

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 273/2003

GAS AUTHORITY OF
INDIA LIMITED

Through

..... Petitioner

Mr. Parag P. Tripathi, ASG with
Mr. Navin Kumar, Ms. Arti Gupta,
Ms. Surbhi Agarwal and Mr. Prashant
Narayan, Advocates

versus

KALYANI MUKUND
LIMITED

Through:

..... Respondent

Mr. S. Ganesh, Senior Advocate with
Ms. Surekha Raman, Advocate

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Date of Decision : APRIL 16, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 25th March, 2003 passed by an Arbitral Tribunal comprising Mr. Justice (Retd.) Rangnath Misra (Presiding Arbitrator), Mr. Justice (Retd.) S. Ranganathan and Mr. Justice (Retd.) Guman Mal Lodha.

2. Though the facts of the present case have been extensively set out in the arbitral Award, the relevant facts are that Kalyani Mukand Limited (earlier known as 'Kalyani Konkan Sponge Private Limited') was formed by its promoters for implementing a sponge iron project in the Raigarh District of Maharashtra. The Gas Linkage Committee set up by the Ministry of Petroleum and Natural Gas allocated .75 MMSCMD of natural gas in favour of respondent-claimant specifically for its proposed project. Respondent-claimant was to be supplied gas from ICP-Heera Pipeline which was being implemented at the relevant time by ONGC.

3. It was decided that respondent-claimant along with Nippon Denro Ispat Ltd., which is now known as Ispat India Ltd. (in short "I.I.L.") would set up their industries adjacent to each other in Raigarh District of Maharashtra. In fact, as both the projects required vast areas of land, respondent-claimant as well as I.I.L. approached Government of Maharashtra's agency called SICOM for acquiring land.

4. On 24th October, 1991, Government of Maharashtra permitted SICOM to acquire land in Pen Taluka, District Raigarh for the said two companies.

5. On 8th January, 1992, respondent-claimant dropped the proposal of land acquisition through SICOM and decided to acquire land directly only through private negotiations. In fact, on 10th March, 1992

Government of Maharashtra directed SICOM to suspend land acquisition proceedings for respondent-claimant.

6. On 30th March, 1992, respondent-claimant entered into Gas Supply Contract with petitioner-objector wherein it was stated that supply of gas would commence from 31st December, 1995. The Schedule of Activities which were to be completed by respondent-claimant was stipulated in Annexure II of the said contract, which reads as under :-

<u>Sl.No.</u>	<u>Activities</u>	<u>Date</u>
1.	Land Acquisition	01-04-93
2.	Commencement of site development and civil works	01-10-93
3.	Mechanical Completion of plant	15-12-95
4.	Commencement of Gas supply	31-12-95

7. One of the relevant terms of the Gas Supply Contract is reproduced hereinbelow :-

“2.02 (iii) The BUYER has indicated the schedule of implementation of key activities of their plant as per ANNEXURE-II to the CONTRACT. The BUYER shall provide the documentary proof to the SELLER of the completion of each of the activities. In case any of the activity is not completed within 3 months of the date indicated in Annexure-II, the SELLER shall recover 25% of the bank guarantee amount per delayed activity from the Bank Guarantee. Further, if the BUYER does not complete the activity No. 3 mentioned in Annexure-II within six months of the date indicated in CONTRACT and forfeit the deposit as well as the amount of the Bank guarantee. Provided further that in case activity No. 3 is completed within six months but drawal of gas is not started within six months of the date of commencement indicated in clause 2.01 above, the amount of

Bank Guarantee and deposit shall stand forfeited without prejudice to other rights under the CONTRACT.”

(emphasis supplied)

8. On 6th April, 1993, respondent-claimant wrote a letter to the Minister of State, Ministry of Petroleum and Natural Gas (hereinafter referred to as “Ministry”) requesting for change of gas allocation from sponge iron project to a power project on the ground that the initial proposed project would be less profitable and there was considerable power shortage in the State of Maharashtra.

9. On 13th May, 1993, petitioner-objector intimated to respondent-claimant that as there was a possibility of delay in implementation of ICP-Heera Pipeline by ONGC, respondent-claimant should keep its project on hold/reschedule activities in relation to the proposed plan for utilisation of gas. It is the respondent-claimant’s case that in pursuance to the said letter dated 13th May, 1993, it stopped taking any step for implementation/execution of its sponge iron project.

10. On 28th July, 1995, respondent-claimant’s proposal for change of user from Sponge Iron to power project was rejected by the Gas Linkage Committee and the gas allocation in favour of the respondent-claimant was cancelled.

11. On 28th September, 1995, petitioner-objector in terms of Gas Supply Contract dated 30th March, 1992 invoked the bank guarantee.

However, the invocation of the said bank guarantee was stayed by the Civil Court at Pune.

12. On 29th November, 1995, respondent-claimant gave a fresh undertaking to the Ministry for implementing its initial sponge iron project at an early date. By this letter, respondent-claimant requested for restoration of its gas allocation.

13. On 6th August, 1996, gas allocation was restored by the Ministry for respondent-claimant's proposed sponge iron project.

14. On 6th November, 1996, respondent-claimant represented to petitioner-objector for re-fixation of dates for key activities and implementation of its sponge iron project. However, as petitioner-objector had already invoked the bank guarantee and security deposit, it did not agree for rescheduling the dates for implementation of sponge iron project.

15. While the issue regarding invocation of bank guarantee and security deposit was pending in the Supreme Court, the parties executed a Memorandum of Understanding (in short "MOU") dated 4th December, 1998 wherein it was agreed that all disputes in terms of Paras (I) to (VI) of the said MOU would be resolved by arbitration.

16. While the disputes were pending adjudication before the Arbitral Tribunal, a Tripartite Agreement dated 21st December, 1999 was executed amongst petitioner-objector, respondent-claimant and I.I.L. By virtue of the said agreement, gas which was initially allocated to respondent-claimant was assigned to I.I.L. The relevant portion of the said Tripartite Agreement is reproduced hereinbelow:

“AND WHEREAS, Ministry of Petroleum and Natural Gas (MOPNG), Govt. of India vide letter No Letter No. L-12014/12/95-GP dated 30th November, 1999 has clarified that the gas allocation of 0.75 MMSCMD made by Gas Linkage Committee in favour of M/s Kalyani Mukund Ltd has not been cancelled and directed that GAIL may assign this quantity of gas to M/s Ispat Industries Ltd., the associate company of M/s Kalyani Mukund Ltd and that the actual drawal of iron facility by M/s Ispat Industries Ltd. Further, the Ministry of Petroleum & Natural Gas has directed that GAIL shall take adequate care to ensure that the gas is used only for the sponge iron production by Ispat Industries Ltd. And that there is no trading of gas in any way and GAIL shall also reverse the right to inspect the site from time to time and regulate the supplies as per the actual expansion of the sponge iron production facility.”

and Article I which is the only relevant article reads thus;

ARTICLE-1

On execution of this TRIPARTITE AGREEMENT, all Contractual rights and obligations of the BUYER under Gas Supply Contract dated 30.03.1992 (Annexure-I) shall stand assigned in favour of the BUYER-ASSIGNEE/Provided that all issues including disputes pending for the period prior to this transfer and assignment of the CONTRACT shall be the responsibility of the BUYER and the BUYER agrees and undertakes to discharge all obligations under the provisions of the CONTRACT irrespective of the transfer and assignment of the Contract. Provided further that, all issues, rights, obligations arising on and after the date of assignment shall be with the BUYER-ASSIGNEE and the BUYER-ASSIGNEE hereby agrees and undertakes to discharge all obligations under the provisions of the CONTRACT without any reservation, protest or objections. Provided further that the assignment is being done in favour of BUYER-ASSIGNEE on the representation by the BUYER & BUYER ASSIGNEE that there is no trading of GAS between them, it is expressly

undertaken by the buyer and the BUYER ASSIGNEE that at any time if it is found that the assignment was in fact a trade in gas allocation between the parties, the BUYER and the BUYER ASSIGNEE shall be responsible for all the costs and consequences arising therefrom and the SELLER will have the right to cancel the contract and refer back the allocation to the Government.”

(emphasis supplied)

17. Mr. Parag P. Tripathi, learned Additional Solicitor General appearing for petitioner-objector submits that the Arbitral Tribunal could not have entertained the respondent-claimant's claims other than those relating to encashment of bank guarantee and security deposit and payment of commission. According to him, the Arbitral Tribunal by entertaining other claims of respondent-claimant has not only enlarged the scope of reference, but has also exceeded its jurisdiction. Mr. Tripathi points out that respondent-claimant's claims, other than bank guarantee and security deposit, were not in existence at the point of time when reference to arbitration was made. In this connection, Mr. Tripathi relies upon a judgment of the Supreme Court in ***Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*** reported in ***AIR 1988 SC 1007***.

18. Mr. Tripathi also contends that respondent-claimant's claims are barred by limitation. He states that the foundation of the case of respondent-claimant was the alleged breach committed by petitioner-objector by its “On-Hold” letter dated 13th May, 1993. He states that respondent-claimant's Claims Statement contains an important

admission of fact and respondent-claimant cannot be permitted to resile from that admission. He points out that not only did respondent-claimant's allege that letter dated 13th May, 1993, constitute the commencement of cause of action, but also interest has been claimed on the said claims with effect from that date.

19. Mr. Tripathi further states that respondent-claimant had no intention of proceeding with the proposed sponge iron project as would be apparent from respondent-claimant's own letter dated 6th April, 1993. He states that initially from 6th April, 1993 till rejection of gas allocation on 28th July, 1995 and from 28th July, 1995 till restoration of gas allocation on 6th August, 1996, no prudent business person would have proceeded with construction of sponge iron plant, when that person had itself requested for a change of project from sponge iron to power plant.

20. Mr. Tripathi also states that the question of damages/compensation payable by petitioner-objector does not arise in the present case as respondent-claimant had not performed its part of the contract. He points out that no part of 600-700 acres of land had been purchased by respondent-claimant by 31st March, 1993, or even by the extended date of 31st June, 1993.

21. Mr. Tripathi next submits that the award of damages/ compensation in the present case is against public policy inasmuch as respondent-claimant has taken benefit of gas allocation by way of sale of its share to I.I.L. In this connection, he places reliance upon the Annual Report and Balance Sheet for the year 1998-1999 of I.I.L., which mentions under the heading “Notes on Accounts”, the sale of shares of respondent-claimant to I.I.L. at a total share value of Rs. 26 Crores. In the aforesaid Annual Report of I.I.L., it has been stated as under :-

“16. In order to enhance the productivity of the Sponge Iron Plant, the Company needs additional allocation of natural gas. It has accordingly, entered into an agreement with the shareholders of M/s. Kalyani Mukund Ltd. (KML) for acquisition of the entire share capital of KML directly and through its nominees. This would result in the gas allocation of 0.75 million Scm per day being held by KML becoming available to the Company. The total consideration payable by the Company for acquiring 4,80,000 equity shares of KML comprising 24% of its paid up share capital is Rs. 6.66 crores against which an amount of Rs. 0.12 core has been paid as advance and the balance amount of Rs. 6.54 crores will be paid once the gas allocation stands transferred to the Company. The Company has also provided a Corporate Guarantee of Rs 26 cores to the shareholders of KML as partial security, for the balance liability of the Company and its nominee companies.”

22. Mr. Tripathi refers to a specific question put to respondent-claimant's witness who denied that any monies were received for transfer of gas allocation and justified it on the ground that it was done in “national interest”. According to him, as respondent-claimant concealed facts from the Arbitral Tribunal, its entire claim was liable to be thrown out. In this connection, he refers to a judgment of the

Supreme Court in *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and Ors.* reported in *AIR 1994 SC 853*.

23. Mr. Tripathi lastly submits that costs and interest awarded by the Arbitral Tribunal were excessive.

24. On the other hand, Mr. S. Ganesh, learned senior counsel for respondent-claimant submits that the extent of judicial review of an award passed under Act, 1996 is extremely limited, and certainly far more narrower than the review permissible under the old Arbitration Act, 1940. He further submits that under the Act, 1996, Courts do not have the power to correct errors, either of fact or of law, which may have been committed by an arbitrator. He submits that Courts have only an extremely limited review jurisdiction, which can be exercised only in restricted circumstances as set out under Section 34 of Act, 1996 and as interpreted by the Courts. In this connection, Mr. Ganesh relies upon the judgments of Supreme Court in *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* reported in *(2003) 5 SCC 705*, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in *(2007) 8 SCC 466* and *State of Rajasthan & Ors. Vs. Basant Nahata* reported in *(2005) 12 SCC 77*.

25. Mr. Ganesh further submits that the present Section 34 petition reads like a first appeal and invites this Court to dwell deep into facts of

the case and appraise the evidence on record to reach findings which are contrary to or different from those reached by Arbitral Tribunal.

26. Mr. Ganesh specifically denies that the Arbitral Tribunal has acted in excess of its jurisdiction. In this connection, he places reliance upon the Arbitral Tribunal's interim order dated 16th October, 1999 by virtue of which petitioner-objector's Section 16 application had been rejected. He points out that the original Gas Supply Contract contained an arbitration clause being Clause 14.2, which was never superseded or put an end to at any time. According to him, the MOU dated 4th December, 1998 has to be read in conjunction with Clause 14.2 of the original contract and as the said Clause is couched or worded in the widest possible term and covered all disputes arising out of the said contract, it would certainly cover all claims of the respondent-claimant.

27. Mr. Ganesh further denies that respondent-claimant's claims were barred by limitation. According to him, though the breach of contract was first committed by petitioner-objector by notice dated 13th May, 1993, the cause of action did not stop on that date. He submits that notice dated 13th May, 1993 was followed by continuous wrongs by the petitioner-objector and as such, a recurring cause of action arose in favour of the respondent-claimant. In this connection, Mr. Ganesh relies upon Article 55 of the Schedule to the Limitation Act, 1963 which provides that a suit or claim based on breach of contract has to be filed within three years from the date of breach. In any event, he

points out that the Arbitral Tribunal as a matter of fact has found that cause of action for filing respondent-claimant's claims arose after 6th August, 1996 when respondent-claimant's gas allocation was restored.

28. Mr. Ganesh denies petitioner-objector's contention that respondent-claimant had done nothing to implement the sponge iron project prior to the 'put on hold' notice dated 13th May, 1993. He points out that prior to 13th May, 1993, respondent-claimant had taken a large number of concrete steps and significant action for the purpose of implementing the sponge iron project, as found by the Arbitral Tribunal in paragraphs 14 and 15 of the impugned Award. Mr. Ganesh also states that after issuance of the 'put on hold' notice dated 13th May, 1993, respondent-claimant had to terminate all its activities including those relating to acquisition of land. He emphasises that under the contract, the deadline for land acquisition was 1st April, 1993 which was extendable upto 1st July, 1993. Consequently, according to him, respondent-claimant could have been guilty of breach of contract in respect of acquisition of land only after 1st July, 1993, provided petitioner-objector's 'put on hold' notice dated 13th May, 1993 had in the meantime not intervened.

29. Mr. Ganesh was at pains to point out that respondent-claimant had neither given up or abandoned its sponge iron project as sought to be urged by the petitioner-objector. According to him, letter dated 6th April, 1993 was a mere request by respondent-claimant taking into

account the power situation in the State of Maharashtra and could not by any stretch of imagination be taken as abandonment of its sponge iron project.

30. Mr. Ganesh further states that Assignment of gas was made under a Tripartite Agreement dated 21st December, 1993 which did not provide for payment of any amount/compensation whatsoever to respondent-claimant. He submits that the said Tripartite Agreement specifically prohibits trading of gas. Consequently, he submits that if according to petitioner-objector, respondent-claimant had earned profit of over Rs. 6 Crores from assignment of gas allocation to I.I.L., then petitioner-objector should have exercised its undisputed power under the Tripartite Agreement to cancel the Gas Supply Contract. He further submits that the Arbitral Tribunal has correctly applied the principles of Section 73 of the Indian Contract Act, 1872 while awarding loss of profits.

31. In any event, I may mention that this submission of Mr. Ganesh is without prejudice to his argument that even a 100% shareholder of a company cannot be equated with a company itself. In this connection, Mr. Ganesh relies upon a judgment of the Supreme Court in *Electronics Corporation of India Ltd. & Ors. Vs. Secretary, Revenue Department, Govt. of Andhra Pradesh and Ors.* reported in (1999) 4 SCC 458.

32. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80, after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd.*** (supra) has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy. Even though Section 34 of Act, 1996 permits a Court to interfere on the ground of an arbitral award being violative of public policy, various judgments of the Supreme Court place an extremely restricted and limited interpretation on the term 'public policy'. In ***State of Rajasthan & Ors. Vs. Basant Nahata*** reported in (2005) 12 SCC 77 the Supreme Court has held as under :-

“36. The words “public policy” or “opposed to public policy”, inter alia, find reference in Section 23 of the Contract Act, Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, Section 3(1) of the U.P. (Temporary Control of Rent and Evictions) Act, 1947 and Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

37. By reason of the said provisions the judiciary has been conferred with power to determine as to the factors of public policy which may form the basis for interference with a contract or award.

38. It may not be necessary for us to deal with extensively the case-laws dealing with the relevant provisions of the said statutes but it would not, in our opinion, be correct to contend that public policy is capable of being given a precise definition. What is “opposed to public policy” would be a matter depending upon the nature of the transaction. The

pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept as to what is for public good or in the public interest or what would be injurious or harmful to the public good or to the public interest at the relevant point of time as contradistinguished from the policy of a particular government. A law dealing with the rights of a citizen is required to be clear and unambiguous. Doctrine of public policy is contained in a branch of common law, it is governed by precedents.

*39. The principles have been crystallised under different heads and though it may be possible for the courts to expound and apply them to different situations but it is trite that the said doctrine should not be taken recourse to in “clear and incontestable cases of harm to the public though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world”. (See *Gherulal Parakh v. Mahadeodas Maiya.*)”*

(emphasis supplied)

33. It is settled legal position, both under Arbitration Act, 1940 and to a even greater extent under Act, 1996, that arbitral tribunal’s decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Courts to take upon itself the task of being a judge on the evidence before the arbitrator (Refer to *M/s. Sudarsan Trading Co. Vs. Government of Kerala and Anr.* reported in (1989) 2 SCC 38).

34. Consequently, this Court is of the view that findings of fact given by the Arbitral Tribunal are not liable to be interfered with unless such

findings are perverse and unconscionable. Moreover, as held in *Lesotho Highlands Development Authority Vs. Impregilo SpA and others* reported in *2005 UK HL 43*, arbitrators do not exceed their powers simply by making a mistake. In *Burchell Vs. Marsh* reported in *58 U.S. 344 (1855)*, the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

35. In the present case, the impugned Award is not only a unanimous one but also a detailed and reasoned one where most of the findings of fact are carefully related to and connected with the evidence and materials on record.

36. As far as the jurisdiction of the Arbitral Tribunal to decide the respondent-claimant's claims is concerned, I am of the view that arbitral tribunal's jurisdiction is to be primarily determined by the wordings of the arbitration agreement. If the arbitration agreement requires adjudication of all claims/counterclaims, in such circumstances arbitral tribunal would be well within its power to adjudicate claims and counterclaims of both the parties. In fact, in such cases, arbitral tribunal is duty bound to adjudicate claims/ counterclaims of both the parties.

In almost all pre-dispute arbitration agreements, parties necessarily agree to get resolved all disputes by way of arbitration in the event of any disputes arising between them.

37. Consideration/non-consideration of claims relates to the jurisdiction of an arbitral tribunal and if in a given case the arbitral tribunal does not exercise its jurisdiction by not considering counter-claims, in such circumstances, arbitral tribunal commits jurisdictional error. Section 34(2)(iv) of the Act, 1996 sets out a ground for challenge to an award if the arbitral tribunal passes an award with respect to disputes not referred to it. Going by same analogy, an award is also liable to be set aside if the arbitral tribunal does not decide claims which were otherwise required to be adjudicated upon by it.

38. There can be few situations where claims/counterclaims of one of the parties to arbitration agreement may not fall within the ambit of jurisdiction of the arbitral tribunal. One such instance could be when before commencement of arbitral proceedings, parties by consent agree to restrict the role of arbitral tribunal for adjudication of claims of only one party and not the claim/counter-claim of other party. This is based on the concept of autonomy of contracting parties, meaning thereby if parties can agree to have adjudication of their respective claims and counterclaims by an arbitral tribunal, the parties can surely alter the terms of arbitration by mutual consent. Another situation where counter-claims may not be entertained by an arbitral tribunal despite the

fact that there is an arbitration clause, is when a court while appointing an arbitrator refers only some claims or claims of one of the parties to arbitration. Yet, another exception can be when claims/counter claims are totally beyond the scope of main/underlying contract, that means, if claims raised have no co-relation with the subject matter of the main contract, which contains the arbitration clause.

39. Undoubtedly, the Arbitral Tribunal derive its authority and power from the arbitration agreement executed between the parties, but unless scope and width of power and jurisdiction of arbitral tribunal is limited/restricted explicitly like in the circumstances mentioned in the preceding paragraphs, the arbitral tribunal is required to adjudicate all claims/ counterclaims of both the parties. One should not forget that the intent of all arbitrations is to achieve finality.

40. Applying the aforesaid principles, I find that in the present case, the claims raised by respondent-claimant are not falling in any of the abovementioned exceptions.

41. For the aforesaid observations, I find support from a judgment of the Supreme Court in the case of ***V.H. Patel & Company & Ors. vs. Hirubhai Himabhai Patel & Ors.***, reported in ***2000 (4) SCC 368*** wherein it held as under :-

“9. We asked the parties to appreciate the matter in the proper perspective to produce the partnership deed and the partnership deed dated 21-4-1986 is produced before us.

Clause 5 provides that “the partnership is commenced on and from the 2nd day of April, 1986 and shall continue for a term of period until the parties hereinbefore mentioned mutually agree to dissolve”. Clause 11 thereto provides that

“all disputes and questions in connection with the partnership or with this deed existing between the parties shall be referred to arbitration under the provisions of the Indian Arbitration Act, 1940, or any statutory modification or re-enactment thereof for the time being in force”.

In the suit filed before the Court it is no doubt true that one party, Respondent 1, was seeking to establish that he had not retired from the partnership and, therefore, there is justification in the criticism levelled by the learned counsel for the petitioner that the prayer for dissolution of the firm is inconsistent with such a claim. But that is not the end of the matter. Even if he had not retired pursuant to the terms of the agreement entered into between the parties, it is certainly permissible for him when disputes had arisen between the parties to ask for dissolution of the partnership and when that was not possible by mutual consent a dispute could certainly arise thereto and such a dispute could have been referred to arbitration as provided in clause 11 of the partnership deed. If that was permissible, such a contention could be raised in the suit filed by the parties. Merely because the disputes between the parties have been referred to arbitration, he is not prevented from raising such a question nor is the arbitrator prevented from deciding such a matter. Therefore, agreeing with the view expressed by the High Court, we reject the contention raised on behalf of the petitioner that it was not permissible for the arbitrator to enter upon the question of dissolution of the partnership. Though the disputes between the parties originated on the basis whether one or the other partner had not retired from partnership or as to the rights arising in relation to trademarks or otherwise, still when there is no mutual trust between the parties and the relationship became so strained that it is impossible to carry on the business as partners, it was certainly open to them to claim dissolution and such a question could be adjudicated. The scope of reference cannot be understood on the actual wording used in the course of the order made by this Court or the memorandum concerned filed before this Court, but it should be looked from the angle as to what was the spirit behind the reference to the arbitration. The idea was to settle all the disputes between the parties and not to confine the same to any one or the other issue arising thereunder. In that view of the matter, the contention addressed to the contrary is untenable.”

(emphasis supplied)

42. I may mention that the Queen's Bench Division (Commercial Court) in *Benford Ltd. V. Loppean* reported in *2004 (2) Lloyd's Report 618* has held that when a counterclaim constitutes a "transactional set-off", such transactional set-off operates as a defence and extinguishes the claim. By the phrase 'transactional set-off' what is meant is that when a claim of set-off arises under an umbrella agreement, such claims of set-off are termed as transactional set-off. In my view, it would be unjust if in a proceeding, claim of a party is considered without taking into consideration the defence/counterclaims of other party, especially when claims of both the parties are having a close commercial relationship.

43. In the present case, the MOU dated 4th December, 1998 executed between the parties is widely worded. It specifically stipulates as under:-

"All disputes concerning supply of gas and encashment of Bank Guarantee No. 19/14 dated 26.3.1992 issued by the Bank of Baroda, Subhash Nagar Branch, Pune-411002 for Rs. 5.73 Crores and forfeiture of Security Deposit of Rs. 1.91 Crores relating to Contract dated 30.03.92 between the parties have been agreed to be resolved....."

(emphasis supplied)

44. Consequently, all disputes which arise under the umbrella Gas Supply Contract had to be adjudicated upon by the Arbitral Tribunal. It is pertinent to mention that petitioner-objector had also preferred claims before the Arbitral Tribunal against respondent-claimant aggregating to

about 271 Crores which had nothing to do either with invocation of bank guarantee or forfeiture of security deposit. In my view, just because these claims have been rejected on merits by the Arbitral Tribunal, petitioner-objector is now raising the plea that claims raised by respondent-claimant are not covered by the arbitration agreement.

45. In fact, it has been the policy of the Government in this country to promote and support arbitration as an alternative disputes resolution mechanism and there have been series of judgments which lay down that interpretation of the arbitration clause/agreement should favour arbitration. Such interpretation discourages multiplicity of proceedings and saves costs and time. Consequently, petitioner's objection with regard to the jurisdiction is devoid of merit.

46. In my opinion, respondent-claimant's claims are not barred by limitation as the Arbitral Tribunal did not accept respondent-claimant's contention that the 'put on hold' notice dated 13th May, 1993 constituted a breach by petitioner-objector. On the contrary, the Arbitral Tribunal after considering the evidence and surrounding circumstances gave the benefit of doubt to petitioner-objector by holding that it was not wholly unjustified in issuing the said notice dated 13th May, 1993. The Arbitral Tribunal ultimately concluded that the said notice did not constitute a breach of contract by petitioner-objector.

47. In fact, the Arbitral Tribunal held that refusal on the part of the petitioner-objector in re-fixing a fresh schedule for implementation of the Gas Supply Contract after restoration of the same in August, 1996, constituted a breach of contract. The Arbitral Tribunal held that cause of action accrued in favour of respondent-claimant shortly after August, 1996 and continued for the next three years upto the date when Tripartite Agreement dated 21st December, 1999 was executed.

48. In my opinion, as rightly pointed out by Mr. Ganesh the date when respondent-claimant made its investments in the project or incurred expenditure in connection therewith is of no relevance. For instance, if in pursuance to a Gas Supply Contract executed in 2000, petitioner-objector had stopped supplying gas in 2008 and the aggrieved customer had filed a claim in 2008, the aggrieved party could certainly claim costs on the plant incurred between 2000 to 2003. Consequently, the fact that the Arbitral Tribunal has allowed respondent-claimant's claim for compensation in respect of expenditure incurred three years prior to the date on which the claim was filed, is irrelevant and does not justify the argument that any part of the respondent-claimant's claim is time barred.

49. Consequently, the Arbitral Tribunal has rightly come to the conclusion that the action on the part of the petitioner-objector from August, 1996 to 1998 constitutes a breach of contract, which entitles the respondent-claimant to claim reimbursement of expenses.

50. The other objection that respondent-claimant is not entitled for compensation as it had not performed its part of the Contract, is contrary to facts inasmuch as on the date the 'put on hold' notice was issued by petitioner-objector, respondent-claimant cannot be said to be in breach of the Contract. Under the Gas Supply Contract, not only was the date for land acquisition extendable upto 1st July, 1993 but in the event the respondent-claimant breached the said deadline, petitioner-objector could only have invoked 25% of the bank guarantee [refer to Clause 2.02(iii) of the Gas Supply Contract (supra)].

51. In my opinion, after issuing the notice dated 13th May, 1993, it did not lie in petitioner-objector's mouth to contend that respondent-claimant has committed breach of contract in respect of acquisition of land. The Arbitral Tribunal has correctly proceeded on the footing that respondent-claimant is not guilty of any breach of contract and this finding, being a possible and plausible one, cannot be interfered with in Section 34 proceedings.

52. The argument that respondent-claimant had no intention of proceeding with the proposed sponge iron project is not borne out from the record. In the letter dated 6th April, 1993, respondent-claimant had only requested for change of its sponge iron project to a power plant project. However, when the said request was rejected, respondent-claimant had given a fresh undertaking for implementing its sponge iron project at an early date. It was on this assurance that respondent-

claimant's gas allocation was restored by the Ministry on 6th August, 1996. In fact, by virtue of restoration of gas allocation in August, 1996, petitioner-objector cannot rely upon respondent-claimant's letters between 6th April, 1993 to 6th August, 1996.

53. I am further of the opinion that there is no concealment of facts by respondent-claimant inasmuch as legally speaking consideration paid by I.I.L. was consideration paid to shareholders of respondent-claimant for sale of their shares and not for sale of gas. Consequently, in my view, the Arbitral Tribunal rightly concluded that invocation of bank guarantee and forfeiture of security deposit by petitioner-objector was illegal and unjustified.

54. However, in my view, the Arbitral Tribunal's finding that respondent is entitled to loss of profit is neither a possible nor a plausible one. In fact, even if petitioner-objector had agreed to supply gas in pursuance to the agreement dated 6th August, 1996, respondent-claimant would have started receiving gas only in the year 2000. This is apparent from the respondent-claimant's own letter dated 11th March, 1996 addressed to petitioner-objector wherein it has been stated that *"after reinstatement of gas, it shall be our endeavour to put up the Sponge Iron Project after reworking on it, in approximately 4-5 years time."* Accordingly, respondent-claimant would have received gas only in the year 2000. However, before the year 2000, petitioner-objector not only at respondent-claimant's request but also with its consent had

started supplying gas to I.I.L. In my view, since the petitioner-objector started supplying gas to respondent-claimant's assignee prior to the date when respondent-claimant could have supplied gas under the restoration agreement, the respondent-claimant is not entitled to any damages/compensation on account of loss of profit.

55. I am further of the opinion that the Arbitral Tribunal's finding in para 60 of the impugned Award is contrary to facts inasmuch as the Arbitral Tribunal has erroneously concluded that "*there is no matter to show the nature of consideration paid for allotment of shares.*" I also find that Arbitral Tribunal has awarded sum of Rs. 5 Crores towards loss of profit without any evidence being led to the said effect. Accordingly, award of Rs. 5 Crores towards loss of profit is set aside.

56. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 9% per annum simple interest. The Supreme Court in ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority and Ors.*** reported in (2005) 6 SCC 678; ***McDermott International Inc.***'s case (supra) and ***Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd.*** reported in (2006) 7 SCC 700 has reduced the rate of interest. In fact, in ***Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.*** reported in (2007) 2 SCC 720 the Supreme Court has held as under :-

"11. here also we may add that we do not wish to interfere with the award except to say that after economic

reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

57. Consequently, keeping in view the aforesaid judgments and the current rate of interest, sub-paras 2 and 7 of para 69 of the impugned Award are modified to the extent that the rate of interest as awarded by the Arbitral Tribunal in these sub-paras is reduced to 9% per annum simple interest. However, it is made clear that in case the aforesaid payment under the Award is not made within a period of 90 days from today, the rate of interest post-judgment would stand increased to 11% per annum simple interest.

58. Accordingly, present petition is dismissed with the modifications mentioned in paragraphs 55 and 57 of this judgment, but with no order as to costs.

MANMOHAN,J

APRIL 16, 2010

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