
(2004) 02 AP CK 0019
In the Andhra Pradesh High Court
Case No : CMA No. 258 of 2004

National Aluminium Company Limited	APPELLANT
Vs	
GERALD Metals	RESPONDENT

Date of Decision : 03-02-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2004) 2 ALD 196 : (2004) 3 ALT 749 : (2004) 2 ARBLR 382

Hon'ble Judges : Gopala Krishna Tamada, J; Bilal Nazki, J

Bench : Division Bench

Advocate : V.R. Reddy, for C.V. Nagarjuna Reddy, for the Appellant; Abhisek Singhvi, for D.V. Sitharam Murthy, for the Respondent

Judgement

Bilal Nazki, J.—This is an appeal against an order passed by the District Judge, Visakhapatnam u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") in I.A. No. 187 of 2004 in OP No. 21 of 2004 which has been filed by Gerald Metals. This appeal has been filed by National Aluminum Company Limited (for short "NALCO") who was respondent before the Trial Court. The parties shall be referred as they were placed before the Trial Court.

2. There is no dispute between the parties with regard to the facts. All relevant facts are almost admitted. The respondent-NALCO is a producer of Aluminum and the petitioner- Gerald Metals is a company incorporated in Switzerland and carries on business at International level. NALCO entered into a contract with a company called Transworld (Aluminum) Limited on 30-11-1998 for sale of 79,000 Metric Tonnes +/- 5% of Sandy Metallurgical Grade Collimated Alumina. The purchase had to be made in a period of five years from 1999 to 2003. The break up, at which the quantities had to be shipped was spelt out in the contract. The port at Visakhapatnam was identified as a loading port for loading the cargo for transshipment. In between the petitioner i.e., Gerald Metals came into the shoes of the Transworld (Aluminium) Limited and it became a party to the contract in the year 2002. Thereafter a deed of novation was entered into on 5-12-2002.

Among other things by this deed of novation, the petitioner-Gerald Metals agreed to take over the rights and obligations of Transworld (Aluminum) and purchase 2,00,000 Metric Tonnes of Alumina in the year 2003. After this agreement of novation, NALCO began to supply Aluminum at the Port of Visakhapatnam to Gerald Metals. Gerald Metals made payment as agreed. In December, 2003 a load of 33,300 Metric Tonnes was to be shipped. Initially it had been agreed that this quantity of Aluminum would be shipped through a vessel called Arran Traders, but due to some problems with the said vessel, Gerald Metals nominated another vessel called M.V.Federal Pescadores. This was brought to the notice of NALCO by a fax dated 11-12-2003. Ultimately the vessel was not ready and did not reach Visakhapatnam port till 1-1-2004. The original contract period between the parties was of five years and the contract had to be completed by 31-12-2003. When the vessel was available at Visakhapatnama port on 1-1-2004, NALCO refused to load the vessel on the ground that the terms of the agreement have been violated and the contract had come to an end on 31-12-2003. It is in this background that the application u/s 9 of the Act was moved by the petitioner-Gerald Metals before the District Judge, Visakhapatnam who passed the impugned order.

3. Learned Senior Counsel Mr. V.R. Reddy appearing for the appellant/NALCO challenged the order of the District Judge mainly on four grounds. He submits that the District Judge had no jurisdiction to entertain an application u/s 9 of the Act. Secondly he contended that in terms of the agreement there was a stipulation of fixing "lay days" by a mutual agreement and if there were no lay days mutually agreed upon, the vessel could not be loaded. Thirdly he contended that the agreement in any case had come to an end on 31-12-2003 and the NALCO was not obliged to supply 33,300 Metric Tonnes of Aluminum to Gerald Metals after 31-12-2003. Lastly he contended that the relief sought by Gerald Metals before the District Judge was that NALCO should be restrained from moving, transferring alienating or otherwise dealing with the cargo earmarked for the plaintiff (Gerald Metals) and lying at the Port of Viskahapatnam, but the Trial Court granted a relief which was not even asked for.

4. Learned Senior Counsel Mr. Abhisek Singhvi who appeared for Gerald Metals, on the other hand, contended that since there was an arbitration clause in the agreement, therefore the District Judge had jurisdiction to entertain the application u/s 9 of the Act. He also contended that agreeing of lay days was not something sacrosanct and it could not be said that once the lay days were fixed, they could not be altered. He submits that in the past even after an agreement with respect to lay days, they were altered even at the instance of NALCO. He further submitted that the issues raised by NALCO should not have been gone into either by the District Judge or by this Court in view of Section 16 of the Act. Mr. Singhvi further contended that in the facts and circumstances of the case even if there had been some shortcoming in drafting the prayer in the application u/s 9 of the Act, the Court was well within its rights to mould the relief in order to do complete justice between the parties. He further contends that NALCO is a

public undertaking company and as such is an instrumentality of the State and therefore is expected that the treatment given by it, is not arbitrary.

5. We heard the learned Counsel for the parties at length and we believe that the main issues which are involved in this appeal related to interpretation of Section 9 of the Act and also to a prima facie meaning of various clauses of the agreement between the parties.

6. Now coming to the first point for consideration which relates to interpretation of Section 9 of the Act, it will be necessary to have a glimpse over the relevant clauses of agreement. Clause 26 of the agreement reads as under,

"Arbitration:

In the event of any question or dispute arising under or out of or relating to construction, meaning and operation or effect of this contract or breach thereto, matter in dispute shall be referred to two Arbitrators, one to be nominated by the Seller and the other by the Buyer and in case of the said Arbitrators not agreeing then to an Umpire to be appointed by the Arbitrators in writing before proceeding on the reference. The decision of the Arbitrators or in the event of their not agreeing of the said Umpire shall be final and binding on the parties to the contract. The provision of English Law to apply to the proceedings. The arbitrators or the Umpire as the case may be shall be entitled with the consent of the parties, to enlarge the time from time to time for making the award. The Arbitrators/ Umpire shall give a reasoned award. The venue of the Arbitration shall be London, England. The Arbitration shall take place in English language. Pending the settlement and thereafter until the Arbitrators made the award :

(a) The parties shall continue to perform their obligation hereunder without prejudice to a final adjustment in accordance with the award made by the Arbitrators; except that where the dispute is for non-payment or non-realization of the price of the material, the Seller will not be obliged to continue/supply the material, and

(b) The operation and activities which shall have given rise to the Arbitration need not be discontinued but if the award recognizes that a complaint was justified, provision may be made in the award for such preparation or compensation in respect of such continued operations and activities as shall be decided by the Arbitrators to be appropriate."

7. Mr. V.R. Reedy contends that this clause of agreement unequivocally settles the following:

(1) That the provisions of the English Law shall apply to the proceedings of Arbitration;

(2) That venue of arbitration shall be at London, England;

(3) That for all the disputes arising out of the contract the respective Courts in England shall have exclusive jurisdiction;

(4) That the contract shall be governed and construed in accordance with laws of England;

8. Mr. V.R. Reddy submits that keeping in view these four undisputed terms which flow from Clause 26 of the agreement, Section 9 of the Act has to be understood in the context of Sub-section (2) of Section 2 of the Act. He submits that Part-I of the Act starts with Section 2 and ends at Section 43 and Part-II of the Act starts with Section 44. Sub-section (2) of Section 2 of the Act lays down:

"This Part shall apply where the place of arbitration is in India."

9. He contends that in terms of Clause 26 of the agreement the arbitration has to take place in England and the place of arbitration is expressly not in India, therefore Section 9 of the Act would not apply which is in part of Part-I of the Act. Mr. V.R. Reddy further contended that although various High Courts had taken the consistent view that where the place of arbitration was out side India, Part-I of the Act would not apply and when the matter went to the Supreme Court, the Supreme Court laid down the Part-I of the Act would apply where the place of arbitration was not side India, provided parties expressly or impliedly excluded the operation of Part-I of the Act by their conduct or agreement. It has been stated at the bar by both the Senior Counsels that perhaps the only judgment which is relevant in this case is the judgment of the Supreme Court reported in Bhatia International Vs. Bulk Trading S.A. and Another, , (hereinafter referred to as "Bhatia"s case).

10. Mr. Singhvi, on the other hand, contends that the exception which Mr. V.R. Reddy wants to create would be in the nature of a proviso being added to the judgment of the Supreme Court by this Court, if the argument of Mr. V.R. Reddy is accepted. Both the Senior Counsel rely on the same judgment, one contending that the District Judge had no jurisdiction and the other contending that he had the jurisdiction. Therefore it becomes necessary for this Court, in order to understand the law laid down by the Supreme Court, to go through the facts in Bhatia"s case.

11. The facts as mentioned in para 2 of the judgment in Bhatia"s case reveal that appellant had entered into a contract with 1st respondent in 1997. The contract contained an arbitration clause which provided that the arbitration would be as per rules of the International Chamber of Commerce (for short "ICC"). On 23.10.1997 the 1st respondent filed a request for arbitration with ICC. Parties agreed that the arbitration be held in Paris, France and ICC appointed a sole arbitrator. While the arbitration had been accepted and an arbitrator had been appointed by the ICC, the 1st respondent filed an application u/s 9 of the Act before the Hi-Additional District Judge, Indore, M.P, One of the reliefs sought was an order of injunction restraining the other side from alienating, transferring and creating third party rights, disposing of, dealing with and/or selling the business assets and properties. The appellant therein raised a plea of non-maintainability of such application. The argument raised was that the Part-I of the Act would not

apply to arbitration where the place of arbitration was not in India. The application was dismissed by the District Judge and it was held that the Court at Indore had jurisdiction and the application was maintainable. Thereafter a writ petition was filed before the High Court of M.P. The writ petition was also dismissed. Thereafter the matter was taken before the Supreme Court. In para-7 of the judgment the contention was noted by the Supreme Court which reads as under,

"7. Mr. Sen submits that in this matter arbitration is being held in Paris i.e., out of India. He submits that to such arbitrations Part I does not apply. He submits that Sections 9 and 17 fall in Part I. He submits that Sections 9 and 17 would not apply and cannot be used in cases where the place of arbitration is not in India."

12. According to Mr. V.R. Reddy, while considering the arguments made at the bar, the Supreme Court was of the view that since an exclusion of the jurisdiction of Courts in India was not expressed, therefore by not specifically providing that the provisions of Part-1 of the Act would apply to international commercial arbitrations held outside the India, the intention of the legislature was to give parties a right to choose whether the provisions of Part-I would apply or not apply and according to him, this agreement of exclusion of Part-I of the Act could be either express or implied. In this connection, he relies on paras-21, 29 and 32 of the judgment which are reproduced below:

"21. Now let us look at Sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India . Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The Legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of Sub-section (2) of Section 2 suggests that the intention of the Legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the Legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

"29. We see no substance in the submission that there would be unnecessary interference by Courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in Clauses (i) and (ii) thereof. Thus there cannot be applications u/s 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act."

"32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

13. Elaborating his argument Mr. V.R. Reddy has drawn our attention again to Clause 27 of the agreement which reads as under:

"Jurisdiction/Governing Laws:

For all disputes arising out of this contract, the respective Courts in London, England shall have exclusive jurisdiction.

The contract shall be governed by and construed in accordance with the Laws of England."

14. He submits that the place of arbitration is England and the laws to be applied are laws of England. The contract would be governed and construed in accordance with laws of England. He did not press the fourth point that the Courts in England would have exclusive jurisdiction. He contends that there cannot be two sets of law in the same matter. As far as arbitration is concerned, laws of England would apply, therefore this should be taken an implied consent of the parties to exclude the applicability of Part-I of the Act.

15. Mr. Singhvi, on the other hand, submits that if such contention is accepted, it would be adding an exception to the judgment of the Supreme Court which was considering a case which was factually very close to the facts of the present case and applicability of foreign laws or holding of arbitration at a place out side the India would not in any way be an implied consent for exclusion of Part-I. Such an exclusion, even if permitted by the Supreme Court, would need something more than an agreement that the foreign laws would apply and the arbitration venue would be out side India. He submits that in almost all contracts of international character, these two postulates can be found. He submits that even in Bhatia's

case the position was same. He draws our attention to para-28 of the judgment which considered the import of Section 9 of the Act. After reproducing Section 9 of the Act, the Supreme Court held:

"28. Thus u/s 9 a party could apply to the Court (a) before, (b) during arbitral proceedings, or (c) after the making of the arbitral award but before it is enforced in accordance with Section 36. The words "in accordance with Section 36" can only go with the words "after the making or of the arbitral award". It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus it is clear that an application for interim measure can be made to the Courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the Court. Thus "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of the Civil Procedure Code. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made, an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the legislature wanted to restrict the applicability of Section 9 it has done so specifically."

16. We agree with Mr. Singhvi and, in our view, there is no implied consent for excluding the jurisdiction of the Courts in India under Part-I of the Act. Mr. Singhvi contended that, as a matter of fact, Section 9 of the Act operates in a specific field and the efficacy of Section 9 of the Act would be more in cases in which arbitration takes place out side India. He contends that it would be absurd to assume that if an arbitration takes place out side India or in England or in Paris, or in United States, goods are somewhere in India which are perishable, would it be advisable to tell the parties to go to England, Paris or United States for seeking interim orders for preservation of goods. He contends that even in the present case where the vessel was at the Port from 1st January, 2004 and the party is paying damages of US \$ 25,000 per day, the doors of the Court shall not be shut to him by the Courts in India on the ground that since the place of arbitration has been fixed in England, therefore they cannot help him. We do not think that the present is one in which there was an implied consent of the parties to exclude the applicability of Part-I of the Act.

17. The learned Senior Counsel appearing for the appellant/NALCO has relied on a judgment of the Supreme Court reported in Shreejee Traco (1) Pvt. Ltd. v. Paper line International Inc. . This is a judgment of a Judge designated by Chief Justice of India in terms of the Act. Obviously when this judgment was pronounced, the judgment in Bhatia's case was not brought to the notice of the learned Judge. Mr. V.R. Reddy for obvious reasons did not press that this

judgment be applied to the present case in which it has been held that Part-I of the Act would not apply where the arbitration takes place outside India, but he contends that this judgment was based on a judgment of the Supreme Court reported in National Thermal Power Corporation Vs. The Singer Company and others, . Suffice to say that the judgment in National Thermal Power Corporation was considered in Bhatia's case. Therefore we need not go into the question whether this judgment in any way excludes the jurisdiction u/s 9 of the Act. It may also be pointed out that this was a case under the old Act and Mr. Singhvi has drawn our attention to the judgment of the Supreme Court reported in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., . In this judgment it was held that the Act of 1996 was materially different from the Act of 1940, therefore the new Act should be interpreted and construed independently and reference to Act of 1940 may actually lead to misconstruction. It further laid down that the provisions of Act of 1996 would have to be interpreted being uninfluenced by the principles underlying the 1940 Act

18. For these reasons we hold that Section 9 of the Act was applicable and the application filed before the District Judge was maintainable.

19. Coming to the second contention that in the absence of agreed lay days the appellant/NALCO could not be forced to load the vessel. At the out set we may make it clear that the contentions raised in this behalf would have to be necessarily decided by the arbitrators in the arbitration. Primarily this Court should be and is concerned with the maintainability of the application u/s 9 of the Act Once that is held that the application was maintainable, then the Court will proceed on well established norms that whether an interim relief could be granted or not because the matters relating to interpretation of the contract for fixing the rights and obligations of the parties would have to be necessarily decided by the arbitrators and parties have already moved in that direction and NALCO has already received letters in that connection, but since an argument has been made, we will try to answer it in order to come to a prima facie conclusion whether in the absence of agreement on lay days the relief could be denied to Gerald Metals. Again a reference would have necessarily to be given to the agreement. Clause 14 of the agreement lays down:

"Despatch Instructions:

The Buyer shall intimate the Seller about the shipping instructions covering the relevant details at least 21 days prior to the commencement of finally agreed lay days. It is expressly understood that Seller will require minimum 21 days clear time to effect dispatch after receipt of shipping instructions. The stipulations in the L/C shall be treated as an extension of this contract for the respective shipments only."

20. By this clause the buyer would have to give a 21 days" intimation along with the shipping instructions before the period of lay days starts. Under Clause 15 the buyer shall advise the seller three weeks ahead of lay days about the

estimated time of arrival of the vessel at the loading port specifying the full particulars of vessel. Before proceeding further, it may be kept in mind that under this clause it is the estimated time of arrival of the vessel which has to be communicated and not the exact time and obviously so. Under Clause 15(b) it is laid down that lay days would be limited to 7 days. The buyer would intimate the seller 30 days before the commencement of the proposed schedule of shipment to mutually arrive at the final lay days by both buyer and seller. Now the factual position as regards the fixation of lay days can be ascertained from various letters of the parties exchanged between them. Annexure-13 is a letter addressed by Gerald Metals to NALCO on 29.10.2003 which reads as under:

"Please note that we still are missing your nominated lay days for the December quota. We now request lay days of December, 24-30 for shipment from Vizag, and ask that you please confirm acceptance in writing by return."

21. Annexure-14 is a reply to annexure-13. After acknowledging the message in annexure-13 on 21.11.2003, NALCO replies:

"We hereby confirm lay days of 24-30 December, 2003 for your scheduled shipment of 33,300 mt+/-5% Alumina in December, 2003".

By annexure-15 the Gerald Metals nominated the vessel on 9.12.2003 and the vessel was accepted by NALCO through annexure-16 on the same day. Till that time there was no problem between the parties, but the problem started on the message dated 11.12.2003 which was sent by Gerald Metals to NALCO which is contained in annexure-17. In this message Gerald Metals informed NALCO that there was some logistic problem with the vessel and they changed the vessel. This was also accepted by the NALCO by message dated 12.12.2003 through annexure-18, but the period of lay days was not changed by the NALCO, it continued to be 24.12.2003 to 30.12.2003. Again Gerald Metals informed NALCO by annexure-19 dated 12.12.2003 that the vessel would be arriving between 27.12.2003 and 29.12.2003 within the actual assigned laycan. NALCO informed Gerald Metals that they have not received any information from the agent with regard to arrival of vessel. Then there was some communication and it appears that Gerald Metals informed that the vessel would be reaching on 29th/30th December, 2003. Then NALCO wrote back on 27.12.2003 by annexure-26:

"As you are aware, our buyer M/s. Gerald in an E-mail, dated 24th December, 2003 had indicated vessel ETA Vizag on/ABT 28th/ 29th December 2003. We have also been requesting you to advise the vessel owner/ master to bring the vessel to Vizag on 29th December, 2003 at least, if before 29th December is not possible, Your fax Msg. dated 26.12.2003 indicated the vessel ETA, 29.12.2003 which was somewhat in line with our discussion. But we are surprised to read your msg. of 27.12.2003 indicating vessel ETA 30.12.2003, in contrary to all above, which is not at all satisfactory."

22. Then the real trouble started on 29.12.2003 when the NALCO was informed by annexure-28 that the vessel was delayed at Haldia due to rain and bad

weather and new ETA is now 1st January, 2004 and the letter contained in annexure-29 is also reproduced which is written by Gerald Metals to NALCO:

"We regret to advise that today we received information from our vessel agent in Vizag (Messrs Monship) that the above vessel has been further delayed at Haldia (where she is discharging) due to bad weather..... We therefore respectfully request an extension to the laycan until January 2, 2004."

23. Mr. V.R. Reddy submits that time was essence as far as lay days were concerned. He suggests that even the tenor of the letter contained in annexure-29 suggests that the time was essence, therefore if the vessel was not available within that period fixed i.e., 24th to 30th December, 2003, they were not bound to load the cargo. He submits that in between the prices have sky rocketed and the public undertaking cannot be made to suffer when they were not bound to load the cargo in accordance with the terms of the agreement. Mr. Singhvi, on the other hand, submits that in the past also the dates were changed in this case even at the instance of NALCO itself. He has produced some documents which show that mutually earlier also the lay days were changed even at the instance of NALCO, therefore it cannot be said that time was essence and there is something sacrosanct about the lay days. Again the question whether the lay days could be extended or not would be a subject-matter which will have to be decided by the arbitrators, but we are also conscious of another clause in the agreement which relates to force majeure. Clause 24.1 lays down:

"Orders are accepted and executed subject to "Force Majeure" circumstances including Acts of God, in the event of stoppage of work in any establishment of the Seller or Buyer during the delivery period owing to war, riot, strikes, lockouts, trade disputes, breakdowns, accidents, fire, tempest, Government Order or restrictions imposed by Government of India, State Government Governmental decree, shortage of raw material, nonavailability of local transport, non-availability of shipping space and/or causes beyond the control of the Seller or Buyer. In the event of any stoppage of Railway's or other carriers, deliveries may be postponed. This is without prejudice to the Seller's right to recover money due to the Seller in respect of deliveries made prior to the commencement of such contingencies under this contract."

Clause 24.2 lays down:

"NALCO will ensure delivery of Alumina as per agreed shipping schedule subject to force majeure conditions. In case NALCO is not able to ship the quantities for genuine reasons it will approach customer to re-schedule the unexecuted quantities. In the event of any non-agreement Buyer will have right to cancel only unexecuted quantities for the schedule period without any financial implication to NALCO. It is expressly understood that default will be restricted to the defaulted quantities only and it will not make the entire contract unenforceable. The Buyer will have to lift quantities in respect of which no default is committed."

24. There is sufficient material on record to prima facie suggest that the delay in reaching of the vessel was due to bad weather. Therefore this issue again will have to be finally decided in arbitration. But prima facie we are of the view that the delay caused in the vessel reaching the Port was due to bad weather, therefore a relief u/s 9 of the Act could not be denied to the Gerald Metals.

25. Coming to the third point that the relief given by the District Judge was not sought by the Gerald Metals, Mr. Singhvi has fairly conceded that there has been some lapse in drafting the application, but that should not deter the Courts from doing the justice in the matter. We do not want to go into a catena of judgments which lay down that in appropriate matters the Court can mould the reliefs. We find that the application is an instance of bad drafting because what the Gerald Metals asked the Court would not be granted to them by any Court. They wanted that 33,300 M.T. of Alumina should be kept as it is in some containers at the Port which was also not practically possible. If that order was passed, perhaps the whole operation of the NALCO would come to a standstill.

26. Now coming to the balance of convenience, we are told that necessary steps have been taken by the Gerald Metals to make the payments and they have produced some documents in that connection and once the papers are ready for delivery, the NALCO can encash the consideration. We are also told that since the vessel is at the Port and the Gerald Metals is paying huge amount of US \$ 25000 per day, therefore we feel that the balance of convenience is in their favour, but at the same time we have been told by Mr. V.R. Reddy that the contract ended on 31.12.200? and therefore even if it is held that in fixing the lay days time was not essence, but the time was essence of the contract and the contract having come to an end by 31st December, 2003, they cannot be forced to shift the cargo on the rates agreed in 1999. He submits that rates have gone up and according to him if the NALCO is forced to supply the cargo, there will be huge loss to the public undertaking company. When the matter was heard on 29.1.2004, we had requested the Senior Counsel appearing for NALCO to let us know about the rates that were prevailing after 1.1.2004. On 30.1.2004 they filed an affidavit. In this affidavit they have stated that the highest rate per tonne of Alumina quoted by the highest bidder was US \$ 461.55 per tonne FOB ST Visakhapatnam. They have stated in the affidavit that tenders were floated in for spot sale of 30,000 MT of Alumina and the tenders were opened on 29.1.2004. The Gerald Metals had also been given an opportunity to tender for it, but they did not do so. The learned Senior Counsel Mr. Singhvi, on the other hand, submits on the basis of certain documents that the NALCO had supplied Alumina to various groups from August, 2003 to January, 2004 at rates varying between US \$ 161.42 and US \$ 179 per M.T. of Alumina. But Mr. V.R. Reddy submits that these rates would not lead to anywhere even the NALCO was getting US \$ 178 per MT of Alumina because the contract had been entered into much before. It has to be taken as a fact that the highest rate at which offer was received on 29.1.2004 was US \$ 461.55 per MT of Alumina, but the agreed rate under the contract was US \$ 178 per MT of Alumina. Counsel for otherside has brought also to our notice the

International Trade Magazine titled, "CRU Monitor Alumina" (contained in annexure-40). According to this magazine, the prices of Alumina were in the range of US \$ 400 to US \$ 410 per tonne at the end of December, 2003.

27. Before concluding, it may also be pointed out that Mr. Singhvi made elaborate arguments on the merits of the case which we are not dealing with because, in our view, those are the arguments which will have to be taken note of by the Arbitrators. Keeping in view all the factors including the affidavit filed by the appellant and the International Trade Magazine i.e., CRU Alumina Monitor, we are disposing of this appeal with the following order:

(1) That Gerald Metals shall be permitted to lift 33,300 MT +/- 5% of Alumina on payment of agreed rates,

(2) That in addition to agreed rates, the Gerald Metals shall also give a bank guarantee of an amount which is the difference between the agreed rate and the rate of US \$ 430 per MT of Alumina in favour of NALCO. The bank guarantee shall be furnished before the Registrar (Judicial) of this Court to avoid delay in the matter who shall transmit it to NALCO.

(3) The bank guarantee shall be encashable by NALCO if they succeed in the arbitration.

(4) No order as costs.