

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 414/2011

Reserved on: 2nd January, 2012

Decision on: 30th March, 2012

VALE AUSTRALIA PTY LIMITED

..... Petitioner

Through: Mr. Arvind Nigam, Senior Advocate with
Mr. Amit Sibal, Mr. Anirudh Das and Ms. Smarika
Singh, Advocates.

versus

**STEEL AUTHORITY OF INDIA LIMITED
& ANR**

..... Respondents

Through Mr. A.K. Ganguli and Mr. Sanjay Jain,
Senior Advocates with Mr. Sharat Kapoor, Mr. Sunil
K. Jain, Mr. Aneesh Mittal, Mr. Parmatma Singh, Ms.
Reeta Chaudhary, Mr. Mayank Jain and Mr. Sachin
Sharma , Advocates for R-1/SAIL.
Mr. Rajiv Nayar, Senior Advocate with
Mr. Dharendra Negi, Mr. Dheeraj Nair and Mr.
Shidharth Sethi, Advocates for R-2/AMCI.

With

O.M.P. 415/2011

AMCI PTY LIMITED

..... Petitioner

Through Mr. Rajiv Nayar, Senior Advocate with
Mr. Dharendra Negi, Mr. Dheeraj Nair and
Mr. Shidharth Sethi, Advocates.

versus

**STEEL AUTHORITY OF INDIA LIMITED
& ANR**

..... Respondents

Through Mr. A.K. Ganguli and Mr. Sanjay Jain,
Senior Advocates with Mr. Sunil K. Jain, Mr. Aneesh
Mittal, Mr. Parmatma Singh, Ms. Reeta Chaudhary,
Mr. Mayank Jain and Mr. Sachin Sharma , Advocates
for R-1/SAIL.
Mr. Arvind Nigam, Senior Advocate with Mr. Amit
Sibal, Mr. Anirudh Das and Ms. Smarika Singh,

Advocates for R-2.

AND
O.M.P. 451/2011

AMCI PTY LIMITED Petitioner
Through Mr. Rajiv Nayar, Senior Advocate with
Mr. Dharendra Negi, Mr. Dheeraj Nair and
Mr. Shidharth Sethi, Advocates

versus

STEEL AUTHORITY OF INDIA LIMITED
& ANR Respondents
Through Mr. Sunil K. Jain, Mr. Aneesh Mittal,
Mr. Parmatma Singh, Ms. Reeta Chaudhary, Mr.
Mayank Jain and Mr. Sachin Sharma , Advocates for
R-1/SAIL.
Mr. Arvind Nigam, Senior Advocate with
Mr. Amit Sibal, Mr. Anirudh Das and Ms. Smarika
Singh, Advocates for R-2.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
30.03.2012

Introduction

1. These are three petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') arising out of the proceedings in which a final Award dated 10th March 2011 was passed by the Arbitral Tribunal ('Tribunal') constituted under the Rules of Arbitration of the ICC International Court of Arbitration.

2. OMP No.414 of 2011 is by Vale Australia Pty Ltd. ('Vale') formerly known as CVRD Australia Pty Ltd. and OMP No.415 of 2011 is by AMCI Pty Ltd. ('AMCI'). Both petitions challenge the final Award dated 10th March 2011 whereby the Tribunal allowed the claim of Respondent No.1 -

Steel Authority of India Ltd. ('SAIL') for damages and held that Vale and AMCI were liable to pay SAIL damages equivalent to US Dollar ('USD') 152,270,789.10, simple interest on the said sum at the rate of 2.335364% per annum *pendente lite* from 2nd April 2009 till the date of the Award aggregating to USD 6,897,815.48, 80% of the SAIL's legal costs and expenses in the sum of USD 320,000 and a sum of USD 160,000 being the advance on costs paid by the SAIL to ICC.

3. After the final Award was passed, both Vale and AMCI filed separate applications on 7th April 2011 under Section 33 of the Act praying for an additional award on the issue of interest for the post-Award period. These applications were rejected by the Tribunal on 16th May 2011 clarifying that the Tribunal had "consciously omitted to make any direction on post-Award interest in the final Award". AMCI has filed a separate petition being OMP No.451 of 2011 under Section 34 of the Act challenging the aforementioned Order dated 16th May 2011.

Background Facts

4. Vale is a company incorporated in Australia having its registered office at Brisbane. It was formerly known as AMCI Australia Pty. Ltd. It was renamed as CVRD Australia Pty. Ltd. and thereafter as Vale after the CVRD Group acquired the shares of AMCI Holding Australia Pty. Ltd., the parent Company of AMCI Australia Pty Ltd. pursuant to an agreement executed on 24th February 2007. AMCI Australia Pty. Ltd. was acting both as the coal producer and seller in terms of the earlier agreements executed between AMCI Australia Pty Ltd. and SAIL as well as under the Long Term Agreement ('LTA') dated 23rd April 2007 (LTA 217/2007) between the parties which forms the subject matter of the present dispute. After the acquisition by the CVRD Group of Vale, Vale acted as the producer under the Agreement and AMCI Pty. Ltd. (AMCI) which was the newly formed

subsidiary of AMCI Australia Pty. Ltd. was to act as the seller. In other words, under the present arrangement, Vale was the producer of coal and AMCI was the seller.

5. By an Agreement dated 22nd June 2004 and by a subsequent Agreement dated 12th April 2005 Vale, then known as AMCI Australia Pty Ltd., had completed supplies of coking coal to SAIL. Under the LTA in question dated 23rd April 2007, Vale and AMCI agreed to supply SAIL 750,000 Metric Tonnes ('MT') of Broad-Borough medium volatile hard coking coal. Pursuant to an amendment dated 7th June 2007, Vale and AMCI were jointly responsible to supply the contracted hard coking coal, with Vale acting as the producer and AMCI the seller.

6. In terms of Clauses 1.1, 1.2, and 1.3 of the LTA 750,000 MT plus/minus 10%, plus 250,000 MT at SAIL's option, was to be supplied by Vale and AMCI to SAIL within the delivery period from July 2007 to June 2008 [hereinafter referred to as 'the First Delivery Period' (FDP)] at a price of USD 96.45 per MT ('PMT') FOB. In terms of Clause 2, the price for the later delivery periods was to be mutually fixed prior to the commencement of the delivery period. Clause 1 of the LTA specified that Broad-Borough Medium Volatile hard coking coal was to be a blend of 50% Carborough Downs hard coking coal and 50% Broadlea hard coking coal.

7. On 26th March 2007, SAIL exercised its option for purchase of an additional quantity of 250,000 MT Broad-Borough hard coking coal for supply during the FDP. Vale and AMCI supplied 246,539 MT of the contracted hard coking coal during the FDP between 1st September 2007 and 21st March 2008. Disputes arose between Vale and AMCI on the one hand and SAIL on the other regarding the supply of the balance 753,461 MT. SAIL's case was that there was a deliberate breach of the LTA by Vale and

AMCI in not meeting the target supplies in the FDP since there was a manifold rise in the price of coal from USD 96.45 PMT to USD 400 PMT FOB during the relevant period 2007-08. SAIL's case is that as a result it had to procure the balance quantity from other sources at a price much higher than the market price at the risk and cost of Vale and AMCI.

8. Under Clause 2.2 of the LTA "price shall be firm and not be subject to any escalation for any reason, whatsoever, until the completion of delivery of the entire Agreement quantity due for delivery in the relevant delivery period with such extensions as might be mutually agreed upon between the purchaser and seller." Under Para 1.2 of the General Conditions of the Agreement ('GCA'), it was stated that "quantities which are delayed and are delivered after expiry of the relevant delivery period shall not attract price adjustment and shall be supplied at the price fixed for the relevant delivery period subject to provisions of Clause 2.2 of the Agreement." Para 7.1 of the GCA stated that "The period of delivery is of the essence of this Agreement." Under Para 8.1 of the GCA, upon the seller's failure to deliver the required materials within the time specified in the Agreement, the seller would have to pay the liquidated damages (not by way of penalty), a sum equivalent to one percent of the price of any materials which the seller has failed to deliver for each and every month of delay or part thereof provided, however, such liquidated damages ('LD') shall not apply to any period of extension granted by the purchaser under the *force majeure* condition. The maximum amount of LD levied on any shipment will not exceed 10% of the value of the materials in that shipment. Further, delivery of materials, after the same was to become liable for levy of LD under the said clause, "shall not operate as a waiver of the Purchaser's right to levy liquidated damages."

9. Para 9 of GCA concerned risk purchase. Para 9.1 read as under:

"9.1 If the Seller in any manner or otherwise neglects or fails

to perform the Agreement, the Purchaser after having come to know of such negligence or non-performance after giving a notice shall take such action as it considers fit including taking any risk purchase action for supply of similar materials at the risk and cost of the Seller.”

10. Under Para 12.1 of the GCA if the Agreement did not meet the objectives set out therein and upon mutual agreement between the parties, it could be foreclosed. Para 20.1 of the GCA contained an arbitration agreement whereby all disputes arising in connection with the Agreement were to be finally settled under the Rules of Arbitration of the International Chamber of Commerce, Paris by the Sole Arbitrator appointed in accordance with the said Rules. The Award made pursuant thereto was to be binding on the parties. The Arbitrator was to give reasons for the award. The place of Arbitration was to be New Delhi, India. Under Para 21.1 of the GCA, the Agreement was to be governed by and construed according to the laws of India for the time being in force.

Arbitral proceedings

11. SAIL submitted its request for arbitration to the ICC on 31st March 2009. The ICC International Court of Arbitration appointed Professor Lawrence G. S. Boo as the Sole Arbitrator in accordance with Article 9(3) of the ICC Rules at its session on 11th June 2009.

12. SAIL's claim as it initially submitted to the Tribunal included a claim for a sum of USD 153,440,000 for non-supply of the contracted quantity of 753,461 MT. This was computed as the total of the excess price PMT paid for different quantities i.e. USD 203.55 (USD 300 – USD 96.45 for 605,240 tonnes); 204.45 (USD 300.90 – USD 96.45 for 148,221 tonnes). SAIL also claimed unpaid demurrage charges pursuant to Bill of Lading dated 21st February 2008 (Hardwar Shipment) in the sum of USD 950,000. In addition

to the above two claims, SAIL had initially claimed USD 7,260,000 as LD in terms of Para 8 of the GCA and USD 50,000 being the sum incurred on account of extra efforts to obtain the contracted material from alternate sources. The last two claims were given up at the final closing submissions by SAIL. The revised claim was for the sum of USD 153,440,000 for non-supply of contracted tonnage based on the excess PMT paid over the contract price and USD 950,000 towards unpaid demurrage charges for the vessel Hardwar and interest at 12.75% per annum from April 2008 till the date of realization and cost of arbitration.

13. The above claims were resisted by Vale and AMCI on the ground that on account of the failure by SAIL to issue them a risk purchase notice under Clause 9.1 of the GCA, no claim for risk purchase could be sustained. SAIL had agreed to accept alternate supply of coal and had thereby discharged both Vale and AMCI from further obligation to supply the hard coking coal for the FDP. SAIL had itself granted extension of time for performance of the contract without reserving its rights. Therefore, Vale and AMCI were not in breach of the contract. It was contended that the letters dated 22nd and 31st October 2008 and 1st December 2008 from SAIL to Vale and AMCI manifested the intention on the part of SAIL “to recognize or to accept the promise of the performance of the alternate obligation” by Vale and AMCI. SAIL had elected for performance and not opted to void the LTA. SAIL was, thus, estopped from alleging any breach by Vale and AMCI. It was further contended that the ongoing participation, negotiation and continued insistence upon specific performance by SAIL after the alleged date of risk purchase was inconsistent with the risk purchase claimed. Therefore, SAIL had lost or alternatively waived its right to claim damages towards risk purchase. It was also inconsistent with its claim for LD. It was specifically pleaded by Vale and AMCI that SAIL had failed to mitigate the loss and that SAIL had not established that it had made risk purchase. The claims for risk

purchase were not properly documented. The documents tendered by SAIL made no reference to the risk purchase. It was likely that SAIL had made the purchase pursuant to the existing LTAs with other Long Term Suppliers (LTSs) which were not risk purchases under the contract. SAIL's claim for LD was resisted on the ground that there were no particulars to substantiate such a claim. Also while extending the time for performance of the contract, SAIL had made no reservation of its right to claim LD for the delay. SAIL had not suffered any loss on account of delay and had not pleaded loss. The claim for LD was inconsistent with the claim for risk purchase. Since the contract did not provide for payment of interest, there was no basis for the claim on that score. In any event, the rate of interest claimed was excessive.

Issues

14. The Tribunal, on the basis of the pleadings, identified the following issues for determination:-

“Whether the Respondents were in breach of Contract No.217/2007 dated 23.4.2007?”

- a. Whether the time for performance by the Respondents of the First Delivery Period under the Contract has been extended by the Claimant?
- b. Whether the Claimant had accepted the Respondents' promise to supply an alternate quality of coal?
- c. Whether the Claimant had dispensed with strict performance of Contract?
- d. Whether the Claimant has waived and/or is estopped from claiming any remedy for the Respondents' alleged non-performance?
- e. Whether the Claimant's legal notice of 20 January 2009 was properly given and its effect (if any)?

Risk Purchase Damages

- f. Whether Para 9 of the GCA requires the Claimant to give prior

notice of any contemplated risk purchase or only a notice of negligence or non-performance?

g. Whether the Claimant had complied with the requirement to give such notice?

h. Whether the Respondents have waived the requirement of such notice?

i. Whether the Claimant undertook risk purchase under Para 9 of the GCA?

j. Whether the Claimant had affirmed the Contract; if so, whether the affirmation precludes the claim for risk purchases action for non-delivery during the First Delivery Period?

k. Whether the Claimant is entitled to claim damages on account of the purported risk purchase and if so, to what amount?

l. Whether the Claimant mitigated the loss it is alleged to have suffered?

Liquidated Damages

m. Whether the Para 8.1 of the GCA is enforceable?

n. If so, whether the claim for liquidated damages can be maintained cumulatively with that of risk purchase under Para 9.1?

o. Whether the Claimant is entitled to liquidated damages, and if so, to ascertain the period of delay for which such damages are payable, and the amount of such damages?

Expenditure

p. Whether the Claimant has incurred extra expenditure towards procurement of deficit coal from alternate sources?

q. If so, what are the expenditure incurred and whether they fall to be borne by the Respondent?

Demurrage

r. Whether demurrage charges were incurred by the Claimant on the shipment on “Hardwar”?

s. If so to ascertain the amount of demurrage and whether they are payable by the Respondent to the Claimant.

Award of interests and costs

t. Whether interest ought to be paid on any of the sums found to be due to the Claimant and if so the proper rate and period thereof.

u. Who should bear the cost of this arbitration and to ascertain the quantum thereof?”

The Arbitral Award

15. The impugned Award answered issue (a) in the negative. After examining the correspondence exchanged between the parties and after discussing the decisions of the Indian Courts interpreting Sections 55 and 63 of the Contract Act 1872, the Tribunal concluded that while due consideration was given by SAIL to the proposals of Vale and AMCI to fulfill their contractual commitments, none of them came to fruition and the time for the performance of contract was never extended by SAIL. In particular, it was held that “no carryover of the First Delivery Period was ever agreed”. It was held that the alleged extension of time to be granted by the non-defaulting party had to be “categorical in nature, rather being vague or on the anvil of presumptions”. It was further held that a mere call by SAIL (through its counsel’s letter dated 20th January 2009) to Vale and AMCI to perform their contractual obligation in accordance with the terms of the contract would not amount to an extension of time or a waiver of late performance.

16. The impugned Award answered issue (b) in the negative. It was held that SAIL had not accepted the promise of Vale and AMCI to supply an alternate quality of coal. Issue (c) was answered in the negative by holding that SAIL had not dispensed with the strict performance of the contract. Issue (d) was answered in the negative by holding that SAIL had not waived and was not estopped from claiming any remedy for the non-performance of the contract

by Vale and AMCI. Issue (e) was answered in the affirmative. It was held that the notice dated 20th January 2009 by SAIL's lawyer to Vale and AMCI was properly given. Its effect was, however, minimal and did not affect the parties' rights whatsoever in the arbitration. It was concluded by the Tribunal that the balance of the contracted materials of 753,461 MT had not been delivered to SAIL within the First Delivery Period. Vale and AMCI did not offer any reason or explanation to account for such failure. It followed that they were in breach of the contract dated 23rd April 2007.

17. As regards issues (f) and (g), the Tribunal found that the invitation by SAIL to AMCI and Vale to attend the meeting of the Empowered Joint Committee ('EJC') would not itself constitute sufficient notice of risk purchase which was required to be given under Para 9 of the GCA. However, the Tribunal answered issue (h) in the affirmative and held that Vale and AMCI had waived notice under Para 9 of the GCA by letter dated 18th December 2007. SAIL was thereafter not required to comply with the requirement of prior notice for making risk purchase. The Tribunal further held that by merely asking Vale and AMCI to comply with their contractual obligation, SAIL had elected not to go in for risk purchase or to exercise its other remedies. Answering issue (j) in the negative, the Tribunal held that there was no affirmation of the contract by SAIL and its actions or omissions did not preclude it "from taking all actions including risk purchase action for the undelivered balance of the Materials due under the First Delivery Period."

18. As regards issue (i), the Tribunal held that SAIL had consciously decided to purchase 800,000 MT of hard coking coal to cover the amount of coal not delivered by AMCI and Vale. On the issue of similarity of the coking coal purchased by SAIL from its three LTSs i.e. BHP Billiton Marketing AG ('BHP'), Anglo Coal Australia Pty Ltd. ('Anglo') and Peabody Energy Australia Coal Pty Ltd. ('Peabody'), it was held that the differences in quality

were not substantial. On issue (l), the Tribunal held that SAIL had done all it could to minimize its loss by purchasing replacement coal from its LTSs instead of the spot market. On issue (k), it was held that SAIL had suffered loss and damage amounting to USD 152,270,789.10.

19. SAIL did not press its claim for LD. Also, at the stage of final submissions SAIL elected to abandon the claim for expenditure. Thus issues (m) to (q) were not required to be decided. SAIL's claim for demurrage issues (r) and (s) were rejected.

20. As regards the claim for *pendente lite* interest [issue (t)], the Tribunal awarded SAIL the LIBOR interest rate + 1.25% i.e. at 2.335364% on USD 152,270,789.10 from the date of request for arbitration (2nd April 2009) till the date of the Award. As regards the cost of arbitration [issue (u)], it was held that Vale and AMCI had to bear the whole of the cost and accordingly, the Arbitrator directed that USD 160,000 be paid to SAIL being the cost paid to the ICC. As regards the legal costs incurred by SAIL, the Tribunal held that Vale and AMCI should pay 80% of the cost incurred.

21. SAIL has accepted the impugned Award and has not challenged the rejection of its claim for demurrage. The present petitions by AMCI and Vale challenge the findings of the learned Arbitrator on issues (a) to (e) [regarding breach of the contract by them], on issues (f) to (l) [concerning risk purchase damages], issues (t) and (u) [concerning interest, cost of arbitration and legal costs] and to the extent that both the applications of AMCI and Vale under Section 33 of the Act were rejected by the Tribunal by the further Order dated 16th May 2011 clarifying that the Tribunal had "consciously omitted to make any direction on post-Award interest in the final Award".

22. This Court has heard the submissions of Mr. Arvind Nigam, Senior

Advocate and Mr. Amit Sibal, Advocate for Vale, Mr. Rajiv Nayar, Senior Advocate for AMCI, Mr. A.K. Ganguli and Mr. Sanjay Jain, Senior Advocates and Mr. Sunil K. Jain, Advocate for SAIL.

23. The Court proposes to consider the submissions issue-wise in the same order as the Tribunal did. Issues (a) to (d) concerned the failure of Vale and AMCI to meet their respective obligations under Contract No. 217 of 2007 dated 23rd April 2007. It was held by the Tribunal that (a) SAIL had not extended the time for the supply to be made by Vale and AMCI under the FDP; (b) SAIL had not accepted their offer to supply alternate quality of coal; (c) that SAIL had not dispensed with strict performance of the contract and (d) that SAIL was not estopped from claiming remedies for non-performance of contract by Vale and AMCI.

Scope of the Court's jurisdiction under Section 34 of the Act

24. Before commencing the exercise of examining the correctness of the impugned Award, it is necessary to recapitulate the settled principles of law regarding the scope of the powers of the Court under Section 34 of the Act. In ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181*** the Supreme Court traced the change in the parameters for judicial review of arbitral awards from the 1940 Act to the 1996 Act as under (SCC, p. 209):

“58. In *Renusagar Power Co. Ltd. v. General Electric Co.* 1994 Supp (1) SCC 644, this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression “public policy” was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705* (for short “ONGC”). This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly (1986) 3 SCC 156* wherein the applicability of the expression “public policy” on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the

Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC* this Court, apart from the three grounds stated in *Renusagar*, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan v. Basant Nahata* (2005) 12 SCC 77)

61. In *ONGC* this Court observed: (SCC pp. 727-28, para 31)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in *Renusagar* case it is required to be held that the award could be set aside if it

is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

25. Significantly, in *McDermott International Inc.*, the Supreme Court was careful to highlight that the **ONGC** grounds of challenge were an addition to the grounds earlier listed in *Renusagar*. Those grounds have been reiterated in a large number of decisions and summarised in *Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63* (SCC, p. 78):

“(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such

breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

26. The proceedings under Section 34 are certainly not of an appellate nature. In ***P.R. Shah, Shares & Stock Broker v. M/s. B.H.H. Securities (P) Ltd. 2011 (11) SCALE 668***, the Supreme Court held: “A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence.” Section 34 is not meant to clothe the Court with anything more than a power of limited judicial review, the width of which is definitely less than that of an appellate court. Considering that the essential thrust of the 1996 Act was to minimize judicial interference, where the court is satisfied that the parties have had a full-fledged opportunity of a hearing on facts and law, including examination of witnesses, followed by a detailed reasoned Award issue-wise, the Court should be reluctant to easily interfere. The threshold set in ***ONGC*** by the Supreme Court and further elaborated in ***McDermott International Inc.***, has to necessarily be high. The illegality has to be “patent” or “go to the root of the matter”. Otherwise, every petition under Section 34 of the Act would end up being argued as an appeal, which definitely was not the legislative intent behind Section 34. Also, since arbitration as an alternative to judicial proceedings was intended to be both efficacious and expeditious, converting the proceedings under Section 34 to that of an appeal on facts and law would defeat that objective.

27. The Court proceeds to examine the challenge to the impugned Award in

light of the parameters delineated in the above decisions of the Supreme Court.

Were Vale and AMCI in breach of the LTA?

28. Issues (a) to (e) were grouped under the broader issue whether Vale and AMCI were in breach of the LTA? The defence of AMCI and Vale was that SAIL had impliedly granted extension of time for performance and chose to insist on performance rather than voiding the contract. Issue (a) therefore was whether in fact there was such extension of time granted by SAIL? Vale and AMCI submitted that the Tribunal's finding that there was nothing to suggest that SAIL had granted an extension of time or had acquiesced for time to "go by" is against the evidence on record, in particular SAIL's letters of 22nd and 31st October 2008, 1st December 2008 and 20th January 2009. Further it is submitted that SAIL's witness Mr. Rawat had in respect of the aforesaid letters admitted that in effect SAIL had offered an opportunity to Vale to supply the balance quantity.

29. There were two specific submissions by Vale and AMCI in this regard. One was that by extending the time for performance of the contract SAIL had dispensed with requirement for timely performance of the contract. Reference was made to Sections 55 and 63 of the Contract Act by pointing out that there was no avoidance of the contract by SAIL, which in the circumstances was one option available to it. Reliance is placed on the decisions in ***Muhammad Habidullah v. Bird & Co. AIR 1922 Privy Council 178***; ***Kailash Nath and Associates v. Delhi Development Authority 2007 (98) DRJ 9***; ***Aryan Mining and Trading Corporation Ltd. v. B. N. Elias & Co. AIR 1959 Cal 472***; ***Manni Lal v. Nihal Chand AIR 1930 Oudh 417***; ***Shriram Pistons v. Buckeye Machines 136 (2007) DLT 254***; ***Hind Construction v. State of Maharashtra (1979) 2 SCC 70*** and ***Arosan Enterprises v. Union of India (1999) 9 SCC 449***. Secondly, it is submitted

that Section 63 of the Contract Act does not require any bilateral agreement for dispensation of performance. It entitles a promisee to dispense with strict performance of the contract and the promisor would then not be held liable for non- performance of the original obligation. In this regard, reliance is placed on the decisions in **Todarmal v. Chironjilal AIR 1956 M.B. 25** and **Mt. Jamnubai v. Murlidhar AIR 1946 Nagpur 148**. It is pointed out that in para 66 of the Award, the Tribunal noted AMCI's argument that time being of the essence of the contract then upon non-performance, the contract becomes voidable at the option of the promisee and that in such a case the only right under Section 55 of the Indian Contract Act which the promisee has is to avoid the contract. It is submitted that this argument was based upon the judgment of the High Court of Andhra Pradesh in **T. Venkata Reddy v. Vegesana AIR 1968 AP 190**. The Tribunal however wrongly assumed that AMCI's argument was "culled from Privy Council's remarks" in **Muhammad Habidullah v. Bird & Co.** and held in Para 67 that there was nothing in the said judgment to substantiate AMCI's argument. It is accordingly submitted that the Tribunal rejected the plea available in law on a totally misconceived premise.

30. The facts relevant for the first set of issues are that under the LTA dated 23rd April 2007 Vale and AMCI were required to deliver to SAIL 1 million MT of hard coking coal during the FDP July 2007 to June 2008. In response to a query from SAIL on 18th May 2007 whether Vale and AMCI would be willing to supply any additional quantity for the FDP, AMCI replied the same day citing restricted port allocation at the Dalrymple Bay Coal Terminal (DBCT) which was undergoing expansion of its facilities and upgrade of its loading capacity. This meant no supplies during July 2007 but deferred coal supplies of 100,000 MT during the months of August, October and December 2007 in two batches of 50,000 MT each month. SAIL wrote to AMCI on 19th May 2007 reminding it that it was required to supply evenly

at least 85,000 MT per month continuously in order to meet the LTA obligations and that other Australian LTSs, were despite the port restrictions at DBCT, not prevented from supplying not less than the pro rata quantity during the same period. SAIL requested that supply of at least 100,000 MT be made per month. AMCI by its reply dated 20th May 2007 however expressed inability to offer additional quantities due to port restrictions. There was a continuous exchange of correspondence thereafter between the parties with the explanations offered by AMCI and Vale for not meeting the target supplies under the LTA ranging from technical problems with the coal processing equipment to high demurrage rates and restricted port allocation at DBCT. As a result the supply targets under the LTA were progressively reduced to 300,000 MT by December 2007 (instead of 500,000 MT) and then further down to 250,000 and 200,000 MT. In the third quarter of the FDP it was 150,000MT and finally down to nil supplies in the last quarter of the FDP 2007-08. During this period from May 2007 till May 2008 the market price of hard coking coal sharply rose from USD 96.45 PMT to USD 400 PMT.

31. It is in the above background of continuous exchange of letters between the parties before and after the letter dated 18th December 2007 of AMCI, that the said letter had to be viewed. By the said letter AMCI informed SAIL that due to the delay in completion of the expansion of the port of DBCT they had not been able to get access to the port allocation and “this port allocation has been permanently lost.” Further, “with the delay of January to March period, 1/4th of this capacity has been lost i.e. 500,000 MT has been lost. In an effort to treat all customers fairly, we had allocated 50% of this allocation to the SAIL business, therefore our ability to perform the above mentioned agreement has been permanently reduced to 300 kt.” AMCI made it clear therefore that it would not be able to deliver 0.3 million MT of hard coking coal as contracted under the LTA dated 23rd April 2007 in the FDP. It

had “tentatively planned” a shipping schedule for the 0.7 million MT to be supplied between July 2007 and June 2008. AMCI requested deferral of “all tonnage commitments for the 2008 and 2009 contract years with resumption of deliveries in 2010.” It was emphasised that AMCI and Vale had “very little confidence in the availability of port capacity in the near to medium term.” They were impelled to “advise SAIL as early as possible so that SAIL is able to consider any other sourcing options that may be available.”

32. This was followed by a series of letters exchanged between the parties which has been tabulated by the Tribunal in para 61 of the Award. Since in support of their submissions Vale and AMCI have particularly referred to the letters dated 22nd and 31st October 2008, 1st December 2008 and 20 January 2009 from SAIL, those may be briefly examined. By its letter dated 22nd October 2008 SAIL rejected the offer of Vale and AMCI to foreclose the contract and asked them to supply the balance contracted quantity of 750,000 MT for the FDP. This by no means was grant of extension of time but actually a reminder of the default in complying with a contractual obligation. The letter dated 31st October 2008 was in the nature of a further reminder by SAIL to Vale and AMCI to honour their supply commitments for the FDP. The ‘conceptual proposal’ that Vale and AMCI put forth was rejected by SAIL by its letter dated 1st December 2008 and they were asked to supply the balance FDP quantity in “the shortest possible time.” It is inconceivable how this could be viewed as an extension of time for performance. The legal notice dated 20th January 2009 reminded Vale and AMCI to resume supplies under the LTA.

33. The Tribunal concluded, after reviewing the case law in regard to Sections 55 and 63 of the Contract Act that the extension of time by the non-defaulting party had to be “categorical in nature rather than being vague on the anvil of presumptions.” Indeed this is the law explained in **Arosan**

Enterprises v. Union of India where it was explained that the parties should “knowingly give a go-by to the stipulation as regards the time” and pointed out that this may have two effects. Either they may “name a future specific date for delivery” or “may agree to abandonment of the contract.” Either course of course had to have consensus. In the present case there was no consensus between the parties that the time for performance would be extended. There were negotiations but to no result. In the circumstances, the Tribunal rightly concluded that SAIL’s calls for performance was at best an invitation to redress a breach and would not amount to an extension of time or “a waiver of late performance.” The finding that there was no extension of time granted by SAIL was the right one as it was based on a correct understanding of the requirement under Indian law for the defence under Sections 55 and 63 of the Contract Act to be availed by the defaulting parties, which in this case were Vale and AMCI.

34. It is next submitted that the Tribunal erred in holding that SAIL had never accepted the offer by Vale and AMCI to supply an alternate quality coal. The facts relevant to this issue are that by letters dated 23rd April, 29th April and 1st May 2008 Vale and AMCI made it clear that they were not in a position to supply coal of the quantity and quality as agreed under the LTA. Going to the spot market to make up for the deficit would have proved too costly for SAIL and so it turned to its other LTSs. On 11th June 2008 Vale and AMCI offered what SAIL terms as “soft coking coal” with no commitments as to quantity or delivery period. On 9th September 2008 Vale and AMCI offered 300,000 MT of Broadlea specification coking coal to be delivered within 12 months. But SAIL insisted on a confirmation that the full balance quantity of 750,000 MT would be supplied. This was not forthcoming from Vale and AMCI. On 7th November 2008 Vale offered to combine the FDP and SDP quantities but this was rejected by the Empowered Joint Committee (EJC) since the offer had elements that were

“vague and uncertain.” It was stated that “there cannot be any question of novation of the earlier contract based on such premises.” The fourth offer was made on 8th December 2008 for supply of 300,000 MT of Broadlea coking coal at USD 96.45 but SAIL did not accept it and asked it to resume supplies of coal as agreed under the LTA. The fifth offer was on 2nd February 2009 for supplying 300,000 MT of Broadlea coal and 450,000MT of hard coking coal but not specifying the delivery period or price. The sixth offer was for the entire balance quantity of 750,000 MT of hard coking coal but again without mentioning the price or delivery period. The Tribunal too has, in paras 84 to 94 of the Award, analysed the entire correspondence between the parties in this regard and concluded that SAIL had not accepted the offer of Vale and AMCI to supply an alternate quality of coal. It is accordingly concluded that at no time did SAIL dispense with the strict performance of the contract. The Court is unable to find any error in the analysis of the evidence or the conclusion of the Tribunal.

35. Raising the plea of estoppel in law, it is submitted by Vale and AMCI that the Tribunal did not consider whether SAIL’s conduct after June 2008 in seeking deliveries of 750,000 MT of coal till January 2009 amounted to a representation to AMCI and Vale that SAIL had not procured risk purchase coal. According to Vale and AMCI, the question to be answered by the Tribunal was whether they had acted upon the representation that SAIL had not undertaken risk purchase action. In para 105 of the Award, the Tribunal noted that the various proposals given by AMCI and Vale were not based on any “representation that SAIL would not undertake risk action”. It is submitted that the Tribunal failed to note that the question whether “SAIL would not undertake risk action” was irrelevant to the defence of estoppel. According to Vale and AMCI, the relevant question was whether SAIL had represented to AMCI and Vale, whether by conduct or otherwise, that it had not undertaken risk purchase (and not that it would not). It is submitted that

the Tribunals' finding in Para 106 of the Award that AMCI and Vale had not acted on SAIL's representation, and had suffered no prejudice or detriment, was without any basis or reasoning. It is submitted that the Impugned Award is against the principle of promissory estoppel under Section 115 of the Evidence Act, which binds a promisor to his promise if the person to whom this promise is made acts on that promise. In this regard, reliance is placed on the decisions in *Central London Property v. High Trees (1947) 1 KB 130*; *Motilal Padampat Sugar Mills v. The State of Uttar Pradesh AIR 1979 SC 621*; *Amalgamated Investment v. Texas Commerce (1982) 1 QB 84*; *Spiro v. Lintern (1973) 1 WLR 1002*; *Taylors Fashions v. Liverpool Victoria (1982) 1 QB 133*; *L.M.L. Ltd. v. State of U.P. (2008) 3 SCC 128*; *Jai Narain Parasrampuriah v. Pushpa Devi Saraf (2006) 7 SCC 756*; *Dhiyan Singh v. Jugal Kishore AIR 1952 SC 145* and *Azizullah Khan v. Gulam Hussein AIR 1924 Sind 97*.

36. The factual foundation for sustaining a plea of estoppel against SAIL had not been laid by Vale and AMCI in the arbitral proceedings. They were unable to show that SAIL had made any representation about not going in for risk purchase. The very submission that by "seeking deliveries of 750,000 MT of coal till January 2009" SAIL had made a representation to AMCI and Vale that it "had not procured risk purchase coal" is to say the least, far-fetched. The correspondence between the parties discussed earlier could not have left Vale and AMCI in any doubt that they were in breach of their obligations of the LTA and SAIL was justifiably concerned about their default. In asking them to honour their commitments under the LTA, SAIL was making no "representation" about not opting for risk purchase, "by conduct or otherwise". Their response was not to comply but make offers of alternate supplies which were not acceptable to SAIL. Neither Vale nor AMCI altered their positions in any manner or suffered any detriment. In any event neither placed evidence to prove that proved that it did. The plea of

estoppel raised by Vale and AMCI has been rightly rejected by the Tribunal.

37. Vale and AMCI admit that they failed to supply 753,461 MT of contracted coal during the FDP. They have also not seriously contested the finding in Issue (e) that SAIL's legal notice dated 20th January 2009 was properly issued. Vale and AMCI did not examine any witness to explain why they were unable to complete their supply obligations during the FDP. As pointed out by the Tribunal, both AMCI and Vale chose to rely only on the evidence of Mr. Rawat and Mr. Arun Jot Malhotra, who were both SAIL's witnesses. That evidence has been analysed in great detail by the Tribunal. This Court is not persuaded to re-appreciate that evidence although it was read extensively by Senior Counsel appearing on behalf of Vale and AMCI. The scope of the present proceedings under Section 34 does not allow this Court to go over the entire evidence again and come to a different conclusion only because it is possible to do so.

38. The Court finds no error in the Tribunal's determination that Vale and AMCI were in breach of the LTA dated 23rd April 2007.

Risk Purchase Damages

39. The Tribunal addressed issues (f) to (l) under the broad heading of 'Risk purchase damages'. It noted in Para 119 that SAIL "had not pleaded its case to come within the ambit of Section 73 (of the Contract Act) for general damages but have elected to pursue its claim damages under a specific clause in the conditions of the contract viz., Para 9 GCA." In the context of the defences raised by Vale and AMCI the Tribunal addressed the issues whether SAIL had elected for performance of the contract which in turn precluded it from taking risk purchase action for non-delivery during the FDP [issue (j)]; whether SAIL was required to and in fact did give Vale and AMCI prior notice of risk purchase under Para 9 GCA [issues (f) and (g)]; whether Vale

and AMCI had waived the requirement of such notice [issue (h)]; It then addressed the issue whether SAIL in fact undertook risk purchase under Para 9 GCA [issue (i)]; whether SAIL was entitled to damages on that account [issue (k)] and whether SAIL had mitigated the loss it alleged to have suffered [issue (l)].

Election

40. According to Vale and AMCI, not only did SAIL not give them any notice of its intention to go in for risk purchase, which in fact, was found to be the case by the Tribunal but it in fact required both Vale and AMCI to perform the contract. It is, accordingly, contended that SAIL elected to pursue with the contract and kept extending the time for Vale and AMCI to perform their obligations thereunder. It is only in the claim petition that SAIL adverted to the fact of having undertaken risk purchase. It is submitted that having elected to affirm the contract and insist on its performance, SAIL was estopped from invoking the risk purchase clause and making risk purchase.

41. It is pointed out that when SAIL invited AMCI and Vale for the first meeting with the EJC, it continued referring to the FDP. It is, therefore, claimed by Vale and AMCI that risk purchase was not contemplated by SAIL even at that stage. According to Vale and AMCI, the issue before the Tribunal was whether SAIL had affirmed the Contract and if so, whether the affirmation precluded the claim for risk purchase action for non-delivery during the FDP. It is submitted that the Tribunal did not decide the issue that was framed for determination. What had been submitted before the Tribunal was that even assuming SAIL had invoked Para 9 of the GCA and had procured risk purchase coal, SAIL could not claim damages as it had elected for and communicated to AMCI and Vale its election of the right to seek performance of the Contract. The right to seek performance being

inconsistent with the right to claim damages under Para 9 GCA, no damages could be claimed under the latter right because of election by SAIL of the former right. According to AMCI the Tribunal, in Para 125 of the Award, however, assumed AMCI's argument to be that SAIL having elected for performance, it could not invoke Para 9 of the GCA "to make risk purchases". Because of this fundamental error in the premise on which the Tribunal proceeded to decide the issue of election, it concluded in Para 136 of the Award that SAIL was not precluded from taking risk purchase action. The Tribunal erred in proceeding on the basis that risk purchase action was undertaken subsequent to SAIL's demands for performance after 22nd October 2008 whereas SAIL had invoked Para 9 even before it claimed performance. Reliance is placed on the decisions in *National Insurance Co. Ltd. v. Mastan* (2006) 2 SCC 641; *Haridas Mafatlal Gagalbhai v. Vijaylakshmi Navinchandra Mafatlal Gagalbhai* AIR 1956 Bom. 721; *Aquis Estates Ltd. v. Minton* [1975] 1 WLR 1452; *Benjamin Scarf Jardine v. Alfred George* (1882) VII AC 345; *Hanmat Bhimrao v. Gururao* AIR 1943 Bombay 36; *Ganga Retreat & Towers v. State of Rajasthan* (2003) 12 SCC 91; *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.* (2005) 6 SCC 462 and *Karam Kapahi v. Lalchand Public Charitable Trust* (2010) 4 SCC 753.

42. The correspondence between the parties reveals that both Vale and AMCI conceded to their respective inability to make the balance supplies under the LTA in the FDP. While SAIL cannot be faulted for insisting that Vale and AMCI should fulfil their contractual obligations, this by no means can be construed as a waiver by SAIL of its right to seek other appropriate remedies, including making good of the shortfall from other sources. This much was known to AMCI and Vale as is evident from the correspondence between the parties. The email dated 24th April 2008 addressed to AMCI inviting it to the EJC meeting held on 9th May 2008 was indeed to discuss

“the status of supply of coking coal by M/s. AMCI and CVRD to sell during July 2007 – June 08 delivery period under the existing LT Agreement No.217/2007.” However, it was also for supply of coking coal to be made to SAIL during the “July 2008 - June 09 delivery periods.” While SAIL was inviting AMCI and Vale to make good the shortfall for the FDP, neither Vale nor AMCI was ready for this. In its email dated 29th April 2008, AMCI informed SAIL that it was unable to participate “meaningfully in the EJC meeting.” Vale too indicated that it will not be possible to produce the necessary coal required under the contract. It further stated that “to the extent of those discussions impact upon the LT Agreement Number 217/2007, I would be pleased if you could keep me advised.” Vale by letter dated 1st May 2008 reiterated that “we cannot continue to meet the targeted obligations and our assessments has identified that we cannot meet the contracted specifications for another at least Mean Max Reflectance, Fluidity and Vitritine Percentage going forward.” Vale attached a copy of the Boradlea Coking Coal specification which showed deterioration in quality. Vale stated that “these conditions were not foreseen at the time of the Agreement No. 27/2007 was entered into.” It was stated that in the circumstances, “we are left with little choice but to suggest foreclosure of the Agreement 217/2007.” Both AMCI and Vale knew the inevitable consequence of their failure to meet their commitments under the LTA would mean that SAIL would have to source the shortfall from elsewhere. This in fact was their advice to SAIL.

43. In the instant case, the Court is unable to read the correspondence between the parties as implying any waiver by SAIL of its right to seek all remedies available to it in terms of Para 9.1 GCA including risk purchase “at the risk and cost of the Seller.” SAIL has reiterated in its written submissions that its claim is “not based on the principle of general damages”. It has based its claim under the risk purchase clause for only the price difference between

the contracted price and the price at which it effected risk purchase. Given the wording of Para 9.1 GCA it cannot be said that if SAIL opted for risk purchase it cannot claim damages as envisaged in Para 9.1 itself. Further, when it was plain that Vale and AMCI were in breach of their obligations despite being repeatedly asked to comply, SAIL was not precluded from opting for risk purchase under Para 9.1. The effect of non-compliance with the requirement of prior notice under Para 9 will be considered hereafter. However, to the question whether SAIL was precluded from opting for risk purchase only because it had asked Vale and AMCI to comply with their obligations under the LTA, which they admittedly failed to, the answer must be in the negative. When SAIL actually invoked the risk purchase option is also not determinative of whether it could still claim damages. In other words, merely because SAIL had already taken steps for risk purchase and was still asking Vale and AMCI to comply with their contractual obligations did not preclude SAIL from seeking to be compensated for the risk purchase under Para 9.1 GCA. These were options available to SAIL which it could and did exercise. The Tribunal has already discussed the case law cited by Vale and AMCI in sufficient detail and rightly summarised the position in Indian law in regard to the doctrine of election.

44. There is merit in the contention that an innocent party that suffers a breach of contract by the defaulting party can resort to either a statutory remedy that may be available or a remedy envisaged by the contract itself. The principle in law that a party suffering a breach of contract must be restituted to the same position had the breach not occurred is well recognised (See *Rohtas Industries Ltd. v. Maharaja of Kasimbazar, China Clay Mines ILR (1951) 1 Cal 420*; *R.K. Malik v. Kiran Pal (2009) 14 SCC 1*; *Lalchand Chowdhury v. Union of India AIR 1960 Cal 270*). In the present case, the risk purchase clause that envisages the innocent buyer that invokes it to do so at the cost of the defaulting seller, is one species of the above settled legal

principle.

45. The finding of the Tribunal that SAIL was not precluded from invoking Para 9.1 GCA to make risk purchase does not call for interference.

Notice under Para 9 GCA and Waiver

46. The next issue to be considered is whether the Tribunal, after holding under issues (f) and (g) that SAIL had failed to give Vale and AMCI prior notice under Para 9.1 GCA, held in issue (h) that Vale and AMCI had waived the requirement of such notice.

47. It is submitted by Vale and AMCI that advance notice prior to undertaking risk purchase as envisaged under Para 9 GCA, was consistent with the customary practice. Reliance is placed on the decisions in ***Alfa Laval (India) Ltd. v. Union of India (2000) 1 AD (Del) 145; Union of India v. Peekay Industries 2008 (3) Arb LR 569 (Del); Flowmore Private Limited v. National Thermal Power Corporation 2009 X AD (Del) 486; Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. (2005) 6 SCC 462; Maharashtra State Electricity Board, Bombay v. Sterlite Industries AIR 2000 Bom 204***. It is pointed out that the Tribunal in fact found that no risk purchase notice as contemplated under Para 9 GCA, was given by SAIL. Since this precondition of prior notice had not been met, SAIL could not have resorted to risk purchase at all. It is further submitted by Vale and AMCI that the Tribunal erroneously concluded that the letter dated 18th December 2007 was an unequivocal recognition by AMCI that SAIL could proceed under Para 9 GCA. The Tribunal not only acted contrary to the settled principle of waiver but also consciously disregarded Para 17 of the Agreement which mandates

strict compliance of the Agreement. Para 17.1 of the Agreement reads as follows:

“This Agreement cancels all previous negotiations between the parties hereto. There are no understanding or agreements between the Purchaser and the Seller which are not fully expressed herein and no statement or agreement, oral or written, made prior to or at signing hereof shall affect or modify the terms hereof or otherwise be binding on the parties hereto. No change in respect of the terms covered by this Agreement shall be valid unless the same is agreed to in writing by the parties hereto specifically stating the same as an amendment to this Agreement”.

48. It is further submitted that in any event even if the letter dated 18th December 2007 amounted to waiver, it was incumbent on SAIL to inform Vale and AMCI that it was purchasing coal at their risk and cost from alternate suppliers. Admittedly, SAIL had not done so. Even the letter dated 18th December 2007 did not ask SAIL to procure coal at the risk and cost of both Vale and AMCI. Thus, even if SAIL wanted to procure alternate supplies, it could never have imposed the costs on AMCI and Vale. In this regard reliance is placed on the decisions in ***Babulal Badriprasad Varma v. Surat Municipal Corporation AIR 2008 SC 2919*** and ***Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel 2006 (33) PTC 281; Provash Chandra Dalui v. Biswanath Banerjee AIR 1989 SC 1834; M. Gangareddy v. The State of A.P. 1996 (3) ALT 53 and Pradip Kumar Chatterjee v. State of West Bengal (1997) 2 Cal LT 4 (HC).***

49. Para 9.1 GCA, which has been reproduced earlier, is the clause of the LTA that permits SAIL to undertake risk purchase where Vale and AMCI fail to meet their obligations to supply the contracted quantity. That clause permits SAIL to take “such action as it considers fit including taking risk purchase action for supply of similar materials at the risk and cost of the Seller” but “after giving a notice”. As rightly pointed out by Vale and AMCI, the Tribunal has in Paras 140 and 141 of the impugned Award held that such

prior notice was required to be given by SAIL if it contemplated risk purchase action and that in fact it did not give such written notice. It also observed in Para 144 of the Award that the invitation by SAIL to Vale and AMCI to attend the EJC meeting “would not of itself be sufficient to constitute notice under Para 9.” Also, it was held that the failure of Vale and AMCI to attend the EJC meeting could not be taken as a “green light” for SAIL “to do as it liked.” However, the letter dated 18th December 2007 from Vale and AMCI to SAIL was held to be a waiver by them of the requirement of notice.

50. Before dealing with the factual aspects of the case in this regard, the law may be briefly recapitulated. In ***Babulal Badriprasad Varma v. Surat Municipal Corporation*** it was explained that “waiver” is the abandonment of a right “in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.” In ***Pradip Kumar Chatterjee v. State of West Bengal*** the Calcutta High Court held that waiver of a legal right required a “clear, unequivocal and decisive act of party showing such purpose as acts amounting to an estoppel on his part”

51. The contents of the letter dated 18th December 2007 have been discussed in some detail earlier. It was urged both by Vale and AMCI that at best the above letter could be read as an inability by them to deliver only 0.3 million MT for the FDP and not an inability as regards the entire lot for the FDP. It was submitted that it was only for the Second Delivery Period (SDP) and Third Delivery Period (TDP) that they were putting SAIL on notice of their inability to perform their contractual obligation and asking SAIL to consider other sourcing options.

52. The letter dated 18th December 2007 from AMCI to SAIL reiterated the

explanation earlier offered for why the target supplies of hard coking coal under the LTA for the FDP could not be adhered to. The delay in completion of the expansion of the port of DBCT had according to Vale and AMCI resulted in their not been able to get access to the port allocation and that the said port allocation had “been permanently lost.” Vale and AMCI made it clear that their ability to perform the LTA in the FDP “has been permanently reduced by 300 kt.” Also in relation to the FDP they offered a tentative schedule of supply of 700,000 MT in the FDP. Vale and AMCI requested deferral of “all tonnage commitments for the 2008 and 2009 contract years with resumption of deliveries in 2010.” AMCI and Vale advised that SAIL should “consider any other sourcing options that may be available.” The said letter therefore talks of the FDP as well as the SDP and TDP. As regards the FDP, there is an admission by Vale and AMCI of the inability to meet the commitment of 300,000 MT in the FDP. Since even the offer of supply of 700,000 MT was only “tentative”, it was plain that there was no firm commitment even as regards that quantity. By this date therefore it was plain to Vale and AMCI that it was unlikely that they were going to meet their commitments for the FDP. They also anticipated what SAIL was likely to do in that event and so advised it to consider “other sourcing options”. This was a conscious act of Vale and AMCI and was clear and as unequivocal as it could be. As it turned out Vale and AMCI admittedly failed to supply 753,461 MT in the FDP. They left SAIL with little option but to go for other sources. SAIL adopted the strategy of still pressing for the FDP quantities while undertaking risk purchase, which was an option available to it and which approach, as rightly held by the Tribunal, cannot be said to be “improper”.

53. Both of SAIL’s witnesses, Mr. Rawat and Mr. Arun Jot Malhotra, stated that Vale and AMCI were in fact not told by SAIL of the risk purchase undertaken and at the same time SAIL asked them to comply with the FDP

commitments. The Tribunal has analysed the evidence in great detail to come to the conclusion that Vale and AMCI “as sophisticated players in the industry” were fully aware that they would be exposed to claims by SAIL and that the various proposals made by them to supply alternate coal was to persuade SAIL to delay exercising its options to seek remedies including the remedies under Para 9 GCA. The conduct of the parties had to be viewed in the light of the exchange of letters between them before and after 18th December 2007. When so viewed, the conclusion of the Tribunal that there was an implied waiver by Vale and AMCI of the prior notice under Para 9 GCA does get strengthened. The objection in this regard is rejected.

SAIL did undertake risk purchase

54. It will be recalled that with regard to issue (i) the Tribunal held that SAIL had in fact undertaken risk purchase under Para 9 GCA to make up for the shortfall of supply of coking coal by Vale and AMCI under the LTA for the FDP. According to Vale and AMCI, the case pleaded by SAIL in its statement of claim was that consequent upon the meetings and discussions held by the EJC, SAIL had agreed to purchase from its LTSs the short fall of 753, 461 MT of coal at about USD 300 PMT. However, SAIL set up another case through its witnesses from which it was apparent that no conscious decision as such was taken to procure risk purchase coal. According to Vale and AMCI, the Tribunal did not consider the case which was put forward by SAIL in its Statement of Claim and proceeded on the basis of the case set up by SAIL’s witnesses while completely ignoring the plea raised by AMCI and Vale that SAIL’s evidence was not in support of its Statement of Claim but was in fact, a new case set up by SAIL.

55. It is further submitted that SAIL did not produce any document in support of any alleged decision taken by the EJC for procuring Risk Purchase coal. The request to produce the decision was opposed by SAIL on the

ground that the minutes of the EJC meeting were confidential. It is submitted that the Tribunal's conclusion in Para 177 of the Award that SAIL had procured 803, 395 MT of Hard Coking coal out of which it had consciously attributed 753,461 MT as Risk Purchase coal was not supported by reasons. Further, the Tribunal's conclusion that SAIL had procured 803,395 MT of coal was without any factual basis. It is submitted that SAIL did not produce any witness to say that any decision to procure risk purchase coal was in fact taken. Being a public sector undertaking, it was inconceivable that SAIL would have taken a 'conscious decision' without a written document.

56. Vale and AMCI submit that SAIL's case of inviting other LTSs to negotiate the procurement of risk purchase coal was patently false. SAIL had not filed any document to show that as a consequence of the non-supply of full quantity of coal by AMCI and Vale, it had invited the other LTSs for discussions about risk purchase. The redacted contracts filed by SAIL also did not reveal that there was any procurement of additional coal by SAIL from its Australian LTSs. According to Vale and AMCI, to overcome this, Mr. Arun Jot Malhotra in his affidavit dated 17th March 2010 pleaded a new case for SAIL that all the Australian suppliers except AMCI and Vale had supplied full quantity of coal which they agreed to supply during the Delivery Period 2007-08; that because of non-supply by AMCI and Vale, there was a shortfall in the buffer stock which SAIL was required to maintain for the year 2008-09; in order to make up the shortfall in the buffer stock, SAIL agreed to procure "additional" 800,000 MT of coal from the other Australian suppliers 500,000 tons from BHP, 100,000 tons from Peabody and 200,000 tons from Anglo. It is submitted that the Tribunal ignored that the aforesaid was a new case set up by SAIL only for the reason that the contracts it was compelled to produce belied its case put forward in the Statement of Claim.

57. Vale and AMCI submitted that SAIL in order to enhance its case had by way of the affidavits of its witnesses travelled beyond its pleadings which was prima facie unfair and contrary to settled legal principles. Reliance is placed on ***Rajgopal (Dead) by LRS. v. Kishan Gopal (2003) 10 SCC 653*** and ***State Bank of India v. S.N Goyal (2008) 8 SCC 92***. It is submitted that a settled rule of evidence is that if the contents of a document are to be proved, the document must be produced itself (“the best evidence rule”). In this regard, reliance is placed on ***Roop Kumar v. Mohan Thedani (2003) 6 SCC 595***; ***Bai Hira Devi v. The Official Assignee of Bombay AIR 1958 SC 448***; ***Kamakshi Builders v. Ambedkar Educational Society (2007)12 SCC 27***; ***Gopal Krishnaji Ketkar v. Mahomed Haji Latif (1968) 3 SCR 862*** and ***Narayan Govind Gavate v. State of Maharashtra (1977) 1 SCC 133***.

58. It is submitted that the Tribunal also ignored the evidence adduced in the arbitration which showed that SAIL’s other Australian supplier BHP had not supplied the full contracted quantities in 2007-08 and, further, that there had been no decline in the buffer stock of SAIL as a result of any non delivery by AMCI and Vale. The quantities mentioned in Ex. C-85, which purportedly were the risk purchase quantities procured by SAIL, did not in fact tally with the actual purchases claimed to have been made for the purpose of risk purchase. Exception was taken to SAIL producing documents along with its written submissions that disclosed that in fact there was a default in supply by one LTS BHP of the contracted quantities for 2007-08. It is submitted that the Tribunal was to give a finding on this aspect along with the final Award but it failed to do so.

59. Before considering the above submissions it is necessary to advert to the international practice in the sourcing of hard coking coal. It is the common case between the parties that Japan is the largest manufacturer of steel and sets a benchmark for purchase of coal for all other steel producing countries

including India. Procurement of coal is done on a yearly basis. In Japan it is done on calendar year basis. In India it is done on yearly basis in the same year. While the procurement process in Japan commences during April, in India it commences in May and continues till August and September. Additionally, in the instant case, where the EJC meeting was to assess the likely consumption of coal in the following year, it was not an exercise for SAIL alone but other steel manufacturers including Rashtriya Ispat Nigam Ltd. Long Term Contracts are entered into by steel companies with coal suppliers to provide for total quantities, the specific quantities of coal to be supplied periodically as well as the terms and conditions of delivery. The procurement is a continuous process for which the steel industry is required to maintain a buffer stock. It is stated that the buffer stocks of carry over in connection with the supply of coking coal was a common feature in the long term coking coal market. The experts examined on behalf of the parties have broadly testified to the above international practice.

60. There is merit in the submission on behalf of SAIL that any suggestion to the LTSs that they were being approached to supply extra quantities on account of the failure by AMCI and Vale to meet their obligations under the LTA dated 23rd April 2007 would have resulted in those LTSs quoting much higher prices. With a view to mitigate the significant losses that would have to be borne by it if it had gone for spot purchases, SAIL invited all its LTSs, including Vale and AMCI to the EJC. SAIL's decision not to disclose to the other LTSs that Vale and AMCI had defaulted in their obligations under the LTA dated 23rd April 2007 was its prerogative. Vale and AMCI despite being invited were not prepared to attend the EJC meeting since they were certain that they would not be able to meet the supply obligations during the FDP or the SDP and TDP.

61. On the issue of whether a conscious decision was indeed taken by the

EJC or SAIL to undertake risk purchase, Mr. Rawat's cross examination revealed how he briefed the EJC, and how it was the Chairman, SAIL who had to take a final call on undertaking purchase of additional coal to make up for the shortfall during the FDP. The affidavit of Mr. Arun Jot Malhotra dealt with this aspect and he too was subject to extensive cross examination. The Tribunal analysed their evidence at great length. It ultimately concluded that SAIL did in fact procure 800,000 MT of additional coking coal for the period following the FDP.

62. The Tribunal in the impugned Award analyzed in great detail the documents by SAIL which showed the quantities agreed to be supplied by the LTSs under the respective LTAs with them. It took note of the submissions of Vale and AMCI that if there was any additional increase in supply and purchase from those LTSs in the post delivery period, it would have been 200,000 MT and not 800,000 MT as claimed by SAIL. The Tribunal negated the submission by holding that it is not unreasonable for SAIL to take into account the actual delivery quantities for one period and project them in the next delivery period. The figure of 800,000 MT correlated with the total amount of actual coal supplied by BHP, Anglo and Peabody during the period July to September 2008. The total hard coking coal received in August to September 2008 was 803,395 MT. The Tribunal has given its reasoning in the following manner:

"175. The Respondents had spent much time in the course of the arbitration to build a scenario under which it was suggested that the Claimant could not have consciously decided to undertake risk purchase action. It was not disputed that price negotiations for hard coking coal usually take place between BHP Billiton – Mitsubishi Alliance ("BMA") and Nippon Steel of Japan usually begin at the end of the calendar year and settlement is usually reached between January and March. The prices settled between BMA and Nippon would usually be the benchmark price for the Claimant in its negotiations with its suppliers in May. For 2008-2009, it was settled at US\$300/MT. During September 2008 to March 2009, due to the global financial crisis, the steel producers announced rapid cuts in

production. Steel producers such as SAIL faced high prices for its hard coking coal of USD 300/MT, and a lower steel price of USD 500/MT. By January-February 2009 the spot market prices of prime hard coking coal fell to around USD 135/T. So SAIL would be paying a high premium for its coking coal from its long term suppliers. Relying on McCloskey's Coal Report of October 28, 2008, it was said that SAIL was pushing back stems (a term used in maritime transportation to mean shipping/loading arrangements) as the demand for steel had declined. The respondents therefore said that SAIL had never intended to take up the Respondents' various offers for the short-delivered coal because of the fall in coal price such that it became no longer beneficial to do so.

176. However, interesting and realistic the theory propounded by the Respondents may be, the fact still remained that the Respondents had failed in the performance of the Contract, giving the Claimant the liberty to exercise its right under Para 9 of the GCA. If indeed SAIL was behaving as the Respondents suggested it did, the Respondents could have simply offered and made delivery of the full contracted Materials much earlier rather than wait until the threat of legal proceedings. As it is, without any factual witness from the Respondents, the full facts can never be ascertained. The Tribunal can only make its decision on what is before it and what can actually be ascertained."

63. The Tribunal analysed the evidence of both Mr. Rawat and Mr. Malhotra and came to the conclusion that SAIL had affected the shortfall of supply during the FDP into the overall requirement for 2008-09. It cannot be said that the said conclusion was beyond the scope of the arbitral proceedings or not based on any evidence whatsoever. With their affidavits the internal notes of SAIL regarding requirement of coking coal for 2007-08 and 2008-09 were enclosed. The extensive cross-examination of the two witnesses does indicate that there was a decision taken at the EJC for sourcing the shortfall during the FDP and subsequent delivery periods.

64. The Tribunal's analysis of the invoices attached to Exhibit C-85 to the Statement of Claim showed 397,543 MT received from BHP, 198,155 MT from Peabody and 207,697 MT from Anglo. The Tribunal held that there

need not be a specific attribution or earmarking of a specific shipment from specific supplier to be considered as risk purchase coal. There was no obligation on SAIL “to have to connect each and every procurement from BHP, Anglo and Peabody to the shortfall of cargo”. The findings in para 174 of the Award are purely factual based on the figures produced before the Tribunal. The overall conclusion drawn by the Tribunal, on the evidence of SAIL’s witnesses, was that SAIL “had taken into consideration the amount of coal not delivered by the Respondents in 2007-2008 and factored them into the overall coal requirements for 2008-2009.”

65. On the above aspects, as can be seen from the submissions made, counsel for Vale and AMCI treated these proceedings under Section 34 of the Act as a first appeal on facts and took the court through several pages of documents and depositions of the witnesses. At the risk of repetition it must be stressed that the Court hearing a petition under Section 34 of the Act is not expected to re-examine the evidence that has been analysed threadbare by the arbitral Tribunal and interfere only because it is possible to take a different view. The Court is not persuaded to do so in the present case.

66. The Tribunal’s conclusion in the final Award that SAIL had made a ‘conscious’ decision to procure additional quantities of coal to make up for the ‘lost’ quantity calls for no interference.

Quality of risk purchase coal

67. On the question of the quality of coal, it is submitted by Vale and AMCI that Para 9 of the GCA required that coal to be purchased in exercise of the right there under must be “similar” to the coal agreed to be procured under the Contract. However, SAIL had not led any evidence to establish this. Further, SAIL had redacted the specifications of the coal in the copies of the contracts with other suppliers produced by it during discovery. Therefore, it

was not possible to precisely compare the risk purchase coal with the contracted coal. It is submitted that in Paras 192 and 193 of the Award, the Tribunal referred to the shipping documents of the other LTSs to compare the specifications of the alleged risk purchase coal with the contracted coal. In doing so, the Tribunal ignored that such shipping documents did not contain complete specifications of the alleged risk purchase coal. Reliance is placed on the decisions in ***Highway Engineering Pvt. Ltd. v. Union of India* (1997) 1 Arb LR 128 (Delhi); *Flowmore Private Limited v. National Thermal Power Corporation* (2009) X AD (Delhi) 486; *Union of India v. Kundra Shoes* 2007 (2) Arb LR 471 (Delhi) and *Union of India v. Peekay Industries* 2008 (3) Arb LR 569 (Delhi)**. Since SAIL had deliberately and willingly withheld evidence on specification of material purchased under the alleged risk purchase action, the Arbitral Tribunal ought to have drawn an adverse inference against SAIL in terms of Sections 101, 102, 106 and 114 of the Evidence Act, 1872 (“Evidence Act”). In this regard, reliance is placed on the decisions in ***Kamakshi Builders v. Ambedkar Educational Society* (2007) 12 SCC 27, *Gopal Krishnaji Ketkar v. Mohamed Haji Latif* (1968) 3 SCR 862; *Narayan Govind Gavate v. State of Maharashtra* (1977) 1 SCC 133**.

68. The Tribunal analysed in great detail the descriptions of coal appearing in the contracts between SAIL and its three LTSs for the period July 2008-June 2009. It also examined the shipping documents and commercial invoices which indicated two of the factors which were of concern to the parties, namely moisture and ash content. In regard to the third supplier, the shipping document gave even more details and these were considered by the Tribunal.

69. The Tribunal discussed the evidence of the expert Dr. Bristow in great detail about the quality of the coking coal sourced by SAIL from other LTSs. It did a comparison of the material specifications of the contracted materials

with Vale and AMCI and the coal supplied by BHP, Anglo and Peabody. It came to the conclusion that “Dr. Bristow viewed that the coal purchased from BHP and Anglo were superior to the contracted material based on his personal knowledge of the coal emerging from his familiarity with the coals that are mentioned in the specifications”.

70. Given the extensive documentation already available from which the Tribunal was able to make a detailed analysis for the purposes of determining the quality of coal procured by SAIL, the criticism that the Tribunal failed to specifically rule on the effect of redaction of the documents by SAIL is not justified. In para 161 of the Award the fact that the copies of the contracts furnished by SAIL were in a redacted form was noted. Further, the fact that on the direction of the Tribunal the originals of the said documents were made available for inspection during the course of oral hearing was also noted. The entire transcript of the Tribunal’s proceedings is available. It bears out that at the arbitral hearing the complete original un-redacted agreements were made available to counsel for Vale and AMCI. SAIL’s witnesses were cross-examined extensively regarding the statements made by them in their affidavits about the purchase of additional quantities of coal during 2007-08. The case set up in the affidavits of SAIL’s witnesses was severely tested by the counsel for Vale and AMCI. The Court is satisfied that no procedural irregularity was committed by the Tribunal and that a full effective opportunity was indeed provided to both Vale and AMCI to establish their respective cases.

71. After the above detailed analysis of the evidence the Tribunal concluded that the coal purchased by SAIL from the three LTSs post July 2008 “belong to the same class of hard coking coal as those of the contracted materials and were not in fact superior”. This was a possible view to take on the evidence placed on record before the Tribunal. No ground for interference under

Section 34 of the Act is made out.

Quantification of damages

72. As regards the quantification of the damages, it is a settled principle that the defaulting party is liable to pay the aggrieved party for the breach of contract. The Bills of Lading and invoices produced by SAIL described the quantity and quality of the coal procured from the LTSs. The Tribunal in quantifying the damages referred to the principles enunciated by the Supreme Court in ***Murlidhar Chiranjilal v. Harishchandra Dwarkadas AIR 1962 SC 366*** and ***Muna Sona Sundaram Chettiar v. Sona Theeanna Chockalingam Chettiar AIR 1938 Mad 672***. The Tribunal went by the chart prepared by AMCI along with its final submissions and determined the differential price for the quantity of 753,461 MT of coking coal. It also undertook the exercise of verifying that the gross quantities and paid tonnages largely corresponded with the bills of lading and accompanying commercial invoices for each of the shipments.

73. Whether the disclosure of further specifications than that that were made available may have led to a different conclusion is a matter of conjecture. The Tribunal has after discussing the evidence of expert witnesses and analyzing the documents on record taken a particular view which is a plausible one. While it may be possible to argue that another view is also possible, that by itself does not constitute a valid ground for a court to interfere under Section 34 of the Act. Consequently, this Court is unable to find any error in the quantification of the damages by the Tribunal.

Costs and pendente lite interest

74. As regards *pendente lite* interest, cogent reasons have been given by the Tribunal for awarding 1.25% above the LIBOR rate as regards the *pendente*

lite interest and, therefore, the rate of interest is fixed at 2.335364% per annum on a simple basis to run from the date of the request for Arbitration (2nd April 2009) until the date of this award (1 year + 343 days). This has been computed as USD 6,897,815.48. Even as regards the award of arbitration and legal costs, this Court is unable to find any ‘patent illegality’ in impugned Award.

Post-Award interest

75. After the making of the Final Award on 10th March 2011, Vale and AMCI each filed an application under Section 33 (4) of the Act stating that although the Tribunal had rejected SAIL’s prayer for post-Award interest, this rejection had been omitted from the Award. They accordingly requested the Tribunal to pass an additional Award under Section 33(4) of the Arbitration Act expressly recording that SAIL’s claim for post-Award interest had been rejected.

76. By a decision dated 16 May 2011, the Tribunal dismissed the said applications by AMCI and Vale on the ground that there was no error in the final Award. The Tribunal observed that the final Award had clearly rejected SAIL’s prayer for grant of interest in the pre-arbitration period. After referring to Section 31(7) (b) of the Act, the Tribunal observed that it had “consciously omitted” to make any direction on post-Award interest in the final Award.

77. AMCI has challenged the aforesaid decision dated 16th May 2011 of the Tribunal by filing a separate petition OMP No. 451 of 2011 under Section 34 of the Act inter alia on the grounds that:

a. The Tribunal made an unnecessary and meaningless reference to Section 31(7) (b) of the Act. It was clear from Para 14 of the decision and the dispositive paragraph (V) of the final Award that the Tribunal had rejected

the claim for post-Award interest. Section 31(7) (b) of the Act therefore had no applicability.

b. The decision amounted to a review of the final Award which the Tribunal was not permitted to do under Section 33 of the Act.

78. Vale has alternatively submitted that post-Award interest of 18% per annum was contrary to the recent trend in India where courts awarded low interest rates where the award amount was in USD. Reference is made to the decisions in *M.M. T. C v. Al Bamar Company Ltd. (2009) 155 PLR 13*, (where this Court was guided by the LIBOR rates where the amount awarded was in USD) and *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy (2007) 2 SCC 720*.

79. In para 126 of the Statement of Claim, SAIL claimed interest 12.75% per annum “from April 2008 till the date of its realization”. In para 219 of the impugned final Award the Tribunal discussed the issue of award of interest. It concluded that the interest could be allowed on the amount of damages in USD “only from the date of commencement of this arbitration, viz., 2nd April 2009 until the date of this Award.” The Tribunal expressly rejected SAIL’s claim for interest @ 12.75% based on the Prime Lending Rate (PLR) of the State Bank of India since that was applicable only on domestic loans in Indian currency. It concluded that the LIBOR rates for USD “provides a better baseline to gauge the costs of funds of USD to the claimant as it represents the lowest real-world cost of unsecured funding in the London market.” On that basis, it fixed the rate of interest by adding 1.25% to the LIBOR rate and awarded simple interest at 2.335364% per annum on the sum awarded as damages. The dispositive para (V) of the Final Award stated “all other claims are accordingly rejected.”

80. Since the only period for which the Tribunal had awarded interest was from 2nd April 2009 till the date of the Award, the rejection of all other claims meant that the Tribunal rejected the claim for interest not only for the period prior to 2nd April 2009 but for the period after the Award till “till the date of its realization” which had been prayed for by SAIL. There was no occasion therefore, for the Tribunal to refer Section 31 (7) (b) of the Act since that would have applied, if at all to an international Award, only where the Award was otherwise silent on the question of post-Award interest. With the final dispositive para (V) of the Award stating that “all other claims are accordingly rejected” SAIL’s claim for post-Award interest “till the date of its realization” was in fact rejected.

81. While the Tribunal has correctly, in its Order dated 16th May 2011, observed that “the Award is clear in its terms that interest prior to the request for arbitration although claimed is not awarded”, it erred in observing that in the final Award the Tribunal had consciously “omitted to make any direction on the post-Award interest.” Dispositive para (V) of the final Award in fact rejected all “other claims” which included SAIL’s claim for post-Award interest. The Tribunal also erred in referring to Section 31 (7) (b) of the Act since that provision was not attracted. With SAIL not having assailed the final Award, the Tribunal could not have by its Order dated 16th May 2011, in the applications filed by Vale and AMCI, clarified that it had “consciously omitted” to pass an order on post-Award interest. To this limited extent O.M.P. No.451 of 2011 succeeds.

82. In that view of the matter, it is not required for this Court to consider the alternative plea of Vale that the rate of post-Award interest was excessive.

Conclusion

83. In conclusion and for the aforementioned reasons,

(a) all objections by Vale and AMCI to the impugned Award dated 10th March 2011 passed by the Tribunal are hereby rejected. OMP Nos. 414 and 415 of 2011 are hereby dismissed with costs of Rs. 1 lakh each to be paid by each Petitioner to SAIL within four weeks.

(b) The observation of the Tribunal in its Order dated 16th May 2011 to the extent that it had consciously omitted to issue any direction as regards the post-Award interest in the final Award is hereby set aside. The reference in the said Order to Section 31 (7) (b) of the Act is also set aside. The final Award dated 10th March 2011 rejecting “all other claims” of SAIL including its claim for post-Award interest, is upheld. OMP No. 451 of 2011 is disposed of in the above terms.

S. MURALIDHAR, J.

MARCH 30, 2012

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