

(2010) 02 DEL CK 0063
In the Delhi High Court
Case No : O.M.P. 65 of 2000

Thyssen Krupp Werkstoffe GMBH

APPELLANT

Vs

Steel Authority of India

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Citation : (2010) 168 DLT 250

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Rishi Aggarwala, Rohma Hameed, Shikha Sarin, Bhuvan Mishra, Akshay Ringe and Arvind Kumar, Darpan Wadhwa, for the Appellant;

Final Decision : Dismissed

Judgement

Manmohan, J.—OMP No. 65/2000 petition has been filed u/s 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the Award dated 24th November, 1999 passed by Mr. Datuk George K.S. Seah, Sole Arbitrator.

2. Briefly stated the facts of this case are that on 29th June, 1995 a contract being No. C-6051 was executed between the petitioner- objector and respondent-claimant wherein respondent-claimant had by 30th September, 1995 agreed to supply 10,000 Metric Tonnes of Prime Mild Steel Hot Rolled Plates of DIN 17100 JAN 1980 GR Rs. 37.2 at a price of U.S.\$408 per Metric Ton Free on Board.

3. On 3rd August, 1995 respondent-claimant served Notice of Readiness (in short "NOR") of material on petitioner-objector requesting it to nominate a suitable vessel in terms of the stipulation contained in the aforesaid Contract. The 35 days. period for nomination of vessel as per Clause 4 of the Contract expired on 7th September, 1995.

4. It is pertinent to mention that between 3rd August to 17th August, 1995, the entire quantity of 10,000 MT steel plates was transported to the Loadport and

kept ready for shipment under the continuous supervision and inspection of M/s. SGS India Ltd., the mutually appointed pre-shipment Inspection Agency under Clause 4.1.3.2. The goods to be sold were found to be in conformity with the Contract by the mutually appointed independent Inspection Agency.

5. Petitioner-objector vide its various communications confirmed that it was working to nominate a vessel and was willing to extend the Letter of Credit, but the vessel was not nominated despite repeated confirmations.

6. On 30th September, 1995 the Letter of Credit for shipment expired and petitioner-objector committed breach of contract by failing to lift the consignment. It was only on 19th October, 1995 that petitioner-objector for the first time complained about the condition of steel plates.

7. On 18th November, 1995 respondent-claimant treated the Contract as closed and on 26th December, 1995 it asked the petitioner- objector to make good the loss of US\$ 1,330,000 along with interest upto 31st December, 1995. On 15th January, 1996 petitioner-objector wrote to respondent-claimant that it was surprised to receive the above claim without any supporting document.

8. On 5th June, 1998 respondent-claimant invoked the arbitration clause being Clause No. 13 contained in the Contract and filed a request for arbitration before International Chamber of Commerce (in short "ICC"), Paris claiming a sum of US\$ 1,330,000 along with interest. The said claim was based on the respondent-claimant's contention that the contracted price of the steel plates was US\$ 408 per Metric Ton and the market price of the said goods was US\$ 275 per Metric Ton. Consequently, according to respondent-claimant, it had suffered a loss of US\$ 1,330,000 (being the difference between US\$408- US\$275 per Metric Ton) on 10,000 Metric tonnes of steel plates.

9. In July, 1998 petitioner-objector's advocate wrote to respondent- claimant asking for inspection of documents referred to and relied upon by them in their request for arbitration. However, on 13th August, 1998 respondent-claimant declined the request for inspection on the ground that the sole arbitrator had not yet been appointed.

10. On 23rd February, 1999, the Arbitrator in accordance with Rule 18 of the ICC Arbitration Rules framed the Terms of Reference. The relevant portion of the Terms of Reference reads as under:

h) The Claimant maintained that the market price prevailing at the relevant time when the contract was closed unilaterally by the Respondent was US\$ 275 per tonne as per the documentary evidences annexed by the Claimant instead of US \$408 per tonne i.e. the sale price agreed between the parties. Hence, the Claimant had suffered the PECUNIARY loss of US\$ 1,330,00 and interest thereof US \$610,306 @ 18% per annum from 3.11.95 to 20.05.98 and further interest @ 18% per annum from 21.05.95 till full and final payment is received by the Claimant.

xxx xxx xxx

10.4 The powers of the Sole Arbitrator shall, without prejudice to the generality of Articles 15 & 21 of the 1998 ICC Rules of Arbitration, include the following:

- a) Power to direct, after hearing and considering the views of the parties and/or their Counsel, the extent to which any particular procedure will be dealt with by written submissions.
- b) Power to give directions as to the length of time to be allotted to all stages of the arbitral hearing.
- c) Power to direct the manner in which evidence of the parties. witnesses shall be adduced economical resolution of the issues in this arbitration.

10.5 The parties may make new claims provided they comply with the Provisions of Article 19 of the 1998 ICC Rules of Arbitration.

11. In the meantime, after completion of pleadings on 14th December, 1998, petitioner-objector once again filed an application for discovery and inspection of documents. The relevant portion of the said application reads as under:

We refer to our earlier letter dated 30th July, 1998 herein marked as Annexure I where we had requested for discovery and inspection of the document referred to and relied upon by the Claimants in their REQUEST and the Claimants. reply dated 13th August, 1998 herein marked as Annexure II.

The Respondents request that necessary directions for discovery and inspection be passed by the Learned Arbitrator in respect of the following categories of documents:

- 1) All documents, books, records (including correspondence) pertaining to matters raised in the pleadings filed by the Claimant.
- 2) All documents, books, records pertaining to the disposal by the Claimant of the 10000 MT of steel plates that were the subject matter of the contract between the Claimant and the Respondent ("the steel plates").
- 3) All documents, books records (including correspondence between Claimant, M/s. Stemcor, SGS and the port authorities) concerning the steel plates.

12. However, on 3rd March, 1999, the Arbitrator rejected the petitioner-objector's application for discovery of documents by a detailed order. The relevant portion of the aforesaid order reads as under:

8.1.1. ...having heard and duly weighed and considered final written submissions of Counsel for the Claimant and Respondent, the relevant Articles of the 1998 ICC Rules of Arbitration, The Indian Arbitration Act, 1940 and The Arbitration and Conciliation Act, 1996 as well as the authorities cited by the parties, hereby summarise my decisions as follows:

1) I adjudge that the 1998 ICC Rules of Arbitration do not empower me to make an order of discovery of documents in the possession, custody or control of the Claimant at the request of the Respondent.

2) I adjudge that The Arbitration and Conciliation Act, 1996, which came into operation on 01.01.1996 does not give me the power to make an order of discovery of documents in the possession, custody or control of the Claimant at the request of the Respondent.

3) I adjudge that Section 27(1) of the 1996 Act does appear to give me the power to direct the production of a document in the possession, custody or control of a party to the Reference in the interest of justice and to prevent an injustice in order to ensure a just and fair decision be arrived at to resolve the dispute between the parties in the Reference subject to the fulfillment of the undermentioned conditions precedent namely,

(a) The particular document must be properly identified and tendered or produced before the Arbitral Tribunal;

(b) The Arbitral Tribunal shall examine the said document pursuant to Section 19(4) of the 1996 Act.

(c) If the Arbitral Tribunal after examining the said document, is satisfied that it is a material document in order to enable the Arbitral Tribunal to reach a fair and just decision to resolve the controversy between the parties in the Reference (Section 27(1) to be read with Section 27(2)(c)(ii) of the 1996 Act).

8.1.2. For the above reasons I, Datuk George KS Seah, the sole Arbitrator hereby adjudge that the application of the Respondent must be refused with costs to the Claimant.

13. After rejecting the said application, the Arbitrator on 3rd March, 1999 itself fixed a schedule of hearing. While 19th March, 1999 was fixed as the last date for exchange of documents, the hearing was directed to commence from 12th April, 1999 till 16th April, 1999 including cross-examination of witnesses.

14. On 12th April, 1999, which was the first date fixed for cross- examination of respondent-claimant's witness, respondent-claimant filed an application for amendment of its claim. Instead of previously claiming US\$ 1.13 million, respondent-claimant asked for following reliefs:

As a consequence of the Defendant's breach of the contract, the Claimant has suffered huge losses as indicated herein under:

A. LOSS ON ACCOUNT OF DIVERSION TO OTHER EXPORTS CONTRACTS LOSS (USD)

Contract No. C-6072 a/c M/s Stemcor, quantity diverted 1623 MT @ USD 345/MT
 $1623 * (408-345) = 102,249$

Contract No. C-6073 a/c M/S Seco, quantity diverted 4857 MT @ USD 345/MT

$4857 * (408-345) = 305,991$ Additional Expenses incurred for handling & transportation for above diversion = 17632 Sub Total-(A) = 425872

B. LOSS ON ACCOUNT OF DIVERSION TO DOMESTIC SALES

Quantity Diverted - 3772 MT Quantity Sold in Domestic Market - 2871 MT Price realized in home sales RS 13218 or USD 377 per MT Loss in realisation on a/c of domestic sales $2871 * (408-377) = 89001$

Additional expenses incurred for handling and transportation for above diversion = 9605

Loss on a/c of unrealised Export incentives @ 10% of FOB Value $(3772*40.8) = 153898$ Sub Total-(B) = 243859

C. LOSS ON ACCOUNT OF UNSOLD MATERIAL

Quantity remaining unsold 901 MT $901*408 = 367608$

D. Ground rent @ USD 1 per MT per month = 71079

E. Administrative expenses for the contract @ USD 2/MT $10000*2 = 20000$

Grand Total A+B+C+D+E = USD 11,28,418

F. Interest @ 18% from 21.10.95 till receipt of the amount claimed

G. Costs and Expenses.

H. Any other amount(s) the Sole Arbitrator and/or ICC's Court of Arbitration may deem fit and proper.

15. On 13th April, 1999, the Arbitrator recorded no objection of petitioner-objector's counsel with regard to respondent-claimant's application for amendment of claim. Though petitioner-objector opposed filing of additional documents, the Arbitrator permitted the said documents to be taken on record after holding that they were the basis on which the amended statement of claim had been filed.

16. On 17th April, 1999, petitioner-objector filed its reply to the amended statement of claim. On 26th April, 1999, the Arbitrator passed an order wherein he recorded that the counsel for petitioner-objector had decided to put the case of respondent-claimant in the arbitration proceedings through cross-examination of claimant's witnesses.

17. On 24th November, 1999, the Arbitrator published the impugned Award wherein he awarded the following amounts in favour of respondent-claimant:

52.1(a) Under Claim A I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$425, 872.00 made up as follows:

i) Loss on account of diversion to Exports Contract C-6072 to STEMCOR UK LTD .. US\$ 102,249.00 and Contract C-6073 to SECO .. US\$ 305,991.00

ii) Additional expenses for handling and transportation .. US\$ 17,632.00

52.1(b) Under Claim B I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$93,803.50 made up as follows:

i) Loss on account of diversion to Domestic Sales .. US\$ 89,001.00

ii) Additional handling and transportation expenses .. US\$ 4,802.50

52.1(c) Under Claim C I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$183,804.00 being loss on account of unsold Materials.

The grand total from Claims (A) +(B)+(C) is US\$ 703,479.50

52.1(d) I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL interest at the rate of 5% per annum on the sum of US\$ 703,479.50 as from 21.04.1998 (the date when Notice of Arbitration was given by SAIL to KRUPP) till full payment.

52.1(e) I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL (a) one-half (1/2) of the sum of US\$80,000 Constituting the costs of the Arbitration as well as (b) one-half (1/2) of the reasonable legal and other costs incurred by the claimant SAIL and parties for this Arbitration.

52.1(f) I also award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the full costs given to them vide my order dated 03 March, 1999.

18. Mr. Neeraj Kishan Kaul, learned senior counsel for petitioner- objector submitted that the impugned Award had been passed in violation of principles of natural justice inasmuch as the Arbitrator had not granted adequate opportunity to petitioner-objector to present its case. He stated that petitioner-objector was taken by surprise at the cross-examination stage as amended statement of claim, amended evidence statements as well as fresh documents had been filed at that stage. He also drew my attention to the transcript of the arbitral proceedings wherein it had been recorded that the respondent- claimant's counsel stated that he had produced new documents along with the amended claim statement only to avoid any challenge of suppression and that respondent-claimant would not refer them in the concluding arguments. He stated that despite the said statement, the Arbitrator, without notice, had relied upon the said documents to pass the impugned Award against the petitioner-objector. According to Mr. Kaul, due to Arbitrator's misconduct, petitioner-objector's case had been prejudiced.

19. To illustrate his submission, Mr. Kaul stated that M/s. SGS's letter dated 5th April, 1999 was produced four years after the alleged breach had taken place and that too, in the midst of cross-examination. He pointed out that the said document was neither mentioned in the original nor in the amended witness statement. Mr. Kaul went on to the extent of stating that the said document had been procured by the respondent-claimant for the purposes of the arbitration. Mr.

Kaul contended that even after the conclusion of final arguments, documents had been filed by respondent-claimant along with their written submissions and the said documents had been relied upon by the Arbitrator while passing the impugned Award. In this connection, he referred to Annexures 2 and 3 of Volume 3 of the paper book to show that by relying upon the said documents, the Arbitrator had accepted respondent-claimant's contention that the unsold domestic quantity was 901 MT. He further stated that the Arbitrator had accepted the quantity of domestic sale and the domestic sale price as US\$ 377 per Metric Ton without any proof. In support of his submission, Mr. Kaul relied upon *Manory Plastic Industries v. Food Corporation of India* reported in 1992(2) Arb.L.R. 122; *Delhi Development Authority v. Anant Raj Agencies* reported in 103 (2003) DLT 730 (DB); *Mehta Teja Singh and Co. Vs. Union of India and Another*, and *Interbulk Ltd. v. Aiden Shipping Co. Ltd. (The "Vimeira")* reported in (1984) 2 LLRs 66.

20. Mr. Kaul next submitted that in any case, compensation/damages could be awarded only on the basis of prevalent market price on the date of the breach. He submitted that market price in such cases was always the starting point. According to him, in the present case, respondent-claimant had failed to establish the market price. In fact, Mr. Kaul stated that the respondent-claimant had given up its initial claim filed on the basis of market price. In this connection, he relied upon the following averments in the respondent-claimant's rejoinder affidavit which reads as under:

4. It is denied that the amended statement of claim is completely inconsistent with the original relief sought in the Request for Arbitration. Even otherwise once the amendment to the claim statement (Relief claimed) has been allowed, the original relief ceases to exist and cannot be referred to for any purpose whatsoever. The rest of the contents of this para are also categorically controverted and those of the corresponding para in the amended statement of claim are reiterated the suggestions/insinuations in the para under reply as regards the invalidity of the claim is specifically disputed and denied. It is denied that the Claimant's case is false as alleged or otherwise. The amended claim further establishes the earnest efforts on the part of the Claimant for mitigation of losses. The Respondent has not even raised a plea that efforts of mitigation of loss were not sufficient or the material could have fetched even higher prices. The Respondent's all the contentions are wrong and are denied.

21. Mr. Kaul stated that the respondent-claimant had based its relief for compensation/damages only for mitigation of losses. In the alternative, Mr. Kaul submitted that the onus to prove the market price had not been discharged in the present case by respondent-claimant.

22. Mr. Kaul further submitted that the Arbitrator had, contrary to all principles of fairness, shifted the onus to prove the market price upon the petitioner-objector. In this connection, he referred to paragraphs 28.2 and 28.3 of the impugned Award which read as under:

28.2 Moreover, KRUPP have not adduced one iota of evidence during this arbitration proceeding to establish that steel plates bearing specification IS 2062 or DIN 17100 JAN 1980 GR RST 37.2 had been sold for a price in excess of US\$ 408MT FOB at about the time of the breach of contract.

28.3 The onus of proving the market price of IS 2062 or DIN 17100 Jan 1980 GR RST 37.2 steel plates at about the time of the breach was in excess of the contract price of US\$ 408 MT FOB VIZAG is on KRUPP and based on the evidence, both oral and documentary, produced in this Reference, I am constrained to find that KRUPP have failed to make good their allegation.

23. Mr. Kaul also submitted that the Arbitrator had erred in law while awarding compensation/damages even after it had come to the conclusion that respondent-claimant had failed to prove the market price. In support of the aforesaid submission, Mr. Kaul relied upon Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, ; Union of India (UOI) Vs. West Punjab Factories Ltd., ; Bharat Sanchar Nigam Ltd. Vs. BWL Ltd., and Prominent Electric Works v. Delhi Development Authority And Ors. reported in 2009(4) Arb.L.R. 506 (Delhi).

24. Mr. Kaul also submitted that the respondent-claimant was not entitled to any compensation/damages as the actual market price of the contracted quantity on the date of alleged breach was much higher than the contracted price. In this connection, Mr. Kaul relied upon the price circulars of the respondent-claimant as well as Annexure 3 of Volume 3 of the paper book which was produced by respondent-claimant for the first time after conclusion of final hearing along with its written submission.

25. Mr. Kaul next submitted that petitioner-objector's discovery application had been wrongly rejected by the Arbitrator vide order dated 3rd March, 1999 and dismissal of the said application had caused grave prejudice to their case. According to him, the aforesaid order was contrary to law as a document which goes to the root of the case should have been directed to be produced. In this connection, Mr. Kaul relied upon K.P. Poulse Vs. State of Kerala and Another, and Shri M.L. Sethi Vs. Shri R.P. Kapur, .

26. Mr. Kaul pointed out that the Arbitrator had awarded US\$ 17632 on account of change of stencil marking without any proof being placed on record. He stated that respondent-claimant had not filed any supporting document in support of the aforesaid claim. He stated that the respondent-claimant had only filed a chart in support of said claim which had been believed as "gospel truth. by the Arbitrator.

27. Mr. Kaul lastly submitted that the procedure adopted by the Arbitrator was contrary to the terms of reference framed by the Arbitrator on 23rd February, 1999. He pointed out that the said terms of reference had been prepared in accordance with Article 18 of the ICC Arbitration Rules which reads as under:

Article 18

Terms of Reference; Procedural Timetable

1. As soon as it has received the file from the Secretariat, the Arbitral Tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

- (a) the full names and descriptions of the parties;
- (b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;
- (c) a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed;
- (d) unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined;
- (e) the full names, descriptions and addresses of the arbitrators;
- (f) the place of the arbitration; and
- (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral Tribunal to act as amiable compositeur or to decide ex aequo et bono.

2. The Terms of Reference shall be signed by the parties and the Arbitral Tribunal. Within two months of the date on which the file has been transmitted to it, the Arbitral Tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the Arbitral Tribunal or on its own initiative if it decides it is necessary to do so.

3. If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference are signed in accordance with Article 18(2) or approved by the Court, the arbitration shall proceed.

4. When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Court and the parties. Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties.

28. Mr. Kaul concluded his arguments by stating that the Arbitrator by allowing the respondent-claimant to flout the terms of reference had not adhered to the basic principles of fairness and accordingly the impugned Award was liable to be set aside on this ground alone. In this connection, he relied upon certain passages in a book "Arbitration World. written by J. William Rowley.

29. On the other hand, Mr. Sanjay Jain, learned senior counsel for respondent-claimant submitted that the jurisdiction of this Court u/s 34 of Act, 1996 was extremely limited. In this connection, he referred to a Supreme Court judgment in State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, wherein it has been held that "Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties...Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the Court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator".

30. Mr. Jain stated that no new claim or fact had been introduced while amending respondent-claimant's claim statement. He stated that by virtue of the said amendment, only the quantification had been changed/altered. Mr. Jain pointed out that no serious objection had been raised by the petitioner-objector to the amendment of the claim statement.

31. In any event, Mr. Jain contended that no prejudice had been caused to petitioner-objector as amendment was in the interest of justice and it was carried out to give effect to the principle of mitigation of damages.

32. As far as Mr. Kaul's submission that petitioner-objector had been taken by surprise in the midst of cross-examination by filing of amended claim statement, amended evidence statements and fresh documents, Mr. Jain stated that the Arbitrator had asked petitioner- objector's counsel if he wanted to continue with the cross-examination or seek adjournment. According to him, the counsel for petitioner- objector opted to continue with the cross-examination. In this connection, Mr. Jain relied upon the Arbitrator's order dated 26th April, 1999 as well as the transcript at Page 51-52 of Volume 5 of the paper book.

33. Mr. Jain stated that M/s. SGS's letter dated 5th April, 1999 had been initially produced along with the amended claim statement. According to him diversion of sale from Contract No. C-6051 to C- 6072 and 6073 was independently proved by the respondent-claimant's witness. As far as proof of compensation/damages of US\$ 17632 on account of change in stencil marking as well as quantity of unsold stock of 901 MT was concerned, Mr. Jain stated that the said amount and quantity had been mentioned in the amended statement of claim as well as in the amended witness statement. Mr. Jain also referred to the transcript of the cross-examination to show that respondent-witnesses had been cross examined

by petitioner-objector's counsel on all these aspects. In this connection, Mr. Jain referred to the following examination-in-chief as well as cross examination and re-examination of respondent's witness:

Mr. Kulshreshtha: I am referring to the amended relief sought in para A. I have already said that when we tried to sell the entire cargo as such to alternate buyers in international market, we had quotations of 291 PMT fob and 275 PMT fob and both were considered low. I have also said and reflected on the reasons that when a cargo made as per the requirements of a particular buyer offered to other buyers, the price obtainable is not the same as the other buyer would be prepared to offer for a cargo which is custom made to his requirements. I have also said that in international parlance, this is known as "stock lot".

Ld. Arbitrator: Prime object is how you come this conclusion.

Mr. Kulshreshtha: I am coming to that. When we were not able to sell the entire available cargo we looked into the existing contracts which were available with us where a part of the cargo was having same specifications and same size mix i.e. thickness, width, length as in contract C 6051 and we found that 2 of the existing contracts one C 6072 and another C 6073 are having some of the sizes and specifications which are common to the cargo specified under C6051. Now each contract specifies its own marking that is to be given on the plates. The only thing now required to enable us to divert the cargo which was common to both the contracts was to re-do the markings as per the requirements of the new contracts. This re do of markings is additional work. Now the quantity which we were able to carry, differ under contract C 6072 which was on account of M/s Stencor was 1623 MT. This contract was on price of US \$345 per MT fob. The difference in the contract price under contract No. C6051 an C6072 was arrived at by subtracting 345 from 408 i.e. 63 dollars. Now the first line where the loss had been shown as US \$102,249 has been arrived at by multiplying the diverted quantity of 1623 tonnes by the difference in the price of 2 contracts which were 63 dollars.

Next one whatever expenditure that is common to both the contracts here also the price was 345 dollars. We diverted 4857 MTs and the loss of US \$ 305,991 have been arrived at by multiplying 4857 with the difference in the price of two contracts which was again 63 dollars.

Now I come to the top line of the second page. I have already explained that we had to re do the markings to meet the requirements of the new contract for fitting the cargo into the new contracts. This involves that plates will be spread on the floor of the stock yard with cranes/forklifts. A black paint will be made on the existing marking and the fresh markings as per the requirements of the new contracts C6072 and 73 would be given with paint by way of stencils. (US \$ 17,632 on account of handling and transportation are for re doing the marking.

Ld. Arbitrator: Next page additional expenses handling and transportation rates and costs.

Mr. Kulshreshtha: Sir here this additional statement has been worked out by our Transport Shipping office and Mr. Suresh Gupta would be more competent to give more details to you.

Mr. Kulshreshtha: Amounts on loss on accounts of diversion to domestic sales. Thus whatever was left out from the available cargo under C 6051 after diverting whatever was available under C 6072 and 73 we had no more existing contracts where this cargo could be fitted and hence a decision was taken to divert them to Domestic market Stock Yard after completing necessary formalities. The amount is 3772.

Our Home Sales Department informed us that out of the quantity diverted under this contract they were able to make actual deliveries to domestic customers of 2878 MTs and the average net realisation worked out to Rs. 13,218 which on a existing conversion of 35 rupees to a dollar approximately had been taken to 377 dollars per MT. This price is under realisation has been arrived at after deducting excise @ 15% ad valorem from the price realized from home sales which is not payable on export sales. So loss of realisation on account of domestic sales has been worked out by multiplying the actual deliveries made by home sale 2871 MTs by the difference with the contract price of 408 and 377 dollars which has given us a figure of 89,001 dollars. For diversion to home sales we have incurred additional expenses for handling and transportation which is 9605 dollars. Again this whole working can be explained by Mr. Suresh Gupta.

Sir, now I come to the last line. When we are exporting our goods, we are getting export incentives on the fob value of exported goods which are to the tune of 10% of fob value. Since 3772 MTs could not be exported we have multiplied 3772 by 10% of fob price 408 dollars and we have arrived at a figure of 153,898 dollars. By adding these figures the sub totals is US \$ 243,859 loss on account of unsold material that is 901 MTs has been calculated by multiplying it with 408 dollars to arrive at 367,608 dollars. WE have also calculated the ground rent as per the provisions of the contract @US\$1 per MT per month; again this amount is \$71,079 can be explained by Mr. Gupta. We have also suffered a loss of 2 dollars per MT on account of administrative expenses on the contract. The figure of 20,000 dollars under grand total of a+b+c+d+e is 1,128,418 DOLLARS. Rate of interest @ 18% from 21.10.95 till the case is settled, (G) is the cost and expenses of arbitration. H- any other amount which the arbitrator may deem fit and proper.

Ld. Arbitrator: Any cross-examination.

Mr. R.F. Nariman: No cross. May I suggest let him finish it completely.

RE-EXAMINATION OF GUPTA

Mr. Kumar: In this statement as has been stated by Mr. Kulsreshta some part of the calculation relating to domestic sales have been made by you. He said you maybe in a position to explain for the benefit of the Arbitrator on what basis and

on what material you have calculated. Can you please explain. You are to explain the domestic part of the calculation.

Mr. Gupta: Additional expenses incurred included for handling transport and diversions, transportation for part diversion a total 17632 dollars which were done to complete the conversion of C 6051 contract to 6072 and 6073. Total quantity which was converted was 6480 tons. I will just give the operation which we have conducted. I have broken up the portion as transportation, equipment handling and rates. First transportation - the material was transported from above stock yard to another stock yard in the same vicinity namely R 4 i.e. one transportation was done for conversion to material in the R 4 yard. After loading material stencil changed. Another transportation was done and then another transportation for calculation and stacking of material was done at the R 4 yard. These were 3 transportation.

Then for the equipment handling material was loaded at the stock yard 2 into trailers for transportation to stock yard i.e. first handling.

Ld. Arbitrator: Here you can tally from the list. You merely say contents in Annexure to clause A. go to the next one. Next is US \$ 153898. No US \$ 243859.

Mr. Gupta: Refer to Annexure B we have incurred additional expenditure for diversion of cargo i.e. 3771.925 tonnes to our domestic sales yard for that we have incurred a transportation cost @ Rs. 27.72 and the amount would be 104557.76. The work cost for loading the material into the trailers was Rs. 24932/-. The labour charges for handling of this material was Rs. 23310/-. The expenditure which was incurred on the material which was not exported again are of additional handling and the handlings have been unloaded from the wagons and then loaded into the trailers for the railway stacks for the purpose of stacking.

Ld. Arbitrator: What is the total.

Mr. Gupta: The total for this independent operation is 9605 dollars. Less on account of diversion of material to the home sales market and sales in the home sale market we have diverted 3772 tonnes quantity which was Figures from statement.

C. The loss on account of un-sold materials since they were un-sold. This is a total loss of 901 + 408 f.o.b. amounting to US \$ 367,608.

D. The ground rent has been calculated from expiry of that days and has been calculated till the material was disposed of from the stock yard. The calculation has been arrived at on the basis of 1 dollar per tone per month or part thereof. From 28th August, 1995 till 31st of Jan. 1996 total cargo of 10,251.807 was available at the export yard. So the ground rent for this period is 52591.77 dollars. From the period 1st Feb. 96 to 20th February, 1996 again the entire quantity 10257.807 was available at our stock yard.

Therefore for this period 7322.72 dollars. From 21 Feb. to 28th Feb. 96 shipment of 1623.66 tons had taken place. That quantity was reduced and the ground rent has been calculated on 8626.71 MT and therefore 2465.35 dollars. For the period 1.3.96 to 30.4.96 the shipment of 4856.816 tons took place has been reduced for calculation of the ground rent for this period. To my calculation of 3771.25 the sum worked out is 7543.85 dollars. For the period 1.5.96 to 31.5.96 we have dispatched 2666.912 tons to our home sales yard. So this quantity has been reduced to 935 for calculation of the ground rent. 1105.013 tons and the amount works out to 1105.013 dollars for the period 1.6.96 to 30.6.96 we had no stock.

The total ground rent is 71079 dollars.

E. This can be explained by Mr. Kulsreshtha.

Ld. Arbitrator: Would you cross examine.

Mr. R.F. Nariman: No.

34. Mr. Jain pointed out that despite the aforesaid statement by respondent-claimant's witness, the petitioner-objector had not cross examined the respondent-claimant's witness on the said aspects. In this connection, he referred to the following transcript at Pages 104 and 110 of Volume 5 of paper book:

Ld. Arbitrator : Would you cross examine.

Mr. R.F. Nariman : No.

xxx xxx xxx

Ld. Arbitrator: Any question arising out from it.

Mr. Nariman: No Sir.

35. As far as filing of documents after conclusion of hearing was concerned, Mr. Jain stated that respondent-claimant had filed eleven documents along with its written submissions out of which the Arbitrator had only relied upon two documents to award some portion of the respondent-claimant's claims. He pointed out that Annexure 2 was subsumed in Annexure 3 and the only portion that was relied upon was with regard to unsold quantity of domestic sales of 901 MT. He stated that in any event, the quantity of unsold stock had been proved by independent evidence as had been already reproduced hereinabove.

36. Mr. Jain stated that the procedure adopted by the Arbitrator had not resulted in violation of principles of natural justice as petitioner- objector's rights had in no manner been prejudiced.

37. As far as computation of compensation/damages was concerned, Mr. Jain stated that both the original and amended claim of respondent- claimant was for compensation/damages based on market price of US\$ 275 per MT. He stated that petitioner-objector had never shifted its case from market price to mitigation of

losses. In this connection, Mr. Jain referred to the original witness statement dated 12th March, 1999 which reads as under:

18. After their refusal to lift the materials by the Respondents and advising SAIL to dispose of the materials elsewhere vide their fax dt. 3rd Nov. 95, we tried to assess the market price of the materials and started looking for appropriate buyers. We enquired over telephone from various buyers, including M/s Stemcor UK Ltd and M/s CMC Trading, regarding the then prevailing price of the materials and their intention to lift the same. Vide Fax dt. 10th Nov. 95, M/s Stemcor offered a price of US\$ 275 per metric ton FOB and vide fax dt. 8th Nov. 95. M/s CMC through their Indian agents. M/s Kavon Trading P. Ltd. vide quoted their price as US\$ 291 PMT FOB.

38. Mr. Jain also referred to the amended witness statement which incorporated the concept of Market price. The relevant portion of the amended witness statement reads as under:

18. Immediately after their refusal to lift the materials in November, 1995 by the Respondents and advising SAIL to dispose of the materials elsewhere vide their fax dt. 3rd November, 1995, we tried without prejudice to our rights under the Contract to assess the market price of the contract materials and started looking for appropriate Buyers. We enquired over telephone from various Buyers including M/s. Stemcor U.K. Ltd. and M/s. CMC Trading, regarding the then prevailing price of the materials with the prescribed specifications and sizes and their intention to lift the same. Vide fax dt. 10th November, 1995, M/s. Stemcor offered a price of US \$ 275 per metric ton FOB and vide fax dt. 8th November, 1995, M/s. CMC through their Indian Agents. M/s. Kavon Trading Pvt. Ltd. quoted their price at US \$ 291 pmt. FOB. Upon closer analysis of the aforesaid offers it was found that the offer of M/s. Stemcor @ 275 pmt. matched the quality specifications and sizes of the existing lot of the material under the aforesaid contract, which the Respondent wrongfully refused to accept.

19. As SAIL could not get alternate buyers at the contract price and the market price of the said materials had fallen substantially. SAIL issued letter dt. 26th December, 1995 to the Respondents claiming US \$ 1.39 Million towards the difference of the contract price of US \$ 408 and the prevailing price of US \$ 275 anticipating that SAIL might have to dispose of the materials at the said reduced price subsequently. However, even so with a view to mitigating its losses and to remedying the situation we continued to explore the possibility of selling the goods at higher price. We were able to direct 4857 MT. and 1623 mt. to M/s. Seco and M/s. Stemcor respectively @ US \$ 345/mt. FOB for sale in European market. These were the only deliveries we could make from out of the contracted materials wrongfully rejected by the Respondents. Despite best efforts, we could not find any other Buyer in the international market for the wrongfully rejected goods. This material was in fact produced for sale in the European market and the prices so negotiated by SAIL were accordingly decided upon considering the substantial export benefits and exemption of excise duty which is payable on sale

in the domestic market.

39. Mr. Jain reiterated that M/s. Stemcor's letter dated 10th November, 1995 indicating a price of US\$ 275 per MT was mentioned in both the claim statements. He pointed out that respondent-claimant's witness had been cross-examined with regard to para 18 of the amended witness statement and during the cross-examination the market price of US\$ 275 per MT was not even disputed by petitioner-objector's counsel.

40. Mr. Jain laid considerable emphasis on the fact that the product manufactured by respondent-claimant under the contract was a customised one for export and could not be sold across the shelf. According to him, respondent-claimant could do nothing more than place on record offers received by it immediately around the time of breach. Mr. Jain reiterated that by virtue of the amendment only the quantification had been altered and that too, to incorporate the concept of mitigation of losses/damages. In this connection, Mr. Jain referred to three rules of mitigation as mentioned in Indian Contract & Specific Relief Acts by Pollock & Mulla, Vol. 1, Twelfth Edition which are reproduced hereinbelow:

The doctrine of mitigation has been stated as governed by three rules. Firstly, the plaintiff cannot recover the loss consequent upon the default of the defendant if the plaintiff could have avoided the loss by taking reasonable steps. Secondly, if the plaintiff avoids or mitigates the loss, he cannot recover for such avoided loss even if he takes steps which are more than what was reasonably required of him. Thirdly, where the plaintiff suffers loss or incurs expense by taking reasonable steps to avoid or mitigate the loss resulting from the defendant's default, he may recover the further loss or expense from the defendant.

41. Thus, according to Mr. Jain, respondent-claimant's claim even the amended written statement was based on the difference between the market price and the contracted price after taking into account the concept of mitigation of losses/damages.

42. With regard to rejection of the discovery application, Mr. Jain submitted that the relief sought for in the said application was extremely wide and omnibus. According to him, no relevant details had been provided in the discovery application for production of documents prayed for. Mr. Jain stated that the test of Section 27 of Act, 1996 was not satisfied in the present case. He laid emphasis on the fact that during the midst of arbitral proceedings, petitioner-objector had not filed any application before this Court u/s 27 of Act, 1996. In any event, Mr. Jain submitted that no prejudice had been caused to petitioner-objector as assuming that had discovery application been allowed, it would have been left to respondent-claimant's discretion to file whatsoever documents it wished to file. According to Mr. Jain, this is precisely what the respondent-claimant did when it filed the amended claim statement.

43. Mr. Jain stated that three price circulars of respondent-claimant relied upon

by learned senior counsel for petitioner-objector to argue that the market price of material in question was higher than the contracted price at the time of breach of contract were not relevant as the same were not applicable to goods meant for export. According to him, the price circulars issued by respondent-claimant from time to time were only indicative of prices of goods produced for domestic market. Mr. Jain further stated that the part of the material that could not be diverted to international market was sold in the domestic market as "export surplus goods". Mr. Jain submitted that petitioner-objector had not led any evidence other than relying on the price circulars to indicate what was the prevalent market price of the contracted material in the international market. He pointed out that after production of Stemcor as well as Kayon's letter written on behalf of CMC the onus to prove shifted on the petitioner-objector and it was for the petitioner- objector to prove that the market price was higher than US\$ 275 per MT on the date of breach. In this connection, Mr. Jain relied upon a judgment of this Court in Nagori and Company v. Indian Sugar Industries Export Corporation Ltd. reported in 39 (1989) DLT 9 wherein it has been held that once the claimant had proved that it had paid certain price for transportation, it was for the respondent to show that claimant could have transported the contracted goods at a lesser rate.

44. Mr. Darpan Wadhwa, learned Amicus Curiae drew my attention to Section 56 of the Sales of Goods Act, 1930 and Section 50 of the English Sales of Goods Act, 1979 which read as under :

I) Section 56 of The Sale of Goods Act, 1930

56. Damages for non-acceptance.-Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non- acceptance.

II) English Sales of Goods Act, 1979

50.-(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

45. Mr. Wadhwa submitted that measureN of damages provided in Section 50 of English Sales of Goods Act, 1979 had been incorporated in Section 73 of the Indian Contract Act, 1872 (in short "Act, 1872"). Consequently, according to him, respondent-claimant had to prove difference in contract price and market price to

claim compensation. According to him, the said test was satisfied in the present case.

46. Mr. Wadhwa after referring to Sections 18, 19, 34(2) and Article 15(2) of ICC Arbitration Rules, 1998 submitted that it was mandatory for the Arbitrator to follow the principles of natural justice. But according to him while deciding this issue it would have to be tested on the basis whether there was denial of reasonable opportunity as opposed to full opportunity to present the case. He pointed out that in *Sohan Lal Gupta (Dead) thr. L.Rs. and Others Vs. Smt. Asha Devi Gupta and Others*, the expression "otherwise unable to present his case" in Section 34(2)(iii) of Act, 1996 was considered and it was held that the said expression would apply only where the matters were outside the control of a party and not in a case where due to its own failure, the party could not take advantage of the opportunity duly accorded to it. He pointed out that the Supreme Court in the said judgment had followed the test stipulated in *Minmetals Germany GmbH v. Ferco Steel Ltd.* reported in (1999) 1 All. E.R. (Comm.) 315.

47. Mr. Wadhwa on analysis of material on record stated that the Arbitrator's conduct during arbitral proceedings did not prejudice or amount to denial of reasonable opportunity to the petitioner-objector.

48. In rejoinder, Mr. Kaul stated that Mr. Jain's argument with regard to the contracted material being customised goods was neither in the statement of claim nor in the amended witness statement.

49. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi*, after referring to a catena of judgments including *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, has held that an arbitral award is open to interference by a court u/s 34(2) of the Act, 1996 if it is:

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

50. The Supreme Court has further held in the aforesaid judgment that an award can 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.

51. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, has succinctly summed up the scope of interference by this Court by stating " the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc...."

52. I must mention that no argument was advanced by petitioner- objector to controvert or dispute the finding of breach of contract by the petitioner-objector.

53. In fact, in my opinion, the objections raised by petitioner- objector can be broadly classified under two heads, namely, the application of wrong test of computation of damages and violation of principles of natural justice including rejection of discovery application, violation of terms of reference and production of fresh documents in the midst of cross-examination as well as after conclusion of final arguments.

54. The parties were *ad idem* that the test to be adopted for computation of damages is incorporated in Section 73 of Act, 1872. The said Section 73 reads as under:

73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.-- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused-by the non-performance of the contract must be taken into account.

55. In *A.K.A.S. Jamal v. Moolla Dawood, Sons & Co.* reported in (1916) AC 175 the Privy Council has held that Section 73 is declaratory of the common law as to damages. Section 73 of Act, 1872 in my view, is clearly based on two rules. Compensation is recoverable for any loss or damage which:

i) naturally arose in the usual course of things from the breach or,

ii) the parties knew, at the time of contract, as likely to result from the breach.

56. The explanation attached to Section 73 provides for the duty to mitigate damages.

57. In fact, in A.K.A.S. Jamal's case (*supra*) the Privy Council held as under:

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach-- with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach--or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract:

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Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares and became entitled to damages such as the law allows....

58. In *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*, the Supreme Court has clearly laid down the test of measure of damages as under:

The contention on behalf of the appellant is that the contract was for delivery f.o.r. Kanpur and the respondent had therefore to prove the rate of plain (not coloured) canvas at Kanpur on or about the date of breach to be entitled to any

damages at all. The respondent admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the date of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damages because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damages by the breach of this contract.

The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London* (1912) A.C. 673. These two principles also follow from the law as laid down in s. 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

59. Consequently, in a case like the one in hand, measure of damages would be the difference in the contract and market price on the date of breach. Both the parties have also taken the stand that there was an available market price for the contracted goods on the date of breach.

60. In the present case, respondent-claimant in its original claim statement as well as in its original and amended witness statement had claimed the market price of contracted goods on the date of breach to be US\$ 275 per MT. Mr.

Kulshreshtra, respondent-claimant's witness in his original affidavit in para 18 stated that respondent-claimant had tried to "assess the market price and started looking for appropriate buyers". He further stated that enquiries were made from various purchasers and the respondent-claimant had received two offers from Stemcor and CMC. Respondent-claimant's amended witness statement improved upon the earlier statement inasmuch as it specifically stated therein that Stemcor's offer matched with the quality specification of the contracted material. Consequently, the respondent-claimant never gave up its case of proving the difference between the market and contracted price.

61. In fact, when Mr. Kulshreshtra was first examined on the additional affidavit, he stated that both the said offers had been rejected by respondent-claimant as they were lower than US\$ 408 per MT and losses would have been very heavy if respondent-claimant had accepted the said offers. In re-examination, the witness had further explained that both prices were considered low, but he was not cross-examined on this aspect. Mr. Kaul's argument that US\$ 275 per MT cannot be taken as the market price as it was itself rejected by respondent-claimant as being low, is contrary to facts. In my view, Mr. Kulshreshtra's statement does not mean that US\$ 275 per MT was not the prevalent market price. In fact, the price offered was not accepted as according to Mr. Kulshreshtra commercial loss on account of such sale would have been very huge. Respondent-claimant's witness had clarified this aspect as under:

Mr. R.F. Nariman: I put it to you that SAIL or Some one on in SAIL told Kovon Trading that the materials to be sold to Kavon were rusted.

Mr. Kulshreshtha: No we rejected both the offers because we knew that this will be quite low from 408 dollars and our losses would be very heavy if we did so.

Mr. R.F. Nariman: These losses according to you could be claimed against Krupp. Why should you worry about losses?

Mr. Kulshreshtha: As a business man I have to worry about losses. Claim is for lawyers.

Mr. R.F. Nariman: After 29 December price was too low for this material what then what was the contract price or the market price.

Mr. Kulshreshtha: Whenever a steel trader or a customer is contracting to buy a lot of steel, the market price will be determined for the sizes against the quantity, distribution among these sizes and specifications. Even if these specifications are same if just production is done or supply is done as per the tailor-made sizes, quantity, distribution price will differ. If a party wants to purchase some steel say 10,000 Met. Tonnes and the quantity of plates available is say 12000 M.t. then I was a buyer who had to purchase this material would pay less because 2000 MT is scrap for me. The price will therefore be lower.

Mr. R.F. Nariman: Why, because they are not tailor-made to your requirement?

Mr. Kulshreshtha: Will not be as per the tailor-made requirement of the buyer. The quantity, distribution among different sizes differs.

62. In view of aforesaid statement given by respondent-claimant's witness, I am of the view that there is adequate proof of US\$ 275 per MT being the market price. Moreover, in my view, law does not mandate that respondent-claimant is bound to sell on the date of breach to establish the market price.

63. Consequently, in my opinion, respondent-claimant was entitled to claim the difference between the contracted price and market price i.e. (US\$ 408-275 per MT), but as respondent-claimant abandoned part of its claim and claimed only the loss that it actually suffered, the Arbitrator, in my opinion, cannot be said to have committed any error of law in awarding the lower amount claimed.

64. I may mention that in arbitration matters, the rule of onus to prove is not very stringent and it shifts between the parties. Since in the present case, the respondent-claimant had discharged its initial burden of proof by proving the market price on the date of breach, it was for petitioner-objector to show by any independent evidence that the market price on the date of breach was higher than US\$ 408 per MT. I am fortified in this view by the fact that even in civil cases, the Supreme Court has repeatedly held that the party in possession of best evidence must produce the same. Keeping in view the fact that petitioner-objector was also a regular trader in the goods contracted, it would not have been difficult for the petitioner-objector to rebut the respondent-claimant's allegation that the market price on the date of breach was in excess of US\$ 408 per MT.

65. In fact, the only independent evidence that was adduced by petitioner-objector to show that the market price was higher than the contracted price of US\$ 408 per MT were the price circulars issued by respondent-claimant as well as Annexure 3 of Volume 3 of the paper book which Annexure was filed along with written submissions after conclusion of arbitral proceedings. In fact, the respondent-claimant's witness was cross-examined by petitioner-objector's counsel with regard to the price lists issued by the respondent-claimant. The relevant part of the cross-examination is reproduced herein below:

Mr. R.F. Nariman: Is it correct to say that your organization comes out with various selling price lists from time to time.

Mr. Kulshreshtha: In international market for export-no.

66. The Arbitrator with regard to the said contention in the impugned Award has observed as under:

27.5 All these Circulars give equivalent prices in respect of steel plates of specification IS 2062 including steel plates of the thickness contracted for. 27.6 The prices are expressed in Indian Rupees and if converted to US Dollars at the prevailing exchange rate at the material point of time, they will show that the prices in SAIL's Circulars were higher than the contract price of US\$408MT

(Annexure B pages 13-14).

27.7 It was pointed out by Mr. Gerhard Beyer (RW1) the Managing Director of KRUPP that SAIL's Price Circulars are base prices and do not include extra charges such as freight, packing, distribution charges, excise etc. (Annexure B pages 15 to 39).

28.1 I accept the submission of Senior Counsel for the Claimant and the explanations given by CW1 that the quantity diverted from this Export Order was sold in the domestic market in India as Export Surplus Goods for which the Price Circulars are not applicable and are therefore of no relevance.

67. In my opinion, it is not for this Court in Section 34 proceedings to appraise the evidence as it is for the chosen forum to decide the quality and quantity of evidence that it wishes to rely upon.

68. As far as principles of natural justice are concerned, I am of the view that they cannot be fitted into a rigid mould and the same are flexible and depend on the facts and circumstances of each case. In fact, the Supreme Court in *The Chairman, Board of Mining Examination and Chief Inspector of Mines and Anr.* reported in (1977) 2 SCC 256 has held that "natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter."

69. In *Canara Bank and Others Vs. Shri Debasis Das and Others*, the Supreme Court has held as under:

13. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

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15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It

says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of *Cooper v. Wandsworth Board of Works* the principle was thus stated: (ER p. 420)

"[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam. (says God)," where art thou? Hast thou not eaten of the tree whereof, I commanded thee that thou shouldest not eat?. " Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

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19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

70. In the present case, we are dealing with an International Commercial Arbitration where both the parties were well advised. Moreover, ICC Arbitration Rules contemplate rendering of an arbitral award without any oral hearing. It is only if a party requests for an oral hearing that the arbitral tribunal has to give an opportunity of hearing. Article 20(6) of ICC Arbitration Rules reads as under:

Article 20 - Establishing the Facts of the Case

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6. The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

71. Accordingly, what one has to see is whether in the facts of the present case there was any prejudice or denial of reasonable opportunity to petitioner-objector to present its case.

72. In my opinion, there has been no denial of opportunity to petitioner-objector to present its case as amendment of claim statement was not objected to by the petitioner-objector's counsel at the relevant time. The relevant portion of the arbitral tribunal's transcript reads as under:

Mr. R. F. Nariman: Frankly Sir, it is very difficult to have any serious objection to the Amendment Application. Claim is reduced in my favour. I do not have any serious objection.

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Mr. R. F. Nariman: Could we pass on as Mr. Kumar has come. I have serious objections to the Bunch of document tendered yesterday and if I may now state what the objections are.

Ld. Arbitrator: First an application to amend. You have no serious objections I think.

Mr. R. F. Nariman: no serious objections

73. In fact, additional documents including the letter dated 5th April, 1999 were objected only on the ground of relevancy and delay. This was argued and rejected by the Arbitrator who was the competent authority to deal with such a request. In any event, I am of the view that once the amendment was allowed then the documents mentioned and relied upon in the said amended claim had to be taken on record as the said documents formed the basis of the amended claim. Moreover, in the present case, petitioner-objector took a conscious decision to go ahead with the case and not to seek adjournment as it wanted to prove its case through cross-examination. The Arbitrator's findings in the order dated 26th April, 1999 are also very significant and its pertinent to mention that the statement attributed by the Arbitrator to the counsel for petitioner-objector has not been challenged even in the present petition. The relevant portion of the order dated 26th April, 1999 is reproduced hereinbelow:

3. Normally, when an amendment to the Statement of Claim is allowed, an opportunity would be given to the other party to file an Amended Reply. Here, to save time and costs, Counsel for the Respondent put the case of the Respondent through the cross- examination of the claimant's witnesses. Counsel for the Respondent has intimated when handing in the Respondent's Reply to the Amended statement of Claim that this was only a formality to put thing straight for the purpose of record. I agree with this course and allow the Claimant to deliver their Rejoinder having satisfied myself that this course of action would not

prejudice or cause any injustice to the parties in this ICC Arbitration in adopting this procedure I have complied with Article 15(2) which states that "in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". In passing I like to point out that no prior notice was given by the claimant to the Respondent indicating their intention to amend the Statement of Claim before the commencement of the arbitral hearing in New Delhi on 12 April, 1999. As a matter of courtesy this should have been done but it was not. Be that as it may, nothing turns on this failure to give prior notice to the Respondent.

74. In fact, the very first question that the counsel for the petitioner-objector asked the respondent-claimant's witness was with regard to the additional documents filed along with the amended claim statement. This is apparent from the arbitral tribunal's transcript which reads as under:

Ld. Arbitrator: This is my decision. I have due consideration to the submissions of Senior Counsel for the Claimant and the Respondent. In my opinion after the amendment to the relief to the statement of claim is being allowed I would have to reject the argument of Ld. Counsel for Respondent that these two bundles of documents are not relevant to the arbitration proceedings. I am inclined to agree with the submissions of Ld. Counsel for Claimant that after their submissions, Mr. Nariman can still submit as to which inference to be drawn from these documents and particularly the one written in April, 1999. For the above reasons, objections are over-ruled.

Ld. Arbitrator: You want to continue with cross examination.

Mr. R. F. Nariman: Yes Please. Would you please turn to para 20 of the amended Witness statement. You refer here to 2 contracts namely one with Stemcor and another with Seco Trading. Did you at any point of time after January 1996 in your correspondence with the Respondent inform the Respondent about these contacts.

Mr. Kulshreshtha: No

75. Consequently, in my view, the petitioner-objector having waived its right to seek an adjournment and having voluntarily decided to proceed with the hearing, cannot now allege that it was taken by surprise at the cross-examination stage by either the amended claim statement or amended evidence statement or by fresh documents. Also, in view of what transpired before the arbitral tribunal, the petitioner- objector's reliance on respondent-claimant's counsel's statement that it would not refer to additional documents in the concluding arguments is misconceived on facts.

76. I am of the opinion that the waiver/concession given by the petitioner-objector's counsel was not for any altruistic purpose but was motivated by the fact that though respondent-claimant was entitled in law to claim the actual difference between the contracted price and market price but by virtue of the

amended claim statement, the respondent-claimant was only praying for award of actual loss that it had suffered, which was far lower than the initial claim filed by it.

77. As far as diversion of the contracted quantity to Contract No. C-6072-6073 and the quantity of unsold domestic stock was concerned, I find that the same was proved by independent evidence by respondent-claimant de hors the letter dated 5th April, 1999 as well as other documents alleged to have been filed subsequently by the respondent-claimant. In fact, in re-examination the respondent-claimant's witness gave detail of assessment of actual loss but the petitioner-objector's counsel did not cross-examine him. In fact, no request was made by petitioner-objector's counsel for adjournment after the additional evidence had been taken on record including the assessment of actual loss and the matter was finally argued. Accordingly, the grievance of petitioner-objector that late filing of M/s. SGS's letter has prejudiced its case, is unfounded.

78. I am further in agreement with Mr. Jain's contention that with regard to compensation of US\$ 17632 on account of change in stencil marking the respondent-claimant's witness had given a rough breakup of the said claim on account of "three transportations", but he was not cross-examined on this aspect by the petitioner-objector. Accordingly, it is not open to the petitioner-objector to allege that no proof of US\$ 17632 was offered by the respondent-claimant.

79. As far as fresh documents being filed with the written submissions is concerned, as mentioned hereinabove, the unsold domestic quantity was independently proved by the respondent- claimant. Moreover, the petitioner-objector "cannot have its cake and eat it too" inasmuch as during the course of the present arguments, learned senior counsel for petitioner-objector strenuously relied upon the letter (Annexure 3 of Volume 3 of paper book) which had been produced after conclusion of arguments along with respondent- claimant's written submissions.

80. I am also not in agreement with the petitioner-objector's argument that in view of the terms of reference, the respondent- claimant could not have amended its claim statement inasmuch as Article 19 of the ICC Rules of Arbitration as well as paragraphs 10.5 of the terms of reference specifically provide that new claims and counter claims can be entertained. I am further of the view that Article 20(5) of the ICC Rules of Arbitration permits the arbitral tribunal at any stage to allow any party to produce additional evidence. Consequently, the petitioner-objector's strict and rigid interpretation of the terms of reference in the facts of the present case, is erroneous in law.

81. As far as the rejection of discovery application is concerned, I am of the view that the Arbitrator has erred in holding that the ICC Arbitration Rules did not have any provision for discovery and further that the Act, 1996 did not contain any provision for discovery of documents. The Arbitrator's reasoning that Section 27 of Act, 1996 gave power for discovery only in certain circumstances is also, in

my view, not correct.

82. In my opinion, discovery is extremely important but it should be used by a contesting party to either contest its case or demolish the case of the opposite party. In majority of situations, early production of relevant documents would not only cut cost and time but would also ensure a fair outcome. I may mention that under the Arbitration Act, 1940, the Arbitrator had the power to direct discovery by virtue of para 6 of the First Schedule which provided that a party shall produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, documents within their possession or power. There is nothing in the Act, 1996 which suggests any limitation or any curtailment of this power.

83. Though, in my opinion, there is no specific provision in the Act, 1996 which specifically confers power on the Arbitrator to direct discovery, the Arbitrator has absolute power and flexibility by virtue of Section 19 of Act, 1996 to conduct the proceedings in the manner it considers appropriate without being bound by the rules of the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908. Section 27 of Act, 1996, in my view, only deals with third party discovery and not with regard to discovery of parties before the arbitral tribunal. This inherent power of discovery, in my view, is found in Section 19(3) of Act, 1996, which reads as under:

19. Determination of rules of procedure. -

xxxx xxxx xxxx xxxx

(3) Failing any agreement referred to in Sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

84. In ICC Arbitration Rules also, the arbitral tribunal has the power under Article 20(5) to order discovery. Article 20(5) of ICC Arbitration Rules reads as under:

Article 20 - Establishing the Facts of the Case

xxxx xxxx xxxx xxxx

5. At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.

85. Though, in my view, as mentioned hereinabove, reasons given by the Arbitrator for rejecting the discovery application are not entirely correct, it would still call for no interference with the impugned Award as firstly, the said application was very general, vague and secondly, the same was infructuous by the time the Award was rendered as prior to the final hearing, respondent-claimant had along with its amended claim virtually filed all the documents sought for in the discovery application.

86. That takes me to the issue of costs to be awarded for these proceedings. It has been held in para 37 of the decision of the Supreme Court in Salem Advocate

Bar Association, Tamil Nadu Vs. Union of India (UOI), that actual costs and not nominal costs should be imposed. This is also the requirement of Section 35 of the Code of Civil Procedure, which requires costs to follow the event. Moreover, in view of the conduct of the petitioner-objector, especially the fact that the petitioner-objector had allowed the Letter of Credit to expire before refusing to lift the consignment, and had strenuously argued before the Arbitrator that they were justified in rejecting the material on quality ground - which was not even disputed in the present proceedings - and after granting its no objection to the amended claim statement and agreeing to go ahead with cross-examination without seeking adjournment is liable to pay actual costs of the present proceedings. Accordingly, I direct that the respondent- claimant to file an affidavit of the concerned and authorised persons as to that what amounts have already been paid for legal costs of advocates or are immediately payable, within a period of six weeks from today, in terms of the commitments already made with respect to these proceedings u/s 34 of Act, 1996. In terms of such affidavit filed by the respondent-claimant and duly supported certificates of the advocates of receipt of fees such costs will be the costs of these proceedings provided the needful is done within the stipulated time. In awarding costs I have taken into account the value of the claims involved and the financial capacity of the parties. I may note that on the issue of costs, I am supported by a decision of a learned Single Judge of this Court in the case reported as Austin Nichols & Co. v. Arvind Behl reported in 2006 (32) PTC 133.

87. Before I part with this judgment, I would like to place on record my appreciation for the assistance rendered by Mr. Darpan Wadhwa, Amicus Curiae in the present case.

88. In view of the aforesaid, present petition filed by petitioner- objector being devoid of merits is dismissed along with costs.