

(2010) 04 DEL CK 0154

In the Delhi High Court

Case No : CS (OS) 1084 of 2008 and I.A. No"s. 6904, 8121, 8152 and 9521 of 2008

Accord Alloys Limited

APPELLANT

Vs

Asia Minerals Ltd. and Another

RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 45
Contract Act, 1872 — Section 62

Citation : (2010) 04 DEL CK 0154

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Maninder Singh and Geetika Panwar, for the Appellant; Jayant Bhushan Kumar Mihir and Gautam Talukdar, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—This order will dispose of an application for ad-interim injunction moved by the plaintiff (IA 6904/2008) and other related applications (IA Nos. 8121/2008, IA 8152/2008, both filed by the plaintiff) as well as IA No. 9521/2008, moved by the defendant, for vacation of interim stay.

2. The plaintiff in the suit, seeks declaration that a request for arbitration, made to the London Court of International Arbitration (LCIA) made by the defendant, through a letter dated 18th October, 2007 and the directions, issued by the Arbitrator pursuant to the reference, on 22.05.2008 are illegal and void.

3. The relevant facts, for the purpose of this order are stated as follows. The plaintiff (hereafter "Accord Alloys") claims to have been incorporated in 1984, and is a globally recognized trading house which deals with various kinds of metals. The first defendant (hereafter "Asia Minerals") is a Hong Kong registered private company, and the second defendant is the LCIA. The suit mentions that Accord Alloys entered into a contract, evidenced by e-mails and communications dated 24.04.2007, 02.05.2007, 03.05.2007 and 05.05.2007 for supply of 500 MT

of SiMn (Silica Manganese) with 60% minimum manganese ore @ US \$ 790 per MT, CFR Kobe. It is submitted that this agreement or arrangement does not contain any arbitration clause, and has the effect of discharging all previous obligations. The plaintiff therefore, alleges that the LCIA cannot exercise any jurisdiction, premised on Asia Minerals' demand for arbitration, based on existence of the arbitration clause.

4. It is contended that the parties had originally entered into an agreement, i.e. Contract No. AML 26298 and Addendum specification No. 1 dated 27th February, 2007 where Asia Minerals agreed to purchase from Accord Alloys 500 MT of SiMn (Silica Manganese) with 65% minimum manganese ore @ US \$ 760 per MT, CFR Yokohama; the goods were to be supplied not later than 7th April, 2007. The suit also states that consequent upon the contract, a letter of credit was established, issued by ING Bank NV on 08.03.2007, favouring Accord Alloys. It is stated that the said contract envisioned simultaneous performance of mutual obligations, despite which Asia Minerals defaulted in performing its part of the bargain. In terms of the contract, the buyer, i.e. Asia Minerals, under Clause 3.8, had to order and arrange inspection for quality and quantity prior to loading of the goods. This part of the contractual obligation was not performed, and there was no timely inspection of the goods to enable timely completion of shipments by the stipulated date, i.e. 7th April, 2007. Accord Alloys mentions about wastage of time by Asia Minerals, and its failure to notify about inspections; it also avers about having issued e-mails dated 16th March, 2007, 19th March, 2007 and 3rd April, 2007 with a copy to Asia Minerals requesting for inspection. It is submitted that in response, through emails, belatedly the request for sampling of the entire cargo was granted, in respect of 475 MT SiMn. Due to this delay, occasioned by Asia Minerals, the inspection could not be completed, and that proved fatal; consequently Accord Alloys was constrained to ship the materials by bill dated 31.03.2007 to Asia Minerals. Thereafter, the latter, to Accord Alloy's consternation intimated, on 10th April, 2007 that SGS's (the inspecting agency's) analysis had been received and that the goods were found to contain 61.22 % Mn; which was later revised to 61.43 % after re-checking. This report, alleges the suit, was not made available to the plaintiff despite repeated requests. Consequently, Accord Alloys was forced, in order to avert loss, to direct the goods to be held in transit at Singapore and later the goods were diverted to M.s Seah Besteel Corporation.

5. The suit alleges that the matter resulted in disputes, which the plaintiff was eager to resolve, and settle on account of its substantial standing and reputation. It is alleged that Accord Alloys offered various alternatives and as a result of subsequent negotiations, the parties novated the original contract, and instead, agreed through discussion and communications, dated 24.04.2007, 02.05.2007 and 05.05.2007 for supply of SiMn 60 grade ore to be shipped at a price different from the one originally agreed, and on different terms; the price was US \$ 790 per MT, CFR Kobe/Yokohama. It is alleged that Asia Minerals confirmed this, and offered to open the Letter of Credit in the same terms as previously agreed,

between the parties. It is alleged that in these background of circumstances that Asia Minerals, in undue haste, communicated on 27th July, 2007 that a dispute had arisen, and purported to invoke the alleged arbitration clause by referring the matter to arbitration to LCIA, and followed it up with a request dated 18th October, 2007 and thereafter filed its claims. The LCIA directed Accord Alloys to file its defense, on 29th March, 2008. It is submitted that the discussions preceding the later contract, arrived at through communications dated 24.04.2007, 02.05.2007 and 05.05.2007 clearly manifest the intention that the previous agreement, and mutual obligations of parties, had been abandoned, or superseded. This later agreement did not contain any arbitration clause, a fact studiously suppressed from the LCIA.

6. Accord Alloys submits that it opposed the reference, and the assumption of jurisdiction, by LCIA, without prejudice to its rights to contest the case, arguing that there was no arbitration clause, which compelled the parties to refer any dispute. It sought for a decision on the preliminary issue about non-existence of an arbitration agreement. It is stated that the Arbitrator of LCIA, unreasonably and in a manifestly perverse manner rejected the request for a decision on the preliminary issue, requiring Accord to enter the defense on merits.

7. By an ex-parte ad-interim order, in IA 6904/2008, this Court recorded the contentions on behalf of Accord Alloys, that the original contract, containing the arbitration clause, had stood superseded, and proceeded to injunct Asia Minerals from proceeding with the arbitration case before LCIA. Accord Alloys later sought a modification of that order, by moving IA 8121/2008, and moved another temporary injunction application, i.e. IA 8152/2008, seeking a restraint against LCIA, from proceeding to adjudicate the reference before it. Asia Minerals, after entering appearance, and filing its written statement, moved an application, IA 9521/2008 for vacation of the ex-parte injunction granted by the Court.

8. Asia Minerals does not join issue with Accord Alloys about the original contract, dated 27th February, 2007, the quantities originally agreed to be purchased by it, and other material terms as originally agreed upon. It however, denies that it defaulted in the performance of its obligations; instead, it contends that the agency appointed to inspect the goods, M/s SGS, reported that the product contained 61.22% SiMn, which was below the standard contracted. Asia Minerals states that Accord Alloys sought, by its communications dated 11th April, 2007, 13th April, 2007, and 14th April 2007 to have the time for delivery extended to 30th April, 2007. It is further submitted that later Accord's stand changed, and it proposed that instead of supply material with 65% manganese content, it would supply goods containing manganese to the extent of 60% in batches of 250 MTs in two lots on 15th May, 2007 and 31st May, 2007. These "inferior" quality goods, says Asia Minerals, was proposed to be supplied by Accord Alloys for US \$ 790 per MT. It is submitted that the correspondence between the parties resulted in the agreement that such goods proposed to be supplied, would be purchased by Asia Minerals, from Accord Alloys.

9. Asia Minerals refers to Clause 8 of the original contract, dated 27th February, 2007 ? with Accord Alloys, and emphasizes that it embodies a valid arbitration agreement, in terms of which the parties are obliged to refer their disputes to arbitration by LCIA. Besides the e-mail communications exchanged between the parties, Asia Minerals also submits that a meeting between the parties took place on 24th May, 2007. Asia Minerals argues that in terms of Clause 8.1 of the contract, the applicable law (of the contract) is English law. It is submitted that the arbitrator, in terms of LCIA's rules, had rendered preliminary findings about subsistence of the arbitration agreement.

10. Asia Minerals, in addition to the above facts, and averments in its replies and applications, relies on the following terms contained in all its later communications, after 10th April, 2007:

Without prejudice to our rights under existing contract between Accord Alloys Limited and Asia Minerals Limited.

Similarly, the other terms in its communications, to the following effect, are also relied upon:

Regardless of your reply and actions in current situation, we reserve all our rights, mentioned in the contract and supported by the International laws governing the Contract, to claim Accord Alloys Limited for any direct or indirect losses connected with improper execution of the Contract by your Company.

11. Learned senior Counsel for Asia Minerals underlined that none of the communications by Accord Alloys even suggested that the proposals mooted for substitution of the quality of the product, or consequently, the price, novated the original contract, or, crucially, that the arbitration agreement stood superseded. He submitted that the plaintiff cannot seek what in terms is an anti suit injunction, which is impermissible, in law. To support the submission, reliance was placed on two orders of the Supreme Court, in *Centrotech Minerals & Metals Inc v. Hindustan Copper Ltd.* Civil Appeal No. 1124/2001, decided on 08.02.2001 and *Dresser Rand v. Bindal Agro Chem Ltd.* Civil Appeal No. 1145-56/1994, decided on 25.02.1994.

12. Asia Minerals also relies on the decision of the Calcutta High Court, reported as *Juggilal Kamlatpat Vs. N.V. Internationale Crediet-En-Handels Vereeniging "Rotterdam"*, for the submission that in order for one to conclude that a contract is novated, or even abandoned, the fresh arrangement must be such the very root of the first contract must have changed, and that the change must be of an essential character. The Court had, in that case, relied on *Morris v. Barron & Co.* 1918 AO 1, that an entirely new arrangement should emerge.

13. The plaintiff Accord Alloys contends that the interim order, made on the first date of hearing should be continued, and subsist till disposal of the suit. It argues, through its learned senior Counsel, that the communications through which the fresh arrangements were arrived at (dated 24.04.2007, 02.05.2007,

03.05.2007 and 05.05.2007) demonstrate that in all essentials, the original contract stood substituted. It is argued that material terms, such as nature and quality of the goods, agreed to be supplied, the price for the goods, the time for performance, and even the dates of supply, are completely different from the originally agreed terms, under which the goods of a different description (i.e. material containing 65% manganese) were agreed to be supplied by 7th April, 2007.

14. Accord Alloy's learned senior Counsel relies on the judgment of the Supreme Court, reported as *R.N. Kumar Vs. R.K. Soral*, and of the Bombay High Court, reported as *Andheri Bridge View Co-op. Hsg. Society Ltd. Vs. Krishnakant Anandrao Deo and others*, in support of the contention that novation of contract is inferable where material terms are changed, resulting in new binding obligations, which are inconsistent with the previously agreed terms. Reliance is placed on the judgment reported as *Nathani Steels Ltd. v. Associated Constructions*

15. Accord contends that mere use of expression "without prejudice" in the defendant's correspondence is of no avail and that the real effect of the exchange of communications indicates that the parties intended that the original contract was to be superseded and substituted with an entirely new set of conditions resulting in novation of contract as understood by Section 62 of the Contract Act. Reliance is placed upon the judgment reported as *Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors*, . It is lastly argued that the defendant's conduct in unconditionally withdrawing I.A. 9520/2008, precludes it from urging that the subject matter of the suit is arbitrable. The plaintiff relies upon the judgment of the Supreme Court reported as *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, and a judgment of this Court i.e. *Kishan Chand Surendra Kumar Vs. Delhi School Teachers Co-operative House Building Society Ltd.*, It is submitted that relief (b) sought in that application was for appointment of an arbitrator in terms of Section 45 of the Arbitration and Conciliation Act. Having abandoned that claim, the defendant now cannot urge that the interim order granted ought not to be confirmed on the ground that there is subsisting arbitration clause.

16. The preceding narrative discloses that there is practically no dispute that in terms of the original contract, Accord Alloys agreed to supply a quantity of 500 MT SiMn with 65% manganese content; the time for supply was indicated, as was the price, i.e. US \$ 760 per MT; the port of origin from where the goods were to be shipped too, was agreed upon. M/s SGS was designated as the agency for inspecting the goods and reporting about their quality. Accord Alloys alleges that Asia Minerals unduly delayed the process of inspection by such agency; the latter (Asia Minerals) on the other hand, alleges that the inspection of 475 MT of the consignment revealed that the product sought to be shipped was not in accordance with the specifications, as it contained 61.22% manganese. In the circumstances, it would be necessary to examine the documentary evidence, on

the record, to evaluate the merits of the rival contentions.

17. The first correspondence hinting at changes in the agreement, may be found in Asia Minerals' e-mail communication dated 10th April, 2007, which is as follows:

Without prejudice to our rights under our existing contract between Accord Alloys Limited and Asia Minerals Limited.

Reference is made to our Specification #1 to our Contract #26296 dt. 27-2-2007 between Asia Minerals Ltd. and Accord Alloys Limited (further referred to as the Contract) and email notification about the quality results we have received today from SGS concerning 475.010 MT of SiMn that was going to be delivered to us under the a/m contract.

According to SGS, the content of Manganese in 475.010 MT of SiMn that was going to be delivered to us, is 61.22% (III)

As you know, according to the contract Mn content shall be 65% min. Thus, Mn content 61.22% is totally unacceptable under our contract with you and we do not accept the goods of the a/m quality.

Also, according to the contract, the goods were to be shipped by 7th April, 2007, at the latest. Until now, you haven't shipped a single metric ton to us. Thus, we hereby notify you about the fact of improper fulfillment of your obligations under the Contract.

We, Asia Minerals Limited, kindly ask you to inform us about the possible shipment date for 500 mt of SiMn of quality in full accordance with the Contract.

Regardless of your reply and actions in current situation, we reserve all our rights, mentioned in the Contract, to Claim Accord Limited for any direct or indirect losses connected with improper execution of the Contract by your company.

Please revert with your URGENT Clarifications and reply regarding current situation and possible shipment date of SiMn with quality corresponding to the later than tomorrow 15 on 11/04/2007, Indian Local Time.

Kind regards,

Dmitry Nadtochiy.

18. Accord Alloys' response, dated 11th April, 2007, was as follows:

(sic) below msg and further clarifications asked by you over phone, we would like to inform you the following,

1) We will make shipment of 500 mt SiMn against the present contract latest by 30 April 2007.

2) Regarding the current lot of 475 mt SiMn already shipped, we are sure that

the material is of Mn content for 65%, but SGS has come out with a wrong analysis which we do not accept. However, we propose that you can still have the material & get a discharge port analysis for the same ascertaining it a 65% material. For this, we further remind you that the material price has increased a few fold and also the scarcity of the material that the market is currently experiencing. So you do not loss even if you accept the maternal .

3) Even if you accept the current lot of 475 mt. we will ship out another lot of 500 mt. against the present contract by 30 April 2007 so that we go through a continued business relationship.

4) In case, you do not confirm to accept or purchase the current lot of 475 mt SiMn by 13:00 hrs (Indian time) tomorrow, we will divert and sell the same Ex-Singapore to some other buyer as a last option open to us.

(sic) but not the least, we would like to suggest that when the price has gone so high and other chemical parameters (apart from Mn content as per SGS) are ok. It sense buying SiMn with 60 % Mn content at a lower rate also comparing to the higher priced market now. Not only that but also, we are giving you another lot of 500 mt SiMn by end of this month.

Awaiting for you immediate response.

Best regards

Partha dev Maiti

19. Accord sent another e-mail communication, (dated 14th April, 2007) stating that the manganese of the requisite standard would be shipped by 30th April, 2007 as "replacement cargo" instead of the original material, which did not contain the agreed 65%. It was further stated that "It was by accident the cargo was shipped in your name due to a mistake committed by our Handling Agent.... However, we would like to inform you that we have procured a right manganese ore for our production at higher rate.." and that for sake of business relationship, were going to ship the right quantity, as per contractual specifications.

20. The communication dated 24.04.2007 by the plaintiff to the defendant:

Dear Mr. Nadtochiy

Ref our below message and further discussion had with you a few minutes back, also as instructed by our Director Mr. Babu Khandelwal, we would like to inform you the following two options,

1) We are facing a problem to get Manganese Ore (confirming to SiMn 65% grade material) which will be available after 2 (two) months only. So we can supply the material at that time when the ore is available,

Or

2) We can supply SiMn with 60% Mn for which we have Manganese Ore available

with us, but we can supply the same at the same price as USD 790 pmt CFR Kobe/Yokohama (hence no prorata reduction in price, please). Also that we will supply 250 mt (out of total 500 mt) latest by 15 May, 2007 and the balance 250 mt by 31 May, 2007.

You are requested to kindly confirm the same at the earliest in order to incorporate the above options in our production planning accordingly.

Best Regards

Partha dev Maiti

21. Asia mailed to Accord Alloys, as follows, on 24.04.2007:

Dear Mr. Partha dev Maiti,

Without prejudice to our rights under existing contract between Accord Alloys Limited and Asia Minerals Limited:

Reference is made to our fax message No. 0185/07-ME dd. 10.04.2007 (our e-mail id. 10.04.2007 with the same content) and following e-mail correspondence between us.

According to Specification#1 to our Contract #26298 dd. 27/02/2007 between Asia Minerals Limited and Accord Alloys Limited (further referred to as the Contract) you were to supply us 500 mt of SiMn-65 by 7th April, 2007, at the latest, having done it.

After that you have confirmed in writing your readiness to supply us aforementioned Goods by 30th of April, 2007, at the latest. Having studied your e-mail dd. 24.04.2007, we understood that you are not going supply the Goods by 30th of April, 2007.

Thus, you are going to fail to full the obligation you gave us again.

With this message we inform you that such failures from your side have thought to direct and indirect losses for our company.

From e-mail dd. 24.04.2007 we have understood that you have no possibility to supply us SiMn-65 during coming months because of non-availability of the relevant Mn-Ore, but can supply us 500 mt of SiMn-60 within May 2007 (250 mt to be shipped by 15.05.2007 and 250 mt to be shipped by 31.05.2007). In your e-mail message you propose us two options, but each of them can only increase our losses and therefore not acceptable for us.

In such circumstances we ask you confirm one of the following proposals (in your option):

1. You supply 500 mt of SiMn-65 with quality and price mentioned in the Contract by 30.04.2007.

2. You supply us 500 mt of SiMn-60 at CFR price 729.23 USD/MT (790 USD/MT

divided by 65 and multiplied by 60, i.e. using scale pro-rata based on price of our Contract) in two equal lots as per the following schedule:

250 mt to be shipped by 15.05.2007.

250 mt to be shipped by 31.05.2007.

In case you cannot accept either of two afore-mentioned proposals, we will have nothing to do but to proceed with legal actions against Accord Alloys Ltd.

In case you accept either of two afore-mentioned proposals, but fail to perform again, we will have nothing to do but to proceed with legal actions against Accord Alloys Ltd.

Please revert with your proper reply regarding current situation by the end of tomorrow 25/04/2007.

Regardless of your reply and actions in current situation, we reserve all our rights, mentioned in the Contract and supported by the International Laws governing the Contract, to claim Accord Alloys Limited for any direct or indirect losses connected with improper execution of the Contract by your company.

Kind Regards,

Dmitriy Nadtochiy

Sales Manager- Middle East Region

Asia Minerals Limited.

22. Asia Minerals" communication dated 02.05.2007 by to Accord Alloys is as follows:

Dear Mr. Partha,

Without Prejudice to our rights under the existing contract between Accord Alloys Limited and Asia Minerals Limited:

We confirm 100% of CRF price (790 CFR Yokohama/Kobe or another basis based on actual freight rate) to be paid through LC. Please go ahead with production and provide us with estimated date when the material will be ready for SGS inspection.

Regarding LC, please note that it will be opened in the same edition as it was opened initially for SiMn-65. Please confirm that it is acceptable for you and as per your satisfaction.

Also please check & provide us with the freight cost to Korean port Gunsan ASAP.

-Hide quoted text-

Regardless to your reply and actions in current situation, we reserve all our rights, mentioned in the Contract and supported by International Laws governing

the Contract, to claim Accord Alloys Limited for any direct or indirect losses connected with improper execution of the Contract by your company.

Regards,

DN

23. The communication dated 05.05.2007 by Asia Minerals to Accord Alloys, is in the following terms:

Dear Mr. Partha,

Without Prejudice to our rights under the existing contract between Accord Alloys Limited and Asia Minerals Limited:

Further to our last phone conversation (Thursday, 03/05/2007), when you confirmed that you have started production of our order, please provide us with all the necessary details regarding the issue, namely:

- when you are going to finalize production of 250 mt SiMn-60?
- when should we order SGS inspection?
- what is the freight cost to Busan?

Your prompt reply regarding the afore-mentioned issues will be highly appreciated.

Regardless of your reply and actions in current situation, we reserve all our rights, mentioned in the Contract and supported by the International Laws governing the Contract, to claim Accord Alloys Limited for any direct or indirect losses connected with improper execution of the Contract by your company.

Regards,

DN

24. At the centre of controversy is whether prima facie it can be discerned that the original contract dated 27.02.2007 was novated and fresh terms substituted instead thus resulting in the supersession of the arbitration agreement.

25. Section 62 of the Contract Act (which deals with novation) reads as follows:

Section 62. Effect of novation, rescission, and alteration of contract.- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

26. The principle underlying the above provision was explained in Lata Construction and Others Vs. Dr. Rameshchandra Ramniklal Shah and Another, in the following terms:

One of the essential requirements novation is contemplated by Section 62 is that there should be complete substitution of a new contract in place of the old. It is

in that situation that the original contract need not be performed. Substitution, of a new contract in the place of the old contract which should have the effect of rescinding or completely altering terms of the original contract has to be in agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the a contract are inconsistent and they cannot stand together the subsequent contract cannot be said to be in substitution of the earlier contract.

27. In that case, the rights under the original contract were not given up as it was specifically provided in the subsequent contract that the rights under the old contract shall stand extinguished only on payment of entire amount of Rs. 9,51,000/- since the amount was not paid by the appellants as stipulated by the subsequent contract, the rights under the original contract were still available to the respondents and they could legally claim enforcement of those rights.

28. The judgment cited by the parties i.e. R.N. Kumar case is in similar vein. Likewise the decision cited by the defendant i.e. Juggilal Kamlatpat also clearly states that novation means that the subsequent contract or arrangement should be completely inconsistent with the original agreement so as to result in an entirely new contract.

29. In the present case, there is no dispute that the original contract dated 27.02.2007 stipulated for the supply of 500 MT product with minimum 65% manganese content. Although Accord Alloys blames Asia Minerals for alleged delay in inspection, yet what emerges from the record is that the goods could not be shipped within the time as Asia Minerals took the stand that the manganese content was below the acceptable limit. Asia Minerals by its communication asked Accord Alloys to inform it about the possible shipment date for 500 MT of the product and at the same time clarified that this was without prejudice to the rights under the existing contract in two places. In reply, Accord Alloys by its communication dated 11.04.2007 offered two alternatives i.e. supply of 475 MT. of the existing product (less than 65% manganese content) or supply of the contract with 60% manganese at a lower rate for the same quantity i.e. 500 MT. A similar offer was made on 24.04.2007, the only difference being that the price for 500 MT. of the product with 60% manganese was communicated as US \$ 790 per MT and that the goods were to be shipped in 2 lots of 250 MT each.

30. The same day, i.e. 24.04.2007 Asia Minerals responded that the two proposals of Accord Alloys had to be confirmed and further proposed that in the event of the second option of supply of the goods with 60% manganese content, 250 MT. was to be shipped by 15.05.2007 and balance 250 MT was to be shipped by 31.05.2007. This offer was reiterated by another email dated 30.04.2007 to the plaintiff (Accord Alloys) by Asia Minerals. Further terms were communicated by email dated 01.05.2007, by Accord Alloys which broadly agreed to supply 60% manganese content in the product in two lots at US \$ 790 per MT, CFT Kobe/ Yokohama. Asia Minerals concurred with proposal and affirmed 100% of CFR at price Yokohama/Kobe to be paid through LC and further stated that regarding the

LC it would be opened/issued in the same condition as it was opened in respect of the original contract. This communication like other communications underlined that the acceptance was without prejudice to Asia Minerals rights and that it retained its rights to claim Accord Alloys for any direct or indirect losses. The e-mails 01.05.2007 and two e-mails dated 05.05.2007 between the parties are in similar vein.

31. An overall conspectus of the correspondence between the parties discloses that while the mode of payment, and other terms of supply were not commented upon, there was a change as far as the quality of the goods, i.e. the manganese content, was concerned. Also, allied to this was the price or cost of the goods; it was agreed at US \$ 790 PMT, instead of the previously agreed US \$ 760. However, the parties were silent as to whether the previous contract or the other conditions stood superseded. Now, the case law pertaining to Section 62 clarifies that while seeing if the parties novated a contract, a single circumstance or fact is not determinative; like in most other things, the intention of the parties is to be discerned from a "global" perspective of the materials. To this Court, it seems that Asia Minerals wanted the supplies of SiMn, initially with 65% manganese content, within a stipulated period; when that was not possible, Accord Alloys offered to supply the same product (read the communication dated 14th April, 2007) by 30th April, 2007. In between, through a series of correspondence, the quality or standard in respect of the product was agreed to be changed; instead of manganese content being 65%, Asia Minerals agreed to accept it with 60% content. Also, the goods were to be shipped in two lots, and by 31st May, 2007. The price or cost was revised to US \$ 790.

32. While it is true that revision in cost can, in many cases, lead to the inference that the parties changed material terms, which even amount to novation (See Andheri Bridge View Co-operative House Building society Ltd.), such conclusion need not necessarily follow in all cases. In the present case, the parties to the contract were in agreement about the product; the specifications alone changed. Likewise, the other change was the cost of the product. As far as quantity was concerned, the one agreed later was the same (500 MT) though to be shipped in two lots. Moreover, Asia Minerals kept insisting that its rights under the preexisting contract were preserved, in each of the admitted correspondence. Significantly, Asia Minerals referred to the original contract, with reference to terms of LC (Letter of Credit) opening. That is a matter of record. Accord Alloy's reliance on Reshmi Construction, in this Court's opinion, is of no avail, because that dealt with a case concerning compromise of disputes. In these circumstances, it is concluded, prima facie, that there was no novation of contract, as contended by Accord Alloys, which had the effect of superseding the arbitration agreement.

33. So far as Accord's contention regarding abandonment of the claim for arbitration, by reason of withdrawal of an application is concerned, the court notes that Asia Minerals did not seek substantive relief; the application was for

rejection of the plaint, where one of the reliefs was to refer the parties to arbitration, u/s 45. Asia Minerals argues, here, - and to this Court's mind, persuasively ? that there was no need for appointment, since a reference had been made for arbitration by LCIA, and proceedings had started. In these circumstances, there is strictly no "abandonment" of a claim, as is urged by Accord Alloys. This Court is also aware of the fact that the parties having chosen their dispute resolution through arbitration, and the contention regarding novation being negated, the continuance of an injunction which assists the party who had entered into the agreement to refer the dispute, to resile from it would be contrary to justice. In the circumstances, the injunction of the kind sought by Accord Alloys, cannot be granted.

34. For the above reasons, the applications preferred by Accord, i.e. IA 6904/2008, IA 8121/2008, and IA 8152/2008, have to fail, and are dismissed. The interim order made on 30.05.2008 is hereby vacated. For the same reasons, Asia Minerals' application for vacation of stay, i.e. IA 9521/2008 has to succeed, and is allowed. No costs.

35. The order in IA Nos. 6904/2008, IA 8121/2008, and IA 8152/2008 is being passed today. Learned Counsel for the plaintiff requests for a suspension of the order to enable him to file an appeal. Accordingly, the order shall not be operative for a week, i.e. upto 28.04.2010.

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List for further proceedings on 13.08.2010.

A copy of this judgment be given Dasti under signatures of Court Master.