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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : 30.01.2026

+ FAO (COMM) 32/2026 CAV 47/2026 CM APPL. 6614/2026 CM APPL. 6615/2026 CM APPL. 6616/2026

ALOKE STEELS INDUSTRIES PRIVATE
LIMITED

.....Appellant

Through: Mr. Jeevesh Nagrath, Sr. Adv. with
Ms. Manisha Chaudhry, Mr. N. Raja
Singh, Ms. Fariya Sharaf, Advs.

versus

ADITYA BIRLA GLOBAL TRADING
INDIA PVT LTD FORMERLY KNOWN
AS SWISS SINGAPORE INDIA PVT LTD

.....Respondent

Through: Mr Jayant Mehta, Sr. Adv. with Mr.
Dhaval Mehrotra and Ms Aditi Desai,
Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

MANMEET PRITAM SINGH ARORA, J. (ORAL)

CM APPL. 6615/2026 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

FAO (COMM) 32/2026



3. This is an appeal under section 37 of the Arbitration and Conciliation Act, 1996 ('Act of 1996'), challenging the judgment dated 21.01.2026 ('impugned judgment'), passed by the District Judge (Commercial Court-01) at Patiala House Courts.

4. The appellant/Aloke Steels Industries Private Limited, is engaged in the manufacturing of bare iron and steel.

5. The respondent/Swiss Singapore India Private Limited, is engaged in the business of providing trading solutions and trades in coal, minerals and metals, fertilisers, etc.

FACTUAL MATRIX

6. On 06.03.2020, the appellant placed a purchase order of 12,000 Metric Tonnes ('MT') of South African Steam Coal RB2 from the respondent. Thereafter, a Sales Purchase Contract ('the Sales Contract') along with a Handling Contract was signed inter se parties on 11.03.2020. As per this contract, the price per metric ton was fixed at Rs. 5100 plus GST plus cess. As per Clause 7 of the contract, the appellant was liable to make 10% advance payment by 14.03.2020.

7. The respondent was ready for the supply of the Steam Coal on 11.03.2020; however, the appellant failed to make payment of the said 10% advance payment by 14.03.2020. The appellant stated that owing to the outbreak of the COVID-19 pandemic, its factory operations were shut down.

8. It was further stated by the appellant that the respondent called upon it to make payment on or before 21.05.2020, failing which the respondent would proceed to sell the goods to third parties in order to mitigate its losses. Thereafter, the respondent proceeded to sell the goods to third parties for a



total value of Rs. 5,02,32,000/- as per Clause 7.4 stipulated in the contract.

9. On 22.05.2020, the respondent informed the appellant that it was allegedly entitled to recover a sum of Rs.1,57,94,706/- from the appellant towards total loss.

10. The appellant responded by asserting that, due to the force majeure situation arising from the COVID-19 pandemic, its industrial plant had remained shut since March 2020. Thereafter, the respondent invoked the arbitration clause contained in Clause 21 of the contract on 20.09.2020.

11. Subsequently, the Arbitral Tribunal passed the impugned award on 12.11.2021, vide which the appellant was made liable to pay Rs. 1,52,91,137/- wherein Rs. 1,33,60,000/- were awarded as damages and Rs. 19,31,137/- as cost of arbitration along with interest @12%.

However, upon challenging the same, the District Judge vide the impugned judgment upheld the arbitral award.

Submissions on behalf of the appellant

12. Mr. Jeevesh Nagrath, learned senior counsel for the appellant, states that as per Clause 7.1 of the contract, the appellant was liable to pay 10% advance within three (3) days, which the appellant failed to do. There is no doubt that the default occurred at the instance of the appellant on 14.03.2020.

12.1. He states that the contractual quantity between the appellant and the respondent was 12,000 MT at an agreed price of Rs. 5,100 per MT, making the total contract value Rs. 6,12,00,000. In terms of Clauses 7.1 read with 7.3 of the contract, the appellant was required to deposit only a 10% advance/EMD. Accordingly, the maximum amount of pre-estimated



damages under the contract could not exceed 10% of Rs. 6,12,00,000, i.e., Rs. 61,20,000.

12.2. He fairly admits that no such plea was raised before the Arbitrator to the effect that the EMD value of Rs. 61,20,000/- is the genuine pre-estimate of losses and that this is the maximum amount which can be awarded by the Arbitrator with reference to Section 74 of the Contract Act, 1872 ('the Contract Act').

He states that since no such plea was raised before the Arbitrator, there is no adjudication on this aspect in the award.

12.3. He fairly admits that before the Arbitrator, the plea raised by the appellant was that there is no liability of the appellant towards damages as the respondent had failed to mitigate losses by selling the goods on 14.03.2020.

12.4. He states, however, that this plea of liquidated damages and genuine pre-estimate of losses (relying upon Clause 7.3) was raised before the learned District Judge in the Section 34 petition.

12.5. He states that in view of the judgment of the Supreme Court in **State of Chhattisgarh and Another v. Sal Udyog Private Limited**¹, the District Judge was obligated to return a finding on this plea.

12.6. He states that the District Judge has dealt with this plea on the merits [at paragraph 19 of the judgment] and he is challenging the said interpretation returned by the District Judge.

12.7. He states that the appellant is entitled to raise this plea in a petition under Section 34, and the mere fact that it was not raised before the

¹ 2021 SCC OnLine SC 1027 [Paragraph No. 24]



Arbitrator does not preclude its consideration in such proceedings. In this regard, he relies upon the judgment of the Supreme Court in **National Textile Corporation Limited v. Nareshkumar Badrikumar Jagad and Others²**.

12.8. He therefore states that the Arbitrator has awarded a sum of Rs. 1,33,60,000/- as actual damages.

12.9. He states that the appellant does not dispute the said quantum; however, the appellant disputes the entitlement of the respondent to receive this amount and contends that the respondent could not have received an amount higher than Rs. 61,20,000/- as per Clause 7.3 of the Sales Contract.

12.10. He states that, therefore, the dispute in the present appeal is only with respect to the differential amount of Rs. 72,40,000/- [1,33,60,000 – 61,20,000] awarded in favour of the respondent.

Submissions on behalf of the respondent

13. Mr Jayant Mehta, learned senior counsel for the respondent, states that the appellant failed to make any submission pertaining to liquidation of damages before the Arbitral Tribunal, neither in the pleading nor during arguments. The submission made before the District Judge that damages were liquidated and hence capped at 10% as per Clause 7.3 of the contract was raised for the first time. Therefore, the appellant is precluded from raising these pleas in view of the admitted stance that no such plea was raised before the Arbitrator.

13.1. He states that, pertinently, the contract does not define the term EMD nor does it specify any amount as EMD. Consequently, EMD was not

² (2011) 12 Supreme Court Cases 695 [Paragraph No. 19]



applicable in the present case. He further states that EMD cannot be equated with an advance payment, and the reference to EMD in Clause 7.3 cannot be read interchangeably with the advance payment contemplated under Clause 7.1.

13.2. He further states that the appellant's reliance on Clause 7.3 of the Sales Contract to contend that EMD constitutes a genuine pre-estimate of losses is misplaced, as the appellant admittedly did not deposit any EMD and, therefore, the said clause was never triggered.

COURT'S FINDINGS

14. This Court has heard the learned senior counsel for the parties and perused the record.

15. The Arbitrator framed eight (8) issues on the basis of the pleadings of the parties. The said issues are as follows: -

“(i) Whether the Claimant proves that the Respondent failed to perform its contractual obligations under the Sales Contract dated 6th March 2020 and was in breach thereof?

(ii) Whether the Claimant proves that it is entitled to receive/recover an amount of Rs. 1,58,00,347 I- from the Respondent along with interest thereon@ 12% from 22nd June 2020 till payment and/or realisation thereof?

(iii) Whether the Respondent proves that the period between 22.03.2020 and 22.05.2020 would constitute as a "force majeure period" under clause 15 of the Sales Contract dated 06.03.2020?

(iv) Whether the Respondent proves that it was unable to perform its obligations under the Sales Contract dated 6th March 2020 due to a force majeure event as defined under Clause 15 of the Sales Contract?

(v) Whether the Respondent proves that it had, in exercise of its contractual powers under Clause 15, only delayed the performance of its



obligations on account of the force majeure event and was not in breach?

(vi) Whether the Claimant is entitled to damages as prayed for in the Statement of Claim since it did not take appropriate and timely steps for mitigation of damages?

(vii) What orders?

(viii) What costs?"

16. The Arbitrator decided issue nos. (iv) and (v) against the appellant and in favour of the respondent herein. The Arbitrator concluded that the force majeure event of COVID-19 in the facts of the case had no effect upon the ability of the appellant to perform its obligation under the Sales Contract. The Arbitrator held that the force majeure event was not the reason for the appellant's non-performance of its obligations under the Sales Contract.

17. In view of the findings returned for issue nos. (iv) and (v), the Arbitrator similarly decided issue no. (i) against the appellant and in favour of the respondent herein to hold that the appellant was in breach of its contractual obligations under the Sales Contract.

18. With respect to issue no. (vi), the Arbitrator concluded that the respondent's duty to mitigate losses arose when the appellant had failed to make the entire agreed consideration by the due date of 25.04.2020 *or* on 11.05.2020 when the appellant failed to lift the entire 12000 MT of the agreed coal.

The Arbitrator concluded that the steps taken by the respondent in selling coal to third parties in May 2020 at the price agreed with them were both timely and appropriate.

The issue no. (vi) was thus decided in favour of the respondent and



against the appellant.

19. The Arbitrator determined the quantum of damages payable by the appellant to the respondent, in its deliberations under issue no. (ii). Upon perusal of the evidence on record, the Arbitrator concluded that the respondent was entitled to a sum of Rs. 1,33,60,000/-, being the actual amount of losses suffered, and also awarded interest at the rate of 12% per annum from 26.04.2020.

However, the Arbitrator disallowed the respondent's claim for ground rent or plot rent in the claim of damages.

20. With respect to issue no. (viii) pertaining to arbitral costs, the Arbitrator awarded a sum of Rs. 19,31,197/- in favour of the respondent.

21. It is pertinent to note that the appellant before us has not challenged the findings returned by the Arbitrator on issue nos. (i), (iv), (v), (vi) and (viii). Inasmuch as the appellant does not dispute that it was in breach of the contract and, consequently, liable to compensate the respondent for the actual losses suffered by it.

Limited challenge to the award of damages under issue no. (ii)

22. In addition, the appellant does not dispute the Arbitrator's finding at issue no. (ii) that the respondent has indeed suffered an actual loss of Rs. 1,33,60,000/-.

23. The limited challenge raised by the appellant is that the maximum amount of damages which could be awarded to the respondent is Rs. 61,20,000/- and no more. The said plea of the appellant with respect to a cap of Rs. 61,20,000/- is based on Clauses 7.3 and 7.4 of the Sales Contract.

I. Interpretation of Clauses 7.3 and 7.4



24. The appellant fairly admits that no such plea of capping of damages under the Sales Contract basis Clauses 7.3 and 7.4 was raised before the Arbitrator and, consequently, no finding has been returned on the said issue in the award. It is further admitted that this plea was raised for the first time before the learned District Judge in the petition filed under Section 34 of the Act of 1996.

25. The appellant contends that, notwithstanding the absence of pleading in the arbitral proceedings, the award is liable to be set aside under Section 34(2)(b)(ii) of the Act of 1996, on the ground that the arbitral award is in conflict with the public policy of India.

26. The appellant contends that the award of damages in excess of Rs. 61,20,000/- is contrary to Clause 7.3 of the Sales Contract as Section 74 of the Contract Act would apply to the Sales Contract. In view of the contractual capping, the award of damages of Rs. 1,33,60,000/- is in excess and is therefore liable to be set aside to the extent it exceeds beyond Rs. 61,20,000/-.

27. The appellant contends that the District Judge in the impugned judgment has failed to appreciate the submissions of the appellant in interpreting the said contractual clause.

28. In view of the admitted position that the said plea was not raised by the appellant during arbitral proceedings before the Arbitrator, the arbitral award is silent on this aspect.

29. There is no dispute that the principles for ascertaining the actual loss suffered by the respondent as stipulated in Section 73 of the Contract Act have been rightly applied by the Arbitrator inasmuch as the Arbitrator has



duly returned a finding with respect to breach of contract by the appellant, legal injury caused to the respondent and actual loss of Rs. 1,33,60,000/- suffered by the respondent.

30. As mentioned above, the only issue urged by the appellant in the appeal is the capping of its liability to the extent of losses at Rs. 61,20,000/-.

31. The District Judge has dealt with the said plea of the appellant on merits and has opined in the impugned judgment is as under: -

“Petitioner made a new argument in this proceeding to say that EMD was the maximum liquidated damage, which respondent could have been entitled for. This plea was apparently not taken before Id. Arbitrator, hence, no finding was given in award qua this plea. Petitioner cannot be allowed to raise a new plea, so, as to present a new interpretation of contract in the proceeding u/s 34 of the Act. Moreover, even on merits, I do not find this plea to be sustainable. Clause 7.3 of the contract did not say that in case of delay or default, seller would be entitled to EMD only as liquidated damages. It was only one of the options given to the seller.”

[Emphasis Supplied]

32. At this juncture, we find it apposite to reproduce the relevant Clauses 7.1, 7.3 and 7.4 of the Sales Contract. The said clauses read as under: –

“7.1. 10% advance within 3 days of signing of the contract and balance 90% payment on rake to rake before placement of rake subject maximum within 45 days. From 11.03.2020. The buyer shall make payment for last rake after deducting 10% advance given to SSIPL.

7.3. That the time shall be of essence to this contract in the payment obligation of the Buyer. Any delay in receiving the payment/LC as above schedule shall entitle the Seller to terminate the Contract without any liability, and notwithstanding any other rights the Seller may have under the Contract and law including but not limited to the right to seek appropriate damages interest @12% plus applicable taxes per annum. Any Earnest Money Deposit (EMD) shall stand immediately forfeited by the Seller in case of any such delay or default of the Buyer. Parties agree that the amount of EMD shall be forfeited as liquidated damages as a



genuine pre-estimate of losses and not as penalty.

7.4. In case if the Buyer defaults to make the payment or delay/defaults in lifting the quantity, the Seller shall have the right to sell the quantity of the product to third parties without any requirement of notice to the Buyer, after completion of 7 days from such default to mitigate its losses/damages, which shall be paid by the Buyer to the Seller. In the event the Buyer defaults under the Contract either to uplift or to make the payment and there is/are other sale purchase Contracts between the parties, then the Seller shall stop supply under those Contracts and shall have the right to be compensated from those Contracts.”

[Emphasis supplied]

33. The interpretation given by the District Judge to Clause 7.3 is reasonable and plausible, and we find no ground to interfere in the finding returned by the District Judge.

34. It is a settled law that there is no principle which requires that once the provision of liquidated damages has been made in a contract in the event of breach by one (1) of the parties, such a clause has to be read covering all types of breaches. In this regard, this Court deems it appropriate to rely upon the judgment of the Supreme Court in the case of **Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited**³. The relevant paragraphs read as follows: -

“20. The question that needs to be determined by us is whether the breaches alleged by the respondent are covered by the stipulations contained in Clause 7.2. If the answer is in the affirmative, obviously compensation cannot be awarded beyond what is provided therein. On the other hand, if breaches are not covered by Clause 7.2, cap provided therein with regard to liquidated damages will not be applicable at all.

.....

23. It is well known that intention of the parties to an instrument has to



be gathered from the terms thereof and that the contract must be construed having regard to the terms and conditions as well as nature thereof. Clause 7.2 that provides for compensation to the respondent for failure to supply or delayed supply of the materials by SAIL was never intended to cover refusal to deliver the materials of the supplies on the part of SAIL. Refusal to supply materials by SAIL resulting in breach is neither contemplated nor covered in Clause 7.2.

24. There is no impediment nor we know of any obstacle for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as unliquidated damages. We are not aware of any principle that once the provision of liquidated damages has been made in the contract, in the event of breach by one of the parties, such clause has to be read covering all types of breaches although parties may not have intended and provided for compensation in express terms for all types of breaches.

25. It is not a question of giving restrictive or wider meaning to Clause 7.2 but the question is what is intended by the parties by making a provision such as this and does such clause cover all situations of breaches by SAIL.”

[Emphasis Supplied]

35. Applying the aforesaid legal principle, we have examined the Sales Contract. The Clause 7.3 of the Sales Contract stipulates that timely payment is the essence of the said Contract. In this context it contemplates that a delay by the buyer in making timely payment shall entitle the seller to exercise its *option(s)* to terminate the Contract, seek damages, etc., and provides for the forfeiture of the EMD in the event of such delay in making payment.

36. Clause 7.4, is an independent provision, and addresses a default by the buyer either in making payment *or* in lifting the quantity. This Clause

³ (2009) 10 SCC 63



clearly contemplates a distinct situation specifically relating to default by the buyer in lifting the quantity. This Clause separately stipulates that in case of default of the buyer in lifting the quantity, the seller shall have the right to sell the quantity to third parties and to recover losses suffered due to the sale from the buyer. This clause does not cap the entitlement of the seller to recover its actual losses.

37. Thus, both Clauses 7.3 and 7.4 contemplate separate fact situations pertaining to defaults by the buyer and reserves the right of the seller/respondent to claim damages.

38. We are of the considered opinion that while Clause 7.3 deals with delay in making payment by the buyer, whereas Clause 7.4 deals with default in making payment and/or default in lifting the quantity by the buyer. Thus, though there appears to be some overlap, Clause 7.4 contemplates an additional situation which is independent and distinct from Clause 7.3.

39. In the facts of this case, undoubtedly the facts postulated in Clause 7.4 have occurred inasmuch as the appellant both defaulted in making the payment and defaulted in lifting the quantity, compelling the respondent/seller to mitigate its losses by selling the goods to a third party leading to a loss of Rs. 1,33,60,00/-. The respondent's right to recover actual loss as per this Clause, is not regulated by the amount of the EMD and thus the impugned judgment has rightly rejected the contention of the appellant.

40. The award of damages of Rs. 1,33,60,000/- is thus, in accordance with the principles stipulated in Section 73 of the Contract Act and therefore is in conformity with the law.

II. Preclusion from raising a new plea



41. We are unable to accept the appellant's plea that it is not precluded from raising a contention basis Clause 7.3 read with Section 74 of the Contract Act for the first time in a petition under Section 34 of the Act of 1996, having admittedly not raised the same before the Arbitrator.

42. The appellant's plea that the maximum amount payable as damages is Rs. 61,20,000/- is a contention arising out of the the clauses of the Sales Contract, and on the appellant's own showing this plea was not raised and pleaded before the Arbitrator.

43. Upon the failure of the appellant to raise such a plea in the arbitral proceedings, it would amount to a waiver of the plea and the appellant is estopped in law from raising such a plea for the first time in a Section 34 petition.

The estoppel against a litigant from raising a new plea at a subsequent stage during appeal is well recognised in law. We say so as Clause 7.3 is not even a statutory right conferred on the appellant and is merely a contractual clause, whereas Courts have held that even statutory rights which are only for the benefit of a party can be waived by a party if it is not raised in the first instance in the pleadings (**Re: Battoo Mal v. Rameshwar Nath and Another⁴**).

44. The appellant, having failed to raise this plea before the Arbitrator, is precluded from doing so at this stage. Were such a plea to have been raised, it would have constituted a plea of fact, to which the respondent would have been entitled to respond before the Arbitrator, particularly regarding whether it was the intention of the parties under Clause 7.3 to treat the EMD as the

⁴ 1970 SCC OnLine Del 108



maximum amount of damages. The effect of the appellant not having deposited any EMD and therefore, the fictional figure of Rs. 61,20,000 having not come into existence, are all pleas which would have been raised and adjudicated by the Arbitrator. The appellant having failed to raise such a plea based on Clause 7.3 in the arbitral proceedings is precluded the respondent from placing on record its response and enabling the Arbitrator to adjudicate on the said dispute and is therefore also precluded from contending that arbitral award is contrary to the public policy of India.

45. This position of law is, in fact, evident from the judgment relied upon by the appellant itself in **National Textile Corporation Limited**⁵ (supra), where the Court has held that unless a factual foundation has been laid in the pleadings, no argument is permissible to raise on a particular point in the subsequent proceedings. Therefore, the contention that the appellant can raise such a plea under Section 34 (2)(b)(ii) of the Act of 1996 is without merits.

46. This Court also finds merit in the submission of the respondent that since no EMD was actually deposited by the appellant, the stipulation of capping losses with reference to EMD under Clause 7.3 did not come into effect. In other words, the capping in Clause 7.3 did not get triggered. In the facts of this case, the appellant failed to perform the agreement in its entirety, it even defaulted in making payment of the EMD and never raised any such plea before the Arbitrator. This plea is based on a contractual agreement and having failed to raise such a plea, the appellant is precluded from raising the same for the first time Section 34 petition.

⁵ Paragraph Nos. 12, 16, 18, and 43]



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47. We therefore find no merit in the present appeal; the same is dismissed.

MANMEET PRITAM SINGH ARORA, J

V. KAMESWAR RAO, J

JANUARY 30, 2026/mt/aa