(2012) 04 DEL CK 0496

Delhi High Court

Case No: OMP No. 736 of 2009

Steel Authority of India Ltd.		APPELLANT
	Vs	
Salzgitter Mannesmann International GMBH		RESPONDENT

Date of Decision: April 18, 2012

Acts Referred:

- Arbitration Act, 1940 - Section 30
- Arbitration and Conciliation Act, 1996 - Section 18, 19, 19(3), 34, 34(2)
- Constitution of India, 1950 - Article 10, 14
- Contract Act, 1872 - Section 23
- Council of Arbitration Rules - Rule 18, 46, 49, 74

Citation: (2012) 2 ARBLR 296 : (2012) 189 DLT 8

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: Sandeep Sethi, with Ms. Ruchi Gour Narula and Mr. Gaurav Singh, for the Appellant; Naresh Mathur with Mr. Ashutosh Chandola and Mr. Dhruv Suri, Advocates., for the Respondent

Final Decision: Dismissed

Judgement

Justice S. Muralidhar

Introduction

1. The Steel Authority of India Limited (''SAIL''), in this petition u/s 34 of the Arbitration and Conciliation Act 1996 (''Act''), challenges the majority Award dated 27th July 2009 passed by the two of the three members of the Indian Council of Arbitration Tribunal (''Tribunal'') upholding the claims of the Respondent, Salzgitter Manesmann International GMBH (''SI'') and dismissing the counter claims of SAIL. Third member of the Tribunal passed a minority/dissenting award on 10th August

2009. In terms of the majority Award, SI was held entitled to a sum of Euro 1,122,785.25 (Rs.6,71,42,880) together with simple interest at 8% per annum from 5th May 2006 till the date of payment and to reimbursement of Euro 360,656.70 (Rs.2,15,67,374) together with simple interest at 8% per annum from 11th August 2006 till date of payment towards refund of the performance bond. SI was also held entitled to legal costs in the sum of Euro 208,263.84 (Rs.1,38,80,452.66) and reimbursement of arbitration cost in the sum of Rs. 11,23,500.

Background Facts

On 24th March 2001 SAIL invited global tenders for upgradation of its Electric Resistance Welded Pipe Plant (''ERWPP'') at Rourkela in order to upgrade the Rourkela Steel Plant (''RSP'') for production of superior quality API grade pipes of steel grades API X-52 to X-70. On 2ndApril 2002 SAIL issued a Letter of Intent (''LOI'') to SI. Pursuant thereto, the Respondent SI inspected the site and surroundings of facilities including the Hot Strip Mill (''HSM'') in accordance with Clause 4.1 of the NIT. On 27th June 2002 a Contract for modernisation and upgrading of the ERWPP was entered into between the parties.

2. SI initially formed a consortium with Otto India Pvt. Ltd. (''OIPL''). SI retained the responsibility of the overall engineering of the project and the procurement of newly imported machinery and equipment. OIPL was given the task of detailed engineering of the machinery to be revamped and procurement of indigenous equipment, components and services. M N Dastur & Co. was appointed by SAIL as consulting engineers to the project.

3. The contract price was Euro 7,485,235 as amended by a letter dated 12th July 2003. SAIL was to pay SI the price as follows:

80% of the price in accordance with progress made and as specified in clause 2.3 of the Appendix 3 of the Contract.

5% of the price upon the issuance of Preliminary Acceptance Certificate (''PAC'')

5% of the price upon the issuance of the Commissioning Test Certificate (''CTC'').

5% of the price upon the issuance of the Performance Guarantee Test Certificate (''PGTC'').

5% of the price upon the issuance of the Final AcceptanceCertificate(''FAC'')

4. SI provided a performance bond dated 29th July 2002 issued by the State Bank of India, Frankfurt Branch, in the sum of Euro 360,656.70. The validity of the Performance Bond was until 30th November 2004 and it was subsequently extended to 31st December 2006.

5. According to SAIL, SI and its consortium partner OIPL defaulted in the timely execution of works. The basic engineering works which were to be completed by

26th September 2002 were completed on 14th April 2003 after a considerable delay of 6 months and 18 days. According to SAIL, by letter dated 29th September 2003 SI admitted to the default in performance and recommended termination of OIPL''s portion of the contract. Consequently, the contract between SI and OIPL was terminated with effect from 14th October 2003. This was followed by an amendment to the Contract dated 27th June 2002 between SAIL and SI on 29th January 2004 (''the Amended Contract'') whereby the responsibilities of OIPL were to be discharged by SI. Additionally, SAIL agreed to facilitate the placing of orders for indigenous equipment at SI''s request. It was also agreed that the Amended Contract would not be treated as wavier by SAIL of its right under the Contract to levy liquidated damages (''LD'') for delay in performance and would not absolve SI of its obligations under the Amended Contract. The revised date of completion was fixed as 17 months from the date of execution of the Amended Contract i.e. by May 2005.

6. SAIL states that in order to complete the work in time, in consultation with SI, it adopted a Fast Track Ordering System specially designed for the subject project. It was agreed that SAIL would deduct the cost of such supplies from the Contract price in accordance with Clause 7 of the Amended Contract. SAIL claims that supplies were procured under various purchase orders and paid by it against the invoices raised by the Suppliers.

7. SAIL states that there was inordinate delay in SI completing various activities; the strength of engineers and personnel deputed by SI was inadequate to ensure timely completion of works. Further, the personnel deputed by SI lacked the required expertise to execute the jobs assigned to them. In terms of Clause 24.1 of the General Conditions of Contract (''GCC''), SI was required to conduct trial runs for individual equipment/units and integrated trial runs of facilities in terms of Clause 24.3 of GCC for PAC. SAIL states that since SI was running behind schedule SAIL did not receive the required notice under Clause 24.1 of the GCC for the PAC test until 23rd November 2005. According to SAIL, a number of defects were noticed during the trial runs conducted for various sections of the ERWPP between 22nd September 2005 and 23rd November 2005. SAIL requested SI to rectify the defects. A consolidated/conditional PAC was issued by SAIL on 19th December 2005.

8. SI was then requested to perform tests for commissioning of the plant. SAIL states that SI indicated its inability to get its sub-agencies to liquidate the pending defects and sought SAIL''s assistance. SI refused to proceed with the commissioning and insisted that it be paid the 5% of contract price relating to PAC. SAIL claims that in order to avoid any more delays in commissioning it was constrained to release 5% of the contract price on 3rd February 2006. It is SAIL''s case that after obtaining the PAC Respondent personnel left the site and the country in December 2005 on the pretext of Christmas vacation and thereafter did not return to complete the remaining stages of the project including commissioning and rectification of PAC

defects.

9. SAIL states that it repeatedly requested SI to resume the work and fulfil its contractual obligations. SI submitted a commissioning test protocol and sought assurance of full payment of 5% of the price. SAIL reiterated that defects were required to be rectified whereas SI insisted on full payment for commissioning and inter alia raised the issue of inadequate quality of coils. SAIL claims to have been shocked to receive on 12th May 2006 a letter from SI terminating the Contract. On its part SAIL issued on 13th May 2006 a notice terminating the Contract and stated that the works left over by SI would be got executed through third parties at SI''s cost. According to SAIL the left over works were completed through third parties in September 2006 and commercial production of higher grade API pipes commenced sometime in December 2007. Meanwhile on 11th August 2006 SI filed its statement of claims before the Tribunal constituted by the Indian Council of Arbitration (''ICA'').

The Award of the Tribunal

10. The majority Award by two of the three members of the Tribunal was given on 27th July 2009 whereby SI was held entitled to Euro 1,122,785.25 (Rs. 67,142,880) being the sum outstanding together with simple interest @ 8% per annum from 5th May 2006 till the date of final payment. SI was further held entitled to a reimbursement of Euro 360,656.70 (Rs. 21,567,374) together with simple interest @ 8% per annum from 11th August 2006 till the date of final payment, being the refund of the Performance Bond. SI was also granted legal costs and reimbursement of arbitration costs to the tune of Euro 208,263.84 (Rs. 13,880,452.66) and Rs. 11,23,500 respectively. The Counter Claims of SAIL were dismissed with costs.

11. On 10th August 2009 the minority Award was passed whereby SI was held entitled to 5% of the total cost of the contract against Claim No. 1 i.e. Euro 3,74,262 (Rs. 2,23,80,960). Against Claim No. 2, SI was given adjustment of the amount encashed against the performance bond and bank guarantee against the counter claims was allowed in favour of SAIL. Claim No. 3 was dismissed. SI was further held entitled to interest @ 8% per annum on the amount awarded from 16th December 2005 till the date of Award against Claim No. 4. SAIL was held entitled to recover from SI, post adjustment, a total sum of Rs. 5,14,22,206 against all its Counter Claims. SAIL was further held entitled to interest on the amount awarded at the rate of 8% per annum from 13th May 2006 till the date of Award. SAIL filed the present petition u/s 34 of the Act challenging the majority Award allowing SI''s claims and dismissing SAIL''s counter claims.

Scope of the present proceedings

12. Before proceeding to deal with the contentions of the parties, it is necessary to recapitulate the settled law as to the scope of challenge to an arbitral Award u/s 34 of the Act. The legal position in this regard has by and large been governed by the

dictum of the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., The said decision was further analysed by the later decision in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, in which the Supreme Court undertook the exercise of comparing the scope of challenge under the earlier Arbitration Act 1940 and the 1996 Act. It was observed (SCC, p.209):

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

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

61. In ONGC this Court observed: (SCC pp. 727-28, para 31) "31. Therefore, in our view, the phrase ''public policy of India'' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the

public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

13. The legal position regarding reappraisal of evidence by a court reviewing an arbitral award was explained in M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, as follows: (SCC p. 350, para 4)

4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (Arosan Enterprises Ltd. v. Union of India (1999) 9 SCC 449) upon consideration of decisions in AIR 1923 66 (Privy Council) Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., , N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, Sudarsan Trading Co. Vs. Government of Kerala and Another, State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, as also in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding u/s 30 of the Arbitration Act. This Court in Arosan Enterprises categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exists a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara stand accepted and adopted by this Court in Bungo Steel Furniture to the effect that the court had no

jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties.

14. The Court proceeds to examine the challenge to the impugned Award in light of the above legal position above which was reiterated in Ravindra Kumar Gupta and Company Vs. Union of India (UOI),

Challenge on the grounds of procedure

15. There are two major objections as regards the procedure adopted by the Tribunal. The first is that SAIL was deprived of an opportunity to properly defend itself in the arbitral proceedings and that this is contrary to the requirement of a proper arbitral procedure u/s 34(2)(v) of the Act. It is pointed out that even u/s 18 of the Act, a proper opportunity should be given to both parties.

16. In order to appreciate the above contention, certain dates and events need to be mentioned. The notice for arbitration was filed with the Indian Council for Arbitration (''ICA'') by SI, the Claimant in the arbitral proceedings, on 11th August 2006. SAIL, the Respondent in the arbitral proceedings, filed its reply and counter claim only on 27th August 2007 i.e. more than 12 months and 15 days after the filing of the claim by SI. Further, as per the schedule established by the Tribunal, parties were required to submit their statements of witnesses by 19th September 2008 and cross-examination was to be conducted eight weeks thereafter i.e. 17th November 2008. In other words, counsel for the parties were given eight weeks time to prepare for the cross-examination of the witnesses of the other side.

17. On 19th September, 2008, SI filed its statement of witnesses but SAIL did not. On 15th October 2008, SAIL required a further period of two weeks for submitting its statement of witnesses. On 20th October 2008, the Tribunal granted the time till 5th November 2008. On that date, i.e. 5th November 2008, SAIL submitted an incomplete statement of its witnesses without the exhibits. This defect was pointed out by the Tribunal in its e-mail dated 10th November 2008. On 11th November 2008, the Tribunal received by courier, about six days before the date on which oral hearings were to commence, exhibits which ran into 1848 pages. On the first hearing i.e. 17th November 2008, SAIL sought an adjournment on the ground that SI had not filed rebuttal witness statements. However, SI went along with the schedule.

18. As pointed out by SI, Article 10 of the Contract states that the arbitration shall be governed and regulated in all respects by the laws of India and the arbitration proceedings by the Act. There is no reference to the Indian Evidence Act, 1872 as being applicable to the arbitration proceedings. Section 19 of the Act permits the Tribunal to set down its procedure with the agreement of the parties and failing

which, in such manner, as it considers appropriate. The power u/s 19(3) of the Act includes the power to determine the admissibility and relevance of any evidence.

19. The avoidable delay by SAIL to complete the steps at each stage in the schedule set down by the Tribunal justified its refusal to give SAIL further time during the course of hearing. By filing documents running into 1848 pages virtually a few days before the commencement of the hearing, SAIL could not take advantage of the default committed by it and expect the Tribunal to grant it adjournments. The Tribunal rightly referred to Rules 46 and 49 of the ICA Rules which underscore the need for parties to adhere to the time lines set by the Tribunal for completion of the various steps in the proceedings.

20. In Para 47 of the majority Award it is noted that on the conclusion of the cross-examination of SI''s witness Mr. Homberg on 18th November 2008, counsel for the SAIL declined to cross-examine SI''s remaining witnesses on the ground that the transcript of the evidence was not available. The majority of the Tribunal declined the request for adjournment. Consequently, SI''s witness Mr. Hubert Reilard was examined in chief but not cross-examined by counsel for SAIL on 18th November 2008. SI''s two other witnesses Mr. Karl-Heinz Rudolph and Mr. Herbert Olfs were examined in chief on 19th November 2008 by SI''s counsel. However, SAIL''s counsel refused to cross-examine them citing the same reason. As pointed out by the majority in the impugned Award, Rule 74 of the ICA Rules does not make it mandatory for the Tribunal to furnish to counsel the transcript of the evidence on a daily basis. Surely, counsel for SAIL could have kept notes of the examination in chief. Further they also had the affidavits by way of evidence of SI''s witnesses. If the evidence of Mr. Reilard, Mr. Rudolph and Mr. Olfs remained un&#xfffd;rebutted, SAIL has only itself to blame.

21. The next ground of challenge concerns the refusal by the Tribunal to extend the time for SAIL to file its reply and counter claim. A reference is made to Rule 18(a) of the ICA Rules in terms of which the Registrar can extend the time. Issue No. 1 was whether SAIL''s pleadings should be considered by the Tribunal despite the objection by SI that they were filed beyond the time permitted under ICA Rules. In para 72 of the majority Award, the Tribunal granted extension of time to SAIL despite pleadings having been filed beyond time. There is therefore no merit in this contention.

22. The third contention is that the majority award is vitiated for "a complete misconception of the procedure for proving or presuming proof of documents produced from official records". Reference is made to para 190 of the Award which is stated to be "perverse" since it overlooks that there is presumption in favour of authenticity of documents produced from official records by the two witnesses of SAIL, Mr. Padhee and Mr. Parichha. The documents produced by them were not certified copies. These were documents mentioned by them in their respective affidavits. However, during the cross-examination it transpired that the witness''s

statement was not prepared by them and, in fact, they did not have any personal knowledge of the record. With SAIL not offering an explanation regarding non-availability of witnesses who could speak for those records, the conclusion drawn in para 190 of the majority Award cannot be faulted. Although the Evidence Act may not be strictly applicable, the majority of the Tribunal was justified in requiring SAIL to satisfy it that its witnesses were conversant with the records and speak to them with some certainty. It is not possible to accept the contention, therefore, that the procedure adopted by the Tribunal is based on a misconception of the rules of evidence which lends presumption to the authenticity of documents produced from official records.

23. The Court is unable to accept the contention of SAIL that the Tribunal committed material irregularity in the conduct of the arbitral proceedings or that a fair opportunity as envisaged u/s 18 of the Act was denied to SAIL. The challenge to the impugned majority Award on the ground u/s 34(2)(v) of the Act should fail.

Was SI guilty of delaying the project?

24. According to SAIL, the Deutsch Report dated 13th October 2008 was prepared only during the course of arbitration and was, therefore, an afterthought. It is contended by SI that the date of the Deutsch Report does not impact its admissibility so long as its contents are not disputed. Karl Deutsch is a firm which prepared the report dated 13th October 2008 after visiting the Rourkela Steel Plant (''RSP''). In a letter dated 13th October 2008 Mr. Maxeiner, a Product Engineer, stated that he had been deputed to RSP four times for the purpose of erecting and starting three Ultra Sonic Machines (''USM'') and to train operators, maintenance people and electricians. He referred to RSP as being "a very dirty and chaotic plant, nothing was ready for start commissioning. To walk inside the plant was very dangerous because of no safety arrangements." Even though the date of the above report is after the commencement of the arbitral proceedings, clearly the statements therein are first hand observations of the author of the letter in relation to his visits to the plant. This document was not refuted by SAIL during the arbitral proceedings.

25. The condition of RSP is corroborated by the evidence of Mr. Homberg. He was subjected to extensive cross-examination. In response to a question by counsel for SAIL, Mr. Homberg stated as under:

999 A: Mr. Franz Hoemberg: Lousy condition can be changed. This lousy condition means we discovered many material lying around, scrap, spare parts, generally it looked rather dirty. But this will not affect finally our work. Of course, it has to be removed and cleaned and then we have the mill. It is requiring some time; cost, but technically no problem. It has not affected the mill.

26. In response to another question by counsel for SAIL that the responsibility for changing the conditions of the plant was that of SI, Mr. Homberg''s reply was:

1002 A-Mr. Franz Hoemberg: Yes. I feel responsible to clear things and you see regarding revamping there was a meeting when Mr. Keutman discussed with your technicals the details of the scope of work and he also put one point - the plant has to be handed over by RSP in broom-clean position. Broom-clean means cleaned generally by brush. That is a saying that we have in Germany-besenrein -broom-clean. We got some dispute on this matter later on. Anyhow it was cleaned. Maybe that Salzgitter had to pay for it.

27. There is justification in contention of SI that what Mr. Homberg actually meant when he stated that SI "had to pay for it" was that SAIL may have made SI pay for something that was beyond its scope of work and was, in fact, a part of the SAIL''s scope of work. SI is also justified in relying upon the unrebutted testimony of Mr. Reilard who states that "the time taken for installation, testing and commissioning exceeded more than four months instead of a standard installation time of two to three weeks." He listed out the numerous problems in the plant. He concluded in his statement dated 18th December 2008 that "working conditions were very inefficient for reasons like huge presence of unskilled workers during the installation, inefficient planning, unjustified harassment of our engineers, damaged parts due to roof leakages and many other small problems with a big impact." He further added that "the plant was and is in an extremely dirty condition." The majority of the Tribunal cannot be faulted for preferring the testimonies of SI''s witnesses to that of SAIL''s in accepting the contention of SI as regards the condition of RSP.

28. SAIL contended that Mr. Parichha stated in his witness statement that RSP was maintained properly since it had earned ISO 9001 Certification. A copy of the said ISO Certificate was exhibited in the arbitral proceedings. SAIL pointed out that SI did not cross examine Mr. Parichha on this point and the said evidence was not referred to by the Tribunal. SAIL also relied upon a letter dated 25th April 2003 whereby it had informed SI that in the event the project was not completed in time, SAIL would levy LD as per the contract. SAIL referred to the minutes of the meeting dated 29th/30th September 2003 which stated that SI had by its letter dated 29th September 2003 expressed regret for the failure to remedy the non-performance of the contract in due time and that since the failure was only attributable to OIPL SI recommended the termination of OIPL''s portion of the contract and its taking over the same without imposing any additional financial liability on SAIL.

29. SI pointed out that the ISO certificate relied upon by SAIL was valid only till 13th June 2005, whereas the commissioning of the ERWPP was thereafter. Further, the said certificate was for a plant that was capable of producing X-52 and not X-70 grade pipes. It also made no reference to the specific quality/chemical composition of the coils. It is stated that the letter dated 25th April 2003 referred to the unamended contract whereas the amended contract states that its provisions shall prevail over original contract to the extent of inconsistency. SI pointed out that the Counter claim No.3 of SAIL was for LD for a delay of nine months up to September

2006. Therefore, the delay would have to be reckoned from 29th January 2004 and not in terms of contract dated 27th June 2002. It is further pointed out that the minutes of the meeting dated 29th/30th September 2003 also pertained to the term of the original contract. The amended contract specifically stated that SAIL reserved the right to levy LD for the delay in performance by SI. Since this clause was mentioned in the amended contract, the original contract correspondingly stood amended and the delay had to be determined with respect to the term of the amended contract.

30. The above submissions of SAIL are really an invitation to the Court to re-appreciate the evidence on record which is precisely what has been disapproved in the decisions of the Supreme Court referred to hereinbefore. Nevertheless, the question to be answered is whether on the appreciation of the above evidence, the conclusion arrived at by the majority of the Tribunal was a possible view to take. The answer to that question in the considered view of the court has to be in the affirmative. The amendment to the contract appears to have been understood even by SAIL to mean that the delays thereafter would have to be reckoned not with reference to the original contract but the amended one. Mr. Parichha''s reliance on an ISO certificate which pertained to the production of X-52 grade pipes and with no reference to the coil quality and the validity of which was only till 13th June 2005 did not help SAIL''s case as far as the majority of the Tribunal was concerned. That was certainly a possible view to take on the evidence. At the cost of repetition it must be stressed that the court is not sitting in appeal over the Tribunal. It is not expected to re-appreciate the evidence in order to come to a different conclusion only because it is possible to do so. In P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, the Court explained that the proceedings u/s 34 of the Act are not of an appellate nature. It said (SCC, p.600): "A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act." Given the scope of the court''s jurisdiction u/s 34 of the Act, it is not persuaded to hold that the impugned Award of the majority of the Tribunal suffers from patent illegality insofar as it holds that the delay in the completion of the project could not be attributable to SI.

Delay in installation of equipments and sub-contracted works

31. The second major issue taken up for consideration by the Tribunal was whether SAIL delayed the installation of equipments and the sub-contracted works. Here, SAIL again referred to the minutes of the meeting dated 29th/30th September 2003 which records the fact that SI admitted to the failure on the part of OIPL to discharge its responsibility and about giving a proposal to SAIL about the manner in which the remaining portion of OIPL''s work had to be carried out. This led to the amended contract dated 29th January 2004. According to SAIL, it went out of the way to facilitate execution of the project by SI since SI had no knowledge of Indian

market and contractors. Since it was agreed that SAIL would help SI by placing orders for indigenous sub-contracted works, SAIL took steps to put the requisite systems in place without delay. It is submitted that SI did not make any grievance in this behalf and was, in fact, in direct contact with the sub-contractor, M/s. GEMCO throughout the period of amended contract. Reference is also made to the cross-examination of Mr. Homberg in which he admits that SAIL helped SI in carrying out the project.

32. As pointed out by SI, while undertaking the task of sub-contracted works SAIL followed a typical government process under which tender was released in November 2004 and offer for acceptance was made in December 2005 with a condition that supplies had to be made within six months of placing the order. This was in relation to lubricants that had to be procured by SI. As a result, lubricants could be supplied only by June 2006. In terms of the Committee Report (Fast Track Ordering System) dated 21st January 2004, SAIL decided to exercise the right to place order for all supplies on behalf of SI. Mr. Rudolph''s statement in this behalf remained un-rebutted. The cross-examination of Mr. Sachdeva also revealed that RSP was directly dealing with GEMCO. Mr. Sachdeva was speaking on behalf of the firm that was awarded the job of electric and electronics. The evidence of Mr. Sachdeva is not helpful to SAIL. The conclusion by the majority of the Tribunal that the delay was on the part of SAIL in installing equipments and sub-contracted works does not call for interference.

Delay in issuing the Preliminary Acceptance Certificate

33. The next issue concerns the delay on the part of SAIL in issuing the Preliminary Acceptance Certificate (''PAC''). Clause 24.2 of the GCC pertains to the PAC. Under Clause 24.3, SI was required to conduct pre-commissioning of not only each machine but an integrated test of the entire ERWP Plant. SAIL urged that SI was bound to commission the ERWPP in terms of Clause 25 of the contract and that the very object of the contract of upgradation of ERWPP was to produce commercial pipes of X 70 grade. SAIL was already producing X 52 grade pipes. SI on its part did not dispute that an integrated trial run was not undertaken. However, it points out that the first pipe was produced on 24th July 2005 and the plant was inaugurated on 6th December 2005. It is stated that the commissioning should be deemed to have been done in October 2005 and an integrated trial run ought to have, therefore, been conducted.

34. A news bulletin, Ispat Sahyog of December 2005 which forms part of the arbitral record has been relied upon to show that even according to SAIL, the ERWP Plant of RSP was formally inaugurated on 6th December 2005. The news bulletin stated that after inauguration the Chairman and Board of Directors "witnessed the fascinating process of pipe making in this ultra modern pipe plant." It was further stated that "after the upgradation the mill will be able to manufacture pipes of grades upto API 5L X 70." It is accordingly contended by SI that at the stage of PAC, there could not

be a coil test to demonstrate working of machine both singly and integrated. If indeed pipes had been produced, an integrated trial run ought to have been conducted by SAIL itself. SAIL refers to the evidence of Mr. Homberg''s and states that it is contrary to the contemporaneous documentary evidence.

35. By a letter dated 24th January 2006 SI informed SAIL that commissioning would take place once full payment is made for the PAC as per the contract. It further proposed to hold official commissioning test around 10th February 2006. It sent another letter on 25th January 2006 pointing out that commissioning had been done on 10th October 2005 and RSP had been producing commercial pipes. SAIL then replied on 25th January 2006 stating that the commissioning is not over and some machines were yet to be put into operation, these machines were UST machines, IDB Trimmer, Marking Machine etc. In his evidence, Mr. Homberg maintained that these machines were in a working condition.

36. It is pointed out by SI that in April 2005 SAIL handed over a procedure for preliminary commissioning which is a document dated 15th March 1991 which was not mentioned in the contract. In terms of the said document, SI had to get the signature of every person involved in the testing of other machines and this in turn caused enormous delay which SI had not anticipated. SAIL maintains that SI failed to rectify the PAC defects. It does appear that the plant was producing commercial grade pipes though not of X 70 grade in October 2005 and definitely by the time the plant was inaugurated i.e. 6th December 2005. SI appears to be right in its contention that in the absence of the quality coil required for production of X 70 grade pipes, there could be no commissioning test in that regard. The defence taken by SI for not being able to complete testing in terms of the document dated 15th March 1991 appears to be a plausible one. The decision of the Tribunal on the delay by SAIL in the issuance of PAC in its majority award cannot be faulted.

Presence of Qualified Personnel

37. Issue No. 4 concerned the presence of qualified personnel. Reliance was placed by SAIL on the statement of Mr. Parichha and to the numerous training certificates issued to the employees of SAIL for satisfactory completion of training requirements. It is pointed out by SI that the three certificates referred by Mr. Parichha expired in the middle of 2003 and cannot possibly be relied upon to show that the employees were trained in using the upgraded ERWP Plant which was commissioned in October 2005.

38. Here again, the evidence of Mr. Rudolph which shows that only 30 to 40% of the employees of the SAIL attended the training for UST machines, fly-cut-off machines, Hydrotester and bevelling machines, etc. remained un-rebutted. The acceptance of this evidence by the majority of the Tribunal cannot be faulted.

39. The next question that arose was whether the experts required for supervising the tests were available at RSP. According to Mr. Rudolph they left RSP in December

2005 and never returned. SI, on the other hand, states that experts, who could manage the machines, were available till 2006. Further, SAIL had not released the PAC payment and, therefore, there was a risk in cost factor for SI as to whether SAIL would make the payment. Thirdly, it is pointed out that German experts left only by the end of December 2005 which was much after PAC was over and the plant was officially inaugurated by the SAIL''s Chairman. It is pointed out that Mr. Parichha also in his cross-examination acknowledges that SI was maintaining its local site office till the middle of 2006. SI also refers to its letter dated 15th March 2006 as demonstrating its good faith in going forward to commissioning even after the plant was inaugurated on 6th December 2005. SI sent a commissioning test protocol on 16th February 2006 followed by a revised protocol on 15th March 2006. It cannot, therefore, be said that SI completely abandoned the RSP and was not prepared to carry forward the commissioning test.

Revamping of the Annealer

40.. SI is justified in its contention that the delay was caused due to the issue of revamping of Annealer during the original contract. SI informed SAIL prior to the signing of the June 2002 contract that the Annealer could not be revamped. SAIL appears to have accepted this. The document dated 25th May 2002 has been relied upon by both parties. Para 1.3 of the said document reads as under:

Revamping of Seam Annealer: M/s. SI had originally quoted for new seam annealers against our specification of revamping of existing annealer and supply of a new annealer. However, at a later date after receipt of RSP''s final summarised list of items where the original scope of revamping plus new was repeated, they have changed over to revamping of existing annealer and supply of one additional new annealer. But during the contract signing discussion they have brought out that the existing annealer was examined in the month of May''02 by their sub-supplier''s technical representative by running the equipment and have recommended that the existing annealer cannot be revamped because of obsolescence. Hence, M/s. SI proposes to replace the existing annealer with a new one of required capacity with extra financial implication which comes to Rs. 1.8 crores (handed cost). This being a technical deviation from the original offer Consultants were asked to advice the course of action. In their view it is necessary to replace the existing old and obsolete annealer with a new one for ensuring quality weld seam of the pipes produced by ERWPP which is mandatory and prime technological requirement (Annexure-I).

41. The interpretation placed on the above documents by the Tribunal that the responsibility of getting a new annealer was not that of SI does appear to be a plausible one. The delay in this regard therefore could be attributed to SAIL.

Commencement of commercial production

42. One of the key issues concerns the date on which commercial production started. The post completion report prepared by RSP itself in para 4.1(b), (c) and (d)

states as under:-

b) Though commercial production started from January 2006, API pipes could not be produced till 22.01.07 because Off Line UST machine was not put into operation by SI. Before they could do so and start API production in an integrated manner, SI withdrew from the work w.e.f. 26.05.2006, citing various disputes with RSP and the whole matter has gone into arbitration. However, efforts were put by RSP engineers and Off Line UST has been tested on sample piece on 7.12.2006 and now is in use to produce the API pipes in an integrated manner to meet the required API specification. So far they have only produced 123/4 size 736 Tons (API 5L GR-B, PSL-1) as on dated 15.2.2007 for NTPC and further production will be done by ERWPP as per the orders to be received in future for various size pipes being produced by them.

c) IS quality production is being done on a regular basis since January 2006. The plant output has shown a steady increase from around 1000 tons per month initially to nearly about 6000 tons per month. This production compares favourably with the projected capacity of 75,000 to i.e.6250 tons per month.

d) The production data per month from January 2006 till December 2006 are given Annex-1. The plant produced upto December 2005 for trial and stabilization of the mill and regular commercial production started from January 2006.

43. The above paragraph was relied upon to state that SI withdrew from the work with effect from 26th May 2006 and that Off Line Machine was not put into operation by SI. The grievance of SAIL is that the Tribunal O.M.P. No. 736 of 2009Page 22 of 32 relied only upon the last sentence of para 4.1(d) in the above paragraph and not the entire paragraph.

44. It is pointed out by SI that the Report does not refer to production of API grade X 70. That would be subject to raw material provided. The other machines installed which were tested did not impact the grade of the official pipe input. The increase of the plant in December 2005 corroborated the stand that delivery and commissioning were fulfilled. It is reiterated that "achievement of performance guarantee parameters" could only be done as per the actual terms if specific grade of coils were provided. Reliance was placed on the statement of Mr. Olfs who was not cross-examined and Mr. Homberg, who was cross-examined.

45. SAIL''s case is that without production of API grades up to X 70 grade, SI failed to fulfill its obligation under the contract or the amended contract.

46. Documents have been produced to show that the first pipe was produced by SAIL on 24th July 2005 and official inauguration took place on 6th December 2005. The cross-examination of Mr. Parichha shows that he was involved in the project since July 2004. In response to a specific question whether SI admitted lapses on its part, he answered in the affirmative. He clarified that he was not present at the

meeting and he was making the statement on the basis of the documents made available to him after he took over from his predecessor.

47. According to SAIL, Mr. Parichha''s evidence is supported by contemporaneous documents. The majority of the Tribunal however preferred the un-rebutted evidence of Mr. Olfs, Mr. Rudolph and Mr. Homberg to that of Mr. Parichha. This cannot be said to be an error tantamounting to a patent illegality requiring interference u/s 34 of the Act. It was a plausible view to take and cannot be faulted. The scope of interference by the Court u/s 34 of the Act does not permit re-appreciation of the evidence only to come to a different conclusion.

Evidence of SAIL''s witnesses

48. There is a lot of criticism by SAIL of the manner in which the Tribunal has approached the evidence of Mr. Parichha and Mr. Padhee. Mr. Padhee was in the commercial department of SAIL and was dealing with the contract as Chief Material Manager. In his evidence, he referred to the sequence of events during the course of the contract and subcontract ,minutes of the meeting and correspondence between the parties. He also relied upon the production programme of SAIL for API Grade Coil and Coil Inspection Report of R&C Laboratory of SAIL. It has pointed out that Mr. Padhee relied on this document only to show that SAIL was already producing API grade pipes in its plant and had requisite raw material in the form of coils. Reliance is placed on the certificate of the R&C Laboratory which states that the coils produced by HSM Hot Strip Mill were A568 M which was the required quality.

49. SAIL also referred to the answers given by Mr. Parichha, technical person, in his cross-examination. It is pointed out that although his evidence dealt with the said issue, Mr. Parichha was not cross-examined by SI''s counsel.

50. SI on its part has pointed out that Mr. Padhee had attached at least seventeen documents with his witness statement which pertained to technical aspects of commissioning. Being a commercial person he should not have relied upon them. Obviously for the documents relied upon by Mr. Padhee, Mr. Parichha could not have been examined. SAIL should have taken care that a technical person spoke for documents of technical nature.

51. As regards Mr. Parichha''s evidence, it is pointed out that his cross-examination took place after Mr. Padhee''s cross-examination and SI did not want to waste the Tribunal''s time for cross-examination of Mr. Parichha on which Mr. Padhee was cross-examined. Mr. Parichha in his cross-examination admitted that "I am not a chemical or metallurgical engineer."

The Hydrotester

52. The Tribunal then considered the issue whether there was delay in accepting that the Hydrotester testing could not be revamped. These delays pertained to a

period prior to the amended contract. SAIL points out that SI did not incorporate any reference to Hydrotesting in the amended contract. SI on its part refers to SAIL''s Committee Report of January 2006 and the un-rebutted witness''s testimony of Mr. Olfs to contend that the amended contract was "sign it or leave it" as provided by SAIL and there was no option for SI but to accept it. The Tribunal has examined this evidence in some detail and has concluded that the Hydrotester could not be revamped although SI withdrew the testimony of Mr. Ahlften. It states that this statement was also attached to SI''s letter dated 27th May 2004. This statement showed that the maximum pressure for which the existing Hydrotester was built was 250 kg. per sq. cm. which was far below the requisite parameter and that this was never disputed by SAIL.

Quality of coils

53. The next issue concerned the quality of coils on which there was a lot of discussion. It was pointed out that according to SAIL, it was only on 10th February 2006, for the first time, that SI raised the plea that the coils were not of adequate quality. It is pointed out by SI that this plea was raised in February 2006 because that was the stage at which those coils were required. The contract itself clearly envisages that the requisite quality of coil required for production of X 70 grade pipe was ASTM A 568M. This was critical to the API grade. Apart from the certificate of R&C Laboratory there was no evidence provided to show that the Hot Strip Mill could produce ASTM A 568M coils. Even that certificate does not specifically say so. On the other hand, Mr. Homberg has in his testimony adverted to the importance of the quality of the coils. His evidence in cross-examination reads as under:

1010 Q: 37 Shri Uttam Dutt: You did not tell us Mr. Homberg - what kind of coil was required for production of high grade; API pipes that were supposed to be produced post-revamping of the plant.

A-Mr. Franz Hoemberg: You can make pipe of any qualification; you can make API grade, low grade, high grade; but depending on the yield. The yield is uneconomically, too low. Even now basis plant is equipped with all facilities that you can make any pipe, but unacceptable yield. There is nothing missing on this plant. There is nothing there except the condition of the coils.

1011 Q:38 Shri Uttam Dutt: This is what I asked you Mr. Homberg. Can you tell us what specification you were looking for in the raw material?

A-Mr. Franz Hoemberg: This 5-6-8A is good enough; it is specified in the contract. That is good enough. The tolerances are given; we are not complaining about thickness, we are not complaining about this. Everything is given in the specification. But the camber is far beyond the limit, permissible limit. The camber is about one inch on six metre length and one inch, we have 40 or 50 or 60 millimetres found on six-seven metres. This camber that creates all the problems that you are complaining in openings coils, in operating a milling machine. Besides that, even if

we - cut it off, there is no facility to handle it. The sheer end welder made for such long scrap ends. There were all facilities for removal of scrap ends, and limit of 400 or 500 millimetres. We were prepared to cut even fish-idial - tail from the coil, but not the camber..... This involves handwork, loss of time, loss of material, less yield. That is the bottleneck. Less yield means it is uneconomic.

1012 Q: 39 Shri Uttam Dutt: When did you realize Mr. Homberg that facilities were not adequate for removal of camber problems that you mentioned just now?

1013 A Mr. Franz Hoemberg: The camber were detected only after feeding suppress coil when the first coil was opened. As I told before, a coil coming from the hot strip mill, blank, ready - we cannot recognize anything about camber. And if we did not expect any camber, since we know new contract conditions, it is the ASTM-A 5-6-8.

1014 Q-40 Shri Uttam Dutt: You told us just now that you realize that there were no adequate facilities for removal of camber. You have not still answered the question that when did you realize that the facilities were not adequate to remove the camber in the pipes?

1015 Dr. Patricia Nacimiento: This question was answered.

1016 A Mr. Franz Hoemberg: When we open.

1017 Arthur Marriot: Not audible

1018 Q:41 Shri Uttam Dutt: He did not specify the time when he realized.

1019 Aurthur Marriot: Not audible.

1020 A Mr. Franz Hoemberg: We realized only when starting of the mill, after open handling the first coil.

1021 Q:42 Shri Uttam Dutt: Apart from camber, Mr. Hoemberg, there was absolutely no other problem with the raw material provided to you.

1022 A Mr. Franz Hoemberg: So far we have not to make any more complaints. Tolerance, we found in limits; width tolerance seems to be okay, thickness..... seems to be okay. Chemical composition, we have not checked. But what we got from your laboratory we found it was perfect. Welding was made well.

54. A further specific answer given by Mr. Homberg was as under:

1210 Q-111 Shri Uttam Dutt: Is it not correct that you were not prepared to produce the highest grade of API pipe that was required to be produced in this plant?

1211 A-111 Mr. Franz Hoemberg: Yes, we could not undertake such due to the inadequate quality of coil we could not demonstrate such API pipe of high quality as per yield agreed in the contract. And we will not be able to do it now and we will not be able to do it in future unless you bring us this type of coil which is ASTMA 568-A. This results out of your hot strip mill, which is not in a condition to mix such

thing-meet this demand.

55. It does appear that the quality of the coil was a very critical parameter for the production of API grade pipes of X 70 and that the coils being manufactured by hot strip mills were not of that quality. When Mr. Parichha was cross-examined on coils, he could not answer these questions because they pertained to metallurgy. His contention was that high grade API pipes could not be produced because the UST machines and IDB trimmers were not working. However, Mr. Homberg pointed out that hot strip mill coil was in excess of the permissible limits.

56. The Mecon Study Report of July 2005 is a pointer to the fact that the HSM could not make coils which would match the requirement. The Mecon study is, in fact, a feasibility report for HSM modernization which was commissioned by RSP itself. It clearly states that "there is no provision for monitoring of camber in the transfer bar on the delay table. Camber in the transfer bar is detected only by visible inspection from the pulpit and cobble pushing is initiated by the operator.

57. It also states that "most of the equipments are old and outdated compared to the technology available today". Even SAIL''s post completion report refers to other constraints due to which the yield of API quality pipes from the input material of hot strip mill was in the range of 50-60% whereas in every plant it was above 90%.

58. In his cross-examination, Mr. Padhee was unable to explain Exh.RW&#65533;1/54 which was a copy of the production programme of SAIL for 15th February 2006 and, in particular, questions on different degrees of equipments on coil since he was not a technical person. Clauses 2.3 and 2.4 of Appendix-V of the contract dated 27th June 2002 mention the specifications of the coils as ASTM 568A. Unless the coils of that quality were available, the plant could not be expected to produce API X 70 grade pipes.

59. Therefore, the Tribunal was justified in holding that SI was not in breach of the contract for failure of the plant producing API X 70 grade pipes.

SAIL''s counter claims

60. As regards its counter claims, it is submitted by SAIL that these have been rejected by the Tribunal without any reasons whatsoever. Counter claim No. 1 was for cost of plant of work in the sum of Rs. 1.3 crores due to non-removal of defects by SI. It is further submitted that despite producing invoices and payment vouchers, the Tribunal failed to consider these documents. As regards lubricants, it was submitted that the Tribunal''s reasoning for rejecting the counter claim was inadequate.

61. A perusal of the impugned Award shows that the Tribunal came to a definite conclusion in paras 179 and 194 that SAIL was in breach of its obligations. The contentions of the parties in the cross-examination of Mr. Padhee and the individual items have been discussed. The adequacy of the reasons cannot be called in

question u/s 34 of the Act. The categorical finding in para 190 is as under:

190. The Respondent''s contention is that under clause 37.2 of the GCC, the Respondent was entitled to complete the incomplete works at its own cost. It contends that notice under clause 37.2 was issued to the Claimant and this is evident in Exhibit RW1/61 in the Affidavit of Mr. Padhee. This work, the Respondent alleges, was incomplete or apparently completed by third parties and it relies on the witness of Mr. Parichha at paragraph 30. It also relies on Exhibits RW2/19. It further contends that the works were completed by third parties and that work orders and payment vouchers had been produced and it relies on Exhibits RW1/62 to RW1/63 which is to be found in the witness statement of Mr. Padhee. It contends that the Claimant was notified of this by notice dated 13 May 2006. It also contends that it was compelled to purchase various materials and equipment for the rectification works. The 2 witnesses that the Respondent called, namely Mr. Padhee and Mr. Parichha had testified that they did not prepare the witness statements themselves. Their testimony is based on records and that they have no personal knowledge of them. The burden of proving these damages is on the Respondent. The Respondent in the Tribunal''s view, is not entitled to merely produce documents and say that they have been proved. The documents have to be proved by persons who have knowledge of these documents. Mr. Padhee and Mr. Parichha have no such knowledge. The evidence is therefore unsatisfactory and despite the fact that the Evidence Act 1872 of India is not applicable to arbitration proceedings, the Tribunal is of the view that the burden of proof has not been discharged.

62. The above conclusions were a possible view to take on the evidence produced. This Court does not propose to re-appreciate the evidence only to come to a different conclusion.

63. Counter claim No. 2 was in the sum of Rs. 5.7 crores claimed by SAIL to be spent in excess of OIPL''s portion of the contract. Again, this was a matter of choosing between the evidence of Mr. Padhee, who had no personal knowledge of the documents which were with the accounts department, and that of the SI witnesses. The Tribunal cannot be faulted for coming to the conclusion that SAIL had failed to substantiate counter claim No.2.

64. Counter claim No. 3 was for LD in the sum of Rs.6.97 crores. With the Tribunal having come to the conclusion that the delay is not attributable to SI but to SAIL, the claim for LD had to fail.

65. Counter claim No. 4 was for refund of training charges in the sum of Rs. 98 lakh. The Tribunal has discussed the evidence including the testimony of Mr. Rudolph and the Deutsch Report and held the claim to be not maintainable.

66. The contention of the SAIL was that in coming to the above conclusion the Tribunal had contradicted itself. While in paras 134 to 137 the Tribunal held that the delay in issuance of PAC was by SAIL, in para 208 it came to the conclusion that the

plant was indeed inaugurated on 6th December 2005. It does not appear that there was any contradiction. SI had carried its obligation to train the personnel but the training imparted could not be absorbed fully because the personnel did not possess the requisite qualification.

67. The Tribunal has also dealt at great length with the credibility of the witnesses. The view taken that SAIL could have called other witnesses who had personal knowledge of the matter cannot be faulted. On the other hand, SI''s witnesses did have personal knowledge of the matters on which they deposed.

68. The award of 8% interest pendente lite and post award period cannot be said to be unreasonable.

69. For the aforementioned reasons, this Court finds no ground having been made out for interference with the impugned Award of the Tribunal. The petition is dismissed with cost of Rs. 50,000 which will be paid by SAIL to SI within four weeks.