Thyssen Krupp Materials Ag vs The Steel Authority Of India on 20 April, 2017

Author: S.Ravindra Bhat

Bench: S. Ravindra Bhat, Deepa Sharma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
RESERVED ON: 25.04.2016
% PRONOUNCED ON: 20.04.2017

+ FAO (OS) 150/2002
THYSSEN KRUPP MATERIALS AG ..... Appellants
Through: Mr. Rishi Agarwala with Ms. Misha Rohatagi, Mr. Umang Gupta and Mr. Karan Luthra, Advocates.

Versus

THE STEEL AUTHORITY OF INDIA ..... Respondents
Through: Mr. Dipankar P. Gupta, Sr. Advocate, Mr. Jaideep Gupta, Sr. Advocate with Mr. Santosh Kumar and Mr. Jagmohan Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA
S.RAVINDRA BHAT, J.

1. Thyssen Krupp Materials, AG, the appellant (hereafter "Thyssen") is aggrieved by an order of a learned single judge, dated 10.01.2002 by which Suit no. 352A/ 1998 (hereinafter referred to as the "suit") for enforcement of an arbitral award, was rejected. The impugned judgment completely set aside the arbitral award; therefore, this appeal under Section 39 of the (old) Arbitration Act 1940 ("the Act"), read with Section 10 of the Delhi High Court Act.

2. Thyssen was previously known as TSU Thyssen Stahlunion GmbH and is registered under the provisions of laws of Germany. Thyssen is acting through its Constituted Power of Attorney, Mr. D.K. Jain. The Respondent - Steel Authority of India (hereinafter referred to as "SAIL") is a central public sector company incorporated under the Companies Act, 1956.

3. Briefly, the facts are that Thyssen contracted, with SAIL by agreement dated 04.03.1994 (hereafter "the agreement") to purchase 10,000 MT, plus-minus 5%, Prime Cold Rolled Mil Steel Sheets in coils (hereinafter "CRC") in terms of specifications given in Annexure 1 to the agreement. Thereafter, Thyssen contracted to purchase an additional 10,000 MT of CRC from SAIL under the said agreement of 04.03.1994 and consequently, inserted an addendum/amendment to the agreement for the supply of second lot on 12.05.1994 (hereafter "the amendment"). Thyssen s

officers and experts made regular visits to SAIL s Bokaro Steel Plant and made reports of the same. SAIL had agreed to regular inspection of the CRC in its plant in Bokaro and also during the pre-shipment stage at the port of loading. Such inspection was carried out by SGS, India appointed by Thyssen. The first lot of CRC was sent to New Orleans, USA via „IRENES DIAMOND under a Bill of Lading dated 11.08.1994 and was to arrive between 15.09.1994 and 21.09.1994. SAIL was invited to inspect the de- coiling and de-canning of the CRC upon discharge but it declined to do so by its letter dated 08.10.1994. Upon its discharge, Thyssen s customers informed it that the CRC supplied was defective and the material was not suitable for continuous coil cutting and leveling into flat sheets and/or slitting. Since the goods were deemed to be defective and were rejected by Thyssen s buyers they had to be sold by way of salvage as a result of which it suffered considerable losses. Thyssen claimed damages -both compensatory and exemplary alleging breach of the agreement and supplementary agreement. SAIL contended that it had not breached the contract and that the supplementary agreement had not been entered into. It also urged that the goods supplied by it were in terms of the contract and further that Thyssen could not claim damages, since its nominated representative/agency had inspected the goods prior to dispatch.

Arbitral Proceedings:

4. In terms of clause 13 of the agreement, the parties resorted to arbitration, to resolve their disputes, in accordance with rules of Conciliation and Arbitration of the ICC. The Chairman of the Arbitral Tribunal appointed a sole arbitrator (Mr. Cecil Abrahams) and the arbitration proceedings took place in New Delhi. The applicable law, as agreed by the parties, were the laws of India for the time being in force. Thyssen, the claimant, contended that it had an enforceable contract for the supply of 20,000 MTs of CRC to be supplied in two lots by the SAIL. It argued that the first lot so received was not in compliance with either the express terms of the contract and/or the implied terms such as those enshrined in Sections 15, 16 and 17 of the Sale of Goods Act. The first lot, which arrived in the United States, was rejected by the buyers and was to be sold by way of salvage, which caused a loss to them.

5. The Claimant contended that in terms of the pre-contractual negotiations followed by the agreement of 04.03.1994, the Respondents were required to deliver "prime cold rolled mild steel sheets in coil in compliance with ASTM A568 completely oiled with sufficient oil to protect the Cold Rolled Coil ("CRC") against water and moisture and with cut/slit edges." These were the express terms of the contract. This term, according to Thyssen, was breached. It relied on the testimony of an expert witness, Dr. Rollins, who gave his interpretation of the term "Prime". The expert deposed that a material is considered prime if "at least 90-95% of it is usable for continuous levelling and cutting operations." Upon cross- examination, he said that continuous coil cutting and levelling into flat sheets is the mark of something which is prime. He also stated that in CRC, there is a prime market and a secondary market. Thus anything, which can be sold in the prime market, is considered to be "prime" material. The word prime not only appears in the Annexure to the Agreement, but also in the heading of the Agreement, (the second Preamble), Clause 1.1 and also in the Amendment dated 12.05.1994, where in clause (a), it is specifically stated that the Inspection Certificate of SGS will confirm the material to be in prime condition. Mr. Sharma, SAIL s expert, deposed that "prime" is mere verbiage. He said that the word "prime" was merely offered to give

some comfort to the Claimants. The word so used in the Agreement was to denote that the goods were to be manufactured according to SAIL s standards, the best prepared. He stated that in order to ascertain the meaning of the term "prime", the intention of the persons forming the contract must be taken into account and must be construed in the context it was used in at the time of making of the contract. The Arbitrator however, did not accept SAIL s contentions and found favour in the meaning given by Thyssen s expert, Dr. Rollins.

6. On the issue of the suitability of the material for continuous coil cutting, SAIL urged that if the pre-contractual fax that was received from Mr. Ramachandran prescribing specifications of the material is to be believed, then it would raise the standard and quality of the material above the required ASTM A568 tolerance. Furthermore, this provision was deliberately and consciously left out of the negotiations of the contract and finds no express mention in the terms of the Agreement dated 04.03.1994. Thyssen countered SAIL s argument by referring to the pre-contractual fax sent by Mr. Ramachandran to establish that at all times both parties had an understanding that the material to be supplied was to be suitable for continuous coil cutting and leveling into flat sheets. Furthermore, they contend that despite there being no express term in this regard, the Claimants had only agreed the reduce the quality of the material from Class 1, exposed material to Class 2 and unexposed material against the background of this well - known requirement. SAIL urged that in order to establish the capabilities of the plant, Mr. Kruger, a very experienced Senior Sales Manager and Thyssen s representative visited its Bokaro plant in December 1993 and from what he was shown during the visit, the purchaser was able to form a favourable impression with respect to the material quality, as well as capability and technical competence of the staff. Thyssen also sent representatives to the plant to view the trial lot. The trial lot itself had defects such as wavy edges, smut, stains and severe rust and no objections were raised against these by the officials of Thyssen. SAIL s contention therefore was that these multiple visits together with examination of Mannesmann cargo, established the manufacturer s published standards and amounts to an inspection of the material that was available. The Arbitrator did not find merit in this argument either and held SAIL to have acted in breach of the agreement.

7. The Agreement contained a provision for a Mill Test Certification by SGS India Pvt. Ltd in clause 4.1.3.1. Thyssen had argued that SGS had no opportunity of looking at the insides of the coil and that it was merely offered to CRC for inspection after skin passed and thus, SGS had no way of knowing whether or not the interior of the coils were defective or not. The report, duly annexed at Page. 430 of Pleadings, Vol. 2, indicate that they had done random sampling to check the chemistry, oiling, the hardness and dimensions of the coils. SGS themselves made it clear that the scope of their investigation was very narrow. Thyssen also appointed IGI as its investigating agency but said that it had a role more limited than that of SGS. The Arbitrator found for Thyssen and did not agree that they were final certificates. For this he relied on the judgments in Rolimpex Centrala Handlu Zagranicznego v. Haji E. Dossa & Sons Ltd., (1971) 1 Lloyd LR 380 and Davie vs. Edinburgh Magistrate, 1953 SC 34 on the issue of the judge s limited powers to re-appreciate an expert witnesses testimony. This was applied by the Supreme Court in Murari Lal vs. State of MP, (1980) 1 SCC 704 where the court observed as follows:

> "... duty of the expert witness is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."

The Arbitrator stated that he arrived at his decision after prudent and due consideration of all evidence produced before him and not merely on the basis of the report of one expert witness. While awarding damages, the Ld. Arbitrator followed the principle set out in Section 73 of the Indian Contract Act, 1872. Thyssen s claim for damages was to the tune of the difference between the sound market value of the goods and the market value of the defective goods. SAIL on the other hand stated that the measure of damages should be based on the breach of warranty and must be the difference between the price paid and the price realized on sale as was held in the case of Union of India vs. Rallia Ram, AIR 1963 SC 1685.The Arbitrator agreed with Thyssen and held that the true basis of assessment of loss is the difference between sound market value and damaged market value.

8. On the question of non-delivery of the second lot, it was contended that it was clear, in terms of the amendment dated 12.05.1994, that SAIL agreed to supply 20,000 MTs of CRC to the Claimants. SAIL on the other hand, contended that there was no binding agreement with regard to this amendment as the on-going negotiation never concluded into a binding promise. It argued that in FOB sale, the essential terms of the contract must be agreed to before a concluded contract can come into existence. Furthermore, no shipping date was agreed to between the parties nor was the size finalized. SAIL stated that it was merely a conditional contract, and alternatively if there was a concluded contract, Thyssen was in breach as it did not act in consonance with the letter of credit issued. The Arbitrator held that there was a valid and binding agreement between the parties with regard to the 2nd lot and that SAIL was in breach. He awarded damages.

9. The award, by the Arbitrator, accepted Thyssen s claims. The claimant was held entitled to exemplary damages to the tune of:

> a. US $2,184,09.81 being the damages awarded to Thyssen for the first and second lot.
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> b. US $424,813.85 being the interest awarded for the two lots till the date of the award.
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> c. US $500,000 being the lead costs awarded under the Award. d. US $50,000 being cost of arbitration awarded under the Award. For interest from the date of award till realization.

The impugned judgment

10. Thyssen had approached this court, for a judgment directing that rule of court should be made, in consonance with the award. SAIL opposed its petition and the proceedings were registered as a suit (Suit No. 352A/ 1998). The single judge relied on the judgments reported as Champsey Bhara & Co. v. Jivraj Balloo Spg. &Wvg. Co. Ltd. AIR 1923 PC 66; Arosan Enterprises Ltd. vs. Union of India & Anr, (1999) 9 SCC 449; State of Rajasthan v. Puri Construction Co. Ltd. (1994) 6 SCC 485 for the scope of interference with arbitral awards. On the argument of role of experts, the judge relied on Murari Lal v. State of MP, AIR 1980 SC 531, that an expert deposes and does not decide; his duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion so as to enable the judge to form his independent judgment upon application of these criteria to the facts proved in evidence. The court while dealing with the opinion of an expert should proceed cautiously, probe the reasons for the opinion and then accept or reject it. The single judge rejected Thyssen s expert s opinion on the meaning of the expression "Prime"; it was held that merely because the description of the steel given was "prime", did not make Class 2 into Class 1 material. It was the overall meaning of the word that must be looked at, said the single judge. Thus, in this background, both parties consciously and with full knowledge agreed to the supply of Class 2 material. Just because the term "prime" appears in the contract, the theory that prime material is the best material found footing, which led to ignoring the fact that the quality ultimately agreed to between the parties was Class II for unexposed application which means that the steel should be used by way of hidden material, not as top class material, which is always exposed. On the question of whether the agreement required the contracted material to be suitable for continuous coil cutting, it was held that the phrase "continuous coil cutting" was deliberately left out of the ultimate contract. Thus, to construe it to be implicit in the meaning of the term "prime" is patently wrong. Had the word "prime" indicated to the quality of continuous coil cutting, the question of providing fitness as per tolerance ASTM would not have arisen. The court held that reliance on an isolated letter dated 05.02.1994 to bind the parties to this requirement when the contract did not mention the same was not tenable. On the next question as to the effect of visits to SAIL s plant, by representatives of Thyssen, it was held - overruling the arbitrator s findings- that the surveyors went for multiple visits to the Bokaro plant and often made recommendations to the manufacturer about the quality of production of the material. Therefore, the finding that Thyssen had no quality control over the material produced was patently erroneous. Similarly, the arbitrator s findings that SGS and IGI had limited role in quality checking and control, were held to be erroneous. On the issue of damages too, the single judge held that the arbitrator erred in law in granting damages. It was held that the proper and applicable principle was compensation for breach of the warranty and the measure of damages is the difference between price paid and price realised on sale. Thus, the true criteria for calculating damages that had to applied by the Arbitrator was that which was propounded in Kasturilal Ralia Ram Jain v State Of Uttar Pradesh AIR 1965 SC 1039. In that case it was held that upon receipt of delivery of goods, a party becomes the owner of the goods and therefore, the advertisement, publicity, storage, commission, overhead expenses cannot be awarded to it as part of compensation towards breach of the warranty. On the last issue regarding whether the additional quantities had to be supplied by SAIL, the court reversed the arbitrator s findings and held that there was no concluded contract between the parties.

11. This appeal was heard earlier and decided by a Division Bench of this court, by judgment dated 28 March 2003. Thyssen was aggrieved by the decision; it therefore appealed by special leave to the Supreme Court. On 5 March 2013, the Supreme Court disposed of the appeals (CA 9675/2003 and CA 1616/2007). The court remitted the matter for fresh decision, by the Division Bench; it also required the bench to first decide the following issue:

> "Whether the arbitrator has taken into account the fact that the contract was f.o.b. Vishakhapatnam and thus, what was the effect thereof?"

The Supreme Court also stated in its order that after deciding the above primary issue and depending on it, this bench should thereafter decide other issues, if needed.

Parties' contentions

12. Mr Rishi Agarwala, learned counsel for Thyssen, argues that the only ground taken by SAIL in its petition for challenging the Arbitral Award in respect of FOB regarding the market price to be decided in terms of the loading port instead of the destination. The Arbitrator ruled against the Respondent and observed in the Award as follows:

> "Steel was contracted to be sold to the US market and therefore the analysis of the domestic value of the steel in India is irrelevant."

Counsel urged that the above finding is supported by the ruling Van Den Hurk Vs. R. Martens & Co., Ltd. - 1920(1) KB 850 which held as follows:

> "In my judgment the proper basis is the date at which the goods arrived at their ultimate destination, and consequently that the proper measure of damages is the higher one, namely, 2010l."

Reliance was also placed on Hope Prudhomme and Company vs. Hamel and Honey, AIR 1925 PC 161; Obaseki Bros vs. Relief & Sons Ltd., 1952(2) Lloyd LR 364 and Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, (1968) 1 SCR 821.

13. It was argued that the definition of "FOB" in terms of the 1990 INCOTERMS only transfers the risk of goods and not the title. The Appellant further submits that a five judge Bench judgment of the Supreme Court of India in B.K. Wadeyar v Daulatram Rameshwarlal, (1961) 1 SCR 924 stated this proposition of law in the following terms:

> "5.....The normal rule in FOB contracts is that the property is intended to pass and does pass on the shipment of the goods. In certain circumstances, e.g., if the seller takes the bill of lading to his own order and parts with it to a third person the property in the goods, it has been held, does not pass to the buyer even on shipment. We are not concerned here with the question whether the passing of property in the goods was postponed even after shipment. The correctness of the proposition that in

> the absence of special agreement the property in the goods does not pass in the case of a FOB contract until the goods are actually put on board is not disputed before us."

It is submitted that in the present case there was a special agreement, which clearly postponed the transfer of title of the goods after the same had crossed the rails of the ship and therefore the effect of FOB in these special circumstances was totally irrelevant. The Sole Arbitrator correctly considered this. It is argued that in any case, even if the FOB nature was considered to be relevant, SAIL s argument that once the goods had been placed on board after inspection, Thyssen could not have rejected the goods at the port of destination i.e. USA is not correct; in this regard reliance is placed on the Arbitrator s finding that SGS India was not Thyssen s agent:

> "SGS themselves had made it clear that the scope of their role was very narrow and that they were performing their obligation under an existing contract that they had with the Respondents. The Respondents contend that SGS are their agents. Having considered the various documents and the submissions, I am satisfied that SGS did not become the a gents of the Claimants. I am also satisfied that the role that SGS had to play was a rather limited one."

Thyssen also submits that SGS India s disclaimer in its pre-inspection certificate to that effect ought to be read against SAIL's contention that the certificate was conclusive of the quality of the goods. The certificate of inspection therefore, could not have been treated to be conclusive as held in the judgment of Rolimpex v. Haji Dossa & Sons 1971 (1) Lloyd LR 380. The disclaimer relied on is in the following terms:

> "... This certificate is not intended to relieve the seller or buyer from their contractual obligations. This inspection has been carried out to the best of our knowledge and ability and our responsibility is limited to the exercise of reasonable care"

14. Thyssen argues that pre-shipment inspection by SGS India cannot be attributed to it and in any case under the agreement was not to be treated as final. Further, the certificate cannot take away SAIL's liability in respect of latent defects and breaches of specification in view of Sections 15, 16 and 17 of the Sale of Goods Act, 1930. Counsel relies on Firm of Shivallingappa Shankarappa Mendse v Joint Family firm of Ck. Balakrishna Chettiar, AIR 1962 Mad 426 and Shri Lal Mahal Ltd. Vs. Progetto Grano Spa, (2014) 2 SCC 433. The inspection Certificate in fact mentions that there were small defects. It is urged that the purchaser in the present case is therefore entitled to warranty on the goods.

15. Thyssen urges that interpretation of the terms of the contract was within the domain of the arbitrator, which meant that his decision is final; it cannot be questioned nor can it be said that the award is based on extraneous considerations. The CRC was to be sold in the US market for the purpose of continuous coil cutting and leveling into flat sheets / slitting. The CRC supplied by SAIL did not answer to the description and specifications agreed to by the parties nor was it of merchantable quality. The CRC was incapable of being used for the purpose which "prime cold rolled mild steel sheet" is used. Therefore, the conclusion that SAIL committed breach of the

contract was justified. The Single Judge rendered inconsistent findings in firstly relying on the correspondence exchanged between the parties at the stage of negotiation- to their intention and on the other hand, faulting the arbitrator for relying on a letter dated 05.02.1994. SAIL s failure to produce Mr. Ramachandran, signatory to the contract was fatal to its argument regarding parties intention as to meaning of the term "prime". SAIL kept back the best evidence i.e. its signatory to the contract, therefore adverse inference ought to have been drawn against it. However, the learned single Judge failed to do so. It is argued that ASTM i.e. American Standard of Testing Material does not deal with the continuous coil cutting and leveling. It was for this reason that the term "prime" was inserted in the contract. ASTM 568 is one of the many specifications to which the material had to conform. Merely because in the ASTM A-568 the words "continuous coil cutting and levelling" were not used did not mean that the other specifications could not be inserted in the contract. The arbitrator was justified in rejecting SAIL s argument that in the absence a fixed standard of material the term "prime" was of no significance. Since the contract contained the specification "prime" over and above the ASTM 568, it had a particular meaning. The single judge s finding that the word "prime" was redundant or it meant Class 2 material, was in excess of the court s jurisdiction. The impugned judgment could not have re-appreciated the evidence led on behalf of Thyssen, in the form of expert opinion of Mr. Joseph Bleke Houser of SGS Commercial Testing and Engineering Co. of USA. Mr. William Pitkin Bowes along with Mr. Servero Calima also inspected the CRC at the premises of TSG s customers. Mr. Bowes found CRC to be with mill imperfections. He further found some oscillation of terms to be both edges wavy and centre/quarter buckle/oil canning, speckled/spotted rust due to oil not being uniformly applied. Some of the CRC coils had speckled edge rust, black carbon stains, holes in the surface of the material, speckled rust due to oil not being uniformly applied, serrated edges, cantor buckle and quarter buckle both sides, bad shape problems/imperfections, fins on edges, etc.

16. It was argued, on the question of damages, that the learned single judge fell into error in holding that the distinction made between sound market and damaged market value in the case of damaged goods, was contrary to law. The Single Judge s understanding, that wherever defective goods or goods unfit for consumption or goods that in breach of specifications are received by the buyer, the latter is entitled to claim compensation for breach of the warranty and the measure of damages is the difference between price paid and price realized on sale therefore, is impeached as incorrect. The application of the Ralia Ram case ratio for calculating damages was not apt. In that case it was held by the Supreme Court that when a party takes delivery of goods he becomes the owner of the goods and therefore, the advertisement, publicity, storage, commission, overhead expenses cannot be awarded to the buyer as part of compensation towards breach of the warranty.

17. It is argued that any certificate issued by SGS cannot take away SAIL's liability for latent defects and breaches of specification in view of Sections 15, 16 and 17 of the Sale of Goods Act. The inspection Certificate in fact mentioned that there were small defects. The purchaser - in the present case the second appellant, is entitled to warranty on the goods under Section 59 of the Indian Sale of Goods Act, which reads as follows:

> "59. Remedy for breach of warranty - (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on

> the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-
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> (a) Set up against the seller the breach of warranty in diminution or extinction of the price; or
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> (b)Sue the seller for damages for breach of warranty. (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage."

Thus, "damages" were to be calculated in terms of Section 73 of the Contract Act, 1872. Reliance is placed on the judgments of the Supreme Court of India to say that the damages would be the difference between the contract price and the market price less mitigation. In this regard Thyssen cites Union of India Vs. West Punjab Factories (1996) 1 SCR 580 to this effect:

> "It is next contended that damages should have been awarded at the rate of Rs. 38/- per bale which was the contract price between the factor/ and the J. C. Mills. This contract was made in November 1942. The contract price in our opinion no measure of damages to be awarded in a case like the present. It is well settled that it is the market price at the time the damage occurred which is the measure of damages to be awarded. It is not in dispute that the trial court has calculated damages on the basis of the market price prevalent on March 8. In these circumstances this contention must also be rejected."

18. SAIL s argument that FOB meant that the difference between the contract price and the market price ought to be taken at the loading port and not the destination is disputed. It is emphasized that the rejection was specific on the point by the Arbitrator. Furthermore, in the cross examination, SAIL s witness, Mr. G.S. Sandhu admitted that the price of steel even in India had increased from the date of the contract. The relevant question and answer is as follows:

> "479. Q. There was talk of knowing the outcome on the first Lot before getting the second lot produced and there was a third factor, was there not? During the course of the period since January 1994 when the price had been agreed, the price of cold-rolled coils had risen substantially, had it not?
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> A. That is true.
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> 480. Q. And it was up by about $100 a tonne by September 1994? A. Maybe that much. It will not be exactly 100, but we can say that."

Therefore, urges Thyssen, assessment of damages by the Arbitrator was by relying upon the report of Mr. Allen Davies (its expert witness), who was thoroughly cross-examined by SAIL. Thyssen s counsel submits that the market price proven by it was of US$ 500 PMT and the contract price was US$ 360.5 PMT. The difference was therefore of US$ 139.5 PMT. However, through mitigation of

losses Thyssen was able to achieve a further reduction in damages and the contractual loss proven by the Appellant was that of US$ 117PMT. Merely because Thyssen was able to obtain a price higher than the contractual price, that cannot be taken as the market price. The only measure of damages is the market price and the difference it has with the contract price. The mitigation only helped SAIL in minimizing the payment of damages to Thyssen. Adding the expenses of US$ 28 PMT, argued counsel Thyssen was entitled to claim and was awarded US$ 145 PMT for the defective supplies.

19. It was argued by Mr. Agarwala, that the learned single judge fell into error in accepting SAIL s contention that there was no concluded contract in respect of the second lot. The amendment, dated 12.5.1994 to the main agreement dated 04.03.1994, clearly increased the contractual quantity to 20,000 MTs to be supplied in two lots. The second lot was to be supplied in May-June 1994. However, the first lot itself was exported in August 1994 and SAIL wanted to escape its obligation to supply the second lot because the international prices of steel had increased as admitted by its witness, Mr. G.S. Sandhu in answers to question Nos. 479 and 480. Accordingly, SAIL took refuge under (a) defects in LC (b) formal amendment not having been executed in respect of sizes as reasons for not being able to supply the said goods. Both the reasons were clearly an afterthought and raised for the first time on 10.10.1994 though all correspondences prior to the same admitted that the size mix had been provided by the Appellant and the establishment of the LC was not in dispute. The Contract between the parties in respect of the second lot was clearly a concluded Contract. Thyssen also relied on the previous judgment of the Division Bench, which had noted the amendment, dated 12.5.1994: "Separate amendment will be issued for sizes in the second lot. All other terms and conditions of the contract remain unchanged"

> Thyssen says that the above words in the said amendment cannot be construed in a manner as to destroy the amendment itself. Thyssen relies on Kollipara Sriramulu v T. Aswathanarayana (1958) 3 SCR 387 where it was held as follows:
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> "3. We proceed to consider the next question raised in these appeals, namely, whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and no such agreement was executed. We do not accept this argument as correct. It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract."

20. Mr. Dipankar Gupta and Mr. Joydeep Gupta, learned senior counsel appearing for SAIL, urged that this court should not interfere with the impugned judgment of the learned single judge. The first contention urged is that the contract between the parties is on FOB basis; reliance is placed on Contship vs. D.K.Lall (2010) 4 SCC 256 where it was held that "in the case offo.b. contracts the goods are delivered free on board the ship. Once the 'seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship 'in terms of the bill of

lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer."

It is argued that neither the claim before the arbitrator nor the award is based on or took into account the fact that the contract was f.o.b. Vizag for the following reasons:

a) The claim made by TSU of US$ 1,776,503.05 is based on the market value of the first lot of US$ 5,008,172.33 (p 95-96 of the appeal Paper book). The award does not explain the market value at which place. TSU, however, led evidence in the arbitration proceedings and from para 3.6 of the evidence of Mr. Alan K. Davis (pg. 337 Vol. I) and Admofsky s evidence it appears that this figure of US$ 5,008,172.33 is the aggregate of the different prices at which the first lot was sold by TSG to their different retail customers at different places in the USA.

b) The amount awarded for the first lot (p. 177 of the appeal Paper book) is based on the very same alleged market value of US$ 5,008,172.37 less the total salvage value thereof plus costs associated with salvage. Though there were some small amendments to the claim (p. 153-154 of the appeal paper book) the basis, namely, the market value in USA, remained the same.

c) Assuming that the materials covered by the first lot or any part thereof were defective in any way (which is denied) damages would have to be established with reference to the market value at the place of delivery, namely Vizag in the present case.

d) It is therefore clear that both the claim and the award with reference to the first lot were unrelated to the market rate at Vizag and therefore the award failed to take into account the fact that the contract was f.o.b. Vizag.

21. Furthermore, it is argued that that the arbitrator completely ignored that the relevant market (even if the goods were assumed to be defective) was at Vizag and therefore ignored the fact that the- contract was f.o.b. Vizag. Counsel relied on the observations of the award in this regard that "it is wrong to take domestic Indian steel-production as a comparison, which it is clear, would never have been acceptable to USA market"(p. 172 of the paper book); "Steel was directed to be sold to the US market and therefore the analysis of the domestic value of the steel in India is irrelevant" (p 158 of the paper book)"The only sensible way of assessing the f. o. b. Vizag price for export to USA (which this cargo was) rather than sale to the domestic market is to take the CIF new Orleans figures and work backward" (p. 72 of the paper, book). Counsel submitted that these observations are grossly mistaken and unwarranted. The market value in different markets of the same goods does not depend upon the cost of transportation from one market to the other. For example, the same goods may be sold at widely varying price in different markets in the same city. In fact, the metal bulletin relied upon by Thyssen (pg. 481 Vol 1) shows that contemporaneous prices in USA were about 100 USD more PMT when compared to contractual price of 360.5 USD PMT. Reliance is placed on Murlidhar Chiranjilal v Harishchandra Dwarkadas, AIR 1962 SC 366. The contract there

was for delivery of certain goods through railway receipt for Kolkata f.o.r. Kanpur. It was held that damages would be the difference between the market price in Kanpur on the date of breach and the contract price and the fact that contract envisaged goods going to Calcutta would be irrelevant. It is urged that the fact that Thyssen was taking the goods to USA is irrelevant because they could take it anywhere else also after obtaining SAIL's prior approval. Such clauses are part of the contract because of international trade relations etc. It is therefore urged that the award did not consider that the contract was f.o.b. Vizag. On this ground alone the award deserves to be set aside. These contentions, urge SAIL are without prejudice to its contention that in terms of the Supreme Court s ruling, in case of an alleged defective sale the correct measure of damages is the difference between price paid and price received - UOI v. Ralia Ram AIR 1963 SC 1685. Further arguendo, even if the alleged market price were to be the basis of damages then in case of a sub-sale the damages is limited by the price of sub-sale by the claimant. This, SAIL submits, is irrespective of the question of alleged defects, which too is dealt with.

22. On the issue of whether the materials were defective, it is contended that since the contract was FOB Vizag and it was no one's case that there was any damage to the goods while during transit from SAIL s Bokaro Plant to Vizag, any defects, to entitle the Thyssen to damages, must be proved to be mill related. There could be no claim otherwise. This was never established. It is argued that M/s. S.G.S. India Ltd. ("SGS") being the Surveyor named in the contract was appointed at Thyssen s insistence. Its witness, Mr. Kruger, in his statement-in-chief stated:"We insisted that all material would go through a full range of inspection by SGS." [Page 320 Vol.I Para 50.3]. It is emphasized that Thyssen paid SAIL for the goods through Letter of Credit supported by the SGS certificates as provided at page 87 of the paper book. Thyssen could not have negotiated the letter of credit if the SGS certificates were not in terms of the contract, i.e. that the materials had not been produced according to the contract requirements. In addition to SGS inspection, the claimants on 29.04.1994 appointed Inspectorate Griffith (India) Pvt. Ltd. (hereinafter referred to as IGI) as their own inspecting agency at their cost, to supervise the material at the Bokaro Steel Plant [Vol.II page 656]. Thyssen stated that this action was taken, to avoid dispute regarding quality of materials. IGI did supervise production at Bokaro but Thyssen did not disclose any adverse report by them. Mr. Jain of NEPL (a witness on behalf of Thyssen) in his cross-examination confirmed that IGI observed production and reported periodically on the same (pg 307 Vol.I). It is argued further that there was direct supervision by Thyssen's Surveyors and representatives of the entire production of the CR Coils at the SAIL s Bokaro Mills, as evident from the following facts:

> (a) On 25.04.1994 Mr. Kruger of TSU after visit to Bokaro mills noted that they have "seen the CRC mill in full and have seen the temper passing of some of the Coils of our order as well as the packing of material for the USA. During this visit we have found some small problems which we felt have to be adjusted....."[pg 636 Vol.II]
>
> (b) NEPL, TSU's Indian agents (Mr. Jain & Somani) who were also visiting the plant during production wrote to Mr. Kruger of TSU on 01.06.1994 as follows:
>
> "Because of this strict inspection asked by us the quantity being produced as been reduced" [Vol.II pg. 727]

(c) There was a joint meeting on 04.06.1994 during production where SAIL, TSU and SGS participated. In this meeting it was recorded that SGS will visually inspect and measure all the coils. Various precautionary measures were discussed. In the minutes of this meeting it is recorded as follows:

"All the coils will be visually inspected and measured by SGS before and after packing as per the contract. Plant has informed that rust preventive oil 13-SO manufactured by IOC is being used and even oiling throughout the surface of the coil and the edges is ensured" [Vol.II pg 731]

(d) On 24.06.1994 NEPL, the Indian agents of the claimant reported to Mr.Sohn (of TSU) that oiling had been increased/changed as per instructions of Mr. Brooks of TSU. [Vol. II pg 746]

(e) On 28.07.1994 Mr. Kruger of the claimant wrote to Mr. Adamofsky of TSG "we have a full inspection by SGS during production, packing, transportation and loading. SAIL has done everything possible to protect the cargo. SAIL has three times produced part of the material newly" [Vol. II pg. 757 to 759] Later, on 04.08.1994, he again wrote to Mr. Adamofsky of TSG in which he observed: "material was inspected and is still being inspected during production, packaging, transport to port and loading".

[Vol.III pg. 764]

(f) SAIL submitted that Mr. Kruger of the claimant observes in his statement of examination in chief that:

"As I stated in my report, everybody at the Bokaro Mill was both cooperative and concerned to ensure that the quality of the CRC met that which TSU required." [Vol. I para 51 p 321].

23. It was also argued that at no stage during production was any complaint made either by representatives of TSU or by any of the Indian surveyors to the effect that the material covered by the first lot was in any way defective. The award fails to take into account and in fact brushes aside all the evidence indicated above to the effect that materials were produced in the presence of and under the direct supervision of TSU, SGS and IGI. The award was also vitiated by reading the word "prime" to mean top quality goods and suitable for continuous coil cutting which was beyond contractual specifications.

24. It is further argued by counsel that the arbitrator's finding in the award with regard to alleged defects in the 1st lot is based upon the evidence of American surveyors Mr. Bowes and Calima who are alleged to have inspected the goods after delivery from TSG to its retail customers at different places in U.S.A. Counsel relied on judgments of the Supreme Court that an expert must give objective findings and it is for the court to conclude whether the expert's views are correct (Ref.

Murarilal v. State of Madhya Pradesh 1980 (1) SCC 704 and Ramesh Chandra Aggarwal v. Regency Hospital Ltd. and Ors. 2009 (9) SCC 709). It is argued that the evidence as well as observations in the award show that the American surveyors totally failed to give objective findings and the Arbitrator blindly accepted the subjective opinions of the American surveyors. Reliance is placed on the following observations in the Award:

> "They say that the surveyors did not sufficiently measure the extent of the defects which they found. If one were taking of the border line goods, there might be some force in it. These goods were according to the surveyors, the worst they had ever seen. They were so defective they did not need correct measurement." (p 144-145 of the paper book)."
>
> "It is not practical, particularly when the extent of the defects was so obvious to the experienced surveyors, to waste time and money inspecting, measuring and quantifying the precise percentage of the defective material including attempting to cut level and then measure defects in sheet which it is known are going to unusable (p. 145 of the paper book).
>
> These, argue counsel, reveal that the award was rendered without considering the contractual specifications and without considering the fact that goods were admittedly fit for such specifications. Additionally, at the time of alleged survey, the American surveyors had reference to the specifications mentioned in the purchase orders of TSG's retails customers placed on TSG (pg 864 Vol.III). These were different from the specifications of the SAIL-TSU contracts. Therefore, the American Surveyors did not have the contractual specifications at the time of their alleged survey. Apparently, the Surveyors were then told that this will not do in view of the proposed litigation with SAIL (pg 869 Vol.III). The surveyors immediately obliged by purporting to certify that the surveyed goods did not conform to the TSU/SAIL contract. (vide pg 870 Vol. III). It is pointed out that with reference to a suggestion put to one of the American surveyors that he had been looking at the material with the wrong specifications in mind, the Award observed that "was not border line material, so the precise specifications make no difference." In the circumstances there was clear evidence to the effect that the goods covered by the 1st lot were not defective in any way and that the award is "otherwise invalid" on this account also.

25. It is pointed out that the Single Judge set aside the award for the second lot, inter alia on the basis that there was no enforceable, binding or concluded contract regarding the same and also on the basis that for an fob Vizag contract, American steel prices could not have been taken into consideration for assessing damages. On whether there was a concluded contract or not with regard to the second lot, the Single Judge had to decide that issue afresh on facts, as per the mandate of Section 33 of the Act, irrespective of any decision of the Arbitrator.

26. This part of the award, it is submitted, has to be treated differently from the portion regarding the 1st lot. The limitations of Section 30 of the Arbitration Act, 1940 would not apply here. SAIL

relies on Khardah Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd. AIR 1962 SC 1810; Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd. AIR 1963 SC 90; Renu Sagar Power Co. Ltd. v. General Electric Co. and Anr1984 (4) SCC 679.

The contract for the first lot was dated 04.03.1994 for 10,000 MTs. There was an amendment to this contract on 12.05.1994 which suggested a supply of a second lot of 10000 MTs of CRC. However, it was envisaged that a separate amendment for sizes of the second lot to be agreed upon later will be issued (pg 88 appeal paper book). It was contended by SAIL that there was no concluded contract for the 2nd lot, inter alia because (a) separate amendment for sizes of the second lot was never issued; (b) Thyssen bases the claim on letter dated 17.03.1994 for agreement on the size mix for the second lot and it being similar to the first lot is incorrect because the size- mix was not specified, in the letter of 12.05.1994, which expressly stated that a further document was to be issued. This read with clauses 9 and 10 of the agreement, negates any argument that the size-mix was already a concluded matter on 12.05.1994 because of the letter dated 17.03.1994. (b) It is argued that the specifications suggested by TSU in September 1994 for the second lot were different from those of the first lot and that the sub-lots and markings were to be indicated later, thereby showing conclusively that they had not been agreed upon even till then.

27. SAIL's counsel urges that the essential terms had not been agreed upon finally and, therefore, no binding contract came into existence. It relies on May v. Butcher 1934 (2) KB 17. It is stated that Mr. Kruger who was primarily responsible for negotiating the contract on the part of TSU did not know that such an agreement was entered into. This was consistent with Mr. Kruger's letter dated 05.09.1994, which is at (pg 768 Vol. III). These contentions were accepted. SAIL urges that the single judge s findings do not call for interference on this aspect. It is urged that no damages would be payable even otherwise. The finding of the arbitrator, it is submitted was totally unwarranted. The arbitrator held that:

> "It is wrong to take domestic Indian steel production as a comparison, which it is clear, would never have been acceptable to the USA market."

Analysis and Conclusions

28. The contract between the parties was concluded on 04.03.1994; Thyssen placed an order for the purchase of 10,000 CRC from SAIL. The parties also agreed that SAIL would supply an additional 10,000 CRC to Thyssen, at a later date. The material supplied by SAIL, was alleged to be not in terms of standards agreed to by the parties. This dispute was referred to arbitration. The several points which included were (a) the interpretation of the contract, with reference to the quality of the goods agreed to be sold;

(b) whether there was a concluded contract between the parties as to the second- additional quantity; (c) whether Thyssen could claim damages in the circumstances- in the context of SAIL s plea that it had the goods inspected from time to time, at the stage of manufacture and also that given the condition that the goods were FOB Vizag there could be no liability and (b) whether Thyssen was entitled to damages based on the difference between the price of the goods at the time

they were ultimately received by its customers and their contract value.

29. It must be noticed at the outset that the remit of the Supreme Court was with respect to rendering a finding whether the arbitrator took note of the fact that the goods were f.o.b. Vizag and the effect thereof upon the validity of the award. The scope of the remand in the present case is found in the decision of the Supreme Court, which has referred the following issue to this Court:

> "Whether the arbitrator has taken into account the fact that the contract was f.o.b. Vishakhapatnam and thus, what was the effect thereof?"

The Supreme Court in its remand order also noted:

> "In view of the above, the judgment and orders passed by the Division Bench impugned in both these appeals are set aside and we remand the cases to the Division Bench of the High Court to consider it afresh and decide first the primary issue and depending upon the outcome of the same, other issues may be considered."

30. It is clear from the order of the Supreme Court that it would be open to this court to consider all the issues raised in this dispute, after deciding the primary question referred to it. Before doing so, it is essential to recollect the scope of the power to be exercised by this Court in a matter arising under Section 30 of the Arbitration Act, 1940, such as the present one. The Supreme Court in the case of Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214, while reviewing the scope of powers of the Court under Section 30 of the Arbitration Act, 1940, held:

> "The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in s. 30. It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award."

31. Similarly, the Supreme Court in State of U.P. v. Allied Constructions, (2003) 7 SCC 396, in relation to Section 30 of the Arbitration Act, held:

> "Interpretation of a contract, it is trite, is a matter for arbitrator to determine Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a

> case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering."

32. Therefore, what emerges clearly from these above dictums is that while dealing with an arbitral award under Section 30 of the Arbitration Act, 1940, the Court cannot set aside the award unless "the reasons are totally perverse or the judgment is based on a wrong proposition of law." Under no circumstance can the Court reappraise the evidence or interfere with the findings of fact recorded by the arbitral tribunal. It also must be noted that under Section 15 of the Arbitration Act, 1940, the Court also has the power to modify an arbitral award. While dealing with the question of modifying an arbitral award, the Supreme Court in the case of Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd., AIR 1989 SC 973 noted:

> "There is, however, one infirmity in the award which is apparent on the face of the award which in the interest of justice as the law now stands declared by this Court, we should correct, viz., the question of interest pendente lite."

Along similar lines, the Supreme Court in Union of India v. Manager, M/s. Jain and Associates, AIR 2001 SC 809 explained the scheme of Section 15 and Section 30 of the Arbitration Act, 1940 in the following terms:

> "Similarly, when the Court is required to proceed without objection application under Section 30 or 33 of the Act, it cannot pronounce the judgment without considering the provisions of Sections 15 and 16 of the Act, which provide, as stated above, for modification or correction of any award or for remitting it to the arbitrator for re-consideration on the ground that (i) there is any error of law apparent on the face of the award, (ii) the award is incapable of being executed, (iii) the award has left undetermined any of the matters referred to arbitration, (iv) that a part of the award is upon a matter not referred to arbitration and (v) the award contains any obvious error. Jurisdiction of the Court to pronounce judgment depends on exercise of its power to modify or remit the award."

33. The remit is a narrow one; yet it involves analysis of some facts, based on the evidence, i.e., as to whether the inspection of the goods at various stages bound Thyssen and the facts on the record, in the context of SAIL s contention that upon delivery of the goods on board, the claimant buyer was precluded from objecting to its quality- which would also ultimately impact the issue of damages, if any and its quantum.

34. Keeping the above view in mind, the first question that this Court must consider is the one referred to it by the Supreme Court. The contract in the present case is f.o.b. Vishakhapatnam. The nature of an f.o.b. contract and its distinction from a CIF contract was explained by the Supreme

Court in the case of Contship Container Lines Ltd v. D.K. Lall, (2010) 4 SCC 256:

> "The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) contracts is well recognized in the commercial world. While in the case of CIF contract the seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination etc., in the case of FOB contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer."

35. It must be noted in this context, that while in an f.o.b. contract, the risk passes to the buyer once the goods are put on board the ship and thereafter the seller s obligations are complete, this does not imply that the buyer does not have any right to claim damages or repudiate the contract in case the goods are subsequently found to be defective. In that sense, an f.o.b. contract has no relevance to the liability of a seller to sell the contractual goods or to the quality of the goods sold. It is only relevant for determination of risk and liability during transportation of the goods. It has been noted in Benjamin s Sale of Goods (7th ed., 2006), p. 1737:

> "An f.o.b. buyer has the normal right to reject the goods if they are defective in a way that amounts to a breach of a fundamental term, or to breach of condition, or to a breach of an intermediate term which causes serious prejudice to the buyer."

Therefore, it is clear that merely because the risk passes to the buyer when the seller places the goods on board the ship in an f.o.b. contract, this does not affect the right of the buyer to reject the goods or claim damages, when subsequently on arrival of the goods, it is discovered that the goods were in a defective condition. Such a rule also finds place in Section 41 of the Sale of Goods Act, 1930, which provides:

> "Section 41 - Buyer's right of examining the goods (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

36. By reason of Section 41, a buyer is not deemed to have accepted the goods delivered to him by the seller, unless he has had reasonable opportunity of examining them. Thus, merely because the

risk passes to the buyer in an f.o.b. contract when the goods are put on board the ship by the buyer, unless the buyer has had reasonable opportunity of examining the goods, he would not be deemed to have accepted them, and consequently, he would be entitled to claim damages in case on examining them it is found that the goods were not in conformity with the contract. The question that then arises is whether the buyer i.e. TSU in this case had the opportunity of examining the goods through its agents-SGS India PTE. Ltd and IGI, before the goods were put on board the ship by the seller. It is important to note that the question of whether SGS India PTE Ltd. and IGI were acting as the agents of TSU and whether they had sufficient opportunity to examine the goods in a manner that displaces the presumption under Section 41 of the Sale of Goods Act, 1930, is essentially a question of fact. Since the learned arbitrator has returned a finding on this point, it would not be appropriate for this Court to reappraise the evidence on its own accord. On this issue, the learned arbitrator has noted that both SGS and IGI had a very limited role to play in the examination of the goods and the nature of the inspection carried out by them was also limited. The arbitrator found that the certificates adduced by SGS or IGI cannot be relied upon as evidencing the fact that the buyer had sufficient opportunity of examining the goods before they were put on board by the seller. Thus, under Section 41 of the Sale of Goods Act, the buyer would retain his right to reject the goods till such time as he has had reasonable opportunity to examine them. In this context, the law in relation to the buyer s right of examination of goods has been stated in Benjamin (supra), p. 1743 in the following terms:

> "First, the burden of proving that the buyer had a reasonable opportunity of examining the goods at the point of the shipment lies on the seller and unless there is an affirmative finding of fact to that effect, the buyer will not be held to have accepted the goods merely because he failed to examine them at that point. Secondly, the opportunity afforded to the buyer must be a reasonable opportunity of examining the goods to see whether they were in accordance with the contract-not merely whether there was reasonable opportunity to have discovered the particular defect which is being sued for if it had been the only defect."

37. Such being the case, in view of the arbitrator s finding, it is clear that in this case, the buyer did not have the opportunity of examining the goods before they were put on board the ship by the seller. The question is whether in case of an f.o.b. contract, the law in relation to the buyer s right to examine the goods would operate differently and whether the buyer would be entitled to exercise such a right only before the goods are put on board the ship by the seller, as the risk would pass to the buyer thereafter. However, it was noted by the Court of Appeal in Boks & Co. v. JH Rayner & Co, (1921) 8 Ll. L. Rep. 108 that "there was not...any general rule that an f.o.b. buyer must inspect the goods before they were put on board." In fact, it is noted in Benjamin (supra), p. 1741 that-

> "In most of the reported cases on f.o.b. contracts, the point of examination has been held to be, not the place of shipment, but the destination of the goods: that is, the place at which they actually get into the hands of the buyer or into the hands of a sub-buyer to whom they are directly dispatched."

Similarly, in the context of the Sale of Goods Act, 1930, it has been noted in Pollock & Mulla, The Sale of Goods Act, (9th ed. 2014), p. 419:

> "..(In f.o.b. contracts) Although the place for examination is usually the place of delivery, there is no rule that the goods must be examined on or before shipment, which may often be impracticable."

38. Therefore, in this case, even though the contract was f.o.b. Vishakhapatnam, the buyer still had the right to examine the goods after receiving them either at the destination or at the place where the sub-buyer received them, and if they were found to be defective, then the buyer retained the right to reject them or claim damages for breach of warranty. In the present case, as is clear from the facts recorded in the arbitral award, the first lot of CRC was loaded on the vessel for shipment to New Orleans, USA. It appears from the facts that the goods were directly dispatched to Thyssen s buyers when the goods reached New Orleans. Its customers, on receiving the goods informed it that the CRC supplied by SAIL had several defects and accordingly rejected the said goods. Therefore, it is clear that the buyer i.e. TSU did not have the opportunity of examining the goods at the initial place of delivery and hence, could not have lost its right to reject the goods or claim damages for breach of warranty, in case the goods were found to be defective by the buyer s customers.

39. Once it is clear that the nature of the contract being f.o.b. Vishakhapatnam did not affect Thyssen s right to claim damages from SAIL in case the goods were found to be defective on examination, the next question that must be considered is whether the goods in the present case are defective in nature. In order to ascertain whether the goods are defective in nature, it would be apposite to reproduce the relevant provisions of the Sale of Goods Act, 1930 dealing with the quality of the goods sold by the seller to the buyer:

> "Section 15 Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description. Section 16 Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any

particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith." Section 59 (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may--

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty. (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

40. In this case, the learned arbitrator in his award found that the goods delivered to the buyer were hit by the operation of Section 15 (implied condition that the goods shall correspond with the description), Section 16(1) (implied condition as to fitness for purpose) and Section 16(2) (implied condition as to goods being of merchantable quality). On the basis of the above provisions, the learned arbitrator found that the goods delivered by the seller were defective in nature, i.e. they did not conform to the description, they were unfit for the purpose that they were being bought and that they were not of merchantable quality. Since this is a finding of fact arrived at by the arbitrator, this Court finds no reason to interfere with the same. In fact, on this point, the Division Bench s decision (which has been set aside by the Supreme Court) also found that the goods delivered by SAIL were defective in nature. Even the learned Single Judge in his decision, after reaching the conclusion that the arbitrator s findings on the defective nature of the goods was fraught with infirmities, nonetheless proceeded to examine the question of damages.

41. This court does not propose to re-appreciate the facts pertaining to contract interpretation, particularly as to the meaning of the expression "prime" and the discussion on applicability of standards, or whether the CRC was suitable for coil cutting or not. As stated earlier, it is clear that interpretation of contract- even under the (now repealed) Arbitration Act, 1940 was the exclusive domain of the arbitrator; the "reasonableness" of that decision is not open to challenge before a court considering an application under Section 30/33 of the Act. (See Allied Construction (supra) Sudarshan Trading Co v Govt of Kerala 1989 (2) SCC 38 and Harish Chandra & Co v State of UP

(2016) 9 SCC 478). Instead of reopening the facts therefore, this court proposes to proceed on the basis that the goods delivered by SAIL to TSU were in some respects, defective in nature, and move to the issue of computation of damages by the learned arbitrator.

42. Once it is established that the goods in question were defective, Section 59 of the Sale of Goods Act, 1930 would apply where the buyer elects to or is compelled to treat the breach of condition by the seller as a breach of warranty, and the buyer in such a case would be entitled to set up against the seller the breach of warranty in diminution or extinction of the price or sue the seller for damages for breach of warranty. The question that would then arise would be in relation to the computation of damages. In this regard, the damages that would be due to the buyer from the seller would be governed by Section 73 of the Indian Contract Act, 1872. Section 73 provides:

> "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.
>
> When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

43. Section 73 stipulates the rule of damages for breach of contract, aimed at compensating the injured party, as far as money can, by placing him in as good a situation as if the contract had been performed. With respect to defective goods, the measure of damages is usually the price paid for the defective goods to the seller reduced by the price received when such defective goods are sold by the buyer. In relation to an f.o.b. contract, the computation of damages has to be with reference to the market price of the goods at the place where the goods were put on board the ship. In this context, in relation to an f.o.r. (Kanpur) contract, the Supreme Court in Murlidhar Chiranjilal v. Harishchandra Dwarkadas, AIR 1962 SC 366, noted:

> "The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principles is qualified by a

> second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [1912] A.C. 673. These two principles also follow from the law as laid down in s. 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

44. Similarly, in relation to an f.o.b. contract, the quantification of damages would have to be with respect to the market price of the goods at the place at which the goods were put on board the vessel, i.e. Vishakhapatnam in this case. Inasmuch as the arbitrator in his assessment of the amount of damages due, has taken into consideration the market price of the goods as prevalent in the US, instead of Vishakhapatnam, prima facie the award on this point seems to have ignored the f.o.b. nature of the contract and is based on an erroneous understanding of the law. However, in Murlidhar (supra) itself, the Supreme Court also noted:

> "But the learned counsel for the respondent relies on that part of s. 73 which says that damages may be measured by what the parties knew when they made the contract to be likely to result from the breach of it. It is contended that the contract clearly showed that the goods were to be transported to and sold in Calcutta and therefore it was the price in Calcutta which would have to be taken into account in arriving at the measure of damages for the parties knew when they made the contract that the goods were to be sold in Calcutta. Reliance in this connection is placed on two cases, the first of which is Re. R. and H. Hall Ltd. and W.H. Pim (Junior) & Co.'s Arbitration [1928] All E.R. 763. In that case it was held that damages recoverable by the buyers should not be limited merely to the difference between the contract price and the market price on the date of breach but should include both the buyers' own loss of profit on the re-sale and the damages for which they would be liable for their breach of the contract of re-sale, because such damages must reasonably be supposed to have been in the contemplation of the parties at the time the contract was made since there contract itself expressly provided for re-sale before delivery, and because the parties knew that it was not unlikely that such re-sale would occur. That was a case where the seller sold unspecified cargo of Australian wheat at a fixed price. The contract provided that notice of appropriation to the contract of a specific cargo in

> the specific ship should be given within a specified time and also contained express provisions as to what should be done in various circumstances if the cargo should be re-sold one or more times before delivery. That was thus a case of a special type in which both buyers and seller knew at the time the contract was made that there was an even chance that the buyers could re-sell the cargo before delivery and not retain it themselves."

45. Plainly Murlidhar tells us that the normal rule in case of an f.o.b. contract is also subject to an exception, i.e. a situation where the parties before delivery, were aware of a contract of re-sale between the buyer and a third party. In other words, if a contract of re-sale was in the contemplation of the parties to the original contract of sale of the goods, then such contract would be relevant for the purposes of computation of damages due to the buyer. In the case of Bence Graphics International Ltd. v. Fasson U.K. Ltd., [1997] 3 W.L.R. 205 the law on this point was laid down in the following terms:

> "The situation often arises where the buyer seeks to displace the presumption and recover losses other than the diminution in value. Where a seller knows that the buyer intended to resell the goods and ought reasonably to have contemplated that a breach of his undertaking as to the description or condition of goods would be not unlikely to cause the buyer to lose the profit he hoped to make on the resale, or potential sub-sale, the buyer may recover damages in respect of such loss of profits caused by a breach of the seller's undertaking."

In a recent decision in the context of Section 73 of the Indian Contract Act, 1872, likewise, the law has been stated by the Andhra Pradesh High Court in the case of The Andhra Pradesh Mineral Development Corporation Ltd. v. Pottem Brothers, (2016) 4 ALD 354:

> "Where the parties knew that the agreement to purchase goods was entered into to supply to a third party under a sub-sale it is a clear case where, under Section 73 of the Contract Act, the party committing the breach would be liable to pay the difference between the contract rate and the sub-sale rate if the parties knew, at the time of the contract, that a breach thereof would result in damages."

46. In the present case, from the findings of the learned arbitrator it seems clear that SAIL was aware of the contract of re-sale between Thyssen and TSG and hence, it could be said that the contract for re-sale was in the contemplation of the parties. Even the learned Single Judge seems to have found that SAIL was aware of the contract of re-sale between TSU and TSG, when he noted:

> "In this case the Arbitrator could have at the most allowed the loss suffered by the TSU while selling the goods to TSG."

A similar view was taken by the Division Bench in its previous judgment in this case, where it was stated as follows:

> "Admittedly, TSU had back-to-back contract with TSG. The entire CRC consignment to TSG as per the record was sold at the rate of US 414 dollars per metric ton. TSG in turn sold the same to its various customers at different rates. The price at which the TSG sold the consignment to its customers has in fact been worked out to be the market price by the arbitrator. To our mind, SAIL cannot be fastened with the liability to compensate at that rate because that is not the loss suffered by TSU. Moreover, that could neither be considered as the market price nor could be treated as the basis for assessing the damages. TSG had no privity of contract with SAIL and being not a contracting party its loss could not be held to be the barometer for assessing the damages. On the contrary, the price at which TSU sold the CRC to TSG at best could be treated the market price for assessing damages. As already observed above, consignment in question having been sold to TSG, the TSU could claim compensation i.e. the difference between the salvage price it got and the price at which CRC was sold to TSG. Supreme Court in the case of Union of India v. Rallia Ram (supra) after considering various provisions as to how to determine the compensation came to the conclusion that compensation could be the difference between the price paid and the price received. Therefore, if we rely on Rallia Ram's decision then appellant would be entitled to the difference between the price paid to the SAIL i.e. USD 363.50 and the salvage price i.e. USD 383.28. On that principle the appellant would not be entitled to any compensation. However, if we take the price at which the TSU had entered into a contract for sale with TSG i.e. USD 414 per metric ton and the salvage price i.e. USD 383.28 dollars per metric ton then the difference would come to USD 30.72 per metric ton. The market price proved by the TSU is at which rate TSU sold the goods to TSG. Had the goods not been damaged the TSU would not have got more than USD 414 per metric ton. Therefore that can only be treated as the market rate. Hence, the difference in the price of the salvage goods and the price at which TSU sold the CRC to TSG, to our mind, is the reasonable compensation which the arbitrator could have awarded."

47. The learned arbitrator in computing damages fell into error by taking into account the price at which Thyssen sold the goods further to its customers. Details of such contracts between TSG and its customers would not be in the contemplation of SAIL while entering into the contract with Thyssen. Moreover, such a computation would be hit by the principle of remoteness and indirect loss, enshrined in Section 73 of the Indian Contract Act, 1872, for which SAIL cannot be expected to compensate TSU. Therefore, in our view, the reasonable compensation that should have been awarded keeping in mind the principles laid down in Section 73, would be the difference in the price of the salvage goods and the price at which TSU sold the goods to TSG, as such a contract was in the contemplation of the parties (i.e. SAIL and TSU). This amount would work out to USD $ 30.72 per metric ton for the first lot of 10,000 metric tons.

48. The learned arbitrator in his award has also awarded damages to Thyssen on the basis of the overhead costs incurred by it for securing the salvage sale. We find that on the issue of overhead costs incurred by the buyer for securing the sale of the defective goods, the law has been settled by the Supreme Court in Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685:

> "This observation proceeds upon a clear fallacy. The respondent had purchased and taken delivery of 29,74,270 packets, out of which he sold 6,34,270 packets and returned 23,40,000 packets under an arrangement whereby the Government of India was to take back the goods found with the respondent in their original packing. The respondent had purchased the goods under the acceptance of tender dated September 9, 1946 which provided by clause 11 that "All sales will be conducted on the distinct understanding that the goods sold are on a 'said to contain' basis. No responsibility for quality will be accepted whatsoever after the delivery is made at the depot." When he took delivery of the goods, he became owner of the goods by the express intendment of the contract. The expenditure incurred for advertisement, publicity, storage, agency commission and other overhead expenses since the respondent took delivery was therefore in respect of his own goods and he cannot claim these expenses as part of compensation payable for breach of warrant in respect of goods retained by him. The respondent was undoubtedly entitled to the difference between the contract price and the market price of the goods which he retained, and that compensation has been awarded to him."

Inasmuch that the risk and title had passed to the buyer in the present case once the delivery was complete, any overhead expenses incurred by the buyer in procuring the salvage sale, would not compensable as damages, as per the ruling in Rallia Ram (supra). Therefore, the only damages that TSU would be entitled to claim for the defective goods in respect of the first lot, would be to the extent of USD $ 30.72 per metric ton for the first 10,000 metric tons.

Second Lot

49. Although this court has returned findings on the question remanded to it by the Supreme Court in its order, to put rest to this protracted litigation that has lasted almost 20 years, the court would decide the issue in relation to the second lot of CRC as well. In relation to the second lot, the dispute between the parties is to the existence of a concluded contract. In this context it must be pointed out that since the arbitrator is a creation of the contract, the question of existence of agreement between the parties, would go to the very root of the arbitrator s jurisdiction and can be examined by this Court under Section 30 of the Arbitration Act, 1940. In this context, the Supreme Court in Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises & Anr., AIR 1999 SC 3627, held:

> "It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the Court and for that limited purpose agreement is required to be considered. For deciding whether the arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must."

Similarly, in Associated Engineering Co. v. Government of Andhra Pradesh, AIR 1992 SC 232, the Court held:

> "An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract.
>
> If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error."

50. In relation to the second lot, the question that arises is whether there was an existing contract enforceable between the parties. In this context, Clause 9 of the main agreement (Agreement for Sale and Purchase of Prime Cold Rolled Mild Steel Sheets in Coils) between the parties is relevant. Clause 9 is reproduced below:

> "Clause 9: Modification of the Contract This Agreement cancels all previous negotiations/agreements between the parties hereto. There are no understandings or agreement between the Buyer and the Seller which are not fully expressed herein and no statement or agreement, oral or written, made prior to or at the signing hereof shall effect or modify the terms hereof or otherwise be binding on the parties hereto. No change in respect of the contract covered by this Agreement shall be valid unless the same is agreed to in writing by both the parties hereto specifically stating the same to be an amendment to this Agreement."

51. With respect to the second lot, admittedly, no such formal modification or amendment to the agreement was made by the parties. The learned arbitrator found that Clause 9 of the agreement had been waived by conduct of the parties and in any event, it would not have any impact on the existence of a concluded contract between the parties in relation to the second lot. He relied on the negotiations between the parties and exchange of letters to find that there was in existence a concluded contract between the parties in relation to the second lot. Such kind of clauses in commercial contracts are known as "entire agreement" clauses, the intention of which is to preclude parties from adducing evidence of a collateral contract or agreement between the parties governing the same issue. The English law in relation to such kind of clauses has been aptly laid down in the case of Inntrepreneur Pub Co Ltd v East Crown Ltd, [2000] 2 Lloyd s Rep. 611:

> "The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.
>
> Entire agreement clauses come in different forms. In the leading case of Deepak v. ICI [1998] 2 Lloyds Rep 140, 138, affirmed [1999] 1 Lloyds Rep 387 the clause read as follows:
>
> "10.16 Entirety of Agreement This contract comprises the entire agreement between the PARTIES ... and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this CONTRACT and superseded thereby ..."

Rix J and the Court of Appeal held in that case (in particular focusing on the words "promises or conditions") that this language was apt to exclude all liability for a collateral warranty. In Alman & Benson v. Associated Newspapers Group Ltd 20 June 1980 (cited by Rix J at p.168), Browne-Wilkinson J reached the same conclusion where the clause provided that the written contract "constituted the entire agreement and understanding between the parties with respect to all matters therein referred to" focusing on the word "understanding". In neither case was it necessary to decide whether the clause would have been sufficient if it had been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties. That is the question raised in this case, where the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the Agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect."

52. While there is hardly any case law or jurisprudence by Indian courts on such concepts, this court is of the opinion that the above ruling in the context of English law, would apply with equal force to the Indian context. The object of insertion of such a clause is the parties resolve to prevent either of them from raising any claim based on a collateral contract, entered into by the parties during negotiations or after conclusion of the contract. The very purpose of such a stipulation would be defeated in case parties were allowed to raise a claim based on a collateral agreement, entered between them during negotiations. In the present case, Clause 9 of the agreement between the

parties is of such nature; it would necessarily preclude the parties from raising any claims based on collateral agreements that are not encompassed within the present contract or are not expressly stated as being amendments to the main agreement. That being the case, we are of the view that the learned arbitrator fell into error by not giving Clause 9 its full intended effect. Indeed by finding that the parties through their conduct had impliedly waived Clause 9, the arbitrator in effect defeated the very purpose of inserting Clause 9- that to prevent parties from raising such claims based on collateral agreements entered into between the parties, not specifically encompassed by the contract nor specifically stated to be amendments to the agreement. Therefore, we set aside the arbitrator s award in relation to the second lot of CRC and find that there was no concluded contract entered into between the parties in relation to the second lot.

53. As far as the award of US $ 500,000/- towards cost and US $ 50,000/- this court is of opinion that the award cannot be faulted for arbitrator's misconduct.

54. In the light of the above discussion, the appeal is partly allowed; the award is modified to the extent that Thyssen is entitled to $ 7,44,000/- towards damages; interest at the rate awarded on the said amount, till date of payment, $ 500,000/- towards cost and $ 50,000/- towards award charges. The impugned judgment of the learned single judge is therefore, modified to this extent. Appeal is allowed in these terms; there shall, however, be no order on costs.

S. RAVINDRA BHAT (JUDGE) DEEPA SHARMA (JUDGE) APRIL 20, 2017