I. Case Reference

Case Citation	:	(2020) ibclaw.in 169 SC
Case Name	:	Anglo American Metallurgical Coal Pty Ltd. Vs. MMTC Ltd.
Appeal No.	:	Civil Appeal No. 4083 of 2020 (Special Leave Petition (Civil) No. 11431 of 2020)
Judgment Date	:	17-Dec-20
Court/Bench	:	Supreme Court of India
Coram	:	Mr. Justice R.F. Nariman and Mr. Justice K.M. Joseph
Original Judgment	:	Download

II. Full text of the judgment

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. This appeal is at the instance of an Australian company, Anglo American Metallurgical Coal Pty. Ltd. ["**Appellant**"], which produces and exports certain types of coal. By a Long Term Agreement dated 07.03.2007 ["**LTA**"], between the Appellant and MMTC Ltd. ["**Respondent**"], the Appellant, referred to as the "seller" in the LTA, agreed to supply certain quantities of freshly mined and washed "German Creek", "Isaac" (Blend of 65% Moranbah North and 35% German Creek coking coals) and "Moranbah North" coking coal to the Respondent. Clause 1 of this LTA is material and states as follows:

> **"CLAUSE 1: MATERIAL, QUANTITY, QUALITY AND DELIVERY PERIOD:**
>
> The SELLER shall sell and the PURCHASER shall buy,
>
> a) The base quantity during the currency of the contract shall be 466,000 (Four hundred Sixty Six thousand) metric tons (of one thousand kilograms each) firm.
>
> b) During the First Delivery Period (1st July, 2004 to 30th June, 2005), a quantity of 464,374 (Four Hundred Sixty Four Thousand, Three Hundred and Seventy Four) metric tons (of one thousand Kilograms each) firm quantity of freshly mined and washed "Isaac", "Moranbah North" and "German Creek" coking coals.
>
> c) During the Second Delivery Period (1st July, 2005 to 30 June, 2006) a quantity of 382,769 (Three Hundred Eighty Two Thousand, Seven Hundred and Sixty Nine) metric tons (of one thousand kilograms each) firm quantity of freshly mined and washed "Isaac", "Moranbah North" and "German Creek" cooking coals.
>
> d) During the Third Delivery Period (1st July, 2006 to 30th June, 2007) a quantity of 466,000 (Four Hundred Sixty Six Thousand) metric tons (of one thousand Kilograms each) firm quantity of freshly mined and washed "Isaac", "Moranbah North" and "German Creek" coking coals.

e) During the subsequent Delivery Periods, in case of the PURCHASER exercising the option to extend the duration of the Agreement by two more years, at its sole discretion, as indicated at Para 1.3 herein below, a quantity of 466,000 (Four Hundred Sixty Thousand) metric tons (of one thousand kilograms each) of freshly mined and washed "Isaac", "Moranbah North" and "German Creek" coking coals hereinafter referred to as the MATERIALS, in conformity with the Technical Specifications incorporated in Annexure – IIB (applicable for "Moranbah North" coking coal) and Annexure IIC (applicable for "German Creek" coking coal) to this Agreement and which shall constitute an integral part of this Agreement, for use of imported coking coals in the coke ovens in its integrated iron and steel works for production of metallurgical coke. The quality of the prime washed coking coals to be supplied under this Agreement shall under no circumstances be inferior to the Technical Specifications as contained in Annexure IIA, Annexure IIB and Annexure IIC to this Agreement as applicable.

1.1.1 Annual base quantity from 1st July, 2007 to 30 June, 2009, in case Purchaser exercises its option to extend the Agreement by 2 years, shall be 466,000 metric tonnes, subject to further discussions at the time of contract extension and the logical contract specification modifications to reflect the changing nature of existing reserves at the Moranbah North and German Creek mining operations will be mutually agreed.

1.2 For the purpose of this Agreement, the Delivery Period shall be reckoned as follows:

First Delivery Period 1st July 2004 to 30th June 2005

Second Delivery Period 1st July 2005 to 30th June 2006

Third Delivery Period 1st July 2006 to 30th June 2007

The shipments will be evenly spread during each Delivery Period. The PURCHASER reserves the right to prepone shipments against any Delivery Period based on its requirement and subject to availability with the SELLER.

The Purchaser reserved the right to postpone the deliveries to be effected under each Delivery Period by upto 3 months i.e. the month of September following each Delivery Period, without any additional financial liability to the PURCHASER.

1.3 The PURCHASER had the option to extend the duration of the Agreement by two more years, at its sole discretion and the Purchaser to exercise its option for extending the Agreement by two more years or otherwise by 31st January, 2007. In case the PURCHASER decides to exercise such option, at its sole discretion, the Agreement shall have two more Delivery Periods as follows:

Fourth Delivery Period: 1st July 2007 to 30th June 2008

Fifth Delivery Period: 1st July 2008 to 30th June 2009"

3. Under clause 2 of the LTA, which refers to "Price", for subsequent Delivery Periods, including the "Fifth Delivery Period", with which we are directly concerned, it is undisputed that when read with Annexure I of the LTA and a letter dated 14.08.2008, setting out the terms of the Fifth Delivery Period, the price was fixed at $300 per metric tonne. Clause 2.2 is important and states as follows:

"**CLAUSE 2: PRICE**

xxx xxx xxx

2.2 The Price for the Delivery of AGREEMENT quantity for subsequent Delivery Periods shall be fixed in accordance with Para I of Annexure-1 and shall be firm and shall not be subject to any escalation for any reason, whatsoever, until the completion of delivery of the AGREEMENT quantity due for delivery in the relevant Delivery Period with such extensions as might be mutually agreed upon between the PURCHASER and the SELLER."

4. Disputes arose between the Appellant and the Respondent as to shipments or "stems" that were to be covered by the Fifth Delivery Period, which ranged from 01.07.2008 to 30.06.2009, the parties mutually extending this period to 30.09.2009. A number of emails and letters were exchanged between the parties from August 2008 to December 2009, which were examined in detail by a panel of arbitrators consisting of Mr. Peter Leaver (Queen's Counsel), Justice V.K. Gupta (Retd.) and Mr. Anthony Houghton (Senior Counsel) ["**Arbitral Tribunal**"] who sat at New Delhi and delivered their international arbitral award in New Delhi on 12.05.2014. It may be stated at the outset that the award is a majority award of Mr. Peter Leaver and Mr. Anthony Houghton ["**Majority Award**"], in favour of the Claimant, being the Appellant before us, a dissenting award being delivered by Justice V.K. Gupta ["**Dissenting Award**"], in which the claim of the Appellant was dismissed in its entirety.

5. The Majority Award was challenged under section 34 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act"**] before a learned Single Judge of the High Court of Delhi ["**Single Judge"**], who upheld the Majority Award by a judgment dated 10.07.2015. However, by the impugned judgment dated 02.03.2020, a Division Bench of the High Court of Delhi ["**Division Bench**"] set aside the judgment of the Single Judge and allowed an appeal filed under section 37 of the Arbitration Act by the Respondent, setting aside the Majority Award.

6. The Majority Award contains detailed reasons, and since it is the subject matter of intense debate between the parties, it is important to set out the facts found by the Majority Award, together with the material findings and ultimate award.

5a. Under the heading, "*I. Common Grounds and Issues in Dispute"*, the Majority Award set out what it describes as the undisputed facts, as follows:

"I. Common Ground and Issues in Dispute

34. Before setting out the List of Issues to be decided by the Tribunal, some of the undisputed facts are summarised by way of background. These matters, of what the Tribunal understands to be common ground, are summarised also in the Claimant's Opening Submission dated 16th September 2013.

35. By a Long Term Agreement dated 7th March 2007 under which the Respondent contracted to purchase freshly mined and washed coking coal from the Claimant on FOB (trimmed) basis from DBCT Gladstone in Australia. The Long Term Agreement they signed was extended by agreement and is to be read along with Addendum No.2 dated 20th November 2008. As referred to at paragraph 5 above, the Long Term Agreement as extended by Addendum No. 2 is referred to herein as "the Agreement".

36. Prior to Addendum No.2, the Agreement encompassed three Delivery Periods of one

year each commencing on 1st July 2004 and concluding on 30th June 2007. The Long Term Agreement included a provision (at Clause 1.3) that gave the Respondent an option to extend the Long Term Agreement for two more Delivery Periods, and this option was exercised such that purchases and deliveries were also to be made in a Fourth Delivery Period (between 1st July 2007 and 30th June 2008); and a Fifth Delivery Period (1st July 2008 to 30th June 2009).

38. In regard to these two additional Delivery Periods it was provided that the Respondent would purchase 466,000 MT of coking coal during each Delivery Period (Clause 1.1.1).

39. The matters which are in dispute arise out of the Fifth Delivery Period. This was to have run to 30th June 2009, but was extended by agreement between the parties so as to expire on 30th September 2009 as confirmed in the Claimant's letter to the Respondent dated 14th August 2008. The coking coal to be supplied was of two types (Isaac Coking Coal blend and Dawson Valley blend) and the agreed price for each for the Fifth Delivery Period was US$300 per MT. That price was agreed by the parties in accordance with the Agreement, and was confirmed by letter from the Respondent to the claimant dated the 20th November 2008.

40. It is not in dispute that the Respondent lifted only two shipments at the agreed price of US$300 per MT during the Fifth Delivery Period. The first was on 30th October 2008, and was a quantity of 2,366 MT, and the second on 5th August 2009, when the Respondent lifted another 9,600 MT.

41. The first of these shipments was via the 'Furness Hartlepool' and was part of a larger shipment under which 48,655 MT was lifted in respect of balance quantities under the Fourth Delivery Period (at the agreed rate for that period of US$96.40 per MT). The Fifth Delivery Period component of this delivery was 2,366 MT and this was transacted at the agreed price of US$300 per MT.

42. The second of these shipments was an ad hoc agreement made in a meeting on 15th July 2009 and confirmed in writing by the Respondent on 22nd July 2009. That ad-hoc agreement ("the Sea Venus agreement") was for 50,000 MT of coal under which 9,600 MT was to be purchased at the contractual price of US$300 per MT, but the balance 40,400 MT was to be sold at an ad hoc price of US$128.25 per MT.

43. Even after these two deliveries were made there was a considerable shortfall in deliveries against the contracted quantity for the Fifth Delivery Period. The total quantity actually lifted in respect of the Fifth Delivery Period was 11,966 MT (2,366 + 9,600MT) as compared to the contracted quantity of 466,000MT. Accordingly, the quantity not lifted by MMTC amounts to 454,034 MT.

44. This quantity not lifted underpins the Claimant's claim, which is for damages arising out of an alleged breach on the part of the Respondent in not lifting the contracted quantity. The loss claimed by the Claimant is the difference between what is said to have been the market price, and the contract price.

45. For its part the Respondent denies any breach on its part in not having lifted the

contracted quantity. This is because, according to the Respondent, the Claimant did not in fact have the goods available for delivery to the Respondent. The Respondent's contention is that the Claimant's marketing manager expressed an inability to supply cargo under the Fifth Delivery Period, and the Respondent says that this was a simple refusal to perform the obligation to supply coal under the Agreement. Correspondingly, the Respondent contends that it was the Claimant which was in breach of the Agreement.

46. The detailed issues which arise, as defined in the Terms of Reference and, as these were supplemented, are as follows:

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."

5b. Under the heading, "*M. The Correspondence Regarding Deliveries*", the Majority Award referred to the various emails and letters exchanged between the parties, as follows:

"M. The Correspondence Regarding Deliveries

56. The correspondence directly concerning deliveries in mid 2009 comprises only a few documents. Firstly, on 11th March 2009 the Claimant wrote to the Respondent:

"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."

57. On 2nd July 2009 the Respondent wrote to the Claimant, requesting, the Respondent submits, the Claimant to indicate stem availability for two deliveries, one each in August and September 2009. The Respondent said:

"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 August 09 and one in September 09. Please confirm availability and convey the laycans."

58. On 3rd July 2009 the Claimant wrote to Mr. Babu of the Respondent seeking time to respond to the request. However there was no follow up from the Claimant. On 21st July 2009 the Respondent again requested confirmation of stem availability:

"We are awaiting stem confirmation from Anglo for August 2009. Please note we have given our Indent well in advance. The flexibility of laycan vested with you completely. We look forward to hear from you..."

59. On 22nd July 2009 the Claimant responded, stating:

"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"

60. The Respondent submits that this means what it literally says; the Claimant refused to confirm stem availability for August and September 2009 due to a lack of availability. Correspondingly, the Claimant failed to supply the contracted material within the Fifth Delivery Period.

61. On 4th September 2009, the Respondent wrote to the Claimant stating that:

"Our cokery has in*creased the pushing's with the result, requirements of coking coal has gone upto 90,000t/month. After Anglo has not given any stem to MMTC. Seavenus [sic] Please give US' one stem of 50,000MT each in October and November 09."*

62. Once again the Claimant (through Mr Wilcox) expressed itself to be unable to supply the coal under the Fifth Delivery Period because of non availability for the remainder of the year 2009 (e-mail of 7th September, 2009). Mr. Wilcox stated:

"Dear Suresh,

....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. "

63. On 21st September 2009 the Claimant wrote as follows:

"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 terms 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."

64. The author of the letter (Mr. Elliott, the General Manager, Marketing and Transportation of the Claimant) then set out the terms which had been agreed with SAIL/RINL and set out a proposal for delivery of the "carryover" quantity and for renewal of the agreement with the Respondent.

65. On 25th September 2009 the Respondent (Mr. Babu) responded to that letter. The response stated that the proposal was "near to impossible" in that it envisaged the Respondent lifting a very substantial quantity of the carryover quantity by end March 2010. The letter then stated:

"In this connection, It may please be appreciated that RINL 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 of 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 at least one shipment of 50,000MT each from October 09 onwards instead of zero stem till end of 2009." "

5c. After setting out summaries of the Claimant's case and the Respondent's case, under the sub-heading, "Availability of Coal", the Majority Award accepted the evidence of Mr. John B. Wilcox, Marketing Manager, on behalf of the Appellant, reading the same with the Respondent's letter dated 20.11.2008, as follows:

"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 December2009. 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.

120. Mr. Wilcox in his Additional Affidavit informed the Tribunal that the Claimant was not a trader in coal but owned coal mines in Australia and had a railway system in place to ensure smooth shipments. He stated that at the relevant time the market was affected by the global financial crisis which brought about a crash in the demand for steel and, consequently, for the relevant type of coking coal. He said that, at the relevant time, the Claimant had a large quantity of surplus production, some of which was sold off by way of "*distress sales*" during the Fifth Delivery Period.

121. Mr. Wilcox was challenged in cross examination (Q40) as to the availability of cargo to supply to the Respondent between July 2009 and 21st September 2009. He disagreed that the Claimant had no supply, stating that the Claimant was producing around 1,000,000 tonnes per month during this period. He said that it would have been very easy for the Claimant to produce coal for the Respondent had they been willing to pay the contract price.

Subsequently (Q43-Q45) he was challenged about the alleged distress sales. He confirmed that such distress sales were made. His affidavit indicated such sales amounted to approximately 712,000 MT, and that these sales were made at between US$83 and US$113 per MT, far below the price agreed with the Respondent.

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 dollars is further added to our woes .... In view of unprecedented recessionary trends in the economy and consequent abnormal low 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."

5d. Under the sub-heading, "*Failure to Offer Stem?*", the finding of the Majority Award was as follows:

"Failure to Offer Stem?

> xxx xxx xxx
>
> 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."

5e. Under the sub-heading, "*Offer of Supply*", the Appellant's letter dated 11.03.2009 was set out in which the Appellant demanded that the Respondent propose a Delivery Schedule for the coal in question. The Respondent denied the receipt of this letter. However, the Majority Award found as follows:

"Offer of Supply

> xxx xxx xxx
>
> 139. Mr. Babu does not rebut the existence of the meeting in April. Nor does he deny having received the 2nd e-mail transmission on 12th March. He merely said in his evidence that there was no need for him to be concerned with the attachments to that e-mail. That does not amount to evidence that the letter was not received.
>
> 140. Moreover, the Claimant referred to its letter of 11th March in a letter sent on 21st September 2009 (Vol.2, page 21) which opened with the sentence "*We refer to our letter of 11th March 2009 to which we have not yet received a response*.". The Claimant did receive a response to the letter of 21st September (Vol.2, page 23) sent on behalf of Mr. Babu, but that response expressed no surprise regarding the reference to a letter of 11th March 2009, nor did it state that no such letter had been received.
>
> 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."

5f. Under the further sub-heading, "*What Was the Respondent Seeking in its emails in June/July 2009?*", the Majority Award found as follows:

"What Was the Respondent Seeking in its emails in June/ July 2009?

142. It appears to the Tribunal that the stage was set for the dealings between the two parties in regard to the Fifth Delivery Period at the time that they agreed the rates for that delivery period. As referred to above, there does not seem to be any dispute that contemporaneously with the agreement of the rates for the Fifth Delivery Period the market price of coal fell markedly, and the Respondent immediately came back to the Claimant to ask for some reconsideration of the agreed rate for deliveries.

143. As the Tribunal has found to be the case above, when the Claimant wrote to the Respondent on 11th March 2009 seeking a delivery schedule for the then outstanding quantities under the Fifth Delivery Period, it met with no response. It is common ground that only a very small quantity of the total due under the Fifth Delivery Period was in fact uplifted by the Respondent; one delivery of 2,366 MT on 30th October 2008 via the 'Furness Hartlepool' was added to balance quantities under the Fourth Delivery Period, and one delivery on 5th August 2009, when the Respondent lifted another 9,600 MT. The second of these shipments was the ad hoc Sea Venus agreement for delivery between 10th and 20th July 2009 (Vol. 2, pages 9- 12).

144. The ad-hoc Sea Venus agreement was for 50,000 MT of coal under which 9,600 MT, or thereabouts was transacted at the price of US$300 per MT, with the balance 40,400 metric tonnes sold at an ad hoc price of US$128.25 per MT. This was said to have been a "*goodwill gesture*"
(Vol.2, page 9).

145. The market price remained low throughout the Fifth Delivery Period (see for example the agreement made by the Claimant with SAIL/RINL on 15th July 2009 (Vol.2, pages 13-20) agreeing rates at below US$129.00 per MT) and, viewed commercially there was little incentive for the Respondent to continue to purchase from the Claimant at the agreed rates.

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 2nd 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 2 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 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 background 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.

150. The Respondent's letter of 25th September 2009 is consistent only with the Respondent having sought discounted price supply in the July/August period. The letter described the difficulty the Respondent would face in incurring losses by purchasing proportions of the "*carry over quantity*", that is the unfulfilled part of the quantities under the Fifth Delivery Period. The Respondent had proposed, in line with an agreement made by the Claimant with SAIL/RlNL, to purchase only 18.7% of the carry over quantity, and was, in the correspondence, balking at the suggestion made on behalf of the Claimant that 56.7% of that quantity be lifted by 31st March 2010. This was described by the Respondent as "*near to impossible*'', and the Respondent asked the Claimant not to ignore the economic realities completely.

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 200[9]). 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."

5g. Under the sub-heading, *"Limitation*", the Majority Award held:

"155. It follows that the Claimant's notice of arbitration, which was issued on 24th September 2012 and received by the Secretariat on the same day was issued and the arbitration commenced within the three-year limitation period."

5h. Under the sub-heading, "*Proof of Damage*?", the Majority Award found:

"Proof of Damage?

156. It appears to the Tribunal, with respect to the Respondent, that this is a hopeless line of argument. There is ample evidence of the market price for coal in 2009 both in the Affidavit and Additional Affidavit of Mr. Wilcox (which details the prices at which the Claimant was selling coal to Chinese parties during the Fifth Delivery Period), but also in the contemporaneous correspondence, including the Respondent's letter of 3rd December 2009 and the agreement reached between the Claimant and SAIL/ RlNL. The Respondent was itself purchasing coal from BHP Mitsui at about US$128 per MT at about this time.

157. There is no dispute as to the relevant quantity of coking coal which was not lifted, and the Tribunal accepts (this not being a matter of dispute) that the difference between the market rate and the contracted rate represents the correct measure of damages. That is the basis upon which the Claimant's claim has been evaluated in its claim documents. Accordingly the Tribunal accepts the Claimant's evidence as to the quantum of its loss."

5i. Finally, therefore, in a useful summary, the Majority Award held:

"Summary

180. Having read heard and considered the evidence and submissions of the parties and for the reasons given above the Tribunal finds, and holds, unanimously save where indicated, as follows:

(a) The Respondent committed a breach of contract by not lifting 454,034 MT of coking coal within the Fifth Delivery Period, which expired on 30th September 2009.

(b) The Claimant was not in breach of contract in failing to supply goods to the Respondent during the Fifth Delivery Period.

(c) The Claimant was, at all material times in a position to perform its obligations under the Agreement by supplying the requisite quantities in a timely manner in accordance with the Agreement.

(d) The Claimant's claims are not barred by limitation."

5j. The award, therefore, in favour of the Appellant, was then stated as follows:

"Dispositive Section

181. For the above reasons the Tribunal Orders and Directs that:

(1) By a majority, the Claimant is entitled to damages from the Respondent in the sum of US$78,720,414.92.

(2) By a majority the Tribunal concludes that the Claimant is entitled to simple

interest on such damages in the sum of US$27,239,420.29 in respect of interest up to the date of this Award, and at a rate of 15% p.a. on the principal sum from the date of this Award until payment.

(3) The Claimant is entitled to its costs of the arbitration which, by a majority we assess in the amount of US$977,395.00.

(4) The sums set out above as being due to the Claimant are due as at the date of this Award and are to be paid by the Respondent.

(5) This Award is final as to the matters in dispute between the parties and referred to arbitration before us. All other requests and claims by the parties are dismissed."

7. Justice V.K. Gupta (Retd.), in his Dissenting Award found as follows:

"4. Analysis

xxx xxx xxx

(k) In the totality of circumstances and after appreciating the contractual provisions and the conduct and evidence led by the Claimant I find apart from one request for the delivery schedule from the Respondent vide letter dated 11th March 2009 there is no evidence on record to show that the claimant had the contracted material ready to supply. Even the chart showing supplies to the third parties filed by the Claimant along with the additional evidence of Mr. John Wilcox indicates that the supplies of the entire quantity of the material available with the Claimant had already been made to all the other Buyers and it appears that the Claimant did not have the material to supply under the Contract at least for the period between July to September 2009 which was the contracted period.

(l) It is incomprehensible that a party which was ready with such huge quantity of coal would not send follow up communications to the Respondent urging them to lift the contracted goods if such goods were ready at the load port. Not a single document has been produced in terms of which the Claimant could show that it had written to the Respondent that so much quantity of material was sitting at the load port and that MMTC has failed to nominate the vessel. After the 11th March 2009 letter there is no other communication addressed by the Claimant to the Respondent requesting the Respondent to provide the delivery schedule. On the contrary in their emails they expressed their inability to supply any cargo within the delivery period. It appears that there were several Buyers between July and September 2009 on account of shortage of coking coal and that there was sudden increase in demand of coal and during the month of July and September 2009 and that the Claimant had over committed the supply and had supplied the contracted quantity to the third parties.

(m) In my view the claimant did not have the contracted material or it diverted the contracted material to a third party and therefore was unable to make the contracted material available under the Contract. The Claimant was therefore unable to supply the contracted material and was in breach itself.

(n) The Claimant being itself in breach is not entitled to claim any damages."

The Dissenting Award also found that the Appellant had failed in discharging its burden of proving the quantum of damages as on the date of breach of the LTA.

8. The learned Single Judge, by a judgment dated 10.07.2015, after setting out the relevant facts, dismissed the Respondent's plea of limitation and then found:

> "45. The majority Award concluded that there was in fact no repudiation of the contract by Anglo and that in any event no acceptance of such repudiation by MMTC. The Court is required to examine whether such conclusion is perverse or patently illegal as contended by MMTC. In the first place it appears that it was not the case of MMTC earlier that the letter dated 21st September, 2009 constituted repudiation by Anglo of the contract. In its reply dated 25th September, 2009, MMTC did not suggest that Anglo had repudiated the contract. It viewed the said letter dated 21st September, 2009 as a request from Anglo to start lifting the contractual quantities. This explains why MMTC in the said reply expressed inability to lift 2,25,174 MT by 31st March, 2010 since it seemed "near to impossible as it worked out to 56.7% of the carryover tonnage." It sought a reduction in prices hoping that Anglo would "not ignore the economic realities completely". MMTC stated that "In short, we are not denying our obligation. The request is only for staggering the time frame for lifting..." In its letter dated 3rd December, 2009 MMTC sought Anglo's help in the matter "so that somehow we are able to run the plant by having a mixture of costly coal which we are committed to lift vis-a-vis the coal at new contract prices." The letter dated 21st September, 2009 when read as a whole and in the context of the above correspondence reflects what the majority Award has rightly understood, viz., that Anglo, far from repudiating the contract or bringing it to an end, was offering MMTC a way to spread out its obligation to lift the carry over quantity over the subsequent period."

A plea of bias levelled against one of the arbitrators, namely, Mr. Peter Leaver, was also rejected. It was found, after copious references to both oral and documentary evidence, that the view of the Majority Award, being a possible view on the Respondent being in breach and the Appellant having proven quantum of damages, that no ground under section 34 of the Arbitration Act for interfering with the Majority Award was made out.

9. The impugned judgment of the Division Bench dated 02.03.2020, after setting out the facts, the Majority Award and the Single Judge's conclusions, based its decision on an appreciation of three emails between the parties, which were picked out of the entire correspondence, namely, emails dated 02.07.2009, 22.07.2009 and 07.09.2009. The Division Bench referred to these as "critical emails", finding:

> "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 emails 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."

As a result, the Division Bench concluded:

> "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."

After setting out in some detail, the judgment in **Associate Builders v. DDA,** (2015) 3 SCC 49 ["**Associate Builders**"], the Division Bench held as follows:

> 33. … 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."

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 emails/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 along with interest of USD 27,239,420.29 calculated upto the date of the award, along with 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"

10. Shri Kapil Sibal, learned Senior Advocate appearing on behalf of the Appellant, painstakingly took us through the LTA and the entire correspondence that ensued between the parties. He

argued that all the findings given by the Majority Award were findings of fact, there having been little dispute on the construction of any term of the LTA; no dispute as to the contracted quantity of coal that was to be supplied in the Fifth Delivery Period, i.e., 466,000 metric tonnes; no dispute as to the price at which such coal was to be supplied, i.e., at the rate of $300 per metric tonne; and no dispute as to the quantity of coal that remained unlifted, i.e., 454,034 metric tonnes. The only issue before the Arbitral Tribunal was whether the Appellant was unable to supply the contracted quantity of coal at the contractual price, or whether the Respondent was unwilling to lift the quantity of coal at the contractual price, both being purely questions of fact as to the performance of contractual obligations stemming from the LTA.

11. Shri Sibal then argued that a crucial letter dated 11.03.2009, by which the Appellant requested the Respondent to propose a Delivery Schedule under the LTA, remained unanswered, the Majority Award having found as a matter of fact that the said letter was received by the Respondent. In any event, he argued that the Appellant's letter dated 21.09.2009, which referred to the letter dated 11.03.2009, would clinch the case in the Appellant's favour, as this letter clearly referred to the delivery of the balance quantity of coal, giving a without prejudice offer, open and capable of acceptance until 30.09.2009. The Respondent's only response to this was by a letter dated 25.09.2009, in which the obligation to lift coal at the contractual price was admitted, the Respondent asking for a reduction in price, without ever stating that it had not received the letter dated 11.03.2009. This, he argued, showed the Appellant's willingness to perform the deliveries as per the LTA, by demanding a Delivery Schedule from the Respondent. His argument, therefore, was that the Majority Award and the learned Single Judge, after referring to the entirety of the correspondence, arrived at the conclusion that the Respondent was in breach of the LTA, whereas the Division Bench arbitrarily picked out three emails out of the welter of correspondence between the parties, ignoring what was communicated before and after those three emails, thereby arriving at a faulty conclusion on facts, as if it were a court of appeal.

12. Shri Sibal also argued that to get over the parameters of judicial review of arbitral awards laid down in **Associate Builders** (supra), the Division Bench wrongly stated that there is "no evidence" to support the conclusion that the Respondent was seeking stems of coal at a reduced rate, below the contractual price, and pointed out several letters and emails showing this to be entirely incorrect. It was also entirely incorrect for the Division Bench to have concluded that there was "no evidence" to support the conclusion that the Appellant had coal available to supply to the Respondent, which would amount to ignoring the evidence of Mr. Wilcox, as well as the documentary evidence of the correspondence between the parties. Equally, he argued that the market price of coal at the relevant period was clearly proven by the figures supplied by Mr. Wilcox and therefore, for the Division Bench to state that there is "no evidence" to prove the market price of coal at the time of breach, was also completely incorrect.

13. Shri Neeraj Kishan Kaul, learned Senior Advocate, supplemented the submissions of Shri Sibal and stated that the overall context of the correspondence showed that the Respondent repeatedly asked for supplies to be made at a price lower than the contractual price throughout the Fifth Delivery Period, since it was clearly unable to lift coal at the price of $300 per metric tonne. Even when only two months in the Fifth Delivery Period were left, a maximum of 50,000 metric tonnes of "mixed" supply was asked for, at a "mixed" rate of $300 per metric tonne and at a rate much lower than that. He also referred to Mr. Wilcox's testimony to argue that the Appellant was a major producer of coal and huge quantities of coal were produced at the time of the Fifth Delivery Period,

in July 2009, which could have easily been supplied, had the Respondent demanded the balance unlifted quantity of 454,034 metric tonnes at the price of $300 per metric tonne.

14. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of the Respondent, supported the impugned judgment of the Division Bench and took us through the correspondence between the parties, the Majority Award, the Dissenting Award, and the judgments of the learned Single Judge and the Division Bench. According to him, this Court ought not to interfere under Article 136 of the Constitution of India, given the fact that the Division Bench had not acted as a court of appeal, but had specifically followed the judgment in **Associate Builders** (supra), in that, it found the present case to be a case in which "no evidence" was led on the crucial issues of breach, as well as quantum of damages. According to him, the three crucial emails that were relied upon by the Division Bench were correctly relied upon, as these emails would unequivocally show that the Appellant was not in a position to supply coal, and that the Respondent was in a position to take supplies, and did in fact demand that supplies of coal be made in accordance with the LTA.

15. Shri Rohatgi then referred to clause 7.2 and annexure IV of the LTA, dealing with the intimation of a Delivery Schedule, and stated that under the LTA, it was first incumbent upon the Appellant, as the seller, to ensure that sufficient quantities of coal were available, subsequent to which, the nomination of a vessel was to take place before a Delivery Schedule would be agreed upon between the parties. He argued, based on the emails and letters exchanged between the parties, that in point of fact, only one ad hoc shipment took place at a "mixed" rate, partially at the contractual price of $300 per metric tonne and partially at the rate of $128.25 per metric tonne, under which an ad hoc quantity of 50,000 metric tonnes was supplied in August 2008. It was thus clear that when the Appellant stated that it was "unable to confirm a stem in Aug/Sep" and that it did not have "any coal availability for the remainder of the year", the Appellant breached and repudiated the LTA. According to Shri Rohatgi, the three critical emails referred to by the Division Bench were crystal clear and unequivocal, and could not be contradicted by oral evidence, the Majority Award, therefore, being wholly incorrect in arbitrarily and capriciously relying upon statements by Mr. Wilcox, to attempt to explain what was unequivocally stated in these emails. He also added that the Division Bench's conclusion of there being no evidence as to the market price of coal as on the date of breach was correct, and cited a number of judgments to buttress his submissions.

16. Having heard the learned counsel appearing for the parties, there can be no doubt whatsoever that the Majority Award is a detailed award, which goes into the facts in great detail, outlines the issues to be answered, and then answers all the issues, with due regard to the oral and documentary evidence given in the case.

17. The first and most important point, therefore, to be noted is that this is a case in which there is a finding of fact by the Majority Award that the Appellant was able to supply the contracted quantity of coal for the Fifth Delivery Period, at the contractual price, and that it was the Respondent who was unwilling to lift the coal, owing to a slump in the market, the Respondent being conscious of the fact that mere commercial difficulty in performing a contract would not amount to frustration of the contract. It was for this reason that the Respondent decided, as an afterthought, in reply to the Appellant's legal notice dated 04.03.2010, to attack the Appellant on the ground that it was the Appellant that was unable to supply the contracted quantity in the Fifth Delivery Period. Once this becomes clear, it is obvious that the Majority Award, after reading the entire correspondence

between the parties and examining the oral evidence, has come to a possible view, both on the Respondent being in breach, and on the quantum of damages.

18. We may hasten to add that the entire approach of the Division Bench is flawed. First and foremost, to cherry-pick three emails out of the entire correspondence and to rest a judgment on those three emails alone, without having regard to the context of the LTA and the correspondence, both before and after those three emails, would render the judgment of the Division Bench fundamentally flawed. Further, the finding that there was "no evidence" that the Respondent demanded stems of coal at a reduced rate vis-à-vis the contractual rate, flies in the face of at least three different exchanges between the parties, being the Respondent's letters dated 20.11.2008, 27.11.2009 and 03.12.2009.

19. Equally, the finding of the Division Bench that no evidence had been led to show that the Appellant had availability of the balance quantity of 454,034 metric tonnes of coal to supply to the Respondent during the Fifth Delivery Period, again completely fails to appreciate Mr. Wilcox's evidence given by way of an Additional Affidavit dated 03.09.2013 and in response to questions in cross-examination before the Arbitral Tribunal on 23.09.2013, together with two letters exchanged between the parties on 21.09.2009 and 25.09.2009. All of these aspects were considered in the Majority Award of the Arbitral Tribunal.

20. The finding that there is "no evidence" to prove market price of coal at the time of breach, and that therefore, quantum of damages could not be fixed, again completely ignores Mr. Wilcox's evidence in chief and cross examination; the Respondent's letters dated 25.09.2009, 27.11.2009 and 03.12.2009; as also the Appellant's re-negotiated contracts with SAIL/RINL. All these aspects have been considered by the Majority Award in great detail.

21. However, Shri Rohatgi invited us to look at the unequivocal language contained in the three emails relied upon by the Division Bench, namely the emails dated 02.07.2007, 22.07.2009 and 07.09.2009, which stated that not only were no stems available for August/September 2009, but that also there was no coal left for the remainder of the year, making it clear that this was an admission on the part of the Appellant that it was unable to supply the contracted quantity of coal during the remainder of the Fifth Delivery Period. However, what is missed by Shri Rohatgi is the crucial fact that no price for the coal to be lifted was stated in any of the emails or letters exchanged during this period. This is in fact what the Majority Award adverts to and fills up by having recourse to the evidence given by Mr. Wilcox, stating that the ambiguity qua price was resolved by the fact that no coal was available for lifting at a price lower than the contractual price. The Majority Award found, relying upon Mr. Wilcox's evidence, that the supplies that were sought to be made in August and September, 2009 were therefore, also in the nature of "mixed" supplies, i.e., coal at the contractual price, as well as coal at a much lower price. This is a finding of fact that cannot be characterised as perverse, as it is clear from the evidence led, the factual matrix of the setting of there being a slump in the market, in which the performance of the contract took place, as well as the ambiguity as to whether the correspondence referred to contractual price or "mixed" price, and thus, is a possible view to take.

22. The Division Bench also relied upon **Smt. Kamala Devi v. Takhatmal and Anr., (1964) 2 SCR 152, ["Smt. Kamala Devi"]** which in turn, relied upon section 94 of the Indian Evidence Act, 1872 ["**Evidence Act**"], by which the Division Bench concluded that it found no reason to look for the undisclosed intention of the parties, since the clear and express words contained in the three

"crucial" emails were perfectly in accord with and applied squarely to the existing facts. Therefore, the ordinary meaning of what was stated in those emails must be accepted, without more, which led to the conclusion that the Appellant did not have any coal available till the end of the year (i.e., 2009) to supply to the Respondent.

23. The judgment in **Smt. Kamala Devi** (supra) dealt with the interpretation of a surety bond which was executed by the appellant in favour of the Court. A judgment of the Privy Council reported as **Raghunandan v. Kirtyanand, AIR 1932 PC 131** was referred to, in which Lord Tomlin referred to an ambiguous surety bond which was to be considered in the surrounding circumstances of the facts in that case, i.e., in light of the order directing the security to be given. After setting out the judgment of the Privy Council, this Court then held:

> "These observations only apply the well settled rule of construction of documents to a surety bond. 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 as expressed by them."

(page 162)

Having so held, the Court then found that the surety bond did not need to be qualified by adding words to it when the words used in the bond were otherwise clear. Importantly, the words "in default of his doing so" were held by the Court to make it absolutely clear that the surety comes into effect only if the judgment debtor makes a default when required to produce the document. Adding that the surety bond has to be strictly construed, the Court held that a demand of the Court on the judgment debtor, and default made by him in so doing, were necessary pre-conditions for the enforcement of the bond against the appellant.

24. Section 1 of the Evidence Act states as follows:

> **"1. Short title.** –– This Act may be called the Indian Evidence Act, 1872.
>
> **Extent. ––** It extends to the whole of India except the State of Jammu and Kashmir and applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-

martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934, or the Air Force Act but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator;"

25. This would be sufficient to keep the application of section 94 of the Evidence Act out of harm's way. However, on the footing that the principle contained in section 94 of the Evidence Act, as to extrinsic evidence being inadmissible in cases of "patent ambiguity", is fundamental to Indian jurisprudence, we proceed to examine whether section 94 of the Evidence Act has been correctly applied by the Division Bench to non-suit the Appellant.

26. Section 94 appears in Chapter VI of the Evidence Act titled, "OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE". In this regard, proviso (6) to section 92 of the Evidence Act is important and states as follows:

"**92. Exclusion of evidence of oral agreement.** –– When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

xxx xxx xxx

Proviso (6). –– Any fact may be proved which shows in what manner the language of a document is related to existing facts."

Illustration (f), then states:

"Illustrations

xxx xxx xxx

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired."

Followed by this, are sections 94 and 95 of the Evidence Act, which state:

"**94. Exclusion of evidence against application of document to existing facts.** –– When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."

95. Evidence as to document unmeaning in reference to existing facts. –– When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense."

27. Importantly, section 92 of the Evidence Act refers to the terms of a "contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document". In all these cases, under proviso (6) read with illustration (f), any fact may be proven which shows in what manner the language of a document is related to existing facts. Illustration (f) of section 92 of the Evidence Act indicates that facts, which may on the face of it, be ambiguous and vague, can be

made certain in the contextual setting of the contract, grant or other disposition of property. Section 94 of the Evidence Act, then speaks of language being used in a document being "plain in itself". It is only when such document "applies accurately to existing facts", that evidence may not be given to show that it was not meant to apply to such facts. Likewise, the obverse situation is contained in section 95 of the Evidence Act, which then states that when the language used in a document is plain in itself, but is "unmeaning in reference to existing facts", only then may evidence be given to show that it was used in a peculiar sense.

28. When sections 92, 94 and 95 of the Evidence Act are applied to a string of correspondence between parties, it is important to remember that each document must be taken to be part of a coherent whole, which happens only when the "plain" language of the document is first applied accurately to existing facts.

29. In Woodroffe and Ali's *Law of Evidence,*((Woodroffe, J. and Ali, A., Law of Evidence, 19th Edition (Volume 3), 2013, Butterworths Wadhwa, Nagpur.)) the learned authors opine that whereas sections 93 and 94 of the Evidence Act deal with cases of patent ambiguity, sections 95 to 97 of the Evidence Act deal with cases of latent ambiguity (see pages 3119-3120). A "patent ambiguity" is explained in the following terms in *Starkie on Evidence*((Starkie, T., A Treatise on the Law of Evidence, 7th Edition, 1829, William Benning, London.)):

> "By patent ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible are capable of receiving a known conventional meaning, the great principle on which the rule is founded is that the intention of parties, should be construed, not by vague evidence of their intentions independently of the expressions which they have thought fit to use, but by the expression themselves. Now, those expressions which are incapable of any legal construction and interpretation by the rules of art are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties; the terms though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the terms used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous are capable of having a distinct and definite meaning annexed to them is no violation of the general principle, for, in such a case, effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party would be to make the supposed intention operate independently of any definite expression of such intention. By patent ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed, either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions, prima facie, unintelligible, are yet capable of conveying a certain and definite meaning."

(page 653)

On the other hand, a "latent ambiguity" is described in Woodroffe and Ali's *Law of Evidence*, as follows:

> "Latent ambiguity, in the more ordinary application, arises from the existence of facts external to the instrument, and the creation by these facts of a question not solved by the document itself. A latent ambiguity arises when the words of the instrument are clear, but their application to the circumstances is doubtful; here the ambiguity, being raised solely by extrinsic evidence, is allowed to be removed by the same means. In strictness of definition, such cases, as those in which peculiar usage may afford a construction to a term different from its natural one as can be seen in s 98, would be instances of latent ambiguity, since the double use of the term would leave it open to the doubt in which of its two senses it was to be taken. It is not, however, to this class of cases that reference is now made, but to those in which the ambiguity is rather that of description, either equivocal itself from the existence of two subject matter, or two persons, both falling within its terms as can be seen in s 96, or imperfect when brought to bear on any given person or thing as per ss 95 and 97."

(pages 3132-3133)

30. At this stage, it is also important to advert to the definition of "fact" in section 3 of the Evidence Act, which is set out hereinbelow:

> **"3. Interpretation-clause.–**–In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: ––
>
> xxx xxx xxx
>
> **"Fact".**–– "Fact" means and includes –– (1) anything, state of things, or relation of things, capable of being perceived by the senses;
>
> (2) any mental condition of which any person is conscious.
>
> Illustrations
>
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
>
> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.
>
> (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
>
> (e) That a man has a certain reputation, is a fact."

31. The picture that emerges, therefore, is that a "patent ambiguity" provision, as contained in section 94 of the Evidence Act, is only applicable when a document applies accurately to existing facts, which includes how a particular word is used in a particular sense. Given that, in the facts of the present case, there was no mention of the price at which coal was to be supplied in the three "crucial" emails, these emails must be read as part of the entirety of the correspondence between

the parties, which would then make the so-called "admissions" in the aforementioned emails apply to existing facts. Once this is done, it is clear that there is no scope for the further application of the "patent ambiguity" principle contained in section 94 of the Evidence Act, to the facts of the present case.

32. However, section 95 of the Evidence Act, dealing with latent ambiguity, when read with *proviso* (6) and *illustration* (f) to section 92 of the Evidence Act, could apply to the facts of the present case, as when the plain language of a document is otherwise unmeaning in reference to how particular words are used in a particular sense, given the entirety of the correspondence, evidence may be led to show the peculiar sense of such language. Thus, if this provision is applied, the Majority Award cannot be faulted as it has accepted the evidence given by Mr. Wilcox, wherein he explained that the three emails would only be meaningful if they were taken to refer to "mixed" supplies of coal, and not supplies of coal at the contractual price.

33. A judgment of the Court of Appeal in Singapore, in **Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd, [2008] SGCA 27,** discussed section 96 of the Evidence Act of Singapore, which is the equivalent of section 94 of the Indian Evidence Act. The Singapore Court of Appeal, after setting out the section, held:

> "77 … The somewhat narrow wording of s 96, which refers to the specific situation where the language in a document "applies accurately to existing facts", is probably attributable to its provenance as a rule of interpretation pertaining to wills. This section should therefore not be read too restrictively. Like s 95 of the Evidence Act, s 96 should be viewed as prescribing a common-sense limit on the use of extrinsic evidence which has been admitted under proviso (f) to s 94. In *Butterworths' Annotated Statutes*, it is stated (at p 275) that:
>
> > The earlier section [ie, s. 95] and the present section [ie, s 96] *lay down the outer limits of interpretatio*n in the sense that they mark the place where the language used by the writer must prevail over any extrinsic evidence and the place where extrinsic evidence may prevail over the language. So just as where the language is patently ambiguous it cannot be cured by extrinsic evidence, so where the language used is plain on its face, it must be given effect to, although it can be shown that the writer has made a mistake.
>
> Similarly, in *Woodroffe* at p 3510, the explanation of s 94 of the Indian Act (which is in *pari materia* with s 96 of the Evidence Act) makes clear that:
>
> > 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, the court accepts the plain and ordinary meaning ... 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. If, however, 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 meanings of the words used in the document.""
>
> (emphasis supplied)
>
> "108 It is evident from the Court of Appeal's reasoning in *Sandar Aung* [2007] 2 SLR 89 that in Singapore, the parol evidence rule (as statutorily embedded in s 94 of the Evidence Act) still

operates as a restriction on the use of extrinsic material to affect a contract. However, extrinsic material is admissible for the purpose of interpreting the language of the contract. In this respect, *Sandar Aung* acknowledges that extrinsic material is admissible even if no ambiguity is present in the plain language of the contract. However, ambiguity still plays an important role, in that the court can only place on the relevant contractual word, phrase or term an interpretation which is different from that to be ascribed by its plain language if a consideration of the context of the contract leads to the conclusion that the word, phrase or term in question may take on two or more possible meanings, ie, if there is latent ambiguity. In *Sandar Aung*, after the Estimate was taken into account, the phrase "all charges, expenses and liabilities incurred by and on behalf of the Patient" could plausibly be taken to mean all charges, expenses and liabilities incurred by and on behalf of the Patient in respect of the envisaged angioplasty. Thus, the court had a legitimate basis to place a narrower interpretation on the contractual term (or, in more informal parlance, to "read down" that term) which would not otherwise have been warranted by its broad and general language. It may be possible to argue that what the court did in *Sandar Aung* in fact constituted variation of the relevant contractual terms in contravention of s 94 of the Evidence Act. This issue shall be addressed in greater detail at [122]–[123] below. It remains to be noted that proviso (f) to s 94 was not discussed in *Sandar Aung*. Thus, the issue of whether ambiguity was a prerequisite for the application of this proviso and its relationship with the common law contextual approach to contractual interpretation was left open."

"(B) THE PAROL EVIDENCE RULE

111 As mentioned earlier, in Singapore, the parol evidence rule lives on in s 94 of the Evidence Act and has been applied assiduously by the courts in case law. The Singapore courts have always been mindful of the need for contractual certainty, especially in commercial agreements (such as the Policy in the present case). In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927, the High Court emphasised that not only is "sanctity of contract … vital to certainty and predictability in commercial transactions", but also:

> The perception of the importance of commercial certainty and predictability is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular.

112 However, the parol evidence rule only operates where the contract was intended by the parties to contain all the terms of their agreement. Where the contractual terms are ambiguous on their face, it is likely that the contract does not contain all the terms intended by the parties. Furthermore, in order to ascertain whether the parties intended to embody their entire agreement in the contract, the court may take cognisance of extrinsic evidence or the surrounding circumstances of the contract.

113 Assuming that the contract is one to which the parol evidence rule applies, no extrinsic evidence is admissible to contradict, vary, add to or subtract from its terms (see s 94 of the Evidence Act)."

(emphasis supplied)

Finally, in a synopsis at the end, the Court of Appeal held:

"132 *To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:*

(a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents.

(b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93–94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement. In other words, where a contract is complete on its face, the language of the contract constitutes prima facie proof of the parties' intentions.

(c) Extrinsic evidence is admissible under proviso (f) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (f) to s 94.

(d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article and Nicholls' article persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]–[129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous.

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (ie, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent. Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, ie, ss 95–100.

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy."

(emphasis supplied)

34. The approach of the Singapore Court of Appeal has our broad approval, being in line with the modern contextual approach to the interpretation of contracts. When proviso (6) and illustration (f) to section 92, section 94 and section 95 of the Evidence Act are read together, the picture that emerges is that when there are a number of documents exchanged between the parties in the performance of a contract, all of them must be read as a connected whole, relating each particular document to "existing facts", which include how particular words are used in a particular sense, given the entirety of correspondence between the parties. Thus, after the application of proviso (6) to section 92 of the Evidence Act, the adjudicating authority must be very careful when it applies provisions dealing with patent ambiguity, as it must first ascertain whether the plain language of a particular document applies accurately to existing facts. If, however, it is ambiguous or unmeaning in reference to existing facts, evidence may then be given to show that the words used in a particular document were used in a sense that would make the aforesaid words meaningful in the context of the entirety of the correspondence between the parties.

35. This approach is also reflected in a recent judgment of this Court in **Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd., (2018) 3 SCC 716**, as follows:

"21. In the event of any ambiguity arising, the terms of the contract will have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties, and not what one of the parties may contend subsequently to have been the intendment or to say as included afterwards, as observed in *Bank of India v. K. Mohandas* [Bank of India v. K. Mohandas, (2009) 5 SCC 313] : (SCC p. 328, para 28)

"28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.""

(page 727)

36. The Division Bench's reliance upon **Smt. Kamala Devi** (supra) to set aside the Majority Award is wholly misplaced. The ratio in **Smt. Kamala Devi** (supra) is contained in the words:

"... 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... "

(page 162)

37. So read, the judgment in **Smt. Kamala Devi** (supra) accords with what has been held hereinabove. It is clear that the three critical emails have to be read in the surrounding circumstances of the entirety of the LTA and the correspondence which ensued between the parties. Once that exercise is undertaken, as was undertaken by the Majority Award, it is impossible to hold that the Majority Award is not a possible view on the facts of this case. The reliance of the Majority Award upon the correspondence between the parties pre-July and in September to December 2009, buttressed by Mr. Wilcox's evidence, cannot therefore be said to be flawed.

38. Shri Rohatgi's argument in support of the impugned judgment of the Division Bench that there is no evidence to demonstrate proof of damage suffered as on the date of breach, is also factually incorrect. It is well established that the arbitral tribunal is the final judge of the quality, as well as the quantity of evidence before it (see **Sudarsan Trading Co. v. Govt. of Kerala, (1989) 2 SCC 38** at page 53). As was correctly pointed out by Shri Sibal, the Majority Award has taken into account Mr. Wilcox's Affidavit dated 10.07.2013 and Additional Affidavit dated 03.09.2013 detailing the prices at which sales of coal were made to Chinese purchasers during the Fifth Delivery Period, which ended on 30.09.2009, being the date of breach as found by the Majority Award. In addition, contemporaneous correspondence, including letters dated 27.11.2009 and 03.12.2009 were also relied upon to show that the Respondent was itself seeking coal at roughly the price of $128 per metric tonne, at around the same time. Hence, the difference between the contractual price and market price was arrived at as $173.383 per metric tonne, in accordance with the law laid down by this Court in **Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Anr., (1962) 1 SCR 653**, as follows:

> "We may in this connection refer to the following observations in *Chao v. British Traders and Shippers Ltd*. [(1954) 1 All ER 779, 797] which are apposite to the facts of the present case:
>
> > "It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for re-sale, but every one who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for res-ale, but, if the goods are not delivered to him, he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has not suffered any damage, if the market has risen the measure of damages is the difference in the market price."
>
> In these circumstances this is not a case where it can be said that the parties when they made the contract knew that the likely result of breach would be that the buyer would not be able to make profit in Calcutta. This is a simple case of purchase of goods for re-sale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone above the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in s. 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach" appearing in s. 73. As the respondent had failed to prove the rate for

similar canvas in Kanpur on the date of breach it is not entitled to any damages in the circumstances."

(pages 660-661)

39. The Single Judge correctly appreciated this part of the case when he stated as follows:

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

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

40. This being the case, it is not possible to accept Shri Rohatgi's argument that the letters dated 27.11.2009 or 03.12.2009 do not reflect the market price of coal as on the date of breach or that the market price of coal cannot be established from the special long-term contracts operating at around the same time as the date of breach. This argument must therefore be rejected.

41. The present case is that of an international commercial arbitration, the Majority Award being delivered in New Delhi on 12.05.2014. Resultantly, this case has been argued on the basis of the law as it stood before the Arbitration and Conciliation (Amendment) Act, 2015 [**"Amendment**"] added two explanations to section 34(1) and sub-section (2A) to section 34 of the Arbitration Act, in which it was made clear that the ground of "patent illegality appearing on the face of the award" is not a ground which could be taken to challenge an international commercial award made in India after 23.10.2015, when the Amendment was brought into force. We, therefore, proceed to consider this case on the pre-existing law, which is contained in the seminal decision of **Associate Builders** (supra).

42. The judgment in Associate Builders (supra) examined each of the heads set out in **Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644**, together with the addition of the fourth head of "patent illegality" laid down in **ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705**. Since we are concerned with the "perversity principle", the relevant paragraphs of this judgment are set out as follows:

"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."

(page 75)

"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* [1992 Supp (2) SCC 312], 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* [(1999) 2 SCC 10] , 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."

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. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594], this Court held:
(SCC pp. 601-02, para 21)

> "21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the

second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

(pages 75-77)

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1) (a) of the Act, which reads as under:

"**28. Rules applicable to substance of dispute**.

—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.

—(1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fairminded or reasonable person could do."

(page 81)

43. This judgment has been consistently followed in a plethora of subsequent judgments, including:

a. **National Highways Authority of India v. ITD Cementation India Ltd.,** (2015) 14 SCC 21 at paragraph 24 (page 38);

b. **Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.**, (2017) 2 SCC 228 at paragraph 45 (page 252);

c. **Venture Global Engg. LLC v. Tech Mahindra Ltd.,** (2018) 1 SCC 656 at paragraph 85 (page 687);

d. **Sutlej Construction Ltd. v. State (UT of Chandigarh),** (2018) 1 SCC 718 at paragraph 11 (page 722);

e. **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.**, (2018) 3 SCC 133 at paragraph 51 (page 169);

f. **HRD Corpn. v. GAIL (India) Ltd.**, (2018) 12 SCC 471 at paragraphs 18-19 (page 493);

g. **M.P. Power Generation Co. Ltd. v. ANSALDO Energia SpA**, (2018) 16 SCC 661 at paragraph 25 (page 679);

h. **Shriram EPC Ltd. v. Rioglass Solar Sa**, (2018) 18 SCC 313 at paragraph 34 (page 328);

i. **State of Jharkhand v. HSS Integrated Sdn,** (2019) 9 SCC 798 at paragraph 7 (page 804); and

j. **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**, (2019) 15 SCC 131 at paragraphs 20, 34-36 (pages 154, 169-170).

44. Given the parameters of judicial review laid down in **Associate Builders** (supra), it is obvious that neither the ground of fundamental policy of Indian law, nor the ground of patent illegality, have been made out in the facts of this case, given the fact that the Majority Award is certainly a possible view based on the oral and documentary evidence led in the case, which cannot be characterized as being either perverse or being based on no evidence.

45. However, Shri Rohatgi relied upon a number of recent judgments, which according to him, throw further light upon the elucidation of law in **Associate Builders** (supra). Thus, in **MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163,** this Court held:

> "11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn*., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.
>
> 12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are

arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA,* (2015) 3 SCC 49. Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation,* (2006) 4 SCC 445; and *McDermott International Inc. v. Burn Standard Co. Ltd*., (2006) 11 SCC 181)

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of reassessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.

16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See *McDermott International Inc. v. Burn Standard Co. Ltd.,* (2006) 11 SCC 181; *Pure Helium India (P) Ltd. v. ONGC,* (2003) 8 SCC 593 and *D.D. Sharma v. Union of India*, (2004) 5 SCC 325].

17. We have gone through the material on record as well as the majority award, and the decisions of the learned Single Judge and the Division Bench. The majority of the Arbitral Tribunal as well as the courts found upon a consideration of the material on record, including the agreement dated 14-12-1993, the correspondence between the parties and the oral evidence adduced, that the agreement does not make any distinction within the type of customers, and furthermore that the supplies to HTPL were not made in furtherance of any

independent understanding between the appellant and the respondent which was not governed by the agreement dated 14-12- 1993."

(pages 166-168)

46. Likewise, in **Dyna Technologies Pvt. Ltd. v. Cromptom Greaves Ltd., 2019 SCC Online SC 1656, ["Dyna Technologies"],** this Court held:

"26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

47. In **Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.**, (2019) 7 SCC 236, after referring to the parameters of review in **Associate Builders** (supra) and other cases, this Court found that with respect to the first claim, relating to price adjustment/escalation, the arbitrator interpreted the relevant clauses of the contract and came to a certain finding. The High Court, in interfering with that finding, was wrong in doing so merely because some other view could have been taken, as the interpretation made by the arbitrator was a possible one. The High Court's judgment was, therefore, set aside to this extent. However, insofar as the second and third claims were concerned, on the facts of that case, the finding was said to be so perverse or irrational that no reasonable person could have arrived at the same, based on the material/evidence on record, as a result of which, the High Court's judgment was upheld.

48. In **South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd**., (2020) 5 SCC 164, a three Judge Bench of this Court referred to the judgment of this Court in **Dyna Technologies** (supra) and found that the interpretation of the arbitral tribunal in expanding the meaning of clause 23 of the contract to include a change in rate of high-speed diesel, not being even a possible interpretation of the concerned contract, the High Court in setting aside the award, could not be said to be incorrect. Also, other contractual terms when seen together with this interpretation would also render such finding perverse.

49. In **Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.,** (2020) 7 SCC 167, this Court, after setting out the law stated in **Associate Builders** (supra) and **Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (**2019) 15 SCC 131, applied the test of perversity and then concluded:

> "26. Even though the High Court in para 44 of the judgment referred to various judgments, including *Western Geco [ONGC v. WesternGeco International Ltd.,* (2014) 9 SCC 263] [which is now no longer good law], the case has been decided on the ground that the arbitral award is a perverse award and on a holistic reading of all the terms and conditions of the contract, the view taken by the arbitrator is not even a possible view. The High Court has rightly followed the test set out in para 42.3 of Associate Builders [*Associate Builders v. DDA*, (2015) 3 SCC 49, paras 40 to 45], which was reiterated in para 40 of *Ssangyong Engg. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, para 19] judgment.
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> 27. In our view, while dealing with the appeal under Section 37 of the Act, the High Court has considered the matter at length, and held that while interpreting the terms of the contract, no reasonable person could have arrived at a different conclusion and that the awards passed by the arbitrator suffer from the vice of irrationality and perversity."

(pages 179-180)

50. All the aforesaid judgments are judgments which, on their facts, have been decided in a particular way after applying the tests laid down in **Associate Builders** (supra) and its progeny. All these judgments turn on their own facts. None of them can have any application to the case before us, as it has been found by us that in the fact situation which arises in the present case, the Majority Award is certainly a possible view of the case, given the entirety of the correspondence between the parties and thus, cannot in any manner, be characterised as perverse.

51. Accordingly, the appeal stands allowed. The judgment of the Division Bench dated 02.03.2020 is set aside, thereby restoring the Majority Award dated 12.05.2014 and the Single Judge's judgment dated 10.07.2015 dismissing the application made under section 34 of the Arbitration Act by the Respondent.

..... J.
(ROHINTON FALI NARIMAN)

..... J.
(K.M. JOSEPH)

New Delhi;
December 17, 2020.