause 6 of the Letter of Intent which expressly provide that the delivery order for the second lot of 30,000/- MT will be issued only after receipt of price of second instalment in advance but the respondent did not pay the price of the second lot inspite of reminders given to the respondent with a caution that in default of deposit penal clause of the contract would be applied. Mr. Mitra submitted that the petitioner never refused to issue delivery order

or to deliver second lot. The petitioner was prevented from issuing delivery order for the second lot for non payment of price of the second lot in terms of the contract.

- 19.** Mr. Mitra submitted that there is no finding that during the last phase of extended period, the respondent was prevented by the petitioner from taking delivery of the remaining quantity of 1564.780 MT in entirety. He submits that under Clause 11 of the letter of intent delivery order to the extent of 1564.780 MT not lifted by the buyer stood cancelled and 1564.780 MT was to be treated as abandoned goods which were intimated by the petitioner to the respondent.
- 20.** Mr. Mitra submitted that there is no evidence of the purchase of 31564.784 MT of Iron Ore by the respondent at a price higher than the contract price was given by the respondent. Mr. Mitra submitted that the respondent was required to establish under law that the respondent has actually paid the purchase price and was commensurate with the market price. Mr. Mitra Submits that under Section 57 of the Sales of Goods Act, a buyer is entitled to claim damages for non-delivery of goods only when the seller has wrongfully neglected or refused to give delivery.
- 21.** Mr. Mitra submitted that altogether 12 issues were framed by the Learned Arbitrator at the 11th meeting including the claim made by the petitioner in the counter claim but the award is silent on the counter

claim of the petitioner and the learned Arbitrator has not answered the claim of the petitioner raised in the counter claim.

22. Mr. Mitra submitted that a new case has been made out by the respondent for the first time at the time of oral argument without any pleading and evidence that the obligation of the petitioner was that the entire 60,000/- MT of Iron Ore would be kept ready for delivery at the mine site but the petitioner failed to comply with its obligation in terms of the contract.

23. Mr. Mitra relied upon the following judgments in support of his argument:

- “i. AIR 2021 SC 5503/ (2022) 2 SCC 275 (State of Chhattisgarh and Another –vs- Sal Udyog Private Limited).*
- ii. (2006) 4 SCC 445 (Hindustan Zinc Ltd. –vs- Friends Coal Carbonisation).*
- iii. (2011) 10 SCC 705 (Shiji alias Pappu & Ors. –vs- Radhika & Anr.).*
- iv. (2011) 2 Arb. LR 390 (Delhi) (Municipal Corporation of Delhi (MCD) –vs- Naresh Kumar Gupta & Company Pvt. Ltd.).*
- v. (2001) 5 SCC 629 (Sikkim Subba Associates –vs- State of Sikkim).*
- vi. (2002) 4 SCC 45 (General Manager, Northern Railway & Anr. –vs- Sarvesh Chopra).*
- vii. AIR 2019 SC 5041/ (2019) 15 SCC 131 (Ssangyong Engineering and Construction Company Ltd. –vs- National Highways Authority of India (NHAI)).*

- viii. (2019) 20 SCC 1 (*Dyna Technologies Pvt. Ltd. –vs- Crompton Greaves Ltd.*).
- ix. (2015) 3 SCC 49 (*Associate Builders –vs- Delhi Development Authority*).
- x. AIR 1990 AP 294/ (1989) SCC OnLine AP 59 (*State of Andhra Pradesh –vs- Associated Engineering Enterprises, Hyderabad*).
- xi. AIR 2011 SC 2507 (*Booz Allen and Hamilton Inc. – vs- SBI Home Finance Ltd. Ors.*).”

24. Mr. Jishnu Saha, learned Advocate representing the respondent submitted that the contract contained reciprocal obligations which were to be discharged by both the parties. He submits that the petitioner had the primary obligation of keeping the materials ready for delivery, the respondent had the reciprocal obligation of making an advance payment for the first lot of 30,000 MT. Mr. Saha submits that after lifting of first tranche, the respondent was obliged to pay in advance for the second lot.

25. Mr. Saha submitted that despite making payment of the first lot, the respondent was not given delivery though the respondent regularly placed the trucks at the site. He submits that the petitioner failed to deliver goods due to the labour unrest prevailing at the site. Even after 70 days from the issuance of delivery order for lot-1, the petitioner had not delivered the materials due to the which, the respondent refused to pay advance for the second lot until and unless the petitioner gave an assurance that the petitioner will deliver the remaining 30,000 MT but

such assurance was not given by the petitioner. Instead, the petitioner insisted for advance payment of the second lot.

- 26.** Mr. Saha submits that the petitioner proceeded to wrongly terminate the contract on the pretext that the respondent did not pay the advance for the second lot of 30,000 MT. Mr. Saha submits that in absence of grounds, the Court cannot re-examine the facts to find out whether a different decision can be arrived at. He submits that the Learned Arbitrator considering the facts as pleaded, evidence given by the parties and the materials available on record, the Learned Arbitrator came to a specific finding that the respondent was ready and willing to take delivery of the goods and it was the petitioner who was in breach of contract by failing to deliver the goods.
- 27.** Mr. Saha relying upon the judgment reported in **(2015) 3 SCC 49 (Associate Builders –vs- Delhi Development Authority)** submitted that it is a settled principle of law that the Arbitrator is the ultimate Master of the quantity and quality of evidence to be relied upon when he delivers his award.
- 28.** Mr. Saha relied upon the judgment reported in **(2009) 6 SCC 414 (G. Ramachandra Reddy & Company –vs- Union of India & Anr.)** and submitted that the Court shall not re-appreciate the evidence while deciding the application under Section 34 of the Arbitration and Conciliation Act, 1996. He further submits that the Court shall only see

whether the Arbitrator has formed a possible view after considering the evidence and materials on record.

- 29.** Mr. Saha submitted that Clause 11 of the tendered document, Clause 1.2 of the Special Terms and Conditions and Clause 1 of the Letter of Intent gave a representation to the respondent that the goods were available for delivery but in the course of performing the contract, the respondent came to know that there was a labour unrest prevailing at the site which had begun even before the contract was concluded between the parties. He submits that the Learned Arbitrator has come to a specific finding of the fact that lifting of the goods was impeded due to labour unrest and the petitioner was not in a position to perform the contract. He submits that the Learned Arbitrator came to the finding after considering the materials on record i.e. the oral and documentary evidence tendered by the parties. The petitioner has wrongly terminated the contract on 24th October, 2005 though the respondent seeks an extension of time by a letter dated 7th October, 2005 from the petitioner which was not allowed.
- 30.** Mr. Saha submitted that the impugned award is passed before the amended provisions of Section 34 came into effect and thus no reliance can be placed on the newly inserted provision of Section 34 (2A) of the said Act.
- 31.** Mr. Saha submitted that though the Counsel for the petitioner has argued that the award is passed without assigning any reason but the

petitioner has not taken any ground in the application under Section 34 of the Arbitration and the Conciliation Act, 1996 that the Arbitrator has passed award without assigning any reason.

32. Mr. Saha submitted that the petitioner was not in a position to deliver the materials not only appearing from the labour unrest prevailing at the site but also from the evidence tendered as the entire stock was not ready for delivery. He submits that the petitioner has given a representation to the respondent that at the time of entering into the contract, the entire quantity of materials was available for delivery.

33. Mr. Saha submitted that during the evidence, the respondent had submitted bills indicating that the respondent had purchased the remaining materials and the bills raised by the third parties against the balance materials and the said documents were exhibited in the evidence. He submits that it is well settled law that absence of cross-examination, amounts to admission and in the present case, the document which was produced by the respondent was not denied by the petitioner.

34. Mr. Saha in support of his submission relied upon the following judgments :

“(i) Union of India vs. M/s Track Innovations (India) Pvt. Ltd. [2014 SCC OnLine Del 3393].

“(ii) Associate Builders vs. Delhi Development Authority [(2015) 3 SCC 49].

“(iii) G. Ramchandra Reddy and Company vs. Union of India and Another [(2009) 4 SCC 414].

(iv) Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHAI) [(2019) 15 SCC 131].

(v) Dyna Technologies Private Limited vs. Crompton Greaves Limited [(2019) 20 SCC 1].

(vi) Som Datt Builders Limited vs. State of Kerala [(2009) 10 SCC 259].

(vii) Kailash Nath Associates vs. Delhi Development Authority and Another [(2015) 4 SCC 136].

(viii) A.E.G. Carapiet vs. A.Y. Derderian [1960 SCC OnLine Cal 44].

(ix) Kalipada Saha vs. Sm. Lila Rani Saha [1995 SCC OnLine Cal 26]”.

35. Heard the Learned Counsel for the respective parties, perused the materials on record, award and the judgment relied by the parties.

36. The respondent had made the following claims before the Learned Arbitrator :

a) An interest claim of Rs. 21,50,747/- at the rate of 18% per annum for delay in delivery of goods for which advance payment was received by the respondent;

b) A claim of Rs. 13,19,329/- on account of the respondent's failure to delivery or allow delivery of 1564.780 metric tons of the goods despite having received the full price therefor;

c) A claim of Rs. 24,21,000/- on account of security deposit wrongfully and illegally forfeited by the respondent;

d) A claim Rs. 26,900/- on account of the difference in the weight of goods stated to have been delivered and actually delivered by the respondent to the claimant;

e) A claim of Rs. 1,67,56,163/- on account of the excess amount spent by the claimant in purchasing 31,564.780 metric tons of the goods from the market;

f) A claim of Rs. 22,31,997/- on account of wrong debits made by the respondent to the claimant's account but thereafter credit to the claimant; and

g) A claim of Rs. 10,77,876/- on account of rate difference in interest on the sum of Rs. 1,67,56,163/-.

37. The main dispute between the parties was non delivery of the balance portion of 1564.780 MT of first delivery order by the petitioner to the respondent, non-payment of the balance amount with respect of second lot of 30,000MT of Iron Ore by the respondent to the petitioner and non-delivery of balance 30,000 MT of Iron Ore by the petitioner to the respondent.

38. Terms of Payment is describe in Clause 6 of the Letter of Intent which reads as follows :

"6. TERMS OF PAYMENT: *Non-interest bearing advance payment covering full value of 30,000 MT of material has to be deposited by BIPL in favour of IISCO by PO/DD drawn on a scheduled bank and payable at Burnpur at a time within 14 days from the date of LOI including sales tax, cess and royalty and other applicable levies. First Delivery Order would be issued only after receipt of such advance payment plus Security Deposit amount at Burnpur.*

Payment of the balance 30,000 MT has to be paid by BIPL positively within 45 days from the date of issuance of first D.O. Second delivery order will be issued only after receipt of second instalment at Burnpur. All payments are to be made in the form of D.D./Pay Order in favour of The Indian Iron and Steel Co Ltd drawn on a scheduled bank and payable at Burnpur and are to be deposited

with AGM (MKTG), Burnpur Bank collection charges, if any, shall be borne by the buyer. Failure to deposit such payments will result in termination of contract without any notice to the successful tender alongwith forfeiture of security deposit. However, if loading or dispatch is affected due to any reason attributable to IISCO, suitable extension in delivery period only may be considered at its sole discretion.”

39. Clause 4 of the Special Terms and Conditions reads as follows :

“4. TERMS OF PAYMENT: *The ST shall be required to deposit non-interest bearing advance payment covering full value of 50% of the total allocated quantity at a time within 14 days from the date of LOI including sales tax, cess, royalty and other applicable levies etc which will be adjusted from the value of materials at the time of dispatch. Frist D.O. will be issued only after receipt of such advance payment and security deposit at Burnpur. Payment of the balance 50% of total allocated quantity has to be paid by the S.T. positively within 45 days from the date of issuance of first D.O. Second delivery order will be issued only after receipt of second instalment at Burnpur. All payments are to be made in the form of D.D./Pay Order in favour of The Indian Iron and Steel Co Ltd drawn on a scheduled bank and payable at Burnpur and are to be deposited with AGM(MKTO), Burnpur Bank collection charges, if any, shall be borne.”*

40. As per this clause Non-interest bearing advance payment covering full value of 30,000 MT of materials has to be deposited by the respondent in favour of the petitioner within 14 days from the date of Letter of Intent including all taxes etc. with regard to this part there is no dispute between the parties as the respondent had paid the said amount.

- 41.** The dispute is with regard to payment of balance 30,000 MT. As per Clause 6 the balance payment has to be paid positively within 45 days from the date of issuance of first delivery order. Admittedly, the respondent has not paid the cost of balance 30,000 MT of Iron Ore. The defence of the respondent for non-payment of the cost of balance 30,000 MT of Iron Ore is that the petitioner has not made ready for delivery of the total 60,000 MT of Iron Ore by the petitioner and the petitioner has not deliver the full quantity of the first delivery order.
- 42.** As per Clause 3 of the Letter of Intent and Special Terms and Conditions of Contract is “Contract period shall be of 90 days from the date of issuance of first delivery order”.
- 43.** Clause 9 of the Letter of Intent and the Special Terms and Conditions of Contract described Delivery Schedule which reads as follows :
- “9. DELIVERY SCHEDULE:** *Total quantity of 60,000 MT has to be lifted within the contract period. Validity of first delivery order for 30,000 MT will be 90 days. Validity of second delivery order for balance 30,000 MT will be 45 days or upto the contract period whichever is higher. In no case, the contract period would be extended.”*
- 44.** As per clause 9 total quantity of 60,000 MT has to be lifted within contract period i.e. 90 days. The validity of first delivery order for 30,000 MT will be 90 days. Validity of second delivery order for 30,000 MT will be 45 days or up to the contract period which ever is earlier. First delivery order was issued on 16th March, 2005. On receipt of the first delivery order, the respondent has placed trucks/tippers for taking

delivery of the but the petitioner failed to deliver goods to the respondent due to labour unrest. The respondents have made several correspondences with the petitioner for delivery of first lot but the same was not delivered within the contractual period and by a communication dated 21st June, 2005, the contract period was rescheduled from 26th May, 2005 to 23rd August, 2005 in place of 16th March, 2005 to 13th June, 2005. In the said communication, it was also requested by the petitioner to the respondent to deposit the advance towards value of the balance materials of 30,000 MT by 9th July, 2005.

- 45.** Clause 7 of the Letter of Intent describe the Mode of Dispatch which reads as follows :

“7. MODE OF DISPATCH: Delivery will be by ‘Road’ from Mining face of Ranichua bench of Gua Ore Mines and IISCO will arrange mechanical loading from the located site to truck/dumper (only 10 ton capacity vehicle would be allowed). Delivery of the materials in terms of Delivery Orders issued shall be taken by BIPL within the stipulated period mentioned in the Delivery Order and also strictly as per any other instructions/ delivery programme given by Gua management from time to time.”

- 46.** As per Clause 7 the petitioner will arrange mechanical loading from the located site to the truck/ dumper. Learned Arbitrator has considered Clause 7 and held that the petitioner is obliged to arrange mechanical loading and the respondent would take delivery. The witness of the petitioner in his cross examination at question no. 49 answered that “*I had already told earlier that once the contract is placed the entire job of delivering the materials rest with executing agency i.e.G.M.Gua or its*

authorised representative.” From the answer of the petitioner’s witness admitted that the petitioners are liable to deliver the materials to the respondent. In answer to the question No. 46 the witness of the petitioner also admitted that “as far my knowledge goes on receipt of payment and issuance of delivery order for 30,000 MT of ROM, IISCO is to give 30000 MT of material to the claimant”.

47. In the case of **Associate Builders (Supra)**, the Hon’ble Supreme Court held that:

“33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., this Court held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock

Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

48. Learned Arbitrator held that other than the oral evidence by the respondent's witness there was nothing on record to substantiate the petitioner, at all material time was ready and willing to give materials. The Learned Arbitrator has also held that the allegation of the petitioner that the delivery could not be taken up by the respondent due to problem of the labourers engaged by the respondent was mere assertion and was not supported by any evidence. It was also held that the pleading and the oral evidence adduced by senior officers of the petitioner are contradicting.

49. In the case of **G. Ramachandra Reddy and Company (Supra)**, the Hon'ble Supreme Court held that:

"19. We may, at the outset, notice the legal principles governing the dispute between the parties. Interpretation of a contract may fall within the realm of the Arbitrator. The Court while dealing with an award would not reappreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong Proposition of law. If two views are possible, it is trite, the Court will refrain itself from interfering.

- 50.** In view of the above, this Court finds that the petitioner failed to supply the balance quantity of the materials of first delivery order to the respondent even after receipt of the total payment of the first delivery order and thus the finding of the learned Arbitrator can not be said to be perverted.
- 51.** As regard the payment of balance 30,000 MT, the same has to be paid by the respondent to the petitioner within 45 days from the date of issuance of first delivery order. On 26th March, 2005, the petitioner issued first delivery order to the respondent on receipt of the total amount of the first delivery order for 30,000 MT of the materials and the respondent was required to take delivery by 13th June, 2005. Admittedly, there was no delivery and delivery period was extended to 23rd August, 2005. In between 26th May, 2005 and 23rd August, 2005, there was delivery of portion of the materials of the first lot of delivery. On 30th August, 2005, a meeting was held between the parties and it was agreed that the remaining portion of the first delivery order will be delivered but no delivery was taken place. As the petitioner has not delivered the balance portion of materials of first delivery order, the respondent had made representations to the petitioner on 22nd September, 2005 and 7th October, 2005, demanding the security amount back and reimbursement of the undelivered 1564.780 MT of iron ore out of the first delivery order. The petitioners have not given any reply to the request made by the respondent.

52. Learned Arbitrator considering the facts held that nothing appears from the evidence or in the pleadings of the petitioner that there was a reasonable attempt to settle the disputes and allow delivery. The Arbitrator further held that the petitioner has also not considered the Force Majeure clause but the petitioner treated the balance undelivered materials as abandoned and wrongly terminated the contract. As from the finding of the learned Arbitrator and the materials on record, it appears that the petitioner could not get the materials ready and thus the payment of balance 30000 MT of the iron ore does not arise.

53. In the case of ***Union of India vs. M/s Track Innovation (India) Pvt. Ltd. (Supra)***, the Hon'ble Delhi High Court held that :

“25. *The scope of section 34 of the Arbitration and Conciliation Act, 1996 is limited to the stipulations contained in Section 34(2) of the Act. The jurisdiction of the Court to interfere with an Award of the Arbitrator is always statutory. Section 34 is of mandatory nature, and an Award can be set aside only on the Court finding the existence of the grounds enumerated therein and in no other way. The words in Section 34(2) that "An Arbitral Award may be set aside by the Court only if" are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section. The Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. A recent observation of the Supreme Court in the case of P.R. Shah, Shares and Stock Brokers Private Limited Vs. B.H.H. Securities Private Limited, (2012) 1 SCC 594 is apposite in this regard and the relevant portion, contained in paragraph 21 of the said judgment is, reproduced as under:*

"21. A Court does not sit in appeal over the award of an Arbitral Tribunal by

reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. 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".

- 54.** Though as per Clause 6 of the Letter of Intent, payment of balance 30,000 MT has to be paid by the respondent positively within 45 days from the date of issuance of first delivery order but in the present case, the time prescribed for delivery schedule was not complied with and it was extended even in the extended period, the petitioner has not shown any evidence that the petitioner was able to supply the full quantity of the first delivery order and the remaining quantity of 30,000 MT was ready for delivery. In view of the above, this Court finds that the findings of the learned Arbitrator does not required any interference.
- 55.** As regard the delivery of remaining 30,000 MT of iron ore was ready for delivery or not? Clause 9 of the Letter of Intent provide for delivery schedule. As per the said clause, the total quantity of 60,000 MT has to lifted within the contract period of 90 days. The validity of the first delivery order for 30,000 MT will be 90 days and the validity of second delivery order for balance 30,000 MT will be 45 days or up to the contract period which ever is higher. Admittedly, the first delivery order was not supplied within the time prescribed and on the request of the respondent the time was extended and even in the extended period, the

petitioner has not supplied the balance quantity of 1564.780 MT of the first deliver order to the respondent.

56. Learned Arbitrator considering the evidence and materials on record held that the person incharge of the Gua Mines has stated in his cross examination that unless the mine face had been cleared no further blasting, could be done, in other words 60,000 MT Iron Ore was admittedly not ready. He further held that from the evidence it is proved that further blasting was required for lifting the balance amount of materials. He further held that there is no evidence that the blasting was done at the other mine faces and 60,000 MT of materials was ready for delivery. The Arbitrator specifically come to the finding that total 60,000 MT of Iron Ored was not ready for delivery.

57. In the case of **Associate Builders (Supra)**, the Hon'ble Supreme Court held that:

“43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it

gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. Oil and Natural Gas Corporation [(2003) 8 SCC 593] and D.D. Sharma v. Union of India).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, the Court held:

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram*, *Thawardas Pherumal v. Union of India*, *Union of India v. Kishorilal Gupta & Bros.*, *Alopi Parshad & Sons Ltd. v. Union of India*, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji* and *Renusagar Power Co. Ltd. v. General Electric Co.*)"

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, the Court held:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and

substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows:

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

- 58.** In the present case, the clauses in the Letter of Intent presuppose only a situation where the respondent failed to take delivery of the goods and the clauses does not contemplate the situation where the petitioner No. 2 fails to deliver goods. The learned Arbitrator considering the evidences of the parties and the documents came to a specific finding that lifting of good was delayed due to labour unrest and the respondent was not able to perform contract. The petitioner despite

receipt of entire payment of first delivery order could not deliver the entire quantity. Taking into the situation of delivery of the first lot, the respondent insisted upon the petitioner to make sure that the second lot is ready and in the event of payment of the second lot is made, the petitioner will deliver second lot. As the petitioner has not given any assurance of delivery of second lot and accordingly, the respondent had purchased remaining materials from the market.

- 59.** Considering the above facts, this Court finds that the award passed by the Arbitrator is well reasoned and has been passed after considering all the materials fact and thus required no interference.
- 60.** As regard the refund of security deposit, Clause 5 of the Letter of Intent and Clause 8 of the tender documents speak about the Security Deposit which reads as follows :

“5) SECURITY DEPOSIT : *Non-interest bearing Security Deposit representing 5 % of the full value of materials allocated on the basis of price quoted has to be furnished by BIPL within 10 days from the date of issuance of LOI. EMD amount already deposited shall be adjusted against Security Deposit, and the balance amount has to be submitted positively within 10 days from the date of issuance of LOI by Pay Order/Demand Draft drawn in favour of The Indian Iron & Steel Co Ltd. on a scheduled bank & payable at Burnpur and is to be deposited with AGM (Mktg), Burnpur. Security Deposit shall be retained by IISCO till completion of the contract & the amount of Security Deposit shall be refunded on satisfactory completion of the contract.*

8. Security Deposit: *The successful tenderer has to furnish non-interest bearing Security Deposit representing 5% of the full value of the materials allocated on the basis of the prices*

quoted/accepted within 10 days from the date of LOI by Pay Order/Demand Draft drawn in favour of THE INDIAN IRON & STEEL CO. LTD on a scheduled bank and payable at Burnpur. EMD amount shall be adjusted against the security deposit. If EMD amount works out to be higher than the security deposit at the quoted price, then no further deposit is required to be made by the tenderer and the EMD amount in totality should get converted to security deposit. If the Security Deposit amount falls short of EMD deposited, the balance amount has to be submitted within 10 days from the date of LOI by Pay Order/Demand Draft drawn in favour of THE INDIAN IRON & STEEL CO. LTD. On a scheduled bank and payable at Burnpur. No interest shall accrue on the Security Deposit or the EMD submitted and the deposit shall be retained by IISCO till completion of the order without any interest and the amount of Security Deposit shall be refunded on satisfactory completion of the contract.

61. Clause 5 is to be read with Clause 10 and 11 of the Letter of Intent.

Clause 10 and 11 reads as follows:

“10. TERMINATION CLAUSE: A) *If the M/S BIPL fails to arrange payment as per terms of the tender, IISCO will have exclusive right to terminate the contract without giving any notice to M/S BIPL in this regard alongwith forfeiture of security deposit and provision of clause 11 of special terms and conditions will prevail.*

B) *If M/S BIPL fails to lift the total allocated quantity within the contract period and if the reasons for non-lifting can be attributed to the M/S BIPL it will be considered as non-performance and IISCO will have exclusive right to forfeit security deposit, and provisions of clause 11 of special terms and conditions i.e. abandoned goods clause will prevail.*

11. ABANDONED GOODS: *BIPL must take delivery of the materials from the located site within the date specified in the delivery order and also covered under the provision of clause no.10. In case the material is not removed in full within the specified date, delivery order for the leftover*

quantity will be treated as cancelled. The materials so leftover will be treated as “abandoned goods”, at the risk and cost of the BIPL, IISCO Management will have full right on such abandoned goods and will be entitled to resell or dispose of the same in any manner it deems fit without any reference to the BIPL. BIPL will have no claim on materials declared as abandoned goods. In addition, IISCO would recover any loss suffered for reselling/disposing off the abandoned goods from the money deposited by BIPL. After such adjustment balance money may be refunded to BIPL.”

62. In Clause 10, two reasons have been assigned for forfeiture of security deposit ie. i). fails to arrange payment and ii). fails to lift allocated quantity of materials. The Arbitrator has categorically held that the respondent is no way responsible to take delivery of the materials in time and none payment of the amount with respect of the second lot and the Arbitrator has held that for both the counts the petitioner failed to deliver the total quantity of materials of first lot and had not informed or assured that the second lot is ready for delivery. The petitioner has challenged the part of the award on the ground that the arbitrator has not assigned any reason for awarding the said amount in favour of the respondent. In the application under Section 34 of the Act, the respondent has not taken any ground that the award passed by the Arbitrator is without any reasons.

63. In the case of ***Dyna Technologies Private Ltd. (Supra)***, the Hon’ble Supreme Court held that :

“26. Having established the basic jurisprudence behind Section 34 of the Arbitration Act, we must focus on the analysis of the case.

The primary contention of the learned counsel appearing on behalf of the appellant is that the award by the learned Tribunal was perverse for want of reasons. The necessity of providing reasons has been provided under Section 31 of the Arbitration Act, which reads as under:

“31. Form and contents of arbitral award.—(1)-(2) * * *

(3) The arbitral award shall state the reasons upon which it is based, unless—

- (a) the parties have agreed that no reasons are to be given, or
- (b) the award is an arbitral award on agreed terms under Section 30.”

27. Under the UNCITRAL Model Law the aforesaid provision is provided as under:

“31. (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.”

34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of

providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”

64. In the case of **Som Datt Builders Limited (Supra)**, the Hon’ble Supreme Court held that :

“25. *The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.”*

- 65.** This Court finds that the Learned Arbitrator after considering the total materials on record, evidences and various clauses has passed the award for refund of security deposit and thus the award does not required any interference.
- 66.** As regard the payment of excess amount, the respondent had adduced evidences and also produced documents to establish that the respondent has purchased the remaining materials from market as the petitioner failed to get the materials ready to be delivered to the respondent. The respondent had also adduced documentary evidence i.e. ledger accounts maintained with the parties against the purchase of the balance materials. The documents which were produced by the respondent at the time of evidence through the witness of the respondent and the same was duly accepted by the petitioner and the petitioner has not denied the genuineness of the said documents during the cross examination of the witness of the respondent.
- 67.** Clause 11 of the Letter of Intent speaks about Abandoned Goods which reads as follows :

“11. ABANDONED GOODS: BIPL must take delivery of the materials from the located site within the date specified in the delivery order and also covered under the provision of clause no.10. In case the material is not removed in full within the specified date, delivery order for the leftover quantity will be treated as cancelled. The materials so leftover will be treated as “abandoned goods”, at the risk and cost of the BIPL, IISCO Management will have full right on such abandoned goods and will be entitled to resell or dispose of the same in any manner it deems fit without any reference to the BIPL. BIPL

will have no claim on materials declared as abandoned goods. In addition, IISCO would recover any loss suffered for reselling/disposing off the abandoned goods from the money deposited by BIPL. After such adjustment balance money may be refunded to BIPL.”

- 68.** In question No. 101 of the cross examination of the petitioner’s witness no.1, he has admitted that “As per the provision of abandoned goods clause after it being declared as abandoned goods the claimant loses control on the said abandoned goods. The respondents can re-sell and if there is any dues from the claimant that can be adjusted from it. After that the rest of the amount can be returned back to the claimant.”
- 69.** In question No. 102, the witness has further stated that “In my earlier deposition I had already explained why abandoned goods of 1576 MT could not be sold within 4 months time before this was transferred to the raw material department. I do not want to add anything more.”
- 70.** In the case of **A.G.E. Carapiet (Supra)**, the Hon’ble Division Bench of this Court held that:

“10. On this point the most important and decisive authority is Browne v. Dunn, reported in (1893) 6 R 67. It is a decision of the House of Lords where Lord Herschell, L.C., Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report observed:

“Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some

questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.”

11. Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said:

“My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

12. In fact Lord Halsbury described the situation as a “perfect outrage” at page 77 of the said report. After quoting the evidence the learned Lord said:

“My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.”

13. *The same view is expressed in the 13th Edition of Odger on Pleading and Practice at page 261 and the 9th Edition of Phipson. On Evidence at page 497-98.*

14. *Secondly, the infirmities in the testimony of witness Venkata Ramiah are far too great and serious to justify any reliance on his testimony.*

(After discussing evidence in this respect his Lordship proceeds). ”

71. In the case of **Kalipada Saha (Supra)**, the Hon'ble Division Bench of this Court have relied upon the judgment of **AGE Carapiet** and held that:

“43. *In the case of A.E.G. Carapiet v. A.Y. Derberian, reported in AIR 1961 Cal 359, this Court has clearly held that if a party to a lis in cross-examination failed to question about the material piece of evidence, placed on record by the witness, in his/her examination-in-chief, the same should be accepted as correct.”*

72. In view of the above, this Court finds that the award passed by the Arbitrator does not require any interference.

73. The judgments relied by the petitioner are in connection with patent illegality, non consideration of terms of contracts, non application of mind by the arbitrator, the award passed by the learned Arbitrator is without any reason and the award is perverse. After considering the judgements relied by the petitioner, this Court finds that the judgments are distinguishable from the facts and circumstances of the present case.

74. In view of the discussion made herein above, this Court finds that the award passed by the Learned Arbitrator required no interference.

75. Accordingly, **AP No. 1097 of 2013** is thus **dismissed**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)