IN THE HIGH COURT OF ANDHRA PRADESH:
AT AMARAVATI
****

COM.C.A.No.03 of 2020

Between:

Rashtriya Ispat Nigam Limited, a Government of India undertaking Incorporated under the Companies Act with its Office at Ukkunagaram, Visakhapatnam rep. by Sri N. Udayabhanu, S/o.P.N. Reddy, aged about 59 years, R/o. Ukkunagaram, Visakhapatnam and working as Asst. General Manager (MM) bearing employee No.108351 with the petitioner company since Mr.N.Udayabhanu retired, presently rep.by J. Venkayya, DGM (MM).

.... Appellant

And

1) M/s.Balaji Coke Industry Pvt. Ltd. Having its Head Office at #12, Ho-Chi-Minh Sarani, Flat No.2-B, 2nd floor, Kolkata – 700071, alternatively
M/s.Balaji Coke Industry Pvt. Limited, having its Head Regd. Office at 2nd floor, 4, Govt. Place, (North), Kolkata – 700001 and **three** others.

....Respondents.

Date of Judgment pronounced on : 06.01.2022

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE B. KRISHNA MOHAN

1. Whether Reporters of Local newspapers may be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals : Yes/No

3. Whether the Lordship wishes to see the fair copy of the Judgment? : Yes/No

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JUSTICE C. PRAVEEN KUMAR

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! Counsel for the Appellant : Sri. C.V. Mohan Reddy
Learned Senior Counsel.

Counsel for the 1st Respondent: Sri B. Adinarayana Rao
Learned Senior Counsel.

<Gist :

>Head Note:
? Cases referred:

1) (1991) 1 SCC 212
2) (2013) 202 DLT 218
3) 2018 SCC Online 8367
4) MANU/SC/0485/2021
5) (2015) 3 SCC 49
6) (2003) 5 SCC 705
7) (2006) 11 SCC 181
8) (2008) 13 SCC 80
9) (2020) 5 SCC 164
10) (2019) 4 SCC 163
11) (2011) 15 SCC 101
12) 2011 (5) SCC 758
13) (2007) 8 SCC 1
14) 2021 SCC Online 695

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE B. KRISHNA MOHAN

COM.C.A.No.03 of 2020

JUDGMENT : *(Per Hon'ble Sri Justice C. Praveen Kumar)*

The present appeal is filed by Rashtriya Ispat Nigam Limited [for short **"RINL"**] under Section 37 of the Arbitration and Conciliation Act, 1996 read with Order 43 Rule 1 of Code of Civil Procedure, 1908 [for short, **"C.P.C"**], assailing the Order, dated 14.10.2019 passed in C.A.O.P.No. 1 of 2018, on the file of Special Judge for Trial and disposal of Commercial Disputes, Visakhapatnam, wherein the application, filed by the appellant herein under Section 34 of the Arbitration and Conciliation Act, 1996, was dismissed confirming the order of the Arbitral Tribunal.

2. The circumstances, which led to filing of the Claim Petition, are as under:-

i) The appellant **[RINL]** herein which is a Government of India undertaking, issued a Global Tender Notice bearing No. PUR.6.17.013/06006 dated 14.03.2006 for supply of 30,000 MT (+)/[-] 5% shipping tolerance of Low Ash Metallurgical (LAM) Coke. The respondent/claimant, who was a successful bidder was given a Letter of Intent, on 21.06.2006 vide PUR 6.17.013/0051. In continuation of the

Letter of Intent, the respondent/claimant placed an acceptance of tender for supply of said goods, inconformity with the specifications mentioned in Annexure-I to the contract @ Rs.7730/- per tonne.

ii) Though, the claimant had to supply the goods between August and September, 2006 as per the purchase order, but delay has occurred due to heavy rains and floods in Gujarat State, where the cookeries were located and that the claimant could offer to supply the goods by nominating the Vessel on 23.09.2006, indicating the particulars of the Ship, which are as under:-

Name of the Vessel	:	M.V. Great Haffy
Year of built	:	1997
Length of overall	:	185.74 metrs
Crane	:	4 x 30 MT
Grabb	:	4 x 10 CBM

iii) However, vide letter dated 26.09.2006, the appellant herein rejected the nomination for the reason as under:

"In terms of the contract and also due to non-submission of Performance Guarantee bond, we cannot accept the vessel nominated on 26.09.2006. We request you to arrange for Performance Guarantee bond immediately but not later than 27.09.2006 for further necessary action at our end".

iv) The material on record also shows that *vide* letter 26.09.2006, the Claimant submitted Performance Guarantee bond and nominated another vessel. The particulars of which are as under:

Name of the Vessel	:	M.V. Halis Kalkavan
Year of built	:	1984
Length of overall	:	186.70 Mtrs
M/Beam	:	28.40 Mtrs
Crane	:	4 x 25 MT
Leavycan	:	7-14, Jan, 2007

v) However, the same was rejected by the appellant herein mainly on the ground that the Vessel is more than 22 years of age, which is contrary to Clause 1.1 of Annexure-II B to A/T, as it prescribes a Vessel not more than 15 years old. Further, the Vessel has Cranes of 25 MT capacity only as against the requirements of 30 MT capacity. No grabs were available on board, while Clause 1.1 of the agreement prescribe that the Vessel should have atleast four grabs each of 12 Cubic Metres capacity. The claimant addressed letters dated 23.12.2006, 29.12.2006, 30.12.2006 and 01.01.2007 requesting the appellant to accept the nominated vessel named M.V. Halis Kalkavan with an undertaking that he would comply all the terms and conditions which are agreed between the appellant and its stevedoring agent at the Visakhapatnam Port. The claimant also agreed to bear all costs in connection with acquisition of additional grabs. The claimant nominated another Vessel by name GESCO and forwarded the details of the same vide letter dated 11.01.2007 for approval, but it was also rejected on the

ground that it did not comply with the requirements of Annexure-II-B.

vi) *Vide* letter dated 03.02.2007, the claimant indicated to the appellant that in view of the rejection of three Vessels nominated by him, without any valid reasons, the claimant got absolved from further performance of contract dated 21.06.2006. Thereafter, the matter landed before the Arbitral Tribunal.

3. The Claimant filed Claim Statement, seeking the following reliefs, which are as under:

> *i) Declaration that the claimant has duly performed and fulfilled its commitments, obligations, covenants and undertakings under the Agreement dated August 13, 2003 [as modified on October 11, 2003] other than the terms performance of which has been prevented or waived by the respondent.*
>
> *ii) A declaration that the claimant is absolved from further performance of the contract dated June 21, 2006 due to the breaches committed by the respondent;*
>
> *iii) Declaration that the contract between the parties has, in the facts of the case; stood repudiated and put to an end thereby disentitling the respondent from claiming from the claimant further performance of the contract between the parties;*
>
> *iv) Perpetual injunction restraining the respondent from claiming from the claimant further performance of the contract between the parties;*
>
> *v) An award for a sum of Rs.14,50,00,000/- as pleaded in paragraph 53 hereof;*
>
> *vi) An Award for Rs.69,57,000/- on account of the refund of the aforesaid amount furnished as bank guarantee by*

the claimant and invoked and/or encashed illegally and wrongfully by the respondent;

vii) Interest and further interest on the awarded sum @ 18% per annum or at such other rate or rates as the Learned Arbitrator may deem fit and proper;

viii) Alternatively, an enquiry be made in the damages suffered by the claimant and an Award be made in favour of the claimant for such sum or sums as may be found due thereupon;

ix) Declaration that the notice No. 02/02/ 6003/000019/000013 dated March 22, 2004 (styled as a modification advice) is invalid, null and void, unconscionable, burdensome, lacking in mutality onerous and not binding on the parties, ineffective and of no effect;

x) Perpetual injunction restraining the respondent from invoking the risk purchase clause being Clause No.14 contained in the said agreement dated June 21, 2006;

xi) Declaration that bank guarantee No.IBC/03/RI/344 dated October 16, 2003 has stood discharged;

xii) Declaration that the purported threat of invocation of the said bank guarantee by the respondent is fraudulent and/or barred by special equities and is null and void, illegal, ineffective and of no effect;

xiii) Perpetual injunction restraining the respondents from invoking or enforcing or encashing the bank guarantee No.IBC/03/RI/344 dated October 16, 2003 or receiving any payment thereunder from the Allahabad Bank, International Branch, Kolkata;

xiv) Costs and incidential to the present arbitration proceedings;

xv) Such further award or awards be made as the Learned Tribunal may deem fit and proper.

The details are as under:-

A) Interest on Rs.21.48 Crores (from August, 2006 to June, 2007 @ 14% on the value of the ordered goods Rs.23.19 Crores less profit Rs.1.74 Crores = Rs.21.48 Crores)	=	Rs.2.75 Crores
B) Loss of Production/Profit	=	Rs.7.15 Crores
C) Loss on account of movement From Kandla to New Mangalore	=	Rs.4.54 Crores
D) Plot Rent at Mangalore Port And other expenses	=	Rs.0.05 Crores
		Rs.14.49 Crores
Total claim (A+B+C+D)	=	**Rs.14.50 Crores**

4. A counter came to be filed by the appellant herein along with a counter claim for Rs.7,78,20,000/- together with interest at 12% from 11.04.2007 and also for *pendente lite* interest apart from costs to the Arbitrator.

(a) While denying the allegations made in the claim petition except to the extent admitted, it is stated that all the terms of the Annexure-II-A are absolutely binding and are mandatory and that it is incorrect to say that they are directory. It is said that the claimant never raised the issue while submitting the offer or even at the time of Acceptance of Tender [**"AT"**]. In order to wriggle out of its commitment under the contract, the claimant is coming forward with the plea that the terms of Annexure-II-A are only warranties. It is said that question of deviating from or departing from the terms under Annexure-II-A does not arise and the claimant

is fully bound by them, having accepted the terms of agreement.

(b) In so far as Acceptance to Tender conditions are concerned, it is stated that the claimant was to furnish a Performance Guarantee bond for 3% on CFR value within 15 days of the issue of the AT order and was to effect shipment during August-September, 2006 in parcel size of 30000 MT (+)/(-) 5%. It is stated that after a great deal of persuasion and repeated correspondence, Performance Guarantee (PG) bond was given in October, 2006 which is beyond the schedule delivery period of August-September, 2006. However, the same was accepted though it was late.

(c) Dealing with the averments in para 10 of the claim petition namely that the conditions in Annexure-I alone are essential for purpose of the contract, the same is denied, stating that the Annexure-II-A is equally important and essential. Though, letters dated 29.08.2006 and 30.08.2006 written by the claimant, were accepted, but it is said that the allegations made in the said letters that the respondent did its best to locate a suitable Vessel to deliver the goods is incorrect. It is further stated in the counter that the claimant failed to adhere to the original schedule of laycan in August, 2006. Letters came to be addressed to the claimant that due to accumulation of stocks, the appellant herein was not in a position to receive the stock till January, 2007.

However, in the month of December, 2006, the claimant nominated the vessel M.V. Halis Kalkavan and informed the appellant herein for its approval. Though, the vessel does not specify the requirements of Annexure-II-A, with regard to physical features, age, crane requirement etc., and also number of grabs, the claimant requested that the vessel should be accepted. But, the reason for rejection was clearly indicated by the appellant herein in their letter dated 22.12.2006. Counter which is running into number of pages answers the allegations made in the claim petition. It may not be necessary for this Court to refer to all the averments in the counter, as the prime issues are reiterated before this Court, which we will refer to a little later.

5. The claimant got himself examined as C.W.1 along with another witness while the appellant herein examined three witnesses on their behalf.

Issue arising out of Claim:

i) *What are the terms of contract dt.21.06.2006 and whether the terms mentioned in Annexure II-A of the contract are mandatory or directory, and or in the nature of warranties which could be waived or varied?*

ii) *Whether the breach of any of the terms of Annexure II-A could give rise to the termination of contract and invoking the guarantee?*

iii) *Whether both the parties have performed their obligations under the contract?*

iv) *Whether the claimant is entitled for a declaration as claimed in paragraph (iii) of the prayer of the claim statement?*

v) *Whether the claimants are entitled to a sum of Rs.14.50 Crores or to any part of claim 'A' to 'D' of paragraph 51 of the claim statement and/or any part thereof?*

vi) *Whether the invocation of bank guarantee by the respondent is improper and whether the claimant is entitled to the said amount?*

vii) *Whether the claimant is entitled to interest for any period before the commencement of arbitration and pendente lite and after the award and if so at what rate?*

viii) *Whether the claimant is entitled for costs?*

ix) *To what relief is the claimant entitled?*

Issue arising out of Counter Claim:

(B):

i) *Whether the respondent Steel Plant is entitled to the counter claim of Rs.7,78,20,000/-?*

ii) *If so, whether the respondent is entitled to interest on the same at 12% from 11.04.2007?*

6. After considering the material on record, an Award came to be passed by the Arbitral Tribunal on 30.04.2015, the operative portion of which is as under:

> *"In the result,*
>
> i) *We award a sum of Rs.14,42,65,130/- as the amount payable to the claimant up to the date of award (roughly 30.04.2015).*
>
> ii) *We further award, in the light of the recent judgment of the Supreme Court in Hyder Consultancy (U.K) vs. Governor, State of Orissa dated 25.11.2014, (partly overruling State of Haryana vs. Arora), future interest at 12% on the above sum of Rs.14,42,65,130/- from 01.05.2015 till payment.*

iii) *We also award and direct the respondent shall pay a sum of Rs.2,00,000/- towards cost of arbitration*".

7. Challenging the same, the appellant herein preferred A.O.P.No.1114 of 2015 which was renumbered as C.A.O.P.No.1 of 2018 before the Special Judge for Trial and Disposal of Commercial Disputes at Visakhapatnam under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to *set aside* the Award of the Arbitral Tribunal. The Special Judge *vide* its order dated 14.10.2019 dismissed C.A.O.P.No.1 of 2018 which is subject matter of challenge before this Court in the appeal filed under Section 37 of the Act.

8. Various grounds are raised in the grounds of appeal, which may not be necessary to be referred to, since the same are reiterated in the arguments advanced by the counsel for the appellant, which are herein under referred to.

9. Heard Sri C.V. Mohan Reddy, learned Senior Counsel representing Sri K. Sarvabhouma Rao, learned counsel for appellant and Sri B. Adinarayana Rao, learned Senior Counsel representing Sri Javvaji Sarath Chandra, learned counsel for respondent No.1.

10. Sri C.V.Mohan Reddy, learned Senior Counsel appearing for the appellant herein submits that though the scope of interference under Sections 34 and 37 of the

Arbitration and Conciliation Act, 1996 are very limited, but the Court can interfere with the award on three grounds (1) award being arbitrary and shocking to the conscience of the Court, (2) violative of substitutive laws in India or judicial pronouncements and (3) award being perverse and opposed to Public Policy. He took us through the judgments of the Hon'ble apex Court in ***(a) Associate Engineering Co. vs. Government of Andhra Pradesh, (b) Ssangyong Engineering vs. NHAI and (c) Anglo American Case.***

11. According to learned Senior Counsel for the appellant, a Global Tender dated 14.03.2006 was issued by the appellant for supply of 90,000 MT of Low Ash Metallurgical Coke (LAM Coke) subject to terms and conditions in the Bid document. The delivery has to be done in a parcel size of 30,000 MT. The tender document lays down certain conditions with regard to the vessel, cranes and grabs etc., on the vessel, which are mentioned in clause 1.1 of the tender condition. Since, they are price bearing conditions, and as the freight charge of the vessels varies depending on age, discharge capacity and other equipment like cranes and grabs etc, these conditions are mandatory. He submits that if the tenderer proposed any deviation in the tender condition, he has to propose the same while submitting his bid, so that the same would be put to all the other tenderers so as to provide a Level Playing Field, more so as the

tenderer is a public sector undertaking. In other words, his plea is that rules cannot be changed once the tender process starts. According to him, the claimant did not choose to propose deviations to the original conditions. When once the claimant agrees to abide by all conditions of the bid document, he cannot now turn around and contend that specifications mentioned, with regard to vessel are not mandatory. Hence, the stand of the appellant in rejecting the vessel nominated on the ground that it does not satisfy the specifications in Annexure-II-B and II-A, cannot be found fault with. He took us through the correspondence between the parties in support of his plea. In other words, his argument in short is that the finding of the Special Court in holding that conditions with regard to specifications of the vessel are only warranties and not mandatory is perverse, and opposed to public policy.

12. The learned Senior Counsel further submits that the appellant being a Public Sector Undertaking cannot relax the Tender conditions during the course of execution of contract, particularly the conditions which have a bearing on price. According to him, if there is any deviation from the tender conditions after the offer of the claimant is accepted, then definitely the authorities will be accused of favouritism, exposing them for an enquiry by vigilance. He placed reliance on the evidence of R.Ws.2 and 3 in support of his

plea. According to him, basing on one sentence in the evidence namely *"but also to bring in some uniformity in all the vessels"*, the Tribunal and Special Court came to a conclusion that the conditions are only warranties and not mandatory, which according to the learned counsel is contrary to the other evidence on record, namely that of R.W.1 who in his cross-examination to question No.5, states that "*all conditions are mandatory*" and *"conditions have not been relaxed after placement of orders"*. He further submits that merely because, the claimant agreed to bear the extra costs that may be incurred if vessels which are older or which do not have the necessary cranes or grabs does not make the tender conditions directory, more so when such offer was accepted by the appellant. Though, the communication between the claimant and the appellant would show that the claimant mentioned that the vessels of the specifications were not available in spite of his best efforts and it is very difficult to get vessels with such specifications, but, there is nothing on record to show the efforts put in to secure such vessel. Even otherwise, the same shall not be a ground to relax the terms of the agreement.

13. According to learned Senior Counsel, the claimants should have filed the Lloyd's Register which contains the names of all the vessels that are available, Or, should have

obtained information from the Directorate of Shipping. But, nothing of that sought was done. He also took us through the letter dated 29.12.2006 to show that the claimant himself has stated that it is very difficult to get vessels for movement of LAM Coke. Hence, the claimant ought to have been verified the factual situation before agreeing to the terms of the contract. He placed reliance on a judgment in ***Kumari Srilekha Vidyarthi (Kumari) vs. State of U.P.***[1]**,** in support of the plea that the State cannot be attributed to show that there is an obvious difference in the contracts between private parties and contracts to which the State is a party.

14. Learned Senior Counsel also took us through Sections 12 and 13 of the Sale of Goods Act, 1930, to show that the buyer alone may waive the condition or elect to treat the breach of the condition as a breach of warranty and not by the supplier.

15. One of the objections raised by learned Senior Counsel for the appellant is that the claimant cannot maintain this claim, as he is only an agent of the supplier. He took us through Clause 3.0, which deals with eligibility criteria. In other words, the plea of the learned Senior Counsel appears to be the tenderer should be a legal owner of the offered Cargo for the purpose of sale to the purchaser. Referring to

[1] (1991) 1 SCC 212

Section 230 of Indian Contract Act, 1872 that the agent cannot personally enforce, nor be bound by terms of the contract on behalf of Principal, referred to bids of landing to show that the companies such as Aditya Coke Private Limited, Antai Balaji Limited and Lotus Energy (India) Private Limited are the owners and as such, it is incomprehensible as to how the claimant can be the owner of the Cargo. A comment was also made on the finding of the Tribunal at Para 13, Page 33 of the award to show that the third category referred to therein was added by the Tribunal and it is not a condition of the agreement at all.

16. Learned Senior Counsel further contends that the respondent/claimant was to transport material from Kandla to Visakhapatnam, but by diverting the vessel to Mangalore Port on his own will, the appellant cannot be made responsible for the freight and plot charges payable at Mangalore. According to him, nobody asked him to transport the material to Mangalore or for that matter load the material into the ship which is not meeting the specifications, at Kandla.

17. Coming to the interests on the value of goods from August, 2006 to June, 2007, he would submit that the goods are not ready by then due to rains from July, 2006 to August, 2007, hence awarding of interests is also perverse.

Learned Senior Counsel would submit that the fundamental question that was ignored by the Tribunal as well as by Court is, there was no need for the claimant to load the Cargo at Kandla and divert the vessel to New Mangalore Port and unload the material there, when the terms of agreement are to the effect that the material has to be delivered at Visakhapatnam.

18. On the other hand, Sri B. Adinarayana Rao, learned Senior Counsel appearing for claimant/respondent No.1 disputes the grounds raised by the appellant. Starting from where the learned Senior Counsel appearing for appellant ended, he would contend that the claimant was forced to unload the goods at New Mangalore as the appeals made to the Chairman of the appellant after the goods were loaded into the vessel at Kandla for being delivered at Visakhapatnam, came to be rejected.

19. Coming to the scope of interference by the Appellate Court in appeal under Section 37 of the Act, he would submit that the same is narrow and very limited. Referring to the judgments of the Delhi High Court in ***Jhang Cooperative Group Housing Society vs. P.T. Munshi Ram and Associates Private Limited***[2] and in ***L.G. Electronics India Private Limited Vs. Dinesh Karla***[3]**,** the judgment of

[2] (2013) 202 DLT 218
[3] 2018 SCC Online 8367

the Hon'ble Supreme Court in ***PSA SICAL Terminals Private Limited vs. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin***[4], he would contend that the jurisdiction of the appellate Court is limited and that too it is only a supervisory jurisdiction. He further submits that the requirement under Section 34 of the Act is, beside raising objections, the party is required to furnish proof in respect of such objections. It is stated that the grounds in respect of each of the objections to the award, were not set forth with reference to material before the Arbitral Tribunal. On the other hand, the appellant was merely pointing out the conclusions arrived at by the Tribunal, which cannot be treated as those falling under Section 34(2) of the Act.

20. In so far as the issue relating to the ownership of the goods, he would submit that the Arbitral Tribunal dealt with the matter in three different angles and accordingly held that the claim made by the claimant requires consideration. In so far as the issue, as to whether the conditions in the tender are warranties, he took us through various clauses and conditions in the tender document and more particularly Clause 10 which deal with delivery of material as per the Annexure-II-A.

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[4] MANU/SC/0485/2021

21. According to learned Senior Counsel, in view of Section 12 of the Sale of Goods Act, the Arbitral Tribunal and the Special Court have rightly come to a conclusion that the aforesaid terms are warranties and hence refusal to accept the vessel nominated by the claimant, is illegal. According to him, the Arbitrators are the masters of the interpretation of the contracts and its terms and even if the Arbitrators make a mistake, the same constitutes an error within the jurisdiction and such errors cannot be grounds for setting aside the arbitral award. Referring to paragraph No.33 in ***Associates Builders vs. Delhi Development Authority***[5] case, he would contend that Arbitral Tribunal is the master of the quantity and quality of evidence, the finding of fact arrived at on the basis of evidence on record are not to be scrutinized, as the Court does not sit in appeal over the award. Hence, the Special Court was right in not interfering with the Award.

22. Learned Senior Counsel further submits that unless it is shown that there was an error apparent on the face of the record, which goes to the root of the matter, interference with the award is unwarranted. Learned Senior Counsel further submits that the specifications of the vessel are only for the purpose of a computing the lay time and demurrage and when the claimant offered to bear the additional costs,

[5] (2015) 3 SCC 49

the appellant cannot have any objection, as the agreement was only in respect of supply of material but not for providing transport facilities. He would submit that Section 12 of the Sale of Goods Act, provides the stipulation in a contract of sale with reference to goods, can be a condition or warranty. According to him, the act denies a condition, as a stipulation essential to the main purpose to the contract, the breach of which gives rise to a right, to treat the contact as repudiated. A warrantee is definite as collateral to the main purpose of contract, breach of which gives raise to a claim for damages but not to reject the goods and treat the contract as repudiated. Since the mode of delivery is collateral to the main contract and its breach can only give raise to a claim of damages, but not otherwise, they are to be treated as warranties.

23. He further submits that Section 13 of the Sale of Goods Act has no application at all. It suggests that even a condition can be waived by the parties so as to avoid the rigour thereof. In so far as the plea that the appellant is a State under Article 12 of Constitution of India and it is bound to follow Article 14, it is contended that in a Commercial contract, the parties are governed by the terms of contract and contract cannot be read with reference Article 14 of the Constitution of India. It is pleaded that the commercial contracts are not states largeness and that is a

bargain. He further submits that on account of movement of goods from Kandla to New Mangalore port, the claimant has sustained loss. The loss incurred on movement of goods from Kandla to New Mangalore port was dealt with exhaustively and the same cannot be gone into for more than one reason. Firstly, the rejection of the vessel is bad in law and secondly having regard to non-availability of the vessel for effecting delivery, the respondent chartered the vessel on 02.01.2007, to comply with the stipulations, thirdly having chartered a ship and when the goods are lying in the yard, the liability for payment to the ship caused greater loss and fourthly, the goods are meant for specific reason which cannot be stored at Kandla and offered for sale.

24. Referring to Clause 2.1.3, learned Senior Counsel would contend that the other condition in the contract cannot be mandatory and the interpretation given to the terms of contract by the Arbitral Tribunal is for coming to a just conclusion since the emphasis of the contract is only the supply of material specifications as to its quality and content. In other words, his argument is that the stipulations as to number of cranes, grabs etc. are meant for the purpose of counting the laytime and for the purposes of fixing the mutual obligations under the contract for the purpose of payment of sum that is agreed upon.

25. He also submits that the awarding of interests from August, 2006 to June, 2007 requires no interference in an appeal under Section 37 of the Act. In other words, he submits that merely because, the goods did not reach Visakhapatnam and were not delivered to the appellant does not mean that the claimant cannot invoke the provisions of the Arbitral Act, claiming damages for the loss incurred. Delivery of goods is not a prerequisite for raising a dispute between the parties. For the aforesaid reasons, the learned Senior Counsel would contend that having regard to the scope of Section 37 of the Act, the order under challenge warrants no interference.

26. The point that arises for consideration is, ***whether the Court hearing the appeal under Section 34 of Arbitration and Conciliation Act, 1996 was right in confirming the Award of Arbitral Tribunal in awarding damages as indicated in the award?***

27. It is to be noted that the present Arbitral Tribunal came to be constituted under the terms of the agreement, meaning thereby that, it is a creature of an agreement entered into between the appellant and respondent. It would be appropriate to extract the said portion of the agreement, which is as under:

23.1: All disputes arising in connection with the present Acceptance to Tender shall be finally settled under the Rules of Arbitration of the Indian Council of Arbitration by one or more arbitrators appointed in accordance with the said Rules and the Award made in pursuance thereof shall be binding on the parties. The Arbitrator(s) shall give a reasoned award. Cost of arbitration to be borne by the losing party. The venue of arbitration shall be Visakhapatnam, India.

28. Before proceeding further, it would be necessary for us to deal with scope of the court for interference under Sections 34 and 37 of the Act. Section 34(2)(b)(ii) of the Act, reads as under:

***34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
(2) An arbitral award may be set aside by the Court only if—
(b) the Court finds that—
(ii) the arbitral award is in conflict with the public policy of India.

*37. **Appealable orders**.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*

3[(a) refusing to refer the parties to arbitration under section 8;
(b) granting or refusing to grant any measure under section 9;
(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

29. In ***ONGC Limited vs. Saw Pipes Limited***[6] **,** the Hon'ble Supreme Court in Para No.31, held as under:

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 case [1994 Supp (1) SCC 644]*** *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.

[6] (2003) 5 SCC 705.

30. In ***McDermott International Inc. Vs. Burn Standard Co.Ltd.***[7]**,** the Hon'ble apex Court in para 58 to 60 held as under:

> *58. In Renusagar Power Co.Ltd. v. General Electric Co. this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. V. Saw Pipes Ltd. (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. V. Brojo Nath Ganguly wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In OnGC this Court, apart from the three grounds stated in Renusagar, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.*
>
> *59. Such patent illegality, however, must go to the root of the matter. The Public Policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.*

[7] (2006) 11 SCC 181

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public inter5est, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata).

31. In ***DDA vs. R.S. Sharma and Co.***[8]**,** the Hon'ble apex Court concluded as under:

"*21. From the above decisions, the following principles emerge:*

(a) *An award, which is*

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) *The 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.

(c) *The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.*

(d) *It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.*

(emphasis supplied)

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in

[8] (2008) 13 SCC 80

respect of those claims with reference to the terms of the agreement duly executed by both parties."

32. In ***Associates Builders' case*** (cited 5 *supra*), the Hon'ble Supreme Court after referring to the earlier Judgments of Apex Court analysed each of the heads contained in ***Saw Pipes*'s case** and observed as under:

> ***33.*** *It must clearly be understood that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.*
>
> ***34.*** *It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.*
>
> ***40.*** *We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator.*
>
> ***42.*** *In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*
>
> ***42.1:*** *(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the*

root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

***"28.** Rules applicable to substance of dispute__ (1) Where the place of arbitration is situated in India___*

(a) In an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

***42.2:** (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality _ for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*

***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__(1)(2)*

(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."

(emphasis supplied).

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.

33. In ***South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) vs. Oil India Limited[9],*** the Apex Court in Paras 17 & 30 of the said judgment while dealing with interpretation of clause *vis-à-vis* circular issued by Government of India, observed as under:-

[9] (2020) 5 SCC 164

"According to rule of construction of any document harmonious approach should be made reading or taking the document as a whole and exclusion should not be readily inferred unless it is clearly stated in the particular clause of the document. This is according to rule of interpretation. A consistent interpretation should be given with a view to smooth working of the system, which the document purports to regulate. The word, which makes it inconsistent or unworkable, should be avoided. This is known as beneficial construction and a construction should be made which suppresses the mischief and advances the remedies. So, the increase in the operational cost due to enhanced price of the diesel is one of the subject-matters of the contract as enshrined in Clause 23. It may be said that Clause 23 may be termed as "Habendum Clause". In the deed of the contract containing various granting clauses and the habendum signifying the intention of, the grantor.

That Clause 23 requires liberal interpretation for interpreting the expression "law" or change in law, etc. will also be evident from the facts that the respondents Oil India Limited. through its witness Mr. Pasrija has clearly stated that the change in diesel price or any other oil price was never done and by way of any statutory enactment either by Parliament or by State Legislature. So, it is clear that at the time when Clause 23 was incorporated in the agreement Oil India Ltd. was very much aware that change in oil price was never made by any statutory legislation but only by virtue of government order, resolution, instruction, as the case may be, on accepting that a condition of the appropriate committee, namely, OPC it is also clear to apply when there is change in oil price, here HSD, by the Government and its statutory authority as enacted in the above without resorting to any statutory enactment. Therefore that the interpretation of expression "law" or change in law, etc. requires this extended meaning to include the statutory law, or any order, instruction and resolution issued by the Central Government in its Ministry of Petroleum and Natural Gas."

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk

of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

34. After referring to ***Associates Builders' case, the Apex Court in MMTC vs. Vedanta Limited***[10] held:-

"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 [Associated Provincial Picture Houses v. Wednesbury Corporation, (1948) 1 KB 223 (CA)] 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.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to

[10] (2019) 4 SCC 163

situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49. Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

14. As far as interference with an order made Under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference Under Section 37 cannot travel beyond the restrictions laid down Under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court Under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court Under Section 34 and by the court in an appeal Under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of reassessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.

(emphasis supplied).

> *16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593 and D.D. Sharma v. Union of India, (2004) 5 SCC 325].*
>
> *17. We have gone through the material on record as well as the majority award, and the decisions of the learned Single Judge and the Division Bench. The majority of the Arbitral Tribunal as well as the courts found upon a consideration of the material on record, including the agreement dated 14-12-1993, the correspondence between the parties and the oral evidence adduced, that the agreement does not make any distinction within the type of customers, and furthermore that the supplies to HTPL were not made in furtherance of any independent understanding between the Appellant and the Respondent which was not governed by the agreement dated 14-12-1993.* (emphasis supplied).

After referring to ***MMTC Ltd. Vs. Vedanta Ltd.,*** the Hon'ble Supreme Court in ***Anglo American Metallurgical Coal PTY Limited vs. MMTC Limited (2021) 3 SCC 308***, observed as under:-

> *54. All the aforesaid judgments are judgments which, on their facts, have been decided in a particular way after applying the tests laid down in Associate Builders (supra) and its progeny. All these judgments turn on their own facts. None of them can have any application to the case before us, as it has been found by us that in the fact situation which arises in the present case, the Majority Award is certainly a possible view of the case, given the entirety of the correspondence between the parties and thus, cannot in any manner, be characterised as perverse."* (emphasis supplied).

Keeping in view the principles of law laid down in the judgments referred to above, we shall now proceed with the matter.

35. It should be further noted here that in the instant case, award came to be passed prior to October, 2015 and as such, Section 34 and 37 of 1996 Act, would apply. A reading of the above judgments make it very clear that the scope of interference would be only when the award is against the public policy of India or the order came to be passed contrary to the terms of the contract or where the order is so perverse which goes to the root of the matter or where the Arbitrator or the Special Court construe the contract / agreement in such a way which no fair minded or a reasonable person would do.

36. The preliminary objection raised by the appellant is with regard to maintenance of Claim Petition by the agent of the supplier. Clause 3.0 of the invitation to tender for supply of LAM Coke deals with Tenderers eligible to quote in response to this invitation to Tender.

> *3.1: The tenders received from the following categories of tenderers only, will be considered by RINL/VSP.*
>
> *Established/LAM Coke Producer (s) owning Cokeries and producing LAM Coke.*
>
> *OR*
>
> *LAM Coke suppliers offering LAM Coke produced by a Cokery/Coke producer, duly backed by a letter of Authority of the concerned Coke Producer/Cokery, specifically authorizing*

the said LAM Coke supplier and no one else to make an offer in response to this invitation to Tender.

The tenderer(s) should be a legal owner of the offered cargo for the purpose of sale to the Purchaser.

37. Admittedly, the respondent herein submitted the bid on behalf of the three Coke manufacturers supported by three documents. The said three companies i.e., Aditya Coke Private Limited, Antai Balaji Limited and Lotus Energy (India) Private Limited have authorized into bid on the claimant to participate in their behalf. Referring to these three letters, it is urged that the claimant is only a supplier, authorized to bid on their behalf and being an agent cannot be the owner of the goods to make a bid.

38. The learned Senior Counsel for the appellant also relied on Section 230 of Indian Contract Act, 1872, in support of his plea. Learned Senior Counsel mainly relied upon the letters, more particularly, the authorized letter, dated 31.03.2006, to show that the claimant is only an authorized agent of the owner of the goods. In other words, his argument is that the tenderer should be the legal owner of the tender Cargo, as indicated in Clause 3.1, and the same has been perversely read by the Tribunal. Learned Senior Counsel also submits that when there are only two categories of persons who can participate in the tender, the Tribunal added a third category, which was only a proviso or

an extension of second category. Therefore, it is pleaded that a new sub-clause was added to the terms of the contract by the Tribunal which was not a part of the original tender conditions.

39. The fact that the claimant is a supplier/agent of the owner of the goods is not in dispute. The said fact was to the knowledge of the appellant at the time when the bid was submitted. Infact, the material and the orders indicate that the letters given by the three owners of the goods, only authorize the claimant to act on their behalf to supply the goods and the said letters were made part of bid document. In spite of the same, the tender was accepted. That being the position, the appellant cannot now turn around and say that the claimant cannot maintain this claim being an agent. Apart from that, the Performance Guarantee bond executed by the claimant was accepted on 21.06.2006 and encashed by the appellant. It is also to be noted here that a plain reading of the tender condition make it clear that even a trader is allowed to participate in the bid, if he gets authorization from the cookeries stating that the stock will be supplied pursuant to this tender. Things would have been different, if a third party or a stranger makes a claim as a real owner of the goods. In the absence of the same and having regard to the letters written by the cookeries, which were enclosed along with the bid and the case of the

claimant being that he entered into an agreement with supplier, for supply of Coke on payment and when the bid of the claimant is accepted, knowing that the claimant is only an agent, the argument of the learned Senior Counsel that the claim itself is not maintainable, cannot be accepted.

40. The second issue which arises for consideration is whether the Arbitral Tribunal was right in holding that the specifications of the vessel as contemplated in the agreement are not mandatory and are only warranties.

41. The fact that the Arbitral Tribunal is a creature of the agreement between the parties is not in dispute. It is also not in dispute that there was a Global tender on 14.03.2006 for supply of 90,000 MT of Low Ash Metallurgical (LAM) Coke. The claimant/respondent was a successful bidder, who was given L.O.I. on 21.06.2006 pursuant thereto the claimant accepted the tender conditions, for supply of goods as per the specifications including the type of vessel in which the goods have to be transported. Clause 1.1 of the tender conditions, as specified in Annexure-II-A reads as under:-

> ***1.1:*** *The SELLER shall effect shipment in single-deckers, self-trimming type of vessels suitable for bulk discharge with self-discharging gear/cranes fitted with grabs fully automatic requiring no manual labour to open/close and guarantee that the vessel has minimum 4 number of cranes each of capacity minimum 30 tonnes and minimum 4 number of grabs each of 12 cubic meters capacity and serving all hatches and accordingly the minimum capacity to discharge is 10,000 tonnes per day of*

24 consecutive hours. The vessels shall not be over 15 years age.

Clause 7.0 deals with Statement of Deviations, which reads as under:-

7.1: The terms and conditions of the offer shall be as incorporated in the draft Acceptance to Tender given in Part-VIII of these Tender Documents. If any tenderer is unable to accept any particular term(s) as incorporated in the draft Acceptance to Tender or proposes any deviation therefrom, the Tenderer shall enclose alongwith his offer, a statement of deviations clearly spelling out the deletions/deviations proposed, which may, however, have an impact on the evaluation of his offer by the PURCHASER.

42. A reading of the above clause would makes it clear that if the tenderer wants to deviate from the tender condition, he should indicate the same, while submitting the bid, which was not done.

43. It is also an admitted fact that the vessels nominated by the claimant for supply of LAM Coke *vide* letter dated 19.12.2006 (M.V. Halis Kalkavan) was rejected on 21.12.2006, on the ground that it does not satisfy the tender specifications i.e., [(a) vessel is 22 years old as against 15 years specified in tender specifications (b) has capacity to carry only 25 MT only as against the request of 30 MT and (c) length of the vessel etc.]. When a vessel as contemplated under the terms of agreement is not available, is it permissible to relax the specifications in the agreement on a plea that the crux of the agreement is only for supply of

material (LAM Coke) and the additional expenditure incurred would be borne by the claimant, which was not accepted by the appellant herein. There cannot be any dispute that interpretation of a clause in the contract or the terms of contract, if there is any ambiguity in the wording of the agreement or where the terms of the agreement are mutually inconsistent to each other, is exclusively within the domain of the Tribunal. Even if, a different view is possible than the one prescribed by the Tribunal and accepted by the Special Court under Section 34 of the Act, it is impermissible to interfere under Section 37 of the Act. But, in the instant case though there is no ambiguity in the terms of the contract, with regard to specifications of the vessel, which has to carry the Cargo, the Special Court held that the said term in the agreement (with regard to specifications of the vessel) is not mandatory but only warranty. Whether the Special Court was right in doing so?

44. In other words, the issue in the instant case is not with regard to interpretation of the terms of contract, but as to whether the said clause in the agreement is mandatory or directory. The terms of agreement are silent on this aspect i.e., whether they are mandatory, conditional or otherwise. The clause in the agreement with regard to specifications of the vessel is very clear, referring to requirements of the vessel. As the vessel hired by the claimant, failed to satisfy

the requirements, after accepting the tender conditions, the appellant herein rejected transportation of cargo in the said vessel even before it set on sail from Kandla.

45. The Special Court has held that the said condition is only a warranty, mainly on an admission made in the evidence of R.W.3 that it is a standard condition to avoid demurrage and basing on the letter dated 03.02.2007 addressed by the claimant to the appellant, long after the rejection of the vessels by the appellant and after the material was loaded. The letter reads as under:-

> *"Both the above vessels were capable of effecting shipment without any difficulty whatsoever at the Port of Visakhapatnam. The objections raised by you to our repeated endeavours to effect shipment by our nominated vessels despite our unequivocal undertaking to bear any extra cost which may accrue on account of deviation in the vessel's specifications or any effect that the altered vessel would have on the unloading rate as fatuous."*

46. It is to be noted here that the offer made in the letter dated 03.02.2007 was not accepted by the appellant. But, however, the Special Court as well as Arbitral Tribunal proceeded on a footing that what all is required under the terms of the agreement is delivery of goods at Visakhapatnam irrespective of age, capacity and number of cranes etc., on the vessel. It would be appropriate to extract the findings on this aspect, which is as under:

> *"25.5. All that the law requires is that the vessels arranged by claimant must be able to deliver the goods at*

Visakhapatnam, (the claimant made a specific pleading in the claim statement that they would able to do so and also gave similar evidence as CW1), whatever be the age, capacity or number of cranes and grabs, as long as claimant is prepared to bear the extra premium for the age, and demurrage for extra time for unloading goods due to using a vessel which does not conform to the specifications in the contract."

47. As seen from the judgments referred to above, the interference with the order or award would arise only when it is opposed to public policy or where it is patently illegal going to the root of the matter or if a decision is taken contrary to the terms of the agreement between the parties. When the agreement to which the claimant is a signatory and agreed to the conditions specified therein, which state the Cargo has to be transported in a vessel having four Cranes of Minimum 30 MT capacity; four Grabs each 12 cubic meters capacity and the vessel should not be more than 15 years age etc, can the claimant be allowed to transport cargo in a vessel not meeting the specifications? The specifications must have been prescribed with a particular purpose, otherwise there is no meaning in insisting on specifications in the tender document. The reason for incorporating a particular clause in the agreement which was agreed to be acted upon, in our view, have to be strictly given effect to. Otherwise, if the conditions were to be relaxed, there would be no reason or rhym for including a particular term in the agreement.

48. At that stage, it would be appropriate to extract the letter dated 03.02.2007 written by the appellant to the respondent/claimant, which reads as under:

> *"You may please appreciate that the specifications provided for in Annexure-IIA of the AT are not devised only to meet the limitations in the Visakhapatnam Port, but also to bring in some uniformity in all the vessels handled by you. Having agreed to abide by the conditions of the Contract, no deviation in the specifications of the vessel is allowed."*

49. It is to be noted that though R.W.3 admits that the conditions in the agreement with regard to specifications of the vessel is to prevent demurrage but at the same time, he categorically deposed that they are mandatory. We are mindful of our limitations in looking into the evidence in an appeal under Section 37 of the Act, but we are forced to observe that the Special Court referred only to a part of the evidence without referring to the other portion wherein R.W.3 along with R.Ws.1 and 2 deposed that terms of agreement are mandatory.

50. Further, the Special Court after referring to Section 12 of the Sale of Goods Act, 1930 held that the term of the agreement is only a warranty. It would be appropriate to refer to Sections 12 and 13 of Sale of Goods Act, which are as under:-

> ***12.Condition and warranty.***—
>
> *(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.*

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

***13. When condition to be treated as warranty**.—*

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

*(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, 1*** the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as .repudiated, unless there is a term of the contract, express or implied, to that effect.*

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

But, as urged by the learned counsel, there is no reference to Section 13 of the Sale of Goods Act either in the Award or by in the order of the Special Court. It is to be noted that Section 12(1) of the Sale of Goods Act deals with Goods and does not refer to the Vessel used in transport of the goods, which is subject matter of dispute herein. Further, Section 12(3) postulates a warranty as a stipulation, breach of which gives rise to a claim for damages but no right to reject the

goods. However, Section 13 categorically states it is only the buyer who can waive the conditions. Be that as it may, as urged by learned Senior Counsel for the appellant that the Special Court while dealing with an application under Section 34 of the Act ought not to have gone into the said issue namely the applicability of Sections 12 and 13 of the Sale of Goods Act, when there is no ambiguity in Clauses 1.1 to 1.3 of Annexure-II, which forms part of the agreement.

51. Further, the payment of loss caused or the demurrage to be reimbursed in our view, may not be a ground in our view to reverse or rewrite the tender conditions as it was not accepted by the appellant. Secondly, if such an offer was made part of the tender document, there could have been more number of participants, offering less price, which we will discuss a little later.

52. Dealing with rewriting the terms of the agreement, the Hon'ble apex Court in ***Satyanarayana Construction Company vs. Union of India and others***[11]***,*** held as under***:***

> *"Thus, as per the contract, the contractor was to be paid for cutting the earth and sectioning to profile etc. @ Rs.110 per cubic meter. There may be some merit in the contention of Mr. Tandale that contractor was required to spend huge amount on the rock blasting work but, in our view, once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work. The whole exercise undertaken by the Arbitrator in determining the rate for the work at serial No. 3 of Schedule 'A' was beyond his competence and authority. <u>It was not open to the Arbitrator to</u>*

[11] (2011) 15 SCC 101

rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The Arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the Award passed by the Arbitrator with regard to claim No. 4." (emphasis supplied).

53. In ***J.G. Engineers Private Limited vs. Union of India (UOI) and others***[12]**,** the Hon'ble apex Court dealt with similar issue holding:-

"A Civil Court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a)(i) to (v) or Section 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are `excepted matters' excluded from the scope of arbitration, would violate Section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate Section 34(2)(b)(ii) read with Section 28(3) of the Act .... (emphasis supplied).

The High Court proceeded on the erroneous assumption that when Clauses (2) and (3) of the agreement made the decisions of the Superintending Engineer/Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the Respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No. 2) and the arbitration costs (counter claim No. 4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the

[12] 2011 (5) SCC 758

arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the Respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld.

..... Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of Section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. Interpreting the said provisions, this Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. 2003 (5) SCC 705 held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under Section 34(2)(b) of the Act.

54. If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of

procedure should be patent affecting the rights of the parties. (***ONGC's case).***

55. Ergo, from the above judgments referred to above, it is clear that decisions of the Court or Arbitral Tribunal shall be in accordance with the terms of contract or agreement and if it is against the terms of agreement, the same would be patently illegal. ***(ONGC and Associates Builders' cases).*** If there is any ambiguity in the terms, the Arbitral Tribunal can interpret the same *vis-à-vis* the other terms of the contract or the communication. As observed earlier, in the instant case, the issue is not with regard to any ambiguity or inconsistency in the terms of the agreement.

56. Issue relating to change in tender condition, after acceptance of the tender, by the successful tenderer came up for consideration before the Hon'ble Apex Court in ***Central Coalfields Limited and another vs. SLL - SML (Joint Venture Consortium) and others dated 17.08.2016 Passed in Civil Appeal No.8004 of 2016.*** It was a case where the bid of SLL-SML in response to a notice inviting tender issued by Central Coalfields Limited was rejected.

57. It would be appropriate to extract the relevant paras in the said judgment, which are as under:

> *34. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of*

the NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.

35. In Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

It is a well-settled Rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary Rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable.....

36. It was further held that if others (such as the Appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondents 4. This resulted in unequal treatment in favour of Respondents 4-treatment that was constitutionally impermissible. Expounding on this, it was held:

It is indeed unthinkable that in a democracy governed by the Rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness.

That is the very essence of the Rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

(Emphasis given)

Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by re-arranging the goalposts, they were denied the "privilege" of participation.

58. In ***Reliance Energy Limited and another vs. Maharashtra State Road Development Corporation Limited***[13]**,** the Hon'ble apex Court while dealing with Article 14, 19(1)(g) of Constitution of India and the doctrine of level playing field, held as under:

36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a freestanding provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho v. State of Tamil Nadu AIR2007SC861 , Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is

[13] (2007) 8 SCC 1

entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g) . Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

59. In ***State of Chattisgarh and another vs. M/S.SAL Udyog Private Limited, dated 08.11.2021 passed in Civil Appeal No.4353 of 2010,*** the Hon'ble apex Court while dealing with a situation, where the Sole Arbitrator

failed to consider clause 6(b) of the Agreement governing the parties, which was not disputed, held in para No.25 as under:-

> *25. To sum up, existence of Clause 6(b) in the Agreement governing the parties, has not been disputed, nor has the application of Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent-Company. We are, therefore, of the view that failure on the part of the learned Sole Arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contact while making an Award. The said 'patent illegality' is not only apparent on the face of the Award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned Award, insofar as it has permitted deduction of 'supervision charges' recovered from the respondent-Company by the appellant-State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant Circular. The impugned Judgment dated 21st October, 2009 is modified to the aforesaid extent."*

60. Hence, the above judgments make it clear that if the terms of agreement are changed after the process has started either by the employer or otherwise, especially if a tender floated by a Government agency, the other bidders would be denied the benefit of either securing the contract or participate in the bid, thereby violating Article 14 of the Constitution of India, which would attract the patent

illegality ground amounting to contravention of Section 28(3) of the 1996 Act.

61. Having regard to the observations made in the previous paragraphs, it is evident that there is no ambiguity with regard to the specifications required to be maintained while hiring a vessel for transport of LAM Coke. Infact, even the Tribunal or the Special Court did not comment upon any ambiguity in the conditions prescribed therein for hiring a vessel. It also remains undisputed that the claimant agreed to hire the vessel meeting the requirements of the appellant herein. As he could not do so, he addressed a letter for hiring a vessel with specifications not meeting the requirements of the appellant, which came to be rejected and the said rejection was communicated to the respondent/claimant (not disputed). But, the letter addressed by him to meet the expenditure incurred towards the demurrage as it will take more time for unloading the material from the vessel hired by him, was not accepted by the appellant herein. In fact, letters have been addressed refusing permission to transport the Cargo in the vessel of claimant's choice. We are making the observation knowing our limitations while dealing with appeals under Section 37 of the Act. As stated earlier all the three witnesses i.e., R.Ws.1 to 3 categorically deposed that the conditions in the agreement are mandatory in nature, which was not taken

into account by the Special Court. Having regard to the above, the order of the said Court in accepting the claim of the claimant is liable to be set aside on this score.

62. Even assuming for the sake of argument that the terms of agreement, with regard to specifications of vessel are only warranties, but the claim made and awarded, is liable to be set aside on another score. As seen from the findings of the Special Court, the request of the claimant to transport cargo in a vessel, which does not satisfy the requirement of tender condition, came to be rejected on 22.12.1996; 27.12.1996 and 02.01.1997. A detailed letter was also addressed by the appellant giving reasons for rejection. In spite of the same, the cargo was being loaded from 26.12.1996 onwards and then the vessel was made sail to Mangalore Port.

63. It is to be noted that the claimant was aware about the rejection of vessel, much prior to loading. Secondly, as per clause 1.3 of the agreement, the material was to be delivered at Visakhapatnam, in a vessel with certain specification, but, for no reason, the material (LAM Coke) was unloaded at Mangalore New Port, which was neither part of the agreement nor was there any understanding between the parties either oral or otherwise, and sold to third parties. No evidence has been adduced with regard to the person/company to whom it was sold and the rate at which

it was sold. As observed in ***ONGC's case*** (cited 6 *supra*) and in Para No.42.3 (3) of ***Associates Builders' case*** (cited 5 *supra*), i*n all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract."*

64. The Patent illegality is the permissible ground for reviewing a domestic award *vide* ruling in ***Delhi Airport Metro Express Pvt. Limited vs. Delhi Metro Rail Corporation Ltd***.[14] What would constitute patent illegality has been elaborately discussed in ***Associates Builders' case,*** *(*cited 5 *supra),* wherein it has been held that patent illegality falls under the head of 'Public Policy'. Failure on the part of Special Court/Arbitral Tribunal to decide in accordance with the terms of contract governing the parties would be opposed to public policy and awarding the claim contrary to terms of the contract goes to the root of the matter. Ignoring the terms of contract, amounts to gross contravention of Section 28(3) of Arbitration and Conciliation Act, 1996 that enjoins the Arbitral Tribunal to take into account the terms of the contract, while making the award. To sum up, in the instant case, the material as per the Letter of Intent issued by appellant, dated 12.05.2006, a quantity of 30,000 M.T. + /- 5% (firm quantity) in parcel size of 30,000 M.T. + /- 5% shipping tolerance of Low Ash Metallurgical (LAM) Coke was to be delivered at

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Visakhapatnam through a specified ship meeting the requirements of the appellant. Diverting the material to the destination which was not stipulated in the contract amounts to violation of the terms of agreement, which as observed is opposed to public policy.

65. Ignoring the admitted terms of the contract in making the award, warrants invocation of the power vested under Section 34 of the Arbitration Act, but the learned District Judge did not advert and take note of the same while upholding the order passed by the Arbitral Tribunal.

66. Accordingly, the COM.CA is allowed by setting aside the Order passed in C.A.O.P.No.1 of 2018, dated 14.10.2019 on the file of Special Judge for Trial and Disposal of Commercial Dispute, Visakhapatnam. There shall be no order as to costs.

Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE B. KRISHNA MOHAN

Date:06.01.2022

Note: LR copy to be marked
B/o.Ms

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE B. KRISHNA MOHAN

COM.C.A.NO.03 OF 2020

(Per the Hon'ble Sri Justice C. Praveen Kumar)

DATE: 06.01.2022

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