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

Pronounced on: 3rd July 2023

+ O.M.P. (COMM) 59/2020

METRO MACHINERY TRADERS & ANR Petitioners
Through: Mr. Saurabh Kirpal, Mr. Abhijat,
Mr. Pratyush Sharma, Mr. Shaashwat Jindal
and Mr. Arpit Kumar Singh, Advs.

versus

STATE TRADING CORPORATION OF INDIA LTD

... Respondent

Through: Mr. K.M. Nataraj, ASG and Mr.
Dinesh Agnani, Sr. Adv. with Ms. Leena
Tuteja and Mr. Ishaan Chawla, Advs.for R-1
Mr. Kuljeet Rawal and Mr. Vikram Alung,
Advs. for objector

+ O.M.P. (COMM) 60/2020

METRO MACHINERY TRADERS AND ORS Petitioners
Through: Mr. Saurabh Kirpal, Mr. Abhijat,
Mr. Pratyush Sharma, Mr. Shaashwat Jindal
and Mr. Arpit Kumar Singh, Advs.
Mr.Manish Makhija. Adv. for Sh. Aqeel
Baksh. Appellant no.3

versus

STATE TRADING CORPORATION OF INDIA... Respondent

Through: Mr. K.M. Nataraj, ASG and
Mr. Dinesh Agnani, Sr. Adv. with Ms.
Leena Tuteja and Mr. Ishaan Chawla,
Advs.for R-1
Mr. Kuljeet Rawal and Mr. Vikram Alung,
Advs. for objector

M/S MAHESH AGRO PVT Ltd. Petitioner
Through: Mr. Kuljeet Rawal, Adv.

versus

THE STC OF INDIA LTD & ORS Respondents
Through: Mr. K.M. Nataraj, ASG and
Mr. Dinesh Agnani, Sr. Adv. with Ms.
Leena Tuteja and Mr. Ishaan Chawla,
Advs.for R-1
Mr.Sanjay Katyal, Adv. for R-3
Mr. Kuljeet Rawal and Mr. Vikram Alung,
Advs. for objector

+ O.M.P. (COMM) 71/2020

HARISH NAGPAL Petitioner
Through: Mr. Sanjay Katyal, Adv.

versus

THE STC OF INDIA LTD & OTHERS Respondents
Through: Mr. K.M. Nataraj, ASG and Mr.
Dinesh Agnani, Sr. Adv. with Ms. Leena
Tuteja and Mr. Ishaan Chawla, Advs.for R-1
Mr. Kuljeet Rawal and Mr. Vikram Alung,
Advs. for objector

+ O.M.P. (COMM) 75/2020

MAHESH KUMAR Petitioner
Through: Mr. Kuljeet Rawal, Adv.

versus

THE STC OF INDIA LTD & ORS Respondents
Through: Mr. K.M. Nataraj, ASG and Mr.
Dinesh Agnani, Sr. Adv. with Ms. Leena
Tuteja and Mr. Ishaan Chawla, Advs.for R-1
Mr. Sanjay Katyal, Adv. for R-3
Mr. Kuljeet Rawal and Mr. Vikram Alung,
Advs. for objector

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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Signed By: SUNIL

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Signing Date: 03.07.2023, O.M.P. (COMM) 59/2020 & connected matters

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J U D G M E N T

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1. These five petitions, under Section 34 of the Arbitration and Conciliation Act, 1996 (“the 1996 Act”) assail award dated 11 June 2010, passed by a learned Sole Arbitrator, arbitrating on the disputes between the STC of India Ltd (STC) on the one hand and the various petitioners in these petitions on the other. STC was the claimant before the learned Arbitrator, and the present petitioners were the respondents. The main respondent was Metro Machinery Traders (MMT), impleaded as Respondent 1 before the learned Arbitrator.

2. Before the learned Arbitrator, the petitioners jointly preferred counter-claims. The impugned Award rejects the counter-claims and awards, to STC, a sum of ₹ 109,74,06,709/–, jointly and severally against the petitioners with interest @ 12% per annum from the date of the award to recovery.

3. The respondents before the learned Arbitrator have challenged the impugned award under Section 34 of the 1996 Act. STC has, on the other hand, preferred OMP (ENF.) (Comm) 172/2018. Inasmuch as the outcome of OMP (ENF.) (Comm) 172/2018 is dependent on the result of the present petitions, which challenge the impugned Award, arguments were heard, and orders reserved, in the present petitions, and OMP (ENF.) (Comm) 172/2018 was adjourned.

4. The present petitions, mercifully, involve no disputed questions of fact. The issue before the learned Arbitrator, which is also the primary issue for consideration before this Court, is a pure question of

law, which has been neatly delineated by the learned Arbitrator in the impugned Award. Before, however, adverting to the question of law that arises for consideration, a brief recital of the factual matrix in which the question arose, is necessary.

Facts

5. *Vide* notice dated 27 January 2005, the Metal and Scrap Trading Corporation of India (MSTC) invited tenders from willing purchasers who desired to purchase, in auction, plant and machinery owned by Neyveli Lignite Corporation (NLC), to be sold on “as is where is” and “no complaint” basis, free from all encumbrances. MMT was the highest and successful bidder in the auction and, consequently, on 1 April 2005, MSTC issued a Letter of Acceptance (LOA) to MMT, confirming acceptance of MMT’s offer. The sale price, as offered by MMT and accepted in the LOA, was ₹ 132 crores, apart from Sales Tax and surcharge on Sales Tax. MMT was required to make an Earnest Money Deposit (EMD) of ₹ 13.2 crores, on or before 30 April 2005. MMT deposited the EMD of ₹ 13.2 crores on 3 April 2005 with MSTC. On 13 April 2005, the market value of the plant and machinery of NLC, forming subject matter of the aforesaid option, was assessed by Neeraj Kapoor, a Government approved valuer, as ₹ 352.25 crores.

6. On 14 April 2005, MMT wrote to STC, seeking to enter into an agreement with STC for disposal/marketing of the ferrous and non-ferrous scrap which would result from dismantling of the plant of NLC. It was stated, in the said letter, that the plant and machinery of NLC would, on dismantling, yield approximately 87000 MT ferrous and nonferrous scrap, worth ₹ 352 crores. Of this, it was further

stated that spares worth ₹ 35.6 crores were lying in sub-stores and loose material worth ₹ 21 crores were lying in different sheds. The total value of the plant and machinery, it was pointed out, ₹ was 149,41,10,270/–, of which MMT was required to pay 70,21,10,270/–, equal to 40% of the bid amount and 100% of taxes and duties on or before 30 April 2005 and the remaining 60% of ₹ 79.2 crores by way of Bank Guarantee (BG) in three equal monthly installments of 20% each. MMT expressed its desire to enter into an agreement with STC for disposal/marketing of the ferrous and nonferrous scrap resulting from dismantling of the plant and machinery of NLC. It was pointed out that MMT had already paid ₹ 13.2 crores as EMD to NLC and 50 lakhs as bid money. Additionally, MMT offered to invest, from its own resources, ₹ 10 crores towards dismantling of the plant and machinery, insurance and security. STC was requested to make payment directly to NLC in accordance with the terms of the auction of the plant and machinery. The letter also entitled STC to claim interest @ 8.5% per annum on the fund deployed by STC, apart from 1.5% service charge. MMT offered to dismantle the entire plant and machinery at its cost, and to insure the plant and machinery, again at MMT's cost for 110% of its value, with the policy endorsed in favour of STC. The terms and conditions further stated that the entire stock of goods would be transferred to Delhi and pledged with STC. STC was, however, permitted to effect sales only to parties selected by MMT, at the price approved by MMT, and was proscribed from selling goods without MMT's consent. Clause 9 went on to state how accounts would be settled. Clauses 8 to 10 of the terms and conditions set out in the letter read thus:

“8. SALES AND DISPOSAL: Since Tamil Nadu attacks Turn Over Tax, the entire stocks of goods will be transferred to Delhi and pledged with STC. The Sales will be effected by STC to parties selected by us and that the price approved by us. STC will not sell the goods

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without our consent. The sales will be effected against payment. No credit sales will be permitted. The entire sales proceeds will be collected by STC.

9. SETTLEMENT OF ACCOUNTS: STC will recover the entire money invested by them along with interest calculated @ 8.5% per annum on the money invested by them, all bank charges towards D/D making and BG and service charges at the rate of 1.5% on the total finances deployed by STC and return the balance amount to us immediately after they have recovered the total dues.

10. SECURITY TO STC: The entire stocks will be pledged to STC. In addition to this, we will provide corporate Guarantee along with a post dated Cheque to cover the entire risks of STC and also personal guarantee of all the partners in accordance with the text enclosed with this application.”

7. Close on the heels of the aforesaid communication dated 14 April 2005, and consequent to discussions which took place thereafter, MMT addressed a second communication dated 18 April 2005, increasing the margin money that it offered to deposit, from ₹ 10 crores to ₹ 15 crores. Additionally, paras 5, 6 and 9 of the said letter read thus:

“5. We agree that, in order to cover the risks of STC, we will initially sell the entire stocks of the plant and machinery to STC, Chennai, as tax-free goods at a price of ₹ 155 crores to enable STC to become the owners of goods and sell the same under their invoice. However, it is clearly understood and agreed that STC will sell the goods to only those parties which are recommended by us. STC will issue Delivery Order and effect transfer of goods from Chennai only against full payment.

6. It is agreed that STC will adjust from the Sales Proceeds of the Scraps from the Plant, the amount of funds paid by them to NLC on our behalf, along with bank charges, interests and other taxes, if any and their Service Charge at the rate of 1.5% on the total fund deployed by them and return the balance amount to us immediately after the total dues of STC is recovered.

9. The Neyveli Lignite Corporation have given us 370 days time to dismantle and left the entire stocks without paying any rent, we expect to dispose of the stocks within 9 months.”

8. *Vide* the following Pledge Deed dated 20 April 2005, the petitioner pledged the plant and machinery of NLC in favour of STC:

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“Pledge Deed

This Pledge Deed is executed on this 29th day of April, 2005 by Mr. Ram Kishan, Managing Partner of Metro Machinery Traders, having its office at 42 2nd floor, Nishant Kunj, Pitampura, Delhi-110088.

I, as a Managing Partner of Metro Machinery Traders, do hereby evenly to complete and unconditionally Pledge the entire Fertiliser Plant and Machinery below my to NLC which has been sold to us by MSTC Ltd Bangalore vide their sale order dated 01/04/2005.

I unconditionally undertake that any materials from the aforesaid Plant will not be removed without making 100% payment and obtaining a delivery order from STC.

Place:- New Delhi

For Metro Machinery Traders

Date:-20/04/05

Ram Kishan
Managing Partner
Executant”

9. On 29 April 2005, an MOU came to be executed between STC and MMT. This MOU forms the fulcrum of controversy in the present case and, to an extent, constitutes the justification for the impugned Award and it is, therefore, necessary to reproduce its relevant terms, *in extenso*, thus:

M.O.U.

This MOU is signed on this 29th day of April 2005

BETWEEN

The State Trading Corporation of India Ltd, a Company Incorporated under the Companies Act, 1956 and having its Registered office/Corporate Office at Jawahar Vyapar Bhawan 1, Tolstoy Marg, New Delhi-110001 and Branch Office at Chennai House (4th Floor), 7, Esplanade, Chennai 600108 (herein after referred to as STC, which expression shall, unless repugnant to the context, include its successors and assigns), of the ONE PART,

AND

M/s. Metro Machinery Traders, a Partnership Firm, constituted under Indian Partnership Act 1932 as amended up-to-date, having its office at 2nd Floor, Nishant Kunj, Pitam Pura, Delhi 110088 (hereinafter referred to as MMT, which expression shall include, unless repugnant to the context, it is administrator, successors and assigns) of the OTHER PART.

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AND WHEREAS, the entire Fertilizer Plant and Machinery was e-auctioned on 25.02.2005 through MSTC Ltd, Bangalore in which MMT participated by depositing an amount of ₹ 50,00,000.00 as Caution Money and the BID of ₹ 132.00 crores offered by MMT was accepted by MSTC Ltd, Bangalore and communicated to MMT vide their letter dated 25/02/2005. In accordance with the terms of E-auction, MMT deposited a sum of ₹ 13.20 crores as EMD equal to 10% value of Bid Amount of Rs.132.00 Cr on March 2, 2005 and MMT received the FINAL sale order no. MSTC-B/NLC/EA-14/2005-06-01/008 dated 01/04/2005 from MSTC Ltd, Bangalore, and as per this Sale Order MMT has to pay to NLC the following amount by 30.04.2005.

Bid Amount : Rs. 132,00,00,000/00

Add:

S.T. @ 12% on Bid Amount: Rs. 158,400,000

S.C. @ 5% on S.T. :Rs 7,920,000

₹ 166,320,000.00 Rs. 16,63,20,000/00

TOTAL Rs.1,48,63,20,000.00

Add:

I.T. @ 1.1% Rs. 1,63,49,520.00

Education Cess @ 2% on IT Rs. 326,990.40 Rs. 1,66,76,510.40

GRAND TOTAL Rs. 1,502,996,510.40

ROUNDED TO Rs. 1,502,996,511/-

LESS: Caution Money Deposited : Rs.50,00,000.00

NET AMOUNT TO BE PAID TO NLC : Rs. 149,79,96,511.00

AND WHEREAS, the entire Fertilizer Plant and Machinery belonging to Neyveli Lignite Corporation limited, Neyveli, Tamil Nadu, hereinafter referred to as NLC (a Government of India Undertaking), which went dismantle, will yield, according to a detailed valuation report prepared by our Government Approved Value of, approximately 87,000 MTS of various types of Ferrous and Non-ferrous Metal Scraps of an estimated value of ₹ 352.00 crores. Out of these stocks, goods worth ₹ 35.0 crores are lying in Sub-Stores as spares for pumps, compressors, blowers, valves, instruments and electrical items and goods worth ₹ 21.00 crores are loose materials consisting of Mild Steels, Stainless Steel, Copper and Brass Mixed lying in different sheds.

AND WHEREAS, MMT Offered STC to enter into a collaboration for executing the Sale order awarded by MSTC Ltd, Bangalore, to MMT for dismantle and disposal of entire Fertilizer Plant belonging to NLC.

NOW, THEREFORE, IT IS HEREBY AGREED BETWEEN THE PARTIES AND DECLARED AS FOLLOWS:

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Clause 1: STC will make payment of the total sum of Rs. 149, 79,96,511 (Rs One hundred Forty nine crores, Seventy Nine Lakhs, Six Thousand, Five hundred and eleven only) by way of Demand Draft drawn in favour of Neyveli Lignite Corporation limited, payable at Neyveli. The above payment will be made by two separate Bank Drafts, one for ₹ 138,71,16,511/- and the other Rs 11,08,80,000/-.

Clause 2: Margin Money: MMT will deposit sum of ₹ 2 5.0 Cr with STC towards the Margin Money by D/D or High Value Cheques before STC makes onward remittance to NLC. This is in addition to the deposit of ₹ 13.20 crores paid by MMT to NLC as Security deposit. The said amount shall be adjusted at the time of settlement of accounts after the successful completion of sale of the entire stock of NLC plant by STC with the assistance of MMT.

Clause 3: Sureties to STC: The 2 firms, M/s Bishan Swarup Ram Kishan Agro Pvt Ltd and M/s. Mahesh Agro Pvt Ltd owned and managed by two major partners, Mr. Ram Kishan and Mr. Mahesh Kumar respectively with each Chairman-come-Managing Directors, duly authorised by Resolutions passed by their Boards of Directors along with a post dated Cheques of ₹ 75.0 Cr each. In addition to this, each Partner of MMT will give a personal Guarantee Bond by way of Affidavit. The aforesaid Guarantees shall be duly executed to ensure the sale of the entire stock of NLC Plant by STC with the assistance of MMT.

Clause 4: Pledge to STC: The MMT undertakes to pledge the entire materials of the Fertilizer Plant and Machinery by a Pledge Deed. Each Partner will sign a Pledge Deed pledging the entire materials of NLC Fertiliser Plant and Machinery to STC with a clear understanding that nothing will move out of the plant without a Delivery Order issued by STC. THE DELIVERY ORDER WILL BE ISSUED BY STC FOR A PARTICULAR LOT ONLY ON RECEIPT OF FULL PAYMENT FOR THAT LOT.

Clause 5: Agreement to Sell: MMT will enter into an Agreement to Sell with STC the entire materials of NLC plant at a total price of not less than ₹ 150 Cr inclusive of all taxes.

Clause 8. Dismantling of Plant: After obtaining the Factory License, MMT will start dismantling the Plant at their own cost. All costs and risks of workers will be the responsibility of MMT.

Clause 11. Mode of Sales and Disposal of Goods: MMT shall be responsible for the successful sale of the entire stock of NLC Plant on behalf of STC. The entire stocks of NLC Plant will be sold and disposed of by STC to the parties selected by MMT against the price approved by MMT. However, STC will issue Delivery Orders to the Parties nominated by MMT only against the receipt of full sale value of the materials in advance.

Clause 12. Settlement of Account: STC will recover its entire investment including Out of Pocket expenses D/D charges, B G charges,

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interest, taxes if any demurrage is, penalties, VAT if the applicable, or further sales by STC, along with their Trading Margins calculated at the rate as stated above all the total funding arranged by date out of the Sales Proceeds of the Scraps obtained from the Fertilizer Plant and Machinery and release the Balance Payment/stocks to MMT as soon as its investments stand recovered within the periods specified in clause 10.

Clause 13. Completion of Project: Neyveli Lignite Corporation Ltd has given 370 days to complete the entire job of dismantle and disposal without charging any extra ground rent. However, MMT will try to complete the work within 270 days. In case MMT fails to complete the work within the prescribed period of 370 days all consequential penalties and expenses will be exclusively to the account of MMT. Notwithstanding what is stated in clause 10 onwards, STC reserves the right to directly dispose of materials at the end of 9th month, to recover its outstanding dues. This is expressly understood by MMT.”

10. On 29 April 2005, a Sale Agreement was executed between STC and MMT. The relevant paragraphs, from the said Sale Agreement, may be reproduced thus:

“Sale Agreement

This Sale Agreement is signed on this 29th day of April 2005

BETWEEN

The State Trading Corporation of India Ltd, a Company incorporated under Companies Act, 1956 and having its Registered office / Corporate Office at Jawahar Vyapar Bhawan, 1, Tolstoy Marg, New Delhi-110001 and Branch Office at Chennai House (4th Floor), 6, Esplanade, Chennai 600108 (herein after referred to as STC, which expression shall, unless repugnant to the context, include its successors and assigns), of the ONE PART,

AND

M/S Metro Machinery Traders, a Partnership Firm, constituted under Indian Partnership Act 1932 as amended up to date, having its office at 2nd Floor, Nishant Kunj, Pitam Pura, Delhi 110088, (hereinafter referred to as MMT, which expression shall include, unless repugnant to the context, its administrators, successors, and assigns) of the OTHER PART

AND WHEREAS. The entire Fertilizer Plant and Machinery was E-auctioned on 25.02.2005 through MSTC LTD.. Bangalore in which MMT participated by depositing an amount of Rs.50,00,000.00 as Caution Money and the BID of Rs.132.00 Cr offered by MMT was accepted by MSTC LTD., Bangalore and communicated to MMT vide their letter dated 25/02/2005. In accordance with the terms of E-auction, MMT deposited a sum of Rs. 13.20 Cr. as EMD equal to 10% value of Bid Amount of Rs. 132.00 Cr. on March 2, 2005 and MMT received the FINAL sale order

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No. MSTC-B/NLC/EA-14/2005-06-01/008 dated 01/04/2005 from MSTC LTD, Bangalore, and as per this Sale Order, MMT has to pay to NLC the following amount by 30.04.2005:

Bid Amount Rs.132,00,00,000/00

Add:

S.T.@12% on Bid

Amount : Rs. 15,84,00,000

S.C.@5% on S.T. : Rs. 79,20,000

Rs. 16,63,20,000.00

Rs.16, 63, 20, 000/00

TOTAL

Rs. 148,63,20,000/00

ADD:

I.T @1.1%

Rs. 1,63,49,520/00

Education Cess @ 2.%

on IT

Rs. 3,26,990.40

Rs. 1,66,76,510.40

GRAND TOTAL

Rs. 150,29,96,510.40

ROUNDED TO

Rs. 150,29,96,511/-

LESS: Caution Money Deposited

:Rs. 50,00,000.00

NET AMOUNT TO BE PAID TO NLC:

Rs. 149,79,96,511.00

(Rs. ONE HUNDRED FORTYNINE CRORE SEVENTY-NINE LACS NINETY SIX THOUSAND FIVE HUNDRED AND ELEVEN ONLY).

Whereas STC and MMT have entered into an MOU dated 29/04/05 to jointly execute a sale awarded in favour of MMT by MSTC vide Sale Order dated 1/04/05 and STC has agreed to provide finance for payment to NLC against Sale Order dated 1/04/05.

In consideration of STC releasing Demand Draft in favour of NLC against their sale order, MMT hereby sells its entire rights in the NLC plant as conferred, on it vide MSTC Sale Order dated 1/04/05 at an amount of Rs. _____ Crores. In pursuance thereof, the entire Fertilizer Plant and Machinery and materials as detailed in Annexure 1, are hereby sold to STC by MMT in terms of detailed terms and conditions given in MOU signed between the parties on 29/04/05, which shall form an integral part of the present Agreement to which the parties are bound.”

11. Though the Sale Agreement was dated 29 April 2005, it was executed on a stamp paper which was purchased on 17 May 2005. This aspect does not, however, seriously impact the outcome of the present proceedings.

12. It may be noted that both the MOU and the Sale Agreement provided for resolution of disputes between the parties by arbitration, through a sole arbitrator to be appointed by the Indian Council of Arbitration (ICA).

13. On 17 May 2005, i.e. on the date when the stamp paper, on which the Sale Agreement was executed, was purchased, MMT issued an invoice to STC, whereunder the plant and machinery of NLC was sold to STC for ₹ 151.29 crores.

14. Dismantling of the plant and machinery of NLC commenced on 18 August 2005.

15. On 19 April 2006, STC wrote to Mr. Ram Kishan of Bishan Swaroop Ram Kishan Agro Pvt. Ltd., requesting Ram Kishan to arrange for issuance of invoices for all individual delivery orders (DOs) issued in favour of STC's customers by MMT, so that STC could issue onward invoices to the said customers. Mr. Kirpal, learned Senior Counsel for STC laid stress on the following passages from the said communication:

“As you are aware, in the case of fertilizer plant, the first sale is between NLC and MMT, second being between MMT and STC and the third sale by STC to customers in whose favour DO's have been issued by MMT.

We did not deposit the sales tax as becoming payable by STC on the basis of your advice that the same be withheld. Keeping in view the same, the filing of returns by STC from June 2005 had been pending.

However, it is not advise-able to keep the returns pending for a long time particularly, when the assessment year 2005-06 has closed on 31st March, 2006. Under the circumstances, in case Sales Tax Authorities issue a notice, there is likelihood of penalty of 150% alongwith liability of interest @ 2% per month. On the advise of our sales tax consultant, we have since deposited the sales tax collected up to 31st March, 2006, on 17th April, 2006. The delayed filing of return alongwith payment of applicable tax on due date entails interest liability which will be to your account, which please note.

You are, however, once again requested to arrange issuance of invoice for all the individual DO's to STC to enable us to issue onward invoices to the customers who are pressing hard for the same."

16. According to Mr. Kirpal, the first of the two passages from the letter dated 19 April 2006, extracted *supra*, amounts to an acknowledgement by STC that there had been an outright sale of the plant and machinery of NLC by MMT to STC.

17. On 25 April 2006, MMT responded, through Counsel, to the above communication dated 19 April 2006 from STC. In the said letter, MMT categorically asserted that, as the plant and machinery of NLC had been sold by MMT to STC for ₹ 150 crores, under a duly executed sale agreement, there was no question of any further advice being sought from MMT for deposit of sales tax. It was further asserted that STC, as the owner of the plant and machinery had been selling the plant and machinery on its own account. Tax and other liabilities were required to be borne by STC without any reference to MMT. Reliance was also placed, in this context, on the MOU dated 29 April 2005 which preceded the execution of the Sale Agreement. It was alleged that the letter dated 19 April 2006, was a *malafide* attempt at seeking to undermine the effect of the Sale Agreement dated 29 April/17 May 2005.

18. STC, thereafter, addressed a notice under Section 21 of the 1996 Act, invoking arbitration to resolve the disputes between MMT and itself, and calling for reference of the disputes to arbitration.

19. As it was not possible to institute arbitral proceedings following on the said notice, STC approached the ICA, in terms of the arbitration agreement with MMT, seeking reference of the disputes to arbitration. The ICA wrote, on 16 May 2007, to MMT, informing

MMT that the disputes had been referred to arbitration by Hon'ble Mr. Justice Y.K. Sabharwal, an eminent former Chief Justice of India.

20. Statement of Claim (SOC) was filed by STC, before the learned Arbitrator on or around 19 July 2006. It was alleged, in the said SOC, that the Sale Agreement dated 29 April 2005 was a mere paper communication, which was never intended to be implemented by the parties. The material resulting from dismantling of the plant and machinery of NLC, it was contended, had never been handed over by MMT to STC as required by the Sale Agreement. Rather, the Sale Agreement incorporated, as an integral part thereof, the terms and conditions of the MOU dated 29 April 2005, which clearly envisaged the sale of the plant and machinery of NLC, by MMT to STC as merely intended to secure the financial assistance provided by STC by liquidating the amounts payable by MMT to NLC against the sale order dated 1 April 2005.

21. The following facts, it was asserted, indicated that the Sale Agreement was merely in the nature of a security against the financial assistance provided by STC:

(i) MMT was not authorized, as per the terms of the tender following which it had purchased the plant and machinery from NLC, to sell the plant and machinery in its existing form. Its authority was limited to obtaining a factory license, dismantling the material and removing the material from the NLC site.

(ii) The Sale Agreement incorporated, expressly, the terms and conditions set out in the MOU dated 29 April 2005, and bound the parties thereby.

(iii) The MOU dated 29 April 2005, in turn, provided for recovery, by STC, of the entire financial assistance provided by it, from the sale proceeds of the material resulting from dismantling of NLC's plant and machinery and for return of the balance material to MMT after the dues were recovered. This provision was incompatible with the stand of STC that the plant and machinery of NLC had been sold, outright, to STC.

(iv) Prior to the letter dated 25 April 2006, MMT had not referred, in any communication, to any Sale Agreement with STC.

(v) Under the Tamil Nadu GST Act, any sale by MMT in the state of Tamil Nadu was required to be reported to the assessing authority in Tamil Nadu where MMT was registered for sales tax purposes. No such sale had been declared by MMT to the assessing authority; rather, MMT had been filing nil assessments. For this purpose, reliance was placed on notice dated 10 February 2006 from the assessing authority to MMT. This position also stood supported by the earlier communication from MMT to STC on 14 April 2005 and 18 April 2005.

(vi) Even after execution of the Sale Agreement dated 29 April/17 May 2005, MMT had advertised, in the press, for sale of the scrap resulting from dismantling of the plant.

(vii) MMT accepted payments for dismantled materials sold directly, from the buyers to whom the material had been sold

and deposited the sale proceeds with STC *vide* their own cheques.

These factors, according to STC, indicated that the Sale Agreement dated 29 April 2005/17 May 2005 was a mere paper transaction, intended to secure the financial assistance provided by STC to MMT by liquidating MMT's outstanding to NLC.

22. The claim in the SOC, for which STC had resorted to arbitration, was based on the valuation report of Neeraj Kapoor, Government approved Valuer, which was made part of the sale invoice dated 17 May 2005, whereunder MMT had sold the plant and machinery of NLC to STC for ₹ 150 crores. The valuation report assessed that, consequent on dismantling, 87000 metric tonnes of material, valued at ₹ 352 to 365 crores would result. As such, asserted STC, MMT was contractually bound to ensure that 87000 metric tonnes of scrap, approximately valued at ₹ 352 to 365 crores was made available to STC. However, consequent on its dismantling, it was found that only 20000 metric tonnes scrap resulted, valued at ₹ 37.74 crores. MMT was, therefore, liable to make available, to STC, the balance quantity of scrap of 68654 metric tonnes worth ₹ 314.26 crores. It was alleged, therefore, that MMT had breached the contract with STC and had become liable to return, to STC, the entire amount of ₹ 149,79,96,511/- paid by STC, less the amounts paid by MMT to STC and amounts recovered by sale of the scrap which had resulted from dismantling of the plant and machinery. The total claim of STC against MMT, in the SOC, was ₹ 109,63,48,073/ -. The claim was made jointly and severally against all the petitioners in the present petitions.

23. Alongwith their written statement, the petitioners filed joint counter claims before the learned Arbitrator. It was alleged that 26,49,79,965/- remained to be paid by STC to MMT against sale of the plant and machinery of NLC. The counter claim, therefore, claimed the said amount alongwith interests, working out to a total of ₹ 33,58,75,307/-, apart from damages and costs.

The impugned Arbitral Award

24. Based on the rival stands adopted by the parties before him, the learned Arbitrator framed the following points as arising for determination:

- “1. Whether the claimant, STC is entitled to realize any amount as claimed in the Statement of Claim from the respondents? If so, on what amount, to what extent and from which of the respondents?
2. Whether the claimant, STC is entitled to realize any interest from the respondents? If so, at what rate, on what amount and from which of the respondents?
3. Whether the sale agreement in respect of sale of fertilizers plant lying at Naiveli site is null and void?
4. Whether the respondents are guilty of misrepresentation of material facts so as to induce the claimant to part with the amount in question and if so to what effect?
5. Whether the respondents are entitled as claimed in the counter claim to realize from the STC any amount towards its counter claim?
6. Whether the respondents are entitled to recover from STC any interest? If so, at what rate and on what amount?
7. Whether the documents were got signed from the respondents by misrepresentation and undue influence etc. as pleaded in the written statement?
8. Whether any of the party is entitled to costs of proceedings.”

25. Thereafter, the learned Arbitrator proceeded to record evidence *in extenso*. The impugned Award proceeds, thereafter, to delineate the principal issue arising for consideration in the arbitral proceedings thus:

“Despite voluminous evidence, both documentary and oral, the real point crucial to decide the controversy between the parties is very short. The said point is whether the transaction in question was only in the nature of funding of the amounts by STC repayable to it by Respondents on terms and conditions stipulated in MOU or it was only initially funding transaction but later STC purchased the plant and machinery and became owner thereof and the MOU stood superseded. The former is contention of STC, later that of Respondents.”

26. The learned Arbitrator has not accepted the submission of MMT that the Sale Agreement dated 29 April 2005/17 May 2005 resulted in outright sale, by MMT to STC, of the plant and machinery of NLC. Rather, the learned Arbitrator has endorsed the submission of STC that the sale was only by way of security for the financial assistance being extended by STC to MMT by way of liquidation of the dues payable to NLC. For this purpose, the learned Arbitrator has proceeded on the following reasoning:

(i) The letter dated 18 April 2005 *supra*, from MMT to STC, clearly stated, even while referring to initial sale of the stocks of the plant and machinery of NLC, held by MMT, to STC, that the said sale was only to enable STC to further sell the dismantled goods under their invoices and, thereafter, to adjust, from the sale proceeds, the amount paid by STC to NLC and return the balance to MMT. This indicated that the proposal of MMT was only for STC making payment of the balance amount to NLC with MMT being agreeable to cover the risk of STC for the amount which it was financing.

(ii) The MOU dated 28/29 April 2005 was also not in dispute. Clause 5 of the MOU envisaged MMT entering into an agreement to sell, with STC, for the entire materials of the NLC plant for a price not less than ₹ 150 crores. Clause 12 of the MOU, which dealt with settlement of accounts, allowed STC to recover, from the sale proceeds of the dismantled plant and machinery, its entire investment and to release the balance payment/stocks to MMT within a stipulated period.

(iii) Apropos the Sale Agreement dated 29 April 2005/17 May 2005, it could not be disputed that MMT had agreed to execute the sale agreement in favour of STC so as to cover the risk of STC, as was manifest from the recitals contained in the proposal dated 18 April 2005 from MMT to STC. The Sale Agreement dated 29 April 2005/17 May 2005 contained nearly identical clauses.

(iv) The Sale Agreement stipulated sale by MMT to STC on the terms and conditions contained in the MOU. This itself negated any possibility of a contention that the Sale Agreement resulted in outright sale of the dismantled plant and machinery by MMT to STC, independent of the MOU. It also discountenanced any submission that the sale agreement superseded the MOU. There was, in fact, no evidence whatsoever to indicate that the sale agreement superseded the MOU.

(v) It was, thus, evident that the Sale Agreement was executed by way of security to cover the risk of STC, and not for sale of the plant and machinery of NLC by MMT to STC.

(vi) Even after the execution of the sale agreement, MMT was dismantling the plant and machinery and selling the scrap, albeit at the price approved by STC. The sale proceeds were deposited with STC. Though it was contended that dismantling was done on behalf of STC, there was no material to support the contention.

(vii) It was inconceivable that MMT, which was contending that the value of the plant and machinery was over ₹ 350 crores, would sell the plant and machinery to STC for ₹ 151 crores, which would not even cover the cost incurred by it.

(viii) Had the plant and machinery been actually sold by MMT to STC, MMT ought, immediately thereafter, to have asked for cancellation of the pledge deed and other documents and return of the two cheques of ₹ 75 crores each tendered by MMT to STC. This was never done.

(ix) It did not lie in the mouth of MMT to contend that the law did not recognize security by way of sale of immoveable property, and that security could only be provided by way of bank guarantee, mortgage deed, pledge deed, etc. as MMT had voluntarily agreed to execute the sale agreement to cover the risk of STC as stated in the letter dated 18 April 2005. The invoice dated 18 May 2005, on which MMT placed reliance, too, did not indicate that the sale of the plant and machinery of NLC, by MMT to STC, was by way of outright sale and not by way of security.

27. In view of the aforesaid, the learned Arbitrator held that the Sale Agreement dated 29 April 2017/17 May 2005 did not result in

outright sale, by MMT to STC, of the dismantled plant and machinery of NLC, but was merely by way of a security against the financial assistance extended by STC.

28. Adverting to the individual claims of STC, the learned Arbitrator proceeded to deal with the individual claims of STC thus:

(i) Claim 1, for ₹ 109,63,48,073/- was allowed by the learned Arbitrator. On quantification, the only contention advanced by the petitioners, in response to the said claim, was that, even assuming the claim was payable, the margin money of ₹ 25 crores and the amount of ₹ 37.71 crores received from sale of scrap ought to have been deducted from the claim. The learned Arbitrator rejected the submission, holding that the inability to settle accounts was owing to the breach committed by MMT and that, without settlement of accounts, MMT could not be permitted to contend that, in the first instance, the figures of ₹ 25 crores and ₹ 37.71 crores ought to have been deducted from ₹ 149.79 crores.

(ii) Claim 3 of STC, ₹ 10,58,636/-, representing advertising costs, bank charges, DD charges, taxes, surveyor's fee, etc was allowed.

(iii) Claim 4 of STC was rejected. There is no challenge to the rejection.

(iv) Apropos Claims 5, 6, 7, 9 and 11, the learned Arbitrator awarded interest, under Claims 9 and 11, @ 12% per annum with effect from 1st May 2006. As a result, he disallowed Claims 5, 6 and 7.

(v) Claims 8 and 10 of STC were rejected.

(vi) Claim 12, for costs of the arbitral proceedings was allowed, quantifying the costs at ₹ 30 lakhs.

(vii) Claim 13 was allowed by granting interests @ 12% per annum from the date of award till realization.

29. In view of the aforesaid, the learned Arbitrator answered the points for determination, as drawn up by him and enumerated in para 24 *supra* thus, in the concluding paragraph of the impugned Award:

“In view of the aforesaid, points for determination are answered as follows:

Points for determination No.1 and 2:

1. Whether the claimant, STC is entitled to realize any amount as claimed in the Statement of Claim from the respondents? If so, on what amount, to what extent and from which of the respondents?

2. Whether the claimant, STC is entitled to realize any interest from the respondents? If so, at what rate, on what amount and from which of the respondents?

The points are answered in favour of the Claimant. Claimant is entitled to recover from the Respondents the amounts as abovementioned. The Claimant is also entitled to realize interest from the Respondents at rate of interest and on amounts as mentioned above while dealing with different claims of the Claimant.

In short an award in sum of Rs.109,63,48,073/- plus Rs.10,58,636/- total Rs. 1,09,74,06,709/- is made in favour of Claimant and against Respondents. On this amount the Claimant is entitled to recover from Respondents interest at 12%: per annum from dates mentioned above while dealing with various claims. The liability of the Respondents would be joint and several. However, the liability of Respondents 7 and 8 would be limited to Rs. 75 crores each, being the guarantee amount.

Point of determination No. 3:

Signature Not Verified

Signed By: SUNIL
SINGH NEGI
Signing Date: 03.07.2023
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M.P. (COMM) 59/2020 & connected matters

Page 22 of 71

3. Whether the sale agreement in respect of sale of fertilizers plant lying at Naiveli site is null and void?

The sale agreement was only an additional security. As discussed hereinbefore, there was no sale by Respondents in favour of the Claimant. This point is answered accordingly.

Point of determination No.4:

4. Whether the respondents are guilty of misrepresentation of material facts so as to induce the claimant to part with the amount in question and if so to what effect?

It is evident from the aforesaid discussion that the Respondents were guilty of misrepresentation in respect of weight and value of the plant. The point is answered accordingly.

Points of determination No.5:

5. Whether the respondents are entitled as claimed in the counter claim to realize from the STC any amount towards its counter claim?

In view of the aforesaid discussions, the Respondents are not entitled to any amount as claimed by them in the counter claim.

Point of determination No.6.

6. Whether the respondents are entitled to recover from STC any interest? If so, at what rate and on what amount?

In view of above, this point is also answered against the Respondents.

Point of determination No.7.

7. Whether the documents were got signed from the respondents by misrepresentation and undue influence etc. as pleaded in the written statement?

There is no material to show that any document was got signed from the Respondents by misrepresentation and undue influence. The point is answered accordingly.

Point of determination No.8.

8. Whether any of the party is entitled to costs of proceedings.

The claimant is entitled to its cost as noted in Claim No.12 amounting to Rs. 30 lakhs only.”

30. The present petitions, under Section 34 of the 1996 Act, assailed the aforesaid Award.

Rival Contentions

31. I heard Mr. K.M. Natraj, learned Additional Solicitor General (ASG), Mr. Saurabh Kirpal, learned Senior Counsel for MMT, Mr. Kuljeet Rawal, learned Counsel for Mahesh Agro, Mr. Sanjay Katyal, learned Counsel for Harish Nagpal, and Mr. Dinesh Agnani, learned Senior Counsel for STC, in detail. Written submissions have also been filed by STC, Mahesh Kumar, MMT and Harish Nagpal.

Opening submissions of Mr. Saurabh Kirpal

32. Mr. Saurabh Kirpal submits that the only issue arising for consideration is the interpretation of the Sale Agreement dated 29 April/17 May 2005. He emphatically disputes the finding of the learned Arbitrator, naturally echoed by Mr. Agnani, that the Sale Agreement was merely executed by way of security for the financial assistance provided by STC. He submits that, in law, security can only be by way of a charge, or a pledge, or a mortgage. Sale of immovable property can never be by way of security, save and except in terms of Section 58¹ of the Transfer of Property Act, 1882

¹ 58. 'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed' defined. –

(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any), by which the transfer is effected is called a mortgage-deed.

(b) *Simple mortgage.* – Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) *Mortgage by conditional sale.* – Where the mortgagor ostensibly sells the mortgaged property –

(hereinafter “the TPA”), which envisaged sale by conditional mortgage, which requires the property to be reconveyed on the loan or financial assistance being liquidated. No such provision for reconveying NLC’s plant and machinery to MMT, at any point of time, existed; ergo, the sale of the plant and machinery was nothing but an outright sale. He submits that the Statement of Claim filed by STC did not allege the Sale Agreement to be a sham, and no such finding had, either, been returned by the learned Arbitrator. The learned Arbitrator cannot, he submits, grant relief in excess of that sought, for which purpose he relies on *Trojan & Co. v. Rm. N.N. Nagappa Chettiar*².

33. In this context, Mr. Kirpal relies on the cross-examination of Mr N.A.N. Jeyakumar, who deposed on behalf of STC as CW-1, to the effect that payment, against sale of dismantled material to the buyers, was made by the buyers directly by way of Demand Drafts (D/Ds) favouring STC.

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
on condition that on such payment being made the sale shall become void, or
on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) *Usufructuary mortgage.* – Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) *English mortgage.* – Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) *Mortgage by deposit of title-deeds.* – Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) *Anomalous mortgage.* – A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

34. Mr. Kirpal submits that a contract is to be interpreted on its terms, and not on the basis of subsequent conduct of parties, for which purpose he relies on Section 92³ of the Indian Evidence Act. Subsequent conduct, he submits, is relevant only where the terms of the contract are ambiguous, and cites, in this context, *Godhra Electricity Co. Ltd v. State of Gujarat*⁴. As no such ambiguity exists in the terms of the Sale Agreement in the present case, Mr Kirpal submits that the learned Arbitrator committed a patent illegality in relying on the subsequent conduct of the parties

35. Mr. Kirpal has placed especial reliance on the letter dated 19 April 2006 [reproduced in para 15 *supra*]. He submits that the learned Arbitrator has, without justification, disregarded this letter on the ground that it was written by “some officer” of the STC, ignoring the fact that the author of the letter was the officer who had signed the MOU dated 29 April 2005. Mr. Kirpal points out that, in the MOU, it is clearly recited thus:

“AND WHEREAS, MMT have offered STC to enter into a collaboration for executing the Sale order awarded by MSTC Ltd,

³ 92. **Exclusion of evidence of oral agreement.** – When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). – Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). – The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). – The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). – The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). – Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6) – Any fact may be proved which shows in what manner the language of a document is related to existing facts.

⁴ (1975) 1 SCC 199

Bangalore, to MMT for dismantle and disposal of entire Fertilizer Plant belonging to NLC.”

Mr. Kirpal further points out that, in the MOU,

- (i) Clause 1 required the sale consideration to be paid by STC directly to NLC,
- (ii) Clause 2, too, envisaged “successful completion of sale of the entire stock of NLC plant *by STC*”,
- (iii) Clause 4 required STC to pay NLC, and effect sale of the dismantled plant and machinery to third parties,
- (iv) in fact, the only form of security envisaged in the MoU was the pledge to which Clause 4 referred,
- (v) though Clause 5 of the MoU envisaged MMT entering into an Agreement to Sell with STC, what came to be executed was a Sale Deed/Agreement of Sale,
- (vi) Clause 6 envisaged appointment of the security agency, for security of the plant and machinery, by STC, thereby indicating that, by that point, ownership in the plant and machinery vested in STC,
- (vii) Clause 7, even while requiring MMT to take a suitable Insurance policy, required the policy to be endorsed in favour of STC, thereby again indicating that STC was the owner of the plant,
- (viii) Clause 11
 - (a) envisaged sale of the stock of the NLC plant by MMT *on behalf of STC*,
 - (b) further went on to require the entire stocks of NLC plant to be “sold and disposed of *by STC* to the parties selected by MMT”,
 - (c) yet further, went on to require the Delivery Orders, too, to be issued by STC,

- (ix) Clause 12 clearly vested ownership of the plant in STC till it recovery its entirely financial investment, and
- (x) Clause 13 reserved, with STC, the right to directly dispose of the materials at the end of the 9th month to recover its outstanding dues.

Mr. Kirpal submits, relying on *Nabha Investment Pvt Ltd v. Harmishan Dass Lukhmi Dass*⁵ that sale requires title in the seller, and that a pledgee cannot sell the property, in view of Section 176⁶ of the Contract Act, 1872.

36. Adverting, next, to the Sale Agreement dated 29 April/17 May 2005 itself, Mr. Kirpal submits that the agreement is one of *sale*, and is not an “agreement to sell”. The covenants of the Sale Agreement, which state that “STC and MMT have entered into an MOU dated 29/04/05 *to jointly execute the sale awarded in favour of MMT by MSTC vide Sale Order dated 1/04/05*, and that, “in consideration of STC releasing Demand Draft in favour of NLC against their sale order, *MMT hereby sells its entire rights in the NLC plant as conferred on it vide MSTC Sale Order dated 1/04/05*”, pursuant to which “the entire Fertilizer Plant and Machinery and materials as detailed in Annexure 1 *are hereby sold to STC by MMT*” makes it clear, beyond doubt, that the transaction consummated by the Sale Agreement was outright sale of the Plant and Machinery of NLC, and nothing less than that. The finding of the learned Arbitrator is, therefore, he submits, contrary to Section 92 of the Contract Act. He also draws attention, in this context, to the invoice dated 17th May

⁵ 58 (1995) DLT 285

⁶ 176. **Pawnee's right where pawnor makes default.** – If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

2005, whereunder MMT sold the plant and machinery of NLC to STC, which bore the receipt of STC on its face.

37. Mr. Kirpal points out that, in its letters dated 14 April 2005 and 18 April 2005, MMT had clearly agreed as under:

“We agree that, in order to cover the risks of STC, we will initially sell the entire stocks of the Fertilizer Plant & Machinery to STC, Chennai as tax paid goods at a price ₹155.00 crore to enable STC to become owners of goods and sell the same under their invoice. However, it is clearly understood and agreed that STC will sell the goods to only those parties which are recommended by us. STC will issue Delivery Order and effect transfer of goods from Chennai only against full payment.”

38. Mr. Kirpal submits that there is neither any assertion that the Sale Agreement dated 29 April/7 May 2005 was a sham, nor was there any prayer to so declare. Even otherwise, he submits, even a sham conveyance deed bound the parties, till it remained in force and was not set aside by any judicial dispensation. Referring to the claims in the SOC filed by STC, Mr. Kirpal submits that there was no claim for a declaration that the Sale Agreement was a sham, or for any consequential injunctive reliefs.

39. Nor, submits Mr. Kirpal, is there any finding, by the learned Arbitrator, that the Sale Agreement dated 29 April/17 May 2005 was a sham. The learned Arbitrator merely held that it was not intended to be acted upon. Mr. Kirpal points out that, while the learned Arbitrator struck, as Point for Determination 3, the specific issue of whether the Sale Agreement was null and void, there is, in the impugned Award, no finding in the affirmative on the said issue.

40. Insofar as the finding, in the impugned Award, that it was inconceivable that the Sale Agreement effected an outright sale of the plant and machinery of NLC, superseding the MoU, was concerned,

Mr. Kirpal submits that the finding is without any basis. Apropos the incorporation, by reference, of the MoU in the Sale Agreement, Mr. Kirpal submits that the incorporation did not mean that the Sale Agreement had no independent existence. Mr. Kirpal further submits that the learned Arbitrator was in error in holding that there was “no proof that MMT dismantled on behalf of STC because it had purchased the plant”, as the Sale Deed clearly said so.

41. Mr. Kirpal emphasizes the fact that the Sale Agreement was executed only on 17 May 2005, which was more than three weeks after the financial assistance had been extended by STC to MMT. He submits that, even for this reason, it was not possible to hold that the Sale Agreement was merely to secure the financial assistance provided by STC.

42. Mr. Kirpal reiterates that it was not permissible, in law, for the learned Arbitrator to rely on the fact that MMT did not ask for cancellation of the pledge deed and other documents, or seek return of the cheques of ₹ 75 crores each that it had furnished to STC, to disbelieve the sale effected by the Sale Agreement, as it would amount to relying on later conduct of MMT. He further submits that the impugned Award provides no basis for the finding that “it (did) not lie in the mouth of Respondents to contend that only bank guarantee, mortgage deed or pledge deed etc. can be executed by way of security and not the sale agreement”. Similarly, he submits, the learned Arbitrator has discountenanced the invoice dated 27 April 2005, which was in fact received by the senior officers in the STC on 18 May 2005, as of “no consequence”, without providing any reason for the finding. He also criticizes the dismissal, by the learned

Arbitrator, of the letter dated 19 April 2006⁷ as an “opinion expressed by an officer”, disregarding the fact that the “officer” in question was the one who had signed the MoU dated 29 April 2005 on behalf of STC.

43. Training his guns, next, on the observation, in the impugned Award, that, in the letter dated 9 June 2005, which authorized Ram Kishan to negotiate sale of the plant and machinery of NLC to various parties in small lots, there was no mention of the Sale Agreement dated 17 May 2005, Mr. Kirpal submits that the learned Arbitrator erred in failing to notice that, had no sale taken place on 17 May 2005, MMT continued to remain owner of the plant and machinery and, therefore, there was no occasion for Ram Kishan requiring any authorization from STC to effect sale of any part thereof. Apropos the lack of any reference, in the said letter of authorization, to the Sale Agreement dated 17 May 2005, Mr. Kirpal submits that there was no occasion for reference to the entire history of all transactions relating to the plant and machinery to find place in a document which was essentially to be shown to a third party.

44. Mr. Kirpal submits that, in finding, in conclusion, that the Sale Agreement did not supersede the MoU, the learned Arbitrator has held in violation of the contractual terms, as the Sale Agreement specifically said so. He also relies on the words “hereby sold”, employed in the Sale Agreement, which, too, according to him, the learned Arbitrator has not dealt with. Invoking Section 2(7)⁸ read with Section 4⁹ of the Sale of Goods Act, 1930, Mr Kirpal submits

⁷ See para 15 *supra*

⁸ (7) “goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are intended to be severed before sale or under the contract of sale;

⁹ **4. Sale and agreement to sell. –**

that the words “hereby sold”, as employed in the Sale Agreement, crystallized the sale of the plant and machinery, and rendered the document a contract of sale, not an agreement to sell. Further, inasmuch as the conditions envisaged in Section 58(c) of the TPA do not find place in the Sale Agreement, Mr. Kirpal submits that the document cannot be regarded as one effecting a mortgage by conditional sale. He relies, in this context, on

- (i) para 2 of the judgment of the High Court of Madras in *Dwarampudi Basivireddi v Gadi Kamaraju*¹⁰, and, from the judgements of the Supreme Court,
- (ii) paras 5 to 9 of *Pandit Chunchun Jha v. Sheikh Ebadat Ali*¹¹,
- (iii) paras 46 to 47 of *Vidhyadhar v. Manikrao*¹²,
- (iv) paras 9 and 14 to 16 of *Mushir Mohd Khan v. Sajeda Bano*¹³,
- (v) paras 3 and 7 of *Sopan v. Syed Nabi*¹⁴, and
- (vi) paras 10, 12 and 13 of *Dharmaji Shankar Shinde v. Rajram Shripad Joshi*¹⁵.

45. Apart from mortgage, Mr. Kirpal submits that the other species of security known to the law are pledge, charge and lien. No notice under Section 176 of the Contract Act having been issued, no pledge over the plant and machinery of NLC could be said to have been

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

¹⁰ 1932 (LVI) ILR (Mad) 560

¹¹ AIR 1954 SC 345

¹² (1999) 3 SCC 573

¹³ (2000) 3 SCC 536

¹⁴ (2019) 7 SCC 635

¹⁵ (2019) 8 SCC 401

created. No charge could be said to have been created as the books of accounts/registers of NLC were never produced. Nor was there any purported lien. Mr. Kirpal refers to Section 66(3)¹⁶ of the Sales of Goods Act which stipulates that the provisions of the Sale of Goods Act do not apply to mortgage, pledge, charge or other security. Pollock & Mulla, in their well known commentary on The Sale of Goods Act, 8th Edn, he points out, clarify that “mortgages, pledges, charges, etc., are dealt with by the Transfer of Property Act, 1882 and Sections 172-179 of the Indian Contract Act 1872.”

46. Mr. Kirpal reiterates that, in view of Sections 91¹⁷ and 92 of the Evidence Act, the learned Arbitrator could not have sought assistance from extrinsic evidence to understand the contents of the Sale Agreement dated 17th May 2005. He also reiterates that there was no prayer, before the learned Arbitrator, to invalidate the Sale Agreement, and cites *Roop Kumar v. Mohan Thadani*¹⁸.

47. Mr. Kirpal proceeds, thereafter, to draw my attention to specific observations and findings in the impugned Award which, according to him, are patently unsustainable in law. He first refers to the following passage:

¹⁶ (3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

¹⁷ 91. **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.** – When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. – When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. – Wills admitted to probate in India may be proved by the probate.

Explanation 1. – This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2. – Where there are more originals than one, one original only need be proved.

Explanation 3. – The statement, in any document whatever, of a fact other than the facts referred to

in this section, shall not preclude the admission of oral evidence as to the same fact.

¹⁸ (2003) 6 SCC 595

“... Clearly, if the sale is on terms and conditions given in MOU, it is unconceivable that it was an outright sale superseding MOU. There is not an iota of evidence which may show that the sale agreement resulted in supersession of MOU. In fact the sale agreement dated 17th May 2005 on which respondents wish to rely also contemplates the sale on terms and conditions of MOU. Thus it is evident that the sale agreement was executed by way of security to cover the risk of STC and not, for in fact, selling of plant and machinery by MMT to STC. No other conclusion in law can be drawn than that the sale agreement did not amount to MMT having sold to STC what MMT had purchased from NLC. Even subsequent events and conduct after the execution of sale agreement also clearly shows that the stand taken by Respondents about their having sold the plant and machinery of NLC to STC is merely an afterthought and is wholly unsustainable. If MMT had sold the NLC plant and machinery to STC and if STC had become owner thereof on 17th May 2005 as respondents allege, the Respondents would not have acted in the manner they did even after May 2005 as would be evident from the facts noted hereinafter.”

Apropos this passage, Mr. Kirpal submits, firstly, that the learned Arbitrator, in relying on the MOU to interpret the sale Agreement, breached Sections 91 and 92 of the Evidence Act, and, secondly, that relying on subsequent events to interpret the Sale Agreement was completely proscribed in law.

48. Even otherwise, submits Mr. Kirpal, what was envisaged in the MOU was not what eventually transpired. The MOU envisaged the execution, between STC and MMT, of an Agreement to Sell. What ultimately came to be executed, however, was not an agreement to sell, but a Sale Agreement per se. Section 4¹⁹ of the Sale of Goods Act, he points out, clearly chalks out the distinction between a sale agreement and an agreement to sell. An agreement to sell does not

¹⁹ **4. Sale and agreement to sell. –**

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

create any right or title, based on ownership or possession in favour of the intending buyer and, in the event of a breach, the only remedy with the buyer would be to sue for breach of contract. The sale agreement, on the other hand, transfers ownership from the buyer to the seller, with all its indicia, rights, liabilities and consequences.

49. Mr. Kirpal further submits that the impugned Award fails to notice the significance of the actual date of execution of the Sale Agreement – 17 May 2005 – as opposed to 29 April 2005 as stated on the body thereof. The fact that the Sale Agreement was executed 18 days after the MOU, he submits, makes it clear that the sale could not have been by way of security to secure the financial assistance provided by STC to MMT. In fact, in observing that the actual date of execution of the Sale Agreement was “of no consequence”, that the invoice whereunder the plant and machinery was sold by MMT to STC “does not in any manner advance the case to the Respondents about the sales having been effected by that document in favour of STC”, disregarding the non-production of the account books of STC and brushing aside the letter dated 19 April 2006, which contained a specific recognition of the document dated 17 May 2005 having indeed been a sale, the learned Arbitrator, submits Mr. Kirpal, ignored all evidence which actually indicated the real nature of the transaction consummated by the Sale Agreement.

50. Before parting with the recital of the submissions advanced by Mr. Kirpal regarding the effect of the MOU dated 29 April 2005 after the Sale Agreement dated 17 May 2005 had been executed, the following passage, from the written submissions dated 8 August 2020, tendered by STC, deserves to be reproduced *in extenso*:

“IV. The terms and conditions of the MOU dated 29.04.2005 cannot be incorporated into the Sale Agreement.

The law is well settled that *if a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted at incorporated into the contract. When there is such incorporation of the terms and conditions of a document, or later of such document, (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract.* As submitted above, the Sale Agreement dated 29.04.2005 (executed on 17.05.2005) is a completely different and mutually exclusive document to the MOU dated 29.04.2005 and absolutely overwrites and supersedes the MOU dated 29.04.2005 ruling out any possibility of incorporation of clauses of MOU dated 29.04.2005 into its own terms and conditions.”

(Underscoring in original; italics supplied)

51. These errors and infirmities, according to Mr. Kirpal, render the impugned Award perverse and suffering from patent illegality, as the learned Arbitrator has failed to follow the mandate of the law. He relies, in this context, on

- (i) paras 27, 31, 40 and 42.1 to 42.3 of *Associate Builders v. D.D.A.*²⁰ and
- (ii) *South East Asia Marine Engineering & Constructions Ltd v. Oil India Ltd*²¹.

52. Mr. Kirpal points out that Section 28(3)²² of the 1996 Act has been amended by Section 14 of the Arbitration & Conciliation (Amendment) Act, 2015 (“the 2015 Amendment Act”), w.e.f. 23 October 2015, and that, prior to amendment, it read:

“(3) In all cases, the arbitral tribunal *shall decide in accordance with the terms of the contract* and shall take into account the usages of the trade applicable to the transaction.”

²⁰ (2015) 3 SCC 49

²¹ (2020) 5 SCC 164

²² (3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

The words “shall decide in accordance with the terms of the contract” have, therefore, been replaced with “shall, in all cases, take into account the terms of the contract”. The *raison d’etre* of this amendment, he submits, is to be found in para 16(ii) of the 246th Report of the Law Commission that recommended it, which reads:

“16. In section 28,

(ii) In sub-section (3), after the words “tribunal shall decide” delete the words “in accordance with” and add the words “having regard to”

[Note: This amendment is intended to overrule the effect of *ONGC Ltd. v. Saw Pipes Ltd*²³, where the Hon’ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]”

Section 26²⁴ of the 2015 Amendment Act, points out Mr. Kirpal, made the above amendment, in Section 28(3) of the 1996 Act, prospective.

53. Even if the terms and conditions of the MOU were to be read into the Sale Agreement, submits Mr. Kirpal, the terms and conditions of the Sale Agreement would, nonetheless, prevail, citing, in this context, paras 16 and 17 of *M.R. Engineers & Contractors Pvt Ltd v. Som Dutt Builders*²⁵. Incorporation of the MOU into the Sale Agreement, he submits, would not result in the sale no longer remaining a sale.

54. It was also submitted, by Mr. Kirpal, that the Balance Sheet of STC would have shown no reference to any loan having been

²³ (2003) 5 SCC 705

²⁴ **26. Act not to apply to pending arbitral proceedings.**—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

²⁵ (2009) 7 SCC 696

extended by STC to MMT. Despite having been called upon, by the learned Arbitrator, it is an admitted position that STC did not produce its Balance Sheet/Books of accounts for the Financial Year 2005-2006. This fact was also admitted by CW-4 Mr. Sarabjeet Singh. Other documents, the relevant to this issue, were also not produced by STC. Despite having indicated, during the course of cross-examination of CW-1 on 4 December, 2008, that failure to produce the said documents would invite an adverse inference against STC, no such adverse inference was drawn in the impugned Award.

55. In written submissions, tendered on 8 August 2020, MMT emphasised the following factors as indicated above and hope and sale of the plant and machinery of NLC having been effected by MMT to STC under the Sale Agreement dated 17 May 2005:

- (i) The surveyor, who surveyed the dismantled plant and machinery, was appointed by STC.
- (ii) Sale of the dismantled goods was made by STC in its own name.
- (iii) STC waste all bills and invoices on the purchasers of the dismantled goods.
- (iv) Sale consideration, from the said purchaser's, was also directly received by STC in its own account, by D/D or cash.
- (v) Dismantling was carried out by STC under the direct supervision of its senior officials.

(vi) The entire stock of dismantled goods was removed and delivered by STC under gate passes issued in the name of STC.

(vii) All statutory taxes and levies on the dismantled goods were deposited by STC with the concerned authorities in its own name.

Submissions of Mr. Kuljeet Rawal

56. Mr. Kuljeet Rawal, appearing for Mahesh Agro and Mahesh Kumar, a partner in MMT, supplementing the submissions of Mr. Kirpal, places reliance on the invoice dated 17 May 2005, immediately following the Sale Agreement dated 17 May 2005, whereby MMT had sold the plant and machinery of NLC to STC. He submits that, consequent to the sale of the plant and machinery to third parties, STC sought refund of sales tax from MMT. Sales tax had been charged by NLC from MMT @ 12%, as per the conditions of the bid. However, under the Tamil Nadu GST Act, Sales Tax on scrap was chargeable only @ 2%. Thus, STC sought the benefit of sales tax refund. On the said request being made by STC, MMT addressed a communication dated 2 January 2006, to NLC, intimating NLC that MMT had sold the plant and machinery to STC, and requiring NLC, irrevocably and unconditionally, to refund the amount of ₹ 13.2 crores in favour of STC. This, he submits, indicates that the plant and machinery stood sold to STC *vide* Sale Agreement dated 17 May 2005. Mr. Rawal also draws attention, in this context, to the record of cross-examination of CW-1 before the learned Arbitrator, during which CW-1 confessed to awareness of the fact that, having effected a second sale of the dismantled plant and machinery of NLC, STC was intending to take

refund of the excess sales tax paid by MMT on the first sale. The learned Arbitrator, he submits, ignored these facts.

57. In this context, Mr. Rawal further submits that STC suppressed its Sales Tax returns which, if produced, would have disclosed these facts. He relies on *Gopal Krishnaji Kelkar v. Mahomed Haji Latif*²⁶ to contend that failure to produce relevant document, even if not called upon to do so, justifies an adverse inference.

Submissions of Mr. Sanjay Katyal

58. Mr. Sanjay Katyal, appearing for Mr. Harish Nagpal, submits that, though he was on paper a partner of MMT after 1 April 2005, he was not practically functioning as a partner on account of his medical condition, and had not signed any Personal Guarantee, to secure the financial assistance provided by STC. He submitted that he was a signatory to the Statement of Defence filed before the learned Arbitrator only because he was told that the learned Arbitrator would be apprised of the true position. He relies on Section 6²⁷ of the Indian Partnership Act, 1932.

Submissions of Mr. Dinesh Agnani

59. Appearing for STC, Mr. Dinesh Agnani points out, at the outset, that the MOU dated 29 April 2005 clearly envisaged sale of the plant and materials of NLC only by way of security for the financial assistance extended by STC to MMT. The nature of the relationship envisaged by the MOU, he submits, was a collaboration between

²⁶ AIR 1968 SC 1413

²⁷ 7. **Partnership at will.**—Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is “partnership at will”.

MMT and STC to dismantle and dispose of the plant and material of NLC. Though STC was to dispose of the plant and material, the MOU make it clear that the disposal would be with the assistance of MMT. He points out that, against the total value of ₹ 352 crores, ascribed to the plant and material at that time, STC had advanced financial assistance of only ₹ 149 crores. STC's right to sell the plant and machinery, he points out, arose not from the Sale Agreement, but from the MOU. He further points out that Clause 4 of the MOU clearly postulated pledge, by MMT, of the entire materials of NLC's Fertiliser Plant and machinery by a Pledge Deed. These were all rights which were in existence even prior to the execution of the Sale Agreement. Clause 5 of the MOU envisaged the execution, by MMT, of an Agreement to Sell. He further relies on Clauses 6 and 7 of the MOU, which required MMT to bear the entire cost of security and also to take out a suitable insurance policy at his cost, to be endorsed in favour of STC. Clause 11 made MMT responsible for successful sale of the entire NLC Plant on behalf of STC. The buyers were also to be nominated by MMT. Most importantly, he submits that Clause 12, which dealt with final settlement of accounts, envisaged release, by STC, of the balance payment and stocks, to MMT, once STC had effected recoveries in terms of the said Clause within the period stipulated in Clause 10.

60. Mr. Agnani submits that there is no dispute about the fact that the Sale Agreement was ante-dated, as it bore the dated 29 April 2005, whereas it was executed on a Stamp Paper dated 17 May 2005. Referring to the covenants of the Sale Agreement, Mr. Agnani points out that the terms and conditions of the MOU dated 29 April 2005 were expressly made an integral part of the Sale Agreement, which

bound the parties thereby. The MOU, therefore, remained, at all times, binding on all parties thereto.

61. If the plant and machinery was completely sold to STC by MMT under the Sale Agreement, queries Mr. Agnani, how could MMT be entitled to any part of the sale proceeds arising out of sale of the dismantled plant and machinery? Mr. Agnani has relied on the terms and conditions set out in the communication dated 14 April 2005²⁸, which stipulate that

- (i) MMT had already paid, to NLC ₹ 13.2 crores as EMD and ₹ 50 lakhs as bid money,
- (ii) MMT agreed, additionally, to invest, from its own resources, approximately ₹ 10 crores towards cost of dismantling the Fertiliser plant and machinery, cost of insurance and security,
- (iii) MMT agreed to deposit ₹ 10 crores with STC, conditional upon STC making payment directly to NLC as per the terms and conditions of the communication,
- (iv) the entire dismantling of the plant and machinery would be done by MMT at its own cost,
- (v) MMT would bear the cost of maintaining security of the plant,
- (vi) MMT would take out insurance, for the plant and machinery, at its own cost, for 110% of the value, and the policy would be endorsed in favour of STC,
- (vii) the entire stock of goods would be transferred to Delhi and pledged with STC,

- (viii) sale of the stock would be effected by STC to parties selected by MMT, at prices approved by MMT, and no sale would be effected by STC without the consent of MMT,
- (ix) no sale would be effected on credit basis; all sales would be against payment,
- (x) from the sale proceeds, STC would recover the monies invested by along with interest, bank charges, BG and service charges, and return the balance to MMT immediately thereafter and
- (xi) the transaction would be secured not only by way of pledge of the stocks in favour of STC, but also by corporate guarantees along with post dated cheques to cover the entire risks of STC and personal guarantees of the partners of MMT.

62. The subsequent communication dated 18 April 2005²⁹, submits Mr. Agnani, further underscored the above position. He has drawn particular attention to Clauses 5 and 6 of the said communication, in which, even while undertaking to sell the stocks of the NLC plant and machinery to STC for ₹ 155 crores, it was clarified that the sale was only to enable STC to become the owners of the goods and further sell the dismantled plant and machinery under its invoice, with the clear stipulation that sale would be effected only to parties recommended by MMT, against Delivery Order and the full payment. Clause 6 further required STC to, after adjusting, from the sale proceeds, the amount of financial assistance provided by STC by way of liquidating of the amounts payable to NLC on behalf of MMT, bank charges, interests, and other taxes if any and Service Charge at the rate of 1.5% of the total fund deployed by STC, return the balance to MMT. It further recorded the agreement of the parties that the interest charged by STC

on the fund deployed by it would be 1% above the bank rate, but that STC would try and negotiate with the banks to keep it at the minimum. Mr. Agnani queries as to how, if the plant and machinery had been sold out right to STC, MMT remained liable to pay service charges to STC or concerned with the rate at which STC obtained loan from the Bank.

63. Mr. Agnani points out that, apart from the above, MMT provided further security to STC against the financial assistance provided by it by way of two post dated cheques for ₹ 75 crores each, drawn by Bishan Saroop Ram Kishan Agro (P) Ltd and Mahesh Agro (P) Ltd, two corporate guarantees from the said companies and personal guarantees from all five partners of MMT.

64. Mr. Agnani submits that the contention, of Mr. Kirpal, that the Sale Agreement was independent of the MOU is contrary to the covenants of the Sale Agreement themselves.

65. Referring to the recitals in that regard contained in the impugned Award, Mr. Agnani points out that MMT has, in WP 43497/2006 filed before the High Court of Madras, seeking quashing of the LOA and direction to NLC to return ₹ 163,49,96,511/- with interest, specifically alleged that, on account of acts and omissions attributed to NLC, MMT was unable to take steps to dismantle the machinery and plant. It was further alleged, in the said writ petition, that, owing to the fraud played by NLC, MMT was entitled to be refunded the entire amount paid to NLC which profit and other benefits lost by MMT. If MMT had, as it seeks to contend, sold the plant and machinery to STC, there was no occasion, submits Mr.

Agnani, for MMT to retain any cause of action to maintain such a writ petition.

66. Mr. Agnani also relies on the letter of authority dated 9 June 2005 signed by Ram Kishan, whereunder Ram Kishan was authorised by STC to negotiate sale of the NLC Plant and machinery in small lots to various parties at terms and conditions to be mutually agreed upon, between Ram Kishan and the buyers. The letter further stipulated that the said authority, conferred on Ram Kishan, was “subject to ratification by STC of each individual sale transaction finalised by him under the MOU between STC and MMT”. Mr. Agnani submits that, if, in fact, the plant and machinery stood sold by MMT to STC, there was no reason for STC to authorise MMT’s employee to effect sale to third parties. The words “under the MOU”, he submits, betrays the fact that, in fact, no real sale of plant and machinery had taken place and that the dominion over the plant and machinery was retained by MMT.

67. Mr. Agnani submits that, in fact, possession of the NLC plant and machinery was never handed over to STC, and that the plant and machinery continued to remain at the site of NLC.

68. Thus, submits Mr. Agnani, the impugned Award does not merit interference.

Submissions of Mr. K.M. Natraj, learned ASG

69. The learned ASG submitted that, at the highest, all that could be pleaded by MMT is that the manner in which the Sale Agreement dated 17 May 2005 was interpreted by the learned Arbitrator is incorrect. Error in construction of a document does not, he submits,

vitiating an arbitral award, within the meaning of Section 34 of the 1996 Act. He cites, in support of the submission,

- (i) para 25 to 27, 29 and 54 of *Pure Helium India (P) Ltd v. ONGC*³⁰,
- (ii) paras 112 to 113 of *McDermott International Inc v. Burn Standard Co. Ltd*³¹,
- (iii) *Associate Builders*²⁰ and
- (iv) *Ssangyong Engineering & Construction Co. Ltd v. NHAI*³².

Submissions of Mr. Saurabh Kirpal in rejoinder

70. Mr. Kirpal commences his rejoinder by pointing out that, as the impugned Award was rendered before 2015, the unamended Section 34 would apply. This position, he submits, stands settled by para 39 of *B.C.C.I. v. Kochi Cricket Pvt Ltd*³³, para 19 of *Ssangyong Engineering*³² and paras 106 to 111 of *Govt of India v. Vedanta Ltd*³⁴. He reiterates that, by ignoring the letter dated 19 April 2006 and the invoice dated 17 May 2005, the learned Arbitrator had rendered the impugned Award patently illegal for overlooking the relevant evidence. Additionally, he submits, the impugned Award is contrary to Sections 91 and 92 of the Evidence Act and Section 58 of the TPA. Mr. Kirpal submits that the learned Arbitrator could not have interpreted the Sale Agreement as not resulting in a sale, and merely amounting to a security, without returning a finding that the Sale Agreement was a sham. No such declaration had been sought by STC, either. He emphasises the words “is hereby sold”, in the Sale

³⁰ (2003) 8 SCC 593

³¹ (2006) 11 SCC 181

³² (2019) 15 SCC 131

³³ (2018) 6 SCC 287

³⁴ (2020) 10 SCC 1

Agreement, and questions as to how, in the face of such a categorical covenant, the learned Arbitrator could have held that the Sale Agreement did not result in a sale.

71. Apropos the decisions in *Pure Helium*³⁰ and *McDermott*³¹ on which the learned ASG relied, Mr. Kirpal submits that they dealt with the permissibility of looking into collateral evidence to ascertain whether an implied term could be read into a contract. The existence of any such implied term, he submits, was required to be pleaded and proved. The present case, he submits, does not fall within the scope of the proviso to Section 92 of the Evidence Act.

72. The battle lines thus stand drawn.

Analysis

73. There can be no manner of doubt that the entire dispute, before the learned Arbitrator, as well as before me, hinges on the interpretation of the Sale Agreement dated 17 May 2005, *vis-à-vis* other documents, especially the MOU dated 29 April 2005, and turns specifically on whether the Sale Agreement effects an outright sale of the plant and machinery of NLC, or merely secures the financial assistance provided by STC to MMT. The learned Arbitrator has interpreted the documents in a manner adverse to the petitioner. The petitioner has challenged the impugned Award under Section 34 of the 1996 Act. At the very outset, therefore, it is necessary to understand the extent to which Section 34 permits interference, by a Court, with the manner in which an Arbitral Tribunal interprets the terms of the contract before it, in the light of the law that has, over time, developed in that regard. All that would remain, then, would be to examine

whether, within the peripheries within which the Court can peregrinate, a case for setting aside the impugned Award is, or is not, made out.

74. There can, equally, be no manner of doubt that Mr. Kirpal has, with his unquestionably enviable knowledge of the law, set up a formidable challenge to the impugned Award, casting a statutory panoply that spans the Contract Act, the Sale of Goods Act, the 1996 Act, the Transfer of Property Act and the Evidence Act. Is it, however, formidable enough to unseat the Award?

75. The boundaries of Section 34 of the 1996 Act have, therefore, in the first instance, to be identified.

76. Mr. Kirpal submits that, inasmuch as the present objections were filed on 1 October 2010, Section 34 of the 1996 Act, prior to its amendment with effect from 23 October 2015 by Section 26 of the 1996 Amendment Act, would apply. He is correct. Interpreting Section 26 of the 1996 Amendment Act, the Supreme Court, in para-39 of *BCCI*³³, held thus:

“The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force.”

The position was re-emphasised, even more categorically, in a declaratory fashion, in para 19 of *Ssangyong Engineering*³²:

“Given this, we declare 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, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.”

77. Section 34(2)(b), in its pre-amended *avatar*, read as under:

“34. Application for setting aside arbitral award. –

(2) An arbitral award may be set aside by the court only if –

(b) the court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. – Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.”

Even while clarifying that an award which is induced or affected by fraud or corruption, or which violates Section 75 (which requires confidentiality to be maintained) or section 81 (which disallows certain categories of evidence to be introduced in arbitral proceedings) would, *ipso facto*, be “in conflict with the public policy of India”, the Explanation to Section 34(2)(b) preserves the generality of the said expression.

78. Though the amendments effected by the 2016 Amendment Act, to the 1996 Act, do not apply to the present case, a glance at the amendment is useful. To the extent it is relevant to Section 34(2) of the 1996 Act, the 2016 Amendment Act substituted the existing Explanation, with two Explanations, elaborating the concept “in

conflict with the public policy of India”. These explanations read thus:

“Explanation 1. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian Law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute.”

A comparison of the Explanation to Section 34(2)(b), as it existed prior to 23 October 2015, and the two Explanations, introduced in its stead by the 2016 Amendment Act w.e.f. 23 October 2015, discloses three interesting features:

(i) Clause (i) of the newly substituted Explanation 1 incorporates the pre-existing Explanation, which envisages an award as being in conflict with the public policy of India if its making was induced or affected by fraud or corruption or violated Section 75 or Section 81. Clauses (ii) and (iii) are, however, newly introduced clauses.

(ii) The pre-existing Explanation was not worded in absolute or exhaustive terms. It merely declared the inducement or affecting of the award by fraud or corruption, or transgression of Sections 75 or 81, as circumstances which would render the award in conflict with the public policy of India. Unlike the newly added Explanation 1, which, by use of the words “only if”, renders the three clauses (i) to (iii) which follow exhaustive

of the circumstances in which an award could be regarded as in conflict with the public policy of India, the earlier Explanation expressly saved the generality of the expression “in conflict with the public policy of India”. Clearly, therefore, unlike what may be superficially apparent, Explanation 1, as introduced with effect from 23 October 2015, was narrower in its scope than the pre-existing Explanation to Section 34(2)(b). The pre-existing Explanation to Section 34(2)(b) allowed the expression “in conflict with the public policy of India” full play, and permitted it to be interpreted in its widest possible connotation, whereas Explanation 1, as substituted w.e.f. 23 October 2015, provided no such latitude. Cases which attracted the amended provision would, therefore, require the Court only to examine whether the facts brought the case within one of the three clauses (i) to (iii) in Explanation 1.

(iii) Even there, Explanation 2 proscribes review of the merits of the dispute while examining whether the award under challenge was in contravention of the fundamental policy of Indian Law.

79. In addition, the 2016 Amendment Act introduced, in Section 34, sub-section (2A), which read thus:

“(2A) An arbitral award arising out of arbitration is other than international commercial arbitration is, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by a reappraisal of evidence.”

80. The expressions employed by the legislature in the newly substituted Explanations 1 and 2 to Section 34(2)(b), and in Section

34(2A) were apparently borrowed from the following passages from the decision in *ONGC*²³, which was held, in *Associate Builders*²⁰, to have been “consistently followed”:

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in *Renusagar Power Co. Ltd. v. General Electric Co.*³⁵, it is required to be held that the award could be set aside if it is patently illegal. The result would be –award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

- (2) The court may set aside the award:
- (i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,
 - (b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,
 - (ii) if the arbitral procedure was not in accordance with:
 - (a) the agreement of the parties, or
 - (b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.
- However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.
- (c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.
- (3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:
- (a) fundamental policy of Indian law; or
 - (b) the interest of India; or
 - (c) justice or morality; or
 - (d) if it is patently illegal.
- (4) It could be challenged:
- (a) as provided under Section 13(5); and
 - (b) Section 16(6) of the Act.”

81. Applying the above understanding of the expression “public policy of India”, which is common to the pre-amended as well as the amended Section 34(2)(b), it is apparent that the distinction between the pre-amended and the amended provision is considerably nuanced. The dynamics of this distinction have been captured in paras 34 to 42 of the decision in *Ssangyong Engineering*³². We are not, however, concerned with the amended Section 34(2)(b) and need not, therefore, burden this judgment with any discussion on this aspect.

82. On the vulnerability of an arbitral award to challenge with respect to the manner in which the Arbitral Tribunal construed the provisions of the contract with which it was concerned, paras 42.3 to 45 of *Associate Builders*²⁰ examines when the construction could be said to suffer from “patent illegality”. [“Patent illegality”, to reiterate, stood subsumed within the ambit of the expression “in conflict with the public policy of India” and was, therefore, a ground on which an arbitral award could be challenged under Section 34, both in its pre- and post-amended *avatars*.] They read as under:

“42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute –

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. *An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.*

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*³¹, 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*³⁶ and *Natural Gas Commission* and *D.D. Sharma v. Union of India*³⁶.]

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*³⁷, 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*³⁸, *Thawardas Pherumal v. Union of India*³⁹, *Union of India v. Kishorilal Gupta & Bros.*⁴⁰, *Alopi Parshad & Sons Ltd. v. Union of India*⁴¹, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*⁴² and *Renusagar Power Co. Ltd. v. General Electric Co.*³⁵)”

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*⁴³, 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

³⁶ (2004) 5 SCC 325

³⁷ (2011) 10 SCC 573

³⁸ AIR 1954 SC 689

³⁹ AIR 1955 SC 468

⁴⁰ AIR 1959 SC 1362

⁴¹ AIR 1960 SC 588

⁴² AIR 1965 SC 214

⁴³ (2012) 5 SCC 306

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.**⁴⁴ and which has been referred to above. Similar view has been taken later in **Sumitomo Heavy Industries Ltd. v. ONGC Ltd.**⁴⁵ 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 **Kwality Mfg. Corpn. v. Central Warehousing Corpn.**⁴⁶ 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.’”*

(Emphasis supplied)

83. Section 28(3), too, as already noted in para 52 *supra*, suffered an amendment by the 2016 Amendment Act. The amendment was, avowedly, to overcome **O.N.G.C.**²³, to the extent it held that, in an arbitral award, “any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being

⁴⁴ (2009) 10 SCC 63

⁴⁵ (2010) 11 SCC 296

⁴⁶ (2009) 5 SCC 142

against public policy”. As to whether the amendment achieved its avowed purpose, is a discussion with which we need not concern ourselves here, as, admittedly, the present dispute has to be decided in terms of the pre-amended Section 28(3), which required the Arbitral Tribunal to, “in all cases ... decide *in accordance with the terms of the contract* and ... take into account the usages of the trade applicable to the transaction”.

84. The scope of interference with the manner in which the Arbitral Tribunal has interpreted the contract forms a definite, recognizable subset of the scope of interference with arbitral awards in general. A notable authority on the scope of interference with the manner in which an Arbitral Tribunal construes a contract is to be found in the somewhat recent decision of three Hon’ble Judges of the Supreme Court in *UHL Power Company Ltd v. State of Himachal Pradesh*⁴⁷, paras 16 to 22 of which read thus:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd. v. Vedanta Ltd.*⁴⁸, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words: (SCC pp. 166-67, para 11)

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would

cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury*⁴⁹ reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*⁵⁰, wherein it has been observed as follows : (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*⁵¹, the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects,

⁴⁹ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)

⁵⁰ (2020) 12 SCC 539

⁵¹ (2019) 20 SCC 1

then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In **Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.**⁵², adverting to the previous decisions of this Court in **McDermott International Inc. v. Burn Standard Co. Ltd.**⁵³ and **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**⁵⁴, wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus :

“9.1. ... *It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.* It is further observed by this Court in the aforesaid decision in para 33 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.* It is further observed that 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.

9.2. Similar is the view taken by this Court in **NHAI v. ITD Cementation India Ltd.**⁵⁴ and **SAIL v. Gupta Brother Steel Tubes Ltd.**⁵⁵.”

20. In **Dyna Technologies**⁵¹, the view taken above has been reiterated in the following words:

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in **South East Asia Marine Engg. & Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd.**⁵⁶ and it has been held as follows:

⁵² (2019) 7 SCC 236

⁵³ (2012) 5 SCC 306

⁵⁴ (2015) 14 SCC 21

⁵⁵ (2009) 10 SCC 63

⁵⁶ (2020) 5 SCC 164

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*⁵¹ laid down the scope of such interference. This Court observed as follows:

‘24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. *We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.* Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.’

13. *It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning.* This Court in *Dyna Technologies*⁵¹ observed as under:

‘25. Moreover, *umpteens number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.*’ ”

22. In the instant case, *we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award.* In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge

exceeded his jurisdiction in interfering with the award by questioning the interpretation given to the relevant clauses of the implementation agreement, as the reasons given are backed by logic.”

(Emphasis supplied)

Applying the law

85. The dispute essentially revolves around the cumulative effect of letters dated 14 April 2005 and 18 April 2005 from MMT to STC, the MOU dated 29 April 2005, and the Sale Agreement dated 29 April 2005 but admittedly executed only on 17 May 2005.

86. The letter dated 14 April 2005 stated that, on dismantling, the plant and machinery of NLC would yield approximately 87,000 MT scrap, worth ₹ 350 crores, based on the valuation done by Neeraj Kapoor. From the amount realised by sale of the dismantled plant and machinery in the end of April 2006, STC was to recover the amount of financial assistance extended by it along with 9% interest, 2% margin money and all costs and expenses. As against this, only ₹ 37.74 crores was realised (as against the projected ₹ 350 crores) from sale of the dismantled plant and machinery. Against the projected recovery of 87000 MT ferrous and nonferrous scrap, only 19866.58 MT scrap was recovered, of which 18366.58 MT could be sold by MMT, for ₹ 37.74 crores. Based on these figures, STC worked out the amount due to it, from MMT, as ₹ 1,096,348,073/–.

87. None of the petitioners, except Mr. Rawal’s clients, disputed the quantification of the claim as worked out by STC. Mr. Rawal sought to contend that, in working out its claim, STC could not charge interest on margin money of ₹ 25 crores and the amount of ₹ 37.71 crores recovered by sale of scrap. The contention was found, by the

learned Arbitrator, to be devoid of merit, as STC had already

deducted, while working out its claim against MMT, the amount of ₹ 25 crores and ₹ 37.71 crores. Inasmuch as, owing to default on the part of MMT, accounts could not be settled in terms of Clause 12 of the MOU, the learned Arbitrator held that the petitioners could not contend that, before calculating interest, the amount of ₹ 25 crores and ₹ 37.71 crores ought to have been deducted from ₹ 149.79 crores.

88. The only substantial challenge, both before the learned Arbitrator as well as before this Court was, and is, therefore, that, as the plant and machinery of NLC was sold by MMT to STC under the Sale Agreement dated 17 May 2005, all earlier agreements, including the MOU dated 29 April 2005, stood superseded. STC, having willy-nilly and in view of the apparently profitable nature of the plant, taken a conscious decision to purchase the plant and machinery from MMT instead of proceeding in accordance with the MOU, stands estopped from taking any claim under the MOU or the earlier communications dated 14 and 18 April 2005.

89. In rejecting the said contention, the learned Arbitrator has taken, into consideration, the following factors:

(i) The letter dated 14 April 2005 from MMT to STC was not in dispute. The letter proposed providing of financial assistance by STC to MMT by way of direct payment by STC to NLC in accordance with the terms of the auction.

(ii) The letter further stated that MMT had already deposited 10% of the bid amount, of ₹ 13.2 crores on 2 March 2005 and received final sale order on 1 April 2005, as well as ₹ 50 lakhs as bid money to NLC. MMT undertook, further, to invest ₹ 10

crores towards dismantling of the fertiliser, plant and machinery and insurance and security charges.

(iii) Sales, though to be effected by STC, were required to be to parties selected by MMT.

(iv) The price at which sales were to be made was also to be approved by MMT.

(v) No sale could be made by STC without MMT's consent.

(vi) The entire stocks were pledged with STC. In addition, MMT provided corporate guarantees along with post dated cheques and personal guarantees of all partners of MMT to cover the risks undertaken by STC.

(vii) The MOU stated that approximately 87,000 MT of ferrous and non-ferrous scrap, worth ₹ 350 crores, would be generated by dismantling of the plant and machinery.

(viii) In its subsequent proposal dated 18 April 2005, MMT expressed its willingness to increase the margin money deposit with STC from ₹ 10 crores to ₹ 15 crores, in order to cover the risks of STC.

(ix) The communication dated 18 April 2005 further stated that STC would adjust the sale proceeds, from sale of the scrap of the plant, along with bank charges, interests, taxes, if any and STC's service charge at the rate of 1.5% of the total funds deployed by STC and return the balance to MMT immediately thereafter.

(x) It was nobody's case that, at the time of issuance of these two communications dated the 14 and 18 April 2005, any proposal or plan to sell the plant and machinery of NLC to STC was in contemplation. The proposal was only intended at providing adequate security to cover the risks of STC.

(xi) The MOU dated 29 April 2005, which was also an undisputed document, envisaged pledging of the plant and machinery of NLC by MMT with STC and execution of an Agreement to Sell for the plant and machinery for a price not less than ₹ 150 crores.

(xii) MMT was to appoint a suitable agency to take possession of the listed plant and machinery and stocks.

(xiii) The entire cost of security was to be borne by MMT.

(xiv) Insurance policy was also to be taken by MMT at its cost, albeit endorsed in favour of STC.

(xv) MMT was to dismantle the plant at its own cost. All costs and risks of the workers was the responsibility of MMT.

(xvi) Out of the amount earned by sale of the dismantled plant and machinery, STC was to recover its entire investment and amounts expended and *to release the balance payment/stocks* to MMT immediately thereafter.

(xvii) The sale of MMT's rights in the NLC plant, even in the Sale Agreement dated 29 April/17 May 2005, was "in terms of detailed terms and conditions given the MOU signed between the parties on 29/04/05". In view thereof, the terms and

conditions of the MOU dated 29 April 2005 stood incorporated by reference in the Sale Agreement. MMT's contention that the Sale Agreement superseded the MOU could not, therefore, be accepted. Nor could it be said that the transaction of sale was independent of the MOU.

(xviii) A sale which was "on terms and conditions given in MOU" could not conceivably be regarded as an outright sale superseding the MOU.

(xix) There was no evidence to show that the MOU stood superseded by the Sale Agreement.

(xx) Inasmuch as the "sale" of the plant and machinery of NLC by MMT to STC was for securing the financial assistance lent by STC, the mere fact that the Sale Agreement came to be executed on 17 May 2005 could not alter the nature of the transaction.

(xxi) It was also inconceivable that MMT, which was valuing the plant and machinery, and the scrap to be generated by dismantling thereof at ₹ 350 crores, would sell the plant and machinery to STC for ₹ 151 crores, which would not even cover the cost incurred by MMT.

(xxii) If, in fact, the plant and machinery had been sold by MMT to STC on 29 April/17 May 2005, MMT would immediately have sought cancellation of the plaintiff deed and other documents and return of the two cheques for ₹ 75 crores each which had been given by MMT to STC. It did not do so.

(xxiii) The fact that the plant and machinery had, in fact, not been sold by MMT to STC on 29 April or on 17 May 2005 was also manifest from the letter of authority dated 9 June 2005, whereby STC authorised Ram Kishan to negotiate sale of the plant and machinery in small lots, at terms and conditions mutually agreeable to Ram Kishan and the buyers. The letter made no reference to sale of the plant and machinery by MMT to STC on 17 May 2005.

Following the above, the learned Arbitrator concluded thus:

“The documents dated 14 April 2005, 18 April 2005, MOU dated 28/29 April 2005, the document RW 1/GX⁵⁷ as also the subsequent conduct as noted hereinabove lead to the only conclusion that the transaction between the parties was financial in nature and the sale agreement was not an independent document; it did not supersede MOU.”

90. By no stretch of imagination can it be said that the learned Arbitrator has arrived at his finding that the Sale Agreement dated 17 May 2005 was, in fact, only by way of security, to secure the financial assistance provided by STC to MMT, without proper application of mind or without properly examining and assessing the worth and evaluating the import of the evidence available in the case before him. The learned Arbitrator has juxtaposed the letters dated 14 April 2005 and 18 April 2005, the pledge deed dated 29 April 2005, other contemporaneous communications, the MOU dated 29 April 2005 and the Sale Agreement dated 17 May 2005, to arrive at a conscious and informed conclusion regarding the exact nature of the transactions between STC and MMT. The exercise undertaken by the learned Arbitrator, and the conclusion arrived at by the learned Arbitrator as a result thereof, do not suffer from any lack either of possibility or plausibility. The circumstances relied upon by the learned Arbitrator

and enumerated hereinabove are, by themselves, sufficient to justify a conclusion that, in fact, the Sale Agreement, though styled as such, was merely to secure the financial interests of STC.

91. The submission of MMT – also urged by Mr. Kirpal before me – that the Sale Agreement superseded the MOU was rightly rejected by the learned Arbitrator, as, in fact, the covenants of the Sale Agreement specifically indicated to the contrary, as the “sale”, under the Sale Agreement was as per the terms and conditions of the MOU dated 29 April 2005.

92. Similarly, the Pledge Deed dated 20 April 2005, too, “irrevocably and unconditionally Pledge(d) the entire Fertilizer Plant and Machinery” belonging to NLC, sold to MMT by MSTC *vide* Sale Order dated 1 April 2005. There was no reference, in the Pledge Deed, of any Sale Agreement.

93. Mr Kirpal’s submission that, had no sale taken place on 17 May 2005, MMT continued to remain owner of the plant and machinery and, therefore, there was no occasion for Ram Kishan requiring any authorization from STC to effect sale of any part thereof, also fails to impress. The requirement of Ram Kishan requiring authorization was not necessarily incompatible with sale being security, in view of terms of the MoU and Sale Agreement.

94. The learned Arbitrator has, therefore, correctly held that it could not lie in anybody’s mouth to contend that the Sale Agreement superseded the MOU or that, once the Sale Agreement was executed, the MOU lost relevance.

95. The MOU, in turn, refers to the earlier communications dated 14 and 18 April 2005. In fact, therefore, the nature of the relationship between MMT or STC was required to be gleaned by a conjoint and juxtaposed appreciation of all the four documents, i.e., the communications dated 14 and 18 April 2005, the MOU dated 29 April 2005 and the Sale Agreement dated 29 April 2005/17 May 2005. This is precisely what the learned Arbitrator has done. As against this, what MMT seeks to contend is that one should read the Sale Agreement dated 17 May 2005 in isolation, treating the Sale Agreement as having superseded and, effectively, therefore, consigned, to oblivion, the earlier communications and agreements/MOU between the parties. That, however, is not the position which flows even from the Sale Agreement dated 29th April/17 May 2005. This is, in fact, the most fundamental error in the stand that MMT seeks to advocate in the present matter. The Sale Agreement dated 29 April/17 May 2005 is, decidedly, no island.

96. The submissions of Mr. Kirpal, by way of challenge to the findings of the learned Arbitrator, have been noted, exhaustively, hereinbefore. I do not deem it necessary to repeat them. Suffice it to state that Mr. Kirpal went into the concept of sale of immovable property under the Sale of Goods Act and the TPA, the various methods by which immovable property could be pledged under the TPA, types of mortgage, including mortgage by conditional sale and other such jurisprudential intricacies regarding the manner in which immovable property could be secured, to submit that the law did not envisage securing of immovable property by way of outright sale, unless the transaction was in the form of mortgage by conditional sale, in which case the property was required, consequent to consummation of the loan or other financial assistance against which the property was

mortgaged, to return to the mortgagor. No such covenant existed in the present case; ergo, submits Mr. Kirpal, the transaction could not be treated as one of mortgage by conditional sale.

97. Mr. Kirpal also take serious exception to the fact that these contentions, though advanced in the arbitral proceedings, have been accorded short shrift by the learned Arbitrator, who has disposed of the said submissions by the following brief observation:

“It does not lie in the mouth of Respondents to contend that the only bank guarantee, mortgage deed or pledge deed etc. can be executed by way of security and not the sale agreement. The respondents themselves agree to execute the sale agreement to cover the risk of STC as stated in the letter dated 18th April 2005.”

According to Mr. Kirpal, the manner in which the learned Arbitrator has dealt – or, rather, failed to deal – with the legal submissions advanced by MMT is profoundly unsatisfactory and renders the impugned Award perverse, and vulnerable to evisceration.

98. I, however, find myself entirely in agreement with the approach of the learned Arbitrator.

99. The learned Arbitrator has correctly held that, once the contractual documents between MMT and STC indicate, unequivocally, that MMT “sold” NLC’s plant and machinery to STC only by way of an interlocutory arrangement to secure the financial assistance being provided by STC and to facilitate further sale, by STC, of the dismantled plant and machinery to third parties, MMT could not seek to rely on argumentative calisthenics, or intricate jurisprudential niceties regarding the manner in which immovable property could be secured or pledged, to wish away the effect of the document to which it had itself ascribed its signature. If the relevant

documents, on their plain terms, indicated that the “sale” of the plant

and machinery was only intended to be by way of security, then, as a signatory to the document, MMT could not seek to contend that such a security was not permissible in law. No occasion arose, therefore, for the learned Arbitrator to examine the various species of mortgage, or the various manners in which immovable property could be secured under the statute and, equally, no occasion arises for this Court to walk down that path either. The learned Arbitrator has, on a conjoint reading of all the documents, arrived at a conscious decision that the “sale” of the plant and machinery of NLC by MMT to STC by the Sale Agreement dated 29th April/17 May 2005 was not, in fact, a sale as understood in law, as, if the Sale Agreement were to be seen in the backdrop of the other contractual documents executed between MMT and STC, it became manifest that the sale was merely by way of security against the financial assistance provided by STC. I have already found this conclusion to be free from any infirmity, illegality or perversity, as would justify interference under Section 34 of the 1996 Act. It cannot be said that the findings of the learned Arbitrator are “in conflict with the public policy of India”, as understood in *O.N.G.C.*²³ and *Associate Builders*²⁰.

100. The inexorable sequitur to the above discussion is that the Sale Agreement dated 29th April/17 May 2005 did not, in any manner of speaking, supersede the earlier communications dated 14 April 2005, 18 April 2005 or the MOU dated 29 April 2005.

101. The attempt of the remaining petitioners to dissociate themselves from all liability on the ground that they were mute participants cannot, quite obviously, sustain. The findings of the learned Arbitrator, to this extent, too, therefore, does not brook interference.

102. No other submission having been advanced by learned Counsel for the petitioners, the impugned Award has to be upheld.

Conclusion

103. Resultantly, the impugned Award is upheld in its entirety.

104. OMP (Comm) 59/2020, OMP (Comm) 60/2020, OMP (Comm) 67/2020, OMP (Comm) 71/2020 and OMP (Comm) 75/2020 are dismissed.

105. There shall be no orders as to costs.

C.HARI SHANKAR, J

JULY 3, 2023/kr