



2025:DHC:9073



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 13th October, 2025

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O.M.P. (COMM) 20/2023 and I.A. 1116/2023

STEEL AUTHORITY OF INDIA LIMITED

.....Petitioner

Through: Mr. Rajshekhar Rao, Senior Advocate
with Mr. Sidhartha Sharma, Mr. Arjun Asthana,
Mr. Yashraj Samant, Mr. Ajay Sabharwal,
Ms. Shalini Basu and Mr. Nachiket Chawla,
Advocates.

versus

BRITISH MARINE PLC

.....Respondent

Through: Mr. Ramesh Singh, Senior Advocate
with Mr. Sumit K. Batra, Mr. Anupam Dhige,
Mr. Manish Khurana, Ms. Hage Nanya and
Ms. Priyanka Jindal, Advocates.

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OMP (ENF.) (COMM.) 50/2023 and EX.APPL.(OS) 1790/2024

BRITISH MARINE PLC

.....Decree Holder

Through: Mr. Ramesh Singh, Senior Advocate
with Mr. Sumit K. Batra, Mr. Anupam Dhige,
Mr. Manish Khurana, Ms. Hage Nanya and
Ms. Priyanka Jindal, Advocates.

versus

STEEL AUTHORITY OF INDIA LTD

.....Judgement Debtor

Through: Mr. Rajshekhar Rao, Senior Advocate
with Mr. Sidhartha Sharma, Mr. Arjun Asthana,
Mr. Yashraj Samant, Mr. Ajay Sabharwal,
Ms. Shalini Basu and Mr. Nachiket Chawla,
Advocates.

CORAM:**HON'BLE MS. JUSTICE JYOTI SINGH**



JUDGEMENT

JYOTI SINGH, J.

O.M.P. (COMM) 20/2023 and I.A. 1116/2023

1. This petition is filed by the Petitioner under Section 34 of Arbitration and Conciliation Act, 1996 ('1996 Act') assailing the arbitral award dated 13.09.2018 passed by the majority of the three-member Arbitral Tribunal.
2. To the extent necessary, the factual matrix is that Petitioner is a Public Sector Undertaking under the Ministry of Steel, Government of India and owns and operates multiple integrated steel plants and units. Petitioner avers that it is India's largest steel producer company and in the ordinary course of its business imports coking coal from various overseas locations for purposes of manufacturing steel. Respondent is an International Ocean Freight Transportation Company which operates and manages a portfolio of owned and chartered-in vessels of Supramax, Handymax (H-MAX) and Panamax (P-MAX) types.
3. At the relevant time, Petitioner's shipping requirement for imported coal from various locations, under the procedure established by Government of India was arranged by Transchart, a division of Ministry of Shipping. All PSUs and Government of India departments sent their requirements to Transchart, who entered the shipping/freight market on behalf of the PSUs or Government Departments to arrange the ships on their behalf. Transchart entered the market through approved ship brokers to invite the offers for required shipments.
4. On 27.11.2007, Transchart floated an enquiry on behalf of the Petitioner for shipping coking coal in bulk for a period of three years for



total quantity of 45 lakhs MTs with 5% 'More or Less at the Charterer's Option' ('MOLCO') by 30.09.2012 or for a period of five years for total quantity of 50 lakhs MTs with MOLCO by 30.09.2012. Shipment was sought through H-MAX vessel i.e., a cargo parcel size of 45-52,000 MTs with 5% 'More of Less at the Owner's Option' ('MOLOO') for shipment from Queensland/New South Wales/New Zealand to ports of Eastern India including Vizag, commencing from January, 2008 to December, 2010, if quantity was 45 lakhs or upto December, 2012, if quantity was 50 lakhs and extendable by 3 months at Petitioner's option.

5. Respondent expressed its interest pursuant to the tender floated by Transchart and on 05.12.2007, Petitioner and Respondent entered into a Contract of Affreightment ('COA') for carriage of cargo of 3 million MT, plus or minus 5% for five years through Geared/Grab/Non-Grabber/H-MAX vessels and it was agreed that vessels would be loaded out of Queensland, Australia and discharged at Vishakhapatnam/Gangavaram/Paradeep/Dhamra/Kakinada/Haldia, at Petitioner's option. The relevant Clauses of the COA are as follows:-

"1. Cargo/Quantity

(a) A cargo of 3.0 million MT 5% more or less in Charterers op/ton for a period of 5 years (5% charterers option to be declarable latest by 30.09.2012) through Geared/Grabbed/Non-Grabbed Handymax vessel.

(b) Parcel size: 45-52,000 MT 5% More or Less Owners option by Handymax Vessels sub 12.5M AWAD.

At the time of nomination loaders, owners to nominate basis one quantity with 5% more or less owners option tolerance out of 45-52,000 MT

Variation in quantity required. If any at the time of nomination performing vessel other than the base vessel the same will be provided / honoured by SAIL subject to suppliers.

2. Shipment period:

Shipment Period from June 2008 to December 2012 (extendable upto three months in Charterers option which to be declared latest by last date of



September month of the respective year) - Shipment to be fairly and evenly spread.

3. Type of vessels:

“British Marine Plc, London” Tonnage T.B.N.-SDBC max 15yrs having minimum 4 x 25ts cranes and min 4 x 10cbm grabs fully automatic which do not require any manual labour during operations and having minimum discharge capacity of 10, 000mt per day. Handymax vessels to be suitable to enter/discharge at Visakhapatnam inner harbour.

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5. Nomination of Vessels:-

Charterers to declare stem 4 to 6 weeks prior to commencement of lay days. Owners to nominate suitable tonnage with 10 days spread lay days within 2 working days and the Charterers to confirm the nomination within 3 working days. Actual performing vessel if not already done to be nominated by Owners 15 days prior to commencement of each lay day and while nominating full details of vessel including IMO NO / ISM/SMC/DOC certificate nos. with DOI and DOV should be indicated along with vessel's latest posn/itinerary and best ETA at load port. Charterers have the option to accept/reject any vessel based on previous performance of the vessel. While nominating Owners to ensure no substitution is made, except in case of operational exigency which should be well in advance and definitely not later than 10 days prior to commencement of lay days.

Owners to assure that the performing vessel meets load port terminal requirements including ISM/ISPS code before calling at load ports with all valid certificates on board. Owners also to ensure vessel to keep deballasting delay including stripping to a minimum (approx. 12/14 hours)". Owners / vessel to comply with ISPS code/requirement.

B) Handymax vessel to be suitable to enter/discharge at Visakhapatnam Inner Harbour.

C) Performing vessel to be nominated minimum 15 days prior commencement of each lay days. Performing vessel to be preferably less than 15 years. Handymax vessel to be suitable to enter/discharge at Vizag Inner Harbour. Vessel to have minimum 4x25 tons cranes fitted with minimum 4x10 CBM grabs, electro hydraulic fully automatic which do not require any manual labour during operations and to be operated from cabins only, on board with minimum discharge capacity of 10000 MT per day.

D) While nominating the performing vessel full details of the vessel including ISM/SMC/DOC certificate numbers with date of issue/expiry should be indicated along with vessel's latest itinerary and best ETA at load port. Vetting questionnaire duly filled should also be sent along with nomination. Validity of nomination should be minimum 3 working days as



per Performa c/p.

Nominated vessel not to tender before 9 A.M on the lay days commencement date and if vessel be not ready at the loading port as ordered before cancelling date of each nomination, or if any wilful misrepresentation be made respecting the size, position or state of the vessel, Charterers to have the option of cancelling this charter, such option to be declared within 24 hours of tendering of Notice of Readiness.

E) In case last parcel quantity is more than 50% of the mean parcel size agreed (i.e. base qty without 5% moloo) in the COA it is Charterers option to either provide additional quantity to make a full shipload or to cancel the left over quantity.

F) In existing Clause relating to vessels gear/grab capacity add “in case owners does not participate in the joint survey even after receiving due notice, the report of the surveyor shall be binding on the owners and charterers”.

G) In vessel suitable Clause add “Haldia lock gate etc “after “Visakhapatnam inner harbour” at both places in their clause.

H) Vessel may be discharged at both outer harbour berths (general cargo berth, nom ore berth etc and inner harbour berths of Visakhapatnam port including berth under control of B.O.T operator(s) Charterers option. Owners shall be required to obtain permission from port authorities for berthing of the vessel at all the locations. If necessary under port rules/regulations and also shall furnish indemnity/any other documentary requirements to port authorities for berthing and unberthing operations at the berth.

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45. Demurrage / Despatch rate at the load/discharge ports shall be US\$40,000 / Half dispatch working time saved. Despatch at the load/discharge ports shall be calculated on the basis of “Working Time Saved”

Laytime allowed for loading and discharging to be non-reversible.

46. Freight rate: Visakhapatnam/Gangavaram port/Paradip/Kakinanda as 1st discharge port

-US\$ 40.00 PMT FIOT basis 1/1 Ex-Queensland loading, basis 20000MT loadrate.

-US\$ 0.40 PMT less if Loadrate 35,000MT

-US\$ 0.50 PMT less if Loadrate 40,000MT

-US\$ 0.50 PMT less if Non-Grabber vessel

-US\$ 2.00 PMT extra on entire cargo / quantity for 2nd discharge port other than Haldia



-US\$ 3.00 PMT extra on entire cargo / quantity if Haldia used as 2nd Disport.

All above basis Queensland loading for 5 years.

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60 Arbitration Clause:

All disputes arising under this Charter Party shall be settled in India in accordance with the provisions of the Arbitration and Conciliation Act, 1996, (No.26 of 1996) or any further amendments thereof, and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The Arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The Arbitrators shall be commercial men.

61. FORCE MAJEURE CLAUSE:

If either Shippers/Charterers be prevented from discharging their or its obligation under this agreement by reason of arrests or restrains by Government or people, war, blockade, revolution, insurrection, mobilization, strikers, civil commotions, acts of God, plague or other epidemics, breakdown 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 the 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 Certificate of Chamber of Commerce or concerned Government 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."



6. As per COA, the freight payable was US\$ 40.00 per MT with some variations depending on load size and types of vessels. The rate was liable to increase to US\$ 42.00 per MT on entire cargo/quantity for 2nd discharge port and to US\$ 43.00 per MT on entire cargo/quantity, if Haldia was used as 2nd discharge port. Clause 61 was a *Force Majeure* Clause which gave either party the right of cancellation of the agreement without being liable to the other party for such cancellation, if *Force Majeure* event continued uninterrupted for 30 days or more or if the total of such *Force Majeure* occurrence, within the overall agreed shipment period added to 90 days or more.

7. COA also contained Clause 62 '*Default Clause*', whereby supplier/charterer was entitled to declare the contract as at an end without any liability on either side, should the supplier/charterer *inter alia*, fail to provide material for shipment or ship the material by the time or time agreed or in any other manner fail to perform the contract. This clause is really the bone of contention between the parties.

8. Petitioner issued the first stem under COA for shipping the cargo from Queensland to Vizag/Haldia with nomination dates being 18.07.2008 to 20.07.2008 for which Respondent nominated vessel MV Aquitania, which carried cargo of 52,499 MTs. Between July, 2008 to June, 2010, Petitioner declared 16 stems and shipment of total quantity of 8,13,793 MTs was made by the Respondent from different ports in Australia to East Coast of India. In September, 2008 worldwide economic meltdown occurred following crash of Lehman Brothers and as a result, Petitioner's requirement for manufacture of steel dropped drastically and consequently, requirement of coking coal also dropped.



9. Respondent insisted for declaration of stem for the month of December, 2008 vide e-mails dated 10.11.2008 and 11.11.2008, however, Petitioner vide e-mail dated 08.12.2008 informed the Respondent that it would not be in a position to declare stem for December, 2008 and January, 2009 in view of global economic situation and unpredictable market situation. Respondent wrote to the Petitioner on 11.12.2008 intimating that if SAIL did not declare stems, Respondent would mitigate its losses for such shipments. Petitioner was unable to provide stem confirmation for a long period and vide e-mail dated 10.03.2010, Petitioner through Transchart informed the Respondent that it was not able to meet its commitment under COA and was declaring the contract as at an end under the Default Clause, without any liability on either side.

10. Subsequently after negotiations, both parties entered into Addendum-2 on 20.04.2011, incorporating the option to convert the vessel from H-MAX to P-MAX for providing quantity of 78,113 MT by May, 2011 and this obligation was successfully carried out. The quantity nominated and lifted under the COA increased to 819,906 MT leaving a balance quantity of 1,958,094 MT to be shipped but Petitioner did not issue stem after the shipment on 04.05.2011.

11. Petitioner avers that Respondent unilaterally and without any prior approval forwarded a list of vessels by e-mail dated 10.05.2011, claiming that vessels had already lifted the cargo and forced the Petitioner to provide 28 P-MAX nominations in 19 months to complete the obligations of lifting the balance quantity of coking coal. This according to the Petitioner was a novation of the agreement. On 18.08.2011, Petitioner wrote to the Respondent through Transchart to extend the COA by a further period of



three years, which was not agreed to, despite extensive correspondence between the parties. On 25.10.2011, Petitioner wrote to the Respondent claiming that Respondent was in breach of the COA and on 12.09.2012, it issued a letter terminating the COA.

12. Disputes having arisen between the parties, three-member Arbitral Tribunal was constituted as per Clause 60 of COA comprising of Mr. Niranjana Chakraborty as Respondent's nominee Arbitrator, Mr. Ashok Sharma as Petitioner's nominee and Capt. S.M. Berry as Presiding Arbitrator. On 05.04.2014, Respondent filed Statement of Claim ('SoC') and on 24.06.2014, Petitioner filed Statement of Defence ('SoD'). Respondent claimed US\$ 58,367,834.86 towards loss of freight and demurrage with interest @12% p.a. On 10.10.2014, Arbitral Tribunal settled the following issues:-

"15. During the first hearing on 10th October 2014 the Tribunal finalised the Issues in consultation with the Ld. Counsel of both the parties which are as follows:

- i) Whether the Arbitration Tribunal has jurisdiction to determine the claims?*
- ii) Whether the dispute raised is a Maritime Dispute under the ICA Maritime Rules?*
- iii) Whether under the Contract dated 5th December 2007, as amended from time to time, there was any binding obligation on the Respondent to provide a minimum number of shipments or whether it is a standing orders/standing contract/option contract as stated in the Statement of Defence?*
- iv) Whether there was a binding obligation upon the Respondent to provide stems "fairly and evenly spread" over the term of the Contract and if so, whether the Respondent failed to provide stems "fairly and evenly spread" over the term of the Contract?*
- v) Whether the Claimant's claim for damages is barred in view of the express terms of the Contract dated 5th December 2007?*
- vi) Whether the Respondent was entitled to terminate the Contract without any liability for either party under Clause 62 of the Contract?*



vii) Whether the Claimant's claim of alleged ambiguity in Clause 62 of the Contract is barred by limitation under the Indian Law?

viii) Whether or not the Claimant is entitled to claim compensation/damages under the Contract? If so does the Claimant prove any loss and if so to what extent?

ix) Whether the Claimant is entitled to interest, if any, at what rate and from what period?

x) Costs."

13. Thereafter Petitioner sent letter dated 06.01.2015 to the Maritime Arbitration Committee of ICA challenging the appointment of Capt. Berry and Mr. Chakraborty. Application was rejected on 03.03.2015, whereafter Petitioner filed OMP (T) COMM. 48/2016 in this Court, which was also dismissed with liberty to the Petitioner to challenge the appointments after the Award was passed. This order was challenged by the Petitioner before the Supreme Court in Civil Appeal No. 34433/2016 and vide order dated 28.11.2016, the Supreme Court allowed the proceedings to go on but directed that the Award shall not be pronounced till further orders of the Court. In view of some additional documents coming on record, Respondent filed amended SoC on 03.03.2016. Respondent reduced the claim to US\$ 55,059,873.62, which included freight difference, interest @12% p.a. till 31.03.2014 and claimed further interest @12% annually compounded till payment. Revised SoD was filed on 08.04.2016.

14. In the meantime, on 19.11.2015 and 15.12.2015 Petitioner requested the Arbitrators to make disclosures under 1996 Act on Form specified in the Sixth Schedule as also to disclose if they had any dealing with Transchart. Tribunal did not accede to the request of the Petitioner on the ground that the 2015 Amendment to the 1996 Act was applicable to appointments after 23.10.2015 and since Arbitrators had already made disclosures as per the ICA format, no further declaration was required.



15. Evidence was closed on 08.02.2017 and final arguments were concluded on 20.02.2018. The Supreme Court passed an order on 23.04.2018 permitting the Tribunal to pass the Award but with a direction to place the same before the Supreme Court in a sealed cover. The appeal was disposed of by the Supreme Court on 14.09.2022, upholding the view of this Court that Petitioner would be entitled to raise all grounds under Section 34 of the 1996 Act and not at the intermediate stage. It was directed by the Supreme Court that all objections, when raised by the Petitioner, will be considered on merits including the objection pertaining to disclosure under Fifth Schedule of the 1996 Act. Respondent was given liberty to urge that Fifth Schedule was inapplicable. The Supreme Court also directed that the Arbitral Award signed on 13.09.2018 and placed in a sealed cover, would be made available to the counsels for the parties before the Registrar on 20.09.2022 and service of copy on the counsel/authorized representatives of the parties will be treated as service on the parties. It was made clear that this order will not be treated as expression of opinion on any aspect relating to alleged disqualification of the Arbitrators in terms of Entry 24 of Fifth Schedule or otherwise under Section 12 of 1996 Act, as amended or even prior to the amendment. This petition was thus filed wherein multiple objections have been raised by the Petitioner assailing the arbitral award and respective contentions of the parties are captured hereinafter.

CONTENTIONS ON BEHALF OF THE PETITIONER

16. Appointments of the Presiding Arbitrator, Capt. Berry and Co-Arbitrator, Mr. Chakraborty as also their continuance was untenable in law. Both had taken a specific view regarding interpretation of Clause 62 of COA in another arbitral proceeding between the SAIL and M/s SeaSpray



Shipping Company Ltd. ('SeaSpray'), which gave rise to justifiable doubts on their independence and impartiality. Respondent invoked the instant arbitration on 31.03.2014 in terms of Clause 60 of COA and on 25.06.2014, Arbitral Tribunal comprising of Capt. Berry, Mr. Chakraborty and Mr. Ashok Sharma was constituted, whereafter SoC was filed on 03.03.2016. At this stage, a separate arbitration involving the Petitioner and SeaSpray was ongoing before ICA, where Capt. Berry and Mr. Chakraborty were Co-Arbitrators and on 01.09.2014, the said Arbitral Tribunal passed the final award. Upon analysis of the award, Petitioner realised that the Arbitral Tribunal had taken a view regarding interpretation of Clause 62 of COA, which did not favour the Petitioner and there was high probability that the two Arbitrators would take the same view in the instant arbitration and therefore, Petitioner raised an objection on ground of '*issue conflict*'. It is only natural that having taken a view on interpretation of Clause 62, the two Arbitrators would confirm to their view and the likelihood of the award being passed against the Petitioner could not be ruled out. Ideally, the two Arbitrators ought to have recused themselves on ground of issue conflict, but they did not do so even on an objection being raised and this resulted in the inevitable consequence of the award being passed against the Petitioner since interpretation of Clause 62 was the backbone of the argument of the Petitioner. Thus the award deserves to be set aside on the sole ground that Capt. Berry and Mr. Chakraborty were *de jure* disqualified in terms of Section 14(1)(a) of 1996 Act applying the doctrine of issue conflict and this ineligibility goes to the root of the matter.

17. 'Issue conflict' is a recognized doctrine and a valid ground for disqualification of an Arbitrator in International Arbitration In **CC/Devas**



(Mauritius) Ltd. & Ors. and The Republic of India, PCA Case No. 2013-09 decided on 30.09.2013, Respondent had challenged the appointment of two of the three Arbitrators on the ground that they had articulated their position and had strong views on the issue in question in an earlier arbitration, which gave rise to justifiable doubts and upholding the challenge, the Appointing Authority held as follows:-

“58. I also note that the basis for the alleged conflict of interest in a challenge invoking an “issue conflict” is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect, as discussed by the Parties, some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.

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64. The standard to be applied here evaluates the objective reasonableness of the challenging party's concern. In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to Professor Orrego Vicuña's ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that Professor Orrego Vicuña should withdraw from this arbitration.”

18. Issue conflict was recognized and its importance was emphasized in



India in a detailed Article authored by a former Judge of the Supreme Court opining that ‘issue conflict’ may arise when the Arbitrator has been a member of an Arbitral Tribunal in another case, involving one of the parties to the current arbitration and in which similar issue(s) come up for consideration and the Arbitrator has expressed his view and opinion in the first arbitration. Similar view was expressed by the author in an Article ‘*International Arbitration, Lucy Reed and Dafina Atanasova, Max Planck Encyclopaedia of International Law, Oxford Public International Law, Oxford University Press, 2018*’. Decision of the Court of Appeal for Ontario in *Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82* and decision dated 20.03.2014 by International Centre for Settlement of Investment Disputes in *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13* also highlight that issue conflict is a valid ground for setting aside an arbitral award. In *Vento Motorcycles (supra)*, it was judicially recognized that procedural fairness is an independent and unqualified right rooted in the sense of procedural justice, which any person affected by an administrative decision is entitled to have. Finding of a reasonable apprehension of bias requires the disqualification of an adjudicator and nullification of any decision made and nothing less will do. It was observed that reasonable apprehension of bias is no minor procedural breach and is in fact a finding that integrity and legitimacy of an adjudicative process has been compromised irreparably.

19. *Caratube International (supra)* is an important decision for the present case, where appointment of Mr. Boesch was questioned *inter alia* on the ground that his participation in *Ruby Roz Agricol v. The Republic of Kazakhstan, UNCITRAL, Award on Jurisdiction, 01.08.2013, IIC 602*



(2013), could lead to some inclination towards the position of the Respondent who had prevailed in that case, putting Arbitrator's impartiality and independence into question. It was held that since the Respondent in the ongoing arbitration was the same as in **Ruby Roz** case and so was Mr. Boesch, the Arbitrator, a third party such as the Claimant was justified in having reasonable doubts on the independence of the Arbitrator and therefore Mr. Boesch manifestly lacked one of the qualities required by Article 14(1) of the ICSID Convention. Relevant paragraphs from the decision are as follows:-

“VI. ANALYSIS

61. *Claimants invoke two grounds for the disqualification of Mr. Boesch:*

- *First, Mr. Boesch's serving as arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan in the case of Ruby Roz Agricol LLP v. The Republic of Kazakhstan;*
- *Second, Mr. Boesch's numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent.*

62. *The first ground concerning the Ruby Roz case in turn results in three alleged cases to disqualify Mr. Boesch, namely: 1) his participation in the Ruby Roz case will lead Mr. Boesch to some inclination towards the position of the Respondent who prevailed in that case, thus putting his impartiality and independence into question; 2) his knowledge acquired in the Ruby Roz case will lead to a manifest imbalance within the Tribunal as the other two arbitrators, namely the undersigned, will not be privy to that body of knowledge; and 3) Mr. Boesch concealed from the other members of this Tribunal his knowledge of the facts of the Ruby Roz case and the opinion he had in this respect, thus aggravating the imbalance within the Tribunal.*

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65. *Furthermore, there is a need immediately to stress that the situation where an arbitrator has possible prior knowledge of facts relevant to the outcome of the dispute must be carefully distinguished from the situation where an arbitrator has possible prior exposure to legal issues that would be equally relevant in that regard. First, in case of an overlap between issues of law in two otherwise unrelated cases, the record on which such issues will be decided will not be of the same nature in the two instances: as to the facts, the arbitrators will rely on documents and witnesses specific to each dispute (or more than one dispute), which are not of a*



general and impersonal character; as to the law, the arbitrators will rely on generally available knowledge of an impersonal and general character, including expert-witness testimony. The expert will opine on matters about which he has authoritative knowledge, as opposed to a fact-witness who states what he has seen or otherwise knows. Second, the arbitrators should be experts in their field, especially in general in the field of law, while they should never be witnesses.

A. Mr. Boesch's serving as arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan in the case of Ruby Roz Agricole LLP v. The Republic of Kazakhstan

66. Before examining the Claimants' ground regarding Mr. Boesch's serving as arbitrator in the case of Ruby Roz Agricole LLP v. The Republic of Kazakhstan it is useful to briefly describe the dispute underlying that case. In doing so, the Unchallenged Arbitrators exclusively rely on the information provided by the Parties in their written submissions concerning the proposal for Mr. Boesch's disqualification, including on the Award on Jurisdiction rendered in the Ruby Roz case, a hyperlink to which was provided by the Claimants in footnote 11 to the Proposal.

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1. Will Mr. Boesch's participation in the Ruby Roz case lead him to some inclination towards the position of the Respondent who prevailed in that case, thus putting his impartiality and independence into question?

71. As was seen in paragraphs 25 to 29 above, the Claimants submit that Mr Boesch's serving as arbitrator in the Ruby Roz case gives rise to a manifest risk of pre-judgment in relation to both jurisdiction and the merits in the present case, namely due to the "obvious similarities between the Ruby Roz case and the present arbitration". Because of these similarities, the Claimants say that they will rely on essentially the same factual allegations with respect to Kazakhstan's acts and omissions and pattern of conduct against Mr. Omar and the Hourani family, as well as the same legal grounds, as the claimant in the Ruby Roz arbitration. Moreover, witness statements of the same individuals will also be submitted in the present case.

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74. For the Unchallenged Arbitrators, the Claimants' arguments as to the existence of a manifest risk of pre-judgment regarding the jurisdiction and the merits in the present arbitration pertain to impartiality, rather than independence. In other words, what is at issue is Mr. Boesch's (in an objective view) perceived ability to serve as arbitrator in the present arbitration without bias or predisposition towards one party, in particular without any inclination towards the Respondent.

75. The Unchallenged Arbitrators agree with the Claimants that the similarity in cases, in particular in the facts underlying the Ruby Roz case



and the present arbitration, is an important consideration in the assessment of Mr. Boesch's perceived impartiality in the present arbitration. As was observed in *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela and EnCana Corporation v. Republic of Ecuador*, a problem can arise where an arbitrator has obtained documents or information in one arbitration that are relevant to the dispute to be determined in another arbitration. In this situation, the arbitrator "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration". Again, what is at issue is Mr. Boesch's perceived impartiality and independence from an objective point of view: while it may well be that Mr. Boesch might be able to maintain a proverbial "Chinese wall" in his own mind and remain fully impartial, the objective view of a reasonable and informed third party would be that expressed in the two cases referred to.

76. The Unchallenged Arbitrators further agree with the Claimants that the cases relied upon by the Respondent, in particular the *Saba Fakes* case and the *Electrabel* case, do not demonstrate the contrary proposition: the similarity in cases does constitute an important consideration for the decision on the proposal for the disqualification of Mr. Boesch.

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83. It is undisputed that the Respondent in the present arbitration is the same as in the *Ruby Roz* case, i.e. *The Republic of Kazakhstan*. However, the Respondent correctly points out that the Claimants in the present arbitration are not the same as in the *Ruby Roz* arbitration. As was seen in paragraph 67 above, following Mr. Kassem Omar's withdrawal from the proceeding, the *Ruby Roz* arbitration continued with Ruby Roz as the only claimant, it being specified that during the arbitration proceeding Ruby Roz remained under the full ownership of Mr. Kassem Omar. By contrast, the Claimants in the present arbitration are Caratube, which is owned to 92% by Mr. Devincci Hourani and to 8% by Mr. Kassem Omar, and Mr. Devincci Hourani. Therefore, the Claimants in both of these cases are not the same.

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85. The Respondent also correctly points out that the present arbitration and the *Ruby Roz* case concern "completely unrelated industries", the former concerning the termination of an oil concession contract and the latter concerning the alleged expropriation of a chicken farm. However, the differences in the industries concerned appear of minor importance in the light of the allegation, common to both arbitration proceedings; that Kazakhstan's "campaign of persecution" and the resulting taking of the different investments were not directed against any particular industry, but specifically targeted the individuals behind these investments, who are closely related.



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88. As a result of this overlap in facts and legal issues, the Unchallenged Arbitrators find that the facts of which Mr. Boesch has gained knowledge (or been able to gain knowledge) through his serving as arbitrator in the Ruby Roz case are also relevant for the determination of some of the legal issues in the present arbitration.

89. The Unchallenged Arbitrators have carefully considered Mr. Boesch's Explanations of 13 February 2014, in particular his assurances that he "consider[s] that it would be improper for [him] to discuss or disclose anything that transpired in the Ruby Roz Agricol LLP case, and [he] will not do so" and that he "consider[s] it improper to form any opinion based upon external knowledge including in particular what may be found in the public media, and [he] will not do so". However, the Unchallenged Arbitrators agree with the tribunal in *EnCana Corporation v. Republic of Ecuador* in that Mr. Boesch "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the [Ruby Roz] arbitration". That Mr. Boesch would consider it improper to form any opinion based upon external knowledge is not to be doubted and neither is his intention not to do so: it remains that Mr. Boesch is privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.

90. Based on a careful consideration of the Parties' respective arguments and in the light of the significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that - independently of Mr. Boesch's intentions and best efforts to act impartially and independently - a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch's objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would pre-judge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.

91. The Unchallenged Arbitrators therefore conclude that the Claimants have demonstrated that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a



reasonable evaluation of the facts in the present case. Accordingly, the Unchallenged Arbitrators find that Mr. Boesch manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case.

2. Will Mr. Boesch's knowledge acquired in the Ruby Roz case lead to a manifest imbalance within the Tribunal as the two other arbitrators, namely the Unchallenged Arbitrators, will not be privy to that body of knowledge?

92. Having concluded that there is an evident or obvious appearance of lack of impartiality and that Mr. Boesch therefore manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case, the Claimants' proposal for disqualification pursuant to Article 57 of the ICSID Convention must be upheld on this ground alone. However, for the sake of completeness and because the Parties have argued this aspect extensively, the Unchallenged Arbitrators will examine the question whether Mr. Boesch's knowledge acquired in the Ruby Roz case will lead to a manifest imbalance within the Tribunal.

93. For the same reasons as those set forth in section A.1., namely the significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, the Unchallenged Arbitrators find that a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case, Mr. Boesch has benefitted from knowledge of facts on the record in that case which may not be available to the two other arbitrators in the present arbitration (or even be incompatible or contradictory with some facts on the record of the present arbitration), thereby giving rise to a manifest imbalance within the Tribunal to the disadvantage of the Claimants.

94. This finding is corroborated by the fact that the claimants in both sets of proceedings are not the same, albeit that they are closely related. Therefore, it cannot be excluded that the Parties in the present arbitration do not have access to or, for example for reasons of confidentiality, cannot use all the information or documents available to the parties in the Ruby Roz case, even though such information or documents would be relevant for the determination of the legal issues in the present arbitration.

95. Therefore, the Unchallenged Arbitrators conclude that a third party would find that there is an evident or obvious appearance of imbalance within the Tribunal based on a reasonable evaluation of the facts in the present case."

20. The *de jure* ineligibility of Capt. Berry and Mr. Chakraborty to continue as Arbitrators also has its roots in Entry 24 of the Fifth Schedule to 1996 Act, which provides: "*The arbitrator currently serves, or has served*



within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties”. Having interpreted Clause 62 in the SeaSpray Arbitration, the two Arbitrators had within the past three years decided on a related issue involving one of the parties and their appointment and continuation was thus hit by Section 12(1) of 1996 Act. In ***Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755***, the Supreme Court observed that it is clear from a reading of Section 12(1) that when a person is approached in connection with his possible appointment as an Arbitrator, it is his duty to disclose in writing any circumstance, which is likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule and the grounds in Fifth Schedule serve as a guide in determining whether such circumstance exists or not.

21. This Court has recently in ***Ram Kumar and Another v. Shriram Transport Finance Co. Ltd., 2022 SCC OnLine Del 4268***, highlighted that requirement of making a disclosure is a necessary safeguard for ensuring the integrity and efficacy of an arbitration as an alternate dispute resolution mechanism and emphasised that this obligation was not optional, thereby upholding that the duty of the Arbitrator to render full disclosure as required under Section 12(2) is sacrosanct. The Supreme Court in ***State of W.B. and Others v. Shivananda Pathak and Others, (1998) 5 SCC 513***, explained ‘bias’ as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction and that condition of mind sways the outcome of the judgment and renders the Judge unable to



exercise impartiality in a particular case. The Supreme Court also observed that ‘bias’ has many forms and could be pecuniary, personal or in relation to subject-matter of the disputes in a given case.

22. In ***State of Gujarat and Another v. Justice R.A. Mehta (Retired) and Others, (2013) 3 SCC 1***, the Supreme Court further clarified that in a given case, there may not be actual bias or even an apprehension that the matter may not be decided impartially, but if circumstances are such that there is reasonable apprehension or likelihood of bias in the minds of the parties that possible bias may affect the decision, it is sufficient to invoke the doctrine of bias, which is one of the limbs of natural justice. It is trite that it is the obligation of an Arbitrator to give complete and truthful disclosure under Section 12 of 1996 Act and this obligation comes into play at the stage of appointment and continues during the entire arbitral proceedings. Non-disclosure by Capt. Berry and Mr. Chakraborty in the Form specified in the Sixth Schedule of their involvement in the SeaSpray Arbitration, wherein they had taken a view with respect to interpretation of Clause 62, is in the teeth of Section 12 read with Entry 24 of the Fifth Schedule of 1996 Act and vitiates the award. Calcutta High Court has taken a similar view in ***C and E Limited (Components and Equipments Limited) and Another v. Gopal Das Bagri and Others, 2023 SCC OnLine Cal 2166***.

23. Notably, obligation to make the disclosure is also mandatory under the Maritime Arbitration Rules, 2012, which incorporate a provision similar to Section 12(2) of 1996 Act i.e., duty to disclose circumstances giving rise to justifiable doubts as to independence or impartiality at the time of appointment and throughout the arbitral proceedings. Maritime Rules specifically provide Guidelines for Arbitrators and parties and both are



expected to follow them to ensure economic and expeditious disposal of arbitration cases. In particular, Guideline 4 lays emphasis on disclosures to be rendered by the Arbitrator as follows:-

“4. When giving notice of his acceptance, the arbitrator shall disclose in writing in the printed format as under:

- any relationship with the parties or their counsel which may affect his independence and impartiality;*
- any personal or economic interest, either direct or indirect, in the subject matter of the dispute;*
- any prejudice or reservation as to the subject matter of the dispute which may affect his impartiality.*
- Where necessary due to supervening facts, this Statement shall be repeated in the course of the entire arbitral proceedings until the award is filed.”*

(emphasis supplied)

24. Additionally, Guideline 5 underscores the importance of disclosure required under Guideline 4 and also provides consequences of failure and subsequent discovery of facts not disclosed. Guideline 5 is as follows:-

“5. Where facts that should have been disclosed are subsequently discovered, the arbitrator may either withdraw or be challenged or the Indian Council of Arbitration may refuse to appoint him in other arbitral proceedings on this ground”

(emphasis supplied)

25. On merits, the impugned award is contrary to Clause 62 of COA, which expressly barred either party to claim damages and is consequently, violative of Section 28(3) of 1996 Act. Being a creature of the contract between the parties, Arbitral Tribunal was bound to decide as per the terms therein. Clause 62 is a part of the agreed terms of COA, which the parties willingly entered into and cannot question the consequences that flow therefrom. Clause 62 gave wide powers to the Petitioner to terminate the contract without any liability including that of paying any damages.



Respondent was not the owner of the ships and it was only within two working days of declaration of a stem that Respondent was required to nominate a vessel to undertake the shipment and thus there was no binding obligation on the Petitioner to declare a stem or on the Respondent to nominate a vessel before declaration of stem by the Petitioner, which means that the contract was a contingent contract and became enforceable on occurrence of a specified event i.e., declaration of stem by the Petitioner. Petitioner had a right to terminate the COA under Clause 61 in the event of a *Force Majeure* lasting for 30 continuous days, which further fortifies that the agreement was contingent and this position is buttressed by the fact that no consequence or liability was envisaged for not providing any particular number of shipments or quantity of cargo and Petitioner was free to terminate the COA without any liability invoking Clause 62. By holding that Petitioner was bound to declare certain number of stems for the Respondent to provide the vessels, Arbitral Tribunal has effectively re-written the contract and novated the same, which is impermissible in law.

26. Arbitral Tribunal has also wrongly held that the agreement specified the schedule within which the stems were to be declared and vessels nominated and made available, since no such schedule was agreed upon and provided. Only an indicative list of vessels was set out in the COA and Respondent was free to nominate other vessels. Moreover, the obligations of the parties, if any, stood suspended during the *Force Majeure* event and irrespective of whether the COA was terminated or not, Petitioner stood absolved of its obligation to declare a stem in the said period.

27. Clause 62 was a 'Default Clause' *inter alia* entitling the Petitioner to terminate the COA if: (a) if there was failure by supplier/charterer to provide



materials for shipment or to ship the materials by the time or times agreed upon; (b) supplier/charterer in any manner or otherwise, failed to perform the contract; or (c) should a Receiver be appointed on its assets or make or enter into any arrangement or composition with creditors or suspend payments (or being a company should enter into liquidation either compulsory or voluntary). Clause 62 clearly enabled the Petitioner to declare the agreement as at an end without any liability. Validity of such clauses giving unilateral right of termination have been upheld by the Supreme Court in *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel and Others*, 2001 SCC OnLine SC 552; *Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. v. Govt. of T.N.*, (1997) 3 SCC 466; and *Oil and Natural Gas Corporation v. WIG Brothers Builders and Engineers Private Limited*, (2010) 13 SCC 377; and by the Madras High Court in *M/s. Crompton Greaves Ltd. v. Dyna Technologies Pvt. Ltd.*, 2007 SCC OnLine Mad 427.

28. Arbitral Tribunal's finding that parties could not have intended termination of the COA by the Petitioner for its own default is contrary to the intention of the parties and express language of Clause 62. Having signed the COA and having taken advantage under the agreement by receiving millions of dollars, right of the Petitioner to declare the COA as at an end under Clause 62, could not be questioned by the Respondent. Arbitral Tribunal erred in appreciating that the words 'suppliers/charterers' in the said Clause cannot be read only as 'supplier' of the material since supplier was not party to the COA and had no right to terminate the same. It was only the charterer i.e., the Petitioner which could terminate the COA and clearly the words 'suppliers' and 'charterers' have been used interchangeably and



refer only to the ‘charterer’. Finding of the Arbitral Tribunal that the first limb of Clause 62 is limited to failure of mine owners in USA or Australia to supply coking coal is a completely implausible finding and against the contractual stipulations. In fact, the Arbitral Tribunal accepted that in September, 2008, after the agreement was entered into, there was an unprecedented global economic crisis which severely impacted businesses and supply of coal from USA. Such unparalleled and unforeseen economic event, which had a devastating effect on the markets worldwide, definitely constituted *Force Majeure* in terms of Clause 61 which lasted for more than 30 days and thus there was no legal infirmity in the action of the Petitioner in terminating the COA.

29. Arbitral Tribunal gravely erred in holding that Petitioner did not invoke *Force Majeure* at the relevant time because no notice was served on the Respondent within 20 days as also because after the *Force Majeure* happened in December, 2010, rather than terminating the COA, Petitioner in April, 2011 executed Addendum-2 agreeing to ship the balance quantities and continue with the COA. In rendering this finding, the Arbitral Tribunal overlooked that since the inception i.e., from the date of issue of the tender to the date of execution of Addendum-2, parties understood that Petitioner was not obliged to issue mandatory monthly nominations and was entitled to bring the COA to an end for the reasons stipulated in the agreement. Owing to factors beyond its control, including but not limited to long standing *Force Majeure* situation in Australia lasting more than 94 days; delay in performance of earlier vessel provider under the previous agreement; and drastic fall in availability of H-MAX stems, Petitioner vide its e-mail dated 22.08.2011 requested the Respondent to extend the shipment period by three



years, however, Respondent refused to do so and took no steps to reduce/mitigate the loss, if any, and thus no liability could be thrust on the Petitioner.

30. Arbitral Tribunal committed a grave error in holding that Clause 62 was violative of Sections 23 and 73 of the Indian Contract Act, 1872 ('Contract Act'). Courts have repeatedly upheld such clauses observing that it is for the parties to decide the terms on which the contracts have to be performed and any interference in the agreed terms will impinge on freedom to contract. There is no provision under the Contract Act, which bars parties from entering into agreement excluding liabilities in certain circumstances, including the freedom to exclude clauses imposing liability of damages in case of non-performance and/or termination of the contract. Object of the COA was to undertake shipment of coking coal and as a consideration, Petitioner was to pay to the Respondent the contracted freight depending on quantity of coal lifted. Parties consciously included the 'Default Clause', which are standard clauses in the regime of Charterparty agreements and was well known to the Respondent, which is a seasoned shipper and regularly enters into such long terms agreements.

31. Arbitral Tribunal wrongly awarded damages in favour of the Respondent despite there being no evidence of loss suffered by it. The scheme of things under the COA was clear that Respondent was not obliged to take action and provide the vessels till the Petitioner declared stem. Respondent neither pleaded nor proved that it was able to perform its obligation under the agreement. Respondent was not the owner and was thus required to prove that vessels were available during the relevant time for undertaking the voyage and it was in a position to nominate the same within



two working days of declaration of the stem. No evidence was led on the freight rate at which such vessels would have been available. Arbitral Tribunal erroneously proceeded on an assumption that Respondent would have been able to perform its obligations, which was in violation of Clause 1(d) of COA, stipulating that in case owners were unable to nominate vessels in the required lay days, the quantity may be covered by charterers on spot basis and the difference in freight, if any, including any other costs/consequences shall be to the account of the owners. The agreement contains no consequences of non-declaration of stems, while damages payable to the Petitioner in case of breach by the Respondent were expressly provided for and this intention of the parties to the contract has been overlooked.

32. Even if it is assumed that Petitioner had repudiated the agreement resulting in loss to the Respondent, computation of quantum of damages arrived at by the Arbitral Tribunal is wholly erroneous. Methodology of computation adopted by the Tribunal by taking the difference between the Contract Price and Spot Market Price, is contrary to Section 73 of the Contract Act and has resulted in a windfall to the Respondent. Without prejudice to the contention that damages were not payable in light of Clause 62 specifically excluding liability on either party in the event of termination of the COA, the computation cannot be accepted as the Tribunal has overlooked that the COA was a long term contract and if the market rate was to be taken for calculation of damages, it should have been based on freight rate applicable for a similar contract since the general Spot Market rate significantly varied from the freight rate under a long term contract. Freight paid to the Respondent could not constitute profits earned by it as this



necessarily involved difference between income and expense. Respondent may have incurred some costs with respect to each voyage on fuel, labour, port charges etc., but these costs only needed to be deducted from the freight to arrive at the profit and a simpliciter deduction of the contractual rate from the market rate was not indicative of the profits. Respondent neither pleaded nor proved loss of profits or costs it would have incurred in respect of each shipment, by leading evidence of loss suffered. No books of accounts or Income Tax Returns or agreements with other ship owners etc., were produced. It is trite that *sans* proof of loss, damages cannot be awarded and this flows from a plain reading of Section 73 of the Contract Act and judgement of the Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC 136.***

33. Arbitral Tribunal erred in awarding damages despite the fact that Respondent made no attempt to mitigate its loss, if any. Respondent was required to deploy the vessels that may have been otherwise nominated for other shipments and then deduct the amounts earned from such transactions from the damages claimed. Inapplicable parameters applied by the Tribunal relating to cases where ship owners have breached the contracts and that too in the absence of mitigation of loss has resulted in a windfall to the Respondent. Contrary to settled law, burden of proof of mitigation of damages was placed on the Petitioner.

34. The award also stands vitiated for the reason that the Arbitral Tribunal has awarded dual rate of interest by directing payment of damages in the sum of US\$ 29,741,320.26/- along with interest @ 6% per annum from the date of breach to the date of award and further penal interest @ 9% per annum after three months, if the awarded amount was not paid, which is



expressly prohibited by law and is contrary to the judgment of the Supreme Court in *Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited*, (2019) 11 SCC 465, wherein the Arbitral Tribunal had awarded dual rate of interest directing payment of interest @ 9% for 120 days post the award and if the amount was not paid within 120 days, interest was payable @ 15% on the sum awarded. Holding the levy of dual rate of interest as unjustified, the Supreme Court observed that the award of higher rate of interest after 120 days was arbitrary since award debtor was entitled to challenge the award within a maximum period of 120 days as provided in Section 34(3) of 1996 Act and if the award debtor was made liable to pay a higher rate of interest after 120 days, it would foreclose or seriously affect its statutory right to challenge the award by filing objections under Section 34 of the 1996 Act. Direction to award interest at the enhanced rate of 15% post 120 days was set aside by the Supreme Court and on this analogy, the award impugned herein to the extent it grants 9% interest on failure to pay the awarded amount within 90 days, deserves to be set aside.

CONTENTIONS ON BEHALF OF THE RESPONDENT

35. The impugned majority arbitral award is a speaking and well-reasoned award and warrants no interference in the limited scope of jurisdiction of this Court in Section 34 of 1996 Act, more particularly, in the case of International Commercial arbitration. It is no longer *res integra* that interpretation given by an Arbitrator to contractual clauses is the domain of the Arbitrator and is impervious to interference by the Court under Section 34. Courts cannot give a different interpretation to a clause only because in the wisdom of the Court another interpretation is possible.



Section 28(3) of 1996 Act provides that while deciding and making an award, Arbitral Tribunal shall take into account the terms of the contract applicable to the transaction and decide accordingly. Just as the Arbitrator is bound to act as per the terms of the contract, jurisdiction of the Court is circumscribed and any interference with a plausible or possible interpretation of the terms of the contract by the Court, is impermissible in law.

36. Arbitral Tribunal has interpreted Clause 62 of COA and disagreed with the Petitioner that it gave unfettered and absolute freedom to declare the contract at an end at any time at its discretion and without assigning any plausible and legally sound reasoning. Clause 62 was designed to legislate for events constituting frustration of the agreement and was directed at the supplier in Australia rather than the Petitioner or at events which prevented performance of the COA, such as liquidation/insolvency of the supplier of coal and could have been invoked only if the supplier failed to supply or if the supplier provided coal to the Petitioner but Petitioner did not provide the same to the Respondent for shipment. Failure envisaged was a failure by the supplier, which in turn led to a failure by the Petitioner and Clause 62 cannot be interpreted to mean that Petitioner was within its rights to put an end to the COA when it was in fact executing fixtures in the spot market for shipment of coal from Australia in the same period. If one were to accept Petitioner's interpretation of Clause 62 it would have led to a situation, where Petitioner would have the right to put an end to the contract for its own breach and thus benefit from its own wrongs. Arbitral Tribunal rightly observed that the interpretation placed on the clause by the Petitioner was absurd and vulnerable under Sections 23 and 73 of the Contract Act and



Court cannot be called upon to substitute its interpretation for that of the Arbitral Tribunal. In any event, Clause 62 is ambiguous by use of words ‘suppliers/charterers’ inasmuch as ‘suppliers’ are not parties to the COA and cannot terminate the same.

37. As for the damages, Arbitral Tribunal has rightly held that *Force Majeure* was not invoked at the relevant time by the Petitioner. *Force Majeure* conditions prevailed in December, 2010 and rather than terminating the COA, Petitioner in April, 2011 executed Addendum-2 agreeing to ship the balance quantities and continue with the agreement. Petitioner declared stem in May, 2011, for which Respondent provided a ship, which loaded the cargo in Australia and completed the voyage. The reason for terminating the COA was simply that Respondent did not agree to extend the COA for three years and not that there was no obligation to issue the stem and in this backdrop, Arbitral Tribunal rightly held that termination of COA under Clause 62 was invalid. Referring to law under Section 73 of the Contract Act and Illustration (g) thereto, finding was given on facts that Respondent had pleaded and proved the loss suffered by it and that there was sufficient evidence to show that Respondent would have fulfilled its obligations under the COA, if Petitioner had declared the stem. Findings of fact in an arbitral award are not open to challenge in Court and more so, when it is an award in an International Commercial arbitration.

38. Arbitral Tribunal took into account the fact that damages claimed by the Respondent were based on difference between market/spot rate and the rate of the COA i.e., based on rates of shipments fixed by the Petitioner in the spot market during the period of COA. Total quantity to be shipped by the Petitioner was 3,000,000 MT less 5% and giving the benefit to the



Petitioner, the quantity to be shipped came to 2,850,000 MT, out of which Petitioner shipped a total of 8,91,906 MT and the remaining balance was 1,958,094 MT. Respondent's initial claim for damages was based on freight rates available with it but later, the claim was amended after getting details of the fixtures by the Petitioner in the spot market. Petitioner's commitment was only for balance quantity of 1,958,094 MT and agreeing with the Petitioner on this aspect and taking into consideration the quantity; agreed freight rate of US\$ 34.00; and average spot rate for the month, damages were awarded and this methodology adopted by the Tribunal, based on contractual terms warrants no interference.

39. There is no merit in the contention of the Petitioner that the rate of interest awarded by the Arbitrator deserves interference being a dual rate of interest. Firstly, on a factual note the interest awarded is not a dual rate and secondly, it is trite that interest is the domain of the Arbitrator. Section 31(7) of 1996 Act clearly ordains that unless otherwise agreed by the parties, it is the discretion of the Arbitral Tribunal to decide the rate of interest as also the period for which the same is to be awarded. In the present case, COA neither provides for interest nor bars grant of interest by the Arbitrator.

40. Argument of the Petitioner that Capt. Berry and Mr. Chakraborty were *de jure* ineligible to be appointed as Presiding Arbitrator and Co-Arbitrator respectively, is untenable in law. Merely because the Arbitrators had taken a view in the SeaSpray Arbitration with respect to Clause 62, which was also the subject matter of adjudication in the present arbitral proceedings, cannot be a ground to hold that they were disqualified or ineligible to continue as Arbitrators and the award stands vitiated on the



doctrine of ‘issue conflict’. It needs no reiteration that grounds of ineligibility or disqualification cannot be outside the Fifth and Seventh Schedule to the 1996 Act. Issue conflict, on which jurisdiction of the Arbitrators is questioned, is not a ground in either of the two Schedules. Entry 24 in the Fifth Schedule falls in the heading ‘*Previous services for one of the parties or other involvement in the case*’ and it was held by the Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)***, (2018) 12 SCC 471, that disqualifications contained in Entries 22 and 24 are not absolute and an Arbitrator may not be disqualified on showing that he was otherwise independent and impartial on earlier occasions. In the present case, there is no allegation that Capt. Berry and Mr. Chakraborty were partial or biased in the SeaSpray arbitration, involving the Petitioner as one of the parties. In any case, Petitioner cannot raise this ground at a belated stage, once it failed to raise the objection of independence or impartiality promptly. The fact that SeaSpray Arbitration involved interpretation of Clause 62 was well known to the Petitioner at the earlier stages of arbitration proceedings, but it chose to raise the challenge only on 06.01.2015, after final award was delivered in the SeaSpray Arbitration on 01.09.2014. In ***The Island Territory of Curacao v. Solitron Devices Inc*** 356 F Supp 1 (USDC, SDNY 1973), the US Court held that failure to take objection that the Arbitrator was not impartial early on in the proceedings, when the grounds for objection were known to the party, constitutes waiver and cannot be raised later. In common law jurisdiction, a party may not ‘lie in ambush’ with an objection to await the decision of the Arbitral Tribunal. **[Ref.: Redfern and Hunter on International Arbitration]**.



41. Heard learned Senior Counsels for the parties and examined their rival submissions.

42. The first and foremost issue that arises for consideration is the challenge to appointment and continuance of Capt. Berry and Mr. Chakraborty as Arbitrators on ground of ‘issue conflict’. The argument is that both the Arbitrators formed part of an Arbitral Tribunal constituted to adjudicate disputes arising between the Petitioner herein and SeaSpray shipping involving *inter alia* interpretation of Clause 62 of COA and since they had formed an opinion with respect to interpretation of the said clause, which was one of the main issues for adjudication in the present arbitration, there were justifiable doubts on their impartiality in deciding the same issue between the parties herein.

43. ‘*Issue conflict*’ is a species of ‘impartiality’ and no doubt a recognized doctrine. The concept essentially means and connotes pre-judging legal issues based on previous opinions/judgments of Arbitrators. In other words, if an Arbitrator has decided an issue in one arbitration and is called upon to decide the same issue in another arbitration, there is a likelihood that his vision on that issue will be coloured by the view taken earlier and a party to the second arbitration may perceive this to be an obstruction in the ability of the Arbitrator to decide with an open mind, since there will be a tendency to confirm to the earlier opinion or view. Distinct from independence of an Arbitrator, ‘partiality’ is defined in the IBA Rules of Ethics for International Arbitrators 1987 as : “*Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.*” Impartiality is therefore, related to the mind of an Arbitrator and under Article 12(1) of UNCITRAL Arbitration Rules 2013, appointment of



an Arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to Arbitrator's impartiality or independence and to the same effect is Section 12(1) of 1996 Act.

44. Issue Conflict has been broadly identified in three categories: (i) where Arbitrator serves or has served as a counsel or expert in matters dealing with issues similar to those arising in the concerned arbitration, commonly referred to as 'double-hatting'; (ii) where Arbitrator makes professional statements on similar issues; or (iii) where Arbitrator has decided similar/same issues in previous arbitration(s). Present case, as per the Petitioner falls in the third category. There are different views with respect to issue conflict. One view is that if an Arbitrator has decided a similar issue, there is apprehension that his commitment to the position adopted will cloud his open-mindedness but the other view is that in certain fields there is a relatively smaller and restricted pool of Arbitrators owing to the technicalities involved, such as in Charterparty agreements and thus it is important to draw a line between harmless predisposition of an Arbitrator and a case of apparent partiality or bias arising from pre-judgment of the issue leading to disqualification or ineligibility of the Arbitrator.

45. Coming to instant case, disputes emanate from a Charterparty Agreement and their adjudication requires specialized Arbitrators. Owing to restricted pool of Arbitrators as also the clauses being more or less similar in these agreements, possibility of same legal issues recurring as also Arbitrators being the same in some arbitrations, even involving same parties, cannot be ruled out. This issue was closely analysed in ***Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal, SA v. Argentine Republic, 2007***, perhaps the first case involving a challenge



based on issue conflict. The question formulated for consideration by the unchallenged Arbitrators was *‘does the fact that an arbitrator or a judge has made a decision that a party in one case interprets as against its interests mean that such judge or arbitrator cannot be impartial to that party in another case? Further, does the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case?’*. The question was answered in the negative, highlighting the adverse consequences on any adjudicatory system, if such high standards were set. It was observed that to exclude an Arbitrator from one case because of his decision or view on similar issues in an earlier case may in a given case, operate to exclude Arbitrators possessing expertise in the given field.

46. No doubt, Capt. Berry and Mr. Chakraborty were part of the SeaSpray Arbitration and had interpreted Clause 62 but the question is whether in the facts of this case, their sheer presence is enough to hold that there were justifiable doubts to their impartiality and thus their appointment became vulnerable under Section 12 of the 1996 Act. In my view, the answer must be in the negative for the reasons that follow hereinafter. Before proceeding further, Entry 24 of Fifth Schedule of the 1996 Act needs reference and is extracted hereunder:-

“Entry 24:

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.”

47. In ***HRD Corporation (supra)***, the Supreme Court observed that the disqualifications contained in Entries 22 and 24 are not absolute and an Arbitrator who has been appointed as Arbitrator on two or more occasions in



the past 3 years by one of the parties or an affiliate, may not necessarily be disqualified on showing that he was otherwise independent and impartial in the earlier arbitrations. This issue also came up for consideration before the Karnataka High Court in *Shyamal Mukherjee v. Pricewaterhousecoopers Services LLP*, 2024 SCC OnLine Kar 12477. The question framed by the High Court was whether an Arbitrator who is considering another dispute between the same or one of the parties is barred from trying a dispute in light of Entry 24 of the Fifth Schedule. Relying on the judgment of the Supreme Court in *HRD Corporation (supra)*, the Court held that the fact that an Arbitrator has decided a dispute earlier, may by itself not be a bar for his appointment as an Arbitrator in another arbitration, unless it is shown that the Arbitrator was partial on the earlier occasion.

48. I may also allude to the decision in *Mudhit Madanlal Gupta v. Emgee Enclave LLP and Ors., Comm. Arbitration Application No. 155 of 2024, decided on 23.01.2025*, where the Bombay High Court was dealing with an application under Section 11 of 1996 Act and the very basis of opposition by Respondent No.2 was that the disputes sought to be raised by the Petitioner pertaining to default by Respondent No.1 in repaying the loan and by other Respondents in honouring the guarantee were already covered by earlier arbitration. Reliance was placed on Entries 16 and 24 of the Fifth Schedule. Noting that Fifth Schedule is a guide to an Arbitrator in discharging his obligation to make a disclosure under Section 12(1) of the 1996 Act, Court observed that emphasis in Entry 24 is to eliminate any conflict of interest arising out of appointing an Arbitrator who has already taken a view on a related issue, however, it would still require examination whether doubts exist with respect to his independence or impartiality,



meaning thereby that there must be something more than the mere fact that Arbitrator had decided a similar issue in another arbitration. Examining Entry 24 in light of Entries 20 to 23, which fall under the heading ‘*Previous services for one of the parties or other involvement in the case*’, in the case before it, the Court held that the Arbitrator had acted in the past not as a partisan advisor, but as an independent Arbitrator and had neutrally interpreted the parties’ positions in the earlier round and therefore, the case would not fall within any conceptual position of potential non-independence or partiality that these Entries in the Fifth Schedule stipulate.

49. In ***Bharat Foundry and Engineering Works and Others v. Intec Capital Limited and Another***, 2022 SCC OnLine Del 3578, the question involved was whether the competence and eligibility of the Sole Arbitrator was questionable by the sheer fact of his appointment in four arbitral proceedings between the parties, in light of Entries 22 and 24 of Fifth Schedule. Noting that there was no challenge to eligibility of the Arbitrator under the Seventh Schedule, Court concluded that Appellants had failed to make out any ground doubting the impartiality and independence of the Arbitrators. Relevant passages are as follows:-

“15. The short question involved in the present case is the competence and eligibility of the Sole Arbitrator appointed in respect of four arbitral proceedings between the parties, in view of Entries 22 and 24 of Schedule V. There is no challenge to the eligibility of the arbitrator under Schedule VII and the challenge raised is limited to suspicions arising under Schedule V.

16. Independence and impartiality of the Arbitrator ensure the sanctity of arbitral proceedings and as such, Section 12 of the Act read with Schedule VI underlines the importance and necessity of a disclosure. A challenge to an incomplete or improper disclosure needs to be seen in the facts and circumstances of each case. In present case, the record shows that the Arbitrator made the following disclosure:

“In accordance with the statutory mandate of section 12 of the Arbitration and Conciliation Act 1996 (As amended by Act NO. 3 of



2016) read with relevant Schedules, it is hereby disclosed that Arbitrator has a vast experience of Conducting Arbitration proceedings and has no direct or indirect relationship with the parties to the disputes or Counsels thereof, neither arbitrator is having any interest in the subject matter of the Dispute, even remotely compromising his neutrality in deciding the present dispute. It is made clear that present Arbitration proceeding involves a subject matter which needs to be dealt with by specialized pool of Arbitrators and as such disclosure on that count is dispensed with in terms of Explanation 3 of Seventh Schedule.”

17. In *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited* reported as (2018) 12 SCC 471, it has been held by the Supreme Court that unlike Schedule VII, circumstances listed in Schedule V would not themselves make the arbitrator ineligible to act, unless it is established by attending facts that the arbitrator's neutrality was indeed compromised. Relevant excerpt from the decision is reproduced hereunder:

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear,



therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

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20. *However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein - that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.*

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23. *Coming to Justice Doabia's appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case". From the italicized words, it was sought to be argued that "the case" is an ongoing one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, para 2.1.2 states:*

"2.1.2. The arbitrator had a prior involvement in the dispute."



(emphasis supplied)

24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely, “Relationship of the arbitrator to the dispute”, it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15.”

18. In view of the above, the contention raised in the present case with respect to appointment of the Sole Arbitrator being hit by Entries 22 and 24 of Schedule V does not per se deprive him of eligibility to have acted as Arbitrator between the parties. The appellants have neither pleaded nor proved any action of the Arbitrator that otherwise taints his neutrality making him unfit to act as an arbitrator. The appellants' sole reliance on Entries 22 and 24 of Schedule V, to presume bias against the arbitrator, is not in the spirit of what has been held in HRD Corporation (Supra).

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22. Notably, a Co-ordinate Bench of this Court in Sudesh Prabhakar



(Supra), while following ratio culled out in *HRD Corporation (Supra)*, also concluded that mere appointment in more than two arbitrations by the parties or their affiliates in past three years would not visit the Arbitrator with absolute disqualification. It was held:

“13. In my opinion, prima facie the challenge of the petitioner(s) to the Arbitrator even on facts does not appear to be justified. It is not denied before me that all other cases in which the Arbitrator has been appointed relates to the same issue regarding the demand of VAT by the respondent. Learned counsel for the respondent makes a statement before the Court that the Arbitrator in question has not been appointed in any other matter by the respondent or has acted as an Arbitrator where the respondent is a party, except for the present batch of petitions. As a common issue of law and facts arises in batch of these petitions, it is even otherwise appropriate for one Arbitrator to decide the entire batch. These references in fact form a single reference and are technically different arbitration proceedings only for the reason that one of the party, i.e. the Petitioners in each case would be different as the Arbitration Agreements are different for each party. However, that does not mean that there are actually more than one arbitration proceedings so as to attract provisions of Item 22 or 24 of Fifth Schedule of the Act.”

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24. Recently, in Amardeep Builders (Supra), the petitioner had approached this Court under Section 11 of the Act seeking reference of disputes to arbitration. While appointing the same Arbitrator in respect of three separate arbitrations arising between the same parties and observing that the disputes involved were similar in nature, the Court held:

“5. Inasmuch as the disputes are between the same parties and are similar in nature, I deem it appropriate, in order to ensure an expeditious resolution thereof, that the disputes be referred to arbitration by the same arbitrator. This, in my view, would not infract, in any manner, the Fifth Schedule to the 1996 Act or Serial No. 24 thereof, as that applies to a situation in which, at the time of appointment of the arbitrator, he is already serving or has served in the past, as arbitrator for either of the parties in a similar case. No such infirmity applies in the present case.”

25. From above, it is evident that the law is well settled that merely because an Arbitrator has been appointed in more than two arbitral proceedings between the parties/their affiliates, the Award cannot be set aside, until a concrete foundation is laid down for doubting the independence and impartiality of the Arbitrator.

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28. This Court is of the opinion that the appellants have failed to show any grounds doubting the impartiality and independence of the Sole Arbitrator and as such, reliance on the decision in *Halliburton Company (Supra)* is also of no avail.”

50. In this context, it would be useful to refer to the decision of International Centre for Settlement of Investment Disputes (‘ICSID’) in ***Ickale Insaat Limited Sirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (11 July 2014)***, where the Tribunal observed as follows:-

“118. Claimant’s proposal to disqualify is primarily based on the fact that Professor Sands served as member of the Kılıç tribunal which addressed the issue of interpretation of Article VII(2) of the Turkey-Turkmenistan BIT, a provision that is also at issue in the present arbitration. The Kılıç tribunal resolved the issue in favor of Turkmenistan, Respondent in the present arbitration. According to Claimant, since the interpretation of Article VII(2) of the BIT is “primarily and ultimately a factual matter” and requires the review of the same evidence, including the travaux préparatoires and other evidence, including expert evidence, that was also reviewed by the Kılıç tribunal, Professor Sands “would have been exposed to information relevant for the determination of the central and most important jurisdictional issue in the present arbitration.” There is therefore, in Claimant’s view, an “evident and obvious appearance of a lack of [impartiality and independence]

119. We note that, unlike in *Caratube*, which Claimant relies upon in support of its position, in the present case there is no overlap of facts relevant to the merits of the earlier (Kılıç) arbitration and those relevant to the merits of the present case; the overlap merely concerns facts relevant to the interpretation of Article VII(2) of the BIT and related legal issues such as the scope of application of the MFN clause. In this case, when analyzing the contentions of the Parties and the facts relevant to the interpretation of Article VII(2), all of the facts recited by Claimant and/or Respondent have been submitted to the Tribunal at the Tribunal’s request in Procedural Order No. 2. If any facts are missing, the Tribunal can identify and request the Parties to address them. Indeed, Respondent has offered to submit any evidence from Kılıç not submitted here. Neither Party however has identified any missing facts that are not available to this Tribunal.

120. Moreover, even if the interpretation of Article VII(2) of the BIT in the present case will involve review of relevant supporting evidence, the task of the Tribunal will be fundamentally a legal one of interpreting the



Treaty; this is the case even when it requires review of the relevant supporting evidence. In the words of the Caratube decision, such a task involves the determination of facts that are “of a general and impersonal character” and not specific to the Parties to this particular case, and is therefore unrelated to facts relevant to the merits. Consequently, Professor Sands’ exposure to evidence relevant to the interpretation of Article VII(2) of the BIT cannot constitute a fact indicating a manifest lack of impartiality. This is in particular the situation here, since as noted by Respondent, the record in the present case is already broader than in Kiliç, and the Tribunal has recognized the importance of the issue, directing the Parties to address “all aspects of the issue” in their submissions.

121. Similarly, unlike CC/Devas, another case relied upon by Claimant in support of its submissions, there is no appearance in the present case “of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.” In CC/Devas, the appointing authority upheld one of the challenges brought against two arbitrators on the basis that the arbitrator had expressed views subsequent to the relevant decision which “raised doubts for an objective observer as to [his] ability to approach the question with an open mind,” while dismissing the challenge brought against his co-arbitrator as the latter “had not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees” that had dealt with it. The appointing authority thus accepted the arbitrator’s statement that his intention was to approach the issue with an open mind and to give it full consideration, and concluded that there was no appearance of pre-judgment.

122. This is also the case here. Professor Sands has not been shown to have expressed any views subsequent to the [previous decision] that would raise doubts as to his ability to approach the interpretation of Article VII(2) of the BIT, and the related legal issues, with an open mind. On the contrary, Professor Sands confirmed in his Explanations of 4 June 2014 that he would approach the issues and the arguments of the parties with an entirely open mind, and that such openness of mind is of the essence of the arbitral function.”

51. To the same effect, are the decisions in ***EnCana Corporation v Republic of Ecuador, Partial Award on Jurisdiction, Ad Hoc Tribunal (UNCITRAL/LCIA), 27 February 2004***; and ***Valeri Belokon v Kyrgyz Republic, Ad Hoc Tribunal (UNCITRAL PCA), Decision on Challenges to Arbitrators Professor Kaj Hober and Professor Jan Paulsson, 6 October***



2014, PCA Case No AA518. The decision in *Valeri Belokon (supra)* is especially relevant as it dealt with *CC/Devas (Mauritius) (supra)*, heavily relied upon by the Petitioner herein and the crucial observations which further the case of the Respondent are as follows:-

"93. Noting that in its Supplemental Submission the Claimant makes its case on denial of justice by reference to Professor Paulsson's Writings, the Respondent submits that Professor Paulsson's previously stated views on the "concept of 'denial of justice'" give rise to a "justifiable appearance of doubt as to his capacity for impartiality and/or open-mindedness." According to the Respondent, Professor Paulsson has "stuck to his views" on three separate occasions and has consistently interpreted 'denial of justice' in a manner favoring investors.

94. The Claimant replies that Professor Paulsson's Writings are in the nature of "general opinions and/or historical surveys," are uncontroversial, do not reflect any bias, and in no way suggest that Professor Paulsson "is not capable of giving his full attention and consideration to the positions developed by each party."

95. Both Parties cite H.E. President Peter Tomka's recent challenge decision in CC/Devas. In that decision, President Tomka stated that:

... knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.

96. President Tomka went on to sustain the challenge to Professor Orrego Vicuna (and reject the challenge to Hon. Marc Lalonde). Notably, President Tomka found that Professor Orrego Vicuna had in prior writings assumed a consistent position on a specific legal issue, several times interpreting the "essential security interests" clause of investment treaties in reference to customary international law on the state of necessity, thus raising doubts for an objective observer as to Professor Orrego Vicuna's ability to approach this specific legal issue with an open mind.

97. By contrast, in the present case, the Respondent has not been able to identify a specific legal issue that Professor Paulsson might have pre-judged. The Respondent's reference to the "concept of 'denial of justice'" is



insufficiently specific. Denial of justice is a general cause of action under international law that may be invoked in a multitude of circumstances. As Professor Paulsson states in the Monograph, "claims of denial of justice cannot be decided without balancing a number of complex considerations which tend to be specific to each instance." As such, the mere fact that Professor Paulsson has written on the general topic of denial of justice only suggests that he has expertise on that subject, but would not raise doubts on the part of a reasonable and fair-minded third person as to Professor Paulsson's ability in the present case to approach the Parties' arguments regarding the Claimant's denial of justice claim with an open mind.

98. While the Respondent has not attempted to demonstrate by specific reference to Professor Paulsson's Writings that there is an appearance of pre-judgment with regard to any legal issue more specific than 'denial of justice' generally, I have nevertheless examined the denial of justice claim made by the Claimant in its Supplemental Submission, as well as each of Professor Paulsson's Writings. On this basis, I am satisfied that Professor Paulsson's Writings do not reveal fixed views on any specific legal issue likely to be relevant in the present case on which the Parties have a reasonable expectation of an open mind. I would add that I have found no indication that Professor Paulsson has consistently interpreted the concept of 'denial of justice' in a manner favoring investors. For example, as noted by the Claimant, in the Pantechniki Award Professor Paulsson rejected the investor's denial of justice claim.

99. Therefore, having reviewed the facts and circumstances of the challenge, and the submissions of the Parties, I do not find the Respondent's doubts regarding Professor Paulsson's independence and impartiality to be justifiable under the circumstances."

52. From a conspectus of the aforesaid judgments, it is palpably clear that merely because an Arbitrator has decided an issue in another arbitration where one party may be common to the arbitration in question, is by itself not a ground to hold that there are justifiable doubts on the impartiality of the Arbitrator rendering him ineligible under Section 12 of the 1996 Act. It must be shown that Arbitrator's ability to decide the issue arising in the second case is clouded and that he will not be able to approach the issue with an open mind so as to do justice to the party. It is not uncommon in arbitration regime for same Arbitrators to be appointed in multiple



references involving same or common parties with same or similar questions of law. It is equally not uncommon that parties prefer to appoint same Arbitrators for different contracts involving similar questions or in fresh arbitrations, where there are pending arbitrations involving similar issues. The reason to make such a choice is the familiarity of the Arbitrator with the background, technical details and nuances as also complicated legal issues, which in turn leads to more informed, efficient and expeditious adjudication. In many International Institutional arbitrations under ICC, SIAC etc., it is a common practice for Arbitrators to preside over multiple related disputes involving the same issues and parties, particularly, where Arbitrator is chosen for its subject-matter expertise or where the disputes arise in related contracts where arbitrations are ongoing in respect of master contracts. Illustratively, in a number of standard format contracts or contracts arising under framework agreements such as Franchise Agreements, EPC Contracts, Power Purchase Contracts, invariably Arbitrators rule on aspects of delay, *force majeure*, liquidated damages etc., and in my view, the mere fact that an Arbitrator has rendered a particular interpretation on any of these aspects, cannot automatically lead to his disqualification to decide a similar issue in a subsequent arbitration, unless it is substantially demonstrated that the Arbitrator will be unable to decide objectively, impartially or independently. Law does not treat mere prior knowledge of a subject or decision on the issue as *per se* bias, unless it is coupled with proof that having prejudged the issue, the Arbitrator will decide the same with closed mind and subjectively or that on an earlier occasion the Arbitrator was not impartial or independent.

53. The judgment in *CC/Devas (Mauritius) (supra)*, in fact, supports the



argument of the Respondent. In the said case, Respondent claimed that there were justifiable doubts on the impartiality of the Presiding Arbitrator and Professor Orrego Vicuna, not owing to lack of independence or inappropriate action, but on issue conflict i.e., pre-existing views held by Professor Orrego Vicuna and Mr. Lalonde regarding an issue in dispute between the parties. It was argued that the two Arbitrators had strongly articulated their positions on interpretation of the “Essential Security Interests” provision in two cases i.e. *CMS* and *Sempra* and Professor Orrego Vicuna repeated this view in *Enron*. Overruling the challenge, it was held that to sustain any challenge, one would require to demonstrate more than simply showing a prior view or opinion, such that the Arbitrator will not be able to decide the issue again objectively or with an open mind. The fact that both Arbitrators in two cases adopted a consistent view on the concept of “essential security interests” was not surprising, as those Tribunals applied the same provisions to similar facts.

54. Applying the aforementioned judgements to the present case and tested on the anvil of the law laid down and observations made, in my view, Capt. Berry and Mr. Chakraborty were not *de jure* ineligible on the touchstone of doctrine of issue conflict. No doubt both had dealt with interpretation of Clause 62 in the SeaSpray arbitration and taken a particular view, but as elucidated in the aforesaid judgments, this by itself is not a disqualification *sans* any evidence that the Arbitrators will decide the issue with a closed mind and without any objectivity or were not impartial in the earlier arbitration involving the Petitioner, which I may note, Petitioner has failed to demonstrate. Objection of the Petitioner is mere presence based and no cogent material has been placed which shows that the two Arbitrators



were partial or decided with a predetermined disposition. This contention is thus rejected.

55. Insofar as the contention that the two Arbitrators did not give a declaration in the format prescribed under Sixth Schedule of the 1996 Act is concerned, be it noted that as a matter of fact, disclosure was given *albeit* not in the format given in Sixth Schedule since the disclosure was given prior to the amendment in Section 12. The question whether this is enough to hold that the two Arbitrators were *de jure* ineligible and consequently, the award vitiates on this ground in the present case, is to be answered in the negative both in law and on a factual note and in taking this view, I find strength from the judgment of this Court in ***Manish Anand and Others v. Fiitjee Ltd., 2018 SCC OnLine Del 7587***, relevant paragraphs of which are as follows:

“10. Reading of Section 12(1) of the Act with the Sixth Schedule would clearly demonstrate the importance of the disclosure to be made by the proposed Arbitrator who is approached by the parties with his possible appointment as an Arbitrator. The disclosure is relevant and necessary as independence and impartiality of the Arbitrator are the hallmark of any arbitration proceedings. The amended provision is enacted to identify ‘circumstances’ which give rise to ‘justifiable doubt’ about the independence and impartiality of the Arbitrator.

11. Having appreciated and re-emphasized the importance of the disclosure under Section 12(1) of the Act, the question is whether an improper disclosure, as in the present case would render the Arbitrator so appointed ineligible or de jure incapable of proceeding with the arbitration proceedings. The answer to this, in my opinion, has to be in the negative. The legislature, while emphasizing on the disclosure under Section 12(1) of the Act, has not further stated that the consequence of such non-disclosure would be automatic termination of the mandate of the Arbitrator so appointed. In absence of such a legislative consequences, in my opinion, it would depend on the facts of the given case whether the mandate of the Arbitrator would stand terminated upon non-disclosure or giving a false disclosure under Section 12(1) of the Act.

12. In Pallav Vimalbhai Shah v. Kalpesh Sumatibhai Shah, High Court of Gujarat held as under:—



“38. In this context, the necessity of disclosure envisaged in subsection (1) of Section 12 becomes important. Only when such a disclosure is made, that the parties can judge for themselves, if circumstances exist to give justifiable doubts as to the impartiality of an arbitrator. Upon disclosure being made any one of the following situations may arise. First is, where the parties may agree that no such circumstances giving rise to justifiable doubts as to the impartiality of the arbitrator exist or the parties may despite such circumstances existing, go ahead and appoint him as an arbitrator or in face of disagreement between the parties on this issue, one of them, as per the procedure envisaged in the arbitration clause, may proceed to appoint such a person as an arbitrator. Whatever be the fall out, it cannot be denied that disclosure of existence of any circumstance likely to give rise to justifiable doubts as to independence or impartiality of an arbitrator, would be of great importance. Not making any disclosure even though such circumstances exist, would render the appointment of an arbitrator without following the mandatory procedure. This is not to suggest that even though no such circumstances exist, mere failure to make a disclosure or in a format different from that provided in the Sixth Schedule by itself would be fatal to the appointment of the arbitrator. This is also not to suggest that if a party objecting to appointment of arbitrator is aware about existence of such circumstances before the appointment is made, he could challenge the same at a later time on the ground that disclosure was not made. Such a situation would be clearly covered by subsection (3) of section 12. This is only to suggest that if circumstances exist and disclosure is not made, appointment of an arbitrator would be wholly non-est. In such a situation a party making appointment of an arbitrator without following such mandatory procedure cannot, by referring to section 13 of the Amending Act, drive the opponent to challenge his appointment before the Arbitrator Tribunal itself and if such a challenge before the Tribunal was unsuccessful, to submit to the jurisdiction of the Arbitral Tribunal and to challenge the award in accordance with Section 34 inter-alia on the ground of incompetence of the arbitrator.”

13. *In HRD Corporation v. Gail (India) Limited 2017 SCC OnLine SC 1024, Supreme Court negated an argument challenging the appointment of an Arbitrator on the ground that the Arbitrator had not made a complete disclosure in his disclosure statement. The Supreme Court held as under:—*

“29. The appointment of Justice Doabia was also attacked on the ground that he had not made a complete disclosure, in that this disclosure statement did not indicate as to whether he was likely to devote sufficient time to the arbitration and would be able to complete it within 12 months. We are afraid that we cannot allow the Appellant



to raise this point at this stage as it was never raised earlier. Obviously, if Justice Doabia did not indicate anything to the contrary, he would be able to devote sufficient time to the arbitration and complete the process within 12 months.”

14. In the present case the Arbitrator has given the disclosure in terms of Section 12(1) of the Act (though not in the form prescribed in the Sixth Schedule) as under:—

“Please be informed that there exist no circumstances that give rise to justifiable doubts as to my independence or impartiality in resolving the disputes referred in this regard.”

15. Though the above disclosure is not in terms of the Sixth Schedule of the Act, the same discloses the most vital aspect of the same. In any case, if the petitioner(s) were not satisfied with the said disclosure they should have made a request to the Arbitrator so appointed for making a proper disclosure or of other circumstances that may give rise to justifiable doubt as to his independence and impartiality. Instead of doing so, the petitioner(s) have filed the present petition(s) under Section 11 of the Act.

16. The petitioner(s) have placed reliance on the judgment of this Court in Dream Valley Farms Private Limited v. Religare Finvest Limited 2016 SCC OnLine Del 5584 to contend that in the absence of a proper disclosure by the Arbitrator, a petition under Section 11 of the Act would be maintainable. I am unable to accept the said argument. In Dream Valley (Supra) the Court was faced with a situation where the disclosure given by the Arbitrator was ex-facie misleading. The Court, in view of the conduct of the Arbitrator in seeking to mislead the petitioner therein and suppress, in the first instance the fact of his being a presiding Arbitrator in 27 matters relating to the respondent therein which in the opinion of the Court smacked of dishonesty and non-becoming of an Arbitrator, is held that the Arbitrator had become de jure disqualified as continuing as an Arbitrator and thereafter proceeded to appoint an Arbitrator in exercise of its power under Section 15 of the Act. The said judgment is therefore, distinguishable on facts of its own case.

17. In Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd. (2009) 8 SCC 520, the Supreme Court summarized the scope of Section 11 of the Act as under:—

“48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated



arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power Under Sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures Under Sub-section (6) is that:

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to



perform such function.

(iv) The Chief Justice or his designate while exercising power Under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(v) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

Thus, as laid down in sub-para (v) of para 48, unless the cause of action for invoking jurisdiction Under Clauses (a), (b) or (c) of Sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power Under Sub-section (6) of Section 11.”

18. In the present case as the Arbitrator has been appointed in accordance with the procedure agreed to between the parties in the Arbitration Agreement, therefore, this Court would not have jurisdiction to exercise its power under Section 11 of the Act to appoint another Arbitrator for adjudicating the disputes between the parties.

19. In view of the above, I find no merit in the present petitions and the same are accordingly dismissed, however, leaving it open to the petitioner(s) to agitate all other contentions regarding the impartiality or independence of the Arbitrator before the Arbitrator himself or in such other proceedings as may be open to it in law. There shall be no order as to cost.”

56. The next argument of the Petitioner was that the Arbitral Tribunal has wrongly awarded damages, despite parties agreeing in the COA to exclude any liability on either party in case of the COA was terminated and that too without any proof of loss. This issue is interlinked with interpretation of Clause 62 the ‘Default Clause’, on which heavy reliance was placed by the Petitioner to contend that should suppliers/charterers fail to provide material for shipment or to ship the material by the time or times agreed upon or fail to perform the contract, the suppliers/charterers shall be entitled to declare the contract as at an end without any liability on either side.

57. Insofar as Clause 62 is concerned, indisputably, it permitted the



suppliers/charterers to declare the contract as at an end without any liabilities on either side. Arbitral Tribunal critically analysed Clause 62 and held that it was designed to legislate for events constituting frustration of the agreement and was directed at the supplier in Australia rather than the Petitioner or at events which prevented performance such as, liquidation/insolvency of the supplier of coal and could be invoked if the supplier in Australia failed and was unable to supply material for shipment and not where the supplier provided coal but Petitioner did not provide stem for the shipments. It was also held that Clause 62 cannot be interpreted to mean that Petitioner was within its right to put an end to the COA when it was in fact executing fixtures in the spot market for shipment of coal from Australia in the same period and if one was to accept the interpretation placed by the Petitioner, it would lead to a situation where Petitioner would have right to put an end to the contract for its own breach and then benefit from its own wrongs.

58. Pertinently, this conclusion of the Arbitral Tribunal was based on the appreciation of the fact scenario in the matter. Tribunal noted that in the letter of termination, Petitioner had referred to three circumstances which led to termination of the COA; (a) longstanding *force majeure* condition in Australia, in December, 2010 lasting for more than 90 days; (b) action of shipowners/COA holders to postpone shipments during early stages of COA; and (c) drastic fall in availability of Handymax stem which jeopardized operation of Handymax COAs. Tribunal noted that Respondent admitted that *force majeure* did exist and itself also agreed on this aspect with the Petitioner, however, observed that admission of the Respondent was with a caveat that they were willing to provide the ships during the



period in question, if the Petitioner declared stem. Tribunal also took note of a critical and significant fact emerging from the pleadings and documents that Petitioner did not invoke *force majeure* at the relevant time and no notice was served on the Respondent. Petitioner's witness, in response to question Nos. 21 and 22, could not confirm if *force majeure* notice was given to the Respondent within 20 days and whether there was a certificate from Chamber of Commerce or concerned authorities in support of this claim, in light of Respondent's categorical stand that no notice was received by it invoking *force majeure* and this position could not be traversed by the Petitioner even during the hearing before this Court.

59. Perusal of the award shows that Petitioner's argument did not find favour with the Arbitral Tribunal despite agreeing that Petitioner had the right under Clause 61 to terminate COA in case *force majeure* conditions prevailed for more than 30 days, for two reasons: (i) Petitioner did not invoke the Clause at the relevant time; and (ii) it executed Addendum-2 in April, 2011, agreeing to ship the balance quantities and continue performing the obligations under the COA. It was also noted that Petitioner declared stem in May, 2011 for which Respondent loaded the cargo in Australia and completed the voyage. Tribunal was of the view that even if it was accepted that certain coal suppliers had declared *force majeure* during December, 2010 to June, 2011 in Australia, the same could not be a defence for the Petitioner since: (a) *force majeure* had been called off by all suppliers before beginning of Petitioner's default and the period of *force majeure* was irrelevant to the dispute in question; (b) Petitioner carried the cargo on spot basis during the alleged *force majeure* period; and (c) signed an addendum and declared stem to continue with the agreement, In light of these facts,



which were undisputed, Tribunal held that Petitioner could not take *force majeure* as a plea to terminate the contract, retrospectively. Both reasons that weighed with the Tribunal have not been traversed by the Petitioner in the pleadings in the objection petition. The view of the Tribunal that if Petitioner chose not to invoke *force majeure* and send a notice, as required and took a conscious call to sign an addendum to proceed with the COA, it cannot take the benefit of termination by invoking *force majeure* at a later stage, cannot be faulted.

60. Tribunal did not delve into the second aspect of action of the shipowners/COA holders to postpone shipments, noting that the parties did not canvass any argument on this issue. On the third aspect, Arbitral Tribunal held that Petitioner continued to honour the contract upto 12.09.2012 at least and admitted even in paragraph 24 of the SoD that it had endeavoured to overcome the hurdles and keep the contract alive as long as deemed appropriate rather than to terminate it. In fact, it was observed by the Tribunal that the real reason for termination was that Respondent did not agree to extend the COA for three years and there was no mention of non-availability of stem in the termination letter. This conclusion was also based on deposition of Petitioner's witness in response to questions 15 and 16 during cross-examination. Tribunal disagreed with the Petitioner that fall in Handymax stem directly affected the COA holding that vide Addendum-2 Petitioner had offered to give Panamax stem to the Respondent for the period April, 2011 to September, 2012.

61. After coming to the aforesaid conclusion, Tribunal analysed whether Petitioner had rightly invoked Clause 62 to absolve itself of liability arising from termination of the COA and held that Respondent's refusal to extend



the COA for 3 years was a legally invalid ground for termination of the COA and/or invocation of Clause 62, since it was purely Respondent's prerogative to agree or not to agree for extension of time. In light of the specific pre-requisites of Clause 62 to put the contract at an end, Tribunal concluded that letter of termination did not show any failure by the Respondent to ship if the stem was provided by the Petitioner. Petitioner failed to prove that it was unable to provide stem for the entire period and on the contrary, evidence produced by the Respondent established that Petitioner was shipping coal from Australia to India during the relevant period in dispute in the spot market. In a nutshell, Tribunal was of the view that termination of COA was for reasons extraneous to Clause 62 and could not be sustained.

62. Having examined Clause 62 and on perusal of the impugned award, I am unable to find any reason to interfere with this part of the award. Clause 62 enabled the suppliers/charterers to declare the contract as at an end without liability, but as rightly held by the Tribunal, termination could only be for reasons specified therein. Insofar as *force majeure* is concerned, there was evidence on record that Petitioner never invoked the Force Majeure Clause at the relevant time and in fact made a shipment in May, 2011 and carried the cargo on spot basis, which showed that there were no *Force Majeure* conditions in Australia at the relevant time. Even if it was accepted that certain coal suppliers had declared *force majeure* from time to time in Australia during the period December, 2010 to June, 2011, this factor would not aid the Petitioner as *force majeure* had been called off by all suppliers before the beginning of Petitioner's default. Conscious of the importance and effect of a "declaration" under Clause 61, Petitioner never declared



force majeure under Clause 61 of COA and instead signed an addendum-2 in April, 2011. Moreover, dispute was for non-declaration of stem by the Petitioner from April, 2011 to September, 2012, which period was not affected by the alleged *force majeure* conditions. Therefore, the plea and defence of *force majeure* conditions set up by the Petitioner to retrospectively terminate the contract was not accepted by the Tribunal and in my view, rightly so.

63. Arbitral Tribunal also did not accept the plea of the Petitioner that there was drastic fall in availability of Handymax stem, which jeopardised the operations, finding from record that Petitioner continued to honour the contract up to 12.09.2012 and as admitted even in paragraph 24 of the SoD, was endeavouring to overcome the hurdles to keep the contract alive and going rather than to terminate the COA under Clause 62. As a finding of fact, Tribunal also observed that fall in Handymax stem did not directly affect the COA inasmuch as letter of termination was given on 12.09.2012 and the addendum-2 was signed on the 20.04.2011, in which the shipment quantity was amended to ‘Parcel Size: 75,000 MT 5% MOLOO through gearless Panamax vessels subject AWAD’, which showed that the stem from April, 2011 till September, 2012 that was agreed in the addendum-2 was for Panamax vessel and not Handymax vessel. Tribunal also rightly observed that the actual ground for termination was not the fall of stem for the Handymax size vessels but as stated in the termination letter was that Respondent did not accede to the request of the Petitioner to extend the shipment period of the COA by three years.

64. Tribunal then examined if termination of COA was valid under Clause 62, in light of the reason of termination that Respondent did not



agree to extension of the COA for three years and referred to Petitioner's witness's reply to questions 15 and 16 during cross examination, that the sentence "COAs to terminate with effect without liabilities on either side", referred to the period when SAIL failed or could not provide material for shipment. Tribunal then posed the question whether Clause 62 was validly applied and looked in the circumstances in which Charterer/Supplier could put the contract to an end viz: (a) supplier fails to provide the material to the Charterer; or (b) Charterer is unable to ship the material/cargo due to supplier not supplying the material on time, as agreed. In this context it was observed that in line with the agreement, any obligation could have arisen only when the chain was complete i.e. material was allocated; vessel was nominated as per the specification and accepted by SAIL as charterer; vessel reached the load port in time; and loaded the material and performed the voyage. In view of this contractual stipulations, Tribunal concluded that Respondent's refusal to extension of the COA was not a ground stipulated in the COA or specifically under Clause 62 and thus right to terminate under this clause was not validly exercised. It was clearly and rightly held that in light of contractual stipulations, non-declaration of stem by the Petitioner should have been based on circumstances beyond its control but Petitioner's letter of termination did not evidence any failure to ship and there was no evidence to prove that there was any genuine reason that prevented issuance of stem. As per the Tribunal, evidence established that Petitioner was shipping coal from Australia to India during the relevant period in dispute in the spot market.

65. Arbitral Tribunal agreed with the Respondent that failure to perform the contract envisaged in Clause 62 did not mean and include refusal to



perform and in this context referred to the judgement in ***Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63***, where the Supreme Court *inter alia* considering the scope of failure under Clause 7.2 of the relevant agreement observed that: “*Although it has been strenuously urged on behalf of the appellant that stipulations contained in Clause 7.2 are comprehensive enough to include all types of breaches, on a careful consideration thereof we are unable to accept the submission made on behalf of the appellant. Can it be said that SAIL intended to provide for liquidated damages in the contract even in a situation where they were unable to make supply of materials for the reasons beyond control or they declined to supply the materials on one ground or the other. The answer has to be plainly in the negative. It is well known that intention of the parties to an instrument has to be gathered from the terms thereof and that the contract must be construed having regard to the terms and conditions as well as nature thereof. Clause 7.2 that provides for compensation to the respondent for failure to supply or delayed supply of the materials by SAIL was never intended to cover refusal to deliver, the materials of the supplies on the part of the SAIL. Refusal to supply materials by SAIL resulting in breach is neither contemplated nor covered in Clause 7.2.*” Relying on this decision, the Tribunal held that failure to supply or delayed supply does not cover the refusal to supply the material. Relevant paragraphs of the award are as follows:-

“80. Therefore, we hold that as per the terms of the COA, the Respondent had an obligation to ship the cargo on ‘Fairly and evenly spread basis’ as per the shipping practice and shipping the cargo which is not ‘fairly and evenly spread’ would be against the terms of the COA Clause 2.

Issue 5: Whether the Claimant’s claim for damages is barred in view of the express terms of the Contract dated 5th December 2007?

Issue 6: Whether the Respondent was entitled to terminate the Contract



without any liability for either party under Clause 62 of the Contract?

81. The Respondent terminated the COA dated 5th December 2007 by their letter dated 12th September 2012. Both the parties have arguments on the subject and we find the Claimants Senior Counsel's arguments/submissions acceptable.

82. In the letter of termination, the Respondent refers to three different circumstances which the Respondent claims have attributed adversely in the working of the COA.

- i) Long standing Force Majeure situation in Australia in December 2010, lasting for more than 90 days, invoked by the Respondent's suppliers and making the subject agreement unworkable.*
- ii) Action of Shipowners/COA holders to postpone shipments during the early stages of the COA adversely affecting SAIL's interest; and*
- iii) Drastic fall in availability of handymax stem which jeopardised operation of the handymax COAs.*

83. *FORCE MAJEURE: RESPONDENT'S ARGUMENT:*

The Respondent argued that the Force Majeure in December 2010 was for more than 90 days and sought as one reason leading to terminate the COA and that the Claim is barred under Clause 61 of the COA. There is no argument that once there is Force Majeure the benefit goes to the Respondent. Respondent's witness in her affidavit of evidence had also established the existence of force majeure during the time period between December 2010 and June 2011. It was stated that:

"18. SAIL had further setbacks in December 2010 when in Queensland Australia. The load port of SAIL's majority shipments, faced heavy rains, storms and floods affecting mines, rails, ports, infrastructure. The Respondent's supplier declared Force Majeure (FM) on all shipments. The Force Majeure situation continued for about six months. Thus, there was Force Majeure situation for a continuous period of more than 30 days and cumulatively for more than 90 days. The information regarding Force Majeure was duly sent by SAIL to all the owners/ operators, including the Claimant through Transchart and all the owners/ operators including the Claimant, who even otherwise were aware of the prevalent Force Majeure event. In spite of all such inhibiting circumstances, the Respondent endeavoured to overcome the hurdles and keep the standing agreements alive as long as deemed appropriate rather than to immediately terminate them under Clause 62 so that if at all possible and as decided, SAIL could exercise its option to provide some stems."

84. The Respondent submitted that the only cross examination with respect to Force Majeure done is extracted below:



“Q 21. Under Clause 61, Force Majeure Clause, did you ever provide the certificate of the Chamber of Commerce or the concerned Govt, authority to the Claimant?”

Ans. I am not aware since I was not handling the desk concerned. However, it is clear from the documents on record that Force Majeure had been accepted by the Claimant, which indicated that all requisite documents would have been provided or agreed to have been waived as the case may be.

Q22. Can you show us the document you are referring to in the previous answer?

Ans. I do not remember all the documents but can refer to one or two. One of the documents is referred to as Exhibit- O to the Statement of Claim at Pg 55 & 56.”

85. The Exhibit ‘O’ Page 55 & 56 of the SoC is the email by the lawyers of the Claimant and it has the statement that the Claimant were prepared to ship during Force Majeure.

86. The Respondent submitted that from the above line of cross examination also, it is a clear fact that Force Majeure situation existed for a period of nearly 6 months from December 2010 to June 2011 in Australia and was an accepted and uncontroverted fact which must be accepted by the Tribunal. The documents referred to clearly acknowledge that force majeure conditions existed.

87. According to the Respondent, British Marine admitted the fact that force majeure did exist. In the Notice dated 9 September 2011(Ex O SOC), the Claimant’s Advocate stated that the Claimant was prepared to ship cargoes in force majeure situations.

88. We agree with the Respondent’s plea that Force majeure may have existed and the statement of the Claimant’s lawyers Exhibit O does not show acceptance that the Force Majeure existed. What the statement states is that they were willing to provide the ship during the period in question, if the Respondent would declare stem.

89. SAIL submits that the provisions contained in Clause 61 are clear. A right to terminate accrues when force majeure exists by reason of one occurrence of force majeure which continues uninterrupted for 30 days or more. Similarly, a right accrues if there are more than one force majeure events and the total period of such force majeure reaches 90 days or more.

Clause 61. FORCE MAJEURE CLAUSE:

If either Shippers / Charterers be prevented from discharging their or its obligation under this agreement by reason of arrests or restrains by Government or people war, blockade, revolution, insurrection, mobilization, strikers, civil commotions, acts of God, plague or other epidemics, breakdown 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 the 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 Certificate of Chamber of Commerce or concerned Government authority and shall likewise intimate the cessation of such cause. The delivery shall be resumed by the party / parties after cessation of force majeure causes.

90. There is no denying that the Force Majeure conditions may have existed for the period Dec 2010 to June 2011. As per the Clause 61, the Respondent, if they wished, could have invoked the Clause by satisfying the conditions therein:

- 'Party invoking protections under such Clause within 20 days of the occurrence of force majeure put the other party on notice*
- supported by Certificate of Chamber of Commerce or concerned Government authority and shall likewise intimate the cessation of such cause.'*

91. From the pleadings and documents, we find the Respondent did not invoke the Force Majeure at that time as per the Clause.

92. During the cross examination of the Respondent's witness in Q 21 and 22 mentioned above, the witness could not confirm if any such notice was served to the Claimant, the notice was to be given to the Claimant within 20 days and whether there is a certificate from the Chamber of Commerce or other concerned Government authorities which was passed to the Claimant in support of the Respondent invoking of Force Majeure in support of their claim due to Force Majeure.

93. According to the Claimant in the present case no notice was issued by the Respondent to the Claimant at that time.

94. According to the Exhibit 'M' of the SoC a message from the Respondent dated September 07, 2011 stated:

'We do not agree to the contention of the owner and would like to reiterate it has always been the intention of the Charterers (SAIL) to perform the COA even though there have been situations allowing the Charterers to discontinue the COA including the Charterers invoking the provisions under Clause 61 and Clause 62.'



95. Here the question is was the Force Majeure invoked by the Respondent as per their message of Sept. 07, 201.

96. However, Exhibit-O of the SoC, notice by the Advocates of the Claimant dated 9th September 2011 stated that if the Respondent wanted to invoke Force Majeure they had to do it as per the terms of the COA and not post facto:

"If you are seriously alleging force majeure, Clause 61 cannot be applied ex-post facto and our clients have not received any notice and supporting evidence required by the Clause..."

97. There is no doubt that the SAIL has the right under Clause 61 to terminate the COA when the Force Majeure conditions prevail more than 30 days but did SAIL invoke the termination as per the terms of the Clause 61? It is apparent from the above that the Respondent never officially invoked the Force Majeure Clause. The Force Majeure happened in December 2010, rather than terminating the COA the Respondent in April 2011 executed the Addendum No. 2 agreeing to ship the balance quantities and continue with the COA. The Respondent declared stem in May 2011 for which the Claimant provided a ship which loaded the cargo in Australia and completed the voyage.

98. It is thus clear that the Respondent never invoked the Force Majeure Clause for which they had to satisfy the conditions therein and cannot now take defence under it retrospectively. In any case, in May 2011 the Respondent made a shipment, which shows that in May 2011 there was no Force Majeure conditions in Australia.

99. Furthermore, even if it is accepted that certain coal suppliers had declared a state of force majeure from time to time in Australia during the period December 2010 - June 2011, this force majeure is not a defence for the Respondent because:

- (i) The period of alleged force majeure is irrelevant to this dispute as force majeure had been called off by all suppliers before the beginning of the Respondent's default.
- (ii) The alleged force majeure did not even affect the Respondent's performance of the COA even when it was in place. The Respondent carried the cargo on the spot basis during the alleged force majeure period.
- (iii) Fully conscious of the importance and effect of a "declaration" under Clause 61, the Respondent never declared force majeure under Clause 61 of the COA as they were obliged to do so in order to rely on it.
- (iv) The Respondent signed an addendum No 2 in April 2011 which shows the Respondent had not invoked the Clause 61.
- (v) In May 2011 the Respondent declared stem and shipment was made



by the Respondent.

(vi) *The dispute is for the non-declaration of stem by the Respondent from April 2011 to September 2012 this period is not affected by the alleged force majeure.*

100. *Therefore, we do not accept the arguments of the Respondent and they cannot take force majeure as a plea to retrospectively terminate the contract. When the Respondent signed the addendum in April 2011 during the alleged Force Majeure they did it knowing that they will be able to ship the cargo from this period onwards.*

ACTION OF SHIPOWNER

101. *The part two of the termination letter is 'Action of Shipowners/COA holders to postpone shipments during early stages of the COA adversely affecting SAIL's interest'.*

102. *The parties have not argued on this point as no particular incident has been named in any postponement of shipment. In any case the COA Clause 5 provided the Claimant the option of substitution of vessel 'but not later than 10 days prior to commencement of laydays.'*

"Clause 5 -While nominating owners to ensure no substitution is made, except in case of operational exigency which should be well in advance and definitely not later than 10 days prior to commencement of lay days."

103. *The incident, if any, at the early stage of the COA would be better addressed at the time of the incident by the Respondent. They could have acted as per the COA to cancel vessel/stem. This was done by the Respondent at that time. Now that the dispute is for the period April 2011 to September 2012 any earlier matter does not affect the present dispute.*

FALL IN HANDYMAX STEM:

104. *The third statement in the Respondent letter of termination was that the 'drastic fall in availability of handymax stem which jeopardised operation of the Handymax COAs.'*

105. *The Respondent continued to honour the contract up to 12 September 2012 at least. In paragraph 24 of the Respondent SoD, the Respondent has admitted that the "Respondent endeavoured to overcome the hurdles and keep the contract(s) alive as long as deemed appropriate rather than to terminate it (them) under Clause 62."*

106. *The actual ground for termination did not rely on any of the events mentioned in the first part of the letter including the fall of stem for the Handymax size vessels. In fact, the Respondent, in the said letter, states that*

"[the Respondent] as a last resort requested to extend the shipment period of the COA by about another three years, but the same was not



reciprocated in its right perspective.

Finally, therefore please be informed that, [the Respondent] is left with no option but to treat the subject agreement stood terminated under the Default Clause'...."

106. The reason for the termination as mentioned in the Respondent's letter was due to the Claimant not agreeing to extend the COA for three years, but there is no mention of the non-availability of stem and the same was not proved. The fall in Handymax stem did not directly affect the COA. It may be noted here that the letter of termination was given on 12 September 2012 and the addendum No. 2 was signed on the 20 April 2011. In the Addendum the Shipment quantity was amended to;

- 'Parcel Size: 75000 MT 5% MOLOO through gearless Panamax vessels subject AWAD.'

107. The stem from April 2011 till September 2012 that was agreed in the addendum No 2 is for the Panamax vessel and not Handymax vessel. So, the fall in the stem for Handymax vessel does not affect the stem for the Panamax vessel.

*108. The Respondent's statement regarding fall in stem of the **Handymax vessel in the** letter of termination cannot be taken as the main reason for the termination. The Respondent had offered to give Panamax stem to the Claimant as agreed in April 2011 by the Addendum no 2 which is stem on the basis of 75000 MT size which is the Panamax size vessel.*

109. In view of above we do not agree to the Respondent's argument that the fall in Handymax stem affected the shipment under the COA.

TERMINATION AS PER CLAUSE 62.

110. The termination of the COA by the Respondent was done on the 12 September 2012 under the Clause 62, which states:

"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."

111. As we have discussed earlier, the Respondent did not rely on any event for the termination of the COA in their letter. The Respondent in the said letter, states that notwithstanding all the earlier events under which they did not terminate the COA and they have terminated as follows:

"[the Respondent] as a last resort requested to extend the shipment



period of the COA by about another three years, but the same was not reciprocated in its right perspective.

Finally, therefore please be informed that, [the Respondent] is left with no option but to treat the subject agreement stood terminated under the 'Default Clause'...."

112. The reason of termination as mentioned in the letter is that the Claimant did not agree to the extension of the COA for three years.

113. In the Respondent's witness's reply to question 15 and 16 during cross examination:

- Q 15. (shown letter of SAIL 19.09.2012 at page 118 of the SoC). The sentence 'the COAs to terminate with effect without liabilities on either side'. Is this correct that this sentence refers to the date from which you consider the COA terminated?*
- A.15. I think it refers to the period when SAIL failed or could not provide material for shipment.*
- Q.16. Does the sentence refer to the time or period when the termination occurred?*
- A. 16. Yes, I think it refers to the time when the agreement is deemed to be terminated.*

114. According to the Respondent witness, she states that the termination letter referred to the period when SAIL failed or could not provide material for shipment. While the letter of termination of the COA expressly states that since the Claimant did not extend the COA for a further three years as requested by the Respondent and the Respondent "have no option but to treat the subject agreement stood terminated under the default Clause."

115. The question is that is the application of the Clause 62 as applied by the Respondent valid? A reading of the Clause 62 shows that the Supplier/Charterers would be able to declare the Contract - COA at the end in the following circumstances:

- i) in case the suppliers fail to provide the material to the Charterer, the Charterers in such case are fully justified in cancelling the contract as they are unable to provide the cargo/material.*
- ii) in case the Charterer is unable to ship the material/cargo due to supplier not supplying the material on time as per their agreed terms. Here again the Charterer is within the terms of the Clause 62 to cancel the shipment.*

116. We go back to the Respondent's termination letter which clearly mentioned the ground of termination as:

- i) Claimant not agreeing to extension of the COA for a further three*



years.

ii) The COA stood terminated with effect from the date when SAIL, as Suppliers/Charterers failed or could not provide material for shipment, the Suppliers/Charterers are 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 chartered and the same reaches in time at the load port, loads the material and performs the voyage.

117. Accordingly, the Claimant not agreeing to extension of the COA is not a ground in the COA or Clause 62 for the termination. It is the prerogative of the Claimant to agree or not for any extension of time under this COA. The COA does not have any Clause granting the extension of time to any party.

118. Therefore, non-declaration of stem by the Respondent should be based on circumstances beyond their control. The Respondent would have been justified in declaring the contract as at an end and without any liability of either side, in any of the above circumstances mentioned or in case of receivership.

119. The Clause 62 provides "should the Supplier/Charterers fail to provide material for shipment or to ship the material by the time or times agreed upon or should the Supplier/Charterers in any manner or otherwise fail to perform the contract the Supplier/Charterers shall be entitled to declare the contract at an end, without any liabilities on either side". The Respondent's letter of termination does not show any failure to ship or to provide the stem of the cargo. The Respondent did not argue on this point but only refers to "could not provide material for shipment?" - not that it did not or refused to provide material for shipment and that too for specifying a date (without proof or specificity) of termination, which was not the reason for termination by the Respondent. The Clause specifies that 'in case the Supplier/Charterers are unable or fail to provide material for shipment or to ship the material.' If the Respondent claims that it could not provide materials for shipment they would be required to show proof that the Supplier/Charterers could not provide the material to the Claimant. In fact, the evidence produced by the Claimant shows that the Respondent was shipping coal from Australia to India during the relevant period in dispute in the spot market

120. The Claimant argued that "failure to perform the contract" as stated in Clause 62 does not mean to include refusal to perform. In this connection the Claimant relied on the case of SAIL vs Gupta Brothers Steel Tube Limited (2009 10 SCC 63) where the Honourable Supreme Court inter alia considered the scope of failure under Clause 7.2 of the relevant agreement which provided as follows:



"SAIL shall supply materials as described in the offer/work order(s)/Delivery order(s) issued by SAIL from time to time. SAIL, however, shall have a period of one month after expiry of the indicated quarter/quarters as grace period for the purpose of supply or supplies. In the event of SAIL's failure(s) to deliver the indicated quantities even after the expiry of the grace period, SAIL shall pay to the customer(s) compensation @0.25% (quarter per cent) per month or part thereof on the value of the materials of the supplies delayed beyond the quarter/quarters plus the grace period(s) subject to a maximum of 3% (three per cent) of the value of the delayed supplies..."

121. The Claimant further submitted that the appellants in that case, much like in this present case, sought to argue that 'failure' had a wide all-encompassing meaning. However, the Honourable Supreme Court held:

"22. Although it has been strenuously urged on behalf of the appellant that stipulations contained in Clause 7.2 are comprehensive enough to include all types of breaches, on a careful consideration thereof we are unable to accept the submission made on behalf of the appellant. Can it be said that SAIL intended to provide for liquidated damages in the contract even in a situation where they were unable to make supply of materials for the reasons beyond control or they declined to supply the materials on one ground or the other. The answer has to be plainly in the negative.

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

122. The ruling in the above case is very clear. The Honourable Supreme Court has stated that failure to supply or delayed supply does not cover the refusal to supply the material. We agree with the ruling in the matter.

123. The Claimant further submitted as under:

(e) The Respondent, wilfully and maliciously and repeatedly, breached the COA by inter alia (i) failing to provide the Claimant nominations as per the COA, duly amended on 20 April 2011 after May 2011; (ii)

....

(f) Due to the failure of the Respondent to provide any nominations from June 2011, the Claimant has suffered losses in terms of earnings foregone. A total of USD 58,367,834.86 is due and payable as damages;



(i) The Respondent was at express notice at the time of entering into the COA that any illegal and / or wrongful failure to provide any nominations, in breach of the COA would expose and inflict losses and / or damages upon the Claimant to the tune of the unearned freight.”

(emphasis supplied)

RESPONDENTS CASE WITH REGARD TO CLAUSE 62.

124. *The Respondent’s case is that*

- i) they have the right as per Clause 62 to terminate the agreement ‘in any manner or otherwise”.*
- ii) Each shipment in the COA is a separate contract and there is a separate Charter party for each shipment.*
- iii) There was no loss suffered by the Claimant.*
- iv) The Claimant’s contention is contrary to express terms of the agreement and the Tribunal has no jurisdiction to grant any damages.*

125. *The Respondent is arguing that the Tribunal has no jurisdiction to grant any damages given such an express provision in the agreement.*

126. *The Respondent has submitted that the validity of such Clauses giving a party a unilateral right of termination has been upheld by the Honourable Supreme Court. It was held by the Honourable Supreme Court in Her Highness Maharani Shantidevi P. Gaekwad vs. Savjibhai Haribhati Patel (2001) 5 SCC 101 as follows:*

“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.”

(Emphasis added)

127. *Similar is the decision in the case of Hajee S.V.M. Mohamed Jamaludeen Bros & Co. vs. Govt, of T.N. (1997) 3 SCC 466 where the Honourable Supreme Court held as follows:*



"18. The result is that appellant cannot by-pass Clause 7 of the instrument under which he obtained the right to collect "chank shells". The said Clause adequately empowers the government to unilaterally terminate the arrangement or revoke the grant without assigning any reason whatsoever. The said Clause is valid and could be enforced by the government at any time and hence the action of the government in rescinding the contract was valid. Appellant is not therefore, entitled to damages."

128. Similarly, in *Crompton Greaves v. Dyna Technologies* (2007) 4 Arb.LR 228 (Mad), the Hon'ble Court held:

"16. Law is now well settled that an Arbitrator cannot travel beyond the contract to award compensation. As a matter of fact, in the present case, the contract expressly stipulates that no compensation is payable if the contract is terminated on account of termination of the project by the principal, namely, DCM. In the face of such expressed prohibition, the arbitral tribunal has obviously committed error by directing payment of compensation even without disclosing the basis for arriving at such conclusion." (Emphasis added)

129. In *ONGC v. WIG Bros. Builders & Engineers (P) Ltd.*, (2010) 13 SCC 377, the Honourable Supreme Court inferred a Clause excluding damages for one's own breach; as

"7. In view of the above, in the event of the work being delayed for whatsoever reason, that is, even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages...."

130. The above ruling does not in any way affect the present case. In the present case the termination of the COA is under Clause 62; the Clause 62 has very specific grounds of termination that is inability to provide the material. In the termination letter in the case the Respondent does not give any grounds or basis of their non-ability to provide the material or to argue the same. The Respondent have taken the plea that the Clause 62 under the Clause "suppliers/charterers in any manner or otherwise fail to perform the contract" gives them the right to declare the contract at its end as and when it wishes. This is not in the spirit of the COA or the Clause 62. We, therefore do not agree with the Respondent's argument and the Tribunal will not be going out of the terms of COA and law in considering the application of the Clause 62.

131. We agree that the Respondent is bound by the COA for the terms therein and has to provide the stem for the shipment. The Respondent is however free to ship any other /additional shipments as may be required from the spot market.

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152. It appears to us that the real bone of contention between the parties is



part of the Clause 62, which entitles the Respondent to declare the Contract (COA) at an end at will, without any liability to either side when “Suppliers/Charterers in any manner or otherwise fail to perform the contract”. The Respondent asserts that this phrase gives it unfettered and absolute freedom to declare the contract at an end at any time whenever it wishes without assigning any reason. We are unable to accept the aforesaid submission for a number of reasons.

a. Such an interpretation of Clause 62 would be absurd and vulnerable to being declared void under Section 23 of Indian Contract Act, 1872. Such an interpretation would also be contrary to Section 73 of the Indian Contract Act, 1872 (“The Contract Act 1872”).

b. Such interpretation would also be in violation of Section 23 read with Section 28 of The Contract Act, 1872. It is well settled in law that parties cannot contract against this statute.

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154. The Tribunal has critically analysed the contentions and submissions made by the parties and hold that the 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 when it was in fact executing fixtures in the spot market for the shipment of coal from Australia in the same period as per the dispute, 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.

155. 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.

We therefore hold that the purported termination by the Respondent of the Agreement dated 5.12.2007 under Clause 62 is not valid and the Claimant's claim is maintainable notwithstanding the provision of Clause 62.

156. We hold that the Claimant's claim for damages is not barred in considering the express terms of the Contract dated 5th December 2007. The Respondent had illegally terminated the Contract under Clause 62 of the Contract. The Respondent's case of Force Majeure, Shipowners postponement of shipments in the early stage, fall in the Handymax tonnage and the legality of the termination notice under Clause 62 all fail. We have already discussed in detail all the above issues and the cases relied upon by the parties and hold the Claimant is entitled to damages for non-performance of the COA by the Respondent."

66. Based on the aforesaid interpretation of Clause 62, Tribunal held that the termination of COA dated 5.12.2007 was invalid and Petitioner's defences predicated on *Force Majeure* conditions; Shipowners' postponement of shipments in the early stage; fall in the Handymax tonnage; and legality of termination notice under Clause 62 were not legally acceptable. Interpreting a contractual clause is the domain and remit of the Arbitral Tribunal and the interpretation placed on Clause 62 is a plausible and possible view, calling for no interference. Petitioner sought to argue that the Tribunal has re-written the contract by its interpretation and that Respondent were questioning Clause 62 after having availed benefits under the agreement. On a careful perusal of the impugned award, this submission is not correct. Tribunal has not held that the said clause is invalid. It has only held that the reason for termination of the COA was outside the stipulations in Clause 62 and which is a correct finding inasmuch as this clause does not permit termination on refusal of the Respondent to agree to extend the contract. Moreover, it is settled that scope of interference in an arbitral award rendered in an International Commercial arbitration is extremely



circumscribed and to avoid prolixity, I may allude to the following judgements of the Supreme Court:-

(a). **Ssangyong Engineering and Construction Company Limited**
v. National Highways Authority of India (NHAI), (2019) 15 SCC
131.

“19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in ONGC v. Saw Pipes Ltd. [“Saw Pipes”] and ONGC v. Western Geco International Ltd. [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

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34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

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36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.



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41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.

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44. In Renusagar, this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same.

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76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot



possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

(b). **Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.**

“37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

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65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the



public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

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66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

67. After holding that termination of COA was invalid, Arbitral Tribunal proceeded to decide the question whether Respondent was entitled to claim compensation/damages under the Contract and if so, whether Respondent had proved any loss and if so, to what extent and held as follows:-

“175. We have considered the arguments and gone through the cases referred to by both parties and agree to the argument put forward by the Claimant. The date of breach we have dealt in detail us above.

176. The Respondent has relied on a judgment in Flame SA v Glory Wealth Shipping PTE Ltd [2013] EWIIC 3153 (Comm) and submitted that as laid down in para 84 and 85 of the judgment, the Claimant has not



established its damages because it failed to plead and prove that it was in a position to perform its obligation under the contract assuming there was one which is denied.

"81since the court is concerned with a question as to the assessment of damages, the court must have regard to the compensatory principle which underlies the assessment of damages....".

It then held that:

"85. The assessment of loss necessarily requires a hypothetical exercise to be undertaken, namely, an assessment of what would have happened had there been no repudiation. That enables the true value of the rights which have been lost to be assessed. The innocent party is claiming damages and therefore the burden lies on that party to prove its loss. That requires it to show that, had there been no repudiation, the innocent party would have been able to perform his obligations under the contract. If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than he would have been in had the contract been performed. The assessment of damages does require an assumption to be made, but it is not the assumption suggested by Mr Akka. When assessing what the innocent party would have earned had the contract been performed the court must assume that the party in breach has performed his obligations."

177. The Claimant submitted that judgment in *Flame SA* is contrary to the law in India. Section 54 of the Contract Act provides:

"54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must take compensation to B for the loss which B sustains by the non performance of the contract."

178. As per the terms of the COA, the dates of shipment and the Addendum no 2 were dependent on the declaration of stem by the Respondent as per the Clause no 5 of the COA. If and when the Respondent declared the



stem, the Claimant is obliged to provide the ship as per the declaration of the stem within 48 hours. Should the Claimant not be able to provide the ship as per the stem, the Respondent holds the right to cancel the stem with 48 hours and the Claimant is liable. If the Respondent has to find a substitute ship in the market for the same stem which the Claimant could not provide, if the rate of the ship in the market is higher than the agreed rate, then the Respondent has the right to claim the difference from the Claimant. Did the Respondent declare the stem is the question which is really the matter of the dispute? The Respondent will have to show the Claimant did not place a ship for the declared stem. The Respondent has not shown any proof of any stem having been declared during the entire period of the dispute. We do find merit in the Respondent's argument.

179. The Respondent relied on the case of Murlidhar Chiranjilal (1962 I SCR 653) considered the scope of Section 73. The Honourable Supreme Court in paragraph 6 the Honourable Supreme Court posed the question for consideration: "whether the respondent has proved the damages which it claims to be entitled to for the breach." Thereafter, in paragraph 7 the Honourable Supreme Court observed that quantum of damages have to be determined under Section 73. Subsequently, the Honourable Supreme Court set out the position in law-

9. 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 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 Railways Company of London [1912] A.C. 673. 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 respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage 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 dale of breach, if that rate was above the contracted rate resulting in loss to it. (emphasis supplied)

180. The above case clearly sets out the burden on the Claimant to prove the rates prevalent in similar shipments in the market for an equivalent during the term of the COA. The Claimant has claimed that the



Respondent had the details of the shipments done by the Respondent during the period but did not disclose. They proved the rates of similar shipments through the information submitted by Transchart by way of the fixture register and charter parties of the ships fixed by them on behalf of the Respondent during the COA period. The examination of Mr Sehrawat the Dy Controller of Chartering also confirmed the details. The Claimant has claimed to discharge this burden as set out herein.

181. The Respondent submitted that this principle has been fully set out in the judgement of the Honourable Supreme Court in Murlidhar Chiranjilal v Harishchandra Dwarkadas AIR 1962 SC 366 where the Hon'ble Court has laid down the aforesaid principles and dismissed the claim for damages in that case because the contract was for sale of canvas FOR Kanpur but the price on the date of breach had been proved by reference to its price at Calcutta (as it then was). The claim for damages was thus dismissed because assessment of damages was not on a like to like basis.

"6.....The necessary facts in that connection are these: The contract was to be performed by delivery of railway receipt f o. r. Kanpur by the appellant to the respondent on August 5, 1947. This was not done and therefore there was undoubtedly a breach of the contract on that date. The question therefore that arises is whether the respondent has proved the damages which it claims to be entitled to for the breach. The respondent's evidence on this point was that it proved the rate of coloured canvas in Calcutta on or about the date of the breach. This rate was Rs. 1-8-3 per yard and the respondent claimed that it was therefore entitled to damages at the rate of Re. -/8/3 per yard, as the contract rate settled between the parties was Rs. 1 per yard.

7. The quantum of damages in a case of this kind has to be determined under s. 73 of the Contract Act, No. LX of 1872. The relevant part of it is as follows: -

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

"Explanation-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

8. The contention on behalf of the appellant is that the contract was for delivery f. o. r. Kanpur and the respondent had therefore to prove the rate of plain (not coloured) canvas at Kanpur on or about the date of breach to be entitled to any damages at all. The respondent



admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the (late of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damage because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damage by the breach of this contract.

*9. 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 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 principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable step” 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 Railways Company of London (1912) AC 673 at p. 689). These two principles also follow from the law as laid down in s.73 read with Explanation thereof. **If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage 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. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore, it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.***

*13. This is a simple case of purchase of goods for resale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. **That means that the respondent had to prove the market rate***



at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone about the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in Section 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach appearing in Section 73. As the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach, it is not entitled to any damages in the circumstances "

(Emphasis added)

182. The Respondent submitted that significantly, there was evidence produced by the Claimant on the express difference in rates between Agreement and spot markets. The decision of the Honourable Supreme Court in *Murlidhar Chiranjilal* (supra) is wholly applicable therefore to the facts of the present case.

183. The Claimant submitted that the Honourable Supreme Court in the case of *Murlidhar Chiranjilal* (1962 1 SCR 653) considered the scope of Section 73. In paragraph 6, the Honourable Supreme Court posed the question for consideration: "whether the respondent has proved the damages which it claims to be entitled to for the breach" Thereafter, in paragraph 7, the Honourable Supreme Court observed that quantum of damages have to be determined under Section 73. Subsequently, the Honourable Supreme Court set out the position in law.

184. The Claimant has argued that the Para 9 of the judgment which the Respondent has relied on is clear that the burden of proof of providing the rates (in this case was Kanpur) was with the Claimant. The rates taken and proved by the Claimant are for the shipment from Australia to East Coast India and also for the period in dispute. As the rates are based on the terms of the COA, according to us are the rates applicable for this dispute.

185. The Respondent submitted that it is equally well settled that for breach of contract compensation can only be given for damages or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall. Reference is made to the decision of the Honourable Supreme Court in *Kailash Nath Associates v DDA* (2015) 4 SCC 136, where the Hon'ble Court held:

"44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award



of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall."

186. It is well settled in law that no party in dispute can make a windfall from any compensation if loss or damage it has not suffered. Here we agree with the Respondent. But we do not agree that in the present COA where the terms of the contract are spelt out there is any claim for any windfall. The case of loss and damage has been discussed earlier. The damages are for non-declaration of stem and claim is the difference in the contract rate and the rates are what the Respondent has paid for the similar ships in the spot market.

187. The Respondent submitted that it is also well settled that damages have to be proved by the party claiming it by leading cogent and relevant evidence. Reference is made to the decision of the Honourable Supreme Court in Bharat Sanchar Nigam Ltd. v Media Marketing Services 2015 SCC Oliebol 735 where it was held:

"23 Be that as it may, even if there was wrongful termination of the contract on the part of the petitioners, the respondents would not have become entitled to claim any compensation unless the respondents would have suffered loss in view of such wrongful termination and such loss would have been proved by the respondents by leading appropriate evidence before the learned Arbitrator. There is no automatic award of compensation even if there was finding of wrongful termination rendered by the learned Arbitrator in absence of any proof of such loss alleged to have been suffered by the respondents."

188. It is agreed that in the case of the breach, the party claiming the breach has to prove that they suffered damages. The Indian Contracts Act 1872, Section 73 provides, "when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, naturally arose in the usual course of things from such breach...". This matter has already been discussed above and in the present case the Claimant is within his right under the Section 73 to claim damages.

189. The Respondent submitted that the entire basis on which the alleged dates of shipments i.e. the dates of declaration of Stem which would be the date relevant for the nomination of the vessel and therefore for the purposes of determining the rate of freight at which the vessel would be Obtained that British Marine has taken into consideration is the Fairly Evenly Spread basis. On the basis of the Second Addendum, it is alleged by British Marine that shipments during this period May 2011 to December 2012 had to be done once every 20 days.

190. The Respondent submitted that SAIL has established that in fact the



shipments were not made on a Fairly/Evenly Spread basis. The Fairly/Evenly Spread basis as recognised in the industry has been given a complete go-by. Indeed, a reference to British Marine's own chart at Exhibit 'C', SOC, Pg 38, would show that in the period July 2008 to June 2010 i.e. a period of 35 months, only 16 shipments were done in a haphazard manner without any correlation to shipments in regular intervals.

191. It would appear that the above contention of the Respondent does not have merit. When it is clearly established that the declaration of stem was to be done by the Respondent, If the shipments were haphazard as claimed, then it is the Respondent who has allocated the stem accordingly. Stem dates whether every 20 days or more have to be decided as per the contract terms.

192. The Respondent relied on the Illustration (g) to Section 73 of the Contract Act, and provides an example which confirms that damages had to be pleaded and proved based on a similar long-term agreement. It reads:

"(g) contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, 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."

193. The above illustration (g) is clear that similarly if 'B' had broken the promise then they will be liable to pay the difference between the contract price and the price of a similar ship during the same period. This further clarifies that the Respondent is liable to the Claimant in such a case.

194. The Respondent submitted that it is well settled law that in the absence of evidence, no damages can be allowed or awarded. In State of Rajasthan v Ferro Concrete Construction Pvt. Ltd. (2009) 12 SCC 1, the Honourable Supreme Court in fact held that if there was no evidence to support damages, then an Arbitral Tribunal would have no jurisdiction to award damages in the following terms:

"55. While the quantum of evidence required to accept a claim, may be a matter within the exclusive jurisdiction of the Arbitrator to decide, if there was no evidence at all and if the Arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the Arbitrator, and wholly unsustainable."

195. With great respect, the above decision of the Honourable Supreme Court does not apply in this case. There is a valid and binding COA



between the parties, during the currency of the COA there is non-declaration of stem by the Respondent and there is termination of the COA by the Respondent. As discussed earlier, the Arbitrators are appointed as per the Clause.60 of the COA. There is a dispute between the parties with the evidence of termination of COA and the party affected claiming damages.

196. The Claimant submitted that Respondent has breached the COA and wrongfully terminated the same and consequently the Claimant is entitled to damages under Section 73 of the Contract Act which provides as follows:

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

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

Illustrations

....

(g) A contracts to let his ship to B for a year, from 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."

196. The Respondent plea that the Claimant has not shown they were in a position to provide ships for the stem during the period in dispute. The Claimant argued that the Claimant has a fleet of vessels owned by the Claimant or chartered in from the market. To perform the COA, therefore, the Claimant would either provide vessels owned by it or charter vessels from the spot market. However, since the Respondent failed to nominate



stems, the Claimant became entitled to damages being equivalent to the Freight Rate set out in the COA subtracted from the spot market rate at the relevant time. If, however, the spot market rate was higher than the contractual rate, then the Claimant would not have been entitled to any damages.

197. The Claimant based its argument that due to the failure of the Respondent to perform under the COA the Claimant could at best let its vessels out in the spot market or would have had to engage vessels in the spot market to perform the COA. Therefore, the Claimant had to provide the spot market rates to prove the quantum of damages. However, it is pertinent to note, as held by the Honorable Supreme Court hereinabove, that the Claimant did not have to actually charter its vessels or charter-in third party vessels.

198. The Claimant submitted that before dealing with calculation of damages, it is pertinent to note that as per the COA the Respondent's cargo of 3 million MT (+/- 5%) was to be loaded on H-Max (and after Addendum No. 2 on Panamax) vessels during the term of the COA. However, as of May 2011, the quantity nominated (and lifted) was 891,906 M.T., leaving a minimum balance quantity of 1,958,094 M.T. outstanding. (Para 16 SOC) If the Claimant had breached the contract, instead of the Respondent, the Respondent could have claimed the market rate and given credit for the contracted rate. In the case of the Claimant, however, he can only claim the contract rate and the market rate is irrelevant for the Claimant's purposes save, as stated to give benefit to the Respondent.

199. The Claimant submitted that damages have been calculated on two distinct bases. First, the Claimant based on an industry standard software calculated the spot market price for each of the 28 P-max stems nominated by the Respondent. These calculations are more particularly set out in Exhibit W to the SoC. Based on this, the Claimant has concluded that it is entitled to damages of US\$ 34,450,314 towards freight.

200. Second, the Claimant called upon the Respondent to produce spot market rates for the vessels engaged by the Respondent, rather than nominating stems to the Claimant. The Claimant submits that even though this information was readily available with the Respondent, even so the Respondent refused to produce the same. Accordingly, the Claimant, with the permission of the Hon'ble Tribunal, and with the assistance of the Hon'ble Delhi High Court, called upon Transchart, the Respondent's agent, to produce the relevant information. This information, other than providing the spot market rate of the vessels chartered by the Respondent, proves two other facts (i) the Respondent in breach of the COA chartered vessels in the spot market, rather than nominating stems to the Claimant; and (ii) majority of the vessels chartered by the Respondent were P-Max vessels. The Claimant, based on the documents produced by Transchart, has calculated the damages of US\$ 31,897,050.95 towards loss of freight.



201. The Claimant submitted that the Respondent has contested the damages claimed on the following basis –

a. The Respondent relying on the judgment in *Murlidhar Chiranjilal* (1962 1 SCR 653) and *Maharajsingh Swaisingh* (AIR 1951 MB 103) urged that the damages have to be calculated on the date of the breach, i.e. according to the Respondent since the shipments were to spread fairly and evenly, there was exact date of shipment and therefore the market rate had to be proved on the same exact date.

b. Further, relying of V/O “Tvazhpromexport”(2005 5 BomCR 130) the Respondent urged that the rates have to be proved on a like to like basis on the date of the breach. Therefore, in substance the Respondent contended that the Claimant would have to find rates of long-term Contract of Affreightments on the date of every breach. Thus, according to the Respondent, the Claimant would have to identify each date of breach and that on the date of the breach the Claimant would have establish the market rate for a fresh Contract of Affreightment. However, the Respondent admitted that the Claimant did not have to actually enter into new Contracts of Affreightment of the date of every breach.

202. The Claimant relied on the Honourable Supreme Court in para 39 of *MSK Projects India (JV) Ltd.* (2011 10 SCC 573) which held that when evaluating damages, the court should make a broad evaluation instead of going into minute details. Further, the Respondent’s contention that the Claimant must get the market price of a Contract of Affreightment is irrelevant. The Claimant claims the contractual price, not market price. Market price is the reduction given by the Claimant to the Respondent at the rates of the Respondent’s own charters. In any case, the Respondent in paragraph 47 has admitted that “freight in any long-term contract is always lower than that prevailing in the spot market”. Therefore, by calculating damages based on the COA freight rate reduced by the spot market rate paid for by the Respondent on the relevant dates, the Claimant is in fact undervaluing its damages and passing on a benefit to the Respondent. Moreover, even though the Respondent is not claiming that damages should be calculated on the basis of H-Max vessels, as a matter of fact, Addendum No. 2 was entered into at the request of the Respondent to include an option of P-Max vessels as the Respondent could not obtain any H-Max stems. This fact is conclusively proved by the documents produced by Transchart - between April 2011 to December 2012 the Respondent chartered 126 vessels (approx.), out of which only 14 were either Supramax or Cape Size. Thus, the Claimant has adequately discharged its burden of proving damages *inter alia* by producing the spot market rates based on vessels chartered by the Respondent.

203. The Claimant submitted that the law in India specifically provides that a party in breach cannot call upon the innocent party to perform. If it



could not do so for the purposes of claiming damages, it would be ridiculous to require the Claimant to prove it for quantifying damages. The ratio of *Flame SA* is absurd and highly impractical. Under the COA only when a stem is provided by the Respondent would the Claimant be obliged to nominate a vessel. Therefore, calling upon the Claimant to prove that it had a vessel ready even before nomination of the stem is to require the Claimant to prove that which the law expressly exempts the Claimant. Further, the Claimant has consistently called upon the Respondent to provide stems as per the COA and therefore shown its willingness and readiness to perform the COA and therefore would also be entitled to claim damages under the Specific Relief Act, 1963. In any case, the Respondent has itself produced Contract of Affreightment dated 6 October 2010 (Annexure R-1 to SoD). Under this second COA, whose term overlaps the COA, the Claimant was to provide P-Max vessels to ship cargo from coal from Australia to India. It is an admitted position that the Claimant performed this second COA and therefore there is no manner of doubt that the Claimant would be similarly capable of performing the COA.

204. The Claimant relied on the Honourable Supreme Court judgment that held that damages flow as a consequence of breach. In addition, the Claimant need not prove actual loss and is entitled to claim the profits that it had intended to make and that itself is the damages. In *Murlidhar Chiranjilal* (1962 1 SCR 653) the Honourable Supreme Court held that

“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...**” (emphasis supplied)

205. The Respondent has further claimed that the Claimant has not mitigated its losses. The Claimant submits that this argument of the Respondent is based on a complete misunderstanding of the concept of mitigation. The Delhi High Court in the case of *M/s Nagori & Co.* (ILR 1989 2 Del. 402) sets out the correct position in law:

It is well settled that the law does not require a party to prove the negative. The onus is always on the person who asserts a fact. Thus, the person who claims damages has to prove that the loss has occurred to him and it is for the person who asserts that loss or damages could have been mitigated to prove that the loss could have been reduced. It is only thereafter that the onus shifts on the person claiming damages to prove that he took all reasonable steps to mitigate the damages.

206. Similarly, in *The “Solholt”* (1983 1 LLR 605) the English Court of Appeal also considered the issue of mitigation and held that –

A plaintiff is under no duty to mitigate his loss, despite the habitual



use by lawyers of a phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting.

207. In the above facts and circumstances, we are inclined to agree with the Claimant's arguments and the cases cited above regarding the mitigation of loss. The Claimant is obliged to mitigate the loss but, in this case, it is not applicable. The burden of proof lies on the Respondent that the loss could be mitigated or damages could be reduced. Furthermore, two decisions cited by the Respondent also help clear the position in law. First, the Honourable Supreme Court in Murlidhar Chiranjilal has noted that damages are to be calculated by taking into account the difference between market price and the contract price and that a plaintiff does not have to actually buy goods to claim damages.

208. The Respondent has submitted the Claimant has failed to prove any loss and it is not recoverable even though the SAIL has terminated the contract and is in breach of the COA.

209. We are unable to accept the Respondent's arguments that the Claimant has not pleaded and proved the loss that the Claimant has suffered. This is in accordance with the Indian Law and we hold that there is sufficient evidence and arguments to show that the Claimant would have performed under the COA if the Respondent would have declared the stem as per the COA. It is clear from the chain of events that the Respondent has been in primary breach of the COA by not providing any stem since May 2011.

210. There is no dispute that as per the COA Clause 5, the Respondent was obliged to declare stem and this was to be evenly and fairly spread. The Claimant was then required to present a ship to perform the voyage as per the terms of the COA. There was enough opportunity for the Claimant to provide the ship as they had 15 days prior to the commencement of the laydays. "The Charterers/Respondents have the option to accept or reject any vessel based on the previous performance of the vessel. The Claimant could only substitute the vessel in case of operational exigency which should be well in advance and definitely not later than 10 days prior to commencement of laydays" This has a very clear and wide application and makes it clear that when and under what circumstances the Claimant can substitute a vessel. So, the Claimant has the option of substitution of vessel. The Clause 5 makes it clear that the nomination of vessel always follows the declaration of stem. We therefore agree and hold that the Claimant is entitled to damages for the breach of the COA by the Respondent.

211. The damages claimed by the Claimant are based on the difference between the market/spot rate and the rate of the COA. It is based on the rates of shipments fixed by the Respondent in the spot market during the



period of the COA.

212. The total quantity to be shipped by the Respondent was 3,000,000 MT less 5% as per COA giving the benefit of 5% less to Respondent as per the COA the quantity to be shipped comes to 2,850,000 MT out of which the Respondent shipped a total of 891,906 MT, the remaining balance quantity for shipment was 1,958,094 MT.

213. The Claimant's initial claim for the damages for the quantity 1,958,094 MT was based on the freight rates available with them was for US \$ 34,450,314.00. The Claimant got the details of the fixtures done by SAIL in the spot market and amended their claim to US \$ 31,897,050.95. The Claimant has based this figure on a quantity of 2,016,000.00 MT considering the full shipments based on 72,000 MT each shipment for 28 shipments. The Claimant has also used the rate of US \$ 34.50 in their above claim. We do not agree to the Claimant's figures.

214. The balance quantity remaining to be shipped is 1,958,094 MT and the Claimant cannot claim any higher quantity than the remaining quantity. Here we refer to Clause 5 E of the COA - 'In case last parcel quantity is more than 50% of the mean parcel size agreed (i.e. base qty without 5% moloo) in the COA it is Charterers option to either provide additional quantity to make a full shipload or to cancel the leftover quantity. '.The Respondent has the option to add or cancel the last shipment as per Clause 5 E. The last shipment is less than the 50% of the mean parcel size, so no additional quantity can be considered. The Respondent is not obliged to ship a higher quantity but may if they so wish if the shipments were proceeding. In case of Claim for damages, we cannot consider any quantity higher than the balance quantity. It may be noted that the shipments can vary depending on the size of the ship and stem declared by the Respondent and can be cleared in 27 shipments instead of 28 shipments as claimed.

215. The Respondent's commitment is for only the balance quantity of 1,958,094 MT. The freight rate as per the Addendum is US \$ 34.00; the Claimant therefore cannot claim any higher rate for any differentials or otherwise. Taking the balance quantity of 1,958,094 MT, the agreed freight rate of US \$ 34.00 and the average spot rate for the month (as per the Annexure A attached) we award the amount of US \$ 29,741,320.26 towards the damages claim of the Claimant. For reference, the Claimants revised exhibit VVI attached hereto as annexure B."

68. As can be seen from the aforesaid passages, Tribunal analysed the claim of the Respondent for damages on the anvil of Section 73 of the Contract Act and the judgments cited by both sides on damages as also proof of loss and mitigation, clauses of the COA and reciprocal obligations of the



parties under the contract, in light of its finding that termination of contract was invalid. Pertinently, before delving into the aspect of damages, Tribunal examined whether Petitioner had declared the stem and after examining Clause 5 of COA and evidence on record rendered a finding against the Petitioner it was guilty of breach having failed in declaring the stem during the entire period of dispute. It was observed that as per agreed terms of the COA, dates of shipments and Addendum-2 were dependent on the declaration of stem and it was only after the Petitioner declared stem, Respondent was obliged to provide the vessels, within 48 hours. Only in a case where Respondent failed to provide the ship as per the declared stem, Petitioner had the right to cancel the stem in 48 hours and Respondent was liable and if Petitioner had to find a substitute ship in the market for the same stem which Respondent could not provide and if the rate of the ship in the market was higher than the agreed rate, then difference could be claimed by the Petitioner. A categorical finding was rendered by the Tribunal that Petitioner failed in its obligation to provide the stem.

69. Based this finding, which was the real bone of contention between the parties, the Tribunal examined rival contentions of the parties with respect to entitlement of the Respondent to damages and considered Section 73 of Contract Act and judgements cited by both parties. On the scope of Section 73, Petitioner had relied on the judgement in *Murlidhar Chiranjilal v Harishchandra Dwarkadas and Another*, AIR 1962 SC 366, wherein the Supreme Court dismissed the claim for damages because the contract was for sale of canvas FOR Kanpur but the price on the date of breach had been proved by reference to its price at Calcutta and thus the assessment of damages was not on a like to like basis. The two guiding principles



elucidated were as follows:-

"6.The necessary facts in that connection are these: The contract was to be performed by delivery of railway receipt f.o.r. Kanpur by the appellant to the respondent on August 5, 1947. This was not done and therefore there was undoubtedly a breach of the contract on that date. The question therefore that arises is whether the respondent has proved the damages which it claims to be entitled to for the breach. The respondent's evidence on this point was that it proved the rate of coloured canvas in Calcutta on or about the date of the breach. This rate was Rs. 1/8/3 per yard and the respondent claimed that it was therefore entitled to damages at the rate of Re -/8/3 per yard, as the contract rate settled between the parties was Re 1 per yard.

7. The quantum of damages in a case of this kind has to be determined under s. 73 of the Contract Act, No. LX of 1872. The relevant part of it is as follows: -

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

"Explanation – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

8. The contention on behalf of the appellant is that the contract was for delivery f. o. r. Kanpur and the respondent had therefore to prove the rate of plain (not coloured) canvas at Kanpur on or about the date of breach to be entitled to any damages at all. The respondent admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the (date of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damage because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damage by the breach of this contract.



9. 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 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 principle 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 Railways Company of London* (1912) AC 673 at p. 689). These two principles also follow from the law as laid down in s.73 read with Explanation thereof. **If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage 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. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore, it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.**

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xxx

xxx

13. This is a simple case of purchase of goods for resale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. **That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone about the contract rate on the date of breach.** We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in Section 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach appearing in Section 73. As the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach, it is not entitled to any damages in the circumstances "

(Emphasis added)

70. Analysing Petitioner's contention that no evidence was produced by the Respondent on the express difference in rates between Agreement and



spot markets as per law laid down in *Murlidhar Chiranjilal (supra)* as also that if damage or loss is not suffered and/or proved, law does not provide for a windfall as held in *Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC 136* and that the rates taken and proved were for shipment from Australia to East Coast India for the period in dispute, the Arbitral Tribunal agreed with the Petitioner to the extent that no party in dispute can have a windfall from any compensation, if loss or damage is not suffered, but disagreed that the instant case was one of windfall and observed that the damages claimed were for non-declaration of stem and calculated on the difference in the contract rate and the rates paid by the Petitioner for similar ships in the spot market. Referring to the decisions of the Supreme Court in *State of Rajasthan and Another v. Ferro Concrete Construction Private Limited, (2009) 12 SCC 1* and of Bombay High Court in *Bharat Sanchar Nigam Ltd., Mumbai v. Media Marketing Services (MMS), 2015 SCC OnLine Bom 735*, relied upon by the Petitioner for the proposition that even if there is wrongful termination of the contract by one party, other party would not become entitled to claim any compensation unless it suffers and proves loss, Tribunal decided this issue in favour of the Respondent. It was held that Illustration (g) to Section 73 which reads as: "(g) 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", clearly connotes that even where 'B' brakes the promise he will be liable to pay the difference



between the contract price and the price of a similar ship during the same period and fortifies that Respondent was entitled to damages. There was a valid and binding COA between the parties and during the currency of the COA there was non-declaration of stem and unlawful termination of the COA. Tribunal negated Petitioner's plea that Respondent was unable to show that it was in a position to provide ships for the stem during the period in dispute and found that Respondent had demonstrated that it had a fleet of vessels, either owned or chartered from the market, which it was in a position to provide, but did not do so since Petitioner failed to nominate the stems. It was thus held that Respondent became entitled to damages being equivalent to the Freight Rate set out in the COA subtracted from the spot market rate at the relevant time *albeit* noting that if the spot market rate was higher than the contractual rate, then Respondent would not have been entitled to any damages. Petitioner's contention that due to failure of the Respondent to perform under the COA, it could at best let its vessels out in the spot market or would have had to engage vessels in the spot market to perform the COA and was thus required to provide the spot market rates to prove the quantum of damages, was not accepted and rightly so, on the ground that Respondent did not have to actually charter its vessels or charter-in third party vessels.

71. As for calculation of the quantum of damages, Petitioner contended that shipments were not made on a Fairly/Evenly Spread basis though Respondent's own chart at Exhibit 'C' reflected that during the period July, 2008 to June, 2010 i.e. for 35 months, only 16 shipments were done in a haphazard manner without any correlation to shipments in regular intervals. Respondent had submitted that as per the COA, Petitioner's cargo of



3 million MT (+/-5%) was to be loaded on H-Max (and after Addendum No.2 on Panamax) vessels during the term of the COA. However, as of May, 2011, the quantity nominated (and lifted) was 891,906 MT, leaving a minimum balance quantity of 1,958,094 MT as outstanding and had Respondent breached the contract, Petitioner could have claimed the market rate and given credit for the contracted rate, while Respondent could only claim the contract rate and the market rate was irrelevant. Respondent attempted to calculate the damages on two distinct bases:(a) damages of US\$ 34,450,314 towards freight, calculated basis an industry standard software, where the spot market price for each of the 28 P-max stems nominated by the Petitioner was taken and set out in Exhibit-W to the SoC; and (b) calling upon the Petitioner to produce spot market rates for the vessels engaged by the Petitioner, rather than nominating stems. Petitioner did not give the information and Transchart, was called upon to produce the relevant information, which proved that majority of the vessels chartered by the Petitioner were P-Max vessels and thus Respondent calculated the damages at US\$ 31,897,050.95 towards loss of freight. Petitioner urged that damages had to be calculated on the date of the breach and since the shipments were to spread fairly and evenly, market rate for damages had to be proved basis the exact date of shipment and on like to like basis. In other words, Respondent would have to find rates of long-term Contracts of Affreightments on the date of every breach; identify each date of breach; and taking each date of the breach, establish the market rate for a fresh Contract of Affreightment.

72. On close perusal of the award on this aspect, I find that Respondent's claim, relying on the judgment of the Supreme Court in **MSK Projects India**



(JV) Limited v. State of Rajasthan and Another, (2011) 10 SCC 573, was that when evaluating damages, Court should make a broad evaluation instead of going into minute details and Petitioner's stand that Respondent must apply the market price of a Contract of Affreightment, was irrelevant since damages were based on contractual and not market price and in any case, Petitioner had admitted that "*freight in any long-term contract is always lower than that prevailing in the spot market*". Therefore, by calculating damages based on the COA freight rate, reduced by the spot market rate paid for by the Petitioner on the relevant dates, Respondent was in fact undervaluing its damages and passing on the benefit to the Petitioner. Moreover, as a matter of fact Addendum-2 was entered into at the request of the Petitioner to include an option of P-Max vessels as Petitioner could not obtain any H-Max stems and this fact was conclusively proved by the documents produced by Transchart, which demonstrated that between April, 2011 to December, 2012 Petitioner had chartered 126 vessels, out of which only 14 were either Supramax or Cape Size and therefore, Respondent had adequately discharged its burden of proving damages *inter alia* by producing the spot market rates based on vessels chartered by the Petitioner. Further, Respondent had consistently called upon the Petitioner to provide stems as per the COA and therefore shown its willingness and readiness to perform the contract and was entitled to claim damages. In any case, Petitioner had itself produced Contract of Affreightment dated 05.12.2007, under which Respondent was to provide P-Max vessels to ship cargo of coal from Australia to India and admittedly, Respondent fulfilled its part of this contract. In *Murlidhar Chiranjilal (supra)*, it was held that "*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.....” and thus this judgement aids the Respondent.

73. Petitioner also disputed the claim of damages on the ground that Respondent had not mitigated its loss, while Respondent relied on the judgement of this Court in the case of ***M/s. Nagori & Company v. Indian Sugar Industries Export Corporation Ltd., 1989 SCC OnLine Del 133***, to contend that law does not require a party to prove the negative and thus it is for the person who asserts that loss or damage could have been mitigated to establish that loss could be reduced and it is only thereafter that the onus shifts on the person claiming damages to prove that he took all reasonable steps to mitigate the damages. Analysing the rival contentions, Arbitral Tribunal held: (a) burden of proof was on the Petitioner to show that loss could be mitigated or damages could be reduced; (b) damages are to be calculated by taking into account the difference between market price and the contract price and party need not have to actually buy goods to claim damages; (c) there was sufficient evidence to show that Respondent would have performed under the COA, if Petitioner would have declared the stem as per the COA; and (d) Petitioner was in breach of the COA by not providing any stem since May, 2011.

74. There is no dispute that as per Clause 5 of COA, Petitioner was obliged to declare stem and this was to be evenly and fairly spread and Respondent was thereafter required to present a ship to perform the voyage as per the terms of the COA. There was enough opportunity for the Respondent to provide the ship as they had 15 days prior to the



commencement of the lay days. As noted above, Tribunal held that Clause 5 made it clear that nomination of the vessel always followed the declaration of stem and that since Petitioner was in breach, Respondent was entitled to damages for the breach. Tribunal observed that the damages were claimed on the difference between the market/spot rate and the rate of the COA i.e. based on the rates of shipments fixed by the Petitioner in the spot market during the period of the COA. As a matter of record the total quantity to be shipped by the Petitioner was 3,000,000 MT less 5% as per COA and giving benefit of 5% less to the Petitioner as per the COA, the quantity to be shipped came to 2,850,000 MT, out of which Petitioner shipped a total of 891,906 MT and thus the remaining balance quantity for shipment was 1,958,094 MT.

75. Respondent initially claimed damages for 1,958,094 MT, based on the freight rates available for US\$ 34,450,314.00, however, later it got the details of the fixtures done by SAIL in the spot market and amended the claim to US\$ 31,897,050.95, taking the quantity of 2,016,000.00 MT with full shipment of 72,000 MT, each shipment for 28 shipments, and applying the rate of US\$ 34.50. Tribunal did not agree with these figures and referring to Clause 5E of COA, it was held that since the balance quantity remaining to be shipped was 1,958,094 MT, Respondent could not claim any higher quantity. Taking this as the balance quantity and applying the freight rate as US\$ 34.00 as per the Addendum as also the average spot rate for the month (as per Annexure-A), Tribunal awarded US\$ 29,741,320.26 towards the damages claim of the Claimant. The damages have been calculated based on contractual provisions and taking the average spot rate *vis-à-vis* the contractual rate, which was as per the agreed condition between the parties.



Nothing was shown by the Petitioner during the course of hearing to demonstrate that either the methodology adopted or the figures taken by the Tribunal were erroneous. Being in breach by not providing the stem, which was a pre-condition for the Respondent to provide the vessels, Petitioner was liable to compensate the Respondent by paying damages. No interference is called for in this finding of the Tribunal, which is based on evidence on record and is in consonance with contractual provisions and moreso, within the limited scope of interference in the impugned award, passed in an International Commercial Arbitration.

76. Insofar as the contention of the Petitioner that loss was required to be proved is concerned, I may only allude to the judgment of the Supreme Court in *Anglo American Metallurgical Coal Pty. Limited v MMTC Limited, (2021) 3 SCC 308*, wherein the Supreme Court while upholding the majority award in an International Commercial arbitration held as follows:-

“19. The first and most important point, therefore, to be noted is that this is a case in which there is a finding of fact by the majority award that the appellant was able to supply the contracted quantity of coal for the fifth delivery period, at the contractual price, and that it was the respondent who was unwilling to lift the coal, owing to a slump in the market, the respondent being conscious of the fact that mere commercial difficulty in performing a contract would not amount to frustration of the contract. It was for this reason that the respondent decided, as an afterthought, in reply to the appellant's legal notice dated 4-3-2010, to attack the appellant on the ground that it was the appellant that was unable to supply the contracted quantity in the fifth delivery period. Once this becomes clear, it is obvious that the majority award, after reading the entire correspondence between the parties and examining the oral evidence, has come to a possible view, both on the respondent being in breach, and on the quantum of damages.

20. We may hasten to add that the entire approach of the Division Bench is flawed. First and foremost, to cherry-pick three emails out of the entire correspondence and to rest a judgment on those three emails alone, without having regard to the context of the LTA and the correspondence, both before and after those three emails, would render the judgment of the Division Bench fundamentally flawed. Further, the finding that there was



“no evidence” that the respondent demanded stems of coal at a reduced rate vis-à-vis the contractual rate, flies in the face of at least three different exchanges between the parties, being the respondent's letters dated 20-11-2008, 27-11-2009 and 3-12-2009.

21. Equally, the finding of the Division Bench that no evidence had been led to show that the appellant had availability of the balance quantity of 454,034 metric tonnes of coal to supply to the respondent during the fifth delivery period, again completely fails to appreciate Mr Wilcox's evidence given by way of an additional affidavit dated 3-9-2013 and in response to questions in cross-examination before the Arbitral Tribunal on 23-9-2013, together with two letters exchanged between the parties on 21-9-2009 and 25-9-2009. All of these aspects were considered in the majority award of the Arbitral Tribunal.

22. The finding that there is “no evidence” to prove market price of coal at the time of breach, and that therefore, quantum of damages could not be fixed, again completely ignores Mr Wilcox's evidence-in-chief and cross-examination; the respondent's letters dated 25-9-2009, 27-11-2009 and 3-12-2009; as also the appellant's re-negotiated contracts with SAIL/RINL. All these aspects have been considered by the majority award in great detail.

23. However, Shri Rohatgi invited us to look at the unequivocal language contained in the three emails relied upon by the Division Bench, namely, the emails dated 2-7-2007, 22-7-2009 and 7-9-2009, which stated that not only were no stems available for August/September 2009, but that also there was no coal left for the remainder of the year, making it clear that this was an admission on the part of the appellant that it was unable to supply the contracted quantity of coal during the remainder of the fifth delivery period. However, what is missed by Shri Rohatgi is the crucial fact that no price for the coal to be lifted was stated in any of the emails or letters exchanged during this period. This is in fact what the majority award adverts to and fills up by having recourse to the evidence given by Mr Wilcox, stating that the ambiguity qua price was resolved by the fact that no coal was available for lifting at a price lower than the contractual price. The majority award found, relying upon Mr Wilcox's evidence, that the supplies that were sought to be made in August and September 2009 were therefore, also in the nature of “mixed” supplies i.e. coal at the contractual price, as well as coal at a much lower price. This is a finding of fact that cannot be characterised as perverse, as it is clear from the evidence led, the factual matrix of the setting of there being a slump in the market, in which the performance of the contract took place, as well as the ambiguity as to whether the correspondence referred to contractual price or “mixed” price, and thus, is a possible view to take.

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42. *Shri Rohatgi's argument in support of the impugned judgment of the Division Bench that there is no evidence to demonstrate proof of damage suffered as on the date of breach, is also factually incorrect. It is well established that the Arbitral Tribunal is the final judge of the quality, as well as the quantity of evidence before it (see Sudarsan Trading Co. v. State of Kerala , SCC in para 29, at pp. 53-54). As was correctly pointed out by Shri Sibal, the majority award has taken into account Mr Wilcox's affidavit dated 10-7-2013 and additional affidavit dated 3-9-2013 detailing the prices at which sales of coal were made to Chinese purchasers during the fifth delivery period, which ended on 30-9-2009, being the date of breach as found by the majority award. In addition, contemporaneous correspondence, including letters dated 27-11-2009 and 3-12-2009 were also relied upon to show that the respondent was itself seeking coal at roughly the price of US \$128 per metric tonne, at around the same time. Hence, the difference between the contractual price and market price was arrived at as US \$173.383 per metric tonne, in accordance with the law laid down by this Court in Murlidhar Chiranjilal v. Harishchandra Dwarkadas, as follows : (AIR p. 370, para 13)*

“13. We may in this connection refer to the following observations in Kwei Tek Chao v. British Traders & Shippers Ltd. All ER at p. 797 which are apposite to the facts of the present case : (QB p. 489)

‘It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for resale, but every one who sells to a merchant knows that he has bought for resale, and it does not, as I understand it, make any difference to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for resale, but, if the goods are not delivered to him, he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has not suffered any damage, if the market has risen the measure of damages is the difference in the market price.’

In these circumstances this is not a case where it can be said that the parties when they made the contract knew that the likely result of breach would be that the buyer would not be able to make profit in Calcutta. This is a simple case of purchase of goods for resale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone above the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words ‘which the parties knew, when they made the contract, to be likely to result from the breach of it’ appearing in Section 73 of the Contract Act apply. This is an



ordinary case of contract between traders which is covered by the words 'which naturally arose in the usual course of things from such breach' appearing in Section 73. As the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach it is not entitled to any damages in the circumstances."

43. The Single Judge correctly appreciated this part of the case when he stated as follows : (MMTC Ltd. case , SCC OnLine Del paras 86-87)

"86. MMTC's submission is belied by what it has itself stated in the correspondence exchanged with Anglo. In its letter dated 25-9-2009, MMTC describes USD 128 as the "2009" rate. In its letter dated 27-11-2009 it refers to "the 2009 price level of US \$128/125 PMT". In its letter dated 3-12-2009 MMTC referred to "coal being purchased at current price of US \$128.25 PMT". Further the re-negotiated contracts with SAIL and RINL acknowledge the slump in coal prices to USD 128 during the period from April 2009 to March 2010. The date of 30-9-2009 fell between the said dates and was the date to be reckoned for determining the prevalent market price.

87. The majority award has based its conclusion as regards the prevalent market price of coal as on 30-9-2009 on the basis of the above evidence. It was a view that was possible to be taken on the evidence made available to the AT. The Court is not persuaded to hold the said finding to be perverse or patently illegal."

44. This being the case, it is not possible to accept Shri Rohatgi's argument that the letters dated 27-11-2009 or 3-12-2009 do not reflect the market price of coal as on the date of breach or that the market price of coal cannot be established from the special long-term contracts operating at around the same time as the date of breach. This argument must therefore be rejected.

45. The present case is that of an international commercial arbitration, the majority award being delivered in New Delhi on 12-5-2014. Resultantly, this case has been argued on the basis of the law as it stood before the Arbitration and Conciliation (Amendment) Act, 2015 ["the Amendment"] added two Explanations to Section 34(1) and sub-section (2-A) to Section 34 of the Arbitration Act, in which it was made clear that the ground of "patent illegality appearing on the face of the award" is not a ground which could be taken to challenge an international commercial award made in India after 23-10-2015, when the Amendment was brought into force. We, therefore, proceed to consider this case on the pre-existing law, which is contained in the seminal decision of Associate Builders.

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48. Given the parameters of judicial review laid down in Associate Builders , it is obvious that neither the ground of fundamental policy of Indian law, nor the ground of patent illegality, have been made out in the



facts of this case, given the fact that the majority award is certainly a possible view based on the oral and documentary evidence led in the case, which cannot be characterised as being either perverse or being based on no evidence.”

77. As in the aforementioned case, in the present case also the Tribunal has rendered a finding that Respondent was always ready and willing to offer its vessel but it was the Petitioner who failed to declare the stem and breached the COA as also that termination of COA by the Petitioner was invalid. On the question of no evidence, the Supreme Court held that the finding of the Division Bench that no evidence was led to show that Appellant had availability of balance quantity of coal to supply to the Respondent, failed to appreciate the evidence given by the witnesses as also documentary evidence. The methodology to work out the damages based on market price of coal as on the date of the breach in special long-term contracts was upheld. In the present case also, the Tribunal has followed the same methodology and awarded damages taking the balance quantity to be supplied, the agreed freight rate, the average spot rate for the concerned month and held the Respondent to be entitled to damages.

78. The last argument of the Petitioner assailing the impugned award was that Tribunal has awarded dual rate of interest which is not permissible in law. In this context, reliance was placed on the judgment of the Supreme Court in ***Vedanta Limited (supra)***. Before proceeding further, I may refer to relevant passage from the award to examine whether the Tribunal has awarded dual rate of interest and the relevant passage is extracted hereunder for ease of reference:-

“221. The Respondent to also pay an interest of 6% from the date of the breach to the date of the award. The Respondent are directed to pay the amount within 3 months of the award along with the interest of 6%. In the event of default, the Respondent to pay 9% interest from the date of the



award till payment.”

79. Section 31(7) deals with discretion of the Arbitrator to award interest. The provision is in two parts. Under Clause (a) in the absence of agreement between the parties to the contrary, an Arbitrator can award interest for the period between date of cause of action to the date of award, either for the whole or part of the said period. Clause (b) provides that unless the award otherwise directs, the sum directed to be paid by the Arbitrator shall carry interest at the rate of 2% higher than current rate of interest from the date of award to the date of the payment. In the present case, Arbitral Tribunal has directed payment of interest of 6% from the date of breach to the date of award with a further direction to pay the amount within three months of the award along with interest of 6% and in the event of default, Petitioner will become liable to pay 9% interest from the date of award till payment. From a plain reading of this direction, I am unable to agree with Petitioner that dual rate of interest has been awarded. The award of interest is for pre-award period and the higher rate of interest is only in case of non-payment of the interest and that too for the post-award period, if awarded amount was not paid within three months. Case of the Respondent is squarely covered by the decision of the Division Bench of this Court in ***Noble Chartering Inc v. Steel Authority of India Ltd, 2024 SCC OnLine Del 4843*** and I quote the relevant paragraph as follows:-

“106. The decision in Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited is inapplicable in the facts of this case. In the said case, the Arbitral Tribunal had awarded interest at dual rates. The Arbitral Tribunal had held that “interest @ 9% per annum would be paid from the date of institution of the present arbitration proceedings provided the amount is paid / deposited within 120 days of the award”. The Arbitral Tribunal had further held that if the respondent fails to pay the amounts within 120 days from the date of the award, the claimant would be entitled to further interest at the rate of 15% per annum



till realization of the amount. Thus, it does appear that a higher rate of interest would be applicable depending on whether the awarded amount was paid within the specified period of 120 days or not. In the present case, the Arbitral Tribunal has awarded interest at the rate of 3% per annum from the date of the Letter of Termination (termination e-mail dated 02.01.2023) till the date of the impugned award. The Arbitral Tribunal has also awarded interest for the post award period at the rate of 9% per annum, which would commence after three months from the date of the award. The pre-award interest is a part of the awarded amount and covered under Clause (a) of Sub-section (7) of Section 31 of the A&C Act while future interest at the rate of 9% is covered under Clause (b) of Sub-section (7) of Section 31 of the A&C Act.”

80. As can be seen in the present case, Tribunal had awarded interest at the rate of 3% from the date of termination till the date of the award with post-award interest at 9% per annum, which was to commence after three months from the date of the award. It was observed that the pre-award interest was a part of the awarded amount and covered under Clause (a) of sub-Section (7) of Section 37 while future interest of 9% was covered under Clause (b) and thus it was not a case where dual interest was awarded for the same period. Significantly, the Division Bench distinguished the decision in ***Vedanta Limited (supra)***, on the ground that in the said case the Tribunal had awarded dual rate of interest, inasmuch as for the same period, i.e., from the date of institution of the arbitral proceedings it had awarded 9% interest and if the awarded amount was not paid within 120 days from the date of the award, higher rate of interest of 15% was payable for the same period i.e., from the date of institution of the proceedings to the date of the award. This was neither the case in ***Noble Chartering (supra)*** nor in the instant case. This contention of the Petitioner therefore deserves rejection.

81. For all the aforesaid reasons, this petition is dismissed and the impugned arbitral award dated 13.09.2018 is upheld. Pending application also stands disposed of.



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OMP (ENF.) (COMM.) 50/2023 and EX.APPL.(OS) 1790/2024

82. List on 20.11.2025 the date already fixed in EX.APPL.(OS) 1149/2025 and EX.APPL.(OS) 1307/2025.

JYOTI SINGH, J

OCTOBER 13, 2025/S.Sharma/YA