

(2011) 08 DEL CK 0426

In the Delhi High Court

Case No : O.M.P. 108 of 2008 and I.A. No. 11533 of 2011

M.S.T.C. Limited

APPELLANT

Vs

Jain Traders and Others

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 28(2), 34

Citation : (2011) 7 AD 104 : (2011) 4 ARBLR 219 : (2011) 4 CompLJ 387 :
(2011) 125 DRJ 435

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Sonia Arora, in O.M.P. 108/2008 and I.A. No. 11533/2011 and Pradeep Misra and Daleep Kumar Dhayani, in O.M.P. 363/2008, for the Appellant; Pradeep Misra and Daleep Kumar Dhayani for the Respondent No. 2 in O.M.P. 108/2008 and I.A. No. 11533/2011 and Sonia Arora, for the Respondent No. 2 in O.M.P. 363/2008, for the Respondent

Final Decision : Allowed

Judgement

Vipin Sanghi, J.—The present petitions, filed u/s 34 of the Arbitration and Conciliation Act, 1996 (the Act) assail the award dated 8th January, 2008 passed by the learned Sole Arbitrator Shri H.C. Gupta. O.M.P. No. 108/2008 has been filed by MSTC Ltd., whose services were engaged by U.P. Rajya Vidyut Utpadan Nigam Ltd. - the owner of the scrap, to sell the same. O.M.P. No. 363/2008 has been preferred by U.P. Rajya Vidyut Utpadan Nigam Ltd. Both these Petitioners were party Respondents in the arbitral proceedings. By the impugned award, the Id. Arbitrator has partially allowed the claim of the Respondent to the tune of Rs. 4,40,408/- and has granted pendente lite interest @ 12% per annum from 10th March, 2006 till the date of the award and also future interest @ 12% per annum till the payment.

2. The Petitioner MSTC Ltd. (hereinafter MSTC) had floated tender No. MSTC(D)/T-547/UPRVUNL/03-04 on behalf of U.P. Rajya Vidyut Utpadan Nigam Ltd. The

"lot" of the scrap which was the subject matter of the tender was detailed in the tender as "125 MVA transformer HT/LT damaged coil set, 11/242 KV copper wound, Gross weight of each set of coil 13.5 tons (tentative) including insulation". The "lot" was to be sold on "as is where is" basis. The tender was to open on 19th March, 2004 and inspection was allowed from 04.03.2004 to 18.03.2004. The tenderness were required to submit a certificate along with their bid, declaring that the materials have been inspected and they are satisfied with the materials" condition.

3. The Respondent, in response to the tender, submitted its bid and was declared the highest and successful bidder. In terms of the tender, Respondent deposited the first installment and pursuant to that they collected the first coil from Aligarh on 19th August, 2004. The Respondent thereafter raised a dispute about the weight of the coil, by claiming that the weight of the coil was 9.46 tonnes, as opposed to 13.5 tonnes stated in the tender. The Respondent requested the Petitioner to reduce the price of the coil which had been delivered and also to ensure that remaining coils were of the tentative weight. As the Petitioners did not agree with the Respondent, the Respondent invoked the arbitration clause on 02.03.2005. Since the appointing authority failed to appoint the Arbitrator, Respondent moved this Court u/s 11 of the Act and same was allowed on 10.03.2006 with the appointment of the Arbitrator.

4. The main contention of the Respondent before the Arbitrator to sustain its claim was that weight was an essential component in pricing and the shortfall of almost 4.40 tonnes i.e. approx. 33% was quite substantial. The bidder could not have ascertained the weight of such a heavy coil, as there was No. provision or facility provided for the same. Respondent admitted that it had inspected the material but at the same time it submitted that it was not possible to judge the exact or approximate weight of the same with the naked eye.

5. The Petitioners opposed the above contention and relied heavily on Clause 5 of General Terms and Conditions of the tender to submit that the goods were sold on "lot" basis and not on unit, number, quantity basis; the weight is purely indicative, and; the owner was not to be liable for any complaint from buyer for any deficiency in quantity, quality, size etc.

6. The learned Arbitrator rejected the defense of the Petitioners and awarded the Respondent's claim. The reasoning of the tribunal for allowing the said claim reads as follows:

May be as it is, it is extremely difficult for me to persuade myself to agree to the submissions made by the Respondents that the actual weight, which is less by one-third of the tentative weight as mentioned in the tender document is not to be considered at all while deciding the issue. Had the difference between the tentative weight mentioned in the tender notice and the actual weight of the coil been marginal, say +10%, things would have been different. However, the actual weight is almost 33% less than the tentative weight. In this view of the matter,

the weight of the coil assumes significance and would be a relevant factor. The coil is sold as the scrap and the claimant, who is the scrap dealer, has to dispose of the same as scrap. Clause 5.3 has to be given a reasonable interpretation and the claim regarding deficiency in the quantity would only mean that the bidder shall have No. claim if the quantity is little more or less than the tentative quantity. But it does not mean that even when the coil turns out to be far below the tentative weight, the Petitioner shall have No. claim. In view of above I hold that the Respondents have breached the terms and conditions of the contract by supplying the coils which were deficient in weight to the extent of 33%.

7. The submission of the Petitioner MSTC is that the award made by the Id. Arbitrator is patently illegal, as the same is contrary to the express contractual terms. By acting contrary to the contractual terms, the learned Arbitrator has acted beyond his jurisdiction and misconduct himself. It submits that it was the accepted position that scrap was sold by way of "lot" on "as is where is" basis. and the Arbitrator has also found the same. Even after holding that the sale was on "lot" basis, the Arbitrator held that the tentative weight mentioned in the tender document was an essential condition of contract, and Petitioners have breached the contractual conditions as the actual weight was less by 33%. This, according to the Petitioners is contrary to the express conditions of contract.

8. Clause 5 of the General Terms and Conditions of tender, on which reliance is placed, reads as under:

5. QUALITY, QUANTITY and SECURITY of SOLD MATERIAL.

5.1. The goods will be sold on "As is where is" basis in so far as the physical condition of the same is concerned. That is to say, the tendered(s) will be deemed to have made themselves aware of the physical conditions, dimensions, size, weight, working conditions etc. by inspecting the material before submitting their tender and No. complaint/claim in this regard will be entertained by MSTC after the submission of the tender.

5.2. Tenderness may quote for all or any of the lots mentioned in the schedule of Rate(s) but No. quotation for part quantity of material in any particular lots will be accepted. Separate Earnest Money shall be payable for each of the lot quoted for.

5.3. Where goods are sold on "lot" basis and not by unit weight/number basis, the entire material lying in the lot will have to be lifted by the buyer(s) so as to clear the entire lot. The quantity, if indicated in such cases against the respective lots, are purely indicative and MSTC/Owner shall not entertain any claim/complaint from the buyer(s) for any deficiency in quantity/quality/size/dimension or for refund of the whole or any part of the purchase money or loss of profit or interest/damages or otherwise.

5.4. Where the goods are sold by unit i.e. weight or number and not on the basis of "lot", the quantity indicated in such cases against the respective lots are

purely indicative which in actual may turn out, to be more or less than the indicated quantity after duly completion of the lifting by the buyer(s), the buyer(s) shall not be entitled to claim any damages, loss of interest of compensation or any other account, but shall be entitled to proportionate refund only.

5.5 Where there are items or more than one classification of any form in any lot & the tendered quoted in lump sum of the entire lot instead of quoting in units per item, then No. refund of any kind shall be entertained by MSTC/Owners, if the quantity, whatever mentioned in the tender, turns out to be less at the time of delivery. However, if the quantity turns out to be more than the tendered quantity then the delivery of materials shall be limited to tendered quantity only.

5.6 MSTC reserves the right to accept or withdraw from sale the materials offered for sale in full or part thereof prior to or after acceptance of the tender without assigning any reason whatsoever. In such an event the payment, if any, deposited by tendered/purchaser shall be refunded by MSTC/Owner in due course of time without interest, and thereafter No. liability/complaint, whatsoever shall be entertained by MSTC/Owner.

MSTC reserves the right to accept or reject the highest tender without assigning any reason and the contract of any or all the lots may be allotted by MSTC to one or more than one tendered as MSTC may deem fit and No. claim/complaint in this regard will be entertained by MSTC/Owner.

9. Counsel for U.P.R.V. Utpadan Nigam Ltd. (Petitioner in O.M.P. No. 363/2008) submits that Arbitrator has failed to take into account the counter claims raised by the Petitioner and has disallowed the same on the basis of non furnishing of the substantial evidence.

10. Respondent submits that the award in question does not suffer from any illegality and the interpretation given to Clause 5 by the Arbitrator is the plausible interpretation. In support of this submission, learned Counsel places reliance on the order passed in Arb. P. No. 263/2005 on 10.03.2006 by Hon'ble Mr. Justice A.K. Sikri, whereby the Id. Arbitrator was appointed on the Respondent's application preferred u/s 11(6) of the Act.

11. It is submitted that Clause 5.3 of the standard terms states that where sale is by "lot" there will be No. complaint regarding weight of the goods sold. At the same time, the tender specified the weight as 13.5 tons tentatively. Arbitrator has harmonized the two terms so as not to render any term otiose. It is further submitted that the indication of the tentative weight as 13.5 tons constitutes a special term of the contract, and that should prevail over the general terms as provided under General Terms and Conditions. Reliance is placed on M.K. Abraham and Co. Vs. State of Kerala and Another, and M/s Phoenix Cotton Tape Factory v. Union of India ILR 1974 DEL 479.

12. It is submitted by the Respondent that contract being one for scrap, weight

was an essential term and deviation amounting to 33% is substantial. Weight of the coil was an essential factor to be considered while making the bid. Petitioners being government organizations should have acted honestly and true disclosure of the quantity of coil should have been made. It is further submitted that Petitioners had opposed the inspection of the other two coils even during the pendency of the arbitral proceedings. Petitioners have not produced any document to show on what basis it had been claimed in the tender document that the weight of the coil was around 13.50 tons.

13. The issues that arise for consideration are whether the Id. Arbitrator has acted contrary to the contractual terms, and; whether the view of the Arbitrator is a plausible view in the facts of this case.

14. The reasons of the tribunal for making its award on the merits of the claim have been set out hereinabove. The fundamental premise on which the award is founded is that the weight of the coil was an essential term and although variation up to 10% of tentative weight would have been acceptable, but deficiency of 33% would amount to breach of the contract by the Petitioners.

15. The aforesaid fundamental premise of the tribunal is completely flawed and patently incorrect. It is not in dispute that the tender stipulated the weight of coils as "tentative", and that the coils were sold in a "lot" on "as is where is" basis. The tender specifically stipulates that "...the tendered(s) will be deemed to have made themselves aware of the physical conditions, dimensions, size, weight, working conditions etc. by inspecting the material before submitting their tender and No. complaints/claim in this regard will be entertained by the MSTC after the submission of the tender.

(emphasis supplied)

16. Clause 5 of the General Terms & Conditions shows that all sales of goods made by MSTC are on "as is where is" basis in so far as physical conditions are concerned. This is to say that the tenderness are deemed to have made themselves aware of the physical conditions namely the dimensions, size, weight, working conditions, etc. by inspecting the material before submitting their tender. No. complaint/claim in this regard is entertained by MSTC after the submission of the tender.

17. Clauses 5.3 & 5.4 deal with different kinds of sale. Whereas Clause 5.3 deals with sale made on "lot" basis and not by unit/weight/number basis, Clause 5.4 deals with goods sale on unit, i.e., weight or number, and not on the basis of "lot". When the goods are sold on "lot" basis the entire material lying in the lot has to be lifted by the buyer so as to clear the entire "lot". This means that the buyer cannot pick & choose some items constituting the "lot" and leave the rest. Clause 5.3 specifically provides that "the quantity, if indicated in such cases against the respective lots, are purely indicative and MSTC/owner shall not entertain any claim/complaint from the buyer(s) for any deficiency in quantity/quality/size/dimension or for refund of the whole or any part of the purchase

money or loss of profit or interest/damages or otherwise". Therefore, it emerges that firstly, the quantity indicated in a sale on "lot" basis is purely "indicative" and, secondly, the buyer is put to prior notice that No. claim on account of deficiency, inter alia, in quantity shall be entertained and No. claim for refund on account of loss of profit/damages will be entertained. In contradistinction to this, when the goods are sold by unit, i.e., by weight or number and not on the basis of "lot", the situation is remarkably different. In that situation, if the quantity is found to be less, the buyer is not entitled to claim any damages, loss of interest or compensation, "but he shall be entitled to proportionate refund only". Therefore, the concept of proportionate refund is contained in Clause 5.4, i.e., when the goods are sold on unit basis, i.e., by weight or by number, and is specifically excluded in the case of sale on "lot" basis.

18. This distinction has been completely ignored by the learned Arbitrator and he has, on the basis of equitable considerations and his notions of fairness, superimposed the concept of proportionate refund in Clause 5.3, even though the same is specifically excluded from Clause 5.3.

19. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide on the basis of his notions of equity and fairness, particularly in such a manner that it goes contrary to the specific contractual terms. Section 28(2) of the Act provides that "The arbitral tribunal shall decide ex aqua et bono or as amiable compositeur only if the parties have expressly authorized it to do so". (emphasis supplied). The phrase "ex aequo et bono" means "according to equity and conscience" (see Black's Law Dictionary 6th edition). In relation to the expression "Amiables compositors" the Black's Law Dictionary refers to "Amicable commoners" and states that "amicable commoners are arbitrators authorized to abate something of the strictness of the law in favour of natural equity". The parties in this case have not agreed that the Arbitrator may decide as an amiable compositeur or on the basis of "justice and fairness". Therefore, the learned Arbitrator could not have disregarded the plain and grammatical meaning of Clauses 5.3 and 5.4 of the General Conditions of Contract to give way to his own sense of equity, fairness or justice. Reference in this regard may also be made to the decision in Food Corporation of India Vs. Chandu Construction and Another, where the Supreme Court in this decision held as follows:

11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see Associated Engineering Co. Vs. Government of Andhra Pradesh and another, and

Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another,

12. In this context, a reference can usefully be made to the observations of this Court in *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, this Court had observed that where there is an express term, the court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, it was emphasized that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In *Bharat Coking Coal Ltd. Vs. Annapurna Construction*, while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: (SCC pp. 161-62, para 22)

22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has No. power apart from what the parties have given him under the contract. If he has traveled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another,

20. After examining the contractual terms, the Supreme Court further observed as follows:

19. ...It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was

not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. Claimants' claim had to be adjudicated by the specific terms of their agreement with the FCI and No. other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has out-stepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconduct himself. Hence, the award made by the arbitration in respect of claim No. 9, on the face of it, is beyond his jurisdiction; is illegal and needs being set aside.

21. If the reasoning of the learned Arbitrator were to be accepted, there would be No. sacrosance remaining in the specific and express contractual provisions, inter alia, contained in Clause 5.1 and 5.3 of the General Terms & Conditions.

22. The submission of the Respondent that in the tender document the tentative weight of the "lot" had been mentioned and that the same constituted the special condition, is completely without substance. Clause 5.3, which deals with the sale of goods on "lot" basis, itself provides that the mention of the weight would be only indicative and that, by itself, would not entitle the buyer to either claim refund or damages even if the goods turn out to be deficient in quantity/quality/size/dimension. Therefore, the indication of the tentative weight does not take the case out of Clause 5.3 of the General Terms & Conditions, and it cannot be said that the indication of weight in the tender is a special condition. Clause 5.3 itself postulates the inclusion of the tentative weight in the tender for sale by "lot". The two decisions relied upon by the Respondent are not applicable in this case for this reason.

23. The mention of the gross weight of each set of coil including insulation as 13.5 tonnes was only tentative and indicative and not much could have been read into it. These sales of scrap, which are conducted by MSTC, do not attract laymen from the street. The bidders invariably are experienced scrap dealers well-versed in their trade who have the expertise to assess the worth of the "lot" that they bid for. Even if, eventually a particular "lot" turns out to be a losing proposition on account of deficiency of quantity/quality/size/dimension, that is No. ground to permit the raising of a claim contrary to the contractual terms, as the bidders participate and bid in the tender process with open eyes. The Petitioners do not guarantee to the successful bidder that the "lot" awarded to him would always be a profitable proposition and the losses, if any, would be to the Petitioners account. The view taken by the learned Arbitrator if allowed to prevail would completely undermine all sales undertaken by the Petitioner-MSTC

on "lot" basis.

24. There is yet another aspect which has not been considered by the learned Arbitrator. The sale was made on "lot" basis of 3 sets of 125 MVA Transformers HT/LT Damaged Coil Sets, 11/242 KV Copper Bound. The Respondent was obliged to pay for and remove all the three sets and could not have picked & chosen one set and raised the claim. Who knows, if the Respondent had taken the entire "lot" as per his contract, he may have been compensated for the alleged loss suffered in the set collected by him, by the weight of the coil in the other two sets. In fact, by not lifting the entire "lot" consisting of three sets it is the Respondent who breached the agreement, and not the Petitioners.

25. The Respondent was made aware of all the conditions and they being prudent businessmen entered into the contract with open eyes. Respondent could not at a later stage plead that they were not aware of the actual weight of the "lot".

26. The learned Arbitrator has completely overlooked and ignored the well-settled principle of Caveat Emptor which was squarely applicable to the transaction in question. The Respondent was told that the material is being offered on "as is where is" basis and he was also required to submit a certificate along with his bid declaring that the material has been inspected and that he is satisfied with the materials condition. He was also aware of Clause 5 and, in particular, Clause 5.3 of the General Terms & Conditions of tender. The Petitioners were shouting from the roof top to tell all bidders that they must bid with open eyes and after satisfying themselves about the quantity/quality/size/dimension of the goods constituting the "lot", and that No. claim of any kind due to deficiency in quantity/quality/size/dimension shall be entertained later for raising a claim of refund or damages.

27. "Caveat Emptor qui ignorat debuit quod jus alienum emit" means "let the purchaser beware who ought not to be ignorant that he is purchasing the rights of another." The purchaser is generally bound to view the land and to enquire after and inspect the title deeds; at his peril if he does not. It is one of the settled maxims, applying to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased, which is obvious, or which might have been known by proper diligence. Caveat emptor does not mean either in law, or in Latin, that the buyer must take chances. It means that the buyer must take care." "Caveat emptor" is the ordinary rule in contract. A vendor is under No. duty to communicate the existence, even of latent defects in his wares unless by act or implication he represents such defects not to exist." [See William R. Anson, Principles of the Law of Contract 245 (Arthur L. Corbin Ed.3d. Am. ed.1919)]. Upon a sale of goods the general rule with regard to the nature or quality of goods is caveat emptor, so that in the absence of fraud, the buyer has No. remedy against the seller for any defect in the goods not covered by some condition or warranty, expressed or implied. It is beyond all doubt that, by the general rules of law there is No. warranty of quality arising

from the bare contract of sale of goods, and that where there has been No. fraud, a buyer who has not obtained an express warranty, takes all risk of defect in the goods, unless there are circumstances beyond the mere fact of sale from which a warranty may be implied. No. one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller. (See Commr. of Customs (Preventive) Vs. Aafloat Textiles (I) Pvt. Ltd. and Others,

28. In the present case, the Respondent buyer was given an opportunity to inspect the goods. They being prudent and experienced men of trade, should have taken all due care to inspect the same and to find any defect whatsoever. Seller MSTC did not provide any warranty as to weight since quoted weight was only tentative and contract specifically stipulated that No. future claims would be entertained as to weight of the goods. In such circumstances, the Respondent cannot plead breach of the contract by the Petitioners.

29. The second issue that requires consideration is whether the view of the learned Arbitrator is a plausible view, as it is contended by the Respondent that if two views are possible, and the Arbitrator has taken one of those two views, the court has No. jurisdiction to interfere with the award. It is argued that when the order u/s 11(6) of the Act was passed in Arbitration Petition No. 263/2005 and OMP No. 443/2005 on 10.03.2006 by Hon''ble Mr. Justice A.K. Sikri, in his order he had himself indicated the same view, as has been eventually adopted by the learned Arbitrator, as a plausible view. It is argued that the petition u/s 11 preferred by the Respondent had been opposed by the Petitioners on the ground that the contractual terms are clear and do not admit of any ambiguity. Therefore, there is No. claim or dispute that the Respondent could raise. The court, in the light of the Supreme Court decision in M/s SBP Company Ltd. v. Patel Engineering Ltd. JT 2005 (9) SC 291 went into the question whether a dispute existed between the parties or not. The court accepted the Respondent's submission that a dispute existed. In doing so, the court appreciated the Respondent's submission that thought the weight was stated to be "tentative", variation could not be to the extent of 33% as the parties were expected to act honestly and the Petitioners, who are public undertakings, could not mention such a weight which was much below the actual weight. After extracting from the decision of the Supreme Court in SBP & Company (supra), Hon''ble Mr. Justice A.K. Sikri on the aforesaid order observed as follows:

12. In view of the aforesaid observations of the Supreme Court, in these proceedings it is necessary to decide the jurisdictional aspects. It is not in dispute that there is a valid and existing arbitration agreement between the parties. What is disputed is that there are No. "live and subsisting disputes" and nothing to be arbitrated upon. I proceed to examine this aspect.

13. No. doubt, the Petitioner had admitted that it had inspected the material before submitting the bid. It is also not in doubt that the gross weight of each set of coil, which is mentioned as 13.5 tons, is tentative. It is also an admitted

position that the material was offered on "as and where" basis. At the same time it cannot be disputed that inspection of the material with naked eyes would not enable the bidder to weigh a particular coil of this magnitude.

14. Had the difference between the tentative weight mentioned in the tender notice and the actual weight of the coil been marginal, say even 10% ?, things would have been different. However, the actual weight found is almost 33% less than the tentative weight. It is also to be borne in mind that the coil is sold as a scrap and the Petitioner who is a scrap dealer has to dispose of the same as scrap. Therefore, weight of the coil assumes importance and would be a relevant factor.

15. In the aforesaid perspective, contention of the Petitioner is that even the Petitioner was allowed inspection; weight mentioned is tentative and the scrap is sold as "as and where" basis, there is a dispute, as according to the Petitioner, the actual weight cannot be wide off the mark. The contention of the Respondents, on the other hand, is that once the coils are sold on "as is where is" basis and the weight mentioned was only tentative and further since general terms and conditions of the tender clearly provided that No. claim on the basis of weight would be entertained, the dispute raised by the Petitioner has No. merit. However, that would be an aspect which will be considered by the arbitrator ultimately. The Respondent No. 1 has itself, on an earlier occasion, accepted the existence of the dispute. It is clear from the reply dated 8th June 2005 of the Respondent No. 1 sent through its counsel to the Petitioner's legal notice. This reply is filed with the petition as Annexure-15 and paras 2 and 4 of the said reply are as under:

2. That the contention of your client regarding less weight of scrap material is baseless and illegal my client had already explained every thing in this regard in detail in earlier communication. However, my client is well ready to co-operate the Arbitration proceedings to be held before the sole Arbitrator i.e. Chief Managing Director of U.P.R.V.U. Nigam Ltd.

3. xxx

4. That it is also mentioned here that the venue for the Arbitration shall be decided by the sole Arbitration hence contention of your client that for Arbitration shall be at Delhi is wrong and baseless.

16. While maintaining its stand the Respondent No. 1 at that stage showed its willingness to cooperate the arbitration proceedings to be held before the sole arbitrator, i.e. the Chief Managing Director of the Respondent No. 1. Thereafter notice dated 13th June 2005 was sent to the Chairman of the Respondent No. 1 requesting him to enter upon reference and issue necessary directions to the parties.

17. Thus, it cannot be said that there are No. disputes between the parties. The contention of the Petitioner that the actual weight found is quite off the mark and

almost 1/3rd less than the tentative weight needs to be considered. Case of the Petitioner is that Clause 5.3 has to be given reasonable interpretation and the claim regarding deficiency in quantity would only mean that if quantity is little more or less than the tentative quantity, the bidder shall have No. claim. But it would not mean that even when the coil turns out to be far below the tentative weight, the Petitioner shall have No. claim. Whether the Petitioner is right in his submission or not is for the arbitrator to decide by giving appropriate interpretation to Clause 5 having regard to the facts of the case. In so far as this Court is concerned, it is clear that there are disputes between the parties which are subsisting.

30. In the impugned award, the learned Arbitrator has verbatim lifted para 14 of the order passed by Hon''ble Mr. Justice A.K. Sikri. The question is - can it be said that the observations made by Hon''ble Mr. Justice A.K. Sikri contains a plausible view? To my understanding, the answer has to be a plain "No".

31. It is settled position in law that the learned Judge while deciding a petition u/s 11 of the Act sits as a designate of Chief Justice. The scope of the proceedings before the Chief Justice or his designate is limited, and issues that can be adjudicated by him are also limited, as laid down by supreme court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., in the following manner.

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal u/s 11, the duty of the Chief Justice or his designate is defined in SBP & Company This Court identified and segregated the preliminary issues that may arise for consideration in an application u/s 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration Clause (as for example, a matter which is reserved for final decision of a departmental authority and accepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in SBP & Company that in regard to issues falling under the second category, if raised in any application u/s 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.

32. The observations of Hon"ble Mr. Justice A.K. Sikri, as quoted above, have to be read and understood in the light of the aforesaid judgment of the Supreme Court in Boghara Polyfab (supra). A perusal of para 15 from the extract of the order of Hon"ble Mr. Justice A.K. Sikri shows that what had been recorded in paras 13 & 14 was a mere elaboration of the Respondent's submission that a dispute under the agreement exists, as according to the Petitioner, the actual weight could not be wide of the mark. After recording the submissions of both the parties, Hon"ble Mr. Justice A.K. Sikri held that these aspects will have to be considered by the Arbitrator ultimately. In para 17, the learned Judge observed "Thus, it cannot be said that there are No. disputes between the parties. The contention of the Petitioner that the actual weight found is quite off the mark and almost 1/3rd less than the tentative weight needs to be considered....Whether the Petitioner is right in his submission or not is for the arbitrator to decide by giving appropriate interpretation to Clause 5 having regard to the facts of the case". In so far as this Court is concerned, it is clear that there are disputes between the parties which are subsisting.

33. Even if the submission of the learned Counsel for the Respondent were to be accepted that the order passed by Hon"ble Mr. Justice A.K. Sikri contain his view, the said view cannot be said to be a plausible view as, while rendering the said view, the distinction between clauses 5.3 & 5.4 have not been analysed and appreciated. The scope of the present proceedings u/s 34 of the Act is far wider when compared to the proceedings u/s 11. The aspect of interpretation of the contractual terms, which impinge on the merits of the claim involved in arbitration, certainly cannot constitute an aspect which can finally be determined in proceedings u/s 11 of the Act and would, necessarily, be have to be left to be determined by the Arbitral Tribunal as held by the Supreme Court in Boghara

Polyfab (supra). I am, therefore, of the view that the decision of Hon''ble Mr. Justice A.K. Sikri in Arbitration Petition No. 263/2005 is of No. avail to the Respondent.

34. For all the aforesaid reasons, I am of the view that the award suffers from patent illegality as the learned Arbitrator has acted contrary to the contractual terms and thereby acted without jurisdiction. Accordingly, the impugned award insofar as it allows the Respondents claims and awards costs and interest is set aside. OMP No. 108/2008 is allowed.

35. So far as the objections of the Petitioner - U.P. Rajya Vidyut Utpadan Nigam Ltd. with regard to the dismissal of its counter-claim is concerned, I find No. merit in the objections. The learned Arbitrator has rejected the said counter-claims on the basis that the Petitioner - U.P. Rajya Vidyut Utpadan Nigam Ltd. did not lead any evidence to support their claim. Even before me, the learned Counsel for U.P. Rajya Vidyut Utpadan Nigam Ltd. has candidly admitted that No. evidence was led in support of the said counter-claim. This being the position, in my view, there is No. merit in the objection raised by U.P. Rajya Vidyut Utpadan Nigam Ltd. with regard to the dismissal of its counter-claim.

36. In view of the aforesaid position, the impugned award, insofar as it allows the Respondent's claim stands set aside, leaving the parties to bear their own costs.