(2013) 07 DEL CK 0638

Delhi High Court

Case No: FAO (OS) No''s. 210 and 214 of 2012

Vale Australia Pty. Ltd.		APPELLANT
	Vs	
Steel Authority of India Ltd. and Another Steel Authority of India Ltd. and Another Vs Vale Australia Pty. Ltd.		RESPONDENT

Date of Decision: July 1, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 28, 31, 31(7)(b), 33(4), 34
- Contract Act, 1872 - Section 63, 73
- Evidence Act, 1872 - Section 101, 102, 106, 114

Hon'ble Judges: Pradeep Nandrajog, J; Manmohan Singh, J

Bench: Division Bench

Advocate: Arvind Nigam, instructed by Mr. Amit Sibal, Mr. Anirudh Das, Ms. Smarika Singh, Ms. B.S. Baby and Mr. Manu Krishnan, in FAOOS Nos. 210 and 215/2012 and Mr. A.K. Ganguly, instructed by Mr. Parmatma Singh, Ms. Reeta Chaudhary, Mr. A.K. Panda, Mr. Jagmohan Sharma, Mr. Mayank Jain, Mr. Madhur Jain, Mr. Sharat Kapoor and Mr. Ashish Goswami, in FAOOS No. 214/2012, for the Appellant; A.K. Ganguly instructed by Mr. Parmatma Singh, Ms. Reeta Chaudhary, A.K. Panda, Jagmohan Sharma, Mayank Jain, Madhur Jain, Sharat Kapoor and Mr. Ashish Goswami, Advocates in FAO(OS) Nos. 210 and 215/2012 and Mr. Arvind Nigam instructed by Mr. Amit Sibal, Anirudh Das, Ms. Smarika Singh, Ms. B.S. Baby and Mr. Manu Krishnan, Advocates in FAO(OS) No. 214/2012, for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

AMCI Australia Pty Ltd. (AMCI), a company incorporated in Australia and owning coal mines entered into Agreement No. 217/2007 dated April 23, 2007 with Steel Authority of India Ltd. (SAIL) for sale of One Million Metric Ton of Hard Coking Coal

as per specifications contained in the agreement. The company was later on re-named CVRD Australia Pty Ltd. after the CVRD Group acquired the shares of AMCI Holding Australia Pty Ltd. and is currently known as VALE Australia Pty Ltd. Since under the agreement, AMCI Australia Pty Ltd. was acting both as the coal producer and the seller and as a result of name being changed upon shareholding of the Holding company''s changing VALE Australia Pty Ltd. become the producer and AMCI Pty Ltd. the seller of the coal. The litigation has been jointly fought by the two companies for the reason the rights and liabilities of the two entities are joint as per a supplementary agreement dated June 07, 2007.

2. As per the agreement, One Million Metric Ton of coal had to be supplied during the delivery period July 2007 to June 2008. The coal had to be of the specification as in clause 1.1 read with Annexure-II and II-A of the agreement. As per clause 1.2 of the agreement the shipment had to be evenly spread during the delivery period with right in SAIL to postpone deliveries by up to three months. As per clause 2.1 the price fixed was US$ 96.45 per Metric Ton (free on board). The port of loading had to be one of the Australian ports listed in clause 2.1. As per clause 2.2, by mutual consent the parties could extend the time for delivery of the coal.

3. As per clause 7.1 the period of delivery was expressly stated to be of the essence of the agreement and as per clause 8.1 if supply was not made within the agreed time SAIL had the right to seek liquidated damages at a sum equivalent to 1% of the price of the coal; but subject to a maximum of 10%.

4. Since much was debated on clause 9.1, on the subject of DEFAULT AND RISK PURCHASE, we note the same. It reads:-

9.1 If the SELLER in any manner or otherwise neglects or fails to perform the Agreement, the PURCHASER after having come to know of such negligence or non-performance after giving a notice shall take such action as it considers fit including taking risk purchase action for supply of similar MATERIALS at the risk and cost of the SELLER.

5. Clause 10.1 empowered SAIL to require the supplier to remedy breach of any provision of the agreement within a reasonable period and if no remedial action was taken to terminate the agreement and as per clause 12 the parties could foreclose the contract. As per clause 17.1 it was mandated that ''no change in respect of the terms covered by this agreement shall be valid unless the same is agreed to in writing by the parties hereto specifically stating the same as an amendment to this agreement.'' As per clause 21 the governing law of the contract had to be the law in India. Disputes, as per clause 20.1, had to be settled under the Rules of Arbitration of the International Chambers of Commerce, Paris by a Sole Arbitrator.

6. As per the agreement, at mutually agreed rates and quantities, the parties agreed to enter into similar agreement for two more years.

7. On June 07, 2007 the agreement dated April 23, 2007 was amended in view of the acquisition of M/s. AMCI Australia Pty Ltd. by CVRD Australia Pty Ltd.; the amendment being to note and record that for the purposes of the agreement dated April 23, 2007 M/s. AMCI Australia Pty Ltd. would be treated as the seller and M/s. CVRD Australia Pty Ltd. as the producer and that the rights and liabilities of the two would be joint.

8. As noted, the delivery period had to commence on July 2007. But before that, on May 18, 2007 AMCI Pty Ltd. informed SAIL by e-mail its inability to supply any coal in the months of July, October and November. Reason stated was the undergoing expansion facilities at the Dalrymple Bay Coal Terminal from where the coal had to be shipped. It was informed that 0.3 million MT coal could be supplied in the month of August, October and December. In other words as against 0.5 million MT coal which had to be supplied by December 2007 it was indicated that only 0.3 million MT coal could be supplied. SAIL responded by its letter the next day i.e. on May 19, 2007. It did not agree to the shipment schedule and requested that shipment be effected as per contract which envisaged the One Million MT coal to be shipped by evenly spreading the shipments over 12 months. AMCI responded by e-mail reiterating its inability to effect supplies as per contract and requested that the tentative shipping schedule intimated by it as per its e-mail dated May 18, 2007 be accepted, to which SAIL responded by e-mail protesting it being discriminated, by highlighting that AMCI was supplying coal to other parties as per contractual obligations. Exchange of letters and e-mails continued with AMCI sticking to its position that due to expansion at the port facilities it was unable to book adequate berths and SAIL sticking to its position that if AMCI was fulfilling its contractual obligations qua other purchasers it could well supply the coal to SAIL.

9. While the dialogue was on by December 2007, 2,56,469 MT coal was shipped i.e. just about 25% of the total supply and 50% of the supply as per schedule till the month of December as per the contract. SAIL was insisting that monthly supply quantity be enhanced so that by the contract stipulated completion date i.e. June 2008 the contracted supply of coal could be received by it and AMCI continued to express its inability to do so till on December 18, 2007 AMCI wrote a letter to SAIL; and since much was debated on the language of the said letter, we note the contents thereof. It reads as under:-

Sub: LT Agreement 217/2007 Dtd. 23rd April 2007 - Contract Issue

Dear Mr. Ahmed,

After discussions with personnel from the Coal Import Group, we wish to advise and clarify the following matters relating to the above mentioned agreement. As you are likely aware the port of DBCT is currently being expanded, but this expansion has been significantly delayed. Originally planned for completion in September/October 2007, it now appears likely that the expanded facility will not be operational till at

least Mid March 2008.

When AMCI met with SAIL in February this year for the LT negotiations, AMCI had in place agreements with DBCT to provide an additional 4 Million tons of port capacity once the DBCT facility was been expanded. On this basis, AMCI/CVRD entered into LT agreement to supply 750 kt (base tonnage) and 250 kt (option tonnage) of Broad-Borough HCC from Central Queensland via the port of DBCT. Unfortunately due to the delay in completing the port expansion, AMCI/CVRD has not been able to get access to this port allocation and this port allocation has been permanently lost. For example, the expected port allocation for Carborough Downs and Broadlea was 2.4 mtps. With the delay for the Jan to March period, 1/4 of this capacity has been lost is 500,000 mt has been lost. In an effort to treat all customers fairly, we had allocated about 50% of this allocation to the SAIL business, therefore our ability to perform the above mentioned Agreement has been permanently reduced by 300 kt. Therefore assuming the DBCT facility comes on line 1 April, the maximum tonnage that AMCT/CVRD can deliver to SAIL will be 700 MT against the current contract year.

To meet this commitment, AMCI has tentatively planned for the following shipping schedule, however, please note that this schedule is subject to confirmation by CVRD of firm port allocation from DBCT once the port expansion is completed and CVRD is notified in writing by DBCT accordingly.

As you may also be aware, the current LT Agreement is for a period of three (3) years with an option for further two (2) years. Unfortunately with the uncertainty surrounding the allocation of firm port capacity by DBCT, CVRD/AMCI is currently unable to confirm what tonnage they could consider for the next calendar year and sincerely request that they may request a deferral of all tonnage commitments for the 2008 and 2009 contract years, with resumption of deliveries in 2010. This is certainly an extraordinary situation, but the uncertainty regarding the port congestion and lack of contract performance by DBCT has lead CVRD and AMCI to have very little confidence in the availability of port capacity in the near to medium term. We sincerely request SAIL''s understanding and will try to resolve this situation as soon as practicable, but we felt that we must advise SAIL as early as possible so that SAIL is able to consider any other sourcing options that may be available.

(Emphasis underlined)

10. Reflecting back upon the letter, it would evidence that AMCI informed SAIL its inability to effect any further supplies till mid March 2008 and the justification given was the port expansion being delayed. On the assumption that port expansion work would be over by March 2008 and ship berthing facilities available by April 01, 2008, AMCI indicated its ability to supply only 0.7 Million MT coal and categorically stated that it would not be in a position to supply the balance 0.3 million MT coal. Aware of the fact that as per its letter AMCI was not giving a categorical assurance and was pledging a course of supply in the future based on the assumption that the port

facility would be available by April 01, 2008, AMCI categorically informed SAIL that it was advising SAIL to consider any other sourcing options that may be available.

11. SAIL responded vide its letter dated January 01, 2008 requesting AMCI to ensure full contracted quantity being delivered within the delivery period and at least an attempt be made to supply at least 0.75 million MT coal within the delivery period to which VALE responded by a polite letter in which we find no categorical stand taken by VALE. Polite letters were exchanged between the parties thereafter till when on March 25, 2008 AMCI informed that due to recent rainfalls the coal pits had been flooded with water and that the mining operations were at a standstill. It was informed that the accessible coal was exhibiting poor quality of coal. With reference to its letter dated December 18, 2007, AMCI informed that it was not possible to effect any shipments in the months of April, May and June, 2008; and suffice would it be for us to note that earlier AMCI had tentatively proposed two shipment of 0.150 million MT coal in each month so as to supply 0.7 million MT coal by June, 2008. In other words by said letter dated March 25, 2008, AMCI informed its inability to effect any further supplies till the contract stipulated period, meaning that out of the contracted quantity only 2,53,469 MT coal stood supplied by the contracted date.

12. SAIL respondent on April 11, 2008 and requested VALE to fulfill the contractual obligation to which VALE respondent on April 23, 2008 informing that currently it was unable to supply the coal as per the quality envisaged under the contract.

13. Since letters and e-mails being exchanged was not taking the parties any forward, on April 24, 2008 SAIL requested AMCI to attend the meeting of its Empowered Joint Committee scheduled to be held on May 9, 2008 so that the status of supply of coal could be discussed, to which AMCI responded on April 29, 2008 that it would be useless for it to attend the meeting because it was just not in a position to supply the coal of the quality required. On May 1, 2008 VALE suggested the contract to be foreclosed and reiterated the same request as per its letter dated May 12, 2008. In its letter of May 12, 2008 VALE attached for consideration by SAIL the technical quality analysis certificate of coal for its Broadlea Carborough Mines, (intending supply of similar quantity coal), to which on July 28, 2008 SAIL responded stating that the proposal to supply alternative coal would be considered by its Empowered Joint Committee and requested AMCI and VALE to confirm a date convenient for the meeting to be held. A reminder was sent by the SAIL on September 24, 2008 informing that the meeting of its Empowered Joint Committee was scheduled to be held on September 29, 2008 and requested somebody to be deputed so that the original agreement including offer to supply alternative quality coal could be renewed. Neither AMCI nor VALE deputed any person to attend the meeting and on October 22, 2008, SAIL informed VALE and AMCI that it was not prepared to foreclose the agreement and requested full balance contracted quantity of coal to be supplied. It reiterated its request on October 31, 2008. VALE responded on November 17, 2008, with a proposal that a contract be entered into for supply of

coal for the next year at fair market price to be mutually agreed and along with the delivery schedule for said period the parties could agree to supply the remaining contracted quantity along with future supplies. SAIL responded on December 1, 2008 informing that its offer was vague. SAIL reiterated that balance quantity be supplied at the earliest.

14. Talks broke down when on January 20, 2009, SAIL issued a legal notice through their solicitors to VALE and AMCI informing breach of the contract and calling upon VALE and AMCI to discharge their obligations. It was followed by a subsequent notice dated February 2, 2009 informing that SAIL has a claim for damages against VALE and AMCI.

15. SAIL made a claim before the learned Arbitrator seeking damages in sum of US$ 153,440,000.00 for non-supply of 753,461 MT coal pleading that as against the contract price in sum US$ 96.45 it had purchased 605,240 MT coal at US$ 300.00 and 148,221 MT at US$ 300.90. Unpaid demurrage charges pertaining to bill of lading dated February 21, 2008 in sum of US$ 950,000.00 and a sum of US$ 50,000.00 on account of administrative expenses incurred to obtain the non-supplied quantity of coal were also claimed besides liquidated damages pursuant to para 8 of the General Conditions of the Agreement in sum of US$ 7,260,000.00 were also claimed. Interest @ 12.75% per annum from April 2008 was claimed, besides cost of arbitration. But before the Arbitrator, during hearing claim towards liquidated damages and sum incurred towards administrative expenses were given up and the two claims pertaining to non-supply of the contracted quantity of coal and unpaid demurrage charges alone were pressed besides interest and cost of arbitration. VALE and AMCI opposed the claim.

16. As per the Terms of Reference, parties had agreed that the following substantive issues would be decided by the learned Arbitrator:-

Whether the respondents were in breach of Contract No. 217/2007 dated 23.04.2007.

a. Whether the time for performance by the Respondents of the First Delivery Period under the Contract has been extended by the Claimant?

b. Whether the Claimant had accepted the Respondents'' promise to supply an alternate quality of coal?

c. Whether the Claimant has dispensed with strict performance of the Contract?

d. Whether the Claimant has waived and/or is stopped from claiming any remedy for the Respondents'' alleged nonperformance?

e. Whether the Claimant''s legal notice of 20 January 2009 was properly given and its effect (if any).

Risk Purchase Damages

f. Whether Para 9 of the GCA requires the Claimant to give prior notice of any contemplated risk purchase or only a notice of negligence or non-performance?

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

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

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

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

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

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

Liquidated Damages

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

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

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

Expenditure

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

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

Demurrage

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

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

Award of Interest and costs

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

u. Who should bear the costs of this arbitration and to ascertain the quantum thereof.

17. Holding VALE and AMCI guilty of breach of contract; further holding that SAIL did not accept VALE/AMCI''s promise to supply alternative coal; further holding that SAIL never dispensed with the strict performance of the contract and hence was not stopped from enforcing remedy on account of the non-performance of the contract, under an award dated March 10, 2011 the learned Arbitrator held that SAIL was entitled to damages and that VAIL/AMCI had waived requirement of notice to be served as contemplated by para 9 of the General Conditions of the Agreement, the learned Arbitrator awarded damages in favour of SAIL in sum of US$ 152,270,789.10 together with interest @ 2.335364% per annum commencing from April 02, 2009 till date of award. Legal cost in sum of US$ 420,072.15 towards legal expensed incurred by SAIL and SAIL''s cost incurred towards arbitration in sum of US$ 160,000.00 were also awarded.

18. VALE and AMCI filed an application u/s 33(4) of the Arbitration and Conciliation Act, 1996 pleading therein that the learned Arbitrator had omitted to record that SAIL''s claim for post award interest had been rejected and thus prayed the same to be recorded, which applications were dismissed vide order dated May 16, 2011 observing therein that since Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 required post award interest to be paid at the rate of 18% per annum, unless otherwise directed, the learned Arbitrator had consciously omitted to make a reference to the post award interest.

19. Two Original Miscellaneous Petitions were filed by VALE and AMCI challenging the award dated March 10, 2011 as also the decision dated May 16, 2011.

20. Vide impugned decision dated March 30, 2012, the learned Single Judge has upheld the award but has set aside the decision dated May 16, 2011 and therefore the Division Bench is seized of three appeals: FAO (OS) No. 214/2012 filed by SAIL, FAO (OS) No. 210/2012 filed by VALE and FAO (OS) No. 215/2012 filed by AMCI. Needless to state SAIL is aggrieved by the view taken by the learned Single Judge that the learned Arbitrator had expressly rejected the claim towards post award interest and thus the view taken by the learned Arbitrator as per decision dated May 16, 2011 was incorrect and VALE and AMCI are aggrieved in so far the award dated March 10, 2011 has been upheld.

21. It was urged before us in appeal by Sh. Arvind Nigam, Senior Advocate and Mr. Amit Sibbal, Advocate who appeared for VALE and AMCI that Courts in India have consistently given a wider meaning to the term ''public policy'' rendering an award liable to be set aside if it was contrary to (i) the interest of India; (ii) justice or morality; (iii) was patently illegal; and (iv) contrary to a fundamental policy of Indian law. The following decisions were cited to make good the point:-

(i) Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, ,; (Paras 17 to 21)

(ii) Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, , (Paras 13, 14);

(iii) Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Others, . (Paras 20-25);

(iv) The Amravati District Central Co-operative Bank Ltd. Vs. United India fire and General Insurance Co. Ltd., (Para 23);

(v) Union of India (UOI) Vs. Selan Exploration Technology Ltd., . (Paras 36 to 45);

(vi) Bharat Coking Coal Ltd. Vs. Annapurna Construction, (Paras 20 to 23, 26 to 30, 36, 40 to 41);

(vii) Oil and Natural Gas Corporation Ltd. Vs. Schlumberger Asia Services Ltd., . (Paras 8 to 9, 11 to 12, 37, 47 to 48, 60, 68 to 70)

(viii) MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan and Another, (Paras 6, 7, 12, 13 and 14)

(ix) Mahanagar Telephone Nigam Ltd. Vs. Siemens Public Communication Network Ltd., (Paras 22 and 24)

(x) D.D.A Vs. Krishna Construction Company, (Paras 19, 20)

(xi) Hindustan Shipyard Limited Vs. Essar Oil Limited and Others, . (Para 57)

(xii) Union of India (UOI) and Others Vs. Satyanarayana Construction Co. and Another, (Para 18)

(xiii) Hindustan Fertilizer Vs. J.M. Baxi and Co. . (Paras 10, 11 and 12)

(xiv) Jai Singh Vs. DDA and Others, (Paras 4, 5, 6 and 8)

(xv) McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, . (Para 55)

(xvi) 2008 (Suppl. 1) Arb.LR 373 (Del) Engineering Development Corporation Vs. Municipal Corporation of Delhi (Para 3)

22. Learned senior counsel Sh. Arvind Nigam urged that the learned Arbitrator has noted in para 119 of the award that SAIL had admittedly not claimed general damages contemplated by Section 73 of the Indian Contract Act, 1872 and the claim was for damages as per para 9 of the General Conditions of the Agreement i.e. risk purchase. It was urged that the law of risk purchase as is well-settled by various judicial decisions in India required:-

(i) Serving risk purchase notice on AMCI and VALE.

(ii) Giving option to AMCI and VALE to participate at the risk purchase to mitigate loss.

(iii) Proof by SAIL of having executed contracts with other suppliers as part of risk purchase.

(iv) Proof by SAIL that quantities procured from alternate supplier was towards risk purchase.

(v) Proof that quality of coal procured by SAIL as part of risk purchase was similar to the Contracted Coal.

23. It was urged that the learned Arbitrator had made out a new case in favour of SAIL inasmuch as the learned Arbitrator held that SAIL had established the fact that it had purchased 0.8 Million MT coal by increasing the annual supply from its long term suppliers for the delivery period 2008-09. It was urged that whereas SAIL had simply pleaded having made a risk purchase of the quantity of coal which was short supplied and not that the so-called risk purchase was by way of augmenting quantity for the delivery period 2008-09 from the long term suppliers of hard coking coal. Learned senior counsel relied upon the decisions reported as MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan and Another, and 2005 (1) Arb.LR 369 MTNL Vs. Siemens Public Communication Network to urge that the learned Arbitrator cannot travel beyond the terms of reference. It was urged that there was no evidence to establish any conscious decision taken by SAIL to make risk purchase and further that there was no evidence to establish any risk purchase being made. Thus, it was urged that the award was without any evidence. Drawing attention to the testimony of Mr. Arun Jot Malhotra, a witness of SAIL as also the testimony of Mr. R.P. Rawat another witness of SAIL, learned senior counsel urged that the witnesses admitted that there was no record with SAIL to evidence contracts made with other long term suppliers for risk purchase nor was there any evidence that pertaining to subsequent purchases made SAIL earmarked the non-contracted quantity towards replacement thereof. Since SAIL had claimed to have purchased extra coal from its long term suppliers namely BHP, ANGLO and Peabody, learned senior counsel extensively referred to evidence led to show discrepancies in the buffer stock and the closing stock for the delivery period 2007-08 and 2008-09 to conclude that what the learned Arbitrator had actually done was to award general damages in light of the price paid by SAIL to effect purchases subsequently vis-�-vis the contracted price between the parties. Referring to sub-Section 2 of Section 28 of the Arbitration and Conciliation Act, 1996 learned senior counsel urged that a meaningful reading of the award would reveal that the learned Arbitrator had decided the matter ex aequo et bono or as amiable compositeur, which he could not have done unless parties had expressly authorized him to do so. Learned senior counsel urged that the learned Arbitrator wrongly held that VALE/AMCI had waived clause 9 of the General Conditions of the Agreement. In the absence of any waiver, law declared in the decisions reported as 2000 I AD (Del) 145 Alfa Laval (India) Ltd. Vs. Union of India, Union of India (UOI) Vs. Peekay Industries, , Flowmore Private Limited Vs. National Thermal Power Corporation Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., . Maharashtra State Electricity Board, Bombay Vs. Sterlite Industries (India) Ltd., had to be applied by the learned Arbitrator; and since this was not done, the award was liable to be set aside. In the absence of a conscious decision being proved to

undertake risk purchase, learned senior counsel urged that in terms of Sections 101, 102, 106 and 114 of the Evidence Act, 1872 and as per the law declared in the decisions reported as Kamakshi Builders Vs. Ambedkar Educational Society and Others, ., Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, and Narayan Govind Gavate and Others Vs. State of Maharashtra and Others, . the award was liable to be set aside because the learned Arbitrator had no option but to draw an adverse inference against SAIL. Lastly it was urged that the mandate of sub-Section 3 of Section 31 of the Arbitration and Conciliation Act, 1996 obliged the learned Arbitrator to state reasons which had to be proper and adequate; a mandate which was breached requiring the award to be set aside keeping in view the law declared in the decisions reported as 2008 (Supp. 1) Arb.LR 379 Hindustan Fertilizers Vs. J.M. Baxi & Co., 2008 (3) Arb.LR 667 Jai Singh Vs. DDA and McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, .

24. Rebutting the submissions made by learned senior counsel for VALE, Sh. A.K. Ganguly, Senior Advocate who appeared for SAIL, drew attention of the Court to the expert witnesses examined by VALE/AMCI; namely Dr. Neil J. Bristow and Mr. C.V. Gubbins to bring home the point that hard coking coal is a key raw material used in steel making. Converted into coke, hard coking coal when fed into blast furnaces along with iron, in a molten state, results in high quality steel being produced. The testimony of the witnesses wherein they deposed hard coking coal is a scarce resource with three main countries being suppliers i.e. Australia, U.S. and Canada was referred to with conjunction with their testimony that Japan being the largest manufacturer of steel sets the benchmark for the price of hard coking coal inasmuch as Japan commences negotiations in the month of January to purchase hard coking coal and concludes bargains by April. These prices set the benchmark and other countries enter into negotiations with the suppliers; market forces i.e. the price paid by Japan to purchase coal regulating the bargains. Learned senior counsel urged that there was intrinsic evidence even otherwise to establish said practice, being the instant contract. Dated April 23, 2007, the delivery year was to commence from July, 2007 to end on June, 2008. Learned senior counsel urged that the commonly understood concept of risk purchase i.e. procuring the contracted goods by going to the market was not applicable in the instant case because nobody could go to the market, since there was none, and place an order for hard coking coal. Learned senior counsel urged that as per sub-Section 3 of Section 28 of the Arbitration and Conciliation Act, 1996, the learned Arbitrator while deciding in accordance with the terms of the contract was obliged to take into account the usages of the trade applicable to the transaction.

25. We commence dealing with the first submission which goes to the root of the matter, for if the said submission succeed, that by itself would be sufficient to set aside the Award dated March 10, 2011. We re-pen the submission: The Award deals with a dispute not falling within the terms of the submission to the Arbitrator.

26. The basis for the submission is that as per Statement of Claim filed by SAIL it was categorically pleaded that it had purchased 753,461 MT coal from alternative suppliers i.e. BHP, Anglo and Peabody and as against that, the learned Arbitrator held that the basis of SAIL''s claim was a risk purchase effected as per para 9 of the General Conditions of the Agreement.

27. The submission advanced is without any factual or legal basis. In para 17 above we have noted the 21 substantive issues settled between the parties as per the Terms of Reference and suffice would it be to note that issues ''f'' to ''l'' under the heading Risk Purchase Damages would reveal that VALE and AMCI clearly understood that they were to deal with SAIL''s case as understood to mean that damages claimed by SAIL were on account of a risk purchase. That VALE and AMCI so understood SAIL''s pleadings is evidenced by the extensive cross-examination effected of SAIL''s witnesses Mr. Arun Jot Malhotra and Mr. R.P. Rawat, who were extensively questioned on the subject of risk purchase effected and for which, while dealing with the objections to the Award under the head whether the Award is contrary to law, we would be highlighting the arguments of the objectors with reference to the pleadings and the evidence led and would inform the reader of our present decision that the submissions by VALE/AMCI would clearly evidence their understanding of SAIL''s pleading as aforenoted.

28. In the decision reported as Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, , speaking on the subject of variance between pleading and proof, the Supreme Court had opined that the purpose of pleadings is to make it known to the opposite party as to what is the case of the opposite party and this helps the parties in leading evidence; and in what manner parties understand the pleadings of the opposite party could be evidenced by the evidence led. The purpose of pleadings is to safeguard against the risk of the opposite party being caught unaware of the case of the other. But where parties lead evidence on a subject matter of dispute, it would not lie in the mouth of either party to urge that the case pleaded by the opposite party was sought to be established at variance with reference to the evidence.

29. Witnesses of both parties have deposed in unison that huge quantities of coal, as in the instant case, upto 0.8 Million MT, and that too of a specific variety i.e. hard coking coal, was not available for instant sale in the market and that only three countries in the world being America, Canada and Australia sell hard coking coal in the international market. Further, since Japan is the largest manufacture of steel, the manufacture whereof requires hard coking coal, the international practice is for benchmark prices to be fixed when market forces operate as a result of Japanese companies concluding bargains by April each year. Thereafter other buyers conclude the contracts with suppliers in America, Canada and Australia and this is the reason why instant contract envisaged supplies to commence from July 2007 till June 2008. Further, witnesses of both parties were not at variance that hard coking coal is purchased in the international market through long term supply contracts, as

we find the instant contract to be. Under the long term supply contracts, parties agree to purchase an agreed quantity of hard coking coal at the agreed price for a period of one year and simultaneously bind themselves to further supplies over the next two to three years, but with the price to be negotiated. The reason seems to be obvious. Hard coking coal cannot be manufactured. It has to be mined. Environmental and other clearances had to be obtained by the miners. Eco-sensitivity, which is a universal phenomenon has led to mining activities being regulated as per the Municipal laws of each countries. Coal mining is as per licenses obtained from the local Government by the miners. Thus, projected demands of buyers have to be pre-known to the miners to enable them to obtain the necessary permission and thereafter create necessary infrastructure to augment mining of coal. The concept of risk purchase has to be understood in this background and we find merit in the submission urged by Shri A.K. Ganguly, learned Senior Counsel for SAIL that pertaining to a contract, any dispute before an Arbitrator requires the same to be decided in accordance with not only the terms of the contract but additionally after taking into account the usages of the trade applicable to the transaction. The only method by which SAIL could effect risk purchase was to enter into a contract with long term suppliers to sell the quantity of coal which was agreed to be supplied by VALE/AMCI but was not supplied. It is not the form of a pleading, but the content which matters. Meaningfully read, case pleaded by SAIL was that it effected risk purchase by entering into contracts with three companies and while so doing not only it contracted to purchase hard coking coal for future use for the ensuing year but even included the short supply quantity in question. The case of SAIL has to be understood with reference to the fact that as a manufacture of huge quantity of steel, SAIL maintains a buffer stock and while effecting purchase of hard coking coal it keeps into account monthly requirement at its different plants but also a buffer stock to be maintained. Thus, argument by VALE/AMCI with reference to risk purchase, which is premised on conventional risk purchases effected for example: ''A'' having agreed to sell 100 rims of paper of quality ''X'' to ''B'' on May 31, 2013 at Delhi being in breach, and the contract permitting ''B'' to make risk purchase, warranting ''B'' to purchase 100 rims of paper of quality ''X'' from the Delhi Market on June 01, 2013; and the difference in price being the measure of damages, is not applicable keeping in view the usages of the trade applicable to the transaction in question. It is in this context that one has to understand letter dated September 24, 2008 written by SAIL to AMCI/VALE requesting that somebody be deputed to discuss the price at which coal could be supplied by them for the ensuing year as also to clear the backlog. Letter dated November 17, 2008 written by VALE to SAIL also contains a proposal that a contract may be entered into for supply of coal for the next year at fair market price to be mutually agreed and along therewith a delivery schedule to supply the remaining contracted quantity be agreed upon. It is clear that VALE/AMCI were clearly understanding that it was not a case of delivery period being extended as conventionally understood but it was a case of VALE/AMCI supplying the contracted quantity of coal at the agreed price so

that their loss on account of risk purchase may be minimized; in fact reduced to nil.

30. The second limb of objection to the Award i.e. that the Award is contrary to law can be broken into five sub-heads. Firstly, that the learned Arbitrator, in para 172 of the Award, noted that SAIL had to prove having taken a conscious decision to procure coal under risk purchase. Thereafter, without any evidence to establish the same, in paragraph 178 of the Award the learned Arbitrator concluded that SAIL had made a conscious decision to purchase 0.8 Million MT hard coking coal since approximately said quantity was short supplied. Secondly, the risk purchase case advanced by SAIL changed at different stages at the arbitration. Whereas in the statement of claim SAIL pleaded that it procured 397,543 MT: 100,164 MT; and 207,697 MT coal from BHP, Anglo and Peabody respectively between July 2008 to September 2008 towards risk purchase, no bills of lading or commercial invoice were proved. Qua Anglo evidence led was pertaining to agreement 221/2008 executed on July 30, 2008 under which Anglo agreed to supply 2.2 Million MT of hard coking coal to SAIL for each of the next five years, from which fact it was sought to be urged that the increase was not to cover any short fall in supply of coal by VALE/AMCI. The extension of the argument was that no evidence was led to show shipments made by the three companies in the year 2007- 08 for alone then could we have a base data, with reference whereto for the next years supplies one could have inferred extra-procurement made. The further limb of the second submission was that evidence led by SAIL would reveal that contracted supply for the year 2007-08 entered into by SAIL with BHP, Anglo and Peabody was 5.5 million MT, 2.1 million MT and 1.0 million MT respectively i.e. a total quantity of 8.6 million MT and for the next year i.e. 2008-09 the quantities purchased from the three companies rose to 5.6 million MT, 2.2 million MT and 1.0 million MT respectively i.e. 8.8 million MT. Thus the difference in quantity between the two years was only 0.2 million MT coal. Further, a letter dated June 10, 2008 addressed by BHP would reveal that said company had failed to supply 5.4 million MT coal pertaining to the period 2007-08. The further submission pertaining to the second sub-head argument was that assuming SAIL''s case at its best keeping in view its plea that it use to maintain a buffer stock, evidence would establish that for the year 2007-08 SAIL had entered into contracts to procure such quantity of hard coking coal that it could maintain a stock of 1.230 million MT hard coking coal with consumption of 12.414 million MT i.e. total requirement being 13.44 million MT and for the next year i.e. 2008-09, towards consumption it required 11.865 MT hard coking coal and for stock build up 1.165 MT i.e. a total of 13.030 MT coal i.e. there was in fact a fall in the requirement of coal by SAIL. Thirdly, it was urged that the Award was based on wrong assumptions by treating the pleading as proved. It was highlighted that as per SAIL it had effected risk purchase of 0.8 Million MT coal by purchasing 0.5 Million MT from BHP, 0.2 Million MT from Anglo and 0.1 Million MT from Peabody and as per evidence led SAIL could manage to establish having purchased 397,543 MT coal from BHP, 148,221 MT from Peabody and 207,697 MT from Anglo. Fourthly, it was

urged that SAIL could not prove that the coal allegedly purchased under risk purchase option was similar to the contracted coal. The fifth and the last sub-head was that the learned Arbitrator ignored material evidence in the form of SAIL''s evidence itself establishing that there was no fall in the buffer stock.

31. Before we deal with the five sub-heads of the main second submission, we would highlight that the controversy raised by VALE/AMCI under aforesaid five sub-heads itself demolishes the first submission which we have already rejected as urged by VALE/AMCI i.e. that the Award dealt with a dispute not contemplated by and hence not falling within the terms of the submission to the Arbitrator.

32. From the submissions advanced pertaining to the five subheads under the main head that the Award is contrary to law, it is apparent that the alleged nature of the Award being contrary to law is in reference to the law of evidence.

33. The evidence has been discussed by the learned Arbitrator with reference to the international practice, and we quote para 175 of the Award. It reads as under:-

The Respondents had spent much time in the course of arbitration to build a scenario under which it was suggested that the claimant could not have consciously decided to undertake risk purchase action. It was not disputed that price negotiations for hard coking coal usually take place between BHP Billition Mitsubishi Alliance "BMA" and Nippon Steel of Japan usually begin at the end of the calendar year and settlement is usually reached between January and March. The prices settled between BMA and Nippon would usually be the benchmark price for the claimant in its negotiations with its suppliers in May. For 2008-09, it was settled at US$ 300/M. During September 2008 to March 2009, due to the global financial crisis, the steel producers announced rapid cuts in production. Steel producers such as SAIL faced high prices for its hard coking coal of USD 300/T. So SAIL would be paying a high premium for its coking coal from its long term suppliers. Relying on McCloskey''s Coal Reporter of October 28, 2009, it was said that SAIL was pushing back stems (a term used in maritime transportation to mean shipping/loading arrangements) as the demand for steel had declined. The respondents therefore said that SAIL had never intended to take up the Respondent''s various offer for the short delivered coal because of the fall in coal price such that it became no longer beneficial to do so.

34. Now, it was not the case of VALE/AMCI that it was not in breach of the contract. Indeed, VALE/AMCI had entered into a contract to supply one Million Metric Ton of hard coking coal to SAIL commencing from July 2007 to June 2008 with deliveries to be evenly spread at a fixed price of US$ 96.45 per Metric Ton. Admittedly only 256,463 MT coal could be supplied by December 2007. Admittedly, before even the first shipment was effected in July 2007, AMCI informed SAIL on May 18, 2007 that it would not be able to supply any coal in July, October and November; stating the reason being the undergoing expansion facilities at the Dalrymple Bay Coal

Terminal from where the coal had to be shipped. Further, AMCI informed that by December 2007 it could only supply 0.3 Million MT of coal as against 0.5 Million MT coal. Further, as noted above, by December 2007, only 256,469 MT coal could be supplied and on December 18, 2007 AMCI wrote to SAIL, a letter contents whereof have been noted by us in paragraph 10 and as per which letter AMCI clearly told SAIL to consider ''any other sourcing options that may be available''. The learned Arbitrator has rightly read the letter as a waiver by AMCI/VALE to the risk purchase notice envisaged by clause 9 of the General Conditions of the Agreement, and for which we would be discussing further, with more reasons, as we deal with the submissions advanced on the subject of risk purchase notice. Now, it has to be kept in mind that as one crossed over to the next year i.e. the year 2008, SAIL had to ready itself with negotiations to firm up contracts for the supply year July 2008 till June 2009 and one would expect commercial bargains to commence by January 2008 and await market prices to be determined by April of 2008 by when Japanese companies would have concluded their contracts i.e. by April or May 2008 the prices could be firmed up by SAIL. The issue has to be seen from the business efficacy point of view. With many buyers but only a few suppliers, negotiations embrace the quantities to be supplied, the quality of supply, monthly deliveries, schedule of payments etc. and by far the most important: the price. The last i.e. the price would be firmed up after the Japanese companies close their contracts, but that would not mean that other companies do not commence the dialogue. Thus, SAIL was clearly informed by December 2007 that it could consider other sourcing options. The same would obviously include an offer made by VALE/AMCI to supply coal from other mines owned by them. The correspondence exchanged between the parties, to which we have made a brief reference in paras 12 to 14 above, would reveal that by March 25, 2008 SAIL was informed that VALE/AMCI cannot supply any coal whatsoever as per the specifications under the contract but they could effect deliveries as per the existing contract as also future supplies from its Broadlea Carborough Mines. Now, these letters would reveal that they would be VALE/AMCI''s ''other sourcing options'' available to SAIL apart from other suppliers. The correspondence exchanged between the parties would reveal that on April 24, 2008, SAIL requested AMCI to attend a meeting of its Empowered Joint Committee scheduled to be held on May 09, 2008 so that status of supply of coal could be discussed to which AMCI responded on April 29, 2008 that it was useless for it to attend the meeting because it could not supply any coal. On May 12, 2008, VALE sent the technical quality analysis certificate of coal from its Broadlea Carborough Mines to which SAIL responded on July 28, 2008 that AMCI/VALE should confirm a convenient date for a meeting with its Empowered Joint Committee. AMCI/VALE did not notify a date convenient to them. On September 24, 2008 SAIL sent a reminder on the subject but AMCI/VALE did not depute anybody to attend the Empowered Joint Committee meeting. Undisputedly, it is the Empowered Joint Committee of SAIL which gives approval to the contracts. To put it pithily, the matter can be looked at from a point of view that SAIL was considering, as a part of any other option,

AMCI/VALE''s offer to supply (under risk purchase) the contracted coal from its Broadlea Carborough Mines.

35. It is in the aforesaid backdrop which we have briefly summarized that we find the learned Arbitrator having discussed in paragraphs 117 onwards upto paragraph 194 of the Award, the issues which have been broken by is into five sub-heads as per para 31 of our opinion. We find that the learned Arbitrator has discussed the law of compensation for loss or damage caused by breach of contract in India as also the law pertaining to risk purchase. The learned Arbitrator has noted the facts which we have briefly recorded in paras 12 to 14 of the present decision. The learned Arbitrator has noted the testimony of the witnesses of SAIL on the subject of the manner in which SAIL had worked out the risk purchase quantities. The entire gamut of the evidence including the alleged variations have been noted by the learned Arbitrator. In paragraphs 153 and 154 of the Award the learned Arbitrator has extracted the testimony of the witness of SAIL. The learned Arbitrator has discussed the evidence pertaining to the similarity of the coking coal supplied by BHP, Anglo and Peabody with reference to the testimony of the expert witness Dr. Bristow examined by VALE/AMCI.

36. It is settled law that adequacy or inadequacy of evidence or on which side does the weight of the evidence lead to would not be an exercise permissible to be undertaken by a Court considering objections to an Award u/s 34 of the Arbitration and Conciliation Act 1996. As long as there is some evidence to sustain a finding of fact recorded by Arbitrator the hands of approach must be adopted by a Court seized of objections to an Award.

37. From the very nature of the objections it is apparent that the objector wants this Court to re-appreciate the evidence and re-weigh the probabilities thereof to infer facts; an exercise which we refuse to perform because our doing so would be in breach of the mandate of the law. We highlight that the five limbs have been discussed with reference to the evidence led and law applicable by the learned Arbitrator in paragraphs 117 to 194 of the Award; and suffice would it be to state that each and every aspect of the evidence referred to by AMCI/VALE has not only been noted but has been dealt with by the learned Arbitrator and being a matter pertaining to re-appreciation of evidence, we repeal each and every submission made under the five sub-heads.

38. The third head of challenge to the Award was that the finding returned on the subject of VALE/AMCI waiving right to notice of risk purchase under paragraph 9 of the General Conditions of the Agreement is vitiated on account of the law laid down in the opinions reported as 2000 (I) AD (Del) 145 Alfa Laval (India) Ltd. Vs. Union of India, 2008 (3) Arb.LR 569 (Del) Union of India Vs. Peekay Industries, 2009 (X) AD (Del) 486 Flowmore Private Limited Vs. National Thermal Power Corporation Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., . Maharashtra State Electricity Board, Bombay Vs. Sterlite Industries (India) Ltd., .

39. Letter dated December 18, 2007 written by AMCI to SAIL, contents whereof we have noted in para 10 above is the documentary evidence considered by the learned Arbitrator for the factual finding of their being a waiver by VALE/AMCI to the risk purchase notice contemplated by paragraph 9 of the General Conditions of the contract.

40. A perusal of the letter would reveal that after expressing its inability to supply more than 0.3 Million MT of coal, VALE/AMCI wrote to SAIL that notwithstanding their offer to try and resolve the issue, SAIL was free to consider other sourcing options that may be available. The concluding part of the letter reads:-

but we felt that we must advise SAIL as early as possible so that SAIL is able to consider any other sourcing options that may be available.

41. The learned Arbitrator has noted various decisions in India pertaining to the general principle with regard to waiver of contractual obligations as found in Section 63 of the Indian Contract Act, 1872. Thereafter, with reference to the letter in question, the learned Arbitrator has found a waiver by AMCI/VALE to the requirement of a risk purchase notice, and suffice would it be for us to note that as regards the enunciation of law pertaining to waiver of contractual obligations as per Section 63 of the Indian Contract Act, 1872, we do not find any scope to interfere with the Award and similarly as regards interpreting the letter dated December 18, 2007 as constituting waiver, we find no scope to interfere with the finding or even venture to discuss whether any interference is warranted, for the reason a finding of fact if applied correctly to the law by an Arbitrator on a view possible, merely because some other view may emerge is not an exercise permissible before us. In that view of the matter we find it useless to discuss the various decisions relied upon by learned counsel for the objectors. For record we note that pertaining to the issue of waiver the arguments were divided into three sub-heads. The first being that the finding of waiver was contrary to the record i.e. there was no evidence to show waiver. Secondly, the finding of waiver was contrary to the terms of the contract i.e. Clause 17 of the General Conditions of the Agreement as per which no change in respect to the terms of this agreement shall be valid unless the same is agreed to in writing by the parties specifically stating the same as an amendment to the agreement. Lastly, that the finding of waiver was inherently contradictory, in that, the learned Arbitrator construed para 9 of the General Conditions of the Agreement as mandating a risk purchase notice followed by a finding that the letter of December 18, 2007 amounted to a waiver notwithstanding the same not expressly authorizing SAIL to buy from other sources. Letter dated December 18, 2007 is a matter of record. Its interpretation was within the domain of the Arbitrator and that it has been treated by the learned Arbitrator as a writing evidencing a consent by AMCI/VALE; a sufficient answer from us with respect to the three limbs of the argument pertaining to waiver.

42. Though fourth limb of the argument would be that the Award is against the settled principle of election. It was urged that a perusal of para 125 of the Award would reveal that the learned Arbitrator assume AMCI''s argument to be that SAIL having elected for performance could not invoke para 9 of the General Conditions of the Agreement to effect risk purchase. Since in para 136 of the Award the learned Arbitrator held that SAIL was not precluded from taking risk purchase action it was urged that this implies that as per the understanding of the learned Arbitrator risk purchase action was done subsequent to SAIL''s demand for performance after October 22, 2008, which was contrary to SAIL''s own case which was that SAIL had invoked the risk purchase clause before it claimed performance. It was further urged that as per the learned Arbitrator various letters written by SAIL seeking complete supplies of the contracted quantity of coal did not amount to election for according to the learned Arbitrator the doctrine of election can only apply where there are two (and not more than two) mutually exclusive remedies, therefore, it was concluded that as per the learned Arbitrator there were more than two mutual exclusive remedies; and for which para 134 and 135 of the Award were referred to. It was urged that the conclusion is clearly contrary to the settled principles of election wherein a party is only required to demonstrate that the course of action or remedy elected is mutually exclusive of and inconsistent with the course of action subsequently sought to be taken. Reliance was placed upon the decisions reported as National Insurance Co. Ltd. Vs. Mastan and Another, , Haridas Mafatlal Gagalbhai Vs. Vijayalakshmi Navinchandra Mafatlal Gagalbhai and Others, , (1975) 1 WLR 1452 Aquis Estates Ltd. Minton & Anr., (1882) VII PC 345 Benjamin Scarf Jardine VS. Alferd George, Hanmant Bhimrao Kalghatgi Vs. Gururao Swamirao Kulkarni, , Ganga Retreat and Towers Ltd. and Another Vs. State of Rajasthan and Others, , Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., . and Karam Kapahi and Others Vs. Lal Chand Public Charitable Trust and Another, . The facts on which aforenoted submissions were predicated was that at the end of the first delivery period i.e. June, 2008 SAIL had the option to either undertake risk purchase action or to claim complete supplies the contracted quantity of coal and by its letter dated October 22, 2008 a conscious decision was taken by SAIL which was unequivocally intimated to VALE/AMCI that SAIL elected to seek complete supplies of the contracted quantity of coal. Letters dated October 31, 2008, December 01, 2008 and January 20, 2009 continued to express the unequivocal option to elect for supplies to be made. That SAIL never intimated VALE/AMCI of the alleged risk purchase undertaken was further evidence that SAIL had elected the performance of the agreement as opposed to risk purchase.

43. The argument may appear to be attractive at the first blush, but ignores that by its letter dated December 18, 2007, AMCI had itself waived the requirement to be put to risk purchase notice inasmuch as expressing inability to supply the contracted quantity of coal SAIL was advised to consider any other sourcing options that may be available. Now, one of the grievance of VALE/AMCI was that when SAIL

proceeded towards risk purchase they had to be intimated of said fact so that, to mitigate the loss, VALE/AMCI could participate at the risk purchase.

44. While dealing the action taken by SAIL to effect risk purchase, in paragraphs 28 to 35 above we have concurred with the view taken by the learned Arbitrator that keeping in view the usage of the trade the technical concept of a risk purchase by going to the open market was not applicable in the instant case and the risk purchase had to be by requiring the short supplied coal to be supplied along with future supplies for the ensuing year when negotiations concluded with long term suppliers. Action of SAIL to call upon VALE/AMCI to participate at the Empowered Joint Committee meetings, which Committee concludes the bargains, is nothing but compliance by SAIL with the requirement of law to permit VALE/AMCI to supply the coal which was short supplied as a part of the risk purchase exercise. As regards the facts, it is relevant to note that prices for the ensuing year supply are finalized by April-May of the each year and on April 24, 2008 SAIL had requested AMCI to attend a meeting of its Empowered Joint Committee scheduled for May 09, 2008. On May 12, 2008, VALE sent the technical quality analysis certificate of coal from its Broadlea Carborough Mines. On July 28, 2008 SAIL requested AMCI/VALE to confirm a convenient date for a meeting with its Empowered Joint Committee. AMCI/VALE did not notify a date. On September 24, 2008 SAIL sent a reminder but AMCI/VALE did not depute a representative to attend the Empowered Joint Committee meeting and this was followed by SAIL''s letter dated October 22, 2008. The correspondence of SAIL has to be read as an opportunity being granted to VALE/AMCI to supply, if not the same the quality, somewhat equivalent quality coal at the contracted price and simultaneously avail the opportunity to negotiate the price for future supplies. Under the circumstances we are of the opinion that the issue pertaining to election by SAIL did not even arise for consideration, and merely because the learned Arbitrator has chosen to deal with the same and assuming a wrong conclusion arrived at; applying the doctrine of severability, the Award has to be upheld by ignoring the non-material finding on election by SAIL.

45. The fifth submission advanced was that the finding by the learned Arbitrator on extension of time is contrary to evidence on record. It was urged that in paragraph 78 of the Award, the Tribunal had held that there was nothing to suggest that SAIL had extended time for completion of the contract and thus could not fall back upon risk purchase being made by concluding contracts with other parties when the contract was breached by non-performance by June, 2008. Letters dated October 22, 2008, October 31, 2008 and December 01, 2008 written by SAIL were relied upon.

46. Para 63 of the Award would reveal that the learned Arbitrator has noted that there is an accepted practice of carry over in connection with supply of coal under the long term agreements. This finding by the learned Arbitrator is supported by the testimony of the two witnesses examined by VALE/AMCI. Under the circumstances, the very basis of the argument that letters written by SAIL amounted to time being

extended to complete the contract is unfounded. We have already held hereinabove that in view of the practice in the trade of carry over in connection with supply of coal under the long term agreements, letters written by SAIL on the subject have to be treated as enabling VALE/AMCI to participate in future supplies and simultaneously make good the existing shortfall i.e. participate in the risk purchase process.

47. The sixth argument was that the finding by the learned Arbitrator on the quality of coal offered to be supplied from the Broadlea Coal Mines, suffice would it be for us to note that from the facts noted in para 14 above, it is apparent that on May 12, 2008 VALE attached for consideration by SAIL the technical quality analysis certificate of coal from its Broadlea Carborough Mines to which SAIL responded on July 28, 2008 that the same would be considered by its Empowered Joint Committee and requested AMCI/VALE to confirm a date convenient for the meeting. VALE/AMCI never responded. On September 24, 2008 SAIL informed AMCI/VALE that a meeting of its Empowered Joint Committee was scheduled to be held on September 29, 2008. A request was made to depute somebody to attend the meeting so that an agreement for future supplies including to make good the contracted supplies could be entered into. AMCI/VALE did not depute any person. On October 22, 2008 SAIL wrote a letter to VALE/AMCI that contracted quantity of coal be supplied. The request was reiterated on October 31, 2008. VALE sent a letter on October 17, 2008 proposing a contract for the next year at fair market price to be mutually agreed, which offer was informed as being vague. Neither VALE nor AMCI responded on the subject.

48. Being a finding pertaining to a matter of fact and interpretation of the letters exchanged, it would be impermissible for a Court to even relook into the matter while considering objections to the Award.

49. The seventh and the eight limb of objection to the Award were that since SAIL had accepted the offer of alternative supply of coal by extending time for performance of the agreement, it had waived its right to undertake risk purchase and that the finding in the award and the impugned judgment that VALE/AMCI did not offer any reason or explanation to account for failure to supply the contracted quantity of coal was irrelevant because SAIL has been awarded the amount on account of risk purchase.

50. The arguments are nothing but another facet of the submissions advanced pertaining to risk purchase and for our reasons above, simply highlighting that risk purchase in the instant case has not to be treated as conventionally understood, we reject the submissions.

51. The last contention urged by VALE/AMCI was on the costs awarded by the learned Arbitrator premised on the plea that since SAIL gave up certain claims, at best, proportionate costs should have been awarded. It was urged that the dispute

being bona fide, parties should have been left to bear their own costs. The argument is repelled for the reason it fell within the domain of the Arbitrator to decide which party would bear the cost and it is settled law that with respect to discretions exercised by Arbitrators, a Court would not substitute its view.

52. Accordingly, we hold that there is no merit in FAO (OS) No. 210/2012 and FAO (OS) 215/2012 filed by VALE and AMCI respectively.

53. As regards FAO (OS) No. 214/2012 filed by SAIL, we find no merit therein for the reason the learned Single Judge has correctly held that save and except the amounts awarded as per the award dated March 10, 2011, all other claims were rejected, and this obviously included the claim towards post-award interest. The reasoning by the learned Arbitrator in the order dated May 16, 2011 that he consciously omitted to grant post-award interest in view of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which envisages interest at the rate of 18% per annum unless otherwise directed, runs in the teeth of the fact that being an international contract where payments had to be made in US$, pre-award interest has been awarded taking into account Libor rate of interest. We find that the learned Arbitrator has awarded interest at the rate of 2.335364% per annum and surely the learned Arbitrator would be contradicting himself if pre-award interest is restricted keeping in view rate of interest as per Libor and post-award interest to be 18% per annum.

54. Accordingly, FAO(OS) No. 214/2012 is also liable to be dismissed.

55. All appeals i.e. FAO (OS) No. 210/2012, FAO (OS) No. 214/2012 and FAO (OS) No. 215/2012 are dismissed with parties to bear their own costs in the appeal.

56. Vide order dated May 18, 2012, upon furnishing bank guarantees either jointly or severally by Vale Australia Pty. Ltd. And AMCI Pty. Ltd. operation of impugned order dated March 30, 2012 was stayed. The bank guarantee(s) have been furnished as informed by the Registry. The same be encashed after six weeks from today. We make the bank guarantee(s) encashable after six weeks to enable VALE/AMCI to avail further remedy before the Supreme Court.