

(2019) 02 DEL CK 0391

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) 225 Of 2018, Miscellaneous Application No. 7136 Of 2018

Steel Authority Of India Ltd

APPELLANT

Vs

Noble Chartering Inc

RESPONDENT

Date of Decision : 28-02-2019

Acts Referred:

Constitution of India, 1950 — Article 14
Indian Contract Act, 1872 — Section 23, 28, 28(3), 73
Arbitration and Conciliation Act, 1996 — Section 34
Urban Land (Ceiling and Regulation) Act, 1976 — Section 21

Citation : (2019) 4 R.A.J. 120 : (2019) 3 ArbLR 114

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Arun Kathpalia, Santosh Kumar, Sarthak Agarwal, V.K.Ramabhadran, J.K.Asher, B.H.Patel, D.Mehrotra, Sudhanshu Sikka

Final Decision : Partly Allowed

Judgement

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging the Award dated 27.12.2017 passed by the Sole Arbitrator.

2. The parties entered into a Contract of Affreightment (hereinafter referred to as the "COA") on 20.08.2008. The period of the contract was three years from September, 2008 to August, 2011. The Cargo quantity was specified as 18,00,000 MT of coking coal (5% more or less at petitioner's option), with parcel size of 70,000 MT (5% more or less). The shipments were to be "Fairly Evenly Spread" (FES).

3. The parties thereafter executed an addendum to the COA on 29.09.2009, whereby certain amendments were carried out in COA inter alia, with respect to the time of declaration of the laycans as also giving an option to the petitioner to avail the service of the respondent from Queensland and New South Wales,

Australia. The period of the COA was extended till February, 2012.

4. By an e-mail dated 30.10.2012, the petitioner agreed to further extension of the COA till September, 2013, however, with a reduction in the quantity to the extent of 5% in terms of the abovementioned COA and the addendum thereto.

5. The respondent vide its counsel's e-mail dated 09.11.2012, confirmed such extension and reduction in the cargo quantity. It further expressly stipulated that the other terms of the COA as amended by the addendum shall remain unchanged. It further through a table showed that the balance quantity to be shipped was 324373.3 MT with a parcel size of 70,000 /5% MOLOO (More or Less at Owner's Option).

6. The petitioner, however, thereafter did not declare any laycans under the extended COA and instead, by a communication dated 02.01.2013, terminated the COA alleging breach of the Agreement by the respondent. This letter is of some importance and is reproduced hereinbelow:

"Please refer to the subject COA and various correspondence and discussions with regard to the continuation or to deal otherwise with the said COA and declaration of stems there under.

Reference may be made to different events and circumstances adversely affecting the subject agreement which does not need any further elaboration.

The M/s Noble Chartering Inc. vide their correspondence and actions defaulted in performing their obligations under the subject agreement stated imposing extraneous demands and conditions which were all beyond the scope of the subject agreement. SAIL in the compelling circumstances of transporting the material from the Load Port and avoid delays therein accommodated the unreasonable demands on a few occasions but the said firm tried to impose unreasonable and impracticable conditions which all were beyond the subject.

Notwithstanding the above facts, the subject agreement continued to be honoured on account of SAILs positive approach for cooperation. However, as it may not be out of place to mention, during the performance under the above COA, on which inter-alia include substitution of Vessels, delayed arrival of vessels etc. All these caused substantial harassment and problems to SAIL besides losses which it had to suffer.

Going by the above facts, it leaves no doubt about the positive Intentions of the SAIL as charterer which led to continuation of the COA, under the aegis of TRANSCART, In spite of hostile conditions and attitude on the part of M/s Noble Chartering Inc.

Finally therefore please be informed that, SAIL is left with no option but to state that the subject agreement stands terminated under the 'Default Clause'.

Therefore the contract stands as terminated/rescinded however, reserving SAIL's right to claim equitable relief and action as remedy for the breach of contract."

7. The respondent by its letter dated 04.01.2013, while refuting that there was any breach of the Agreement by the respondent and stating that such allegations were vague in nature, asserted that the termination of the Agreement by the petitioner was a repudiatory breach of the Agreement by the petitioner itself, and the respondent would be entitled to claim losses occasioned therefrom.

8. Finally, by the letter dated 10.01.2013, the respondent reiterated that the petitioner is liable to compensate the respondent for the loss occasioned by such breach of the Agreement.

9. The disputes were referred to the Sole Arbitrator vide Agreement dated 29.06.2016 between the parties. The Sole Arbitrator by his Impugned Award has awarded in favour of the respondent damages of a sum of USD 8,524,908.60 with interest @ 3% per annum from the date of issuance of the letter of termination by the petitioner, that is, 02.01.2013. The Arbitrator has directed that such payment be made by the petitioner to the respondent within three months, failing which the petitioner shall pay further interest @9% per annum from the date of the Award till payment.

10. In reaching this conclusion, the Sole Arbitrator has rejected the submission of the petitioner that the COA did not constitute as a binding Agreement between the parties but was only in the nature of a Standing Order/contingent contract/MOU/Agreement to agree in future with no binding obligations on the petitioner.

11. The Arbitrator has considered various terms of the COA as also the evidence led by the parties, including the statements made by the witnesses produced by the respective parties, to hold that the COA imposes binding obligations for shipment for a fixed term of a fixed quantity of Coking Coal on the petitioner.

12. The Arbitrator has further held that Clause 62 of the COA does not entitle the petitioner to declare the Contract at an end at will and even otherwise, the facts narrated in the letter dated 02.01.2013 would not justify the termination of the COA under Clause 62 thereof. In reaching this conclusion, the Arbitrator has held that grant of a right to a party to the Agreement to unilaterally terminate the same without any liability, would render the Clause void under Section 23, 28 and 73 of the Indian Contract Act, 1872.

13. As far as the quantification of damages is concerned, the Arbitrator found that the damages calculated on the basis of the spot market rates would be the correct method of such determination and therefore, taking the laycans to be "Fairly Evenly Spread" over the extended period and falling due in December, 2012, March, 2013, May, 2013 and August, 2013, awarded damages in favour of the respondent.

SUBMISSIONS OF THE PETITIONER

14. The learned senior counsel for the petitioner feebly tried to argue that the COA does not amount to a binding Contract between the parties. He submitted that the COA is at best an Agreement to enter into an agreement in future and

is, therefore, not enforceable.

15. The learned senior counsel for the petitioner has further submitted that Clause 62 of the COA gives a right to the petitioner to unilaterally terminate the Agreement for convenience without any liability. He submits that the finding of the Arbitrator that the grant of such power to a contracting party to unilaterally terminate the Agreement would be void under Section 23 and 28 of the Contract Act is clearly incorrect. He submits that the Supreme Court in the case of *Her Highness Maharani Shantidevi P.Gaikwad vs. Savjibhai Haribhai Patel & Ors.* (2001) 5 SCC 101, has held that a contract cannot be held to be void only on the ground that it gives absolute power to the parties to terminate the agreement. He submits that in fact, such a right to unilaterally terminate the Agreement has been accepted by the Indian Courts and in this regard he places reliance on the judgment of the Supreme Court in *Hajee S.V.M. Mohamed Jamaludeen Bros. & Co. vs. Govt. of T.N.* (1997) 3 SCC 466 and of this Court in *Altus Group India Pvt. Ltd. vs. Darrameks Hotels & Developers Pvt. Ltd.* MANU/DE/1362/2018.

16. The learned senior counsel for the petitioner submits that the Arbitrator having held that a power to unilaterally terminate the Agreement would be void in terms of Section 23 and 28 of the Contract Act, has thereafter proceeded to put a restrictive interpretation to Clause 62 of the COA and has held that the power to terminate must be restricted to events beyond the control of the petitioner. He submits that such interpretation of Clause 62 of the COA is contrary to the plain reading of the said clause of the Agreement and therefore, cannot be sustained. Placing reliance on the judgment of the Supreme Court in *Steel Authority of India Ltd. vs. J.C.Budharaja, Govt. & Mining Contractor* (1999) 8 SCC 122, he submits that in the present case there was no question of interpretation of any terms of the Contract involved, but a mere reading of Clause 62 of the COA would have shown that the petitioner had a right to terminate the Agreement as per its convenience. The Arbitrator, in the name of interpreting the Agreement, could not therefore, have re-written the same for what he thought to be just and reasonable.

17. Learned senior counsel for the petitioner further submits that even assuming that the grounds mentioned by the petitioner in its notice dated 02.01.2013 terminating the Agreement were found to be incorrect, once it is accepted that the petitioner had the power to unilaterally terminate the Agreement, such termination can be sustained by this power. He submits that in fact, the notice of termination did refer to Clause 62 that is the "Default Clause". He places reliance on the judgment of the Supreme Court in *Juggilal Kamlatpat vs. Pratapmal Rameshwar* (1978) 1 SCC 69 to contend that the termination of the COA can be justified on grounds not taken in the termination notice, if such grounds existed at the time of termination.

18. Learned senior counsel for the petitioner further submits that even otherwise, the damages that have been awarded in favour of the respondent are without any proof and on an incorrect basis. Relying upon the Illustration (g) to

Section 73 of the Indian Contract Act, he submits that as the Contract between the parties was a long term Contract, the damages could have been awarded only by comparing it with a similar kind of contract, that is, a long term contract. The Arbitrator could not have awarded the damages on the basis of spot market rates, which are one-of Agreements.

19. The learned senior counsel further submits that the petitioner had also raised an issue with respect to the quantity of cargo to be taken into account for the purpose of calculation of damages as also the rates and the deductions that are to be made in terms of the COA as per the rate mentioned in the COA. He submits that it is an admitted case of the respondent that the respondent had entered into another back to back agreement with another company, Noble Chartering Ltd., and inspite of demand, the respondent did not produce the said Agreement before the Arbitrator. Damages, if any, in favour of the respondent could have been ascertained only if this document would have seen the light of the day. Therefore, an adverse inference should have been drawn against the respondent.

20. He further submits that the Arbitrator having held that the parties did not act in accordance with the "Fairly Evenly Spread" principle as stipulated in the COA, could not have thereafter, used the spot rates of December 2012, March, 2013, May, 2013 and August, 2013 to award damages to the respondent.

21. The learned senior counsel for the petitioner submits that all the above contentions of the petitioner on the quantification of the damages have been rejected by the Arbitrator without giving any reason and infact, without even advertng to the same.

22. He further submits that even assuming that the damages were to be awarded taking the spot rate as in December, 2012, March, 2013, May, 2013 and August, 2013, the Arbitrator could not have awarded interest on the total awarded amount with effect from 02.01.2013, that is, the date of termination of the Agreement.

23. Lastly, he submits that the Award being in US Dollars, in terms of the judgment of the Supreme Court in Vedanta Ltd. vs. Shenzen Shandong Nuclear Power Construction Co. Ltd. MANU/SC/1159/2018, only London Interbank Offered Rate (LIBOR) could have been awarded on such amount. In any case, the award of dual rate of interest cannot be sustained.

SUBMISSIONS OF THE RESPONDENT

24. On the other hand, learned senior counsel for the respondent submits that Clause 62 of the COA having been interpreted by the Arbitrator, this Court in exercise of its power under Section 34 of the Act cannot interfere with the same only because it would prefer another interpretation to the said Clause. He places reliance on the following judgments:

(i) Pure Helium India (P) Ltd. vs. Oil & Natural Gas Commission (2003) 8 SCC

593;

(ii) National Highway Authority of India vs. ITD Cementation India Ltd. (2015) 14 SCC 21

(iii) Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49;

(iv) Sumitomo Heavy Industries Ltd. vs. Oil and Natural Gas Corporation Ltd., (2010) 11 SCC 296

25. He further submits that the legislature has also recognized the limited nature of the power vested in this Court under Section 34 of the Act and to clarify the same has amended Section 28(3) of the Act, which now provides that the Arbitrator shall "take into account the terms of the contract" instead of the earlier language used, wherein it was provided that "the Arbitral Tribunal shall decide in accordance with the terms of the contract". Relying upon the 246th Law Commission Report, he submits that this amendment would result in the Judgment of the Supreme Court in Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705 not being good law. He submits that the public policy is now to be even more narrowly construed and as was done by the Supreme Court in the judgment of Renusagar Power Co. Ltd. vs. General Electric Co. 1994 Supp (1) SCC 644.

26. Learned senior counsel for the respondent further submits that the Arbitration Agreement dated 29.06.2016 filed by the petitioner with the petition is not the true copy of the Agreement executed between the parties. Copy of the Arbitration Agreement has been handed over by the learned senior counsel during the course of his arguments.

27. Relying upon Clause 10 of the said Agreement, he submits that the provisions of the Act as amended by the Arbitration and Conciliation (Amendment) Act, 2015 were made applicable to the Arbitration. Therefore, the amended provisions of Section 28(3) would apply to the present case.

28. He further relied upon Clause 1 of the Arbitration Agreement dated 29.06.2016 to contend that the power vested with the Arbitrator was very wide. Infact, a specific issue of interpretation of Clause 62 of the COA was referred to the Arbitrator for adjudication. The Arbitrator, therefore, having interpreted the Clause in a particular manner, it was not open for this Court to upset the Award on basis of another interpretation being preferred over it.

29. He further submits that Clause 62 of the COA can only apply to circumstances which are beyond the control of the petitioner. He submits that the words "should Suppliers/Charterers in any manner or otherwise fail to perform the contract" have to be read along with the preceding and the following conditions stipulated in the said clause and have to take colour from them. As the preceding part of the clause refers to failure of the Supplier to provide material for shipment and the subsequent part of clause provides for a situation where a receiver has been appointed on the assets of the petitioner or the

petitioner proceeds to liquidation, the words quoted hereinabove have to be narrowly construed so as to include only circumstances which are akin to these conditions and are beyond the control of the petitioner.

30. He further submits that Clause 62 of the COA, in any case, is an ambiguous Clause as it uses the words "Suppliers/Charterers"; clearly "Suppliers", who are not parties to the COA, cannot terminate the COA. Relying upon the answers given by Ms.Jasmina Maiti, witness of the petitioner, he submits that the witness had clearly admitted that the term "Supplier" used in Clause 62 of the COA refers to the supplier of the coal and not to the petitioner. There being an ambiguity in the Agreement, the Arbitrator was justified in interpreting the Agreement and the Arbitrator having so interpreted the Agreement, this Court would not second guess the same or upset the Award only because it would prefer another interpretation to the same.

31. Learned senior counsel for the respondent further submits that the judgment of the Supreme Court in *Her Highness Maharani Shantidevi P.Gaikwad (supra)*, would not be applicable to the facts of the present case inasmuch as, in that case the contractual terms were clear and unambiguous in granting power to the contracting party to unilaterally terminate the Agreement.

32. The learned senior counsel for the respondent, however, fairly admits that it was not the case of the respondent that power vested in a contracting party to unilaterally terminate the Agreement would be void in terms of Section 23, 28 and 73 of the Contract Act. He submits that this was not a plea raised by the respondent before the Arbitrator nor is he defending such finding of the Arbitrator before this Court.

33. As far as the issue of damages is concerned, the learned senior counsel for the respondent submits that at the time of agreeing to the extension of the period of Contract by e-mail dated 09.11.2012, the respondent had clearly mentioned the balance quantity that remains to be shipped in terms of the COA. Therefore, there was absolutely no justification in the submission made by the petitioner on this account and the same has been rightly rejected by the Arbitrator.

34. As far as the claim of the petitioner that it was entitled to reduce the quantity of the cargo by 5%, the learned senior counsel for the respondent draws my attention to Clause 1(a) of the COA and submits that this option could have been exercised by the petitioner only once during the contractual period. This option was duly exercised by the petitioner in its e-mail dated 30.10.2012 and had been agreed upon by the respondent in respondent's response dated 09.11.2012. The option therefore, stood exhausted and there was no question of giving this option again to the petitioner. He submits that the submission of the petitioner was, therefore, clearly fallacious and has been rightly rejected by the Arbitrator.

35. In response to the submission that the Arbitrator has given contradictory finding on the issue of the "Fairly Evenly Spread" being the basis of supply, the

learned senior counsel for the respondent submits that the finding of the Arbitrator that the parties had given a go by to the stipulation in the manner of conduct, was confined only to the initial period of the COA and not to the extended term of the Contract. He submits that while agreeing to the extension, the parties had clearly stipulated that they will remain bound by other terms of the COA, this therefore, necessarily includes the term of "Fairly Evenly Spread".

36. As far as the use of the spot market rates, in spite of and in place of a long term contract being the measure of damages, he submits that the petitioner in its Statement of Defence had stated that the long term contract cannot be a basis for determination of damages and, in fact, had itself relied upon the spot market rates while claiming mitigation of loss. Further, relying upon Clause 1(d) of the COA, he submits that even for the damages to be awarded to the petitioner in case of default by the respondent, the Contract itself stipulates use of spot market rates and therefore, the said basis was justified not only in law but also in Contract. In any case, the Arbitrator having considered this issue and being the final judge of the evidence led before him, this Court cannot interfere in such finding in exercise of its powers under Section 34 of the Act.

37. The learned senior counsel for the respondent fairly submits that there is a typographical error in the Award inasmuch as it awards USD 8,524,908.60 in place of USD 8,506,669.6 in favour of the respondent. He submits that this Court, however, cannot set aside the Award on account of this mistake, but the Award can be modified taking into account the correct figure of the damages.

38. As far as the rate of interest is concerned, he submits that even adopting the LIBOR Rate, the rate of interest awarded by the Arbitrator would be reasonable and fair.

FINDINGS:-

39. I have considered the submissions made by the learned senior counsels for the parties.

40. I am unable to agree with the submission made by the learned senior counsel for the petitioner as far as the binding nature of the Agreement is concerned. The COA clearly defines the cargo quantity to be shipped over the period of three years, that is, the contractual period; the parcel size of each shipment; freight; the type of vessel that is to be used in the shipment; and the timeline with regard to nomination of vessel(s). Therefore, all material terms of a binding contract are clearly available in the COA. The COA further goes ahead and provides for circumstances where the parties may be discharged from performing their respective obligations due to force majeure conditions or default. It cannot therefore, be said that the COA was not a binding contract between the parties. All that was required to be done was for the petitioner to declare the laycan in accordance with the terms of the COA and the respondent to nominate the vessel and make the shipment at the agreed freight.

41. As far as submissions with respect to Clause 62 of COA is concerned, Clauses 61 and 62 of the COA are reproduced as under:-

"61. Force Majeure Clause

If either Shippers/Charterers be prevented from discharging their or its obligations under this agreement by reasons of arrests or restraints by Government or people, war, blockade, revolution, insurrection, mobilisation, strikes, civil commotions, acts of God, plague or other epidemics, breakdowns of mining rail, road or port equipment, destruction of materials by fire or flood or other natural calamity interfering with production, loading or discharging, the obligations under this agreement shall be deferred to a date to be agreed considering the length of time required to resume natural operations. However, if any on occurrence of force majeure continues uninterrupted for 30 days or more or if the total of such occurrence within the agreed shipment period adds to 90 days or more, Owners/Charterers may opt to cancel this agreement without in any way being liable to the other party for such cancellation.

Party invoking protections under such clause will put the other party on notice within a reasonable period of time supported by certified from chamber of commerce or concerned government authority or concerned authority or company/secretary and shall likewise intimate cessation of such causes.

The delivery shall be resumed by the party/parties after cessation of Force Majeure causes.

62. Default

Should Suppliers/Charterers fail to provide materials for shipment or to ship the materials by the time or times agreed upon or should Suppliers/Charterers in any manner or otherwise fail to perform the contract or should a Receiver by appointed on its assets or make or enter into any arrangements or composition with creditors or suspend payments (or being a company should enter into liquidation either compulsory or voluntary) the Suppliers/Charterers shall be entitled to declare the contract as at an end without any liabilities on either side."

42. The Sole Arbitrator in the Impugned Award has considered Clause 62 and held that if the same is to be read as giving complete freedom to the petitioner to terminate the Contract, the same would be vulnerable as being declared void under Section 23 read with Section 28 of the Indian Contract Act, 1872. It would also be forbidden being contrary to Section 73 of the Contract Act.

43. As noted above, the learned senior counsel for the respondent admits that this was not even a plea raised by the respondent before the Arbitrator and he does not seek to defend the same.

44. In any case, in Her Highness Maharani Shantidevi P. Gaikwad (Supra), the Supreme Court held as under:

"49. We are unable to agree with the approach of the High Court and find

substance in the contention of Mr Nariman. Clause (17) is in the nature of express stipulation that before delivery of possession, the contract could be unilaterally terminated. When there is no ambiguity in the clause, the question of intendment is immaterial. The fact that the clause is couched in a negative form is of no consequence. The intention is clear from the plain language of clause (17) of the agreement. In the case in hand, Section 202 has no applicability. It is not a case of agency coupled with interest. No interest can be said to have been created on account of plaintiff being permitted to prepare the Scheme and take ancillary steps. The plaintiff could not get possession before declaration under Section 21 of the ULC Act.....

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51. It has been held that "in the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible". In the present case we are concerned with an unambiguous document and, therefore, we have to go by its plain meaning. Further, affidavit-cum-declaration only reiterated what was contained in the agreement. It did not enlarge the agreement. It did not substitute any clause in the agreement. It was not a document executed between the parties. It was a document executed by original Defendant no.1 alone for the purposes of filing it before the competent authority. Clause 17 of the agreement does not call for any other interpretation except that the contract could be unilaterally rescinded before delivery of possession.

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54. In our view, the aforesaid passage has been misread in National Fertilizers case. Further in Central Bank of India Ltd.v. Hartford Fire Insurance Co. Ltd., decisions of the Madras High Court and of this Court (Union of India v. Maddala Thathaiah) were considered. The question in that case was whether the insurance policy had been terminated. This Court was concerned with a clause in an insurance policy which, inter alia, provided that the policy can be terminated at the option of the Insurance Company. The contention of the respondent Insurance Company was that it had power under the said clause to terminate the contract at will and it had duly exercised that power. The appellant's contention was that it was implied in the clause that termination could only be for a reasonable cause which did not exist in that case. It was further contended that if this interpretation of implied term is not accepted, the clause giving such right to terminate at will without reasonable cause must be treated as void and ignored. This Court said: (AIR p. 1290, para 5)

"5. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the

plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "this insurance may be terminated at any time at the request of the insured", and "the insurance may also at any time be terminated at the instance of the company". These are all the words of the clause that matter for the present purpose. The words "at any time" can only mean "at any time the party concerned likes". Shortly put clause 10 says "either party may at its will terminate the policy". No other meaning of the words used is conceivable."

55. Regarding validity of the clause which gave power as aforesaid, this Court held: (AIR pp. 1292-93, paras 15-16)

"15. The next argument was that clause 10 was bad as it gave more option to the insurer than to the assured. We express no opinion as to whether the clause would be bad if it did so, for we are clear in our mind that it did not. The argument that it did was based on the use of the word "request" in the case of a termination by the assured and "option" in the case of a termination by the insurer. It was said that the word "request" implied that the request had to be accepted by the insurer before there was a termination whereas the word "option" indicated that the termination would be by an act of the insurer alone. We are unable to agree that such is the meaning of the word "request". In our view, the clause means that the intimation by the assured to terminate the policy would bring it to an end without more, for the clause does not say that the termination shall take effect only when the assured's request has been accepted by the insurer.

16. Lastly it was said that the termination of the contract by the letter of August 7, 1947 was a conditional termination and as the condition was impossible of performance in the circumstances prevailing, there was in fact no termination. That condition, it was said, was the removal of the goods from Bakarwana Bazar, Amritsar to a safer locality. We have nothing to show that the condition, if it was such, was impossible of performance. However, that may be, there is no question of any condition. The letter clearly terminated the policy. It gave an option to the assured to keep the policy on its feet if it did something. Further we do not think that it can be said that if a party has a right at will to terminate a contract, the imposition by him of a condition, however hard, on failure to fulfil which the termination was to take effect, would make the termination illegal, for the party affected was not entitled even to the benefit of a difficult condition. The agreement was that the power to terminate could be exercised without more and that is what we think was done in this case.

(Emphasis has been supplied by us)"

56. From the aforesaid, it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the

insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted."

(Emphasis Supplied)

45. In any case, in *Central Bank of India Ltd, Amritsar vs. Hartford Fire Insurance Co., Ltd.*, AIR 1965 SC 1288, the Supreme Court held as under:

"7. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This Insurance may be terminated at any time at the request of the Insured", and "The Insurance may also at any time be terminated at the instance of the Company." These are all the words of the clause that matter for the present purpose. The words "at any time" can only mean "at any time the party concerned likes". Shortly put clause 10 says "Either party may at its will terminate the policy". No other meaning of the words used is conceivable."

46. This Court, after analyzing various judgments on this issue, in *M/s Classic Motors Ltd. v. Maruti Udyog Ltd.*, 1996 SCC OnLine 872, in relation to the franchise agreement, has held as under:

"Interpretation and meaning of the expression "without assigning any cause:"

68. The aforesaid expression appears in clause 21 of the agreement which states that either party to the agreement could terminate the contract after giving to the other party a notice of 90 days 'without assigning any cause'. The present agreement, it must be remembered, was entered into by the parties in the realm of private law as a result of purely private commercial transaction. It is also to be remembered that in a private contract a party is free to choose the person and the subject matter of the transaction according to its own free will. No restriction or fetter could be imposed on either of the parties to the manner, mode and the nature of the agreement that they choose to enter into. But the law applicable would be different when such an agreement is entered into in the realm of public law.

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70. In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reason with a reasonable period of notice in terms of such a clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

71. On an overall view of the entire matter, it appears to me that the present agreement was never intended to be permanent and that in respect of dealership sales agreements between private parties such agreements could never be held to be perpetual unless so intended by the parties and specifically stated in the agreement itself. On a reasonable construction of the agreement in hand I hold that either party to the agreement was entitled to terminate the contract without assigning any reason by giving 90 days notice or even without giving any notice upon the happening of an event. Termination without cause in common law is a valid power which the parties may give to themselves.

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85.The parties were private parties dealing in the realm of private contract. Therefore, it is for the defendant to decide whether in view of such allegations and evidence against the defendant the agreement should not be terminated or not.....However, in view of the specific provision in the agreement that the defendant could terminate the contract in accordance with clause

21 without assigning any reason, which according to the defendant was resorted to in the present case, this finding appears to be not very material for the purpose of answering issue No.1."

47. In Oil and Natural Gas Corporation Ltd., Mumbai v. M/s Streamline Shipping Co. Pvt. Ltd., 2002 SCC OnLine Bom 303, the High Court of Bombay held as under:

"5. Having heard the learned Advocate General for the appellant and Mr. Thakkar for respondent, in our opinion, it is not possible to agree with the view expressed by the learned single Judge that clause 19.3 is unconscionable and opposed to public policy. Clause 19.3 gives power to the appellant to determine the contract after expiry of one year without assigning any reason. All that the appellant did was to exercise that right or power to terminate the contract whose terms and conditions were well known and agreed to by the respondent. Thus the contract by virtue of clause 19.3 sets out the power of termination by the appellant and the appellant has so acted under that clause. The clause while setting out the right of termination further says that the appellant can do so without assigning any reasons for the same. However, in the present case the duty to act fairly is sought to be imported into the contract to modify and alter its terms and create

an obligation upon the appellant which is not there in the contract. It is settled position of law that where the contracts are freely entered with the State there is no scope for invoking the doctrine of fairness and reasonableness for the purpose of altering or adding to the terms and conditions of the contracts. In such cases the question of public law based on Article 14 of the Constitution do not arise and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of Specific Relief Act providing for non-enforceability of certain types of contracts."

48. In *Altus Group India Private Ltd. v. Darrameks Hotels & Developers Pvt. Ltd.*, MANU/DE/1362/2018, this Court held that:

"9. In my opinion, the Arbitrator has completely misguided himself. It cannot be denied that commercial contracts by their very nature are determinable. A contract may provide for the termination of the contract with or without a cause. Private commercial transactions can be terminated by the parties even without assigning any reason, with a reasonable period of notice in terms of a clause in the agreement authorizing such termination. Such termination cannot be challenged even on the grounds of it being mala fide."

49. Thereafter, the Division Bench of this Court while deciding the appeal against aforesaid order, in *M/s. Darrameks Hotels & Developers Pvt. Ltd. v. M/s Altus Group India Pvt. Ltd.*, 2018 SCC OnLine Del 9335, held as under:-

"6. We do not find any merit in the said stand and stance as Sub-clause (IV) of Clause (9) is clear and categoric and does not suffer from any doubt or ambiguity. Either party had option to terminate the contract by giving thirty days notice in writing. Sub-clause (II) on the other hand is a specific clause, which empowered and gave option to the respondent i.e., to the Project Manager and Consultant to terminate the agreement in case of non-payment of fees within thirty days from receipt of reminder by a courier letter. There would be instant termination on satisfaction of the stipulations under Sub-clause (II), whereas in case of Sub-clause (IV) termination would take place vide thirty days prior notice. Sub-clause (II) had dealt with a specific eventuality, i.e., non-payment of fee by the owner/appellant to the Project Management and Consultant/respondent. Sub-clause (IV) obviously was incorporated with the intention giving an option to the either party to terminate the contract. No doubt, Sub-clauses (I) and (IV) would overlap insofar as right of the owner, i.e., the appellant is concerned, but this cannot be a ground to hold that Sub-clause

(IV) would not be available to the respondent. Sub-clause (IV) in plain and simple words thus states that either party could terminate the contract by giving thirty days notice in writing to the other. In a way, both the appellant and the respondent were placed equally and given same right and option of termination by thirty days notice.

7. Learned single Judge in the impugned order has referred to and quoted from several decisions of the Supreme Court in *Central Bank of India, Limited*,

Amritsar v. Hartford Fire Insurance Co., Limited, AIR 1965 SC 1288, Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel, (2001) 5 SCC 101, Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49, Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL), 2017 (12) SCALE 241. Reference was also made to judgments of the Delhi High Court in Classic Motors Limited v. Maruti Udyog Limited, (1997) 65 DLT 166 and judgment of the Bombay High Court in Oil and Natural Gas Corporation Limited v. Streamline Shipping Company Private Limited, 2002 SCC OnLine Bom 303. After examining scope and ambit of judicial interference, it has been held that clause 9(IV) being explicit was the final word on the intent of the parties and clearly had authorized either party to terminate the agreement without cause by simply giving notice to the other. The Award, on the other hand, was counter and contrary to clause 9(IV) and the learned Arbitrator had, therefore, committed a fundamental error in holding that the contract had not provided for option to the respondent for termination of the agreement without cause.

8. The view we have taken upholding the decision of the learned single Judge does not conflict with the ratio in ITD Cementation India Limited (supra). Construction of the terms of the agreement is within the jurisdiction of the Arbitral Tribunal and if the view taken is a plausible one, Courts would not interfere and substitute its view in place of the interpretation accepted in the Award. This however, is not to say that in no case the Court can interfere even when interpretation is plainly abstruse and esoteric. In Nabha Power Limited (supra), it was observed by the Supreme Court that a multi-clause contract has to be understood and interpreted in a manner that a particular clause of the contract should not do violence to another part/clause of the contract. In Western Geco International Limited, (2014) 9 SCC 263, it was observed that "fundamental policy of Indian law" connotes some matter, which concern public good and public interest and an Award which on the face of it is patently in violation of statutory provisions is not in public interest as it would adversely affect administration of justice.

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12. The present case, according to us, falls within the four corners of the expression "patent illegality" as expounded and explained in the said decisions, as clause 9(IV) has been completely misconstrued and made inconsequential and redundant. There is apparent and patent fallacy and flaw in the interpretation which is contrary to the plain language and therefore must be checked and corrected. This is not a case of fair minded or reasonable construction, but a construction which is ex facie contrary to the written and agreed clause and the interpretation is completely erroneous. Interference was, therefore, justified and required....."

50. The above judgments would clearly show that it is no longer res integra that a Contract may vest with a party to the Contract a power to unilaterally terminate the Agreement for its convenience and such a Clause would be valid

under the Indian Contract Act.

51. The Arbitrator having held that conferring of a power to terminate the Agreement unilaterally would be void under Section 23, 28 and 73 of the Contract Act, thereafter proceeded to interpret the same and has held that the words "Suppliers/Charterers in any manner or otherwise fail to perform the Contract" would have to be read ejusdem generis to the other terms in the said Clause.

52. The exercise of interpretation was predicated on the finding of the Arbitrator that the plain reading of the clause would make the clause vulnerable as being declared void. Once the foundation of such interpretation is found to be incorrect, the exercise of such interpretation conducted by the Arbitrator was totally uncalled for. The Contract had to be read in its plain manner and required no further interpretation.

53. I am fully conscious of the limitation on the power of this Court while exercising its jurisdiction under Section 34 of the Act, however, at the same time, if the interpretation put forward by the Arbitral Tribunal on the face of it is incorrect, rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

54. In *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL)* and Anr. (2018) 11 SCC 508, the Supreme Court has held as under:-

"72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any "implied term" but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

55. In *Steel Authority of India Ltd. v. J.C.Budharaja, Government and Mining Contractor* (1999) 8 SCC 122, the Supreme Court had highlighted the exception to the principle of hands-off approach by holding that in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the Arbitrator ignores it and awards the amount despite the prohibition in the Agreement, the Award would be liable to be set aside.

56. In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises*

& Anr. (1999) 9 SCC 283, the Supreme Court reiterated that where there is no question of interpretation as the language of the contract is absolutely clear and unambiguous, by ignoring such terms the Arbitrator would have travelled beyond his jurisdiction and the Award would be liable to be set aside.

57. In *Rashtriya Chemicals and Fertilizers Limited v. Chowgule Brothers & Ors.*, (2010) 8 SCC 563, the Court held that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties.

58. Infact, in paragraph 115 of the Impugned Award the Arbitrator himself interprets the Agreement, including Clause 62 and states that under Clause 62 the petitioner had a further right to terminate the Agreement for failure to ship goods or if it fails to perform the Contract in any manner, that is, in effect the unilateral termination Clause. Having held so, the interpretation later given by the Arbitrator was only because he had held that such a power would be void under Section 23, 28 and 73 of the Contract Act. Paragraph 115 of the Award is quoted hereinbelow:-

"115. Therefore I do not accept the Respondent's plea that the Case 1 Agreement is merely a standing order or an agreement to agree. As has been rightly pointed out by the learned senior counsel for the Claimant, the opening paragraph and Clause 1 in particular support his contention that the parties intended binding obligations for shipment of a fixed quantity of coking coal over a defined period. At the same time, however both parties provided for their respective rights to terminate the Contract if force majeure circumstances existed for particular periods i.e. continuously for 30 days or 90 days cumulatively over the shipment period. The Respondent had the further right to terminate under Clause 62 i.e, the Default Clause, for failure to ship goods or if it failed to perform the Contract in any manner i.e. in effect a unilateral termination clause."

(Emphasis Supplied)

59. It is further of some relevance to note that even the respondent, in its reply to the Statement of Defence had given varied interpretation to Clause 62 of the Agreement. Therefore, the interpretation put forth by the respondent or by the Arbitrator was not on the basis of what the Clause actually read or was intended by the parties to read as, but how it should be so read to make it reasonable and workable for the respondent. This certainly was not the function assigned to the Arbitrator. The relevant paragraph of the reply to the Statement of Defence is quoted hereinunder:-

"11. xxxxxx

(ii) In the alternative and without prejudice to the foregoing, Clause 62 contains an obvious mistake which should be corrected by construction: the words "supplier/charterers" in the penultimate line should be substituted with the word

"Owners". Without that correction Clause 62 would be an absurd provision which would confer rights on the defaulting party rather than the innocent party, and would entitle the Respondent to bring the COA to an end on account of their own default, rendering the COA effectively worthless from the Claimant's perspective. The Respondent itself recognizes this absurdity in paragraph 29 of the Defence.

(iii) In the alternative and without prejudice to the foregoing, Clause 62 is for the reasons in the previous sub-paragraph, manifestly inconsistent with and / or repugnant to the rest of the COA and should be rejected, alternatively held to apply only to less egregious forms of default. Given the gravity of the breaches and defaults in this case, Clause 62, properly construed, provides the Respondent with no defence to liability.

(iv) In the alternative and without prejudice to the foregoing, even if Clause 62 were taken literally (so as to involve the absurdity just mentioned), it should be considered only in cases of "Force Majeure" which has not been why the Respondent has not performed the COA in the present case which is clear from the Respondent's own letters to the Claimant, therefore the Claimant submits that Clause 62 would have no application.

(v) In the alternative and without prejudice to the foregoing, the Respondent being a public sector "Maharatna" entity, the Claimant had a reasonable expectation that the Respondent would be fair, non-discriminatory and unbiased in its dealings. However, by attempting to renege from its obligations under the COA and/ or by relying on Clause 62 of the COA to justify its defaults, the Respondent is acting in an arbitrary and high handed manner, which is contrary to the doctrine of legitimate expectation."

60. In view of the above, the premise of the Arbitrator that a Clause in the Agreement empowering one of the parties to terminate the Agreement at its convenience and without there being a justifiable cause for the same would make other clauses redundant, cannot be accepted. The entire foundation of interpreting Clause 62 as being applicable only to events constituting inability of petitioner in circumstances outside its control, is therefore, fallacious and unsustainable in law. Once the foundation goes, the building has to fall.

61. In view of the above, reliance of the learned senior counsel for the respondent on amended Section 28(3) of the Act or on the 246th Report of the Law Commission of India also cannot be accepted.

62. The Arbitrator has further held that the facts and circumstances narrated in the letter dated 02.01.2013 addressed by the petitioner to the respondent would not justify the termination under Clause 62 and for reaching this conclusion, the Arbitrator relies on his earlier finding that Clause 62 of the COA has to be read in conjunction with Clause 61 of the COA. As I have already held such interpretation of the Agreement by the Arbitrator to be incorrect, the finding of the Arbitrator on the validity of the notice dated 02.01.2013 cannot also be sustained.

63. In any case, as rightly relied upon by the learned senior counsel for the petitioner, in *Juggilal Kamlapat (Supra)*, the Supreme Court has held that the law permits the defendant to justify the repudiation of the Contract on any ground which existed at the time of repudiation, whether or not the ground was stated in the correspondence.

64. Further, the letter dated 02.01.2013 specifically refers to the "Default Clause", i.e. Clause 62 of the COA.

65. Even otherwise, the claim of the respondent is one of damages. In *Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors.*, (1991) 1 SCC 533, the Supreme Court in light of a clause allowing revocation of Agreement by either party by giving 30 days' notice, allowed compensations/loss of earnings for period of notice (30 days), holding as under:

"12. The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms.....This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted....

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14. The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under clause 27 of the agreement. No doubt, the notice of termination of distributorship dated March 11, 1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the appellant-Corporation; and such acts would permit exercise of the right of

termination of distributorship under clause 27. However, the arbitrator having held that clause 27 was not available to the appellant-Corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revokable by either party in accordance with clause 28 by giving 30 days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship. The award has, therefore, to be modified accordingly. The compensation for 30 days notice period from March 11, 1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd."

66. In *Comau UK Limited v. Lotus Lightweight Structures Limited*, [2014] EWHC 2122 (Comm), the Queen's Bench Division held:

"20. The reason is that in my judgment the existence of Clause 12.5 shows that Comau probably did not have the entitlement it suggests and on which the thrust of its claim is premised. Mr.Allen submitted that one could not treat Clause 12.5 as defining the scope of the parties' reasonable expectations, and that it did not cut down what he described as Comau's "expectation interest". In my judgment, the Clause probably does both these things.

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23. In my judgment, viewing things at this interim stage in the proceedings:

xxxx

(d) Comau's contractual expectation interest accordingly appears to be limited to such profit as it might have made until such time as Lotus chose to "terminate for convenience" under Clause 12.5.

(e) It appears that Comau's loss is to be assessed on the basis that but for its breach Lotus would have availed itself of clause 12.5 to reduce its liability to Comau. In point is this passage from Chitty on Contracts 31st edition Vol 1 at 26- 074:

"If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at the least cost to himself... A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for breach on the assumption that the defendant would have exercised the option" See also Lord Denning MR in *The Mihalis Angelos* [1971] 1 QB 164 at 196G-197A.

(f) The fact, to which Mr Allen draws attention, that Lotus was only entitled to invoke clause 12.5 if it was not in breach, does not appear to be relevant because the assessment looks at what Lotus would do if there had not been a breach.

(g) It appears that any assessment of damages would proceed on the assumption that Lotus would have exercised its rights under clause 12.5, because any other assumption ignores the limited nature of Comau's "expectation interest" - that Comau was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any "termination for convenience". If the effect of clause 12.5 is ignored when assessing damages, the effect would be to give Comau the benefit of a better bargain than it actually made.

67. These judgments were also cited with approval by this Court in the case of Pipavav Energy Pvt. Ltd. vs. Madhavi Procon Pvt. Ltd., 2018 SCC OnLine Del 13100, while setting aside the loss of profit claim awarded in favour of the respondent therein as a consequence of termination of the Agreement.

68. On the measurement of damages, the Arbitrator, after relying upon Section 73 of the Contract Act and various other judgments expounding the law of damages, has held as under:-

"211. From the above, it becomes apparent that the measure of damages would be the difference between the contract price and the market rate at the time of the breach. The party that has suffered the breach is not required to go to the market and buy or sell or perform a contract before claiming damages. On the date of the breach, if the party who has suffered breach goes to the market and buys or sells or performs a contract then the measure of damages is the difference between the contract price and the rate at which the party who has suffered breach has performed. Alternatively, if the party who has suffered breach goes to the market and buys or sells or performs a contract, well after the date of the breach, the measure of damages would still be the difference between the contract price and the market rate at the time of the breach and not the rate at which the party who has suffered breach has bought or or sold or performed a contract.

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214. I am unable to accept the submission of the Respondent that the Claimant has not, in accordance with the requirements of Indian law pleaded and proved the loss that it has suffered. In my opinion, there are sufficient pleadings and evidence to show that the Claimant would have been able to perform the four stems had the same been declared.

215. Under Clause 5 of the COA, the charterers are required to declare stems 4 to 6 weeks prior to the commencement of laydays. Thereafter owners are required

to nominate suitable tonnage with 10 days spread laydays within 2 working days. Thereafter the charterers are required to confirm nomination within 3 working days. Actual performing vessel, if not already done, is to be nominated by owners 15 days prior to the commencement of each laydays. In my opinion this schedule provides enough opportunity to the owner to nominate a suitable vessel on the laycan being declared by the charterer. Furthermore, the Clause permits the owner to substitute the nomination in cases of operational exigencies. This, of course, has to be done well in advance and definitely not later than 10 days prior to the commencement of laydays. Such substitutions were always accepted by the Respondent throughout the performance of the contract. The aforesaid Clause makes it clear that the nomination of the vessel always follows the declaration of the stem. The Respondent not having declared the stem, the Claimant was not required to nominate any vessel. I, therefore, hold that the Claimant would be entitled to the damages for the breach of COA by the Respondent.

216. I have noticed extensively the manner in which damages have been calculated by the Claimant. In the amended Statement of Claim, the amount of damages claimed is USD 8,546,213.85 or in the alternative USD 8,524,908.60. A claim is also made for incidental losses of USD 32,500.

217. The claim of USD 8,524,908.60 is made on the basis of the recognized principles for awarding damages as noticed in the earlier part of the award. I do not accept claim for damages as calculated on the basis of Baltic Index or on the basis of Forward Pricing. Nor do I accept the claim for damages calculated by Ms. Jean Richards on the basis of Spot Market, i.e. on the data of market fixtures by independent market sources. In my opinion, all the aforesaid three methods would be unsatisfactory for calculation of approximate damages in the facts and circumstances of the present case.

218. I, therefore, hold that the Claimant is entitled to damages in the sum of USD 8,524,908.60."

69. In my view and in view of the finding which has been given by me on the validity of the termination notice, the submission made by the learned counsels for the parties need not be considered in much detail. In the Statement of Claim / rejoinder, the respondent had itself asserted that as on the date of the termination only the stem of December 2012 has become due applying the principle of "Fairly Evenly Spread". Based on the spot market rate, it had calculated the damages for this stem as USD 2,013,585.60. Applying the ratio of the judgment of the Supreme Court in Amritsar Gas Service & Ors (Supra) and of this Court in Pipavav Energy Pvt Ltd (Supra), the respondent would be entitled to damages only on this stem. As the other stems fell due after the date of termination and Clause 62 of the COA clearly discharged the Charterer/petitioner from any liability thereafter, the respondent cannot be held entitled to damages for the remaining stems. However, at the same time, the termination notice cannot have a retrospective effect so as to absolve the petitioner of its liability of

breach already incurred as on date of termination.

70. Further, the learned senior counsel for the petitioner is right in his submission that the said amount would have to be reduced by an amount of 1.25% payable to the brokers in terms of Clause 48 and brokerage commission, if any, in terms of Clause 49 of the COA.

71. As far as the argument of the learned senior counsel for the petitioner that such damages have to be calculated only on basis of the long term Contract, the same loses significance as the respondent is being held entitled to claim damages only for a single stem. Equally, the discrepancy in the amount of the damages due to the typographical error also loses all significance.

72. As far as the argument of the learned senior counsel for the petitioner that the petitioner was entitled to reduction of the quantity by 5% also, I am in agreement with the submission of the learned senior counsel for the respondent that in terms of the extension agreed to by the respondent by its fax/e-mail dated 09.11.2012, this option has already been taken into account while determining the balance quantity of cargo as 3,24,373.3 MT and the parcel size of 70,000 with 5% MOLOO (More or Less Owner's Option). In view of this fax/e-mail, the submission of the learned senior counsel for the petitioner that the petitioner was entitled to yet another 5% reduction in the quantity cannot be accepted. The said e-mail, also shows that the parties intended to also make the basis of "Fairly Evenly Spread" applicable to the balance shipment. The fax/e-mail records this as under:-

"Dear Sirs,

Our clients thank Charterers for their message dated 30 October.

On behalf of Owners, we confirm that Owners agree to extend this COA to latest end September 2013.

We further confirm that Owners agree to allow Charterers to exercise their option to reduce cargo quantity by 5%. .

The COA as amended by the Addendum dated 29 September 2009 is otherwise unchanged.

The remaining shipments are to be performed on a FES basis as per COA. Please note the shipments performed so far under the COA are as follows:

SAIL/NOBLE COA

C/P DD 20/AUG/08

XXXXXX

XXXXXX

XXXXXX

TOTAL QUANTITY CARRIED SO FAR

1385626.7

BASE QUANTITY

1800000.0

QTY AFTER CHARTERERS EXERCISE OF 5% OPTION AFTER 5% DISCOUNT

1710000.0

BALANCE QUANTITY

324373.3

COA PARCEL SIZE

70,000/5% MOLO

Owners request Charterers to declare the next laycan, either from the USEC as per original COA, or from Australia as per the Addendum dated 29 September 2009.

Page No. 3

Please liaise with Owners direct as regards such declaration." (Emphasis Supplied)

73. As far as the submission of the learned senior counsel for the petitioner that for failure of the respondent to produce its Agreement with Noblel Chartering Limited, an adverse inference should be drawn against the respondent for the purposes of calculating the damages, in my view, as the Arbitrator has relied upon the spot rates, which are otherwise not being denied by the petitioner, the said submission has no force. There can be various methods of determining the damages suffered by a party. In fact, an indication of the basis is also evident from the COA itself in form of Clause 1(d) thereof, which states that incase the respondent is unable to nominate a vessel in the required laydays, the quantity may be covered by Charterer/petitioner on spot basis and the difference in freight, if any, including any other cost / consequence shall be on account of owners. In any case, the adoption of spot rates as measure of damages being reasonable, it is not open to this Court to interfere with the same in its exercise of power under Section 34 of the Act.

74. As far as the question of interest is concerned, as the Award is in terms of US Dollar and provides for a differential rate of interest, that is, 3% from the date of issuance of the letter of termination till the date of the Award and 9% from the date of Award till date of payment, the same cannot be sustained in view of the judgment of the Supreme Court in Vedanta Ltd.(Supra). In Vedanta Ltd. (Supra), the Supreme Court has held that the Award of dual rate of interest was unjustified and awarded interest as per the LIBOR plus 3 percentage points on

the date of the Award till the date of realization. In the present case, the Award of interest is therefore, set aside and interest is awarded in favour of the respondent at the above rates.

75. The petition is partially allowed in the above terms, with no order as to cost.