R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF FEBRUARY 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE RAVI V.HOSMANI

M.F.A. NO.11155 OF 2010 (AA)

BETWEEN:

1. AMCI (INDIA) PVT. LTD.,
NO.T-2/1 KAVERI ROAD
BESANT NAGAR
CHENNAI 600 090
REPRESENTED BY ITS DIRECTOR
MR.M.A.JAWAHAR.

2. AMCI EXPORT CORPORATION
ONE ENERGY PLACE
SUIT NO.2000, LATROBE, PA 15650
REPRESENTED BY ITS
AUTHORIZED REPRESENTATIVE
MR.M.A.JAWAHAR.

... APPELLANTS

(By Sri. K. SHASHIKIRAN SHETTY, SR. COUNSEL FOR
Smt. FARAH FATHIMA, ADV.)

AND:

1. FIZA DEVELOPERS AND INTER-TRADE PVT. LTD.,
A COMPANY INCORPORATED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956
AND HAVING ITS OFFICE AT
NO.25/1, RESIDENCY ROAD

BANGALORE – 560 052
REPRESENTED BY
ITS MANAGING DIRECTOR
B.M.FAROOKH.

2. HON'BLE MR.JUSTICE K.SHIVASHANKAR BHAT
FORMER JUDGE, HIGH COURT OF KARNTAKA
NO.401/29, 12TH MAIN, RMV EXTENSION
SADASHIVANAGAR, BANGALORE – 560 080.

... RESPONDENTS

(By Sri. S.S. NAGANAND, SR. COUNSEL FOR
Sri. S. SRIRANGA, ADV., FOR R1
R2 SERVED)

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THIS M.F.A. IS FILED UNDER SECTION 37(1)(b) OF ARBITRATION AND CONCILIATION ACT, AGAINST THE ORDER DATED 8.10.2010 PASSED IN AS NO.53/2005 ON THE FILE OF PRINCIPAL CITY CIVIL & SESSIONS JUDGE, BANGALORE, DECREEING THE ABOVE SUIT FILED U/S 34 OF ARBITARATION AND CONCILATION ACT R/W RULE 4 OF HIGH COURT OF KARNATAKA ARBITRATION (PROCEEDINGS BEFORE THE COURTS) RULES, 2001 SETTING ASIDE THE AWARD DT 14.9.2005.

THIS M.F.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short) has been filed against judgment dated 08.10.2010 passed by the trial court, by

which objection filed by respondent No.1 under Section 34 of the Act has been allowed.

FACTUAL BACKGROUND

2. The respondent No.1 and the appellant No.2 entered into a Joint Venture Agreement dated 21.10.2003 for supply and purchase of iron ore fines. The main object of the agreement was to procure supply and sell the iron ore fines of specified quality to overseas customers to be nominated by appellant No.2 and to share the profit from such a sale. Under the agreement, it was agreed that respondent No.1 shall export the iron ore of requisite quantity and quality to the overseas buyers at the price and in the manner agreed to between the parties. The appellant No.2 represented the appellant No.1 as an agent and the authorized representative of appellant No.2 executed the agreement on behalf of appellant No.1. It is the case of respondent No.1 that after execution of the agreement, it continuously endeavored to honor its obligation under

the agreement and perform its part of the agreement. The respondent No.1 had to procure iron ore in Chikkanayakananalli, Hospet, Bellary to ensure supply of iron ore fines under the agreement. The agreement prescribed supply of screened iron ore fines of iron content of not less than 61.6%.

3. It is the case of the respondent No.1 that the iron ore found in ROM condition was required to be processed by crushing and screening to tailor it to the needs of the appellants. The respondent No.1 agreed to supply the iron ore agreement under the agreement. The respondent No.1 could not put up a crushing and screening plant on account of various objections raised by local authorities and transported the iron ore in Run of Mill conditions to New Mangalore Airport. Under the agreement, the plaintiff was required to obtain a certificate from the Quality Inspection Agencies, certifying the iron content in the ore. The quality inspection agency certified that iron content in the iron

ore Run of Mill from Chikkanayakananalli mines had less than 61.60% of iron content and thus, was not conforming to the standards prescribed in the agreement.

4. It is the case of respondent No.1 that since, the quality of the iron ore fines of the quality specified in the agreement was not available in Chikkanayakananalli and surrounding areas, it vide communication dated 14.11.2003 offered either to ship the consignment of screened iron ore fines during second week of January 2004 or alternatively supply ore in Run of Mill condition. The appellants however declined to accept the respondent No.1's proposal. As per the version of the respondent No.1, the appellants failed to furnish the copies of agreements for sale, which they had entered into with overseas purchasers, which was an essential pre-condition in the agreement for initiation of supply of trial consignment. The respondent No.1 therefore, could not effect trial shipment of 40,000 metric tonnes and

had to transport iron ore in Run of Mill condition from Chikkanayakananalli mines to New Mangalore port in the hope that the same would be accepted by the appellants. However, the appellants declined to purchase the aforesaid ore. Thereupon, the respondent No.1 was left with no option but to sell it to third parties. Thus, the dispute arose between the parties and an arbitral tribunal was constituted comprising of the sole arbitrator. The appellants filed a claim of Rs.76,03,20,000/- along with interest, as damages on account of non-supply of iron ore by the respondent No.1 as per the agreement.

5. The respondent No.1 *inter alia* pleaded that the contract in question was a contingent contract and in fact there was a breach of contract on part of the appellants and therefore, the appellants were not entitled to claim any amount as compensation. The arbitral tribunal by an award dated 14.09.2005, *inter alia* held that agreement is not a Joint Venture

Agreement and even if it is a joint venture, the buyer under the agreement is entitled to 50% of the profit and if the said profit is denied to the buyer on account of the breach committed by the seller, the buyer is entitled to seek damages. It was further held that respondent No.1 is responsible for breach of terms of the agreement and did not supply the iron ore as agreed by them and therefore, the respondent No.1 is under an obligation to compensate the buyer for loss of profits. It was further held that the conduct of respondent No.1 clearly exhibited its unwillingness to supply the iron ore. The arbitral tribunal therefore, decreed the claim of the appellants to the tune of Rs.57,60,00,000 and awarded interest on the aforesaid amount from 01.04.2005 till the date of the Award, to the tune of Rs.2,30,40,000 and also awarded a sum of Rs.1,47,000/- cost along with interest at the rate of 12% per annum.

6. Being aggrieved, the respondent No.1 challenged the award dated 14.09.2005 passed by the

arbitral tribunal by way of an objection under Section 34 of the Act *inter alia* on the following grounds:

(i) The Arbitral Tribunal has neither considered the substantive law nor provisions of the agreement between the parties and has passed an award and dehors the terms and conditions of the agreement and has thus acted beyond jurisdiction.

(ii) The award is in conflict with the public policy of India as the same is not duly stamped and is therefore not valid in law.

(iii) The arbitral tribunal failed to appreciate that the contract in question was contingent contract and could not have been enforced unless the contingencies contemplated under the contract would have taken place.

(iv) The Arbitral tribunal while passing the award did not take into account Sections 73 and 74 of the Contract Act, 1872

relating to assessment, scope and extent of proof of damages.

(v) *The arbitral tribunal has not taken into account the substantive laws such as Mines And Minerals, Development And Regulation Act, 1957, Forest Conservation Act And Environment (Protection) Act, 1980.*

(vi) *The award has been passed in violation of the provisions of Sale Of Goods Act, 1930 and the Interest Act, 1978.*

(vii) *The Arbitral tribunal failed to appreciate that there was no brevity of contract between the appellant No.1 and respondent No.1 and the manner of computation of damages is contrary to clause 7.3 of the agreement.*

(viii) *Interest at the rate of 12% per annum has been granted in violation of Section 3(1)(b) of the Interest Act.*

7. The trial court vide impugned judgment dated 08.10.2010 *inter alia* held that agreement in question is a Joint Venture Agreement and since, the contract has not come into existence, therefore, there is no breach of the terms and conditions of the contract by respondent No.1. It was further held that since, the contract in question is contingent contract and in the event it becomes impossible to perform the same, the contract is rendered as void. It was further held that the quantity of iron ore, which was available at Chikkanayakananalli mines was not the quality of iron ore prescribed under the agreement and therefore, performance under the contract was rendered impossible on account of non availability of the iron ore. It was further held that appellants have neither invested any capital in the business nor have complied with requirements of opening of Letter Of Credit, as well as furnishing the details of prospective overseas buyers.

8. It was further held that the claim petition under Section 34 of the Act by appellant No.1 in its individual capacity is not maintainable before the Arbitral Tribunal and therefore, the award is not sustainable. The award was therefore, set aside and the objection preferred by respondent No.1 under Section 34 of the Act has been allowed. In the aforesaid factual background, the appellants have filed this appeal.

SUBMISSIONS:

9. Learned Senior Counsel for the appellants submitted that the trial court while passing the impugned judgment has exceeded its jurisdiction under Section 34 of the Act. It is further submitted that the trial court has passed the impugned judgment on the basis of appreciation of facts and interpretation of contractual terms, which is neither warranted nor permissible in a petition under Section 34 of the Act. It is also submitted that the trial court has re-appreciated the evidence and has acted like court of appeal. It is

also urged that the impugned judgment is in contravention of several decisions of the Supreme Court with regard to scope and ambit or powers of Section 34 of the Act. It is contended that the trial court has re-appreciated the evidence and has conducted a fresh trial and has misinterpreted and misconstrued various clauses of the agreement dated 21.10.2003. It is also pointed out that the findings recorded by the trial court that the agreement dated 21.10.2003 is a contingent contract and its performance had become impossible and therefore, the same was not capable of performance are perverse. It is also urged that the trial court ought to have appreciated that the respondent No.1 has failed to make out any ground for interference with regard to the award passed by the arbitral tribunal under Section 34 of the Act and the approach of the tribunal in dealing with the objections is misdirected. In support of his submissions, learned Senior Counsel for the appellant has placed reliance on decisions of the Supreme Court in

'ASSOCIATE BUILDERS VS. DELHI DEVELOPMENT AUTHORITY', (2015) 3 SCC 49, 'NAVODAYA MASS ENTERTAINMENT VS. J.M.COMBINES', (2015) 5 SCC 698, 'NATIONAL HIGHWAYS AUTHORITIY OF INDIA VS. ORIENTAL STRUCTURAL ENGINEERS PVT. LTD.', AIR 2015 DEL 79 AND 'MARINERS BUILDCON INDIA LTD. VS. K.V.MAKKAR CONTRACTS', 2015 SCC ONLINE DEL 6523.

10. On the other hand, learned Senior Counsel for respondent No.1 has submitted that sum and substance of the findings recorded by the trial court has to be seen. It is urged that the arbitral tribunal is bound to examine the terms and conditions of the contract and the award passed by the arbitral tribunal has been passed in violation of the terms and conditions of the contract. The arbitral tribunal has completely failed to appreciate the well settled legal provisions and the propositions with regard to law of damages and the tribunal ought to have appreciated that the party

pleading the loss has to make out a case of mitigation and in the instant case, no evidence was produced with regard to the mitigation of loss. It is urged that the trial court has rightly held that the contract in question is a joint venture contract and was a contingent contract, the performance of which had become impossible.

11. It is further argued that arbitrator has awarded interest in contravention of provisions of Interest Act, 1978. Learned Senior Counsel has taken us through the award passed by the arbitral tribunal as well as the judgment passed by the trial court. In support of his submissions, learned Senior Counsel has referred to decisions of the Supreme Court in the case of '***OIL & NATURAL GAS CORPORATION LT. VS. SAW PIPES LTD.', (2003) 5 SCC 705, 'HINDUSTAN ZINC LTD. VS. FRIENDS COAL CARBONISATION', (2006) 4 SCC 445, ' OIL & NATURAL GAS CORPORATION LIMITED VS. WESTERN GECO INTERNATIONAL LIMITED', (2014) SCC ONLINE SC 937, 'M/S***

MURALIDHAR CHIRANJILAL VS. M/S HARISHCHANDRA DWARKADAS & ANOTHER', AIR 1962 SC 366, 'STATE OF KERALA & OTHERES VS. M/S UNITED SHIPPERS & DREDGERS LTD.', AIR 1982 KERALA 281, 'INDIAN CONTRACT AND SPECIFIC RELIEF ACT, POLLOCK & MULLA', 12TH ED. 2001 'SIKKIM SUBBA ASSOCIATES VS. STATE OF SIKKIM', (2001) 5 SCC 629, 'JALPAIGURI ZILLA PARISHAD AND ANOTHER VS. SHANKAR PRASAD HALDER', AIR 2006 CAL 1, 'GANGOTRI ENTERPRISES LIMITED VS. UNION OF INDIA AND OTHERS', (2016) 11 SCC 720, 'FOOD CORPORATION OF INDIA VS. MAHESH KUMAR', MANU/DE/1186/2010, 'MAHARASHTRA STATE ELECTRICITY BOARD BOMBAY VS. STERLITE INDUSTRIES (INDIA) LIMITED' 2000 (2) MH.L.J., 'FATEH CHAND VS. BALKISHAN DASS', (1964) 1 SCR 515, 'MAULA BUX V.S UNION OF INDIA, (1969) 2 SCC 554, 'UNION OF INDIA VS. RAMPUR

DISTILLERY AND CHEMICAL CO. LTD.', (1973) 1 SCC 649, 'UNION OF INDIA VS. RAMAN IRON FOUNDRY', (1974) 2 SCC 231, 'M/S H.M.KAMALUDDIN ANSARI AND CO. VS. UNION OF INDIA & OTHERS', (1983) 4 SCC 417, 'M.NANJAPPA VS. M.P.MUTHUSWAMY', AIR 1975 KAR 146, 'VAIRAVAN CHETTIAR AND OTHERS VS. KANNAPPA MUDALIAR', AIR 1925 MAD 1029, 'ARUN PROKASH BORAL VS. TULSI CHARAN BOSE', AIR 1949 CXAL 510, 'SARADAMANI KANDAPPAN VS. S.RAJALAKSHMI AND OTHERS', (2011) 12 SCC 18, 'JAI DURGA FINVEST (P) LTD. VS. STATE OF HARYANA AND OTEHRS', (2004) 3 SCC 381, 'PROVASH CHANDRA DALUI AND ANOTHER VS. BISWANATH BANERJEE AND ANOTHER' AIR 1989 SC 1834, 'THE NORTH EASTERN RAILWAY COMPANY VS. LORD HASTINGS', (1900) AC 260 (267) AND F.M.DEVARU GANAPATHI BHAT VS.

PRABHAKAR GANAPATHI BHAT', (2004) 2 SCC 504.

12. By way of rejoinder learned senior counsel for the appellant has invited the attention of this court to the decision of the supreme court in '***MMTC LTD. VS. VEDANTA LTD.', (2019) 4 SCC 163*** and has submitted that the Court can interfere with the award only if one of the conditions specified under Section 34(2)(b) of the Act is fulfilled. It is also urged that such interference does not entail review of merits of the dispute and is limited to situations where the findings of the arbitrator are arbitrary capricious or perverse. It is also urged that from the material available on record it is evident that the respondent No.1 has supplied the quantity specified in the agreement to third parties and the trial court while passing the impugned judgment has not even mentioned as to how the award passed by the

arbitrator is in contravention of the conditions of the contract.

THE RELEVANT STATUTORY PROVISIONS:

13. Before proceeding further, it is apposite to take note of relevant statutory provisions. Relevant extract of Section 34 at the relevant time reads as under:-

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34. Application for setting aside arbitral award.––

(1) xxxxxxx.

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was

in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation --Without prejudice to the generality of sub clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

31.Form and contents of arbitral award.

(1) xxxxxxxxxx

(2) xxxxxxxxxx

(3) xxxxxxxxxx

(4) xxxxxxxxxx

(5) xxxxxxxxxx

(6) xxxxxxxxxx

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent . higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

THE INDIAN CONTRACT ACT, 1872

Sec. 32.Enforcement of contracts contingent on an event happening.— Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened – contingent contract to do or not to do anything if an uncertain future event happens, cannot be enforce by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

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

of it.- Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.— When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for.—(1)When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach

is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty. Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned there in.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

The Interest Act, 1978

3. Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,—

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the

proceedings: Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

ANALYSIS

14. From the various decisions of the Supreme Court relied on by both sides as well as decisions of the Supreme Court in ***'RASHTRIYA ISPAT NIGAM LTD VS. DIWAN CHAND RAMASARAN', (2012) 9 SCC 552, 'SUTLEJ CONSTRUCTION LTD VS UNION TERRITORY OF CHANDIGARH', (2018) 1 SCC 718 AND 'POST GRADUATE INSTITUTE OF MEDICAL EDUCATION AND RESEARCH CHANDIGARAH VS. KALSI CONSTRUCTION COMPANY', (2019) 8 SCC 726*** the following principles emerge with regard to scope of interference under Section 34 of the Act:-

Legal Principles with regard to Scope of Section 34

(i) Even though Arbitral Tribunal may have committed mere error of fact or law in

reaching its conclusion on the disputed questions of law submitted to it for adjudication, the Court has no jurisdiction to interfere with the award.

(ii) The Court whiie dealing with application under section 34 of the Act, can not act as an appellate Court and substitute its own findings and can not correct error of law or fact.

(iii) If two views are possible then, the view taken by the Arbitrator shall prevail and the court would not interfere with the Award passed.

(iv) The Arbitrator can not re-write the contract in the guise of interpretation.

(v) If an Award on the face of it, is passed in violation of statutory provisions, it can not be said to be in public interest, as the same is likely to affect administration of justice. Thus an award can be set aside if it is contrary to fundamental policy of Indian law,

the interest of India, Justice or Morality or if it is patently illegal and such illegality goes to the root of the matter.

(vi) The Award can be interfered with even if it is contrary to terms of the contract, as the same would be patently illegal and opposed to public policy of India.

(vii) The expression 'Fundamental Policy of Indian Law' would inter alia include that every determination by Court or Authority which affects the right of citizen must adopt judicial approach, and should record reasons in support of its decision and perversity and irrationality of decision would be tested on the touch stone of Wednesbury Principle.

(viii) In the absence of agreement to the contrary between the parties section 31(7)(a) of the Act confers jurisdiction on the arbitral tribunal to award interest unless other wise agreed by the parties, at such rate as the arbitral tribunal considers necessary.

Principles contained in Section 32, 74 and Section 75 of the Indian Contract Act, 1872

(i) Section 32 of the Indian Contract Act, 1872 envisages that if the event on the happening of which the contract is contingent, becomes impossible. The Contract becomes void. [SEE: '***SATYAVRATA GHOSE VS. MUGNEERAM BANGUR AND ORS.'***, ***AIR 1954 SC 44***, '***RAJA DHRUV DEV CHAND VS. HARMOHINDER SINGH AND ANR.'***, ***AIR 1968 SC 1024*** AND '***GOVINDBHAI GORDHANBHAI PATEL VS. GHULAM ABBAS MULLA ALIBHAI AND OTHERS***', ***AIR 1977 SC 1019***].

(ii) Section 74 of the Indian Contract Act, 1872 exempts a party to prove actual extent of loss or damage. However, he is required to establish the basic requirement for award of compensation viz., the fact that he has suffered some loss or damage. The proof of basic requirement is not dispensed with by

Section 74 and party complaining of breach of contract and any compensation is entitled to succeed only on proof of legal injury having been suffered by him in the sense of some loss or damage having been sustained on account of such breach.

(iii) In assessing damages the court has jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case.

(iv) The object of award of damages for breach of contract is to place the plaintiff so far as money can do it in a situation as if the contract was performed. He is thus enabled to recover damages in respect of loss of gains of which he has been deprived of due to the breach [See: ***ANSON'S LAW OF CONTRACT, 26th Edition, Page 494***].

(v) Frustration of a contract takes place when there supervenes an event (without default of either party and for

> which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and / or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance. [See: ***CHITTY ON CONTRACTS, 26TH Edition, Page 1635***]

Now we may advert to the relevant extract of the agreement which reads as under:

Salient features of the Agreement:-

> *This sale & purchase agreement is made on October 20, 2003 by and between FIZA DEVELOPERS & INTER-TRADE PRIVATE LIMITED based at 25/1, Residency Road,*

Bangalore – 560 025, India and hereinafter referred to as "Seller"

AMCI 9INDIA PRIVATE LIMITED (for AMCI Export Corporation) based at 6b, 113-114 Theyagaraya Road, T.Nagar, Chennai - 600 017, India and hereinafter referred to as "Buyer".

Whereas Buyer wishes to purchase the specified quantity of iron ore fines, the seller wishes to sell iron ore produced in Hospet, Bellary & Chiknayakanahalli, Karnataka, India.

Now the parties hereto agree as follows:

Period of agreement

Article 1.0

The term of this contract shall be deemed to commence on October 20, 2003 and shall continue in effect until March 31, 2005 or until obligations of both parties have been completed.

Quantity

Article 2.0

The seller agrees to sell and the buyer agrees to purchase a trial shipment of 40,000 metric tons, plus or minus ten percent of iron ore fines, to be loaded on an ocean faring vessel during the period December 01, 2003 to December 31, 2003.

Article 2.1

Subject to the trial shipment being performed to the full satisfaction of Buyer, as per this contract, the Seller agrees to sell and the Buyer agrees to purchase additional 600,000 mt plus or minus 10% (in Buyer's option) of iron ore fines to be loaded on ocean vessels during the period January 01, 2004 to March 31, 2005.

Article 2.2

Seller agrees to give exclusivity to Buyer for Iron ore fines mined & screened from Chiknayanhalli area until March 31, 2005 & to be extended by mutual agreement.

Delivery

Article 3.0

The trial shipment of iron ore fines is tentatively scheduled for loading during December 01 – December 30, 2003 or earlier s mutually agreed.

Article 3.1

Upon successful and satisfactory completion of the above stated trial shipment, the balance quantity of 600,000/- mt shall be construed as contracted and the delivery of this 600,000 mt will be evenly spread during January 2004 to March 2005. The targeted shipment rate would be one shipment every 4-6 weeks.

Article 5.0

Ail sampling and analysis necessary to pursuant to this agreement shall be carried out in conformance with the relevant standards of the International Standards Organization or according to the American Society for Testing and Materials, as required by the Buyer.

Article 7.0 (Base Price)

The base price of the iron ore fines will be free on Board Trimmed (FOTB) US $ 22.00 PMT (US Dollars twenty two per metric ton) New Mangalore Port, West Coast of India. This price is based on a minimum iron (fe) content of 62.40% on dry basis, maximum Silica (SlO2) of 3.0% on dry basis, maximum Alumina (Al2O3) of 3.5% on dry basis and a maximum Total Moisture of 6.0% on as received basis.

Article 7.3 (profit sharing)

a. *Any & all differences over / in excess of the base as established in Article 7.0 and the actual overseas sales price between any AMCI Group Company and the ultimate overseas buyer will be construed as PROFIT.*

b. *Such PROFIT estimation /calculator will be established for each shipment effected under this contract and will be*

duly substantiated by both buyer and seller.

c. *Buyer and seller mutually agree and commit to share the profit arrived by the above stated procedure on a 50:50 basis.*

15. Thus, from perusal of the terms and conditions of the contract in particular Articles 1 to 4, 7 and 7.3 and Article 12 it is evident that the contract casts certain duties and obligations on the parties. Under the agreement, it was the duty of respondent No.1 to make the iron ore of the specified quantity as mentioned in the agreement available and it was the corresponding duty of the appellants to make available the overseas buyers to whom the iron ore fines could be exported and the profit could be shared. Admittedly, the trial shipment of 40,000 metric tons has not taken place within the stipulated time limit in the agreement and the contract in question was a contingent contract under Section 32 of the Contract Act.

16. At the first blush, after perusal of the judgment passed by the trial court and in view of the issue framed by

the arbitral tribunal whether or not the award is liable to be set aside and use of the expression "prima facie" as well as the finding that the claim cannot be said to be not maintainable, we were inclined to remit the matter to the trial court for decision afresh. However, we refrain from doing so as on closer scrutiny of the judgment passed by the trial court, we find that the grounds for interference as enumerated under Section 34(2)(b) of the Act are made out, even though the same may not have been expressly stated in the impugned judgment. Besides this, a remand would give a fresh lease of life to the litigation in which, an award was passed in the year 2005. Therefore, we decided to scan the judgment of the trial court, in order to find out whether in substance the trial court has satisfied itself with regard to existence of the grounds as enumerated under Section 34(2)(b) of the Act.

17. For the facility of reference, we may refer to the findings recorded by the arbitral tribunal as well as the trial court in the tabular form:

Findings of the Arbitrator	Findings of the trial court
1. **On the nature of contract**: The arbitrator held that the agreement is a venture to share the profits arising out of sale of iron ore fines in the international market and even if it is a joint venture agreement, the profit has to be shared to the extent of 50%.	1**.On the nature of contract:** The agreement casts certain duties and obligations on both the parties. The seller is expected to make available the iron ore of the quality specified in the agreement and the buyer is expected to do the marketing of the same. Therefore, the agreement is not an agreement simplicitor but it is a joint venture agreement to market iron ore fines and to make profits.
2.**Breach of Contract:** The respondent is responsible for breach of terms of the contract as the respondent did not supply the iron ore fines under the agreement.	2. **Breach of contract:** Admittedly, the trial shipment of 40,000 metric tones had not taken place at all within the stipulated period i.e., 1.12.2003 till 31.12.2003 or even subsequently. Thus, under Article 3(1) of the contract, the contract with regard to supply of 6,00,000 metric tones of iron ore cannot be construed to have been contracted and therefore, the award is against the terms of the contract.
3.**On performance of Contract** A contract is a contract from the time it is made and not from the time, performance is	3.**On performance of Contract** From the contents of the contract, it is evident that it is a contingent contract as

due. If before the time of performance arrives a party refuses to perform the contract in its entirety, there is anticipatory breach of the contract.	defined under Section 32 of the contract Act and if the event becomes impossible, the Contract is rendered void.
4.**Quantum of damages** The arbitral tribunal held that since respondent No.1 failed to supply the iron ore fines under the agreement to the respondent and assuming that the international sale price on an average was 70$ per metric tonne, the appellants are entitled to a sum of Rs.57,60,00,000/- on account of compensation as well as interest on the aforesaid amount for a period from 01.04.2005 till the date of passing of the award to the tune of Rs.2,30,40,000/-. The Tribunal also awarded cost of Rs.1,47,000/- as well as interest at the rate of 12% per annum on the sum awarded to the appellants.	4.**Quantum of damages** The trial court has held that there is no provision for payment of any damages in the agreement and the appellants have not produced any document disclosing their overseas contract with ultimate buyers and therefore, in the absence of any legal injury having been suffered in the sense that some of the loss or damage having been sustained on account of such breach, the award of damages is contrary to Section 73 and 74 of the Contract Act. Thus, the grant of damages is contrary to the substantive law and the damages have been quantified without any basis.

18. The trial court has looked in to the agreement to find out whether the Award has been passed in violation of terms and conditions of the contract. The relevant extract of para 28 of the Judgment of the trial court reads as under:-

28. Admittedly, the trial shipment of 40,000 MT has not taken place at all within the stipulated period from 1.12.2003 to 31.12.2003 or subsequently till now. Thus, under Art.3(1) of the Agreement it is clear that the balance of the contract with regard to supply of 600,000 MT of Iron ore as contracted between the parties cannot be construed as having been contracted. Hence, prima facie, it is seen that the award passed by the defendant no.3 taking into its fold the transaction which has not been contracted while passing the award prima facie discloses that the Award is against the terms of the contract.

19. Thus the trial court has recorded a finding that award has been passed against terms of contract. The trial court in para 42, which is quoted below has held as under.

42. Further, it is not the case of the claimant that what was transported to New Mangalore Port was the iron ore of the quality as agreed upon between the parties and admittedly even according to the claimant what was transported to New Mangalore Port

was the iron ore of ROM (Run of Mines) quality, then it cannot be said that the respondent though having the quality of the iron ore as contracted between the parties failed to supply the same. In other words, the contract is rendered impossible because of the non-availability of the iron ore on par with the quality contracted and the purpose of the contract was rendered impossible under section 32 of the Contract Act.

20. The relevant extract of para 54 and para 67 of the judgment of the trial court is reproduced below:-

54. On perusal of the above, it only goes to show that the iron ore so transported was of lesser quality than that of the one which was agreed to be supplied to the claimants.

67. Thus by composite reading of such documents got marked by the defendants, it is seen that (1) Quality of iron ore as specified in the contract i.e., Agreement dated 20-10-2003 at Chikkanayakanahalli Mining Area was not available; (2) There was obstruction from the local public and intervention at the mining site for transportation of the iron ore; and (3)

There was offer made by the plaintiff with regard to the available material in ROM condition to the defendants to which no response was given which means that it can be read that they have declined to accept such offer and (4) The Letter of Credit in favour of the plaintiff inspite of confirmation by the plaintiff as discussed herein above is not opened by the defendants 1 and 2.

21. The para 74, 75 and 80 the trial court has held as under:-

74. As already discussed supra, it is held that the nature of the contract clearly establishes that it is a joint venture as contended to by the counsel for the plaintiff that there is no provision for payment of any damages in the agreement, the defendants have not produced any document disclosing their overseas contract with ultimate buyers nor they have produced the copies of the letter of credit with the overseas buyers. In the circumstances, as contended to by the plaintiff that the calculation of the damages under Sections 73 and 74 of the contract Act is not warranted, will have to be accepted and in

which event also the award is liable to be set aside.

75. In fact, in this regard it is to be seen that even till date the defendants 1 and 2 have failed to produce any documents disclosing their overseas buyers and the maximum price at which they would have sold the iron ore by opening the letter of credit to secure base price of the iron ore for the plaintiff.

80. Thus to repeat, unless the said 40,000 MT of trial shipment to the full satisfaction of the defendants and the buyer at the end is carried out the question of having been contracted to supply 60,000 MT of iron ore does not arise at all. In the foregoing circumstances, the award passed by the Arbitrator for the entire 6,40,000/- MT of iron ore is not warranted.

22. Thus, from perusal of the findings recorded by the trial court, it is evident that the trial court has satisfied itself that the award has been passed by the arbitrator in violation of Sections 74 and 75 of the Contract Act, 1872. It has further been held that the award is contrary to Article

3(1) of the Contract. If sum and substance of the judgment is read in it's entirety, it is evident that the trial court has satisfied itself that the award is patently illegal and such illegality goes to the root of the matter. The trial court has also satisfied itself that the decision of the Arbitral tribunal is perverse and irrational. Therefore, the trial court has exercised the jurisdiction vested in it within four corners of law.

In view of preceding analysis, we do not find any merit in this appeal. The same fails and is hereby dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

SS