

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

+ **O.M.P. 76/2015 & I.A. No.13588/2017**

Reserved on: 20.12.2018

Date of decision : 28.02.2019

STEEL AUTHORITY OF INDIA LTD Petitioner
Through Mr.Sanjay Jain, Sr. Adv. with
Mr.Sunil K. Jain, Mr.Madhur Jain,
Mr.Abhishek Jain, Ms.Anusha
Agarwal and Mr.Yuvraj Sharma,
Advs.

versus

M/S SEASPRAY SHIPPING CO LTD Respondent
Through Mr.Gaurav Mitra, Mr.Dhruv
Kapur, Ms.Deepali Dwivedi,
Mr.Aliff Fazelboy and Mr.Adit
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 20.08.2014 passed by the Arbitral Tribunal adjudicating the disputes that had arisen between the parties in relation to the Agreement dated 04.12.2007 executed between the parties.

2. In the order dated 22.02.2017 passed by this Court, it was observed that the Arbitral Tribunal has not given reasons for its conclusions in respect of issues at paragraphs 71.5 to 71.7 of the Award. Consequently, it was directed that the Arbitral Tribunal which gave the Award will, for the limited purpose of giving the reasons in respect of the conclusions in

the Impugned Award with regard to the paragraphs (issues *sic*) 71.5 to 71.7, reconvene and furnish reasons to the Court.

3. In compliance with the above directions, the Arbitral Tribunal has passed an Additional Award dated 10.06.2017 giving reasons in support of its conclusions in paragraphs (issues *sic*) 71.5 to 71.7 of the Award dated 20.08.2014. The petitioner has thereafter filed I.A. No.13588/2017 challenging the Additional Award and the reasons given therein.

4. The disputes between the parties are in relation to the Contract of Affreightment dated 04.12.2007 (hereinafter referred to as the 'COA') whereby the petitioner as Charterer had engaged the services of the respondent as owners to ship a Cargo of 2,000,000 MT 5% more or less in Charterer's Option (5% Charterer Option to be declared latest on 30.09.2012) of Coking Coal in bulk from Queensland, Australia for discharge at the East Coast in India. The Shipment period was April, 2008 to December, 2012. The Shipment was provided to be on "evenly spread per month basis".

5. Disputes arose between the parties due to non supply of cargo under the COA by the petitioner, leading to invocation of Arbitration.

6. The petitioner thereafter, by an e-mail dated 11.09.2012 exercised its option to reduce the quantity of shipment by 5%. Immediately thereafter, by a separate Fax Message dated 11.09.2012, the petitioner terminated the Agreement invoking "Default Clause" in the Agreement. This gave rise to a dispute between the parties, with the respondent claiming that the petitioner had no unilateral right to terminate the

Agreement, and the petitioner claiming that such right was vested in it as per Clause 62 of the COA.

7. The respondent filed its claims before the Arbitral Tribunal, which have been allowed by the Arbitral Tribunal by its Award dated 20.08.2014 holding that the termination of the Contract was invalid and that the respondent was entitled to damages of USD 14,596,890.11 less 2.5% address commission for the petitioner and 1.25 % brokerage to be deducted and paid to the Indian Broker as per Clause 48 of the COA. The Arbitral Tribunal further directed the payment of interest at the rate of 6% p.a. from 01.12.2012 to the date of the Award and thereafter at the same rate till the date of payment.

8. As noticed above, pursuant to the order dated 22.02.2017 passed by this Court, the Arbitral Tribunal by its Additional Award dated 10.06.2017 supplied reasons for its conclusions on issues in paragraphs 71.5 to 71.7 of the Award. In the said Additional Award, the Arbitral Tribunal held that Clause 62 of the COA has to be read in context with the other provisions of the COA and when so read, it could apply only to circumstances constituting frustration of the Agreement and is directed at the Supplier of coal in Australia rather than the petitioner. The Arbitral Tribunal further held that even assuming that Clause 62 of the COA was to be read as empowering the petitioner to unilaterally terminate the Agreement, the notice dated 11.09.2012 cannot be termed as a notice under Clause 62 of the COA and therefore, termination of the Agreement was not valid.

9. As far as the consequential damages are concerned, the Arbitral Tribunal found that the respondent need not go to the market to hire a vessel in order to prove its damages and relying upon the market rates at the Baltic Exchange Fixture for the balance quantity, awarded damages in favour of the respondent.

10. Learned senior counsel for the petitioner submits that the Arbitral Tribunal has failed to adopt a judicial approach as it disregarded the terms of the Contract while arriving at its finding as regards the nature of the Contract. He submits that the Agreement was merely a Memorandum of Understanding and not a binding Agreement between the parties.

11. He further submits that Clause 62 of the COA gives power to the petitioner to unilaterally terminate the Agreement for convenience and therefore, the finding of the Arbitral Tribunal that Clause 62 of the COA can be invoked only in circumstances of frustration of Agreement is contrary to the terms of the Agreement itself and cannot be sustained.

12. He further submits that Clause 62 of the COA uses the word “time or times agreed” and therefore, the termination would operate for the entire unshipped quantity, whether prior or post such termination. There is thus, no question of any retrospective application of the termination notice in the present case.

13. He further submits that the Impugned Award and the Additional Award are in conflict with the public policy of India because they proceed to grant damages without actual damages being pleaded or proved by the respondent.

14. On the other hand, learned counsel for the respondent submits that the COA was a binding Agreement between the parties. It contained all the terms necessary for the Agreement, that is, the quantity to be shipped, period of contract, rate, and the manner in which the vessel is to be nominated and Coking Coal shipped. He submits that relying upon the terms of the Agreement, the Arbitral Tribunal has rightly concluded the same to be a binding Contract.

15. As far as Clause 62 of the COA is concerned, he submits that Clause 62 is not a clause empowering the petitioner to terminate the Agreement for convenience. He submits that any such clause would infact, be not enforceable and be null and void. Without prejudice to the above arguments, he submits that in any case, Clause 62 of the COA is ambiguous in nature inasmuch as it uses “Supplier/Charterer” in conjunction while granting power to them to terminate the Agreement upon their failure to perform the Agreement. He submits that “Supplier”, not being a party to the Agreement, can certainly not have the power to terminate the Agreement. He submits that Clause 62 of the COA being ambiguous, has to be read against the petitioner and cannot be enforced. He submits that with regard to Clause 62, a purposive interpretation is to be adopted whereunder the said Clause has to be read in conjunction with other clauses of the said Agreement, particularly Clauses 1 to 5 of the COA. So read, Clause 62 can apply only to circumstances beyond the control of the Charterer/petitioner and is not a clause of termination for convenience. He further submits that in any case, the Arbitral Tribunal having interpreted Clause 62 of the COA in a particular manner, it would

not be open for this Court to set aside this Award merely because it prefers another interpretation to the same.

16. Learned counsel for the respondent further submits that, on facts, the Arbitral Tribunal has found that the fax message dated 11.09.2012 does not amount to a declaration of termination of the Agreement. This being a factual finding, again it would not be open for this Court to re-appreciate the evidence and come to a different conclusion. He further submits that in any case, the finding of the Arbitral Tribunal is correct inasmuch as the fax message dated 11.09.2012 was not addressed to the respondent but was addressed to 'Transchart' and to 'Sujora Shipping Pvt Ltd.', the Indian Broker. Further, on the same day, a little prior to the said fax message, the petitioner in exercise of its power under COA, had exercised its option to reduce the quantity by 5%. Therefore, there was no clarity in the mind of the petitioner itself as to whether it was terminating the Agreement or continuing to abide by it, albeit for a reduced quantity. In fact, the petitioner in its Statement of Defence has further relied upon a message received from Transchart on 13.09.2012 confirming the reduction in the quantity, thereby implying that even on 13.09.2012 the Agreement was in full force and not terminated.

17. He further submits that even assuming that the petitioner had a right to unilaterally terminate the Agreement under Clause 62 of the COA and did infact terminate the same by its fax message dated 11.09.2012, the same could only have a prospective effect. The Arbitral Tribunal has also held that there can be no retrospective effect given to such termination notice. As on 11.09.2012, the petitioner was in default for

the period of June, 2011 to September, 2012 and only three months of the contractual period were left thereafter. The respondent therefore, at a minimum, was entitled to proportionate damages for this period.

18. As far as the damages are concerned, relying upon the Illustrations to Section 73 of the Indian Contract Act, 1872 and the judgment of this Court in *M/s Saraya Distillery v. UOI & Anr.*, AIR 1984 DEL 360, he submits that the respondent was not required to procure the vessel for purposes of claiming damages. The damages have been rightly assessed as a difference between the contractual rate and the spot rate for the period of default. Infact, such default rates have been taken from the rates published by Baltic Exchange and therefore, cannot be challenged. Further the Arbitral Tribunal has rightly reduced the quantity as also allowed deduction to be made from the damages in accordance with the COA. He also relies upon Clause 1(d) of the COA which provides that in case of a default by the respondent, the petitioner would be entitled to damages calculated on spot basis. He submits that similar method had to be adopted for calculating the damages suffered by the respondent, therefore, the Award cannot be faulted on this ground.

19. He further submits that the submissions of the learned senior counsel for the petitioner that the damages could only have been awarded on the basis of a long term contract is again ill-founded inasmuch as, at the time of the termination of the Agreement, only three months of the contractual period was left and therefore, the spot rate basis was the correct method of determination of the damages.

20. In rejoinder, learned senior counsel for the petitioner submits that there is no ambiguity in Clause 62 of the COA. The word “Supplier/Charterer” referred to the petitioner only albeit in two different capacities. Under some circumstances, the petitioner is a supplier of coal as well and therefore, Clause 62 of the COA intentionally and rightly uses the term “Supplier/Charterer”. He submits that in any case, in the present facts, the position of the petitioner as a Charterer cannot be challenged and clearly therefore, exercise of power by the petitioner in terms of Clause 62 of the COA cannot be challenged.

21. As far as the communication of the termination letter to the respondent is concerned, he submits that all communications were being routed to the respondent through Transchart and therefore, there can be no benefit granted to the respondent only on this account.

22. Further, he submits that the Arbitral Tribunal has placed its entire reliance on the judgment of the Supreme Court in *A.T. Brij Paul Singh & Ors. v. State of Gujarat*, AIR 1984 SC 1703. Relying upon the judgment dated 27.07.2018 of this Court in *Zeman Techno Group v. UOI*, FAO (OS) (COMM) 74/2017, he submits the judgment in *Brij Paul Singh* (Supra) is applicable only in cases of construction contracts and therefore, has no application to the facts of the present case.

23. I have considered the submissions made by the learned counsels for the parties.

24. The first issue to be determined is whether the Arbitral Tribunal is right in concluding that the Agreement dated 04.12.2007 was a binding

Contract between the parties and not merely a Memorandum of Understanding or an Agreement to enter into an Agreement in future.

25. Clause 1 of the Agreement gives the quantity of the Coking Coal and its parcel size to be shipped by the petitioner from Queensland (Australia) to the Eastern Coast in India. Clause 2 gives the shipment period to be from April, 2008 to December 2012 extendable upto March, 2013. Clauses 3 and 4 give the details of the vessels to be used, while Clause 5 gives the procedure of nomination of vessel and Clause 6 the loading and unloading parameters. Other terms of the Agreement also clearly show that the above Agreement is a binding Contract between the parties and cannot be termed as a Memorandum of Understanding or Agreement to enter into an Agreement in future. The Arbitral Tribunal has also considered this issue in its Impugned Award dated 20.08.2014 and I do not find any reason to interfere with the said finding.

26. As far as the interpretation and effect of Clause 62 of the Agreement is concerned, it would first be advisable to quote Clause 61 and 62 of the Agreement as under:

“61.FORCE MAJEURE CLAUSE:

If either Shippers/Charterers be prevented from discharging their or its obligation under this agreement by reason of arrests or restraints by Government or people, war, blockade, revolution, insurrection, mobilisation, strikes, civil commotions, acts of God, plague or other epidemics, breakdowns of mining, rail, road or port equipment, destruction of material by fire or flood or other natural calamity interfering with production, loading or discharging, the obligations under this agreement shall be

deferred to a date to be agreed considering the length of time required to resume natural operations.

However, if any one occurrence of force majeure continues uninterrupted for 30 days or more or if the total of such occurrence within the agreed shipment period adds to 90 days or more. Owners/Charterers may opt to cancel this agreement without in any way, being liable to the other party for such cancellation. Party invoking protections under such clause within 20 days of the occurrence of force majeure put the other party on notice supported by certificates of Chamber of commerce or concerned Governmental Authority and shall likewise intimate the cessation of such causes. The delivery shall be resumed by the party/parties after cessation of force majeure causes.

62. DEFAULT:

Should Suppliers/Charterers fail to provide materials for shipment or to ship the materials by the time or times agreed upon or should Suppliers/Charterers in any manner or otherwise fail to perform the contract or should a receiver be appointed on its assets or make or enter into any arrangements or composition with creditors or suspend payments (or being a company should enter into liquidation either compulsory or voluntary), the Suppliers / Charterers shall be entitled to declare the contract as at an end without any liabilities on either side.”

27. The Arbitral Tribunal in its Additional Award (Reasons) dated 10.06.2017 has held that Clause 62 was designed to legislate for events constituting frustration of the Agreement and is directed at the Supplier in Australia rather than the petitioner herein, and at events which prevent performance such as the liquidation/insolvency of the Supplier of coal. In reaching this conclusion, the Arbitral Tribunal held that the

interpretation put forward by the petitioner that the Agreement could be terminated at its own convenience would be absurd and would render other clauses in the Agreement, including Clause 61 totally redundant and, therefore, cannot be accepted. The relevant findings of the Arbitral Tribunal are quoted hereinbelow:

“01. In our view, clause 62 must be read in context with the other provisions of the Contract of Affreightment dated 4th December 2007. If there are two possible constructions of clause 62 then the one which would give effect to all the clauses of the Agreement must be adopted and not another which would nullify them. We find that the Claimant’s interpretation gives effectiveness to the rest of the provisions of the Agreement whereas the Respondent’s interpretation would serve to invalidate them. For example, it is impossible to reconcile the Respondent’s binding obligation to ship at least 1,900,000 MT of coal with an interpretation of clause 62 that makes such performance optional. Similarly, an attempt to reconcile the Respondent’s binding obligation to ship the stated cargo within the stipulated shipment period from April 2008 to December 2012 (extendable up to three months in the Charterer’s option) with an interpretation of clause 62 that makes such an obligation optional would lead to an absurdity. We have already held at paragraph 148 of the “Reasons for the Final Arbitration Award” that the Contract of Affreightment (COA) dated 4.12.2007 is a binding contract between the parties and not a mere agreement. We have also observed at paragraph 138 that the very opening words of the COA Agreement state that both parties mutually agree that a “Cargo/Quantity (a) 2,000,000 MT 5% more or less in Charterer’s option (5% Charterer’s option to be declared latest by 30.9.2012) Coking Coal in bulk shall be loaded from Queensland (Australia) for discharge at E.C. India under this Contract of Affreightment”. Therefore as per the COA Respondent-

Steel Authority of India (SAIL) were always obliged to ship 1,900,000 MT at a minimum and a maximum of 2,100,000. We have also observed at paragraph 141 that the language of the COA Agreement is in mandatory and compelling terms and that there is nothing optional and/or non-binding in any of the provisions of clauses 1 (Cargo/Quantity), 2 (Shipment period), 3 (Type of Vessels), 4 (Details of Vessels Likely to perform COA) and 5 (Nomination of Vessels). Even where flexibility is allowed, the limits of the flexibility are strictly imposed and are binding. One therefore cannot come away from a reading of the COA Agreement without concluding that both parties fully intended for it to be binding on themselves. If one were to agree with the Respondent's interpretation of clause 62, it would practically annihilate the binding nature of many clauses in the Agreement including clauses 1,2,3,4 and 5 even though they expressly convey that the parties intended for them to be binding. We are therefore unable to agree with the Respondent's interpretation of clause 62.

We agree with the Claimant's submission that clause 62 was designed to legislate for events constituting frustration of the Agreement and is directed at the supplier in Australia rather than the Respondent or at events which prevent performance such as the liquidation/insolvency of the supplier of coal. Considering the factual matrix in the present case, clause 62 could only have been invoked if a supplier in Australia failed or was unable to supply material for shipment. It cannot be said to operate if the supplier provides coal to the Respondent but the Respondent does not provide the same to the Claimant for shipment, as argued by the Respondent. The failure must be a failure by the supplier which in turn leads to a failure by the Respondent. Clause 62 cannot be interpreted to mean that the Respondent was within its rights to put an end to the COA Agreement when it was in fact executing fixtures in the spot market for the shipment of coal from Australia in the same dates as per the disputes which should have been given to the Claimant instead. If one were to accept the

Respondent's interpretation of Clause 62, it would lead to a situation where the Respondent would have the right to put an end to the contract for its own breaches and thus benefit from its own wrongs. This kind of interpretation would be absurd as it would render other clauses in the Agreement including clause 61 totally redundant."

28. I cannot agree with the finding of the Arbitral Tribunal. The Arbitral Tribunal has proceeded on a totally incorrect premise that an Agreement cannot be put to an end at the convenience of a party to such an Agreement. Having proceeded on this incorrect surmise, it has sought to interpret Clause 62 and thereby restrict its application.

29. In ***Central Bank of India, Ltd, Amritsar v. Hartford Fire Insurance Co., Ltd.***, AIR 1965 SC 1288, the Supreme Court, held as under:

"7. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This Insurance may be terminated at any time at the request of the Insured", and "The Insurance may also at any time be terminated at the instance of the

Company.”These are all the words of the clause that matter for the present purpose. The words “at any time” can only mean “at any time the party concerned likes”. Shortly put clause 10 says “Either party may at its will terminate the policy”. No other meaning of the words used is conceivable.”

30. In ***Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel and Ors.***, (2001) 5 SCC 101, the Supreme Court has held as under:

“49. We are unable to agree with the approach of the High Court and find substance in the contention of Mr Nariman. Clause (17) is in the nature of express stipulation that before delivery of possession, the contract could be unilaterally terminated. When there is no ambiguity in the clause, the question of intendment is immaterial. The fact that the clause is couched in a negative form is of no consequence. The intention is clear from the plain language of clause (17) of the agreement. In the case in hand, Section 202 has no applicability. It is not a case of agency coupled with interest. No interest can be said to have been created on account of plaintiff being permitted to prepare the Scheme and take ancillary steps. The plaintiff could not get possession before declaration under Section 21 of the ULC Act.....

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51. It has been held that "in the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible". In the present case we are concerned with an unambiguous document and, therefore, we have to go by its plain meaning. Further, affidavit-cum-declaration only

reiterated what was contained in the agreement. It did not enlarge the agreement. It did not substitute any clause in the agreement. It was not a document executed between the parties. It was a document executed by original Defendant no.1 alone for the purposes of filing it before the competent authority. Clause 17 of the agreement does not call for any other interpretation except that the contract could be unilaterally rescinded before delivery of possession.

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54. In our view, the aforesaid passage has been misread in National Fertilizers case. Further in Central Bank of India Ltd.v. Hartford Fire Insurance Co. Ltd., decisions of the Madras High Court and of this Court (Union of India v. Maddala Thathaiah) were considered. The question in that case was whether the insurance policy had been terminated. This Court was concerned with a clause in an insurance policy which, inter alia, provided that the policy can be terminated at the option of the Insurance Company. The contention of the respondent Insurance Company was that it had power under the said clause to terminate the contract at will and it had duly exercised that power. The appellant's contention was that it was implied in the clause that termination could only be for a reasonable cause which did not exist in that case. It was further contended that if this interpretation of implied term is not accepted, the clause giving such right to terminate at will without reasonable cause must be treated as void and ignored. This Court said: (AIR p. 1290, para 5)

“5. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such

that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says 'this insurance may be terminated at any time at the request of the insured', and 'the insurance may also at any time be terminated at the instance of the company'. These are all the words of the clause that matter for the present purpose. The words 'at any time' can only mean 'at any time the party concerned likes'. Shortly put clause 10 says 'either party may at its will terminate the policy'. No other meaning of the words used is conceivable."

55. Regarding validity of the clause which gave power as aforesaid, this Court held: (AIR pp. 1292-93, paras 15-16)

"15. The next argument was that clause 10 was bad as it gave more option to the insurer than to the assured. We express no opinion as to whether the clause would be bad if it did so, for we are clear in our mind that it did not. The argument that it did was based on the use of the word 'request' in the case of a termination by the assured and 'option' in the case of a termination by the insurer. It was said that the word 'request' implied that the request had to be accepted by the insurer before there was a termination whereas the word 'option' indicated that the termination would be by an act of the insurer alone. We are unable to agree that such is the meaning of the word 'request'. In our view, the clause means that the intimation by the assured to terminate the policy would bring it to an end without more, for the clause does not say that the

termination shall take effect only when the assured's request has been accepted by the insurer.

16. Lastly it was said that the termination of the contract by the letter of August 7, 1947 was a conditional termination and as the condition was impossible of performance in the circumstances prevailing, there was in fact no termination. That condition, it was said, was the removal of the goods from Bakarwana Bazar, Amritsar to a safer locality. We have nothing to show that the condition, if it was such, was impossible of performance. However, that may be, there is no question of any condition. The letter clearly terminated the policy. It gave an option to the assured to keep the policy on its feet if it did something. Further we do not think that it can be said that if a party has a right at will to terminate a contract, the imposition by him of a condition, however hard, on failure to fulfil which the termination was to take effect, would make the termination illegal, for the party affected was not entitled even to the benefit of a difficult condition. The agreement was that the power to terminate could be exercised without more and that is what we think was done in this case.

(emphasis has been supplied by us)”

56. From the aforesaid, it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held

to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted.”

31. This Court, after analyzing various judgments on this issue, in *M/s Classic Motors Ltd. v. Maruti Udyog Ltd.*, 1996 SCC OnLine Del 872, in relation to the franchise agreement, has held as under:

“Interpretation and meaning of the expression “without assigning any cause:”

68. The aforesaid expression appears in clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days ‘without assigning any cause’. The present agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law.

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70. In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to

be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

71. On an overall view of the entire matter, it appears to me that the present agreement was never intended to be permanent and that in respect of dealership sales agreements between private parties such agreements could never be held to be perpetual unless so intended by the parties and specifically stated in the agreement itself. On a reasonable construction of the agreement in hand I hold that either party to the agreement was entitled to terminate the contract without assigning any reason by giving 90 days notice or even without giving any notice upon the happening of an event. Termination without cause in common law is a valid power which the parties may give to themselves.

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85.The parties were private parties dealing in the realm of private contract. Therefore, it is for the defendant to decide whether in view of such allegations and evidence against the defendant the agreement should not be terminated or not.....However, in view of the specific provision in the agreement that the defendant could terminate the contract in accordance with clause 21 without assigning any reason, which according to the defendant was resorted to in the present case, this finding appears to be not very material for the purpose of answering issue No.1.”

32. In *Oil and Natural Gas Corporation Ltd., Mumbai v. M/s Streamline Shipping Co. Pvt. Ltd.*, 2002 SCC OnLine Bom 303, the High Court of Bombay, held as under:

“5. Having heard the learned Advocate General for the appellant and Mr. Thakkar for respondent, in our opinion, it is not possible to agree with the view expressed by the learned single Judge that clause 19.3 is unconscionable and opposed to public policy. Clause 19.3 gives power to the appellant to determine the contract after expiry of one year without assigning any reason. All that the appellant did was to exercise that right or power to terminate the contract whose terms and conditions were well known and agreed to by the respondent. Thus the contract by virtue of clause 19.3 sets out the power of termination by the appellant and the appellant has so acted under that clause. The clause while setting out the right of termination further says that the appellant can do so without assigning any reasons for the same. However, in the present case the duty to act fairly is sought to be imported into the contract to modify and alter its terms and create an obligation upon the appellant which is not there in the contract. It is settled position of law that where the contracts are freely entered with the State there is no scope for invoking the doctrine of fairness and reasonableness for the purpose of altering or adding to the terms and conditions of the contracts. In such cases the question of public law based on Article 14 of the Constitution do not arise and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of Specific Relief Act providing for non-enforceability of certain types of contracts.”

33. In ***Altus Group India Private Ltd. v. Darrameks Hotels & Developers Pvt. Ltd.***, MANU/DE/1362/2018, this Court held that:

“9. In my opinion, the Arbitrator has completely misguided himself. It cannot be denied that commercial contracts by their very nature are determinable. A

contract may provide for the termination of the contract with or without a cause. Private commercial transactions can be terminated by the parties even without assigning any reason, with a reasonable period of notice in terms of a clause in the agreement authorizing such termination. Such termination cannot be challenged even on the grounds of it being mala fide.”

34. Thereafter, the Division Bench of this Court while deciding the appeal against aforesaid order, in ***M/s. Darrameks Hotels & Developers Pvt. Ltd. v. M/s Altus Group India Pvt. Ltd***, 2018 SCC OnLine Del 9335, held as under:-

“6. We do not find any merit in the said stand and stance as Sub-clause (IV) of Clause (9) is clear and categoric and does not suffer from any doubt or ambiguity. Either party had option to terminate the contract by giving thirty days notice in writing. Sub-clause (II) on the other hand is a specific clause, which empowered and gave option to the respondent i.e., to the Project Manager and Consultant to terminate the agreement in case of non-payment of fees within thirty days from receipt of reminder by a courier letter. There would be instant termination on satisfaction of the stipulations under Sub-clause (II), whereas in case of Sub-clause (IV) termination would take place vide thirty days prior notice. Sub-clause (II) had dealt with a specific eventuality, i.e., non-payment of fee by the owner/appellant to the Project Management and Consultant/respondent. Sub-clause (IV) obviously was incorporated with the intention giving an option to the either party to terminate the contract. No doubt, Sub-clauses (I) and (IV) would overlap insofar as right of the owner, i.e., the appellant is concerned, but this cannot be a ground to hold that Sub-clause (IV) would not be available to the respondent. Sub-clause (IV) in plain and simple words thus states that either party could terminate the contract by giving thirty days notice in writing to the other. In a way, both the appellant and the respondent were placed equally and given same right and option of termination by thirty days notice.

7. Learned single Judge in the impugned order has referred to and quoted from several decisions of the Supreme Court in *Central Bank of India, Limited, Amritsar v. Hartford Fire Insurance Co., Limited*, AIR 1965 SC 1288, *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel*, (2001) 5 SCC 101, *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL)*, 2017 (12) SCALE 241. Reference was also made to judgments of the Delhi High Court in *Classic Motors Limited v. Maruti Udyog Limited*, (1997) 65 DLT 166 and judgment of the Bombay High Court in *Oil and Natural Gas Corporation Limited v. Streamline Shipping Company Private Limited*, 2002 SCC OnLine Bom 303. After examining scope and ambit of judicial interference, it has been held that clause 9(IV) being explicit was the final word on the intent of the parties and clearly had authorized either party to terminate the agreement without cause by simply giving notice to the other. The Award, on the other hand, was counter and contrary to clause 9(IV) and the learned Arbitrator had, therefore, committed a fundamental error in holding that the contract had not provided for option to the respondent for termination of the agreement without cause.

8. The view we have taken upholding the decision of the learned single Judge does not conflict with the ratio in *ITD Cementation India Limited* (supra). Construction of the terms of the agreement is within the jurisdiction of the Arbitral Tribunal and if the view taken is a plausible one, Courts would not interfere and substitute its view in place of the interpretation accepted in the Award. This however, is not to say that in no case the Court can interfere even when interpretation is plainly abstruse and esoteric. In *Nabha Power Limited* (supra), it was observed by the Supreme Court that a multi-clause contract has to be understood and interpreted in a manner that a particular clause of the contract should not do violence to another part/clause of the contract. In ***Western Geco International Limited***, (2014) 9 SCC 263, it was observed that “fundamental policy of Indian law” connotes some matter, which concern public good and public interest and an Award which on the face of it is patently in violation of statutory provisions is not in

public interest as it would adversely affect administration of justice.

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12. The present case, according to us, falls within the four corners of the expression “patent illegality” as expounded and explained in the said decisions, as clause 9(IV) has been completely misconstrued and made inconsequential and redundant. There is apparent and patent fallacy and flaw in the interpretation which is contrary to the plain language and therefore must be checked and corrected. This is not a case of fair minded or reasonable construction, but a construction which is ex facie contrary to the written and agreed clause and the interpretation is completely erroneous. Interference was, therefore, justified and required.....”

35. This Court again in ***Pipavav Energy Pvt Ltd v. Madhavi Procon Pvt. Ltd.***, 2018 SCC OnLine Del 13100, followed the aforesaid view and held:-

“14. A reading of Clause 29.1.1 clearly shows that the petitioner may “at any time”, terminate the Contract “for any reason” by giving the respondent a notice of termination referring to the said Clause. Admittedly, the petitioner had addressed the termination notice dated 24.11.2011 to the respondent relying upon the said Clause.

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21. In the present case, there was no challenge made by the respondent to Clause 29.1 of the Agreement. The petitioner having exercised its right under the said Clause, therefore, the finding of the Arbitrator that such termination is invalid, cannot be sustained, being contrary to the terms of the Contract between the parties.

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23. As far as the submission of the learned senior counsel for the respondent that the jurisdiction of this Court is limited and this Court cannot interfere with the finding of the Arbitrator on the interpretation of the Contract or on facts, does not persuade me in the facts of the present case. The Arbitrator, in the Impugned Award has not interpreted Clause 29.1 at all. In fact, the effect of Clause 29.1 of the Agreement, though raised by the petitioner as a defence, has been completely ignored by the Arbitrator. The Arbitrator has held that the termination of the Contract by the petitioner was unjustified, however, as held by the Supreme Court in *Central Bank of India Ltd. (supra)*, once the contract did not require any reason to be stated for terminating the contract and empowered the petitioner to terminate the contract “for any reason”, the Court/Arbitrator must give effect to the plain meaning of the words, even if it may dislike the result.”

36. In view of the above, the premise of the Arbitral Tribunal that a Clause in the Agreement empowering one of the parties to terminate the Agreement at its convenience and without there being a justifiable cause for the same would make other clauses redundant, cannot be accepted. The entire foundation of interpreting Clause 62 as being applicable only to events constituting frustration of the Agreement is, therefore, fallacious and unsustainable in law. Once the foundation goes, the building has to fall.

37. Clause 62 of the Agreement empowers the petitioner to declare the Contract as at an end in case it fails to perform the Contract “in any manner or otherwise”. Clearly, therefore, this was an agreement to terminate the Agreement for convenience by the petitioner. As held by the Supreme Court in *Competition Commission of India v. Fastway Transmission Private Limited and Others*, (2018) 4 SCC 316, the words

“in any manner” are words of wide import and must be given their natural meaning.

38. The submission of the learned counsel for the respondent that the use of the words “Suppliers/Charterers” makes Clause 62 ambiguous cannot be accepted. The words “Suppliers/Charterers” refer to the petitioner alone. In any case, the use of these words in Clause 62 cannot denude the effect of the Clause in any manner.

39. I am fully conscious of the limitation on the power of this Court while exercising its jurisdiction under Section 34 of the Act, however, at the same time, if the interpretation put forward by the Arbitral Tribunal on the face of it is incorrect, rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

40. In *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor* (1999) 8 SCC 122, the Supreme Court had highlighted the exception to the principle of hands-off approach by holding that in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the Arbitrator ignores it and awards the amount despite the prohibition in the Agreement, the Award would be liable to be set aside.

41. In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises & Anr.* (1999) 9 SCC 283, the Supreme Court reiterated that where there is no question of interpretation as the language of the contract is absolutely clear and unambiguous, by ignoring such

terms the Arbitrator would have travelled beyond his jurisdiction and the Award would be liable to be set aside.

42. In *Rashtriya Chemicals and Fertilizers Limited v. Chowgule Brothers & Ors.*, (2010) 8 SCC 563, the Court held that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties.

43. In *Amravati District Central Cooperative Bank Ltd. v. United India Fire and General Insurance Company Ltd.*, (2010) 5 SCC 294, the Supreme Court held that where the interpretation put by the Arbitrator on the contractual terms is contrary to the express words of the contract, the Award would be liable to be set aside.

44. Having held that Clause 62 of the Agreement empowers the petitioner to terminate the Agreement at its convenience, the finding of the Arbitral Tribunal that the letter dated 11.09.2012 does not amount to termination of the Agreement needs to be considered. I would first quote the relevant finding of the Arbitral Tribunal as under:

“Notwithstanding the aforesaid, even if the Tribunal were to accept the Respondent’s interpretation of clause 62, the clause itself requires the Charterer to declare the contract at end (assuming that it is entitled to do so). We find no such declaration having been made by the Respondent. The fax message dated 11th September, 2012 is not a declaration of termination but merely a message from the Respondent to the Respondent’s own brokers seeming to suggest that the Agreement had come to an end in May 2011. The fax message dated 11th September 2012 addressed by the Respondent to Transchart who transmitted it to M/s. Sujora Shipping Pvt. Ltd., Shipbrokers for the Claimant. Who in

turn emailed it to the Claimant on 13th September 2012 only states that "the contract had come to end with effect from the date the SAIL had not provided any material for shipment or to ship the material, without any liability on any party." Clause 62 does not envisage an automatic termination as suggested in this message but needs a positive declaration of termination which is apparently absent in the Respondent's message. It must also be borne in mind that just a little while before the fax message dated 11th September, 2012, the Respondent had exercised its option to lower the contracted quantity by 5% vide its email dated 11th September, 2012 also addressed to its brokers. Further, as stated in paragraph no.9 of the Respondent's original reply, in order to shelter itself against its failure to provide shipments the Respondent even relied on clause 61 of the COA Agreement. The relevant portion of which reads, "the obligations under this agreement shall be deferred to a date to be agreed considering the length of time required to resume natural operations." Furthermore, as stated in paragraph no.10 of the said Reply, the Respondent even sought to renegotiate the terms of the COA Agreement with the Claimant on 24th August, 2011 so as to extend the shipment period of the Agreement by approximately three years. The aforesaid instances are positive affirmations of the fact that the Respondent had all along treated the Agreement as valid and subsisting and was aware that it was bound by the obligation to provide the required cargo. We therefore do not accept the Respondent's argument that it validly terminated the Agreement much less that it was done retrospectively with effect from May 2011. If parties to contracts were allowed to retrospectively terminate their contracts it would lead to an absurdity and render many provisions of the Contract Act, 1872 redundant and inapplicable."

45. The above finding of the Arbitral Tribunal can be considered in two parts:

- a) Whether letter dated 11.09.2012 expresses the intention of the petitioner to terminate the Agreement;
- b) Whether such termination can take retrospective effect from the first default of the petitioner.

46. Letter dated 11.09.2012, after referring to certain events, finally stated as under:

“Finally therefore please be informed that, SAIL is left with no option but to treat the subject agreement stood terminated under the 'Default Clause' which entitled SAIL to declare the contract at an end without any liabilities whatsoever on either side. The COA stood terminated with effect from the date when SAIL as Suppliers/Charterers failed or could not provide materials for shipment, the Suppliers/Charterer is entitled to declare the contract as at an end without any liabilities on either side. It is in line with the agreement as any obligation under the arrangement under the subject agreement could have arisen only when material has been allocated and the vessel in line with the specifications is nominated and accepted by SAIL as charterer and the same reaches in time at the loan port, loads the material and performs.

Therefore in terms of Default Clause of the contract the contract had come to end with effect from the date of SAIL had not provided any material for Shipment or to ship the material, without any liability on any party.”

(Emphasis supplied)

47. A reading of the letter would clearly show that the petitioner had in no ambiguous words expressed its intent to bring to an end the Agreement, exercising its power under the “Default Clause” that is, Clause 62 of the Agreement. The finding of the Arbitral Tribunal that the

positive declaration of termination is missing from the said letter, cannot be sustained. The letter clearly states that the Agreement had come to an end. No other words of declaration were required.

48. The Arbitral Tribunal has been influenced by the fact that the said letter sought to terminate the Agreement with effect from May, 2011, when the last cargo order was provided by the petitioner. This, however, could not denude from the effect of the termination. The termination being valid and effective, the Arbitral Tribunal should have considered separately, for working out the consequence thereof, whether such termination can take effect retrospectively or from the date of the said letter.

49. In my view, the letter dated 11.09.2012 was clearly an exercise of power under Clause 62 of the Agreement by the petitioner and therefore, in effect terminated the Agreement between the parties absolving them from future performance of the Agreement. The said letter, however, could not have terminated the Agreement with retrospective effect. Clause 62 of the Agreement does not empower the petitioner to retrospectively terminate the Agreement. The termination was, therefore, effective only from 13.09.2012, when Transchart had communicated the above letter to M/s Sujora Shipping Pvt.Ltd., who in turn e-mailed the same to the respondent.

50. The submission of the learned counsel for the respondent that the letter dated 11.09.2012 cannot be read as a letter of termination as it is addressed to Transchart, which is the shipping arm of the Government of India and therefore, an agent of the petitioner, and M/s Sujora Shipping

Pvt. Ltd and not to the respondent itself, cannot be accepted. As noted in the Additional Award, the said communication was duly forwarded by M/s Sujora Shipping Pvt. Ltd., to the respondent on 13.09.2012 and therefore, at least on that date the termination became effective.

51. The further submission of the learned counsel for the respondent that as the petitioner by its earlier e-mail dated 11.09.2012 had exercised its right to reduce the quantity of shipment under the Contract, the letter of termination cannot be given effect to, cannot also be accepted. The petitioner had a right to reduce the quantity of the shipment under the Agreement by 5%. It exercised its right by e-mail dated 11.09.2012/10.09.2012. It further, by a subsequent fax message dated 11.09.2012 exercised its right under Clause 62 of the Agreement. The termination being subsequent, cannot be denuded of its effect by relying upon the earlier correspondence.

52. Even otherwise, the claim of the respondent is one of damages. In ***Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.***, (1991) 1 SCC 533, the Supreme Court in light of clause allowing revocation of Agreement by either party by giving 30 days' notice, allowed compensation/loss of earnings for period of notice (30 days) holding under:

“12. The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by

restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms.....This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted....

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14. The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under clause 27 of the agreement. No doubt, the notice of termination of distributorship dated March 11, 1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the appellant-Corporation; and such acts would permit exercise of the right of termination of distributorship under clause 27. However, the arbitrator having held that clause 27 was not available to the

appellant-Corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revokable by either party in accordance with clause 28 by giving 30 days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship. The award has, therefore, to be modified accordingly. The compensation for 30 days notice period from March 11, 1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd.”

53. In ***Comau UK Limited v. Lotus Lightweight Structures Limited***, [2014] EWHC 2122 (Comm), the Queen’s Bench Division held:

“20. The reason is that in my judgment the existence of Clause 12.5 shows that Comau probably did not have the entitlement it suggests and on which the thrust of its claim is premised. Mr.Allen submitted that one could not treat Clause 12.5 as defining the scope of the parties’ reasonable expectations, and that it did not cut down what he described as Comau’s “expectation interest”. In my judgment, the Clause probably does both these things.

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23. *In my judgment, viewing things at this interim stage in the proceedings:*

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(d) Comau's contractual expectation interest accordingly appears to be limited to such profit as it might have made until such time as Lotus chose to “terminate for convenience” under Clause 12.5.

(e) *It appears that Comau's loss is to be assessed on the basis that but for its breach Lotus would have availed itself of clause 12.5 to reduce its liability to Comau. In point is this passage from Chitty on Contracts 31st edition Vol 1 at 26–074:*

“If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at the least cost to himself... A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for breach on the assumption that the defendant would have exercised the option”

See also Lord Denning MR in The Mihalis Angelos [1971] 1 QB 164 at 196G-197A.

(f) *The fact, to which Mr Allen draws attention, that Lotus was only entitled to invoke clause 12.5 if it was not in breach, does not appear to be relevant because the assessment looks at what Lotus would do if there had not been a breach.*

(g) *It appears that any assessment of damages would proceed on the assumption that Lotus would have exercised its rights under clause 12.5, because any other assumption ignores the limited nature of Comau's “expectation interest” – that Comau was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any “termination for convenience”. If the effect of clause 12.5*

is ignored when assessing damages, the effect would be to give Comau the benefit of a better bargain than it actually made.

54. These judgments were also cited with approval by this Court in the case of **Pipavav** (supra), while setting aside the loss of profit claim awarded in favour of the respondent therein as a consequence of termination of the Agreement.

55. As noted above, the learned senior counsel for the petitioner has further challenged the Award of damages in favour of the respondent on the ground that the respondent had failed to adduce any evidence in support of such damages. He has placed reliance on:

- a. Bharat Coking Coal Ltd. v. LK Ahuja*, (2004) 5 SCC 109;
- b. State of Rajasthan & Anr v. Ferro Concrete Construction Pvt. Ltd.*, (2009) 12 SCC 1;
- c. All India Radio v. Unibros & Anr.*, 2010 (115) DRJ 573;
- d. Kailash Nath Associates v. DDA*, (2015) 4 SCC 136.

56. The learned senior counsel for the petitioner further submits that in order to succeed in its claim for damages, it was incumbent on the respondent to have adduced evidence of entering into an Agreement for hiring a vessel with a third party.

57. I am unable to agree with the above submissions of the learned senior counsel for the petitioner.

58. Illustration (a),(d) and (g) to Section 73 of the Indian Contract Act, 1872 are reproduced hereinbelow:

“(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

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(d) A contracts to buy B’s ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

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(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.”

59. The Arbitral Tribunal while awarding damages has relied upon Section 73 of the Indian Contract Act, 1872 and more specifically the Illustrations to the said section and has held as under:

"09. None of these illustrations that form part of the statute itself, requires the non-defaulting party to incur expense or go out into the market and procure the goods or the ships. The law does not require that the Claimant must go through the trouble and expenses of hiring vessels when the

Respondent had failed to provide the relevant cargoes under the COA Agreement. Even if the Claimant had done so, the Claimant's losses would have been similar. In fact considering the facts of the present case, we find it not only reasonable but also prudent of the Claimant to have refrained from hiring vessels on the spot market as mitigation of further expenses was given the fact that the Respondent was failing to provide cargoes for shipment under the COA Agreement. This view is supported by a judgment of The Delhi High Court in the case of Saraya Distillery v. Union of India (AIR 1984 Delhi 360) wherein a similar argument was made by the Appellant who contended that before a party could claim damages it must go to the market, purchase the goods not Supplied/short supplied and suffer actual loss in order to be Entitled to damages. The Hon'ble Court held that, "[pr.9]" what the Buyer is deprived of in the usual course of things by non-delivery, is the value of the goods at the time and place of the delivery, less price payable by him under the contract. This loss of value is the only natural result of the breach the only kind of damage that ensues in the usual course of things. The quantum of damages on account of the breach of such contract would be difference between the contract price and the market price of the goods in question at the time when the contract is broken. The provisions contained in Section 73 do not envisage that the buyer must resort to actual purchase and suffer loss before claiming damages. It was so held in Ismail Sait & Sons v. Wilson & Co. AIR 1919 Madras 1053. Similar view was taken in Vishwanath v. Amarlal AIR M.B. 190. The Supreme Court in the case of M/s Murlidhar Chiramjilal v. M/s Harishchandra Dwarkada and another AIR 1962 SC 366 Observed at page 369:

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

second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Ry.Co. of London (1912) AC 673. at P.689). These two principles also follow from the law as laid down in S.73 read with the Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the Respondents duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it is suffered any damages thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the Respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it..."

10. We, therefore, find the Respondent's contention that the Claimant has not suffered an actual loss to the unfounded in as much as the actual loss suffered by the Claimant in this case is the loss of an expected profit that the Claimant would have earned had the Respondent honoured its obligations under the Agreement. We find that none of the judgments relied upon by the Respondent i.e. (i) Bombay Container Terminals Pvt. Ltd. v/s. Central Warehousing Corporation [CS(OS) No.776-A of 2004], (ii) Ashok Kumar Khanna v/s. Johnson & Johnson Co. & Anr [RFA (OS) 32/2011] negate the aforesaid view and do not help the Respondent. We find that the Claimant calculated loss of profit as difference between the contracted rate and the spot market rate at which the Respondent fixed the same cargoes during the period. We, therefore, conclude that the Claimant is entitled to damages for its loss of profit."

60. I do not find the above finding of the Arbitral Tribunal to be incorrect in any manner.

61. As far as the quantification is concerned, the Arbitral Tribunal has relied upon the market rates available at the Baltic Exchange and has further allowed deduction of 2.5% for Address Commission and 1.25% for brokerage as per Clause 48 of the Agreement. The Agreement, in Clause 1 thereof provides for the parcel size and further Clause 2 states the shipment to be on “evenly spread per month basis”. The petitioner was in default since June, 2011 and therefore, the Arbitral Tribunal has adopted the average of the Baltic Exchange fixture for arriving at the damages. No fault can be found in this approach. In any case, this Court cannot interfere with an Award merely because it would find some other measure of such damages to be more just or reasonable.

62. I cannot also agree with the submissions of the learned senior counsel for the petitioner that damages could only have been awarded on basis of a long term agreement. The petitioner was in breach of COA for each of prior failure to declare laycan in terms of the COA on basis of “evenly spread per month basis.” The respondent could not have entered into a long term agreement for each of such failure/breach. In any case, Clause 1(d) provides for calculation of damages based on spot rates in case of default by the respondent. Adoption of same basis for calculating damages in favour of the respondent cannot be faulted.

63. Having said so, the Arbitral Award insofar as it awards damages for the quantity of coal that would have been shipped after the termination of the Agreement till December, 2012 cannot be sustained as

the exercise of power by the petitioner under Clause 62 of the Agreement has been held to be valid in this order.

64. As the shipment was to be made on “evenly spread per month basis”, the amount due to the respondent would be reworked by taking the Shipment quantity that was due till the date of termination of the Contract.

65. The last challenge of the learned senior counsel for the petitioner is to the award of interest at the rate of 6% per annum by the Impugned Award. Relying upon the judgment of the Supreme Court in *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, 2018 SCC OnLine SC 1922, he submits that as the Award is in foreign currency, the respondent was entitled to interest only at the London Inter Bank Offered Rate (LIBOR). The counsel for the respondent does not dispute this submission. In view of the same, the Award of interest is modified to the rate as granted by the Supreme Court in *Vedanta Ltd.* (supra).

66. The petition is partially allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 28, 2019/Arya