IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Md. Nizamuddin

FMAT No. 313 of 2020

M/s. S.B.I.W. Steels (Private) Limited
Vs.
Steel Authority of India Limited (SAIL)

For the Appellant	**:**	**Mr. Surajit Nath Mitra, Sr. Adv.,** **Ms. Noelle Banerjee,** **Mr. Dipak Dey,** **Mr. Dipanjan Dey, Advs.**
For the Respondent	**:**	**Mr. S.N. Mookerjee, Ld. Adv. Gen.,** **Mr. Chayan Gupta,** **Mr. Prasun Mukherjee,** **Mr. Deepak Agarwal, Advs.**
Judgment on	**:**	**02.12.2022**

I. P. MUKERJI, J.-

TMT bars are made from billets. These billets have to undergo a manufacturing process. Steel Authority of India Limited, (the respondent) required TMT bars having diameters of 8, 10, 12, 20, 25 and 32 mm.

They entered into an agreement with the appellant on 16th June, 2011 by which the latter became "the wet leasing agent" of the respondent for the area around Durgapur. The appellant was required to manufacture TMT bars of the above specification from the billets supplied by the respondent, for three years from 20th June, 2011 to 20th June, 2014. 90% of the weight of billets had to be converted into TMT bars. A minimum of 9684 metric tons were to be manufactured and supplied every month. There was a liquidated damages clause in the agreement whereunder the appellant was liable for a fixed amount for a shortage in supply. The amount was arrived at by a calculation shown in the agreement.

When the tender for such supply was invited by the respondent on or about 6th October, 2010, a condition was prescribed that the bidder should have a

valid “BIS” Certificate/licence by the Bureau of India Standards and that the manufactured product should have a BIS Certificate after undergoing the required tests. The appellant possessed this licence and was awarded the contract. But their licence expired on 17th May, 2012.

However, they continued to supply and the respondent continued to receive the billets without the BIS licence after 17th May, 2012 upto 27th July, 2012. From 28th July, 2012, they refused to supply the billets. Many contentions were raised by the appellant. It was said that the respondent was aware of the expiry of the appellant’s licence on 17th May, 2012 but still continued to accept the supply made by them, on reminding them that they should obtain renewal of the licence forthwith, referring inter alia to the respondent’s letters dated 25th May, 2012, 27th June, 2012, 9th July, 2012 and 16th July, 2012 and the invoice raised by them on 30th June, 2012 on a sales order dated 27th June, 2012. This suspension of supply continued till 20th September, 2012.

For this period of stoppage of supply, the respondent imposed liquidated damages which it called penalty, of Rs.1,46,42,271/- on the basis of a calculation made by them in terms of the liquidated damages clause in the agreement.

Although some efforts were made in a conciliation proceeding to resolve the disputes between the parties, it failed and ultimately, the above amount was deducted by the respondent from the pending bills of the appellant.

The agreement between the parties contained an arbitration clause. This dispute became the subject matter of the arbitral reference between the parties. A learned arbitrator was appointed who entered upon the reference and adjudicated upon the solitary issue as to whether the imposition of penalty was justified or not.

By his award dated 25th May, 2017, he held that the imposition of penalty was unjustified and that the respondent was entitled to the said sum of Rs.1,46,42,271/- along with interest @ 8% per annum from the date of deduction till recovery. Other claims made by the appellant were rejected.

Aggrieved by this award, the respondent made an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned judge, Commercial Court at Asansol. The Section 34 application was allowed. The learned judge held on 12th February, 2020 that in view of the Bureau of Indian Standards Act, 1986 and the rules and regulations framed thereunder, supply of TMT bars without a BIS licence was illegal. The award, in his words, was unfair, "unreasonable which shocks the conscience of the court." He ruled that the award was patently illegal. The award was also criticized on the same grounds for having ignored the provision in the contract for liquidated damages to be awarded, described as penalty for breach of contract. The imposition of penalty imposed by the respondent was upheld.

Now, this judgment and order of the learned Commercial Court is appealed against before us.

Mr. Surajit Nath Mitra, learned Senior Advocate appearing for the appellant made the following contentions:-

1) On the expiry of the BIS licence on 17th May 2012, from 25th May 2012, the respondent from time to time wrote to his client to submit a renewed BIS licence. There was no threat of termination of the contract.

2) The sale invoice a sample of which was one dated 30th June, 2021 at pages 133 to 134 of the paper book showed that supply without BIS licence was made by the appellant and received by the respondent.

3) The appellant had fulfilled the eligibility criterion of possessing a BIS licence to participate in the tender after expiry of the licence. The respondent accepted supply without demur and protest and thus waived whatever rights they had of rejecting supply of TMT bars without the BIS mark/ licence/ certificate. In the impugned judgment issues were framed as if the learned court hearing an application under Section 34 of Arbitration and Conciliation Act, 1996 was hearing an appeal.

4) In the impugned judgment the learned judge had attempted to re-appreciate evidence.

5) That manufacture of TMT bars without BIS licence was illegal is not the respondent's case.

6) The finding of the learned judge that it was imperative for the appellant to have a BIS licence was substitution of the views of the judge with that of the learned arbitrator.

7) The award was valid and that the learned judge erred in setting aside the award.

Mr. S. N. Mookerjee, learned Advocate General appearing for the respondent made the following submissions:-

1) Possession of a BIS licence was an essential condition for execution of the agreement.

2) The licence ensured adherence to a particular quality of the appellants' product. The terms and conditions of the contract required certification of the products of the appellants by the Bureau of Indian Standards together with marking thereon that the products had been tested to conform to those standards. It was a requirement under the Bureau of Indian Standards Act, 1986 that the TMT bars were manufactured under such licence and had the necessary certification and marking as it was a scheduled industry under Section 14 of the said Act read with its first schedule.

3) The finding of the learned arbitrator that the BIS licence was only required at the time of obtaining the contract but not otherwise is absolutely perverse and against law. Hence, the award is likely to be set aside.

4) There could be no waiver against statute and the respondent could not have waived any condition in the contract that supply had to be made by the appellant on the possession of a valid BIS licence.

5) Under Section 28(3) of the Arbitration and Conciliation Act, 1996, the learned arbitrator had to take into account the terms and conditions of the agreement between the parties. The learned arbitrator had completely misconstrued Section 74 of the Contract Act which stated that upon breach

of contract by a party in a contract, the other party was entitled to a reasonable agreed amount of liquidated damages. The learned arbitrator had seriously erred in law in holding that the respondent was not entitled to impose liquidated damages, despite inability on the part of the appellant to supply TMT bars under the BIS licence for the subject period. This error of law is on the face of the award was patent. The award is otherwise illegal and perverse against the terms of the contract and submission. The learned arbitrator had misused his jurisdiction. Hence, the award was liable to be set aside. The award is also against the decisions of the Supreme Court.

I will deal with the judgments cited by learned counsel at the time of discussing the merits of the case.

DISCUSSION

An arbitrator or an arbitral tribunal is a creature of an agreement between the parties. The agreement is for redressal of the disputes arising out of a legal relationship between them, outside court. It is a private adjudicatory body created by them by agreement. A presumption operates that they have innate faith in the competence and honesty of the arbitrator chosen by them and that they would accept and abide by his decision. However, if the appointed arbitrator causes a breach of this faith and trust reposed on him by the parties they would have an option of challenging his award in court.

Recognizing this, Parliament has tried to regulate the functioning of the arbitral tribunal and also subjected the award to judicial scrutiny on specific grounds only, by enacting the Arbitration and Conciliation Act, 1996. Considering the above circumstances, the grounds are indeed very limited.

There may be allegations of corruption against the arbitrator or he may have conducted the proceedings arbitrarily or unfairly. He may not have given a party an adequate opportunity of presenting his case. He may have been biased in favour of one party. The evidence proposed to be adduced by a party may have been shut out or while considering the evidence the arbitrator considered some evidence and ignored the material part or he

may have acted on no evidence or ignored the terms of the contract. He may have adjudicated on a subject matter not referred to him or not capable of being decided by him. In all these cases the award is liable to be set aside.

Again if the learned arbitrator has made a statement of law in the body of the award or proceeded on the basis of a legal proposition and the statement or proposition appears to be wholly erroneous, going to the root of the matter and affecting a substantive right of the parties, the court would consider it to be a patent error of law on the face of the award and interfere with it by setting it aside. Short of this, an acceptable misinterpretation or misapplication of the law is allowed. Similarly, if in the award an inference of fact is so grossly erroneous, unfair or irrational or unreasonable that no reasonable person would ever have come to that conclusion, to the point of being perverse, it would also be considered as patently illegal and the court would set it aside. In cases where the basic foundation on which the Indian legal system is built is disregarded or the jurisprudence of this country has been ignored, the award could be said to be against public policy and liable to be set aside.

[See ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***, ***SSANGYONG ENGINEERING AND CONSTRUCTION COMPANY LIMITED Vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)*** reported in ***(2019) 15 SCC 131***, ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.*** reported in ***AIR 2021 SC 4661***, ***Indian Oil Corporation Ltd. Vs. Shree Ganesh Petroleum Rajgurunagar*** reported in ***(2022) 4 SCC 463***, ***Anglo American Metallurgical Coal Pty. Limited vs. MMTC Limited*** reported in **(2021) 3 SCC 308 = 2020 SCC Online SC 1030,** ***MMTC Limited vs. Vedanta Limited*** reported in **(2019) 4 SCC 163** and ***Tonganagaon Tea Co. Pvt. Ltd. vs. Associated Tea Industries*** reported in **AIR 2019 Cal 403 = (2019) 2 CHN 431,** ***Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd.*** reported in **(2022) 1 SCC 131**, ***Punjab***

State Civil Supplies Corporation Ltd. and Anr. vs. Ramesh Kumar and Company and Ors. reported in **2021 SCC Online SC 1056**.]

BIS LICENCE

The appellant had the licence at the time of execution of the agreement but it expired thereafter. The respondent refused to accept supply between 28th July, 2012 and 20th September, 2012 when the appellant was without this licence. Treating this as a breach of contract, the respondent imposed liquidated damages as provided therein. The finding of the learned arbitrator with regard to possession of a BIS licence seems to be incongruous. He has observed as follows in one portion of the award:-

> *".....None the same it would be illogical to perceive a situation where a tenderer gets BIS license and on that basis is awarded a contract but thereafter allows the BIS license to lapse. The correspondence between the parties and especially the letters written by the claimant to the Bureau of Indian Standard also indicate that even the claimant understood the requirement of BIS license to be one which would extend over the entire contract period. The letters by the claimant dated 12/6/12 and 14/07/12 are of significance and so is the letter dated 06/07/12 from the Bureau of Indian Standard."*

In another portion he comes to the finding:-

> *"Thus, there is merit in the claimant's argument that only at the tendering stage was the claimant required to be a BIS license holder as per the contract terms and in light of what I have discussed above the arbitrator hold his views in favour of the claimant on this issue.*
>
> *21. Therefore, what follows is that it was not required for the claimant to have a BIS license between the period July, August and September, 2012. The respondent's insistence upon the BIS license was therefore not justified."*

The terms of the contract with regard to possession of the BIS licence, inspection and quality control are, inter alia, as follows:

"5(i) The tenderer should be a BIS License holder of IS 1786/2008 for Fe500 D Grade at the time of application and should have a good market

reputation. Those applicants who do not have a valid BIS license for TMT Fe-500D but possess license for Fe-500 grade can also apply but they will have to produce the BIS license for Fe-500D grade same within 60 days from the opening of the price bid or earlier." (Invitation to Tender Annexure II Page 52A onwards of paper book).

14. (vii) Test Certificate shall incorporate the following in addition to the regular information: a) Name, address of the re-roller, ISI mark and their BIS license number. b) SAIL logo and the brand name "SAIL TMT 500 or as per instructions from SAIL". c) The draft of Test Certificate (TC) is to be provided as per Annexure – XI.

(viii) The draft of TC may be got approved from BIS, as per jurisdiction of the marks area of BIS.

(ix) After obtaining approval from BIS the final format of TC would be approved by SAIL /CMO Head Quarter, Kolkata for the purpose of uniformity.

(x) To inspect as to whether documentation through the SAIL's ITES System is being effectively managed." (Annexure III Instructions to Tenders Pg. 56A onwards of paper book).

The Bureau of Indian Standards Act, 1986 was in force at the material time. Section 14 of the said Act provided that the products of any scheduled industries under the Industrial (Development and Regulation) Act, 1947 would have to conform to the standards of description quality and durability prescribed by the Act. In other words products of iron and steel which were provided in the schedule read with the notification dated 9th September, 2008 had to be manufactured under a BIS licence, after undergoing inspection and verification of quality, obtaining the certificate issued after testing and with the BIS mark on the product. Now, TMT bars are used in construction work where the requirements of quality of the product, its durability and safety are paramount. With this objective in mind the said Act of 1986 was enacted by parliament to ensure this

standard and safety for the people. Any reasonable person would not have even remotely entertained the idea that under the terms and conditions of the contract between the parties. BIS licence was necessary only at the time of submission and consideration of the tender and not later on, as the learned arbitrator ruled.

The learned arbitrator has completely misunderstood and misapplied the terms of the contract and the law. TMT bars cannot be marketed without BIS inspection certification and a marking on it. This part of the award is patently illegal and rightly set aside by the learned court below.

LIQUIDATED DAMAGES

The second part of the award relates to imposition of liquidated damages. The provision regarding liquidated damages is provided in Annexure 4 of the terms and conditions of the agreement between the parties in Clause 11. It is as follows:-

*"**11. Guarantee of work & penalty.***

a) *SAIL shall endeavour to utilise the Leased Capacity to the WLA, arrived at as per para 3(b) of terms & conditions of Wet Leasing, on a monthly basis, but a minimum monthly conversion volume of 75% of the leased capacity, shall be guaranteed by SAIL. While certain diameter/section--wise percentage breakup may be indicated in the tender in order to indicate the extent of output desired in each size/size range, a consolidated rate will be obtained for TMT in the rate schedule. The actual percentage of work in the specific diameter range can vary.*

b) *If SAIL fails to supply semis for conversion for 75% of leased capacity (the minimum guarantee), 60% of the Wet Leasing charges per tonne for the quantities short supplied from the minimum guarantee (75% of leased capacity) percentage shall be paid to the WLA as per the example given below.*

   Example: In case actual semis supplied are to the extent of 70% of leased capacity, then 5% will be the short supplied quantum in terms of Billets. Assuming the Wet Leasing charges are Rs. A/- per tonne of finished product and 5% of billets short supplied translates to B tonnes on a quantitative basis, then penalty payable will be Rs.60% of A X B tones X 0.95.

   However, Force Majeure provision shall be invoked if supply of Semis is affected due to breakdown of Plant and Machinery of the company,

conditions like strike, lock out, natural calamity etc. or due to any other act beyond its control and no compensation shall be payable in such an eventuality.

c) *The Wet-leasing Agent shall have to ensure above minimum monthly guaranteed production (i.e. above 75% of leased capacity) failing which penalty equal to the conversion charges per tonne in respect of the shortfall in the volume with reference to the minimum guaranteed (75% of the leased capacity or 75% of the proposed maximum capacity of the mill to be taken under Wet-Leasing as indicated at 5(viii) of Invitation to Tender (Annexure – II), whichever is minimum), shall be paid by the WLA, in a manner similar to the example given at para b above. In case force majeure conditions like strike, lockout, natural calamity etc. affects totally the production in the leased plant, penalty commensurate with the period in which production was suspended due to force majeure conditions, the same can be waived by SAIL. In such an event, Wet-leasing Charges shall not be payable by the company in respect of the shortfall quantity, if any, than the minimum guaranteed volume.*

d) *While the above penalties on either side shall be calculated on a monthly basis, there shall be a make up clause of a quarterly basis on either side, for the purpose of actual payment/recovery. In other words, shortfalls during a month or two during the quarter under consideration can be made good during the quarter as a whole."*

While entering into a contract, the parties may provide for an agreed sum to be paid in case of breach of contract by a party. The agreed sum to be paid in case of breach of the contract may also be in the form of a penalty. It may also provide for a penalty to be imposed in the event a certain act is done by a party during performance of a contract.

Section 74 of the Indian Contract Act, 1872 enshrines this principle as follows:-

> *"**74. Compensation for breach of contract where penalty stipulated for**:- 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 therein.

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."

With regard to the second part, the learned arbitrator has come to the following findings:-

"22. The second issue is in relation to clause 11(C) of the contract. Such clause states that WLA would have to ensure the monthly guaranteed production. It is a contract where semis have to be made over to the WLA by the respondent and the claimant would return TMT bars after conversion. There is some substance in the claimant's argument that the respondent having not made over semis to the claimant, is not entitled to complain when the claimant does not return TMT bars after conversion.

23. However the arbitrator does not deem it necessary to give any finding on the second issue since one glaring fact stares at the respondent namely total lack of evidence in support of the respondent's claim that it had suffered loss due to non-renewal of the claimant's BIS license. This was indeed the point urged again and again in course of argument as well as in the notes submitted by the claimant. The claimant in course of argument pointed out that the respondent even after being made alive to the claimant's express contention that no particulars of loss of orders or decline in sales has been provided by the respondent, is not choosing to substantiate its case with any such particulars. In fact the arbitrator for the ends of justice convened a sitting on 2nd November, 2016 after both sides filed and exchanged their notes. This was only to enable both sides to cover up any issue which they felt necessary after receiving the other side's written argument. The claimant has rightly contended that even at this sitting on 2nd November, 2016 no endeavour was made by the respondent to provide any particular of sales going down or loss of orders.

After the conclusion of hearing on 2nd November, 2016, the arbitrator gave both sides an opportunity to file supplementary notes. In the supplementary note also the Arbitrator does not find the respondent providing any such particular.

The claimant is also right in its contention that it is not the case of the respondent that this is such a case where the loss cannot at all be proved with any certainty. The substance of the claimant's contention that the judgment of the Supreme Court in the case of ONGC Limited –vs- Saw Pipes Limited has to be read in the context of how the Supreme Court in its later judgment (Kailash Nath –vs- Delhi Development Authority & Anr.) has laid down the law after considering ONGC Limited's case.

The arbitrator fails to understand why the respondent did not furnish particulars of its sales going down or loss of orders in spite of getting repeated opportunities to do so.

24. The Arbitrator then finds that the penalty of a sum of Rs.1,46,42,271/- which has been imposed by the respondent upon the claimant was unjustified and the recovery is incorrect. The claimant is therefore entitled to the said sum of Rs.1,46,42,271/- along with interest @ 8% per annum from the date of adjustment. The rate of interest is reasonable and proper having regard to the market scenario."

On the question whether the respondent was entitled to liquidated damages, the learned arbitrator, on his understanding and interpretation of Section 74 of the Contract Act ruled that inspite of several suggestions the respondent was unable to quantify the loss suffered by it due to non-supply of the contracted quantity by the appellant. For this reason, they were not entitled to claim liquidated damages.

Now, it is to be considered whether this finding is so grossly illegal or unreasonable or perverse that it should be set aside.

The learned arbitrator has made a specific observation that inspite of repeated opportunities, the respondent did not produce any evidence to show that it had suffered any loss or damage for non-supply of billets by the appellant from 29th July, 2012 till 20th September, 2012. He has also considered the said Clause 11 in the contract regarding imposition of liquidated damages in case of breach of contract by the appellant. He has entered the finding that since the respondent could not prove any loss

having occurred to them by non-supply of the contracted materials for the above period they were not entitled to impose the subject "penalty" as liquidated damages as provided in the said clause in the contract.

Mr. Justice J. C. Shah delivering the judgment of the Supreme Court in ***Fateh Chand vs. Balkishan Dass*** reported in ***AIR 1963 SC 1405*** has inter alia pronounced the following dictum referring to Section 74 of the Indian Contract Act:-

> *"**10.....**The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."*

The dictum of that case was followed in ***Kailash Nath Associates Vs. Delhi Development Authority & Anr.*** reported in ***(2015) 4 SCC 136*** by Mr. Justice Nariman by the following words:

> ***43.1.*** *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*
>
> ***43.2.*** *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*
>
> ***43.3.*** *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

43.4. *The section applies whether a person is a plaintiff or a defendant in a suit.*

be paid or be payable in future.

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded."*

See also ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*** reported in **(2003) 5 SCC 705** and ***Construction and Design Services vs. Delhi Development Authority*** reported in **(2015) 14 SCC 263**.

Thus, in the absence of loss, liquidated damages could not be claimed.

The finding of the learned arbitrator that the respondent was unable to prove any loss was one of fact. In my opinion, it is a reasonable inference drawn from non-production of evidence by the respondent. That for lack of proof for any loss or damages from breach of contract by the appellant, the respondent was not entitled to recover any amount as liquidated damages from the bills of the appellant is very ably supported by the above quoted dictum of the Supreme Court.

However, the learned judge in the impugned judgment and order reversed the finding of the learned arbitrator and expressed the following view:-

"As such, the claimant was in breach of the contract by reason of expiry of BIS licence on 17th May, 2012 during continuance of the contract resulting which the SAIL authority was entitled to levy penalty and/or effect recovery from the pending bills. The learned arbitrator did not consider these aspects which renders the subject award at variance with the terms of the contract and it is in conflict with public policy.

All the aforesaid issues stand disposed of in favour of the petitioner."

Since the above finding of fact regarding non-occurrence of any loss to the respondent is perfectly tenable followed by appreciation of the law as laid

down by the Supreme Court that in case of absence of loss, liquidated damages cannot be claimed, there was no earthly reason for the learned judge to hold that "SAIL authority was entitled to levy penalty and/or effect recovery from the pending bills SAIL authority was entitled to levy penalty and/or effect recovery from the pending bills."

First of all, the learned judge reversed a finding of the learned arbitrator on wrong premises both factual and legal. Secondly, he acted like a court of appeal which he was not entitled to do. Thirdly, he tried to substitute his view for that of the learned arbitrator. More than anything else, the finding of the learned arbitrator on this issue, far from being perverse or suffering from any illegality, latent or patent was correct in fact and in law. Even if the learned judge entertained a different view, the view of the learned arbitrator was at least a plausible view which ought not to have been interfered with by the court.

Now, even if it is held that the first issue was erroneously decided by the arbitrator, and if the award set aside with regard to that issue, the award with regard to the second issue is severable and can stand alone. We have to look at it in this way. Even if the appellant had no right under the law to manufacture TMT bars in the absence of a BIS licence, could liquidated damages in terms of the contract be imposed? Even if we assume that the appellant had no licence to perform the contract, still in the absence of proof of loss and damages by the respondent, liquidated damages in terms of the said clause in the contract could not have been claimed by them, in the absence of proof of loss, as rightly held by the learned arbitrator.

Therefore, that part of the impugned judgment and order setting aside the award with regard to imposition of liquidated damages is set aside. The award of the learned arbitrator with regard to that issue is restored. The other part of the impugned judgment and order setting aside the award with respect to BIS licence is affirmed. The award relating to that part is set aside. Hence, the award of the learned arbitrator with regard to setting

aside the imposition of liquidated damages on the appellant by the respondent is upheld and may be enforced in accordance with law.

This appeal is allowed to the above extent.

Urgent certified photo copy of this judgment and order, if applied for, be furnished to the appearing parties on priority basis upon compliance of necessary formalities.

I agree.

(Md. Nizamuddin, J.) **(I. P. Mukerji, J.)**

FMAT No. 313 of 2020

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Vs.
Steel Authority of India Limited (SAIL)

Later

Learned counsel for the respondent prays for stay of operation of this judgment and order.

The prayer for stay is considered.

The appellant shall not take any steps in execution or in contempt for a period of four weeks from date.

(Md. Nizamuddin, J.) **(I. P. Mukerji, J.)**