Xindia Steels Limited vs)Monitoring Committee on 13 January, 2023

IN THE COURT OF THE LXXXIII ADDITIONAL CITY
CIVIL AND SESSIONS JUDGE AT BENGALURU
CITY [CCH-84]
:Present:
Ravindra Hegde,
M.A., LL.M.,
LXXXIII Addl. City Civil & Sessions Judge,
Bengaluru
Dated on this the 13th day of January 2023
COM.A.S.No.74/2019

Plaintiff — Xindia Steels Limited,
having its registered office at:
Kunikere & Hirebaganal village,
Ginigera post,
Koppa District-583281.
Karnataka.
(By Sri.A.D, Advocate)

// versus //

Defendants — 1)Monitoring Committee
Chairman, Mr. dipak Sarmah,
No.49, 5th Floor, Khanija Bhawan,
Devaraj Urs Road,
Bengaluru-560001.

2) Anil Kumar (Former Judge)
B-33, Panchsheel Enclave,
New Delhi-110017.
(D.1 by Sri.T.B, Advocate,
D.2 - Learned Arbitrator)

Date of Institution of the petition	:	27/04/2019
Nature of petition	:	Arbitration suit
Date of commencement of recording of the evidence	:	--

Date on which the Judgment was pronounced.	:	13/01/2023

		Year/s	Month/s	Day/s
Total duration	:	03	08	17

JUDGMENT

This Arbitration suit is filed by the plaintiff praying to set aside the arbitral award dated 31/1/2019 passed by the learned Arbitrator in the dispute between plaintiff and defendant.

2. The plaintiff was the claimant before the learned Arbitrator. The defendant No.1 was the respondent and defendant No.2 is the learned Arbitrator.

3. Case of the plaintiff in brief is as under:

> Plaintiff is engaged in the business of manufacturing pellets from Iron ore through its plant located at Kunikeere and Hirebaganal village of Koppal Taluk and plaintiff is purchasing Iron ore which is used as raw material in the plant to manufacture pellets. Defendant No.1 is responsible for conducting e-auction of iron ores from certain districts in Karnataka including that of MML from the site. The plaintiff participated in online auction conducted by the defendant and plaintiff submitted necessary documents. In the bidding, plaintiff quoted Rs.2,170/- per metric tonne for the lot aggregating to Rs.86,57,20,000/- before taxes. The plaintiff emerged CT 1390_Com.A.S.74-2019_Judgment.doc successful in its bid for the lot. The defendant issued Acceptance letter dated 20/1/2014 and the details of the materials lying in the lot is mentioned in the letter and schedule of payments due from the plaintiff is also noted. The aggregate consideration payable by the plaintiff was Rs.113,84,83,640/-. The plaintiff was required to lift the allotted material from the site and transport it to its plant for its consumption in the manufacture of pellets. After executing acceptance letter, when plaintiff intended to deploy trucks for the purpose of transportation of the allotted material from the site to the plant, plaintiff came to know that the public road was not motorable and construction was undergoing on public road and blockage would continue for another 2 ½ months i.e. until end of April 2014. Defendant had deliberately concealed this fact and there was lack of access to the public road to lift the ore. Plaintiff also explored alternate vehicular movement options and traced route from Somanahally - Yeshwanthnagar to the site, which added 25 kilometers to the route. Though plaintiff was willing to consider this route, it was thwarted as there was no operational weighbridge available to it at the site. It is the duty of the defendant to provide a weighbridge to the plaintiff as per the agreement, the defendant has not installed a weighbridge nor designated another weighbridge which could be used CT 1390_Com.A.S.74-2019_Judgment.doc by the plaintiff. Plaintiff attempted to resolve the issue of the weighbridge and plaintiff received the approval from the forest department to set up a mobile temporary weighbridge in December 2014. Plaintiff was finally able to transport the allotted material from the site, using the public road as well as the alternate road only after 11 months. Plaintiff had paid two installments to the defendant with regard to the allotted material in terms of contract. Plaintiff had also paid a sum of Rs.58,88,000/- as EMD. Plaintiff had borrowed loans to the tune of Rs.40,90,602/- to pay the installment amount i.e. Rs.70,63,63,640/- inclusive of the EMD. Plaintiff also found that iron ore allotted to the plaintiff was of lower grade than that required by the plant to produce the pellets and accordingly it was necessary to have the

allotted material treated in beneficiation plant and plaintiff was given permission for benefication in July 2014. The Deputy Director, Department of Mines and Geology has sought additional royalty on the iron ore that was to be beneficiated. The royalty payable on the iron ore at the time of the auction was 10% as per the acceptance letter and has increased the royalty to 15%. The plaintiff also faced problem as trucks were detained illegally by local thugs who were threatening the life and property of the plaintiff and its employees CT 1390_Com.A.S.74-2019_Judgment.doc and the trucks were being detained on pretext of extorting the plaintiff for money. The plaintiff was able to lift a small quantity of 73,080 MT from December 2014 to February 2015 and transport it to the beneficiation plant and only a quantity of 15,988 MT iron ore was shifted from the beneficiation plant to the plaintiff's plant to manufacture the pellets. Inspite of exercising all possible options available to it to transport the allotted material, plaintiff was not successful and therefore plaintiff had sought cancellation of contract and refund of money to the un-lifted material. Since the plaintiff could not lift material, contract was frustrated and plaintiff sought for cancellation of the contract by letter dated 24/4/2014 and 9/5/2014 and sought refund of the amount. Letters were exchanged between the parties and the defendant rejected the request of cancellation of the contract made by the plaintiff. Plaintiff sought to invoke clause 9 of Annexure B of the contract. Since no response was forthcoming from the defendant regarding the plaintiff's request to cancel the contract, plaintiff invoked arbitration as provided in the contract by sending letter. Defendant on 15/12/2015 rejected the plaintiff's request for cancellation of the contract and directed the plaintiff to lift the remaining material from the site. After several further communications between the parties, CT 1390_Com.A.S.74-2019_Judgment.doc 2nd defendant was appointed as Arbitrator to decide the dispute between plaintiff and defendant by letter dated 26/10/2016. Defendant No.2 commenced arbitral proceedings and statement of claim was filed by the plaintiff and defendant filed statement of objection and also made a counter claim. Subsequently defendant abandoned its counter claim. Learned Arbitrator after hearing passed impugned award by rejecting all the claims put forward by the claimant/plaintiff.

4. Being aggrieved by this award, plaintiff filed this arbitration suit and challenged the award and contended that the award is liable to be set aside in terms of Section 34(2)(b)(ii) of the Act since it is in contravention with the fundamental policy of Indian law i.e. the contract Act. It is stated that the tribunal has failed to give effect to the express provision of clause 9 of Annexure B of the Contract which states that in the case of buyers failing to lift the entire quantity within the contract period, advance amount equal to the value of the unlifted quantity will be refunded to the buyer and security deposit will be forfeited. It is stated that the tribunal has failed to appreciate that the retention of the entire amount of Rs.70,63,63,640/- paid by the plaintiff is contrary to the law laid down on forfeiture and penalty and it cannot be given effect to. It is stated that as per the CT 1390_Com.A.S.74-2019_Judgment.doc contract plaintiff is entitled to the advance amount equal to the value of the unlifted quantity which approximately comes to Rs.49,40,66,240/- and same ought to have been refunded to the plaintiff. It is stated that clause 9 of the contract contains an inbuilt forfeiture amount and only EMD can be forfeited in the event of failure by the plaintiff to lift the

allotted material and this is only remedy available in the event of any failure committed by the plaintiff to perform its obligations under the contract or any breach committed by the plaintiff in performing its obligations under the contract. It is also stated that forfeiture of the EMD falls under the ambit of Section 74 of the Contract Act as per which an award amount is stipulated under contract, then no amount higher than such stipulated amount can be awarded to an aggrieved party. It is stated that the award is against the decision in Fateh Chand v. Balkishan Das, Maula Bax v. Union of India, Oil and Natural Gas Corporation Limited v. Saw Pipes and also Kailash Nath Associates v. Delhi Development Authority and it is stated that in Kailash Nath Associates it is stated that earnest money would necessarily be covered by Section 74. It is stated that the tribunal has not appreciated the purport of clause 6 of the contract and clause 9 of Annexure B of the contract. It is stated that as per clause 9, in the event of failure of CT 1390_Com.A.S.74-2019_Judgment.doc the plaintiff to lift the allotted material, the defendant can forfeit the EMD and have to return the value of the unlifted quantity. It is stated that the plaintiff is not able to perform its obligation under the contract for the reasons solely attributable to the defendant. It is stated that clause 15 stipulates that in the event of termination of the contract, the security deposit, which in this case is the EMD will stand to be forfeited. Therefore any amount other than the EMD cannot be withheld by the defendant. It is also stated that the plaintiff is entitle to the amount equivalent to the unlifted material and the tribunal has failed to appreciate the forfeiture clause contained in clause 9. On this ground the plaintiff contends that the award is in contravention with fundamental policy of Indian law. It is also stated that even the provision of sale of goods Act are not followed by the tribunal. It is stated that the plaintiff had participated in the e- auction based on its experience of having participated in over 281 auctions and minimum conditions that were necessary for the collection and transportation of iron ore would at the very least include ready access to the site apart from other basic facilities including electricity, internet connection, water and toilets. It is stated that though the iron ore was sold on 'as is where is no complaint basis', CEC has set out certain basics which would necessarily need to be complied in CT 1390_Com.A.S.74-2019_Judgment.doc the cases of 'as is where is no complaint basis'. It is stated that a specific recommendation of CEC in the meeting dated 5/6/2012 certain effective steps to be implemented by the respondent to address the complaints that had been received from the bidders regarding the grade, weight, composition of the fines and the lumps and the moisture content in respect of the iron ore being sold from the Donimalai mining lease. It is stated that under Section 16 of the Sale of Goods Act until the buyer has taken delivery of the goods from the seller, the seller must ensure that they are of merchantable quality. It is stated that it was encumbent upon the defendant to have ensured a merchantable quality of the iron ore until it was picked up by the plaintiff, which was not done. It is stated that with the quality of the iron ore always being of depleted quality, necessitating beneficiation of the same and the beneficiation permission was given belated. It is stated that the tribunal has also failed to appreciate that Section 56 of Sale of Goods Act as per which if the buyer refuse to accept the delivery for goods, seller will be entitle for damages. It is stated that the defendant has not claimed for damages from the plaintiff and defendant is entitled to EMD, even assuming that the plaintiff has failed to discharge its obligations under the contract. It is also contended that the award is liable to be set aside in CT 1390_Com.A.S.74-2019_Judgment.doc terms of Section 34(2)(b)(ii) of the Act since it is in conflict with the most basic notions of morality and justice. It is contended that the defendant is benefiting from its own blatant actions of misrepresentation like deliberate non disclosure of inaccessibility to the public road, no provision for a weighbridge and deliberately

withholding amounts apart from the EMD and extracting money from the plaintiff. It is stated that the defendant knew that it had a virtual monopoly with regard to the mining of iron ore since it was acting under the directions issued to it by the Hon'ble Supreme Court and the plaintiff do not have an alternative to the defendant for the purchase of iron ore in the state of Karnataka and the defendant deliberately took advantage of the sensitive position of the plaintiff. It is also stated that the plaintiff had borrowed loans from a consortium of banks and since the claimant was unable to lift the quantities of the allotted material and was incapable of keeping their plant operational, its plant had to be shut down. It is stated that despite the infusion of money in the plaintiff's company in early 2018, the plaintiff is still struggling to keep themselves open as on the date of the filing of the instant suit. It is stated that the plaintiff is legitimately entitled to an amount equivalent to the unlifted material and by not CT 1390_Com.A.S.74-2019_Judgment.doc appreciating this aspect, the award is passed which is to be set aside.

5. Defendant has filed statement of objection wherein, defendant has stated that none of the grounds of challenge under Section 34 of the Act has been made out. The defendant has also referred to the decision of Hon'ble Supreme Court in Ssangyong Engineering & Construction Company Limited v.NHAI and the decision in Associate Builders v. Delhi Development Authority wherein, the grounds on which arbitral award can be set aside under Section 34 of the Act have been considered. It is stated that jurisdiction of the court under Section 34 of the Act is not of appellate jurisdiction and the court have limited power to set aside an award under specific circumstances mentioned in Section 34 and it is stated that the court cannot review the merits of the dispute and also cannot re-appreciate the evidence. It is stated that as per this decision, construction of the terms of a contract is primarily for an arbitrator to decide and the court cannot disturb a possible finding. It is stated that no such grounds have been made out under Section 34 2(b)(ii) or under Section 34 (2-A) of the Arbitration & Conciliation Act in the present petition. It is stated that the tribunal has adjudicated the claim, by considering the averments of claim and objection and evidence. It is stated that CT 1390_Com.A.S.74-2019_Judgment.doc the finding that the agreement has not been cancelled by the defendant and still the plaintiff has been asked to lift the material is a finding of fact which cannot be disturbed and therefore, law of forfeiture and penalty contended in the suit is not applicable. It is stated that the claim for refund of the consideration can arise only on rescission of the contract by the defendant and therefore the question of forfeiture do not arise. Defendant has also stated that the Arbitrator has dealt with the matter after careful examination of the facts, circumstances and evidence on record. It is stated that defendant was constituted under the order of Hon'ble Supreme Court and called for online auction and defendant participated and was successful. It is stated the lot No.3R/SG was sold to the plaintiff as one entire lot and was not divided into various lots. It is stated that the EMD deposit is for the entire lot of 3,92,000 MT . It is stated that the present lot was an entire lot and the EMD of Rs.58,80,000/- is provided as required by the plaintiff. It is stated that the bidding quote of Rs.2,190/- of the plaintiff was accepted. It is stated that the plaintiff has paid consideration of two installments and has not paid remaining two installments of Rs.43,80,00,000/- and he is yet to pay this amount as per the contract. Various averments of the plaint in different paragraphs are answered by CT 1390_Com.A.S.74-2019_Judgment.doc the defendant specifically and it is stated that all the contention taken are considered by the learned Arbitrator in different paragraphs of the award as mentioned in the objection. It is stated that the plaintiff was responsible for not lifting the material

when there was accessible road and also plaintiff had left portion of the material. It is stated that all the difficulties that are faced by the plaintiff as mentioned in the statement of claim have been considered by the tribunal and the finding has been given and these finding are on facts, which cannot be interfered by the court. It is stated that the defendant has not accepted the request of the plaintiff for cancellation of the contract and requested the plaintiff to perform its part of the contract. It is stated that the tribunal has interpreted the terms of contract and the interpretation is reasonable and the same cannot be interfered. It is stated that tribunal has rightly interpreted the terms of contract and passed a well reasoned award. It is stated that the tribunal has violated the provisions of Contract Act and has interpreted the entire contract in just and reasonable manner and the tribunal has given cogent reason after appreciating the document and evidence on record and also judgment and the finding that the contract continued to set aside and there was no acceptance and reasons and therefore plaintiff was to CT 1390_Com.A.S.74-2019_Judgment.doc perform its obligation is a proper finding and on right interpretation of the terms of contract. It is stated that several contentions taken in the present arbitration suit by the plaintiff are afterthought. It is stated that the defendants have not terminated the contract and defendant has not accepted the cancellation of the contract and there is no breach on the part of the defendant and therefore there is no question of invoking section 74 of the Indian Contract Act and clause 15 of the Agreement has no application. It is also stated that the claimant have not proved that there was any breach on the part of the defendant and the question of damages do not arise. It is stated that the plaintiff has never raised any issue of quality of ore and the goods were sold on 'as is where is no complaint basis' and therefore, question of quality does not arise in the present case. On these grounds, defendant has prayed to dismiss the petition.

6. Plaintiff has even filed rejoinder to the statement of objection by way of affidavit and stated that from the averment in the plaint, it is clear that the award is in conflict with most basic notions of morality and justice and the contentions of the plaintiff have not been considered at all and defendant has committed breach of the terms of contract and has violated clause 9 of Annexure B of CT 1390_Com.A.S.74-2019_Judgment.doc the agreement. It is also stated that the retention of entire amount of Rs.70,63,63,640/- by defendant No.1 is violative of law on forfeiture and penalty and stated that the plaintiff was ready and willing to perform its part of contract. It is stated that when there is an amount stipulated in the contract no amount higher than such stipulated amount can be awarded as compensation. It is stated that the award is contrary to several decisions mentioned in the rejoinder and also a petition. It is stated that, it was the duty of the defendant to ensure the merchantable quality of goods as per Sale of goods Act. It is stated that remedy available is under Section 56 of the Sale of Goods Act for damages in case of non acceptance of goods. It is stated that EMD is the only amount that the defendant is entitled to even if it is proved that the plaintiff had failed to discharge its obligations. It is also stated that the plaintiff sought cancellation of the contract prior to invoking arbitration by 7 letters. It is stated that by retaining money from plaintiff, the defendant No.1 has violated the terms of the contract resulting in undue loss to the plaintiff. The plaintiff in the rejoinder has also referred to different paragraphs of the objection filed by the defendant No.1 and denied the contention of the defendant in support of the award. It is stated that Arbitrator has totally ignored the fact that the plaintiff had on CT 1390_Com.A.S.74-2019_Judgment.doc several occasions sought to rescind the contract and the learned Arbitrator has wrongly held that the plaintiff has not exercised its right to terminate the

contract and this finding is contrary to the record of the case and such finding cannot be considered as possible view. Plaintiff has also stated about financial difficulties on account of various issues faced by the plaintiff due to defendant No.1 refusing to accede to the plaintiff's repeated attempts to terminate the agreement and refund the balance monies to the plaintiff.

7. Now the point that arise for consideration are:

1) Whether the plaintiff has made out any ground under Section 34 of the Arbitration & Conciliation Act to set aside the award passed by the learned Arbitrator on 31/1/2019 in the dispute between the parties?

2) What order?

8. Heard both the counsels. Written arguments are also filed. Perused records.

9. My answer to the above points are :

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POINT No.1          : In the Negative.
POINT No.2          : As per final order for the
                            following:

                   REASONS
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10. Point No.1: Present arbitration suit is filed challenging the award passed by the learned CT 1390_Com.A.S.74-2019_Judgment.doc Arbitrator by disallowing the claims of the present plaintiff who was the claimant before the learned Arbitrator. The admitted facts are that the plaintiff and defendant No.1 entered into contract dated 20/1/2014 for purchase of Iron Ore bearing lot No.3R/SG containing 3,92,000 MT of sub grade Iron Ore and the plaintiff was required to pay amount of Rs.113,84,83,640/- for the total quantity of Iron Ore and the payment was to be made in four installments. The plaintiff had paid Rs.58,88,000/- as earnest money and there is a payment schedule fixed in the contract and the plaintiff has paid amount upto the second installment. Total amount paid by the plaintiff is Rs.70,63,63,640/-. Plaintiff had lifted only 73,367.2 MT of Iron Ore. According to the plaintiff, there were several issues like approach public road to lift Iron Ore, issue of weighbridge, disturbance caused by thugs, benficiation of the iron ore to suit the purpose of plaintiff and increse in Royalty etc. Accordig to plaintiff, it has many times sent letter to defendant No.1 requesting cancellation of contract and to refund the value of un-lifted Iron Ore in respect of which payment was already made and also sought refund of EMD. Defendant refused to terminate the contract and asked plaintiff to lift remaining Iron Ore. The dispute finally went to the learned Arbitrator. Defendant No.1 has denied CT 1390_Com.A.S.74-2019_Judgment.doc various contentions of the plaintiff about frustration of the contract and non performance of the obligation by the defendant No.1 and contended that the Iron Ore which was sold to the plaintiff is on "as is where is and no complaint basis" and the defendant No.1 contended that the plaintiff cannot complain about quality of the ore and contends that it is only a Monitoring committee appointed by Hon'ble Supreme Court for sale of Iron Ore which are already mined and the plaintiff was required

to satisfy itself about the quality specification of the product and acquaint itself with the other operational aspects relating to logistic, before bidding and plaintiff is bound to lift the Iron Ore as per the contract. The defendant has also contended that it has rejected the request of plaintiff for cancellation of the contract and also contended that the amount which is value of the unlifted Iron Ore and also the EMD cannot be returned to the plaintiff. Learned Arbitrator has passed award and rejected the claim of claimant

11. Jurisdiction of the court to set aside an arbitral award is limited to the grounds set out in Section 34(2) and 34 (2A) of the Arbitration & Conciliation Act 1996. It is well established principle, as laid down various decisions, including decision in Associate Builders, that, even if contrary view based on the facts before the Arbitral Tribunal is possible, in CT 1390_Com.A.S.74-2019_Judgment.doc the absence of any compelling reasons, court cannot interfere with the view taken by the learned Arbitrator. It is also well established principle that the court sitting U/S.34 of the Act is not supposed to go for re-appreciation of evidence or impose its view as against the view of learned Arbitrator and the power of the court is only to set aside the award, if it is coming under one of the grounds mentioned in the said section. It is also well established principle that the court under section 34 cannot sit in Appeal over the Award. It is also established principle that interpretation of terms of award is left to the arbitrator and unless, interpretation of terms of award by arbitrator is perverse court cannot interfere. In the presence of these basic principles, grounds urged by the plaintiff and the award of the learned Arbitrator are to be looked into.

12. On looking to the award of learned Arbitrator has considered the case that has been pleaded by both the parties and from page 46 to page 64 has adjudicated claims. Though, Learned Arbitrator has noted that though the defendant had made counter claim for remaining part of the consideration amount, subsequently, defendant No.1 has not pressed the plea on the ground that the agreement had not been cancelled by the defendant No.1 and claimant has also not lifted the entire CT 1390_Com.A.S.74-2019_Judgment.doc material. The learned Arbitrator has noted basically that the Iron Ore in lot 3R/SG containing 3,92,000 MT of sub Grade Iron Ore was auctioned and the plaintiff and even other bidders had participated in the bid. The learned Arbitral Tribunal has noted that as per clause 1 of the acceptance letter the Iron Ore is offered on "as is where is and no complaint basis". Learned Arbitrator has noted that bidders were asked to satisfy themselves about the quality specification of the product and quantity and other operational aspects, relating to logistic etc before bidding. Learned Arbitrator has also noted that as per clause 1 of Acceptance letter, bidder is even permitted to collect reasonable quantity of samples from a designated place to ascertain quality and as per clause 10, delivery of the mineral is on 'as is where is and no complaint basis'. Learned Arbitrator has also noted that present plaintiff has participated in the auction to purchase the Iron Ore without any reservation or exception. Learned Arbitrator has also noted that plaintiff has purchased the Iron Ore by participating in the auction and as against Reserved price of Rs.650/-, plaintiff offered higher price of Rs.2,170/- and was successful and now he cannot complain about quality of Iron Ore and also cannot complain on other issues which are not the obligations of the defendant. On the issue raised of CT 1390_Com.A.S.74-2019_Judgment.doc closure of public road, Learned Arbitrator has noted that public road was closed even before auction and plaintiff was expected to know the same and even other bidders were using alternate road for lifting Iron Ore and even plaintiff has lifted portion of Iron Ore to the extent of 73,367.2 MT.

Learned Arbitrator has held that as plaintiff was expected to check and satisfy about quality specification of the product and also issues like logistic, cannot complain later. Learned Arbitrator has also considered the evidence and found that, statement of the witness that they have not visited the spot, but expected that minimum required industrial standard facilities would be available, would only show that claimant was negligent in acquainting itself of the local condition.

13. The learned Arbitrator has noted that requirements expected by claimant are based on assumptions and are not evident obligations under the contract and held that the alleged expectation cannot be equated with the express terms of the agreement. The learned Arbitrator has also noted that as the sale was made as is where is basis, there is no room for such assumption and claimant cannot contend that this is legitimate expectation of the claimant. On issue of weighbridge also it is held that it was the duty of the claimant to get itself acquainted with all the relevant parameters and conditions which CT 1390_Com.A.S.74-2019_Judgment.doc were required for transportation and lifting of Iron Ore and also stated that the document produced show that there was weighbridge provided of 60 tonne capacity. The learned Arbitrator has held that it was the claimant's own conscious decision to participate in the bidding and opt for Iron Ore of a lower grade than that which was required by its plant and that too at a much higher price of Rs.2,170/- though the reserved price was Rs.650/- only. The learned Arbitrator has even considered a report dated 5/6/2012 produced by the claimant which was in connection with NMDC Auction from Donimalai mining lease and it was an advance e-auction and the learned Arbitrator has held that in advance e-auction the material is not available for inspection at the time when the auction is conducted and the same is not the case here, as specifically, bidders were asked to inspect the materials which are kept for sale and therefore this report do not help the claimant.

14. Learned Arbitrator has also held that clause 9 and clause 15 cannot be separately considered and stated that all the clauses of the auction notice and the terms and conditions of auction are to be considered together. The learned Arbitrator by looking to various clauses has held that refund of money is only if quantity is not delivered by defendant and not if the quantity is not lifted by CT 1390_Com.A.S.74-2019_Judgment.doc auction purchaser. The learned Arbitrator has found that on request of plaintiff, extension of time was granted and agreement is not cancelled by defendant and still plaintiff is asked to lift the material. Learned Arbitrator has held that, clause 9 will have no application in a situation where auction purchaser is not ready and willing to perform its obligation and is unwilling to lift he material, contrary to the terms and conditions of the contract and clause 15 cannot be invoked as the respondent has not exercised its right to terminate the contract. On these grounds learned Arbitrator has found that plaintiff do not have right to seek refund of price paid in advance.

15. The contention of the claimant that due to several difficulties faced by the plaintiff in lifting the Iron Ore have frustrated the contract is also not accepted by the learned Arbitrator. The learned Arbitrator has noted that as another successful bidder in the same area has transported Iron Ore as per the conditions of sale, there was no difficulty to even plaintiff and held that, plaintiff was not interested in transporting the Iron Ore and it kept on giving one excuse or the other for not lifting. The learned Arbitrator has held that plaintiff has not established as to, how after entering into contract, it became impossible to perform and hence, section 56 of the Contract Act cannot be

attracted. The learned CT 1390_Com.A.S.74-2019_Judgment.doc Arbitrator has also noted that there is no supervening event which has occurred between the date of e- auction and the time of lifting of the material and therefore doctrine of frustration will not come to the rescue of the claimant. The learned Arbitrator has held that, merely because performance of the contract has become more onerous, party cannot be absolved from liability to perform his part of the contract. Learned arbitrator has held that, non performance on the part of the defendant of its obligation is not established and held that there are no such breach or non performance on the part of the defendant which will entitle the claimant to claim damages. By considering all these aspects, learned Arbitrator has rejected the claim for refund of Rs.70,63,63,640/- paid as portion of aggregate sum and also the interest and other amounts claimed in the claim petition.

16. On looking to the award and the contention raised by the plaintiff who was claimant in arbitration, plaintiff has mainly relying on Section 73 and 74 of the Indian Contract Act and also clause 9 of Annexure-B of e-auction notice and also lapses on the part of the defendant, which according to the plaintiff has resulted in frustration of the contract and made it impossible to perform. The plaintiff also contends that award is in contravention with fundamental policy of Indian law, that is, Indian contract Act, Sale CT 1390_Com.A.S.74-2019_Judgment.doc of Goods Act and also different clauses of Contract entered between parties, particularly clause 9. On the basis of clause 9 it is contended by plaintiff that, if plaintiff failed to lift entire quantity within the contract period, advance amount equal to value of the unlifted quantity is to be refunded to plaintiff and security deposit will be forfeited. On this basis, it is argued for the plaintiff that at the maximum, only security deposit can be forfeited and the value of unlifted quantity already paid in advance, which comes to Rs.49,40,66,240/- have to be refunded. It is also contended by the plaintiff that even entire security deposit cannot be forfeited, as under Section 74 of the Indian Contract Act, when contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, whether actual damage or loss is caused or not, still the party who has broken the contract has to pay reasonable compensation not exceeding the amount so named in the contract. By referring to this section, it is argued for the plaintiff that, even if it is held that the contract is broken by the plaintiff, still the defendant would be entitle for only reasonable compensation not exceeding the security deposit amount as per clause 9 read with Section 74 of the Indian Contract Act. The plaintiff further contended that plaintiff could not lift the Iron Ore, due to reasons attributable to defendant CT 1390_Com.A.S.74-2019_Judgment.doc and there is no lapse on the part of the plaintiff. It is also contended for the plaintiff that the award is even against the most basic notion of morality or justice, as defendant has misrepresented the facts, which lead to plaintiff suffering loss and even closing its plant and Learned arbitrator has not considered the same. Plaintiff also contends that the award is in violation of fundamental policy of Indian law as it is passed in contravention of binding judgments of Hon'ble Supreme Court and Hon'ble High Court.

17. As considered above, learned Arbitrator has noted the clauses of Acceptance letter in which it is clearly mentioned that the specification of Iron Ore mentioned in the e-auction are offered on 'as is where is basis and no complaint basis' and the intending bidders were asked to satisfy themselves about the quality of specification of the product and acquaint themselves with other operational aspects including logistic and were also permitted to take samples for verifying. Plaintiff is a company stated to be in the same business from many years and participated in many auctions and

is having experience in the field. It is stated in the plaint that it is a public company with investors from USA, India and China and is engaged in the business of manufacturing pellets from Iron Ore and is involved in the purchase of Iron Ore which is thereafter used as raw material in the plant CT 1390_Com.A.S.74-2019_Judgment.doc to manufacture pellets. Therefore the plaintiff is a well established company doing business from many years. As per the evidence given before the learned Arbitral Tribunal, plaintiff had participated in several such e-auctions and had purchased the Iron Ore from different companies even earlier. Therefore the plaintiff cannot contend that inspite of specific terms and conditions mentioned in Annexure B to the e- auction notice, it has not verified and not ascertained the quality specification and operational aspect like logistics, before participating in the auction. As the Iron Ore are sold in the online auction by offering on 'as is where is and no complaint basis' plaintiff cannot raise any issue on quality of the Iron Ore. Lot No.3R/ SG with quantity of 3,92,000 MT is one lot and is sold on 'as is where is basis' and the plaintiff by knowing the same has participated in the bid and was successful bidder and has lifted only part of the lot. Interestingly, as stated by the Defendant and also even observed by the learned Arbitrator, against reserve price fixed by the defendant at Rs.650/- per MT, plaintiff had offered highest price of Rs.2,170/- and out performed other bidders and bagged the contract. Therefore, as plaintiff has purchased sub Grade Iron Ore, with full knowledge that it is sold on 'as is where is and no complaint basis' by agreeing to pay higher price of Rs.2,170/- as against reserved CT 1390_Com.A.S.74-2019_Judgment.doc price of Rs.650/-, cannot now complain about the loss suffered and financial implication on the plaintiff in case, he lifts entire material by paying balance amount. As such, plaintiff cannot now say that he cannot lift remaining portion of the same lot. The learned Arbitrator has considered these points.

18. Finding of the learned Arbitrator with regard to Road access, weighbridge issue, issue on quality of Iron Ore and financial difficulty of the plaintiff etc are finding of fact, which cannot be interfered by the court. As held in many decisions, arbitrator is the master of facts and the court cannot interfere on the finding given on facts. The learned Arbitrator has found that though plaintiff had raised several issues, out of 3,92,000 MT of Iron Ore, plaintiff had lifted 73,080 MT from December 2014 to February 2015. Even the contention about delay in beneficiation permission also, learned Arbitrator has held that it is not provided in the contract and the defendant cannot be blamed. Therefore, finding of the learned Arbitrator that the difficulties stated to have been faced by the plaintiff in lifting Iron Ore cannot be attributed to Defendant-Monitering Committee, is finding of fact and cannot be interfered.

19. Plaintiff has contended that Arbitrator has not properly interpreted the terms of contract. Regarding interpretation of the contract it is held in CT 1390_Com.A.S.74-2019_Judgment.doc many decisions that the interpretation of the contract is left to the arbitrator and unless the interpretation made by the Arbitrator is perverse, award cannot be interfered.

20. In the decision reported in (2006) 11 SCC 181 (McDermott International Inc v. Burn Standard Company Limited) the Hon'ble Supreme Court has held that "...the term of the contract can be express or implied and the conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the Hon'ble Arbitrators having regard to the wide nature, scope and ambit of the arbitration

agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties...." It is also held that "...Interpretation of a contract is a matter for the Hon'ble Arbitrator to determine, even if it gives rise to determination of a question of law..."

21. A decision reported in (1973) 2 SCC 825 (Delhi Development Authority v. Durga Chand Kaushik) is relied by the plaintiff with regard to interpretation of contract and it is stated that the contract cannot be interpreted according to the presumed intention of the parties, but according to CT 1390_Com.A.S.74-2019_Judgment.doc the meaning of the words which they used. In another decision reported in (2015) 4 ALD 409 (P.Madhusudhan Rao v. Lt.Col.Ravi Manan and another) it is held that, court must ascertain the intention of the parties based on the language. In these decisions it is held that, contract must be interpreted according to the plain meaning of the words. According to the plaintiff, interpretation of the clauses in the contract is not properly done by the learned Arbitrator. It is contended that learned Arbitrator has construed the contract in perverse manner.

22. The learned counsel for the plaintiff has also relied on the decision reported in (2019) 15 SCC 131 (Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI). In this decision, Hon'ble supreme Court in para 40 has held, "...The construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction..."

23. In another decision reported in AIR 2020 SC 2488 (Patel Engineering Limited v. North CT 1390_Com.A.S.74-2019_Judgment.doc Eastern Electric Power Corporation Limited) it is held that where interpretation of the contract arrived suffers from irrationality and perversity, such award can be set aside under Section 34.

24. In the decision reported in AIR 2020 SC 2323 (South East Marine Engineering v. Oil India Limited) it is held that an interpretation which does not read the contract as a whole and is so irrational that no reasonable person would arrive at, is vitiated by perversity and liable to be set aside.

25. In one more decision cited by plaintiff reported in MANU/KA/2895/2021 (Hajee Ummer Kizhakkumbrath v. Mathew v. Parackel and others) the Hon'ble High Court has held in para 31, "...The patent illegality committed by the Arbitral tribunal in interpreting the agreement of sale, certainly attracts section 34(2)(b)(ii) of the Act. Therefore we are of the considered opinion that there is perversity, inter alia, patent illegality in the award passed by the Arbitral Tribunal in interpreting agreement of sale contrary to the intention of the parties and which is unreasonable and shocks the conscience of the court..."

26. On looking to these decisions, it is clear that though interpretation of terms of contract is in the domain of arbitrator, still, if such interpretation is contrary to intention of the parties, unreasonable,

perverse, shocks conscience of Court or arbitrator CT 1390_Com.A.S.74-2019_Judgment.doc wanders outside the contract, then such finding can be interfered by the court under section 34. With these principles, interpretation of the contract terms made by Learned arbitrator is to be seen.

27. Learned Arbitrator has held all the clauses in the auction notice and the terms and conditions are to be considered together. He has held that clause 9 and 15 will not help the claimant to claim refund of the value of the unlifted quantity of Iron Ore. The learned Arbitrator has considered clause 6 of online auction notice as per which, if for any reasons beyond the control of Monitoring committee, all the mineral offered through online auction or part thereof cannot be delivered, liability of Monitoring committee will be limited only to refund of proportionate amount paid by the customer as applicable for the quantity not delivered. By referring to clause 6, Arbitrator has found that if material could not be delivered by the defendant then only, question of refund of value of unlifted quantity would arise. On the other hand, claimant had contended that as per clause 9 of Annexure B to the auction notice, on the failure of buyer to lift entire quantity within the contract period, advance amount equal to the value of the unlifted quantity will be refunded to the buyer and security deposit will be forfeited. In clause 15 of Annexure B, it is mentioned that if successful bidder CT 1390_Com.A.S.74-2019_Judgment.doc fails to perform the contract as per terms and conditions of Acceptance letter, Monitoring committee reserves the right to terminate the contract with immediate effect and forfeit the security deposit and consequential losses and additional expenditure, if any, incurred by Monitoring committee to carry on operations or for making alternative arrangement for the balance period of agreement would be to the account of the successful bidder and committee shall have the right to recover losses and expenses from the security deposit of the firm to the extent possible and the bidder shall also replenish the amount paid if any, in addition to the amount recovered from the security deposit. Learned Arbitrator has considered these clauses and has found that, liability of the defendant to refund the money is only if quantity is not delivered and it do not arise if quantity is not lifted by the purchaser and by holding so, he has held that clause 9 will not apply which is with regard to payment and lifting of the material within the contract period. The learned Arbitrator has noted that the plaintiff has not made payment in time and lifted ore and sought extension of time and defendant has liberally granted extension of time. The learned Arbitrator on considering all these clauses and also the fact that the plaintiff had participated in the auction by knowing that material is sold on, 'as is where is basis' CT 1390_Com.A.S.74-2019_Judgment.doc and has won the bid by quoting highest price, has held that, where auction purchaser is not ready and willing to perform his obligation and unwilling to lift the material contrary to the terms and conditions, he would not be entitle for value of unlifted quantity by applying clause 9.

28. Clause 15 provides right to terminate the contract only by Monitoring committee and the auction purchaser is not given any right to terminate the contract. If the purchaser do not lift the material within the period, then option is given to the defendant to terminate the contract and to recover whatever the expenses it may incur in making alternative arrangement for the balance and the expenses and loss shall be recovered from the security deposit to the extent possible and if the same is insufficient then still the auction purchaser have to make additional payment to make good the loss. Therefore, termination could be done only by the defendant and in the present case the defendant has not terminated the contract and it is reiterated by the defendant by its letter that the

plaintiff have to lift the remaining Iron Ore. In the claim petition, plaintiff had prayed for declaration that that the claimant is discharged from any other further obligation. This relief could not be granted by the learned Arbitrator, as the plaintiff who had left portion of the Iron Ore CT 1390_Com.A.S.74-2019_Judgment.doc from the same lot, do not have any right to terminate the contract and he cannot be discharged against the will of the defendant. The plaintiff is obliged to lift the Iron Ore completely and to make payment as agreed. Admittedly, defendant has refused to terminate the contract and asked the plaintiff to lift the remaining Iron Ore. Only in case of defendant terminating the contract, question of calculating the damages and expenses incurred would arise. Since contract is not terminated as provided, plaintiff cannot claim on the basis of clause 9. On considering the entire facts and materials and terms and conditions of contract, interpretation made by the learned Arbitrator cannot be said to be perverse interpretation and is bad in law.

29. Next ground of challenge is that under Section 74 of Indian Contract Act, when the specific amount is fixed in the contract for compensation or penalty, then party who has breached the contract would be liable to pay the compensation for the loss suffered by other party, not exceeding the amount so fixed in the contract and if loss suffered is not established, then reasonable compensation can be awarded. On the basis of this Section 74, it is contended that security deposit amount given is the specified amount in the contract as liquidated damages, as security deposit can be forfeited as per CT 1390_Com.A.S.74-2019_Judgment.doc clause 9, and any compensation that can be given to defendant would be not exceeding security deposit amount and even to claim such amount, defendant have to establish actual loss suffered. It is contended that aspect of forfeiture and penalty as per the provisions of Indian contract Act are not considered by the learned arbitrator. It is also contended for plaintiff, that advance amount given by plaintiff, for lifting Iron Ore as per the contract cannot be forfeited or recovered as penalty and it is argued that, out of advance, value of unlifted quantity is to be returned to the plaintiff.

30. In support of these contentions, learned counsel for the plaintiff has referred to many decisions. In the decision reported in 2013 (1) SCC 345 (Satish Batra v. Sudhir Rawal) it is held in para 15 as under:

> "15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part- payment of purchase price cannot be forfeited unless it is a guarantee for the due CT 1390_Com.A.S.74-2019_Judgment.doc performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply".

31. In another decision reported in AIR 1957 Karnataka 10 (KCN Gowda and Brothers v. Molakram Tekchand and Sons) the Hon'ble High Court has held in para 12 as under:

> "12. There are numerous decisions of different High Courts which have laid down that an earnest money can be forfeited if the party who had paid the same was in default. In other words, the said earnest money was held to be in the nature of a security given for the performance of the contract and on the failure of the party who gave such security to perform it, the same should be forfeited."

32. In the decision reported in MANU/DE/8136/2007 (Bagrodia Machinery Stores and others v. National Products Limited) the Hon'ble Supreme Court has held in para 14 and 15 as under:

> "14. The hollowness of the appellant's argument is exposed from yet another important fact. The case which is sought to be projected now, namely, the amount given is to be construed as earnest money and, Therefore, appellant had right to forfeiture was not even the case projected by the appellant in the trial Court. There is no averment in the written statement that the amount in question given by the CT 1390_Com.A.S.74-2019_Judgment.doc respondents to the appellant was earnest money. There was no reliance upon the payment terms, though contained in one purchase order only. The only plea raised in the written statement is that since the respondents failed to take the delivery of the goods, they were not entitled to refund of the advance amount paid. The plea was based on the statement made in the letter dated 14.02.1977 as per which the respondents were "duly notified forfeiture"

of the advance. Therefore, the appellant cannot be permitted to take the plea that amount represented earnest money and on this basis the appellant had right to forfeit the same.

15. No doubt, there was a breach of contract on the part of the respondents. In view of this breach, appellant was entitled to claim damages from the respondents. However, as per Section 73 of the Contract Act, such damages are to be proved. The appellant neither laid the claim nor gave any evidence to show as to whether it had suffered any damages. It simply made the claim of "forfeiture" which it has not been able to substantiate or sustain."

33. In another decision reported in MANU/DE/ 4757/2018 (Versatile Commotrde Pvt. Ltd., v. Satpal Yadav) it is held in para 16 as under:

> "Insofar as the sum of Rs. 1.2 crores is concerned, the amount clearly did not constitute any part of the earnest money deposit and constitutes part payment of the sale consideration. As per the settled position in law in Satish Batra v. Sudhir Rawal MANU/SC/0887/2012: (2013) 1 SCC 345, the part CT 1390_Com.A.S.74-2019_Judgment.doc payment, which is in distinct from the earnest money, cannot be forfeited or retained. ...".

34. In the decision reported in 1928 Madras 326 (Desu Rattamma v. Kakaraparthi Krishnamurthi), wherein, in a contract for the sale of goods the buyer paid certain moneys to the seller at the time of the contract and when the contract fell through on account of the buyer's default and the agreement provides that the buyer had paid an advance of Rs. 750 and it bears interest, Hon'ble High Court has held that advance cannot be considered as earnest money, guaranteeing the fulfillment of the contract by the buyer and that it cannot forfeited to the seller for the default of the buyer. On the basis of this decision, it is argued that the payment of amount other than the security deposit is not earnest money or security deposit and it is the consideration and such consideration cannot be forfeited.

35. In another decision reported in AIR 1985 Bombay 185 (Indian Drugs and Pharmaceuticals v. Industrial Oxygen Company Limited and others) it is held that, to attract the provisions of Section 74, it is not necessary that the entire contract should come to an end. It is held in para 8 as under:

> "...To attract the provisions of Section 74 it is not necessary that the entire contract should come to an end; the breach of each term therefore can be visualized in advance CT 1390_Com.A.S.74-2019_Judgment.doc and taken care of by providing an adequate clause for liquidated damages so that the parties to the contract can proceed to work out the contract in future and settle the question of damages that have accrued on the basis of the rate that has been put as a pre-estimate at the commencement of the contract. If the very purpose of putting a genuine pre-estimate is to avoid litigation and introduce certainty in computation of difficult question of assessment of damages, it seems to be in the highest degree unlikely that the intention would have been that the clause of liquidated damages will not come into operation till the entire contract has been broken...."

36. In the decision reported in (2015) 4 SCC 136 (Kailash Nath Associates v. Delhi Development Authority and another), it is held that amount mentioned in contract cannot be forfeited when no loss is suffered by the seller. In this decision the Hon'ble Supreme Court has held that damage or loss is sine qua non for payment of compensation for breach of contract even under Section 74. Similarly in the decision reported in 1964 SCR (1) 515 (Fateh Chand v. Balkishan), it is held that the jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the court duty to award compensation according to settled principles.

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37. The plaintiff has also relied on the decision reported in ILR 1954 Bombay 739 (Iron & Hardware (India) Company v. Shamlal and brothers) in which it is held that "...In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability nor would it be true to say that he or other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained..."

38. The learned counsel has also relied on the decision reported in AIR 2015 SC 620 (Associate Builders v. Delhi Development Authority) and contended that award in contravention of section 73 and 74 of Indian Contract Act is against fundamental policy. In the decision reported in 2018 (4) ABR 87 (Anila Gautam Jain v. Hindustran Petroleum Corporation Limited) it is held that overlooking the provisions of Section 73 and 74 of the Indian Contract Act, vitiates the award. In another decision reported in MANU/MH/0262/2019 (Home Care Retail Marts Private Limited v. Haresh N. Sanghavi), it is held that where a security deposit is forfeited without proof CT 1390_Com.A.S.74-2019_Judgment.doc of damages, it is contrary to section 73 and 74 of the Indian Contract Act.

39. On going through these decisions cited for the plaintiff and considering the facts of the case which brought the parties before learned arbitrator with the dispute and the Award, it is not in dispute that, defendant is not doing any business of selling Iron Ore, but, is entrusted the work of selling the Iron Ore by order of Hon'ble Supreme Court. As per the order, defendant has conducted online auction and has sold this lot to the plaintiff who was successful bidder. When higher price is offered by the plaintiff and the plaintiff failed to lift entire Iron Ore as agreed, plaintiff cannot blame the defendant. The clause 15 of the terms and conditions gives right to terminate the contract to the defendant and not to the plaintiff. As such the defendant cannot insist the plaintiff to terminate the contract. In case of termination of the contract the defendant is entitled to compensation and also expenses for making alternative arrangement to lift the remaining Iron Ore and those expenses are to be borne by the plaintiff. This situation would arise only on termination of the contract for the breach committed by the plaintiff.

40. Section 73 and 74 of the Indian Contract Act can be pressed into service only on the breach of contract by the plaintiff and when defendant decides CT 1390_Com.A.S.74-2019_Judgment.doc to terminate contract under clause 15. It is the plaintiff who failed to lift the Iron Ore and the defendant who had promised to give the Iron Ore is still ready to perform its part of the contract When the breach is from the plaintiff and the contract permits termination by the defendant, it is left to the sweet will of the defendant to terminate the contract for the breach of the plaintiff and to seek appropriate compensation and expenses for making alternative arrangement from the plaintiff and in such case Section 73 and 74 of the Indian Evidence Act can be relied. Whether the security deposit given is the liqudiated damages provided under the contract for the purpose of section 74 as contended by the plaintiff, can be considered only in such case and not in the present scenario, where plaintiff, who is at default, is seeking return of amount.

41. Only if Monitoring Committee fails to deliver materials, then under clause, 6 it would be bound to return the amount and not otherwise. When the contract is entered on the basis of 'as is where is and no complaint basis' and the bidder participated in the competition bid and as against the reserved price of Rs.650/- offered Rs.2,170/-, if for the lapses on its part, the successful bidder after lifting portion of the Iron Ore do not lift the remaining quantity and seek return of the value of unlifted CT 1390_Com.A.S.74-2019_Judgment.doc quantity, then, defendant would suffer injury as the defendant has already lost the opportunity of selling the same Iron Ore to other bidders who had participated but, could not reach the price quoted by the plaintiff. If ultimately the defendant decided to terminate the contract then as required under Section 73 of the Contract Act the

defendant may claim compensation and even expenses as even permitted under clause 15 of the annexure B and in such case the defendant may have to sell the remaining Iron Ore and then seek the difference between the price offered by the plaintiff and the price actually realized by the defendant as permitted under Section 73 of the Indian Contract Act and this situation would arise only if the contract is terminated by the defendant. In the present case contract is not terminated and even in 2015, defendant asked the plaintiff to lift the remaining Iron Ore.

42. Therefore, Section 73 and 74 cannot be applied in the present case on the request of the plaintiff. As per the contract the materials are purchased for more than Rs.113 crore and the payment is made only Rs.70 crore and only portion is lifted. On looking to all these aspects Section 73 and 74 would not help the plaintiff to contend that, defendant have to return the value of unlifted Iron Ore and that, to whatever compensation to which the CT 1390_Com.A.S.74-2019_Judgment.doc defendant is entitle is to be quantified and then such compensation cannot be in excess of the security deposit and that whatever the claim as compensation for the defendant, is to be satisfied out of the security deposit amount. The learned Arbitrator by considering these intricacies in the contract and also considering the facts has held that the contract is not terminated and the plaintiff cannot seek value of unlifted Iron Ore.

43. The principles stated in the decisions cited by the plaintiff, which are referred above, cannot be applied to the present case, as breach of contract is by the plaintiff and therefore, plaintiff cannot insist for termination. Defendant cannot be compelled to terminate the contract on the say of the plaintiff. Since, defendant is not seeking termination and is not seeking compensation, section 74 or 75 of Indian Contract Act cannot be applied to the present case. Only when defendant seeks compensation, these decisions can be relied by the plaintiff.

44. The learned counsel for the defendant has relied on the decision of Hon'ble Supreme Court reported in (2012) 2 SCC 261 (Industrial Promotion & Investment Colrporation of Orissa Limited v. Tuobro Furguson Steels). In this decision in para 15 the Hon'ble Supreme Court has held as under, CT 1390_Com.A.S.74-2019_Judgment.doc "...The question of forfeiture of the earnest money would have arisen in case the parties had not acted upon in furtherance of the sale letter but the matter in this case went much beyond that stage. The parties agreed for the sale of unit for an amount of Rs.40 lakhs out of which the respondents were required to make a down payment of Rs.8 lakh which they did. On payment of the part consideration money, the possession of the unit was made over to them. The respondents were, thus, under the legal obligation to pay the balance consideration of Rs.32 lakhs in installments and along with interest, as stipulated in the letter. The Corporation had, therefore, not only the right to retain Rs.8 lakhs paid to it as part consideration but also to realize the balance amount of consideration, in accordance with law..."

This finding of Hon'ble Supreme Court clearly applies to the present case and in this case the contention of the plaintiff that the defendant is bound to return the value of the unlifted Iron Ore is clearly not acceptable.

45. In another decision reported in 2001 SCC Online AP 692 (Grandhi Subramanyam v.

Vissasmsetti Visweswara Rao) the Hon'ble High Court has held in para 11, "...The respondent's claim for refund of the consideration can arise only on rescission of the contract by the appellant...". It is also held in para 20 that "...He has not either expressly or by necessary CT 1390_Com.A.S.74-2019_Judgment.doc implication accepted the repudiation on the part of the plaintiff..." and it is also held that "...the plaintiff cannot claim refund of the amount as the defendant had all along been ready and willing to perform his part of contract..." On the same analogy, in the present case also, as the defendant was always ready and willing to perform its part of the contract of providing agreed quantity of Iron Ore, the plaintiff cannot claim refund of the amount already paid. Therefore, award of the learned Arbitrator cannot be set aside on the ground of not applying section 74 and 75 f Indian Contract Act.

46. Another contention raised by the plaintiff is about not following the provisions of Sale of Goods Act. This contention also cannot be accepted. The plaintiff has contended that as per Section 56 of Sale of Goods Act, where buyer wrongfully neglects or refuses to accept and pay for the goods, seller may sue him for damages. This section only gives right to defendant to seek damages but do not give right to plaintiff to seek termination of contract or seek return of amount. Contention that under this Act, it is the duty of the seller to keep the goods in mercantile quality till the goods are lifted by the purchaser is also not acceptable, as good are not sold with promise of particular quality and it is sold on 'as is where is CT 1390_Com.A.S.74-2019_Judgment.doc basis' and defendant has not promised any particular quality.

47. On looking to all these aspects, plaintiff has failed to prove that the award is against fundamental policy of Indian Law and is against public policy of India and is patently illegal as contended. Learned arbitrator by considering all the aspects has rightly dismissed the claim of the plaintiff by noting that the defendant has not terminated the contract and plaintiff only is to be blamed for not lifting the remaining quantity of Iron Ore which he had offered to purchase and for that, defendant cannot be made to suffer and that, allegations made against the defendant are not established. On looking to the entire award view of the learned Arbitrator is clearly a possible view which cannot be interfered. Since plaintiff has failed to establish any of the grounds urged to challenge the award, award passed by the learned arbitrator cannot be set aside as prayed. Accordingly, point No.1 is answered in the negative.

48. POINT No.3 : For the discussion made on above point, following order is passed:

> ORDER Arbitration Suit filed under Section 34 of the Arbitration & Conciliation Act CT 1390_Com.A.S.74-2019_Judgment.doc challenging the award passed by the learned Arbitrator on 31/1/2019, is dismissed.

[Dictated to the Judgment Writer; transcript thereof corrected, signed and then pronounced by me, in the Open Court on this the 13th day of of January 2023] [Ravindra Hegde] LXXXIII Additional City Civil Judge.

BENGALURU.

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