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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 29.01.2020

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Judgment pronounced on: 02.03.2020

+ FAO(OS) 532/2015 & CM.APPL 20560/2015

MMTC LIMITED

..... Appellant

Through Mr. P.V. Kapur, Senior Advocate,
Mr.Sanjeev Puri, Senior Advocate,
Mr. Rajeev Mehra, Senior Advocate
with Ms. Suman Yadav, Mr. Aditya
Sarin, Ms. Divya Krishan and
Mr.Hitendra, Advocates.

versus

ANGLO AMERICAN METALLURGICAL COAL PTY LTD

..... Respondent

Through Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr.Samar Kachwaha,
Ms. Ankit Khushu, Mr. Ashok Sagar
and Mr. Aayush Marwah, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ANUP JAIRAM BHAMBHANI, J.

This is an appeal under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter the "A&C Act") against judgment dated 10.07.2015 passed by a learned single Judge of this Court by which objections to the majority arbitral award dated 12.05.2014 (hereinafter referred to as the "Award") filed under section 34 of the A&C Act have been dismissed. By way of the Award, the claim filed by the respondent/Anglo American Metallurgical Coal Pty. Ltd. for damages on account of non-lifting of 453,034 MT of coking coal by the appellant/MMTC Ltd. was allowed and the respondent was held to be entitled to recover damages in the sum of USD 78,720,414.92 alongwith *pendente lite* and future interest and costs. A

dissenting award dated 13.03.2014 was passed by the third arbitrator, dismissing the claim petition filed by the respondent.

2. Some basic facts, which are not disputed, that are required to be noticed for the disposal of this appeal are that the appellant, which is a Government of India enterprise, entered into a Long-Term Agreement ('Agreement') dated 07.03.2007 with the respondent. Under the Agreement, the appellant agreed to purchase a certain quantity of freshly mined and washed coking coal from the respondent over three delivery periods between 01.07.2004 and 30.06.2007. Under clause 1.3 of the Agreement, *vide* addendum dated 20.11.2008, the period of agreement was extended by two years, thereby adding two delivery periods *i.e.* a Fourth Delivery period commencing 01.07.2007 and ending 30.06.2008; and a Fifth Delivery period commencing 01.07.2008 and ending 30.06.2009. By consensus between the parties, the Fifth Delivery period was further extended till 30.09.2009; and it was agreed that the respondent would supply 466,000 MT of coal to the appellant at USD 300 per MT for the said delivery period.

3. As it would appear from the record, in view of the global financial crisis, after issuance of addendum dated 20.11.2008, *vide* letter dated 20.11.2008, the appellant requested the respondent for reduction in the price of coal for quantities to be supplied for the Fifth Delivery period. It may be noted that the subject matter of the arbitration proceedings are disputes between the parties pertaining to the Fifth Delivery period *i.e.* 01.07.2008 to 30.06.2009 as extended up to 30.09.2009. It is during the Fifth Delivery period that the respondent was required to supply to the appellant 466,000 MT of coking coal at the rate of USD 300 per MT or such other rate as agreed between the respondent and Rashtriya Ispat

Nigam Ltd. (RINL)/Steel Authority of India Ltd. (SAIL) during the delivery period between 01.07.2008 and 30.06.2009. The essential contention of the appellant is that the respondent failed to supply 454,034 MT of coking coal; whereas the respondent's contention is that the appellant failed to buy the coal in breach of the Agreement.

Appellant's Submissions :

4. Mr. P.V.Kapur, learned senior counsel appearing for the appellant submits as under:

4.1. On 02.07.2009 the appellant wrote to the respondent *inter alia* stating that the appellant was arranging for a vessel, namely a cargo ship, for receiving/lifting a certain quantity of coal, referred to as a 'stem', in July 2009. By the same communication, and bearing in mind the backlog under the Fifth Delivery period, the appellant additionally requested for two stems, one each in August 2009 and September 2009 respectively; and requested the respondent to confirm availability of coal and convey the 'lay-cans' as was required on the part of the respondent under clause 7.2.1 of the Agreement.

4.2. *Vide* reply e-mail dated 03.07.2009 the respondent acknowledged the request for the supply in July 2009; but as regards other shipments, the respondent did not offer a stem but stated that it would "revert shortly". Through the aforesaid e-mail the respondent therefore sought time to revert on the availability of coal under the Agreement and for conveying the lay-cans.

4.3. In the meantime, by way of an *ad-hoc* arrangement, by way of what the parties refer to as 'letter agreement' dated 15.07.2009 the parties agreed for a one-time *ad-hoc* supply of 50,000 MT of coking

coal. The parties agreed that 40,400 MT of coal was to be lifted at USD 128.25 per MT and the balance 9,600 MT at USD 300 per MT *i.e.* the contracted price for the Fifth Delivery period, as carry-over under the Agreement. It is contended by the appellant that this ‘*ad-hoc* supply’ was entirely distinct from the ‘contracted supply’ under the Agreement.

4.4. Since the respondent failed to revert as promised *vide* e-mail dated 03.07.2009, the appellant wrote another e-mail dated 21.07.2009 *inter alia* again requesting for confirmation of stem availability from the respondent for August 2009. *Vide* reply e-mail dated 22.07.2009 the respondent *inter alia* informed the appellant that:

"Unfortunately, at this stage we are unable to confirm a stem in Aug/Sep for MMTC due to cargo availability.

We are continuing to review our position and will advise our preferred schedule for Oct-Dec 2009 as soon as possible"

(Emphasis supplied)

4.5. Thereafter, on 04.09.2009 the appellant wrote to the respondent *inter alia* stating that the appellant's requirement of coking coal had increased but that after the *ad-hoc* shipment in July 2009, the respondent had not supplied any stem to the appellant; and accordingly, the appellant requested one stem of 50,000 MT each in October and November 2009. However, *vide* reply e-mail dated 07.09.2009 the respondent again expressed inability to supply coal under the Fifth Delivery period on the ground of non-availability of the contracted goods for the remainder of the year 2009.

4.6. It is submitted that the respondent had failed to confirm stem availability for August and September 2009, which was within the contracted period; and hence had failed to supply any material within the Fifth Delivery period which was to expire on 30th September 2009.

4.7. Thereafter, *vide* its letter dated 21.09.2009 the respondent put the agreement to an end *inter alia* stating that “*The Fifth Delivery Period of the Agreement has now finished bringing the term of the Agreement to an end*”.

4.8. Simultaneously with terminating the agreement, the respondent also submitted a fresh proposal for delivery of the balance quantity that was to be supplied by it under the Fifth Delivery period and for renewal of the contractual arrangement. The terms of the fresh proposal and proposed renewal of the agreement appeared onerous to the appellant; which was communicated to the respondent *vide* letter dated 25.09.2009, whereby the appellant forwarded a counter-proposal, *viz.* to stagger the lifting/delivery periods; but at the same time the appellant reiterated its request for stems for October and November 2009. In this regard, the parties exchanged correspondence dated 25.09.2009, 25.11.2009, 27.11.2009, 01.12.2009, 03.12.2009 and 07.12.2009 in which the respondent refused to accept the proposals made by the appellant; and accordingly, failed to arrive at any fresh agreement.

4.9. Subsequent to termination of the Agreement and upon the negotiations and proposed renewal of the agreement not fructifying, *vide* a legal notice dated 04.03.2010, the respondent demanded from the appellant USD 78,720,414.92 along with interest @12% on account of alleged breach of the appellant’s obligation to lift 466,000

MT coal as envisaged under the Agreement. *Vide* its reply dated 24.04.2010 the appellant denied all allegations contained in the legal notice *inter alia* stating that *vide* e-mails dated 22.07.2009 and 07.09.2009, it was the respondent who had expressed inability to provide stems in August and September 2009 as also for the remainder of the year on account of non-availability of cargo; and that therefore, it was the respondent who was in breach of the Agreement. By letter dated 02.11.2010 however, the respondent reiterated its demand contained in legal notice dated 04.03.2010.

4.10. On 24.09.2012, i.e. more than 3 years after the respondent terminated the Agreement, the respondent appointed Mr. Peter Leaver, Q.C. as its arbitrator and submitted a request for arbitration to the International Chamber of Commerce (ICC) along with its Statement of Claim for USD 78,720,414.92, also claiming interest and costs against the appellant. In the said claim, the respondent alleged that the contracted quantities were available for supply with the respondent; however, according to the respondent, it was the appellant that had refused/failed to lift the quantities agreed to under the Agreement. The respondent thus claimed damages in respect of the 454,034 MT of coal that the appellant had allegedly not lifted, by claiming the difference between the allegedly then prevailing market price and the contracted price of goods. The appellant submits that it is the common case between the parties that stem availability was never confirmed within the Fifth Delivery period by the respondent to the appellant as required under the terms of the Agreement.

4.11. It is further submitted that under the Agreement, the delivery schedule and prices were to be mutually decided by the parties; and the Tribunal had also not held that the appellant had an obligation to

offer a delivery schedule first in point of time. The single Judge therefore erred in holding the appellant liable for breach of the Agreement and for payment of damages. The Tribunal's observation that the respondent had discharged its obligation under the Agreement by relying upon respondent's letter dated 11.03.2009 is misconceived. Under clause 7 of the General Conditions of the Agreement, it was the respondent's obligation to intimate to the appellant its readiness to deliver quantities of coal first, so that the appellant could thereafter nominate a suitable vessel.

4.12. It is submitted that the plain language of communications dated 02.07.2009 and 03.07.2009 indicates that the appellant sought stems in August and September 2009 to clear contractual "backlogs" and it was so understood by the respondent; and that though the Tribunal accepted the plain language of the afore-stated communications, it incorrectly held that the e-mails indicate that the appellant had requested supplies at a discounted price of USD 128 per MT and not at the price of USD 300 per MT as contracted under the Agreement, which inference and interpretation is incorrect. Since there is no ambiguity in the communications, the unilateral understanding of the respondent's Marketing Manager Mr. John Wilcox, as he deposed during evidence, that the e-mails pertained to a request of discounted supply rather than fulfilment of the obligations under the Agreement, could not have formed the basis of the Tribunal's findings.

4.13. It is submitted on behalf of the appellant that reply e-mail dated 07.09.2009 sent by the respondent shows that it did not have coal for the remainder of the year 2009 and this constituted an unqualified repudiation by the respondent of its obligation to supply

coal. Under section 37 of the Indian Contract Act 1872, when the offer made for the performance of an agreement is not accepted, the promisor is excused from performance provided the promise is unconditional. The appellant herein performed its part of the agreement by inviting intimations of stems; but the respondent put an end to the contract, without there being any intimation by the appellant that it was refusing to perform its obligation or that it was disabled from performing the same. The said act of the respondent violated the provision of section 30 of the Indian Contract Act. It is also contended that under section 39 of the Indian Contract Act, non-communication of an offer to perform, is not sufficient to entitle the other party to terminate the contract.

4.14. Notwithstanding the fact that the appellant disputes receipt of communication dated 11.03.2009 (the delivery of which is also not proved by the respondent), it is the appellant's case that when, by communication dated 11.03.2009, the respondent demanded that the appellant give a delivery schedule, *vide* e-mails dated 02.07.2009 and 21.07.2009 the appellant provided such schedule and made an unconditional offer. To this the respondent replied *vide* e-mail dated 07.09.2009 stating plainly that goods were not available for the remainder of the year 2009; and *vide* letter dated 21.09.2009 the respondent offered stems only for the year 2010. The respondent also unambiguously stated that the Agreement and Fifth Delivery period had come to an end; and thereafter made a fresh offer for supply of coal for the year 2010. This shows that the respondent was unwilling to perform its obligations under the Agreement and had repudiated the same on 21.09.2009. In this backdrop, the appellant contends that the single Judge incorrectly relied upon the appellant's letter dated

25.09.2009, to support the reason that in that letter the appellant did not make an explicit statement as to the termination of the Agreement.

4.15. It is further submitted that the Tribunal had failed to notice that in June 2009 both parties had agreed that the discounted price was only for that one-time transaction and that the other supplies would be at the contracted price as agreed under the Agreement i.e. USD 300 per MT.

4.16. Insofar as the calculation of the alleged damages is concerned, it is submitted that for calculating damages, at the very least, the respondent was required to prove the market price of coal on the date of the alleged breach of the Agreement, that is 21.09.2009 or 30.09.2009. However, the respondent had not produced any evidence to prove the market price but had only relied upon the negotiation letters and correspondence seeking reduction in prices, which correspondence related to nearly a year before the alleged date of breach; and had tried to arrive at the market price through some averages, which is contrary to the law laid down by the Supreme Court in *Murlidhar Chiranjilal v. Harshchandra Dwarakadas*, (1961) 1 SCR 653.

4.17. It is submitted that the single Judge has ignored the erroneous findings in the Award and has failed to notice that the Agreement envisaged and required the parties to coordinate the supply and delivery at the same time; and further, that indication of stem availability by the respondent and nomination of vessel by the appellant, were steps to be taken in 'implementation' of the delivery schedule and not 'preparatory' to it. The single Judge has therefore omitted to notice that the interpretation in this regard given by the

Tribunal is contrary to the terms of the Agreement. Clauses 7.2, 7.2.1 and clauses 2 and 4 of Annexure- IV to the Agreement clearly establish the sequence in which the obligations contained in each of the said clauses were to be performed, as per which, confirming stem availability by the respondent was the first obligation; while the agreement on the delivery schedule was a bilateral obligation; and the nomination of vessel by the appellant was subsequent to that. The delivery schedule had to be jointly prepared by the respondent and the appellant based on the availability of stem. The Award however erroneously accepted the contention of the respondent that it was not obligatory for the respondent to first indicate stem availability to the appellant. Thus the findings in the Award are contrary to the terms of the Agreement; and hence, are in conflict with the public policy of India, as per the decision rendered by the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd. v. SAW Pipes* (2003) 5 SCC 705; and is thus liable to be set-aside in terms of section 34 (2) (b) (ii) of the A&C Act.

4.18. It is submitted that the single Judge also failed to appreciate that the erroneous findings contained in the Award are also in contravention of the provisions of section 52 of the Contract Act, according to which it is incumbent upon contracting parties to follow and comply with the sequence of obligations in the same order as provided under a contract; and in the present case, upon failure of the respondent to perform its first obligation under the Agreement in such sequence, the appellant stood discharged from performing its obligation for nominating the vessel. However the single Judge has omitted to notice that the Tribunal had failed to return a finding on the said issue. It is further the appellant's contention that the Award

is also in contravention of section 54 of the Contract Act, which provides that in case of reciprocal promises, where one of them cannot be performed or its performance cannot be claimed till some other promise has been performed, then firstly, the failed promisor cannot enforce the dependant promise; and secondly, the promisee of the first promise need not perform the promise on its part. The Tribunal however brushed aside the law laid down by the Supreme Court in the case of *Nathulal v. Phoolchand*, (1969) 3 SCC 120 on this aspect; and for this reason also therefore, the Award is liable to be set-aside under section 34 of the Act.

4.19. It is submitted that the single Judge also failed to appreciate that the findings in the Award, based on the oral testimony of the respondent's witness Mr. Wilcox as recorded in paragraph 134 that:

"...the shipping arrangements throughout the period of the Agreement were worked out through mutual discussions and not subject to a sequence of obligations"

and that

"...the normal course was to meet and agree upon an indicative Delivery Schedule. Only thereafter will the Claimant offer stem."

are findings which are contrary to the express written terms of the Agreement and cannot therefore be accepted. The reliance by the majority of arbitrators on the aforesaid oral testimony which is contrary to the express terms of a written contract, is in the teeth of the provisions of sections 91 and 92 of the Indian Evidence Act 1872, which prohibits and excludes oral evidence being led in relation to a transaction which has been reduced into writing or in relation to the terms of the contract, as has been held by the Supreme Court in the case of *Abdul Rashid Khan (Dead) & Ors. V. P.A.K.A. Shahul Hamid & Ors* (2000) 10 SCC 636 (para 5). Thus, the

findings in the Award based on oral evidence which evidence contradicts the contractual terms, are liable to be set-aside, being contrary to the written terms of the Agreement, as well as to the provisions of law.

4.20. It is submitted that the single Judge failed to appreciate that the findings in paragraphs 118 to 124 of the Award on the issue of availability of coal with the respondent, are also contrary to the material on record available in the form of e-mails sent by the respondent on 03.07.2009, 22.07.2009 and 07.09.2009, which leaves no manner of doubt and clearly establishes that firstly, the respondent failed to confirm stem availability as required under clause 7.2 of the Agreement; and secondly, the respondent had also categorically communicated that it did not have any coal availability for the remainder of the year upto December 2009.

4.21. It is submitted that the single Judge and the majority of arbitrators had failed to appreciate that even if it is assumed that the respondent owns coal mines, the same was no answer to e-mails dated 22.07.2009 and 07.09.2009 in which the respondent, first refused to confirm cargo availability and subsequently, in clear words, admitted that it did not have coal for the remainder of the year 2009. The appellant point-outs that the respondent did not bring the author of e-mail dated 22.07.2009 into the witness box. Instead of noticing that the respondent had no answer to the said e-mails, the majority of arbitrators relied upon and without basis accepted, the oral evidence of Mr. Wilcox, including in relation to the contents of the e-mail authored by another person namely Ms. Kim Street, who is stated to be a subordinate officer of the respondent, who was not produced to confirm the contents of the e-mails written by her in

response to the request made by the appellant's General Manager Mr. Suresh Babu requesting confirmation of stems and supply of coal. On the other hand the Tribunal ignored the evidence of the appellant's witness Mr. Suresh Babu, who deposed that the e-mails requesting the respondent to offer stems was under the Agreement and therefore at the rate of USD 300 per MT and not under the one time *ad-hoc* arrangement for supply of coal at the rate of USD 128 per MT.

4.22. The single Judge also failed to appreciate the erroneous acceptance by the majority of arbitrators of the oral testimony of Mr. Wilcox on account of so-called consistency with the appellant's letter dated 20.11.2008. The single Judge erred in taking the view that what was stated by Mr. Wilcox in his deposition was consistent with the appellant's letter dated 20.11.2008; and omitted to notice that a request by the appellant for a reduction in price was in fact rejected by the respondent ; and that therefore Mr. Wilcox's statement was not in line with what had transpired between the appellant and the respondent in the context of appellant's letter dated 20.11.2008. It is urged that this in fact is an error apparent on the face of the record. It is argued that the reliance on a letter issued in 2008 to decide availability of coal in July 2009 is also entirely misconceived. The majority of arbitrators ignored the evidence of Mr. Suresh Babu, who in his cross examination (Q6) answered that:

“... though it may not be viable for MMTC to buy and make coke @ USD 300, MMTC realized its contractual obligation with the supplier and therefore viability had taken a second position”

in view of which there was no reason for the majority of arbitrators to rely upon the letter dated 20 November 2008.

4.23. It is submitted that the single Judge could not have relied upon letter dated 20.11.2008 to conclude that the appellant was not in a position to continue buying coal at USD 300 per MT for the reason that the said letter was only a request made by the appellant to the respondent to reduce the price of the contracted quantity; and upon the respondent's refusal to accede to such request, the appellant never repeated its request. Secondly, on the same date in fact the appellant had agreed to purchase the contracted material at USD 300 per MT. Thirdly, the letter was written ten months before the expiry of the Fifth Delivery period; and seven months before the appellant requested stem from the respondent.

4.24. It is further submitted on behalf of the appellant that letter dated 11.03.2009 was never received by the appellant; but be that as it may, as a prudent commercial person desirous of completing the performance of the Agreement, the respondent would have followed-up immediately with the appellant in that regard, which the respondent did not do. It is pointed-out that the said letter has been not been filed on record by the respondent; and even if it is assumed that the appellant received the said letter, a reading of the same does not establish any offer of delivery schedule made by the respondent.

4.25. It is argued that the 'backlog' referred to in e-mail dated 02.07.2009 was obviously, and could only have been, the remaining quantity under the Agreement and not outside it. The single Judge and majority of arbitrators ignored three material aspects: first, that pursuant to a one-time *ad-hoc* arrangement 50,000 MT of mixed

cargo had already been shipped via MV Seavenus. Therefore, *vide* e-mail dated 04.09.2009 when the Appellant requested for one stem of 50,000 MT and complained to the Respondent that

"after Seavenus (laycan 20-30 July), Anglo has not given any stem to MMTC"

(Emphasis supplied)

the said request of 50,000 MT was, and could only have been, under the Agreement at USD 300 per MT. Second, the lay-can i.e. the period during which the ship chartered for carrying the coal was required to be loaded, of the one-time *ad-hoc* shipment was 20-30 July 2009. Therefore, the refusal of the Respondent to confirm any stem for August / September 2009 "due to cargo availability" by e-mail dated 22 July 2009, could again, only have been under the Agreement and not under any other understanding or arrangement. Third, if the said e-mail pertained to an *ad-hoc* shipment or non-contractual shipment, the same should have carried the proposed price and specifications. Since there is no price or specification mentioned in the said e-mail, the only possible conclusion is that the e-mail sought deliveries under the Agreement at the rate of USD 300 per MT.

4.26. It is submitted that the single Judge relied upon the statement of Mr. Wilcox to the effect that the price of coal had slumped and the respondent had been dumping coal in China; and the respondent had only declined to supply coal at below the contract price of USD 300 per MT. On the contrary, the respondent in its evidence had stated that prices had started rising in June 2009; but the Award

erroneously records that the price of coal remained low during the Fifth Delivery period.

4.27. It is submitted that the Award quantifies for damages on ‘no evidence’ since firstly, the affidavit and additional affidavit of Mr. Wilcox is completely silent on the market price on 21.09.2009 or 30.09.2009. Secondly, letter dated 03.12.2009 of the appellant, relied upon by the majority of arbitrators, also does not mention the rate of coal on 21.09.2009 or 30.09.2009. Thirdly, the market rate of coal cannot be established from a special long-term contract between the Respondent and third parties, in this case SAIL and RINL. The majority of arbitrators however ignored the fact that on 21.09.2009 or 30.09.2009 the only evidence available as regards the price of coal were the special contracts between the Respondent and the SAIL/RINL and the Agreement between the parties. Both these contracts were special; and both these third-party contracts reflected completely different rates. While the Agreement stipulated the rate of USD 300 per MT, on the same date even as per the Respondent, the contracts between the Respondent and SAIL/RINL stipulated a rate of USD 128 PMT. Thus, there was no credible ‘market price’ of coal on 21.09.2009 or 30.09.2009 available before the Tribunal. These special contracts are long term and are dependent on long term dealings between parties and thus cannot establish the prevalent ‘market price’ on the date of alleged breach. Also, purchases made by the appellant from BHP Mitsui were based on a long-term special contract and at the relevant time purchases were made @USD 300 PMT.

4.28. While relying upon communication dated 21.09.2009, the appellant has also submitted that the claim of the respondent was patently beyond limitation, since having terminated the agreement on 21.09.2009, the respondent filed the claim on 24.09.2012, that is beyond the limitation period of three years.

4.29. It is submitted that the finding of the single Judge and the Tribunal with respect to interest is also perverse since the amount of USD 27,239,420.29 calculated @7.5% p.a. on the principal awarded amount of USD 78,720,414.92 from 30.09.2009 till 12.05.2014 is exorbitant; and the LIBOR rate of interest or a lower rate of interest should have been awarded, if at all. The date of commencement of interest, that is 30.09.2009, is also incorrect. The post award interest @15% p.a. till date of payment is also exorbitant. Furthermore, the costs amounting to USD 977,395.00 is without any basis.

Case law relied upon by the Appellant:

5. Senior counsel for the appellant relies upon the following judicial precedents in support of his contentions:

5.1. *Oil & Natural Gas Corporation Ltd. v. Saw Pipes*: (2003) 5 SCC 705 (paragraphs 1, 13 to 17, 22, 30, 31, 64 and 74), to submit that the phrase “public policy of India” used in the context of section 34 should be given a wider meaning. What is for public good or in public interest has been interpreted variously from time-to-time. An award which *prima facie* violates statutory provisions cannot be held to be in public interest and would adversely affect the administration of justice, and should thus be set-aside. The Supreme Court has added to the narrower meaning given to the term “public policy” in *Renusagar Power Co. Ltd. v. General Electric Co.*: 1994 Supp (1) SCC 644 and has observed that an award could also be set-aside on

the ground of patent illegality. Also, an award can be set-aside under section 34 of the Act if the same is contrary to the fundamental policy or interest of India, justice or morality. But the illegality must go to the root of the matter; and if the illegality is of trivial nature, it cannot be held that the award is against public policy. An award can also be set-aside if it is so unreasonable or unfair that it shocks the conscience of the court; and if such award is opposed to public policy, it is required to be adjudged void;

5.2. *National Thermal Power Corporation v. Siemens*: 2012 SCC OnLine Del 5686 (paragraph 47), to submit that an arbitral tribunal must act according to the terms of contract; and the construction of contractual terms has to be that of a fair-minded, reasonable person. In the absence of a reasonable construction, the award should be set-aside under section 34 or 37 of the A&C Act;

5.3. *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.*: (2014) 9 SCC 263 to submit that perversity or irrationality of decisions is to be tested on the Wednesbury principle of reasonableness. If, on facts proved before the arbitrators, they have failed to draw an inference which ought to have been drawn; or if they have drawn an inference which, on the face of it, is untenable, resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards, will be open to challenge; and may be cast away or modified depending upon whether the offending part is, or is not, severable from the rest;

5.4. *State of Orissa v. Samantary Construction Pvt. Ltd*: 2015 SCC OnLine SC 856 (paragraph 22), to submit that the award is required to be a reasoned one, unless the parties agree that no reasons

are to be given or the award is based on agreed terms under section 31 of the A&C Act. The arbitrator ought to have evaluated the claim for damages, in the absence of which the award can be held to be perverse or based on non-application of mind; and a perverse award can be set aside under section 34 of the Act;

5.5. **NHAI v. Progressive Construction**: 2017 SCC OnLine Del 7867 (paragraphs 21-23), to submit that an award which is contrary to substantive provisions of law or against the terms of the contract or patently illegal or prejudicial to the rights of the parties, is open to interference by the court under section 34(2) of the A&C Act. It is open to the court to consider whether the award is against the specific terms of the contract; and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India;

5.6. **HRD Corporation v. GAIL**: (2018) 12 SCC 471 (paragraphs 19 to 20), to submit that under section 34 of the Act an arbitral award governed by Part-I of the A&C Act can be challenged on the ground of 'patent illegality' appearing on the face of the award. Counsel further relies on **Associate Builders v. DDA**: (2015) 3 SCC 49 (paragraphs 22, 27 to 61) to submit that where a finding in the award is based on no evidence; or ignores vital evidence; or an arbitral tribunal takes into consideration something irrelevant for arriving at a decision, such decision would be perverse and can be set-aside under section 34. An award is said to be against public policy if it is against justice, morality or is patently illegal; and an award is against justice, if it shocks the conscience of the court;

5.7. **Emkay Global Financial Services v. Giridhar Sondhi** : (2018) 9 SCC 49 (paragraph 21) and on **Promod Kumar v. Religare**:

249 (2018) DLT 682; to submit that although ordinarily an application under section 34 of the A & C Act does not require anything beyond the record that was before the arbitrator, in the light of the amendments made to sections 34(5) and 34(6), the Supreme Court has now ruled that if there are matters not contained in such record which are relevant to the determination of the issues arising under section 34(2)(a) they may be brought to the notice of the court by way of affidavits; and that cross-examination of deponents should not be allowed unless absolutely necessary, since the truth will emerge on a reading of the affidavits filed by the parties;

5.8. ***ADTV Communication Pvt. Ltd. v. Vibha Goel***: 2018 V AD (DELHI) 273 (paragraph 35), to submit that an appeal under section 37 of the Act is a form of second appeal; and therefore while the court would be hesitant to interfere with the decision of the single Judge, however if it is shown that the view taken by the single Judge is palpably erroneous on facts or in law, or is manifestly perverse, the court would interfere under section 37;

5.9. ***IRB Ahmedabad Vadodara Super Express Toll Ways Pvt. Ltd. v. NHAI***: 2018 SCC OnLine Del 8946 (paragraphs 29 to 31), to submit that though construction of the terms of a contract is primarily for an arbitrator to decide, if the arbitrator construes the contract in a manner that it could be said to be something that no fair-minded or reasonable person would do; and if the construction of contractual terms is not a possibility, the legality of such construction can be judged on the touchstone of section 34 of the A&C Act;

5.10. ***Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Limited*** reported as 2019 SCC OnLine Del 6562, whereby, applying the principles enunciated in ***Associate Builders***

(supra), the Division Bench partially set-aside an arbitral award as suffering from perversity, irrationality and patent illegality on the face of the award on account of confusion and ambivalence in the award; holding that the arbitral tribunal had ignored and did not consider vital evidence; and that the tribunal had relied upon averments made in the statement of claim instead of evidence and material to arrive at the award amount;

5.11. *MMTC Ltd. v. M/s Vedanta Ltd.*: Civil Appeal No. 1862 of 2014 decided on 18.02.2019 (paragraph 11), to submit that an arbitral award can be set-aside under sections 34 and 37 of the A&C Act on account of patent illegality, if the tribunal has ignored vital evidence;

5.12. *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.* : 2019 SCC OnLine 1656 (paragraph 36), to submit that arbitral award can be set-aside under sections 34 and 37 of the A&C Act on the ground of insufficiency and inadequacy of reasoning;

5.13. With regard to the contention that the author of e-mail dated 22.07.2009 *i.e.* Ms. Kim Street was not cross-examined, counsel places reliance on *Sardar Gurbaksh Singh v. Gurdayal Singh*: AIR 1927 PC 230 to submit that the true object to be achieved by a court of justice can only be furthered with propriety by the testimony of the party, who, personally knowing the whole circumstances of the case, can dispel the suspicions attached to it. Senior counsel also relies upon *Vidhyadhar v. Manik Rao*: (1999) 3 SCC 573 to submit that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Where a party to the suit does not appear in the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a

presumption would arise that the case set-up by him is not correct. Reliance was also placed upon *Man Kaur (Dead) v. Hartar Singh*: (2010) 10 SCC 512, to submit that if a plaintiff has to prove that he was ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, he should necessarily step into the witness box and give evidence that he was willing to perform his part of the contract and subject himself to cross-examination on that issue. On the rule of hearsay evidence, counsel relied upon *Kalyan Kumar Gogoi v. Ashutosh Agnihotri*: (2011) 2 SCC 532 to submit that since Ms. Kim Street was not produced for examination and cross-examination her e-mail ought not to have been relied upon;

5.14. Learned counsel relies next upon *Gangabai w/o Rambilas Gilda v. Chahhabubai w/o. Pukharajji Gandhi*: (1982) 1 SCC 4, to submit that the bar imposed by sub-section (1) of section 92 of the Indian Evidence Act applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself; and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. Reliance is also placed upon *Abdul Rashid Khan v. PAKA Shahul Hamid* (supra) to submit that the law regarding pleas taken by parties beyond a written agreement is well settled. In view of section 92 of the Indian Evidence Act, where any contract is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or apart from the said contract is admissible in law. While relying upon *State Bank of*

India v. Mula Sahakari Sakhar Karkhana Ltd: (2006) 6 SCC 293 counsel submits that in a commercial document, surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise. Referring to oral evidence, when section 92 of the Indian Evidence Act would be attracted, is flawed;

5.15. ***Sahebzada Mohammad Kamgarh Shah v. Jagdish Chandra:*** AIR 1960 SC 953 to submit that, if and when, parties have first expressed themselves in one way and then go on to say something which is irreconcilable with what has gone before, it is the duty of the court to look at all parts of the document to identify what was really intended by the parties. Reliance is also placed upon ***V.S. Talwar v. Prem Chandra Sharma:*** (1984) 2 SCC 420 to submit that while construing instruments, one must have regard not to the presumed intention of the parties, but to the meaning of the words which they have used; and while construing a lease deed, reference to oral evidence or even the tenant's documents would be wholly out of place. The terms of the document, if they make any good meaning, must be given effect to. Reliance is also placed upon ***Roop Kumar v. Mohan Thedani:*** AIR 2003 SC 2418 to submit that it is a general and most inflexible rule that wherever written instruments are appointed, either by requirement of law or by the contract of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. Relying upon ***Transmission Corporation v. GMR Vemagiri Generation:*** AIR 2018 SC 2965, counsel submits that if the contract is capable of interpretation on its plain meaning with regard to the true intention of

parties, it will not be prudent to read the implied terms on the understanding of a party or by the court based on any notions of business efficacy. A commercial document cannot be interpreted in a manner so as to arrive at a conclusion that is at complete variance with what may originally have been the intention of the parties. Such a situation can only be contemplated when the implied term lends efficacy to the terms of the contract;

5.16. In regard to the submission made by the appellant that the respondent wrongfully repudiated the Agreement, counsel places reliance upon *Florrie Edridge v. Rustomji Danjibhoy Sethna*: AIR 1933 PC 233 to submit that a wrongful repudiation by one party cannot, except by the election of the other party so to treat it, put an end to an obligation; if the other party still insists on performance of the contract, the repudiation is what is called '*brutum fulmen*', that is, the parties are left with their rights and liabilities as before. Reliance is also placed upon *Gajjala Nagiseti v. Maddi Venkatasubbayya*: AIR 1935 Mad 345 to submit that repudiation of the contract by one party does not release the other party from their own obligations under the contract. The party which did not repudiate should not fail to perform the condition precedent. Reliance in this regard is also placed upon *State of Kerala v. Cochin Chemical*: AIR 1968 SC 1361 and *Jhandoo Mal-Jagannath v. Phul Chand Fateh Chand*: AIR 1925 Lah 217.

5.17. With respect to the contention that the respondent filed the claim before the Tribunal beyond the limitation period, counsel relies upon *Deepak Khosla v. Vikram Bakshi*: 2018 (5) RAJ 222 (Del).

Respondent's Submissions:

6. *Per contra*, Mr. Neeraj Kishan Kaul, learned senior counsel appearing for the respondent submits as under:

6.1. By e-mails dated 08.10.2008 and 14.10.2008 the respondent offered to deliver the contractual quantity of coal; but as recorded in the respondent's internal e-mails (both) dated 11.11.2008, the respondent had gathered that the appellant would not lift coal till February 2009. Pursuant to several meetings held between them, the respondent sent letter dated 11.03.2009 asking the respondent to lift coal and provide a delivery schedule; however, the appellant did not reply to the same.

6.2. Counsel submits that on account of inability on the part of the appellant to lift coal, on 15.06.2009 the respondent agreed to supply one mixed-price shipment of 50,000 MT of coal to the appellant. This mixed-price shipment included 9,600 MT of coal at USD 300 per MT and 40,400 MT at USD 128.25 per MT. In this regard the parties signed letter agreement dated 15.07.2009, which letter agreement was signed by the appellant on 22.07.2009. By this date over 9 months of the Fifth Delivery period had already elapsed but the respondent was nowhere close to performing its part of the bargain to lift the agreed quantity of coal under the Agreement for the Fifth Delivery period. However, in order to preserve the commercial relationship between the parties, the respondent made a 'without prejudice' offer on 21.09.2009 by which the respondent proposed that the appellant should take delivery of the carryover quantity of coal under the Agreement; and proposed further renewal of the Agreement, which was kept open for acceptance by the respondent till 30.09.2009. By letter dated 25.09.2009, the appellant

rejected the same, stating that the suggestion that the appellant should lift a total quantity of 225,174 MT by 31.03.2010 seemed to be a near impossibility in the backdrop of the prevailing harsh economic conditions. In response to appellant's letter dated 25.09.2009, by its letter dated 25.11.2009 the respondent made a revised 'without prejudice' offer requiring the appellant to lift 85,000 MT at USD 300 by March 2010 and the balance over the next two years. It is contended however that by its letter dated 27.11.2009, the appellant stated that it could not accept this offer unless the respondent agreed to supply mixed-price cargo, which would have reduced the overall price to USD 160 per MT.

6.3. Senior counsel for the respondent further contends that the submission of the appellant that it offered to lift the entire 466,000 MT of coal at USD 300 per MT during the Fifth Delivery period and the respondent refused to deliver the same and therefore committed breach of the Agreement, is irreconcilable with the admissions made by the appellant in letters dated 20.11.2008, 25.09.2009, 27.11.2009 and 03.12.2009. The respondent argues that the said letters highlight that the appellant was in no position to lift any shipment at USD 300 per MT.

6.4. It is further submitted that the letters sent by the appellant in July/September 2009 amounted to a request to supply coal by way of non-contractual, mixed-price shipments; and the respondent was not obliged to accept the requests so made. Also, the only reason for the appellant's non-acceptance of the 'without prejudice' offers dated 21.09.2009 and 25.11.2009 made by the respondent was that it required mixed-price shipments for the entire un-lifted quantity of coal under the Fifth Delivery period.

Case law relied upon by the Respondent:

7. Senior counsel for the respondent relies upon the following judicial precedents in support of his contentions:

7.1. On the proposition that the scope of interference of courts under section 37 of the Act is even more restricted than that under section 34 of the Act, counsel relies upon para 14 in the case of ***Morepen Laboratories Limited v. Phafag AG.***: 2013 (136) DRJ 668, wherein the court has held that the Division Bench as an appellate forum would intervene only if the single Judge's determination about the award exceeding jurisdiction or being manifestly contrary to Indian law or substantive provisions, is erroneous. Short of such threshold, this court, as an appellate court would not substitute its opinion for another plausible opinion adopted by the court of first instance. Reliance is also placed on paras 15 to 18 and 21 to 23 in the case of ***M/s L.G. Electronics India (P) Ltd. v. Dinesh Kalra***: 2018 SCC OnLine Del 8367 in this regard;

7.2. ***Associate Builders*** (supra) (paras 17, 32, 33, 45, 48, 49 and 56) to submit that none of the grounds contained in section 34(2)(a) of the Act deals with the merits of a decision rendered by an arbitral award. It is only when an arbitral award is in conflict with the public policy of India that the merits of the award are to be looked into, under certain specified circumstances;

7.3. ***NHAI v. Progressive Constructions Ltd.***: 2017 SCC OnLine Del 7867 (paras 30, 31, 37 and 43), whereby this court held that a possible view by the arbitrator on facts has necessarily to be accepted as the arbitrator is the ultimate master of quantity and quality of evidence to be relied upon when he delivers the award. Thus, an award based on little evidence or no evidence, which does not

measure-up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, the arbitrator is the last word on facts.

7.4. *Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited & Ors*: (2018) 3 SCC 133 (paragraph 51), to submit that the scope of intervention of courts under section 34 of the A&C Act is limited since the Tribunal is the master of evidence, and the findings of fact arrived at by the arbitrators on the basis of evidence on record are not to be scrutinized as if the court were sitting in appeal; which position now stands settled by a catena of judgements pronounced by the courts without any exception.

7.5. In regard to the contention raised as to contextual interpretation of a document, more particularly the e-mails and letters exchanged between the parties, senior counsel relies upon para 12 of *Ram Kishore Lal v. Kamal Narayan*: AIR 1963 SC 890, to submit that to ascertain the intention of the parties to an instrument, the court has to consider the circumstances under which particular words in a document were used. Counsel relies next upon *Investors Compensation Scheme v. West Bromwich Building Society*: [1997] UKHL 28, to contend that the meaning of a document must be taken as what the parties, using the words in the document, would reasonably have taken them to mean against the relevant background. Counsel further relies upon paras 53 and 61 in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*: [2008] 3 SLR 1029 to contend that a contract ought to be interpreted within its context, i.e. the circumstances surrounding the formation of the contract, including the object or purpose for which it was entered into; and that the plain meaning or literal approach is not

an alternative to contextual interpretation, but can only be understood as operating within the contextual method. Counsel relies next upon a decision of the High Court of Bombay in *ICICI Bank v. United Breweries (Holdings) Ltd.*: 2015 SCC OnLine Bom 5913, arguing that on construction of a commercial contract, the court must consider the intention of the parties, which must be gathered not from the recitals alone, but also from the main agreement itself.

Discussion and Conclusions:

8. We have heard learned senior counsel for the parties, perused the relevant correspondences and have considered their rival contentions.
9. The arguments of Mr. P.V. Kapur may be summarised as follows:
 - (i) that the award suffers from perversity, irrationality and patent illegality;
 - (ii) that the majority of arbitrators have exceeded their jurisdiction by giving their own interpretation to the communications between the parties, when in fact the communications themselves are crystal clear; and there was no requirement of interpretation; and thus, the award rendered is against public policy;
 - (iii) that the findings of the Tribunal are patently illegal and lack judicial approach by being unreasonable, unfair, arbitrary and whimsical in the light of two vital communications dated 22.07.2009 and 07.09.2009 in which the respondent had categorically stated that it did not have any coal available to supply till the end of the year 2009;
 - (iv) that in view of the clear communication by the respondent that it had no coal available to supply, the question of the appellant having defaulted in its commitment to lift coal does not arise ; and that therefore, there was no question of imposing damages upon the appellant;
 - (v) that furthermore, the interpretation given in the Award to the communication exchanged between the appellant and the

respondent, to the effect that the appellant had placed a request for coal at a discounted rate of USD 128 per MT from the respondent, is an inference which is baseless and perverse and does not arise from the plain or contextual reading of the e-mails and correspondence exchanged between the parties since the rate of USD 128 per MT was discussed and agreed between the parties only in relation to one mixed-price shipment referred to in letter agreement dated 15/22.07.2009; and the subsequent demand by the appellant for coal was evidently at the contractually agreed rate of USD 300 per MT under the Agreement.

10. The arguments of Mr. Neeraj Kishan Kaul, on the other hand may be summarised as under:

- (i) that the scope of interference in an appeal under section 37 of the Act is even narrower than that under section 34 while deciding the initial objections to an award;
- (ii) that the Arbitral Tribunal is the final word on facts, on interpretation of the documents and the application of the law. In case the Tribunal has taken a plausible view the court would not interfere under section 37, even though another view may be possible;
- (iii) that the arbitrators were entitled to read the documents holistically, and based on the correspondences exchanged between the parties, the only view possible has been accepted by the Tribunal, which cannot be faulted. Nothing has been placed before the court to show that the findings in the Award are outrageous, illogical, perverse or irrational; or which no reasonable person would arrive at. The court cannot sit as a court of appeal and consequently correct errors of fact as the arbitrators are the final arbiter of quantity and quality of evidence. Section 34(2A) of the A&C Act requires patent illegality to appear on the face of the award and re-appreciation of evidence cannot be permitted. Additionally,

nothing on record in relation to the award is such as would shock the conscience of the court;

- (iv) that on merits, the respondent has clearly expressed reluctance to lift the quantity of coal as per the Agreement, which is evident from the fact that upto the Fifth Delivery period, 466000 MT of coal were to be lifted between 01.07.2008 to 30.09.2009 but only 11,966 MT were actually lifted;
- (v) that furthermore, repeated communications by the appellant show that the appellant was consistently requesting for reduction of price of coal, thereby declining to lift coal at the contractually agreed price of USD 300 per MT under the Agreement.

11. Upon a conspectus of the submissions made by the parties, the position that emerges is that as per the agreement entered into between the parties, the Fifth Delivery period began from 01.07.2008 and, after extension, ended on 30.09.2009. During the Fifth Delivery period 4,66,000 MT was to be supplied by the respondents to the appellant at 300 USD per MT. Interestingly even as an addendum dated 20.11.2008 to this agreement was being entered into, the appellant addressed a communication of the same date to the respondent highlighting that due to worldwide crisis in the financial markets, there had been an unprecedented fall in the price of major commodities including steel. It was also highlighted that there was an apprehension about the beginning of economic recession world-wide, which may continue for a long time. In these circumstances, the appellant pleaded that prices of iron and steel products in the international market had nose-dived in the months of September and October 2008; and that pig iron, the finished product manufactured by the appellant was not in demand in the consumer market even at the rate of USD 300 per MT. Consequently, the appellant requested the respondent for reduction in the price of coal

since it was not viable to manufacture pig iron to be sold at the rate of USD 300 per MT if the input cost of coal for such manufacture was itself USD 300 per MT. While on the one hand, it is the appellant's contention that the request for reduction in price of the coal was made only in relation to an *ad-hoc* supply of coal that was requested by the appellant from the respondent and not a reduction in price as agreed to under the Agreement, it is the respondent's contention that the appellant had requested a reduction in the price of coal agreed to under the Agreement; and that therefore the respondent had declined to supply coal, stating that the coal was not available, only for the reason that the appellant was requesting supply of coal at a price less than the contracted price under the Agreement.

12. As the dispute between the parties revolves around the interpretation of the communications exchanged between them between July 2008 and December 2009, we deem it appropriate to reproduce the relevant correspondence *in extenso* hereinbelow:

Letter dated 20.11.2008 sent by the appellant to the respondent:

"File no. MMTC/C&HC/08-09/CC/Anglo/798 20th November, 2008

M/s. Anglo Coal Australia Pty. Ltd.
201, Charlotte Street
Brisbane 4000
Queensland
Australia.

Fax no. 0061-7-3834-1390

KIND ATTN: MR. JOHN B WILCOX, MARKETING MANAGER

Sub:- Addendum to Long Term supply of coking coal contract for the Delivery Period 2008-09

Dear Sirs,

As discussed, we hereby confirm the acceptance of coking coal supply during the period 2008-09 vide Addendum No. 2 To LT Agreement No. MMTC/C&HC/LT/HCC/NINL/ANGLO/585 DATED 7th March 2007.

As you are aware, due to worldwide crisis in financial markets, there has been unprecedented fall in prices of major commodities including steel. Such a steep fall is a rare phenomenon and all over there is a feeling that it is a beginning of economic recession in the world. It is feared that it may continue for long time to come.

The prices of iron and steel products in the international market has nose-dived in the month of September and October 2008 and pig iron, a finished product manufactured by us and being exported is not getting customer on date even at US\$300 FOB. Same is the situation in the domestic market and we are not able to sell our product. Under the circumstances, you will appreciate it has become absolutely unviable to produce and sell pig iron based on the imported coking coal having price of US\$300 per tonne FOB for hard coking coal. More than three-fold increase in the price of coking coal during a period when the prices of finished steel including pig iron had virtually crashed, will make difficult for us to run the plant on sustainable basis. The sustainable depreciation of Indian rupees to US\$ has further added to our woes and under the circumstances. We have already cut the production to a bare minimum so as to just keep running our coke oven batteries as well as blast furnace. In view of unprecedented recessionary trends in the economy and consequent abnormal low realization on pig iron, we request price reduction of coal for quantities finalized for delivery during 1st July 2008 to 30th June 2009 period to a level that was settled for delivery period 1st July 2007 to 30th June 2008. This only will help us to keep the plant running and to produce on consistent basis.

We look forward for your positive response.

*Yours faithfully,
For MMTC Ltd*

*Ved Prakash
Chief General Manager "*

Letter dated 11.03.2009 sent by the respondent to the appellant :

*“Mr.H.S. Mann
Director (Marketing)
MMTC Limited
Core-1 “Scope Complex”
7 Institutional Area, Lodhi Road
New Delhi – 110003
India*

*Brisbane Corporate Office
Rod Elliott
General Manager Marketing &
Transportation*

*Direct Fax: +61 (0)7 3834 1366
Direct Line: +51 (0)7 38341297
e-mail: rod.elliott@anglocoal.com.au*

11 March 2009

Dear Mr. Mann

AGREEMENT FOR THE SALE AND PURCHASE OF COKING COAL NO. MMTC/C&HC/LT/HCC/NINL/ANGLO/585 DATED 7TH MARCH 2007 BETWEEN ANGLO COAL AUSTRALIA PTY LTD ('ANGLO') AND MMTC LIMITED ('MMTC')

"We refer to discussions in New Delhi on 24th February 2009 between Mr. Suresh Babu and our Mr John Wilcox at your office. Anglo remains very concerned that deliveries for the Fifth Delivery Period of the Agreement remain unperformed by MMTC, and that to date MMTC has not intimated arrangements for performance of obligations arising under the Agreement.

Accordingly, kindly send MMTC's proposed Delivery Schedule for the Fifth Delivery Period, as referred to in Clause 4 of Annexure IV of the Agreement, for our consideration. Under the circumstances, we seek your response by close of business Brisbane time on Friday 20th March 2009."

*Yours sincerely
Anglo Coal Australia Pty Ltd*

*Rod H.Elliott
General Manager, Marketing & Transportation"*

E-mail dated 02.07.2009 sent by the appellant to the respondent:

*"From: sureshbabu@mmtclimited.com
To: John.Wilcox@anglocoal.com.au
Cc: chris.dhar@gauri.com.au
Sent: Thursday, July 02,2009 11:01 AM
Transchart has already entered the market on behalf of MMTC for the vessel against July 09 stem.*

*Keeping the **huge backlogs** in mind, we would like to avail two stems in the August 09 and one in September 09. Please confirm availability and convey the laycans.*

*With Thanks & Regards
Suresh Babu
GM(coal & Coke)
Cell: 91 9818913799
Fax +91 11 2436 6362"*

E-mail dated 03.07.2009 sent by the respondent to the appellant:

*"From: Street Kim
To: sureshbabu@mmtclimited.com*

Cc: chris.dhar@gauri.com.au ; Martvr, Rebecca ; Baxter, Alan
Sent: Friday, July 03, 2009, 9:46 AM
Subject: Anglo/MMTC Shipment July
Dear Suresh,

Thank you for your advice, we look forward to your vessel nomination against agreed stem in laydays 20-30/July earliest.
Regarding other shipments planned in our schedule, we shall revert shortly.
Regards,
Kim Street
Anglo Coal Australia Pty Ltd.”

Letter dated 15.07.2009 sent by the respondent to the appellant:

“MMTC Limited
Core – 1 Scope Complex, Brisbane Corporate Office
7th Institutional Area, Ian Wakely
Lodhi Road Head of Metallurgical Coal
New Delhi 110003
INDIA

Direct Fax +61(0)7 3834 1366
Direct Line +61 (0)7 3834 1256
e-mail Ian.Wakely@anglocoal.com.au

15th July 2009

Dear Mr. Suresh Babu,

Anglo/MMTC:09/10 Supplies under Long Term Agreement

We refer to our existing agreement for the sale of coal namely, Agreement No: MMTC/C & HC/LT/HCC/NINL/ANGLO/585 dated 7 March 2007 ("the Long Term Agreement")

Further to our meeting with you on 15th June 2009, we are pleased to confirm our agreement to the following arrangement:

1. One full shipment of Isaac Hard Coking Coal to load 50,000mt +/-5% from Dalrymple Bay Coal Terminal, Queensland under the Long Term Agreement.
2. Laycan 20-30 July 2009
3. For this shipment, MV "SEAVENUS" (or substitute vessel), it is agreed that:
 - (a) 9,600mt of carryover from the 2008/09 Delivery Period shall be supplied at US\$300.00 on the terms outlined in paragraphs 5 and 7 below; and
 - (b) the balance of approximately 40,400mt shall be supplied on an ad-hoc basis at a price of US\$128.25mt (as finalized with EJC on 16th June 2009) on the terms outlined in paragraphs 6 and 7 below.
4. The total **carryover quantity** remaining undelivered from the 08/09 Delivery Period as at 1st July 2009 **is agreed as 463,634mt.**

5. *The carryover quantity to be performed from the 08/09 Delivery Period is to be performed as per the terms & conditions applicable for the 08/09 Delivery Period except for shipping terms.*
6. Terms and conditions agreed for the ad-hoc volume **only** are:
- (a) *Total Moisture The guaranteed value for 09/10 delivery (on 'as received basis) will be from 10.0% to 9.5%.*
- (b) *Chargeable Weight The invoice weight reduction for excess Total Moisture above the guaranteed specs will be at the rate of 1.3 % for every 1% increase (fractions pro-rata) above the guaranteed specifications up to the absolute maximum tolerance limit of 12%. The existing terms for exceptional circumstances shall remain.*
- (c) *Ash – Guaranteed & Tolerances.*
- | | Guaranteed | Tolerance |
|-------------------|------------|-----------|
| Isaac Coking Coal | 8.5% | 0.4% |
- (d) *Demurrage – US\$ 15,000 per day: and*
- (e) *Except for shipping terms (see paragraph 7), all other terms and conditions of the Long Term Agreement shall apply.*
7. *Shipping Terms as finalized with EJC on 16th June 2009 shall apply for total shipment.*

*For the avoidance of doubt, the parties acknowledge and agree that **this arrangement ("Ad-hoc Sale") is made without prejudice to either parties rights and obligations under the Long Term Agreement.***

Please return this letter countersigned with your confirmation of this arrangement.

Yours faithfully,

*Ian Wakely
Head of Metallurgical Coal
Anglo Coal Australia Pty. Ltd.*

For MMTC Confirmed and Accepted

E-mail dated 21.07.2009 sent by the appellant to the respondent:

*"From: 'sureshababu@mmtclimited.com'
To: Street. Kim
Sent: Tuesday, July 21, 2009 2.51 PM
Subject: Re: Anglo/MMTC shipment July*

We are awaiting stem confirmation from Anglo for August 09. Please note we have given our indent well in advance. The flexibility of laycan is vested with you completely. We look forward to hear from you.

With Thanks & Regards,

Suresh Babu

*GM (Coal&Coke)
Cell: +919818913799
Fax: +9111 2436 6362”*

E-mail dated 22.07.2009 sent by the respondent to the appellant :

*“From: Street.Kim
To: sureshbabu@mmtclimited.com'
CC: Chris Dhar'; Martyr, Rebecca ; Wilcox, John ; Baxter, Alan
Sent: Wednesday, July 22, 2009 1:08 PM
Subject: RE: Anglo/MMTC shipment July*

Dear Suresh,

Unfortunately at this stage we are unable to confirm a stem in Aug/Sep for MMTC due to cargo availability. We are continuing to review our position and will advise our preferred schedule for Oct-Dec 2009 as soon as possible.

*Regards,
Kim Street
Anglo Coal Australia Pty Ltd”*

E-mail dated 04.09.2009 sent by the appellant to the respondent :

*“From: sureshbabu@mmtclimited.com'
To: Kim.Street@Anglocoal.com.au
CC: John.Wilcox@Anglocoal.com.au ; pravinaearwal rpm
Sent: Friday, September 04, 2009 5:08 PM
Subject: Fw: Anglo/MMTC shipment July*

Our cokery has increased the pushings with the results requirement of coking coal has gone upto 90,000t/month. After Seavenues (laycan 20-30 July 09). Anglo has not given any stem to MMTC give us one stem of 50,000MT each in October and November 09.

With Thanks &Regards,

*Suresh Babu
GM (Coal&Coke)
Cell: +91 9818913799
Fax: +91112436 6362”*

E-mail dated 07.09.2009 sent by the respondent to the appellant :

*“From: Wilcox. John
To: sureshbabu@mmtclimited.com ; Street. Kim
Cc: pravinagarwal rpm*

*Sent: Monday, September 07, 2009 7:36 AM
Subject: RE: Anglo/MMTC shipment July*

Dear Suresh

Thank you for your email.

Unfortunately at this stage we do not have any coal availability for the remainder of the year.

We will continue to monitor the situation and let you know if the position changes.

*With regards,
John B Wilcox
Marketing Manager
Anglo Coal Australia Pty Ltd”*

Letter dated 21.09.2009 sent by the respondent to the appellant:

*“Mr.H.S. Mann
Director (Marketing)
MMTC Limited
Core-1 “Scope Complex”
7 Institutional Area, Lodhi Road
New Delhi – 110003
India*

Brisbane Corporate Office

*Rod Elliott
General Manager Marketing &
Transportation*

Direct Fax: +61 (0)7 3834 1366

Direct Line: +51 (0)7 38341297

e-mail: rod.elliott@anglocoal.com.au

21st September 2009

Dear Mr. Mann

*AGREEMENT NO. MMTC/C&HC/LT/HCC/NINL/ANGLO/585
DATED 7TH MARCH 2007 ('AGREEMENT') BETWEEN ANGLO
COAL AUSTRALIA PTY LTD ('ANGLO') AND MMTC LIMITED
('MMTC')*

We refer to our letter of 11 March 2009 to which we have not yet received a response.

The Fifth Delivery Period of the Agreement has now finished bringing, the term of the Agreement to an end. However, to date,

MMTC has only taken delivery of 11,966 tonnes of coal out of a total contracted tonnage of 466,000 tonnes for the Fifth Delivery Period.

Despite our repeated requests MMTC has not provided Anglo with a schedule for taking delivery of the remaining 454,034 tonnes of coal from the Fifth Delivery Period ('Carryover'), other than to say that it will agree to the same arrangements made between Anglo and SAIL and RINL with regards delivery of 2008 carryover tonnes.

It is a matter of public record that the carryover delivery arrangements with SAIL and RINL have now been agreed as follows:

- *2009/10 Delivery Period - 18.7% of the total remaining carryover tonnes will be performed.*
- *The remainder of the carryover tonnes will be performed equally over the following two Delivery Periods unless otherwise agreed.*

We therefore submit the following proposal for delivery of the Carryover and renewal of the Agreement with MMTC :

- *MMTC to perform a total of 38% of the total contracted tonnage for the Fifth Delivery Period on the terms and conditions (including price) applicable under the Agreement (a further 172,533 tonnes) by March 31, 2010. This will bring MMTC into line with the contract performance of SAIL and RINL for the 2008/09 Delivery Period.*
- *In addition, MMTC is to perform 18.7% of the remaining Carryover (a further 52,641 tonnes) by March, 31, 2010 on the terms and conditions of the Agreement (including price) as agreed with SAIL and RINL.*
- *Anglo will enter into a new long term agreement with MMTC on the same terms and conditions as the current long term agreements with SAIL and RINL (including performance of the remaining Carryover) for 466,000 tonnes per annum for a period of 3 years commencing 1 April 2010.*

Therefore, in summary, MMTC will take delivery of 225,174 tonnes of coal at 2008 price, terms and conditions between now and 31 March 2010 and, under the new 3 year contract, perform the remainder of the Carryover evenly spread over the first 2 years of the contract.

This proposal is made without prejudice to our rights under the Agreement. It will remain open and capable of acceptance until 5.00 pm (Brisbane time) on Wednesday 30th September 2009.

Yours faithfully

Anglo Coal Australia Pty Ltd

*Rod H.Elliott
General Manager, Marketing & Transportation”*

Letter dated 25.09.2009 sent from the appellant to the respondent :

“Mr.Rod Elliot *25.9.2009*
*General Manager Marketing & Transportation,
Anglo Coal Australia Pty Ltd.
210 Charlotte Street Brisbane 4000
Australia*

Dear Sir,

Agreement no.MMTC/C&HC/LT/HCC/NINL/ANGLO/585 dated 7th March 2007 (“Agreement”) between Anglo Coal Australia Pty Ltd (“Anglo”) and MMTC Limited (“MMTC”).

We have for reference your letter dated 21.09.2009 on the above subject. As usual we were awaiting the contract signed between SAIL and Anglo as it forms the basis of contract between MMTC and Anglo.

As you had conveyed in your letter referred above, the following delivery arrangements SAIL and RINL had with the suppliers were in the public domain.

- 1) 2009/10 Delivery Period – 18.7% of the total remaining carry over tones will be performed.*
- 2) The remainder of the carryover tones will be performed equally over the following two delivery periods unless otherwise agreed.*

Accordingly, MMTC conveyed its intention to lift 18.7% of the carry over quantity. However, Anglo had suggested MMTC to lift a total of 2.25.174 MT by 31.3.2010 which seems near to impossible as it works out to 56.7% of the carry over tonnage.

In this connection, it may please be appreciated that NINL is basically a producer of LAM coke and pig iron where the value addition is negligible or negative sometimes. The Industry is yet to come out of the shock of recession. Lifting even 18.7 % carry over tonnage implies a loss of USD 25/1 coke produced. Keeping these issues in mind, we had approached Anglo Coal for a reduction in price via our

letter dated 20.11.2008. Lifting another 38% implies a further increase in loss by another USD 80/1. For the sake of negotiation, we hope you will not ignore the economic realities completely. Steel Melting Shop at NNL is under implementation and the commissioning is expected sometime in end 2010. Economy will also come out of recession gradually.

In short we are not denying our obligation. The request is **only for staggering the time frame for lifting** as explained in para 1 & 2 above. Please review and reconsider our request for allotting of least one shipment 50,000 MT each from October 09 onwards **instead of zero stem till end of 2009.**

Thanking you,

Yours faithfully,
For MMTC Ltd.

For (Suresh Babu)”

Letter dated 25.11.2009 sent by the respondent to the appellant :

“Mr.H.S. Mann
Director (Marketing)
MMTC Limited
Core-1 “Scope Complex”
7 Institutional Area, Lodhi Road
New Delhi – 110003
India

Brisbane Corporate Office
Rod Elliott
General Manager Marketing &
Transportation

Direct Fax: +61 (0)7 3834 1366
Direct Line: +51 (0)7 38341297
e-mail: rod.elliott@anglocoal.com.au

25th November 2009

Dear Mr.Mann

AGREEMENT FOR THE SALE AND PURCHASE OF COKING COAL NO. MMTC/C&HC/LT/HCC/ RINL/ANGLO/585 DATED 7TH MARCH 2007 BETWEEN ANGLO COAL AUSTRALIA PTY LTD ('ANGLO') AND MMTC LIMITED ('MMTC')

We refer to our further proposal for dealing with the unperformed 2008 tonnage contained in our letter of 21st September 2009, your counterproposal in your letter of 25th September 2009 and your discussions with Mr John Wilcox in New Delhi on 13th November 2009.

In order to progress matter we now propose that MMTC perform the remaining 454, 034 metric tonnes of 2008 Contract Year in line with our agreements with SAIL and RINL, at the 2008 price of US\$300, according to the following schedule:-

<i>January – March 2010</i>	<i>85,000</i>	<i>18.7 %</i>
<i>April 2010 – March 2011</i>	<i>184,566</i>	<i>40.65%</i>
<i>April 2011-March 2012</i>	<i>184,566</i>	<i>40.65%</i>

We trust that this arrangement meets with your approval.

This proposal is made without prejudice to our rights under the Agreement. It will remain open and capable of acceptance until 5.00 pm (Brisbane time) on Friday 4th December, 2009.

Yours sincerely

Anglo Coal Australia Pty Ltd

*Rod H.Elliott
General Manager, Marketing & Transportation”*

Letter dated 27.11.2009 sent by the appellant to the respondent :

*“M/s Anglo Coal Australia Pty Ltd
201, Charlotte Street Brisbane 4000 27th November, 2009
Australia GPO Box 1410
Brisbane 4001 Australia*

*Kind Attn.: Shri Rod H. Elliott. General Manager
Sub : Agreement for sale and purchase of coking coal
No.MMTC/C&HC/LT/HCC/RINL/ANGLO/585, dated 7th March 2007
between M/s Anglo and MMTC.*

Dear Sir,

This has reference to your letter dated 25th Nov. 2009 regarding supply of the following carry over quantities of coking coal pertaining to the 2008 contract in line with your agreements with SAIL & RINL at the 2008 price of US\$ 300 PMT :-

<i>S.No.</i>	<i>Period of Supply</i>	<i>Quantity (MT)</i>	<i>Percentage</i>
<i>1.</i>	<i>Jan 2009 to March, 2010</i>	<i>85,000</i>	<i>18.7%</i>
<i>2.</i>	<i>April 2010 to March 2011</i>	<i>1,84,566</i>	<i>40.65%</i>

3.	April 2011 to March 2012	1,84,566	40.65%
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The above proposal is acceptable to us subject to your allocating the left over quantities pertaining to 2009 contract at 2009 prices based on the terms and conditions agreed upon in the EJC of SAIL & RINL. To be specific the balance supplier amounting to 4,25,600 MT at the 2009 price level of US\$ 128/125 PMT shall also be made in proportion alongwith the carryover quantities of 2008 as proposed above in line with the terms agreed upon with SAIL & RINL.

We look forward for a comprehensive proposal.

Thanking you,

Yours faithfully

*(SURESH BABU)
General Manager”*

Letter dated 01.12.2009 sent by the respondent to the appellant:

<i>“Mr.H.S. Mann Director (Marketing) MMTC Limited Core-1 “Scope Complex” 7 Institutional Area, Lodhi Road New Delhi – 110003 India</i>	<i>Brisbane Corporate Office Rod Elliott General Manager Marketing & Transportation Direct Fax: +61 (0)7 3834 1366 Direct Line: +51 (0)7 38341297 e-mail: rod.elliott@anglocoal.com.au</i>
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1st December 2009

Dear Mr.Mann

AGREEMENT FOR THE SALE AND PURCHASE OF COKING COAL NO. MMTC/C&HC/LT/HCC/ RINL/ANGLO/585 DATED 7TH MARCH 2007 BETWEEN ANGLO COAL AUSTRALIA PTY LTD (‘ANGLO’) AND MMTC LIMITED (‘MMTC’)

We refer to our proposal dated 25th November 2009 and MMTC letter dated 27th November 2009 for dealing with the unperformed 2008 tonnage.

Kindly be advised that it is not possible to make any additional tonnage commitment to MMTC over and above that detailed in our

proposal of 25th November 2009, as restated below, for the shipment of unperformed 2008 commitments at a price of US\$300 :-

<i>January – March 2010</i>	<i>85,000 tonnes</i>
<i>April 2010 – March 2011</i>	<i>184,566 tonnes</i>
<i>April 2011-March 2012</i>	<i>184,566 tonnes</i>

We again recommend this proposal to MMTC and trust that it will be accepted as a pragmatic approach that restores the working relationship between our organisations.

This proposal is made without prejudice to our rights under the Agreement. It will remain open and capable of acceptance until 5.00pm (Brisbane time) on Friday 4th December 2009.

Yours sincerely

Anglo Coal Australia Pty Ltd

*Rod H.Elliott
General Manager, Marketing & Transportation”*

(Emphasis supplied)

13. For completeness, it is also deemed appropriate to reproduce the issues framed by the Tribunal, which are extracted below:

“A. Whether the Respondent committed breach of contract in not lifting 454,034 MT of coking coal in terms of Agreement and if so, the consequences thereof? If yes, what is the date of such breach?

B. Whether the Claimant was in breach of contract in failing to supply goods to the Respondent during the Fifth Delivery Period? If yes, what is the date of such breach?

In considering this issue, and so far as relevant, was the Claimant in a position to perform its obligations by making available the requisite quantities in a timely manner as per the stipulations under the Contract?

C. Whether the Claimant's claims are barred by limitation?

Whether there was a failure on the part of any party to perform the obligations cast upon it under the Contract, in a timely manner, or at all and if so, the effect thereof.

D. Whether the Claimant is entitled to any damages and if so to what amount?

E. Whether the Claimant is entitled to interest on any damages to be awarded and (if so, at what rate and for what period?

F. Whether the Claimant is entitled to interest pendente lite and post pendente lite, and if so at what rate.

G. Costs of the arbitration, and interest, if any, on the costs awarded.”

14. Also, since both counsels have relied upon certain portions of the evidence recorded before the Tribunal, we deem it appropriate to reproduce such portions hereinbelow:

Examination-in-chief of Respondent’s Witness Mr. John Wilcox:

“...Nevertheless, as a goodwill gesture, Anglo offered the same terms to MMTC on an ad hoc basis making it clear that it was without prejudice to the parties obligations under the Long Term Agreement. It may be stated that around this time the global steel market started picking up and soon after the Claimant agreed to this ad hoc arrangement, MMTC started asking for repeat cargos on the same basis i.e. with 18.7% at the contractual price and the balance at an ad hoc price of 128.25 per MT (the price then agreed with EJC for SAIL / RINL for Issac hard coking coal). In this context MMTC's Mr. Suresh Babu sent me an email dated 2nd July 2009 asking for two stems in August and one in September 2009 (i.e. total of 150,000 MT of material). Upon receipt of this mail, I directed my junior colleague, Ms. Kim Street to reply that while we look forward to vessel nomination against the agreed stem in laydays 20th - 30th July, we would revert regarding other shipments. The reason for this was that the coal demand was picking up and we had no agreement with MMTC to supply them any further ad hoc quantities (thereby stressing our other contractual commitments). Anglo had to prioritise its contractual commitments in the first instance.

xxxxx

"(vi) At that time the Claimant's total annual commitment for hard coking coal would be in the range of about 12 million MT and as stated above Claimant had about 19 long term contractual agreements (customers). The Claimant thus knew well in advance its contractual commitments and made its production arrangements accordingly. It may be stated that the Claimant was not merely in the business of marketing of coal. It has an integrated business as a producer / seller of coal. As reflected in the Long Term Agreement dated 7th March 2007 with MMTC, the Claimant had a 70% participating interest in the Capricorn Coal Developments Joint Venture (the Jena Pty. Ltd. is also a Claimant group company) and the Claimant owned an 88% participating interest in the Moranbah North Coal Joint Venture. Indeed, the Long Term Agreement with MMTC records that the Claimant is authorised to act as Seller on behalf of the aforesaid two coal mines i.e. Capricorn Coal Developments Joint Venture and the Moranbah North Coal Joint Venture. Thus, the Claimant was at all times fully capable of taking care of its contractual commitments. At the same time, the Claimant did most of its business through long term contracts and not through spot sales or ad hoc sales. In a situation where the market demand was picking up (as it was in the second half of the 2009 calendar year) there was little room for the Claimant to enter into ad hoc sales or spot sales as MMTC was requesting for.

(vii) MMTC through Mr. Suresh Babu signed the ad hoc Agreement dated 1st July 2009 (Annexure C-10) on 22nd July 2009. One day prior thereto he once again asked for stem for August 2009. This was promptly replied by our Ms. Kim Street on the very next day stating that **Anglo cannot confirm any stem in August / September due to cargo availability and that we would revert later in October-December** should the position change.

(viii) On 4th September 2009 the Respondent's Mr. Suresh Babu again emailed Ms. Kim Street with copy to me asking for stems in October and November which for reasons stated hereinabove were declined vide my email of 7th September 2009 and I made it clear that we do not have any coal availability for the remainder of the year. Ms. Kim Street is my subordinate and I am fully aware of the purport of this correspondence which as stated above was all under my directions. I reiterate that all these requests from MMTC were non contractual (as explained above). MMTC also understood it in that light. This becomes clear if Mr. Suresh Babu's letters dated 25th September 2009, 27th November 2009 and Mr.H.S Mann's letter dated 3rd December 2009 (along with the rest of the correspondence) are seen which are at Annexures C-12 to C-18.

xxxxx

"2. I respectfully state that the Claimant's ability to perform its obligations by making available the contracted quantities of coal in a timely manner can never be in doubt. This is for several reasons; Firstly

the Claimant is not a trader or an intermediary. It has an integrated business with ownership of the coal mines and long term agreements with the ports and railways in place to ensure smooth shipments as contracted for. Secondly, during the Fifth Delivery Period the global financial crisis was on in full swing bringing about a crash in the demand for steel and consequently for hard coking coal. Far from scarcity of material, the Claimant had a large quantity of surplus production some of which had to be sold off by way of distress sales during the Fifth Delivery Period. Despite the suppressed market demand during the period (October 2008 to September 2009) the Claimant sold about 12.21 million MT of hard coking coal (of the type contracted for with MMTC) averaging over a million tonnes a month. MMTC's contracted quantities (466,000 MT at US\$ 300 per MT) if evenly spread over the Delivery Period would be less than 3.9% of our monthly sales. In such scenario there could have been no reason for the Claimant not to be able to make available to MMTC the contracted quantities at the contracted price. I elaborate the aforesaid below:

xxxxx

"12. As stated in my earlier Affidavit, the international benchmark price for hard coking coal for the period 1st April 2009-31st March 2010 dropped from US\$ 300 to about US\$ 128-129. Further almost all parties with whom the Claimant was dealing with at that time (Including SAIL / RINL) were asking for carryover arrangements which had to be worked out with them as stated in my earlier Affidavit. In such scenario there could have been no reason for the Claimant not to make available to MMTC the contracted quantities at the contractual price as per the contract.

13. I say that in the emails referred to and relied upon by MMTC where I or Ms. Kim Street refer to "availability" of coal, It was with reference to the non-contractual requests from MMTC. In other words what we were saying was that we do not have any surplus coal available for spot sales (which is what MMTC was requesting). By that time (i.e. July 2009) having already reduced our surplus stock to manageable limits (about 50% of the maximum capacity) and in view of the coal market picking up, we wanted to refocus on our long term contractual arrangements and commitments which in any case is our normal preferred business model.

xxxxx

"14. ... In various personal visits to India (as mentioned in my first Affidavit) in the months of January, February, April, May and June 2009, I tried to convince MMTC to agree to lift at least some quantities under the Agreement but to no avail.

15. It is submitted that the entire dispute has arisen only because MMTC was not willing to lift the goods or comply with any of its

obligations under the contract. It is because MMTC simply refused to lift material that there was occasion for the Claimant to make more than one offer to MMTC to accept cargo on an ad hoc basis with a small cargo at the contractual rate and the balance at the then market rate of US\$ 128. (Annexure C-8 to C-10 refer to this). "

(Emphasis supplied)

Cross-Examination of Respondent's Witness Mr. John Wilcox:

"Q12. Did you record some minutes of meeting or follow up what transpired during the meeting by way of any means of communication?"

Ans. Yes. I have brief meeting notes. The reason for the meeting was that in October 2008 we had offered two stems to MMTC one on the 8th October 2008 for stem in 20-30 November 2009. The response to this offer was communicated through our Indian Marketing Representative as negative. This email communication is not in my Additional Affidavit as I could not find the email. I have subsequently found the email which I can produce if required. The offer of 14th October for the December 20-30 stem is in my supplementary affidavit.

In the meeting MMTC expressed its reluctance to lift any cargo until January or February. We were in constant communication with our Indian marketing representatives who were discussing the issue of stems on a weekly basis with MMTC.

Examination-in-chief of Appellant's Witness Mr. Suresh Babu:

"33.As is clearly established from the e-mails and other correspondence above, the Respondent had all along requested the Claimant to intimate the availability of the stem for the supply of the contracted goods. However, the Claimant categorically intimated the Respondent that they had no availability of the material until the end of the 2009 which was beyond the Fifth Delivery Period and beyond the LTA. It was not an obligation on the part of the Respondent to agree to delivery schedule prior to even the Claimant informing about the availability of the material and stem availability as regards the contracted goods. At no point of time the Claimant ever intimated to the Respondent during the currency of the Fifth Delivery Period as regards the availability of the stem apart from supplying 9036 MT supplied in July 2009.

34. Even in the alleged letter dated March 11, 2009 purportedly issued by the Claimant, the Claimant does not indicate the availability of the stem and/or intimation by the Claimant in accordance with clause 7.2.1 of the GCA. It is also surprising that the letter dated March 11, 2009 stated to have been sent was resent in an unconnected e-mail sent on March 12, 2009. I reiterate and assert that the e-mails dated July 2,

2009, July 3, 2009, two emails of July 21, 2009 and September 4, 2009 and September 7, 2009 exchanged between myself and the Claimant pertained to the supplies under the Long Term Agreement and under the Fifth Delivery Period. Any suggestions to the contrary are vehemently denied.

35. I say that the Claim of the Claimant is an afterthought as would be evident from the fact that the Claimant waited for more than three years to initiate arbitration after bringing an end to the LTA, vide its letter dated September 21, 2009.

(Emphasis supplied)

Cross-Examination of Appellant's Witness Mr. Suresh Babu:

"Q1. Would it be correct to say that during the Fifth Delivery Period there was a severe global financial crisis?

Ans. Yes.

Q2. Would it be correct to say that as a result, MMTC found it unviable to produce steel on the basis of Imported coal having price of US\$ 300 per MT?

Ans. Yes. For some time we were trying to stagger the delivery of US\$ 300 coal.

xxxxx

"Q10. Would it be correct to say that you continued to pick up coal from BMA at the market price of around US\$ 128 through the Fifth Delivery Period?

Ans. No. The entire quantity is not procured from BMA @ US\$ 128 per MT. Some quantities was picked @ US\$ 300 per MT during the Fifth Delivery Period from BMA. Since BMA had agreed to supply coal continuously till end of December 2009 MMTC could make an offer to Claimant for the purchase of coal @ US\$ 300 per tonne. I made an offer to Mr. John Wilcox for allotting two stems in the months of August and September 2009 from the backlog MMTC had with the Claimant.

I had not put the rate @ US\$ 300 per MT while making the offer to the Claimant. MMTC had only one contract with the Claimant at that point of time where the coal was priced at US\$ 300 per MT. Therefore the word "backlog" is in relation to US\$ 300 coal only.

xxxxx

"By the Tribunal:

During the Fifth Delivery Period you were able to buy coal from the Claimant at the contracted price of US\$ 300 per MT?

Ans. Yes.

xxxxx

"Q23. Can you please state that when according to you in May 2009 you started discussions with the Claimant for a US\$ 300 cargo and were willing to lift at US\$ 300, the Claimant did not agree but instead negotiated with you a mixed price cargo as evidenced by Annexure C-10?

Ans. We had already started negotiations with the Claimant for the mixed cargo before May itself that culminated in July 2009 stem. Subsequently our request were turned down by the Claimant. In this connection I would like to draw the attention to their emails dated 3rd July 2009, 21st July 2009 and 7th September 2009 wherein the Claimant was saying either they will revert to our request for the stem or they are unable to consider our request for the stem because they do not have cargo. While replying they have not mentioned that they are refusing it because we had asked for a mixed cargo or they did not mention that in case of our request is for US\$ 300 cargo they would consider the stem.

As had been brought out earlier also in our email dated 3rd July we had stated that there is huge backlog to be serviced by the Claimant. Kindly allot stem for August and September. We had only one signed contract with the Claimant that is for supply of coal @ US\$ 300 per tonne. All our requests are for US\$ 300 coal only since we have only one signed agreement with Anglo.

xxxxx

"Q28. [Witness shown his answer to Q16]. Can you please elaborate. Are you saying here that MMTC was willing to alternate vessels between BMA and Anglo i.e. one vessel from BMA at US\$ 128 and the other from Claimant at US\$ 300. Is this how you would have an average price of about US\$ 224 per MT as you have said in response to this question?

Ans. The Claimant had given the July shipment as a one time arrangement and they were not willing to consider any other request. Since the Claimant was taking a tough stand we had discussed with BMA who will continue to supply at US\$ 128 per tonne and we will take coal from the Claimant at US\$ 300 per tonne so the average price will be US\$ 224 per tonne.

xxxxx

"Q37. Please see your letter of 25th September 2009 and the reference therein to MMTC's previous letter of 20th November 2008. Would it not

be correct to say that the difficulties stated by you in lifting the material at the contractual rate of US\$ 300 are the same as stated by Mr. Ved Prakash in his letter of 20th November 2008?

Ans. This letter (25th September) is to be seen from the light of Claimant's letter dated 21st September wherein they have put an end to the Fifth Delivery Period and they could not supply cargo for want of availability.

Q38. Is it not correct to say that MMTC's commercial position did not change through the Fifth Delivery Period as to lifting of cargo at US\$ 300 per MT as what was stated by Mr. Ved Prakash in his letter dated 20th November 2008 is repeated here and indeed the said letter of 20th November 2008 is referenced here?

Ans. Notwithstanding the commercial difficulties the Respondent had come forward for taking cargo at US\$ 300 per tonne. The Claimant was not able to offer the cargo because of non-availability and for the same reason they have to put an end to the Fifth Delivery Period. So MMTC has also decided to ask for the same terms and conditions as is being offered to SAIL/RINL.

Q39. In your letter of 25th September 2009, you say that it is "near to Impossible" to lift 225,174 MT between 21st September 2009 and 31st March 2010 but at the same time in the last para you request for one shipment of 50,000 MT each from October 2009 onwards. Would it be correct to say that this request for stem from October 2009 was on the basis that 18.7% cargo would be at US\$ 300 per MT and the balance 81.3% would be at the market price of US\$ 128.25 per MT?

Ans. This is in continuation of my earlier reply. Since the Claimant had put an end to the Fifth Delivery Period the Respondent has also decided to ask for the terms and conditions being extended to SAIL. Yes. We are only asking for the same terms and conditions with SAIL and RINL i.e. 18.7% in the first year.

xxxxx

"By the Tribunal:

Please look at the last para of the letter of 25th September 2009. First sentence says, in short we are not denying our obligation. What obligation is that?

Ans. Our obligation is to lift US\$ 300 coal.

I thought you told us that the Fifth Delivery Period had come to an end so what was your obligation?

Ans. In fact subsequent to the letter dated 21st September from the Claimant we were only trying to re-negotiate with the Claimant.

What was the obligation you were referring to in your letter?

Ans. I only meant that the US\$ 300 coal was not lifted though by the 21st September letter the Claimant put an end to the Fifth Delivery Period.

What, if the Claimant had put an end to the Fifth Delivery Period, was the Respondent's obligation under the Long Term Agreement?

Ans. In fact there should not have been any obligation.

xxxxx

"Q43. Please see your Affidavit at page 45 (Volume 6) where you have referred to Claimant's letter of 25th November 2009. You have stated that Claimant's offer to supply the outstanding tonnage from January to March 2010 "establishes the fact that the Claimant did not have any contracted material.....". Is it not correct that the Claimant's offer to supply as stated in Annexure C-14 is in response to your letter of 25th September 2009 where you have requested for "staggering the time frame for lifting" (last para)?

Ans. The letter preceding this letter had offered coal from 21st September till 31st March 2010. Suddenly the offer is changed from January to March 2010 together with various previous replies of the Claimant clearly stating that cargo cannot be supplied for want of availability. I feel that this may not be in response to my letter of 25th September 2009.

Q44. Is it your stand that under the Long Term Agreement in the first instance the Seller has to offer stem and only thereafter there is any other obligation upon the Buyer Including agreeing upon a delivery schedule?

Ans. Stem, which represents availability of cargo with the Claimant should be known then only the Respondent can give the delivery schedule.

Q45. Do you say this as a matter of practice or otherwise?

Ans. This is a matter of practice."

(Emphasis supplied)

15. Drawing inferences from the e-mails/correspondence as aforesaid, the majority of the members of the Arbitral Tribunal (that is to say two out of three members) have reached the following conclusions:-

"117. The Claimant's case is somewhat self-evident in that it is no more complicated than an assertion that there was an

agreement to purchase a certain quantity of coal which went unfulfilled on the part of the Respondent which failed to lift the requisite quantity in the relevant period. Accordingly It is appropriate for us to consider matters as canvassed by the Respondent in its defence while keeping in mind that the burden of proof lies of course on the Claimant.

Availability of Coal

118. The first element to be considered is the assertion advanced on behalf of the Respondent that the Claimant did not have the contracted goods to deliver. This depends entirely upon two e-mails, one dated 22nd July 2009 and the other dated 7th September, 2009. The first of these stated that the Claimant was unable to confirm the stem in August/September "due to cargo availability" and was reviewing the position in regard to October-December 2009. In the 2nd the Claimant stated that "unfortunately at this stage we do not have any coal availability for the remainder of the year".

119. The Claimant's case, which we accept, is that there was no shortage of supply at the relevant time. The e-mails have to be read in context, and as we explain below, the context is that the Respondent was seeking further deliveries of coal at below the contract price.

xxxxx

"122. The Tribunal accepts Mr. Wilcox's evidence. It is entirely consistent with the Respondent's own letter dated 20th November 2008 which reads:

"....As you are aware, due to worldwide crisis in financial markets, there has been unprecedented fall in prices of major commodities including steel...

The prices of iron and steel products in the International market has nosedived In the month of September and October 2008 and pig iron,... is not getting customer on date even at US\$300 FOB. Same is the situation in the domestic market and we are not able to sell our product. Under the circumstances, you will appreciate it has become absolutely unreliable to produce and sell pig

iron based on the imported coking coal having prices US\$300 per tonne FOB for hard coking coal... The substantial depreciation of Indian rupees to the US dollar is further added to our woes.... In view of unprecedented recessionary trends in the economy and consequent abnormal lower realisation on pig iron, we request price reduction of coal for quantities finalised for delivery during 1 July, 2008 to 30 of June 2009 period to a level that was settled for delivery period 1 July, 2007 to 30 of June 2008."

123. It appears to us that the evidence is all one way, to the effect that demand for coking coal was substantially reduced during the last few months of 2008 and in, at least, the first half of 2009, and it follows, it seems to us, that this strongly corroborates Mr. Wilcox's evidence as to the availability of coking coal for supply to the Respondent.

124. Accordingly we reject the Respondent's assertion that the Claimant did not have the contract goods to deliver. The Tribunal makes one further observation: the Fifth Delivery Period price was agreed just over two months after the global financial crisis which started at about the time of the collapse of Lehman Brothers on the 15th September 2008. The price agreed by the parties for that period was significantly higher than the price for any of the preceding periods. That is in itself extraordinary, but what is even more extraordinary is that the Respondent's request for a price reduction was made on the very same day on which the Fifth Delivery Period price was agreed.

Failure to Offer Stem?

125. The Respondent asserts in addition however that in any event the Claimant failed to offer stem to the Respondent and that, in consequence, the Respondent was discharged from any further obligations under the Agreement. This primarily turns on a construction of the contract, but involves also a consideration of the way in which the parties implemented their contract,

xxxxx

"128. The Tribunal does not accept that the Respondent's construction is correct in this regard. Nor, as appears below, do we agree with the Respondent's contention that there was a failure to offer stem on the part of the Claimant.

xxxxx

"133. Accordingly we do not accept that the Agreement required the Claimant to take the initiative and offer stem wholly without reference to any obligation on the part of the Respondent. Viewed overall, it is clear to us that the Agreement envisaged and required the parties to coordinate supply and delivery. The primary document for this was intended to be the Delivery Schedule. Indications of stem availability and nomination of vessels were steps to be taken in the implementation of the Delivery Schedule, not preparatory to it. It follows from this, it appears to us, that there is no contractual basis on which the Respondent can contend that the Claimant was in breach in failing to offer stem to the Respondent. Absent an agreed Delivery Schedule there was no obligation to do so.

xxxxx

"Offer of Supply

137. Whether that understanding of the contract is correct or not however may be beside the point. On the facts, it appears to the Tribunal that the Claimant did take steps towards offering stem to the Respondent in any event. This came about, at least by the Claimant's letter of 11st March 2009 in which letter the Claimant said:

"We refer to discussions In New Delhi on 24th February 2009 between Mr Suresh Babu and our Mr John Wilcox at your office. Anglo remains very concerned that deliveries for the Fifth Delivery Period of the Agreement remain unperformed by MMTC, and that to date MMTC has not intimated arrangements for performance of obligations arising under the Agreement.

Accordingly, kindly send MMTC's proposed Delivery Schedule for the Fifth Delivery Period, as referred to in

Clause 4 of Annexure IV of the Agreement, for our consideration. Under the circumstances, we seek your response by close of business Brisbane time on Friday 20th March 2009."

xxxxxx

"141. In summary therefore there is much in the contemporaneous correspondence to support the Claimant's assertion that this letter was sent, and nothing to rebut that assertion. So far as the witness evidence is concerned, not least because it is corroborated by the documents, the Tribunal prefers and accepts the evidence of Mr. Wilcox that supply of coal was offered by the Claimant to the Respondent, including by the letter of 11th March 2009.

xxxxxx

"146. The Tribunal's view of the correspondence is that the Respondent saw matters similarly, and was seeking to purchase further quantities of coal at the lower rate obtained in the Sea Venus agreement, in the e-mail of July 2009. Mr. Babu referred to the Respondent having progressed the chartering of a vessel for the Sea Venus agreement, and asked, without apparent distinction about the availability of further stems for August and September. Receiving no substantive response to the enquiry regarding such further stems Mr. Babu followed up by e-mail on 21st July 2009. He did not, as might have been expected if this was part of the usual contractual arrangements point out that the Claimant was obliged to fulfil this order, nor did he make any complaint that the Claimant had failed to comply with the "prerequisite" of indicating stem availability before the Respondent was required to act.

147. It was in this context of that Claimant wrote on 22nd July 2009 referring to an inability to confirm stem in August/September due to cargo availability. Seen in the context of the exchanges between the parties, and seen against the back ground of the evidence given by Mr. Wilcox to the effect that prices had slumped and the Claimant was "dumping" coal in China, the only possible understanding of this e-mail is that the claimant was declining to supply further coal at below the contract rate as had been done In the ad hoc Sea Venus agreement.

148. On 4th September 2009 the Respondent wrote again seeking stem (for delivery beyond the contract period), noting that there had been no delivery since the Sea Venus agreement. **Once again the response received by the Respondent was that there was a lack of availability.**

149. None of these exchanges refer specifically to the price at which the coal was being sought, or at which it might be available. Mr. Wilcox's evidence was however clear that the contemporaneous discussions between the parties were on the basis that the Respondent was seeking further discounted supplies, and indeed his understanding was that the Respondent was purchasing from other suppliers at rates lower than those to which it was bound under the Fifth Delivery Period.

xxxxx

"151. Thus, the first relevant letter written by the Respondent during the Fifth Delivery Period [C-5] on 20th November 2008 sought a reduction in the price of coal to be delivered under the Fifth Delivery Period as did the last such letter, that of 25th September 2009. Following the conclusion of the Fifth Delivery Period the Claimant made a further offer of supply (on 25th November 2009) which the Respondent was prepared to accept only at a price reduced from the contractual rate (Respondent's letter of 27th November 2004 (sic, 2009). The Respondent's arguments now are predicated on there having been a temporary change of stance during the course of the year such that, in June and July 2009 It was seeking no more than to avail Itself of supplies of coal at the contract rate. Seen In context, the correspondence relied on does not begin to support that contention, and the Tribunal rejects it. The Respondent was seeking coal at below the contract rate and the Claimant was refusing to supply on those terms. The Respondent failed to fulfil Its contractual obligation to lift the contracted quantities of coal at the contract rate."

(Emphasis supplied)

16. We are unable to fathom as to how the respondent/claimant's assertion that, it was "unable to confirm the stem in August/September due

to cargo availability"; and *"unfortunately at this stage we do not have any coal availability for the remainder of the year"* as extracted in para 118 of the Award, leads the Tribunal to accept the respondent/claimant's case and to hold that *"there was no shortage of supply"* as held in para 119 of the Award. Instead of reading what was stated in plain English in the e-mails and correspondences, the Tribunal imports into the discussion the fall in demand for coking coal internationally to infer *"that this strongly corroborates Mr. Wilcox's evidence as to the availability of the coking coal for supply to the respondent"* in para 123. Nor do we understand as to how the Tribunal ignores the equally clear and unqualified assertion in the respondent's e-mail dated 07.09.2009 that *"unfortunately at this stage we do not have any coal availability for the remainder of the year"* as extracted in para 118 of the Award to hold that the respondent had coal available to supply to the appellant.

17. We are further at a loss to understand as to how, having observed that *"None of these exchanges refer specifically to the price at which the coal was being sought, or at which it might be available"* in para 149, the Tribunal infers that *"Mr. Wilcox's evidence was however clear that contemporaneous discussions between the parties were on the basis that the respondents was seeking further discounted supplies"* in the same para.

18. In the above manner, the Tribunal has reached the conclusion that there was no shortage of availability of coal with the respondent at the relevant time; and that e-mails dated 22.07.2009 and 07.09.2009 are to be read to mean that the appellant was seeking delivery of coal at below the contracted price. The Tribunal has also referred, with acceptance, to the additional affidavit of Mr. Wilcox, wherein the witness had stated that the respondent was not a trader in coal but owned coal mines in Australia and

had a railway system in place to ensure smooth shipments. In the additional affidavit the witness also deposed that on account of the global financial crisis there was a crash in the demand for steel, and consequently, for coking coal. Mr. Wilcox also stated that at the relevant time, the respondent had large quantity of surplus production, some of which the respondent had sold by way of distress sale. Mr. Wilcox had also testified that he disagreed that the respondent had no availability of coal since, as per Mr. Wilcox's oral testimony, the respondent was producing 1,000,000 MT of coal per month; and that it would have been easy for them to supply the coal provided the appellant was willing to pay the contracted price. The Tribunal accepted all this evidence, since according to the Tribunal, it was consistent with letter dated 20.11.2008 of the appellant. In our view Mr. Wilcox's additional affidavit as also his oral testimony could not have effaced or changed what had been expressly stated in contemporaneous e-mails/letters exchanged between the parties. Such additional affidavit and oral testimony was therefore wholly irrelevant.

19. We are conscious of the limitations of our jurisdiction under section 37 of the A&C Act and the scope of interference by this court in such proceedings. We are also cognizant of the fact that there is a majority arbitral award in favour of the respondent; which has been upheld by a single Judge of this court ; and that, on general principles of section 37, this court is expected to forbear from interfering in conclusions of fact reached by the Tribunal.

20. That being said however, it is also our understanding that if the court finds that a conclusion or inference drawn by the Arbitral Tribunal, even if upheld in proceedings under section 34, is not supported by a plain, objective and clear-eyed reading of documents, this court would not flinch

in correcting such conclusion or inference, especially if it goes to the root of the matter. We may only say that in this case, we have noticed exactly such position, whereby the Arbitral Tribunal by majority, has chosen to *read words into* written communications between parties *which words do not exist* ; and to *omit to read what is written* in plain, simple and uncomplicated English.

21. While there is a plethora of communications exchanged between the parties in the form of letters and e-mails over a period of several months, the Tribunal's decision as accepted by the single Judge, turns essentially on the following three e-mails, which are extracted below again, though at the cost of repetition:

E-mail dated 02.07.2009 :

*"From:sureshababu@mmtclimited.com
To : John.Wilcox@.anglocoal.com.au
Cc:chris.dhar@gaury.com.au
Sent: Thursday, July 02, 2009 11:01 AM*

Transchart has already entered the market on behalf of MMTC for the vessel against July 09 stem.

***Keeping the huge backlogs in mind,** we would like to avail two stems in the August 09 and one in September 09. Please confirm availability and convey the laycans.*

With Thanks & Regards,

*Suresh Babu
GM (coal and Coke)
Cell: 919818913799
Fax: + 911124366362"*

E-mail dated 22.07.2009 :

*"From: Street.Kim
To: sureshababu@mmtclimited.com*

Cc: Chris Dhar'; Martyr, Rebecca, Wilcox, John ; Baxter, Alan

Sent: Wednesday, July 22, 2009 1:08 PM

Subject: RE:Anglo/MMTC shipment July

Dear Suresh,

Unfortunately at this stage we are unable to confirm a stem in Aug/Sep for MMTC due to cargo availability. We are continuing to review our position and will advise our preferred schedule for Oct-Dec 2009 as soon as possible.

Regards,

Kim Street

Anglo Coal Australia Pty Ltd"

E-mail dated 07.09.2009 :

"From: Wilcox.John

To: sureshabu@mmtclimited.com

Cc: pravinagarwal rpm

Sent: Monday, September 07, 2009 7:36 AM

Subject: RE:Anglo/MMTC shipment July

Dear Suresh,

Thank you for your e-mail.

Unfortunately at this stage we do not have any coal availability for the remainder of the year.

We will continue to monitor the situation and let you know if the position changes.

With regards,

John B Wilcox

Marketing Manager

Anglo Coal Australia Pty Ltd"

(Emphasis supplied)

22. In the course of arguments, it has been strenuously urged on behalf of the respondent that since the subject of the above e-mails is

“RE:Anglo/MMTC shipment July”, the only shipment that was being discussed by way of these e-mails was that relating to the month of July 2009. In our view, this is a misconception and we would like to dispel this notion at the outset.

23. It is a matter of common knowledge, and we take judicial cognizance of it, that in a series of e-mail communications exchanged between parties, by way of replies, responses and rejoinders, commonly called e-mail trails, it is not electronically possible to change the subject of the first e-mail. The only way the subject can be changed is by starting a new e-mail trail, which would result in dis-continuity in the conversation. For all practical intents and purposes therefore, parties do not change the subject of an e-mail trail. Accordingly, the subject of the e-mail trail would not be conclusive in deciding the context of the e-mails, in the same way that the title of a section or of a clause in a contract is not conclusive for purposes of construing its meaning.

24. In the above background, a plain and straightforward reading of the e-mails extracted above shows the following :

(i) E-mail dated 02.07.2009 was in two parts: firstly, it referred to *“July 09 stem”*, namely the quantity of coal ordered by the appellant from the respondent for the month of July, 2009. Secondly, by this e-mail the appellant acknowledges the *“huge backlogs”* (sic) in relation to the Long Term Agreement between the parties ; and proceeds to say that the appellant would like to avail *“two stems in October 09 and one in Sept 09”* ; and requests the respondent to confirm availability of coal for such shipment. To be sure, e-mail dated 02.07.09 appears not to be a part of any e-mail trail.

(ii) Now coming to the e-mail trail with the subject *“RE:Anglo MMTC shipment July”*, e-mail dated 22.07.09 starts with the respondent regretting (says ‘unfortunately’) that they are unable to

confirm stems for “*Aug/Sept for MMTC due to cargo availability*”. The plain and simple reference being to the non-availability of cargo for the stems requested by the appellant for Aug/Sept 2009. The e-mail then proceeds with the respondent saying that they are “*continuing to review our position*” and that they “*will advise our preferred schedule for Oct-Dec-2009 as soon as possible*”. Yet again therefore, the respondent is saying that it will review *its* position and would prefer a schedule for delivery in Oct-Dec-2009. On a plain and simple reading of the e-mail it is clear that the review referred to is in relation to the availability of coal since that is the only end of the bargain that the respondent was responsible for.

(iii) Insofar as e-mail dated 07.09.09 is concerned, the e-mail again begins with a regret (says ‘unfortunately’) and proceeds to say that “*we do not have any coal availability for the remainder of the year*” ; which can mean only one thing, namely that the respondent did not have any coal available to supply to the appellant for the remainder of the year 2009. The e-mail concludes by the respondent stating that it will “*continue to monitor the situation and let you know if the position changes*”; whereby the respondent takes on the responsibility to monitor the situation, which can only mean the situation of availability of coal for shipment to the appellant.

25. It is extremely important to note that in these three critical e-mails, upon which the decision of the Arbitral Tribunal as well as single Judge hinges, *there is no reference whatsoever* to the price of coal to be supplied. Furthermore, nowhere does the respondent say that it does not have coal available *at any specified price*. In the e-mails, the respondent simply says that it does not have any coal available for the remaining part of the year 2009 *period*. However, what has *not been said* or even reflected in the aforesaid e-mails, is *read into* the said e-mails by the majority of the Arbitral Tribunal; and accepted by the single Judge. The aforesaid e-mail communication is taken to mean that the respondent *had* coal available *at*

USD-300 per metric tonne ; and that the respondent meant that it did not have coal available at USD 128 per metric tonne. The majority of the Arbitral Tribunal as well as the single Judge therefore read the aforesaid e-mails to mean that the appellant was requesting supply of coal only at USD 128 per metric tonne, which is something that has nowhere been said in any of these e-mails.

26. We are at an utter loss to understand as to how the Arbitral Tribunal can read into commercial communication between educated and worldly-wise men of commerce, words that do not exist in the communications. In our view, if such imaginary interpolations are allowed into the e-mails, then the inferences and conclusions derived therefrom must be held to be perverse in law.

27. In the circumstances, we do not think there is any scope for trying to infer what was 'intended' by the parties, since it is not for the court to look for intendment in matters such as this. The court must read *what is plainly said in the e-mails, nothing more, nothing less ; and no effort is called-for to try and gather what may have been intended.* This is not a case where a legislative body has enacted a statutory provision and the court is called upon to 'construe' it, looking at what the legislature may have intended. In any written communication between parties, the court must assume that one party understood what is plainly stated by the other ; and the court would be loath to ascribing any meaning or context to what is plainly so stated. In our view, the above e-mails ought to be 'read' and not 'interpreted', especially since there is no ambiguity as regards what the parties have said in plain terms. Where the Arbitral Tribunal has erred, is that it has attempted to draw inferences as to what was being intended by what was

said in the e-mails, instead of merely going on the basis of what was actually said.

28. Furthermore, even a cursory perusal of the depositions of the respondent's witness Mr. John Wilcox and the appellant's witness Mr. Suresh Babu, as extracted above, will show that while the deposition of Mr. John Wilcox runs completely contrary to and against the text and the grain of the e-mails/communications between the parties, that of Mr. Suresh Babu is in complete consonance and accord with what is written in such e-mails/communications. Mr. John Wilcox has even gone on to depose in relation to e-mails/communications which had been authored by Ms. Kim Street, while the latter was never produced as a witness; although Ms. Kim Street is stated to be still in the employ of the respondent and therefore available to depose.

29. We are aware that a court seized of proceedings under section 37 of the A&C Act is not to re-appreciate evidence, muchless in a case where the Arbitral Tribunal as well as the single Judge under Section 34 have agreed with a certain view on the facts of the case. However, it is also the law that where a factual inference is based on *no evidence*, the court may interfere with such inference even under section 37. In our reading of the legal position, a factual inference that is based on *what is not stated* in a document or what may be called 'imaginary evidence', is the same as an inference based on 'no evidence' ; or an inference derived ignoring vital evidence. A decision based on such inference would necessarily be perverse. If the majority of the Arbitral Tribunal ignores what is plainly stated in commercial correspondence and reads into e-mails words that do not exist, or ignores words that are contained in e-mails, this can only pave the way for complete injustice. It is not the purport of any of the precedents that inferences drawn from thin air would become sustainable,

hiding behind the shield of an arbitral award. As we see it, this is exactly the position in the present case. There is *no evidence* to support the conclusion that the appellant was demanding consignment of coal at any reduced rate vis-à-vis the contractually agreed price. There is also *no evidence* to support the conclusion that the respondent had coal available to supply to the appellant, when the appellant demanded it. If anything, there is a straight forward acknowledgement by the respondent that it had no coal available till the end of the year 2009, without any qualification or reservation that coal was available at the contracted rate but not at a discounted rate.

30. What is more is that there is also no basis to the calculation of damages. The Tribunal has calculated damages by taking the difference in the agreed price of coal and the assumed 'market price' at the relevant time. However there is no evidence to prove the market price of coal at that time. The question of mitigation of damages by the respondent has not even been alluded to.

31. We find the legal foundations of our views in the decision of the Supreme Court in *Associate Builders vs. DDA* (supra), in which the Supreme Court has laid down the following 'third principle' of the fundamental policy of Indian law as to 'perversity' in the decision of an Arbitral Tribunal, in the following words:-

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

"32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, it was held: (SCC p. 317, para 7)

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

(Emphasis supplied)

32. We would also highlight the emphasis laid by the court in *Associate Builders* (supra), by quoting an earlier decision in *ONGC Ltd. vs. Western Geco International Limited* (supra), mandating that a court or an authority is bound to adopt a 'judicial approach' in deciding a matter. The following paras of *Associate Builders* (supra) may be noticed on this point:

"28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC does not elaborate that aspect. Even so, the expression must, in our opinion, include all such

fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the

standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

(emphasis in original)

29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.”

(Emphasis supplied)

33. It is also important for us while dealing with this matter under section 37, to express clearly as to why we are of the opinion that the view taken by the majority of arbitrators deserves to be set-aside in spite of the otherwise well-settled position that the arbitrator is the ultimate master of the quality and quantity of evidence. The principle in this behalf is enunciated in the following paragraph of *Associate Builders* (supra) :

"33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of

fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. ..."

(Emphasis supplied)

In the present case however, we find that the view taken by the majority of arbitrators is *not a possible view* since it is not a question of the 'quantity' or 'quality' of evidence or of 'little evidence' or of 'evidence which does not measure-up in quality to a trained legal mind' but this is a case where the inferences drawn are a *non-sequitur* to the plain and simple words of the e-mails/communications read in evidence, which were before the Tribunal and which do not support the inferences drawn. In this view of the matter, clearly the approach of the majority of arbitrators is arbitrary and capricious ; and therefore cannot pass judicial muster.

34. In the passing, we may also refer to the observations of a three-Judge Bench of the Supreme Court in ***Smt. Kamala Devi vs. Seth Takhatmal & Anr.***: (1964) 2 SCR 152, in which the court observed as follows:-

"8. ... Sections 94 to 98 of the Indian Evidence. Act afford guidance in the construction of documents; they also indicate when and under what circumstances extrinsic evidence could be relied upon in construing the terms of a document. Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the

*intricacies of the human mind to a certain one's **undisclosed intention**, but only to take the meaning of the words used by him, that is to say his **expressed intentions**. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply, accurately to existing facts. **But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document.** The other sections in the said group of sections deal with ambiguities, peculiarities in expression and the inconsistencies between the written words and the existing facts. In the instant case, no such ambiguity or inconsistency exists as we shall demonstrate presently. The Privy Council's case was one of ambiguity and the surrounding circumstances gave the clue to find out the real intention of the parties expressed by them."*

(Emphasis Supplied)

In the present case, we find no reason to look for the 'undisclosed intention' of the respondent since the clear and express words of the respondent, as contained in the afore-cited e-mails/communications, are perfectly in accord with and apply squarely to existing facts. We must therefore accept the ordinary meaning of what is stated in those e-mails/communications, namely that the respondent did not have any coal available till the end of the year 2009 for supplying to the appellant.

35. Proceeding on this basis, by a majority, the Tribunal has awarded USD 78,720,414.92 as damages alongwith interest of USD 27,239,420.29 calculated upto the date of the award, alongwith 15% p.a. future interest on the principal sum, in addition to USD 977,395.00 as costs. This amount, calculated at the ballpark prevailing exchange rate of approximately USD 1 = INR 70 translates to INR 7,48,56,06,115 that is to approximately INR 748 crores. In our view, such an award must rest on surer factual and legal footing than only to say that it has been rendered by an arbitral

tribunal; and is therefore sacrosanct. In the above view of the matter, the award of damages, interest and costs is a travesty of justice and the award suffers from perversity.

36. In our consideration, the single Judge has also not appreciated the aforesaid basic aspects, upon which the decision of the majority of the Tribunal turns. While doing so the single Judge has therefore committed error in the proceedings under section 34, which are amenable to be corrected in the present proceedings under section 37.

37. In view of the above discussion, we set-aside the majority award dated 12.05.2014 as also order dated 10.07.2015 of the single Judge made under section 34 of the A&C Act.

38. In the circumstances, the parties are left to bear their own costs.

ANUP JAIRAM BHAMBHANI, J.

G.S.SISTANI, J.

MARCH 02, 2020//