
(2009) 11 GAU CK 0024

In the Gauhati High Court

Case No : Arbitration Appeal No. 1 of 2007

Bongaigaon Refinery and Petrochemicals Ltd.

APPELLANT

Vs

Buildsworth (P.) Ltd. and Another

RESPONDENT

Date of Decision : 16-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 37, 37(1)

Citation : (2010) 4 GLR 315 : (2009) 5 GLT 397

Hon'ble Judges : Ranjan Gogoi, J;A.C. Upadhyay, J

Bench : Division Bench

Advocate : K.N. Choudhury, R. Dubey, S. Shyam, J. Patowary and R. Kakati, for the Appellant; R.P. Sharma, S. Sharma and D.K. Das, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Upadhyay, J

1. This appeal u/s 37 of the Arbitration and Conciliation Act, 1996, is directed against the impugned judgment and order dated 22.9.2006, whereby the learned District Judge, Bongaigaon dismissed Misc Arb. Case No. 5/2004 instituted by M/s. Bongaigaon Refinery and Petrochemicals Ltd, the appellant herein, for setting aside the arbitral award u/s 34 of the Arbitration and Conciliation Act, 1996 ("the Act").

2. We have heard Mr. K.N. Choudhury, Learned Senior Counsel assisted by Mr. R. Dubey, Learned Counsel for the appellant and Mr. M.S. Sarma, Learned Counsel for the respondent.

3. The facts, leading to filing of this appeal may be narrated briefly, as follows:

The appellant, a Government company, floated an enquiry on 16.5.1990, inviting offers for execution of the work of design, fabrication, testing, packing, forwarding and supply of 2 (two) numbers of SO₂ Vessels. In the enquiry aforesaid, a Schematic Drawing, Nozzle Orientation, Design Data and special

notes were also furnished, fixing 19.6.1990 as last date for submission of the offer. As the "Vessel" mentioned in the enquiry came under the purview of the Indian Explosives Act, 1884, it had to be designed as per "Static and Mobile Pressure Vessel (Unfired Rules, 1981 and, thus, the design and drawing of the Vessel required approval from the Chief Controller of Explosives, (in short CCE). Nagpur before its fabrication.

4. Pursuant to the aforesaid enquiry, the respondent No. 1, besides others, had submitted its offer quoting an amount of Rs. 8.79,240 (Rupees eight lakhs seventy-nine thousand two hundred forty only), for each vessel, together with additional amount of Rs, 6,000 per "Vessel" on account of transportation charges. The respondent No. 1 had, inter alia, together with the offer had proposed a clause concerning price escalation, which read as follows:

Price escalation: Our offer is subject to the price variation in the event of any increase/decrease in steel prices by the Government J.P.C. The effect of price variation of steel will vary our quoted price by 0.75% over every increase of 1% in steel price.

5. After consideration of the respective offers made by the parties, the appellant called the respondent No. 1 for negotiation pursuant to which a meeting was held on 20.12.1990 in the office of the appellant at Dhaligaon. The proceedings of the meeting was reduced into writing and signed by the parties. The minutes of the said meeting contained the price escalation formula, which read as follows:

BRPL(appellant) reiterated that price escalation should be the price increase based on actual variation of Steel Price as per J.P.C. and quantity to the weight of the Vessel. M/s. Buildworth did not agree to the above price and they are firm to their original price escalation clause. However, they have offered that procurement time of materials is limited to 41/2 months from the date of receipt of our technical clear order or 31/2 months from the date of receipt of interest free 20% mobilization advance. No escalation of price will be applicable beyond the period as specified above.

6. The Minutes also laid down the delivery period of the Vessels to be 7 months from the date of receipt of the approved design and fabrication drawing from the Chief Controller of Explosives, Nagpur ("CCE"). Pursuant to the above, the respondent No. 1 by letter dated 20.12.1990 intimated the appellant confirming the price escalation clause. Thereafter, the appellant M/s. Bongaigaon Refinery and Petrochemicals Ltd. (BRPL) by letter dated 29.1.1991, referring to the Letter of Inquiry, quotation and the discussions held between the appellant and the respondent No. 1, issued Letter of Intent (LOI), for fabrication and supply of 2 Nos. of Sulphur Dioxide Storage Vessels. In the LOI it has been also mentioned that the base price of each Vessel including Excise Duty, Assam Finance Tax and freight charges would be Rs. 8,79,240 and the period of delivery would be 7 months from the date of receipt of the design and drawing from the CCE. On receipt of the LOI the respondent No. 1 forwarded a Bank Guarantee in order to

avail 20% interest free Mobilization Advance in connection with the work in question. On completion of formalities the appellant issued purchase order dated 6.2.1991 to the respondent No. 1 in connection with the work in question.

7. Following terms and conditions were reflected in the purchase order aforesaid, in respect of "escalation of price" and "liquidated damages", in the event of delay in delivery of the SO₂ Vessels in question:

"Price escalation: we will pay price escalation as per below" - "For every 1% increase of price of steel materials as affected by Government/JPC, you will be paid extra 0.75% of Basic value of Purchase Order. Duration of price escalation will be effective with reference to the price prevailing on the date of quotation and shall be limited to 4 1/2 months from the date of purchase order or 3 1/2 months time from the date of receipt of advance payment whichever is less."

14. Liquidated damages/Delayed Delivery: The time for and the date of delivery as stipulated in the order shall be deemed to be essence of contract. In case of delay in execution of the contract the company may at its option either (i) recover from the suppliers price reduction of 1/2% of total order value per week of delay or part thereof subject to a maximum of 5 percent of the total order value or (ii) purchase elsewhere on account and at risk of the suppliers, the items not delivered or cancel the order.

8. In order to hold the insulation to the external surface of the SO₂ Vessel, platform cleats had to be fitted in it. On 27.7.1992, the appellant requested the respondent No. 1 to provide cleats for the platform in the workshop of the respondent No. 1. The appellant also advised respondent No. 1 to ask for additional costs for providing the cleats and informed that the platform cleats being external fixtures it had nothing to do with the operational part of the Vessels and as such did not come under the purview of the approval by the CCE. However, the appellant not being sure about the exemption of CCE in respect of Platform cleats, left it open for the respondent No. 1 to obtain CCE's approval, if it was felt so necessary.

9. According to the appellant since the vessels were not made ready for delivery within the stipulated date of delivery, therefore, upon consideration of requests for extension of time made by respondent No. 1, the delivery period was extended up to 18.9.1992 by the appellant. The appellant alleged that even in spite of extension of delivery period, the respondent No. 1 failed to deliver the Vessels within the extended time and eventually delivered the first Vessel only on 16.11.1992 and submitted a bill amounting to Rs. 11,15,345 for the vessel, inclusive of Excise Duty, Sales Tax, Transportation Charge, etc., and together with the bill aforesaid also claimed price escalation to the tune of Rs. 2,92,810 including excise duty and sales tax, showing escalation on the ordered value as Rs. 2,33,417. A sum of Rs. 7,39,433 was paid to the respondent No. 1, after deduction of the mobilization advance, Assam Finance Tax, Bank Guarantee, liquidated damage (LD) for delay in supply, which was accepted by the

respondent No. 1 without raising any protest. Nevertheless, the price escalation claim of Rs. 2,92,840 made by the respondent No. 1 was rejected by the appellant.

10. On 4.1.1993, the respondent No. 1 had supplied the second vessel and submitted a bill for an amount of Rs. 9,39,497, after adjustment of mobilization advance. The respondent No. 1 also claimed Rs. 3,04,448 being price escalation together with excise and sales tax charges, showing escalation on ordered value of Rs. 2,42,670. However, the appellant after deducting an amount of Rs. 72,574 on account of AST, an amount of Rs. 43,962 on account of liquidated damage for delayed delivery, paid a sum of Rs. 8,22,961 to the respondent, which was accepted without raising any protest. However, here also the price escalation claimed by the respondent No. 1 was rejected by the appellant.

11. The respondent raised claims for price escalation and objected to the deduction of liquidated damages from the bill amount. After substantial correspondence in this regard, though the appellant was agreeable to consider the claim of price escalation made by the respondent No. 1 leniently even at the belated stage, the appellant did not accept the claim made by the respondent No. 1 on the ground that adequate proof and/or information as per the requirement of the price escalation clause was not furnished by the respondent No. 1.

12. In such circumstances, the respondent No. 1 initiated an arbitration proceeding by approaching the hon'ble Chief Justice of this Court under the provisions of the Act. In the said proceedings, the respondent No. 2 Shri H.N. Chakraborty was appointed as sole arbitrator to resolve the disputes between the parties.

13. During the arbitration proceedings the sole Arbitrator framed three issues, on the basis of respective pleadings of the parties as well as materials available on record, which are as follows:

1. Whether the disputes raised by M/s. Buildworth (P.) Ltd. fall within the terms and conditions of the agreement? Whether the claimant is entitled to escalation amount?

2. Whether the claim of M/s. Buildworth (P.) Ltd. for Price Escalation of the plea of increase of price of steel on the basis of information about the price of steel from M/s. Steel Authority of India Ltd. without substantiating their having procured the required steel at such claimed increased price is sustainable? Whether the claimant is entitled to the escalation amount in terms of the purchase order?

3. Whether, in view of the factual position, the claim of M/s. Buildworth (P.) Ltd. for refund of the amount deducted by M/s. BRPL for delayed delivery of the SO2 Vessels is sustainable? Whether L.D. amount was wrongly recovered from the claimant by the respondent? Whether the claimant is entitled to get refund of the

L.D. Wrongfully received by the respondent?

14. On consideration of the submissions made by the parties, the sole Arbitrator appointed by the court passed an arbitral award dated 30.4.2004 awarding in favour of the respondent No. 1 an amount of Rs. 12,47,646 on account of price escalation as claimed and also awarded refund of a sum of Rs. 2,68,478, on account of deduction made as LD (liquidated damage) by the appellant for delayed delivery, together with interest @ 18% per annum on the aforesaid amount after lapse of two months from 30.4.2004.

15. The appellant preferred an appeal before the learned District Judge, Bongaigaon u/s 34 of the Act, against the Arbitral Award dated 30.4.2004, praying for quashing and setting aside the award. On hearing arguments advanced by the Learned Counsel for the parties and on consideration of available materials on record, the learned District Judge, by the impugned judgment and order dated 22.9.2006, passed in Misc. (Arb.) Case No. 5/04, dismissed the application filed by the appellant u/s 34 of the Act. Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned District Judge, Bongaigaon, the appellant herein has now preferred this appeal u/s 37(1)(b) of the Act.

16. Mr. K.N. Choudhury Learned Senior Counsel appearing for the appellant has submitted that in terms of the agreement reached between the parties the price escalation clause would apply only for a period of 31/2 months from the date of receipt of the 20% interest free mobilization advance subject to submission of paid invoices or any other document to prove such procurement during the aforesaid period. Therefore, Learned Counsel reiterated that in order to claim price escalation, the respondent No. 1 was required to establish the period of procurement of the materials by submitting paid invoices or any other document to prove such procurement during the agreed period. The Learned Counsel further pointed out that the genesis of price escalation clause being to protect the respondent No. 1 from escalation of price during the period of procurement, the respondent No. 1 was also bound to furnish proof of having incurred additional expenses or loss in procurement of steel due to increase of price in order to claim escalation. Learned Counsel for the appellant alleged that in the arbitration proceedings the respondent No. 1 did not produce any purchase document or paid invoice to substantiate the claim of escalation of steel price as agreed to between the parties.

17. Learned Counsel for the appellant further submitted that in the arbitration proceedings although issue No. 2 was framed by the arbitrator for the purpose of deciding as to whether the respondent procured the steel at the increased price but while deciding the issue in question did not take into account the price prevailing on the date of procurement made by the respondent No. 1 and also did not consider the agreed terms of the parties in respect of procurement of steel by insisting on paid invoices from respondent No. 1. It has also been alleged that on scrutiny of the price list submitted by the respondent No. 1,

different slabs of prices corresponding to the same period was produced. Therefore, the appellant also obtained a price list from SAIL for the corresponding period. The appellant also alleged that the assortment of steel referred to in the list respondent No. 1 was also different from the one apparently used by the respondent No. 1 for fabricating the Vessel.

18. The "price escalation" clause proposed by the respondent No. 1, obviously was a protection for any major variation in steel prices during the period of execution of contract. However, claim of such escalation, if any, could be made by the respondent No. 1 for major variation of steel price as declared by the JPC/Government and that too within the specified period of 31/2 months from the date of receipt of interest free 20% mobilization advance.

19. In terms of the price escalation clause agreed to between the parties, obviously the procurement time of steel plates for fabrication was not limited to 31/2 months from the date of receipt of the mobilization advance but only the claim of escalation of steel price was available for a short duration of 31/2 months from the date of receipt of the mobilization advance. The terms of contract between the parties unswervingly restricted the respondent No. 1 from claiming escalation of steel price beyond the period aforesaid, the obvious reason being the 20% advance amount paid by the appellant to enable the respondent No. 1 to procure the required steel, if they so desired. However, there was no compulsion to purchase the required steel plates for fabricating the Vessel within any specified period of time. Neither there was any compulsion in the agreement to use steel for fabrication which was acquired during the procurement period of 31/2 months; nor there was any restriction to use steel plates from the existing available stock, if any, maintained by the respondent No. 1. If any purchase or procurement of steel for fabrication of the Vessels, was made by the respondent No. 1 beyond the period of 31/2 months from the date of receipt of the interest free 20% mobilization advance at the existing market rate to complete the task, the appellant would not have been liable to pay such escalated price.

20. It is pertinent to mention here that admittedly prior to initiation of arbitration proceedings, the appellant, on its own, acting bona fide on the proposal made by the respondent No. 1 in respect of the price escalation clause requested for production of copies of the paid invoices showing the expenses incurred by them due to escalation of price. However, the respondent No. 1 forwarded the price list(s) issued by SAIL (Steel Authority of India Ltd.) during the relevant period in question in support of its claim for price escalation. Learned Counsel for the appellant submitted that on making identical enquiry with the SAIL, the appellant was supplied a different price list for the relevant period, which created a state of confusion, instead of resolving it.

21. Mr. K.N. Choudhury, Learned Senior Counsel for the appellant submitted that approval of the award of the arbitrator would enable the respondent No. 1 to illegally reap the benefit of price escalation without production of paid invoice of procurement of steel, which is against the law and would be against the public

policy of India. If the Arbitral Tribunal did not follow the mandatory procedure prescribed under the Act, it would mean that it had acted beyond its jurisdiction and thereby the award would be patently illegal and, thus, liable to be set aside.

22. Mr. Choudhury, Learned Sr. Counsel laying emphasis on the meaning of the phrase, "Public Policy of India" relied on the decisions of the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., to establish that the arbitral award is against the public policy of India. The relevant extract of the decision aforesaid reads as under:

15. The result is - 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 u/s 34. However, such failure of procedure should be patent affecting the rights of the parties.

What meaning could be assigned to the phrase "Public Policy of India?"

16. The next clause which requires interpretation is Clause (if) of Sub-section (2) (b) of Section 34 which inter alia provides that the court may set aside the arbitral award if it is in conflict with the "public policy of India". The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and constitutional provisions....

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 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.

23. Mr. Choudhury Learned Senior Counsel for the appellant has pointed out that the findings and award given by the Arbitrator is against the public policy of India and as such the finding has to be regarded as a perverse finding of fact. In support of his contention, the Learned Counsel has relied on the decision of the Apex Court in Security Printing and Minting Corporation of India Ltd. v. Gandhi Industrial Corporation (2007) 13 SCC 236, wherein the Hon"ble Supreme Court held that what is binding is the completed contract and not the terms of offer of the advertisement. Whatever may be the offer in the advertisement, once the completed contract has come into existence, what is binding is the terms of the contract and not the terms in the offer of advertisement. It is true that normally the courts are very slow in interfering with the finding and interpretation given by the arbitrator. So far as the principle of law is concerned, there are no two opinions and it has to be accepted. But the fact remains that if any perverse order is passed, then the courts are not powerless to interfere with the matter. As pointed out above, once the concluded contract has come into existence, then in that case the offer of advertisement cannot override the terms and conditions of the completed contract.

24. The Apex Court in its later judgments has reiterated the same view as aforesaid on the interpretation of "Public Policy of India" and we do not wish to burden the judgment by referring to the same. The objectives of the law propounded by the Apex Court binds us. However, the basic fact, which underlines the scope of interference of the court in such matters, i.e., whether the award is against the public policy of India, needs determination.

25. Learned Counsel, further, submits that successive letters issued by the SAIL as regards price of steel corresponding to the procurement period only multiplied the confusion which ultimately triggered rejection of all such documents submitted by the respondent No. 1. However, the appellant agreed to consider the price escalation if paid invoices were produced in proof of procurement of steel. In view of the existing confusing situation as stated above the decision rendered by the Arbitrator would have substantial bearing on the issues under consideration in this appeal. Therefore, it would be pertinent to scrutinize the arbitral award, where all such issues have been analyzed and discussed. The relevant extract of the award of the Arbitrator in respect of the price escalation in question is given below:

(iv) The price escalation will be calculated with reference to the price prevailing on the date of quotation.

The basic dates as referred to in the above price escalation clause for this

particular case are as below:

(a) Date of quotation: (a) 16.6.1990

(b) Date of purchase order: (b) 6.2.1991

(c) Date of payment of 20% advance @ 10.2.1991 (d) Validity of escalation Clause (d) up to 25.5.1991. From the above information, it can be concluded without any reservation or ambiguity that -

(i) The basic prices of steel shall be based on the declared prices of steel by the Government/JPC. In this particular case both the claimant and the respondent collected price of steel from M/s. Steel Authority of India, a Government of India Undertaking dealing exclusively with production and sale of steel throughout India.

(ii) The price increase under the price escalation clause of the relevant purchase order is exclusively dependent only on price increase/decreases affected by Government/JPC and not on any other period.

(iii) The price escalation shall be available only for a limited period 31/2 months from the date of payment of 20% advance.

(iv) It is obligatory on the part of the BRPL (Respondent) to pay escalated cost of the vessel in view of rise in price of the steel based on prices of steel determined by the Government/Joint Plant Committee from time to time within the period up to 25.5.1991 (31/2 months period).

(v) There is no other requirement in the purchase order which are to be fulfilled for claiming the escalation amount by the claimant.

26. To look at it closely, we may go to the terms of the price escalation clause agreed to between the parties once again. In the price escalation clause there is no express agreement between the parties to produce paid invoices in order to claim price escalation. It is specifically indicated that escalation shall be dependent upon major increase in steel price as affected by Government/JPC. Therefore, there is no reason to insist on production of paid invoices of the steel procured by the respondent No. 1 as because, even if all such paid invoices would have been produced, such invoices would not have been acceptable in terms of the agreement without specifics in respect of increase in price of steel materials as affected by Government/JPC during the period of 31/2 months. Therefore, in any view of the matter, in order to find out increase in steel price during the specified period of 31/2 months, production of approved price list of steel materials showing price escalation as affected by Government/ JPC, would have been necessary. The Arbitrator also adopted the same yardstick to determine the price escalation and based his findings on production of approved price list of steel materials, as affected by Government/JPC.

27. In this context it would not be out of place to clarify that it would not be prudent on the part of this Court to look into the minute details in respect of the

varieties of steel plates that may have been used by the respondent No. 1 in fabricating the Vessels. There is petite scope to insist on actual procurement price to rule out such an anomaly. In fact such kind of examination is best left to the Arbitrator for decision.

28. The Learned Counsel for the respondent No. 1 has further emphasized on the fact that the respondent No. 1 did not claim escalation in cost of steel materials beyond the period agreed to between the parties and further pointed out that in terms of the agreement between the parties, which was ratified later on, there was no requirement of production of paid invoices or proof of procurement within the specified duration of the time for which escalation has been claimed. It is further pointed out that the claim has been made on the basis of the actual purchase made by the respondent No. 1 in terms of the agreement.

29. Though the appellant insisted on production of paid invoices of the steel during the interim period of 31/2 months, however, the terms of contract, ex-facie, did not stipulate production of any such paid invoices or any other document to substantiate the claim; In such a situation normally when price escalation is claimed without paid invoices or proof of procurement, the apprehension of the appellant would be whether the respondent No. 1 in fact procured the steel long before price escalation and, thus, may have tried to gain profit illegally on the basis of the price escalation clause without, in fact, incurring any loss in procurement of steel. But, it may also have been possible that the respondent No. 1 had available stock or procured the required steel beyond the interim period of three and half months from the date of receipt of 20% mobilization advance and, thus, incurred loss. In any case admittedly the price of steel required for manufacturing SO2 Vessel was not static during interim period of 31/2 months as aforesaid.

30. Appellant admitted that there was confusing indication regarding the price escalation and the report received by them from SAIL (Steel Authority of India), in respect of the prevailing rates of steel during the procurement period indicated above. The arbitrator on his part analyzed all the documents submitted by the appellant as well as by the respondent No. 1 to come to the findings recorded. The arbitrator also analyzed the increase in steel price, within the period specified, on the basis of the documents made available by the parties. The duration of price escalation vis-a-vis of escalated amount was calculated by the arbitrator in terms of the agreement. In fact, after holding the requirement of production of paid invoice a redundant exercise for assessing the steel price it is not necessary for us to minutely examine and analyze the wisdom of the arbitrator in coming to a conclusion in respect of the extent of escalation of price of steel during the interim period. This is a matter on which the finding of the arbitrator must be understood by the court to be final or conclusive.

31. Mr. Choudhury, Learned Senior Counsel has also pointed out that the terms of the contract between the parties can be looked into only to ascertain whether there was agreement for consideration of the price escalation clause. The

contractor cannot be allowed to derive benefit of price escalation clause without proof of procurement of materials during the period agreed to between the parties.

32. Hon''ble Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement, if words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention differently from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law, which prevents them from setting up that term. Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. In the present case parties expressly agreed that "for every 1% increase of price of steel materials as affected by Government/JPC, you will be paid extra 0.75% of Basic value of Purchase" if the words are clear, there is very little the court can do about it and there is no scope to interpret that the respondent No. 1 had indirectly agreed to submit paid invoices to claim escalation of the price of steel.

33. Learned Counsel for the respondent No. 1 submitted that in interpreting any clause in the agreement, if two views are possible, then the view approved by the arbitrator will have to be accepted by the court if such a view is not perverse. In support of his contention Learned Counsel referred to a decision delivered by Hon''ble Supreme Court in Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., which reads as follows:

17. We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that courts shall not ordinarily substitute their interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the courts to set things right. In the present case, the aforesaid clauses reproduced above, clearly lay down that all taxes, duties and levies have to be borne by the contracting party.

34. Learned Counsel emphasized on the uncertainty of the puzzling price list, for the relevant period as furnished by SAIL. Be that as it may, however, it would not be prudent on the part of this Court to believe that the price list indicating escalation of value of steel would not be reliable; this Court would not be persuaded to insist of paid invoices only on this count particularly when the appointed arbitrator has given into the details of the matter and has recorded a

conclusion.

35. In view of the above discussion after having given attentive consideration of the issues, in our opinion, there cannot be any reason to insist on paid vouchers to assess escalated price when the terms of completed contract do not spell out such a requirement. The procurement time of steel was not restricted to 31/2 months from the date of receipt of the mobilization advance; only the claim of escalation of steel price was available for a short duration of 31/2 months from the date of receipt of the mobilization advance. The award so given by the sole arbitrator, in the above facts and circumstances is neither perverse nor it offends the public policy of India. Therefore, the point of view postulated by Mr. Choudhury, Learned Senior Counsel, in our considered view, is not acceptable.

36. Mr. Choudhury, Learned Counsel, further, submitted that the Arbitrator erroneously fixed the date of supply of vessel to be 2.7.1993 and, thus, awarded refund of liquidated damages deducted by the appellant for delayed delivery of the Vessels. Mr. Choudhury, Learned Counsel for the appellant submitted that although respondent No. 1 was under a contractual obligation to complete the delivery of the two Vessels on or before 18.7.1992, they failed to do so without any valid reasons.

37. In terms of the order dated 6.2.1991, the respondent No. 1 was supposed to design the Vessels and the said design and drawing of the Vessel in question was required to be approved by the CCE, Nagpur. The approval of the drawings of the two Vessels was received from the CCE, Nagpur by the respondent No. 1 on 21.12.1991. Thus, appellant's Counsel submits that as per the agreed terms in respect period of delivery, the respondent No. 1 was under contractual obligation to deliver the Vessels within 7 (seven) months from 21.12.1991, i.e., on or before 18.7.1992.

38. Learned Counsel for the appellant contended that the respondent No. 1 supplied Vessels long after the date extended for delivery of the items and no reason whatsoever had been indicated in such communication received by the appellant. Therefore, for delayed supply of the Vessels, the respondent No. 1, in terms of the contract, was liable to pay liquidated damages. In calculating liquidated damages for delay in supply of the Vessels, as mentioned in the purchase order, from the date of receipt of approved drawing of the CCE followed by third party inspection is required to be taken into consideration. The respondent took the plea that delayed supply of the Vessels was due to additional supply order made by the appellant, i.e., for supply of platform cleats. However, Learned Counsel for the appellant refuted such stand on the ground that the supply of platform cleats was not required to be processed for approval through CCE.

39. Showing the reasons for delayed supply of the Vessels, Learned Counsel for the respondent No. 1 has further submitted that due to additional supply order for platform cleats made by the appellant belatedly, the supply of the Vessels

was delayed. However, for such delayed supply liquidated damage has been levied against the respondent No. 1. Learned Counsel further pointed out that extension of supply date was made on 18.9.1991. On 27.7.1992, a request was made by the appellant to supply platform cleats which were essential for the purpose of extended feature of the Vessels under fabrication in the workshop of the respondent, which reads as follows:

To M/s. Buildworh 27.7.1992 Guwahati. Kindly arrange to provide clots for platform as per drawing submitted in Sv2 Vessels under fabrication in your work sheet. These cleats should be extended feature of the vessel which otherwise would have been carried out at site as such shall not come under the provisions of CCE. This clarification may be provided to (Illegible). Additional cost for the clots may be asked from BRPL. If required CCE approval may please be obtained for this also.

Copp: Guwahati.

Sd/- (Illegible)

40. It is not disputed that platform cleats is an accessory essential for fitting and fixing of the SO₂ Vessel in question. Therefore, the order placed by the appellants for supply of platform cleats which is an integral component for the SO₂ Vessels has to be considered to be extension of the supply order of the Vessels. If supply of platform cleats was a separate transaction beyond the ambit of the contract for supply of "Vessels" ordered before, another tender/expression of interest should have been floated by the appellant which was not done by the appellant.

41. On careful analysis of the factual position, it transpires that the delay in delivery of the Vessels occurred mainly due to delay in approving the drawing of the Vessels by the appellant authority as well as CCE and third party inspection. In terms of the purchase order dated 6.2.1991, the respondent No. 1 had to supply the two Vessels within the stipulated delivery time mentioned in the Purchase Order, i.e., 7 months from the date of order, i.e., by 16.9.1991 subject to the following conditions:

(i) The delivery period of the Vessels shall be reckoned from the date of receipt of approved drawing from the Chief Controller of Explosive, Nagpur.

(ii) On condition of inspection of fabrication work by a third party Inspection Agency nominated by the appellant at the workshop of the respondent No. 1 at every stage of the construction.

(iii) The owner shall furnish drawing based on their requirement to the supplier.

(iv) The supplier shall prepare the required fabrication drawing and forward to the owner for its concurrence.

(v) On receiving the drawing from owner with required corrections, modifications, etc., and resubmit it to the owner for approval.

(vi) After approval as above, the design/drawing shall be sent to third party inspecting authority for scrutiny and approval.

(vii) On approval of the third party inspecting authority, the same will be sent to CCE for approval.

(viii) The CCE may approve the drawing or may return it with their comment for resubmission.

42. For the purpose of supply of platform cleats, approval of the appellant was given on 1.12.1992 and on 18.12.1992 approval was given by the CCE in respect of the platform cleats and the first vessel was supplied by the respondent No. 1 on 16.11.1992. Though the 1st vessel was supplied before the approval of CCE in respect of platform cleats, the respondent No. 1 could not have skipped the approval in any case. As because, although CCE's approval was not made mandatory for platform cleats, but the language pressed into service by the appellant, instead of easing the issue of requirement of CCE's approval, left it entirely for the respondent No. 1 to fend for itself to resolve the issue. This ultimately did not enable the respondent No. 1 to skip the required approval and inspection, and the respondent No. 1 had to religiously follow it up to complete the process of CCE's approval. In view of the supply order for platform cleats, with the approval, etc., the due date of delivery automatically got extended up to 2.7.1993, i.e., seven months from the date of receipt of the approved drawing. Therefore, in view of the above as submitted by the Learned Counsel for the respondent No. 1 there was no delay in supply of the Vessels alleged by the appellant.

43. The aforesaid process took a considerable time for obtaining the required approval of the design/drawing of the Vessels. As reflected by the Arbitrator, in his report, admittedly final inspection of the fabricated Vessels with platform cleats was conducted by the third party Inspection Agency only on 5.11.1992 and the respondent No. 1 supplied first vessel to the appellant on 16.11.1992 after completing painting and finishing, etc. The final inspection and test on the second vessel was conducted by the third party Inspection Agency only on 24.12.1992 and the claimant supplied second vessel to the appellant on 4.1.1993 after completing painting and finishing.

44. From the above discussion, it transpires that apparently there is no negligence on the part of the respondent in completing their assigned job in terms of the contract. Though apparently, CCE's approval of platform cleats was not made mandatory (that such approval was obtained), but third party inspection was made, compulsory. Again for the second vessel, admittedly third party inspection was completed only on 24.12.1992 by the appellant and the vessel was delivered on 4.1.1993 after painting and finishing.

45. In terms of the contract, to charge liquidated damages for delayed supply of the items, there has to be positive proof of delay or failure on the part of the supplier to supply the items in time as per the contract. Thus, in assessing the

delay in execution of contract, if the appellant had a positive and assigned duty to perform in terms of the agreement to enable the respondent No. 1 to complete the execution of contract, such period taken/utilized by the appellant in executing its own part of the contract cannot be ignored in calculating the delay in execution of the contract. Therefore, the appellant cannot be expected to turn around to put the blame of breach of contract for delayed supply of the Vessels by failing to discharge his own part of contract. In the present case apparently though time was the essence of the contract but the appellant did not ensure timely completion of its duties under the contract. Therefore, it would not be fair to put the blame for the delay upon the respondent No. 1 in the facts and circumstances of the case. Thus, from the above analysis, it transpires that the finding recorded by the arbitrator is not perverse or beyond the terms of the contract signed between the parties.

46. In this context a decision of the hon"ble Supreme Court in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, appropriately answers the issue by holding that unless there is a total perversity, a court may not set aside an award by appreciating the evidence on record, and, where two views are possible on a question of law as well, the court would not be justified in interfering with the award. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.

47. After having considered all the areas agitated by the Learned Counsel for the appellant as well the respondent No. 1, we are of considered view that the award is neither perverse no it is against the public policy of India.

48. In view of the above discussion, we are of the opinion that this appeal does not merit consideration and accordingly it is dismissed. However, in the facts and circumstances of the case, we pass no order as to costs.