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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 478/2016

GAIL (INDIA) LTD.

..... Petitioner

Through: Mr. Sridharan Ramkumar, Dr. Sheetal Vohra and Mr. Manvendra Gaur, Advocates.

versus

OSRAM INDIA PVT LTD.

..... Respondent

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Diwakar Maheshwari, Mr. V Gupta Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER

09.03.2017

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1. The challenge by GAIL (India) Ltd. ('GAIL') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 is to an Award dated 25th September 2014 passed by the Arbitral Tribunal ('AT') in the disputes between GAIL and Osram India Pvt. Ltd. ('OIPL') in the disputes arising out of a gas transmission agreement ('GTA') dated 1st May 2000.

Background facts

2. The GTA was for a period of 15 years i.e. up to 31st December 2022. In the GTA, OIPL is described as the 'Shipper' and GAIL as the 'Transporter'. In terms of Clause 2.2 of the GTA, the Shipper and the Transporter were to enter into transactions in relation to 'redelivery point' whereby the Shipper was to contract for "specified capacity for a specified duration for

transportation of the gas through the Transporter's facilities and the Transporter shall provide Gas Transmission services for such duration." Such transaction was to be governed by the GTA and by other terms agreed between the parties confirming the transaction.

3. In terms of Clause 2.7(iii) of the GTA, the gas supplied was subject to Shipper's 'termination security' as per Clause 13.3 of the GTA. The GTA could be terminated prior to 31st December 2022 on limited grounds as stated in Clause 5.5 thereof. The grounds were detailed in Clause 13 and/or 11.8. The GTA required the Shipper to provide a bank guarantee ('BG') covering 60% of its agreed liability in case of earlier termination of the GTA and a letter of credit ('LC') under Clause 8.10 of the GTA covering regular payment for use of facilities. It is stated that a 'termination' BG was submitted by OIPL to GAIL on 1st November 2007 for a sum of Rs.3,34,34,568. On 8th November 2007, the gas transportation commenced after the 'Spur Line' (pipeline) came to be connected to OIPL's delivery point.

4. According to GAIL, at the time the said Spur Line was commissioned, its estimate cost was Rs.4.88 crores. The fixed Spur Line charges in the GTA was calculated on the above estimated cost by using the discounted cash flow method in order to give a return of 12% post tax over a 15 year period.

5. Clause 6.1 of the GTA provided for transmission charges. Apart from the transmission charges, the Shipper was also to pay 'fixed monthly charges towards Spur Line'. Annexure-I to the agreement provided that "in addition to the transmission charges to be paid in transmission of the said Annexure,

the Shipper shall pay fixed monthly spur line charges of Rs.9,28,738 and these charges shall be payable by the Shipper irrespective of gas transmission/drawl from the start of the first CT agreement till the term of this agreement or its extension.”

6. As far as the LC was concerned, under Clause 8.0 it was to be opened in favour of GAIL for an amount determined in any contract year by reference to the first day of such contract or equivalent in aggregate to Rs. (16 X redelivery upon MDQ X the sum of the transmission rate and Spur Line charges per day + applicable taxes and duties). Under Clause 8.2, the Shipper was to make a security deposit of Rs.9,28,738.

7. Clause 13 provided for termination and reads as under:

Clause 13-Termination

13.1 Termination of Agreement:

(a) In addition to the other provisions in this Agreement, Transporter may serve a notice of its intention to terminate this Agreement which the Transporter believes is the cause of the Event of Default upon the occurrence and continuation of any of the following event (each a “Shipper Event of Default”), unless any such event occurs as a result of a breach by the Transporter of its obligations under this Agreement or by an event of Force Majeure or, except as provided for in Clause 12:

i. the shipper fails to pay when due any amounts owed to the Transporter under this Agreement for which shipper has received the fortnightly invoice and where such failure continues for not less than 30 (thirty) days following the date on which such payment is due:

ii. the shipper fails to issue, extend, replenish or replace any shipper LC and Bank Guarantee as per Exhibit-E within the time period specified in this Agreement.

iii. The Shipper commits any other material breach of its obligations under this Agreement;

iv. If shipper become insolvent.

(b) In addition to the other provisions in this Agreement, Shipper may serve a notice of its intention to terminate either this Agreement which the Shipper believes in the cause of the event of default upon the occurrence and continuation of any of the following events (each a “Transporter Event of Default”), unless any such event occurs as a result of a breach by the shipper of its obligations under this Agreement or by an event of force majeure or, except as provided for in clause 12:

i. the transporter commits any material breach of its obligations under this agreement.

'ii. When, under this agreement, during any 90 (ninety) days, the shortfall quantity occurs for 5 (five) consecutive days or during any 365 (three hundred and sixty five days, the shortfall quantity occurs for consecutive 20 (twenty) days.

iii. If transporter becomes insolvent.

13.2 Termination procedure

a) Termination by the transporter

i. Upon the occurrence and continuation of any shipper event of default, the transporter may deliver a notice (the “Shipper default notice”) to the shipper. Following a shipper event of default, the transporter shall have the right to suspend the performance of its obligations under the agreement until such default has been cured in accordance with the provisions of this clause 13.2. Any non-performance by the transporter of its obligations under this Agreement, during such period of suspension shall not amount to a transporter event of default. The shipper shall be liable for payment of transmission charges

including spur line charges and transporter shall not be liable for any shortfall quantity for such period of suspension.

ii. Following the receipt of any shipper default notice, the shipper shall (1) promptly notify the transporter of the measures it has taken or intends to take to remedy the shipper event of default which is the subject of such notice, and (ii) have a period of 30 (thirty) days from the date of such receipt (or such longer period as the transporter may specify in such notice) (the shipper cure period) in which to remedy such breach or default and shall act as a reasonable and prudent person in doing so.

iii. During any shipper ;cure period, both parties shall, save as otherwise provided herein, continue to perform their respective obligations under this agreement and shall not, whether by act or omission, impede or otherwise interfere with the endeavours of either party to remedy the breach or default to which such shipper cure period relates. Provided the transporter shall not be required to perform its obligations under this clause 13.2 (a) (iii). If the transporter has elected to suspend the performance of its obligations as specified in clause 13.2(a)(i) above.

iv. Following the expiry of the shipper cure period, if the shipper event of default to which the shipper default notice relates is continuing, the transporter may terminate this agreement by written notice (a transporter termination notice) to the shipper and this agreement shall terminate with immediate effect on the date of such transporter termination notice and bank guarantee submitted by the shipper shall be encashed/forfeited.

b) Termination by the shipper.

i. Upon the occurrence and continuation of any transporter event of default, the shipper may deliver a notice (the “transporter default notice”) to the transporter. Such notice shall specify in reasonable detail the transporter event of default to which such notice relates.

ii. Following the receipt of any transporter default notice, the transporter shall (i) promptly notify the shipper of the measures it has taken or intends to take to remedy the transporter event of default which is the subject of such notice, and (ii) have a period of 30 (thirty) days from the date of such receipt (or such longer period as the shipper may specify in such notice) (the transporter cure period) in which to remedy such breach or default and shall act as a reasonable and prudent person in doing so.

iii. During any transporter cure period, both parties shall, save as otherwise provided herein, continue to perform their respective obligations under this agreement and shall not, whether by act or omission, impede or otherwise interfere with the endeavours of either party to remedy the breach or default to which such transporter cure period relates.

iv. Following the expiry of the transporter cure period, if the transporter event of default to which the transporter default notice relates is continuing, the shipper may terminate this agreement by written notice (a shipper termination notice) to the transporter and this agreement shall terminate with immediate effect on the date of such shipper termination notice.

13.3 Termination payment

If this Agreement is terminated prior to the term of this Agreement as per clause 13.2 a), then transporter has the right to suspend the supplies and shipper shall make the termination payment as per Exhibit E within 15 days of such termination. Shipper will submit an irrevocable and uncontrolled bank guarantee as per the format at Exhibit C. In case the shipper fails to make the termination payment as per this clause 13.3 then the transporter has the right to encash such bank guarantee. However, the shipper shall be liable for payment of balance 40% of respective five or three or two years tariff of spur line as the case may be for contracted quantities, in accordance with

Exhibit E, if this agreement is terminated by transporter on the occurrence of default by the shipper as per the clause 13.1 (a) during the period of the contract.

Until the termination of this agreement, the amount of the bank guarantee as mentioned above shall be as per the amount given in Exhibit E for respective contract years and the shipper shall renew the bank guarantee 15 days before its expiry.

Bank guarantee for termination payment for first five (5) years of the contract shall be given by the shipper to the transporter as per the schedule given below:

Time period	Amount of bank guarantee
At the time of signing of GTA	10% of the amount as per Exhibit E.
At the time of award of spur line project	40% of the amount as per Exhibit E.
After mechanical completion of spur line	70% of the amount as per Exhibit E.
15 days prior to commissioning of spur line	100% of the amount as per Exhibit E.

If the shipper does not replace the bank guarantee of higher amount as per the schedule and as informed by the transporter above then the transporter shall have unrestricted right to encash the bank guarantee and withheld the development of the project of laying of spur line.

In the event not pertaining to transporter event of default, if the shipper terminates this agreement before the commissioning of spur line or before the commencement of transmission services by the transporter, then the transporter shall forfeit the security deposit and encash that portion of bank guarantee submitted by

the shipper. However, shipper shall be liable to pay the termination payment as applicable as per this clause 13.3.”

8. The above clauses reveal that if the agreement were to be terminated prior to fixed term, as per Clause 13.2 (a) then GAIL had the right to suspend the supplies. In such event, OIPL was to make termination payment as per the Exhibit E within 15 days of the termination.

9. Under Clause 13.3, OIPL was to submit an irrevocable and unconditional BG. In case OIPL failed to make payment under Clause 13.3, GAIL had the right to encash such BG. In such event, OIPL was liable for payment of the balance 40% of respective five or three or two years tariff of spur line as the case may be for contracted quantities in accordance with Exhibit E. This Exhibit E specified the termination payment. For instance, if it was during the first five years of operation from the start date, the payment would be for a sum equivalent to 5 years of tariff of spur line for contracted quantities.

Withdrawal of spur line charges

10. At this stage it requires to be noticed that in 2007 the Petroleum and Natural Gas Regulatory Board (‘PNGRB’) was constituted. It notified the Petroleum and Natural Gas Regulatory Board (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines) Regulations, 2008. In terms of the GTA, the transmission charges for the trunk line and the spur line were to be as per the recommendations of the Tariff Commission/Regulator. After the above regulations were notified, an amendment was executed in March 2010 between the parties. The supplies continued after the amendment.

11. On 25th August 2010, PNGRB took a decision that the additional spur line tariff should not be charged. Accordingly, GAIL informed OIPL by a letter dated 2nd September 2011 that it would charge tariff for the spur line as per the transmission rate with effect from March 2011.

12. Upon expiry of the termination BG dated 1st November 2007, OIPL submitted a fresh BG for the same amount on 22nd October 2011 which was valid up to 16th September 2012 and became renewable on 1st October 2012. GAIL makes the point that this was an acknowledgment by OIPL of its obligation to maintain a BG to cover the termination payment in terms of Clause 13.3 even in the absence of any liability to pay the spur line charges. It was also acknowledgment that both parties understood that the value of the BG shall be in terms of the quantum already determined under Exhibit E of the agreement. It is stated that on 1st August 2012, OIPL stopped drawing gas. According to GAIL, this has been in violation of the procedure laid down in Clause 13.2 of the GTA since none of the conditions envisaged in Clauses 11.8 or 13 of the GTA existed.

13. On 6th August 2012, GAIL drew attention of the OIPL to the effect that there was nil consumption of gas as far as OIPL was concerned and sought reason for such stoppage of gas. OIPL by its letter dated 28th August 2012 informed GAIL that it had stopped production at Sonapat Plant and, therefore, did not require any gas. The supplier of the gas IOCL had also been informed likewise. The letter dated 28th August 2012 stated that it should be treated as OIPL's notice for termination of the GTA.

14. On 4th October 2012, GAIL replied to the said letter inviting attention of OIPL to Article 13.3 of the GTA which made it incumbent on OIPL to settle the payment following which GAIL would have to encash the BG. GAIL also requested OIPL to settle the balance 40% of the termination payment. GAIL proceeded to invoke the BG on 5th October 2012. This led to OIPL invoking the arbitration clause by the notice dated 1st April 2013 and seeking the appointment of a three Member Arbitral Tribunal ('AT').

Proceedings before the AT

15. Before the AT, OIPL filed a claim *inter alia* claiming the amount of the BG which was invoked together with interest @ 18% per annum. This apart GAIL filed its reply and a counter claim which contained six claims. Counter claim No.1 was for Rs.2,22,89,712 being the 40% of termination payment. Rs.1,15,159 towards interest on late payment of invoices. Rs. 5,00,926/- towards ship or pay and imbalances charges, Rs.1,728.35p towards various invoices/tax certificates. The further counter claims were towards interest at the rate of 18% per annum on the balance amount of 40% of the termination payment till the date of payment and for costs.

16. The AT decided the dispute on the basis of documents already filed by the parties, thus dispensing with the recording of evidence. Before the AT, a factual note was filed on behalf of GAIL in which *inter alia* it was pointed that fixed spur line charges were based on the estimated capital cost as by using the discounted cash flow method. The estimated cost of the spur line charges was Rs.4.88 crores. It was pointed out that from 5th August 2010, GAIL Gas Ltd., a subsidiary of GAIL, was also drawing gas from the said

spur line at two different locations.

17. In the written submissions by GAIL before the AT *inter alia* it was submitted that the BG was a separate and distinct contract independent of the primary contract i.e. the GTA. Therefore, the encashment of the BG did not depend upon adjudication of disputes arising out of the GTA. Accordingly it was submitted that with the BG not having any arbitration clause, invocation of BG by GAIL could not be the subject matter of arbitration.

18. As far as the merits were concerned, it was pointed out that there was unilateral repudiation of the contract by OIPL by its letter dated 28th August 2012 and this was contrary to the procedure envisaged under the GTA. Since the GTA stood terminated for the default of OIPL, GAIL was entitled to termination payment [which GAIL now termed as liquidated damages ('LD')] under Section 74 of the Indian Contract Act, 1872 ('ICA'). It was further submitted that the termination payment under Clause 13.3 "is to compensate the Transporter for quantified damages in the event contract comes to an end prematurely." The quantification thereof was in terms of Exhibit E. According to GAIL, this was simply a "genuine, agreed and pre-estimation of damages i.e. loss of profit which would otherwise be impossible to quantify." It was pointed out that irrespective of the spur line charges not being levied in terms of the decision of PNGRB it would not in any manner affect the termination payment. It was further specifically pleaded by GAIL as under:

“Nor does it make any difference that though the spur line was initially designed as a dedicated pipeline, it has subsequently been put

to use for other customers. The fact which remains and is uncontroverted is that had the contract continued to its full terms, the Respondent would have continued to recover transportation charges from the claimants for the contracted quantities and consequently would have made profits which it has been deprived of for about 10 years. In these circumstances, the claim of termination payment is fair and just and has been properly quantified. In any event, the Respondent is entitled to reasonable damages for breach of the GTA.”

19. The case of OIPL before the AT was, however, that the only purpose of charging the monthly fixed spur line charges was to enable GAIL to recover its cost in relation to laying down of pipe line for transportation of gas to OIPL. Since that cost had already been recovered, and the spur line charges stood withdrawn, there was no justification for GAIL to have invoked the termination BG. GAIL was, therefore, according to OIPL required to return to it the original BG.

20. It was also pleaded by OIPL on the strength of decision in ***DLF Universal Limited v. Director, Town & Country Planning, Haryana (2010) 14 SCC 1*** that the AT could look into the purpose of the contract to interpret it. It was further contended that even assuming that GAIL could claim termination payment it had to follow the procedure under Clause 13.2 (a)(i) for which there had to be a ‘Shipper Event of Default’.

Impugned Award

21. In the impugned Award, the AT negated the preliminary objection regarding the arbitrability of the claim since it was not raised in the first instance under Section 16 of the Act. In any event the question was really whether GAIL was entitled to recover termination payment and not whether

the BG has been rightly invoked.

22. As regards the merits of the claim, the AT purportedly summarised the submissions of learned Senior counsel appearing on behalf of the GAIL as regards the estimated cost of the pipeline and the calculation of the fixed spur line charges. The AT then observed that: "There is no dispute that termination payment was to recover the spur line cost from the claimant for the dedicated pipeline through which gas was being supplied to the claimant." As regards the merits, the AT noted that the spur line from which gas was being supplied has ceased to be a dedicated pipeline. The PNGRB had on 23rd August 2010 ordered that GAIL could not charge any additional tariff for such line. The AT then concluded that since the termination payment was based upon the spur line charges calculated for the period of 5 years, "we are clearthat after the issue of notification by the Regulatory Board prohibiting the gas companies from recovering spur line charges, GAIL would not be entitled to claim any termination payment on the basis of spur line charges. Since in our view the Respondent was not entitled to termination payment, it had no right to recover the same by encashing the bank guarantee." Accordingly, the AT ordered the BG amount to be refunded to OIPL. It further held that OIPL was not liable to pay the balance 40% of the termination payment. Interest @ 12% per annum was allowed on the above sum. No further claim of OIPL including the claim for loss of reputation was allowed.

23. The counter claims of GAIL were rejected in toto since it was held that GAIL would not be entitled for balance termination payment. Only counter

claim No. 3 of GAIL to the extent of Rs.5,02,654.35 was allowed. This was directed to be adjusted against the BG sum that was encashed.

Submissions on behalf of GAIL

24. It is submitted by Mr. Sridharan Ramkumar, learned counsel appearing for GAIL, that the AT erred in linking up the termination payment with the fixed spur line charges. He pointed out that under Clause 13.3, in the event of a premature termination of the agreement, GAIL was entitled to recover the termination payment. He submitted that Exhibit E only indicated the measure for quantification of the termination payment. He stressed that the statement in the impugned Award that there was no dispute that the termination payment is only for recovering the cable cost of laying the spur line was erroneous. There was no such concession made by GAIL. He submitted that the AT misconstrued the written submissions of GAIL in this regard. He submitted that there was a clear breach of contract committed by OIPL attracting Section 39 of the ICA. The termination was traceable to Clause 13.1 (a) of the GTA.

25. Mr. Ramkumar further pointed out that what was sought to be compensated was a genuine, agreed and pre-estimation of damages. According to him this fell within the parameters of Section 74 of the ICA and the decision of Division Bench in *ONGC v. Saw Pipes (2003) 5 SCC 705* would apply. He submitted that had the contract continued to its full term, the GAIL would have continued to receive transportation charges from OIPL for the contracted quantities and would have made profits which it now has been deprived of for about 10 years. Thus the termination payment

was justified even in law.

26. According to Mr. Ramkumar the AT's interpretation of the intention of parties was wholly erroneous assumption. The AT had virtually re-written the GPA. This was against fundamental policy of India thus attracting Section 34(2)(b)(ii) of the Act. Mr. Ramkumar also pointed out that although the spur line charges were removed with effect from March 2011 and the contract was amended in September 2011, the renewed BG was not submitted by OIPL thereafter. The dispute arose only in August 2012 when OIPL unilaterally stopped drawing the gas without any prior intimation to GAIL. Reliance is placed on the decision in *ONGC Limited v. Garware Shipping Corporation Limited (2007) 13 SCC 434*, *Provash Chandra Dalui v. Biswanath Banerjee AIR 1989 SC 1834*, *Bharat Coking Coal v. Lalchand Ltd. v. Annapurna Construction AIR 2003 SC 3660*, *Arosan Enterprises Ltd. v. Union of India AIR 1999 SC 3804* to urge that the AT could not have relied on evidence outside the terms of the agreement. Reference is also made to Section 38(3) of the Act in this regard.

Submissions on behalf of OIPL

27. Mr. Dayan Krishnan, learned Senior counsel appearing on behalf of OIPL, submitted that in accordance with Clause 8.10 an LC had been opened by OIPL in the sum of Rs.39,40,000. The LC was also calculated on the basis of the monthly fixed spur line charges. This also formed the basis of the termination BG. Once, PNGRB had decided that there would be no justification for any spur line charges, GAIL stopped charging the said monthly fixed spur line charges from March 2011. A fresh LC of

Rs.6,10,319 was opened by OIPL. However, despite regular follow up and reminders, GAIL refused to return his original termination BG which also had to be reworked. He pointed out that OIPL was constrained to close its operation at Sonapat Plant on 1st August 2012. He submitted that the GAIL was kept duly informed of the inability of OIPL to continue to avail the gas supply transported through the GAIL pipelines.

28. Mr. Krishnan submitted that the failure to observe the procedure under Clause 13.2(a) of the GTA has vitiated the action of GAIL in invoking the termination BG. Mr. Krishnan maintained that the termination BG emanated from Exhibit E. The entire basis for calculating the amount for which the BG was issued was only the monthly fixed spur line charges which itself stood withdrawn from March 2011. It is submitted that this Court is not expected to sit in appeal over the decision of the AT. The interpretation of the contract by the AT was final unless it is so perverse as to shock the judicial conscience of the Court. Reliance is placed on *Associate Builders v. Delhi Development Authority 215 (2014) DLT 204 (SC)* and *National Highways Authority of India v. ITD Cementation India Limited (2015) 14 SCC 21*.

29. Mr Krishnan submitted that the plea that termination payment was being claimed as LD was but not pleaded before the AT. Reference is made to the decision in *Delhi Jal Board v. Kaveri Infrastructure Pvt. Ltd. 206 (2014) DLT 136* to urge that GAIL cannot better its case in a Section 34 petition and go beyond the pleadings before the AT. Reliance is placed on the decision in *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012)*

5 SCC 306 to urge that even if AT construes the terms of a contract in an unreasonable manner it would not mean that the Award would be set aside on that ground. It is further submitted that the Court does not have jurisdiction to modify the Award under Section 34 of the Act. Reliance is placed on the decisions in **McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181** and **Puri Construction Pvt. Ltd. v. Larsen & Toubro Limited** (decision dated 20th April, 2015 in FAO (OS) 21 of 2009 (DB)].

Scope of judicial review of arbitral awards

30. At the outset the Court would like to observe that the scope of the judicial review of an arbitral Award under Section 34 of the Act is well settled. It has been dealt with *in extenso* by recent decision of the Supreme Court in **Associate Builders v. Delhi Development Authority** (supra) and **National Highways Authority of India v. ITD Cementation India Limited** (supra). While it is correct that the AT normally has the final word on merits as well as interpretation of the contract, the limited scope of enquiry by the Court is whether the AT has adhered to the clauses in the contract in terms of Section 28(3) of the Act and whether the interpretation placed thereon is so perverse so as to shock the judicial conscience. The Court has to ask question whether the Award could be said to be opposed to the fundamental policy of India.

Justification for Termination Payment

31. In the present case it must be noticed straightway that the central question was whether GAIL was justified in realising the termination

payment in terms of Clause 13.3 of the GTA. Incidental to this was whether the action of GAIL invoking and encashing the termination BG was justified.

32. A perusal of Clause 13.3 of the GTA reveals that termination payment had to be calculated in terms of Exhibit E which in turn referred to spur line charges. However there is nothing in Clause 13.3 which indicates that in the absence of any spur line charges, no termination payment would be recoverable. In other words, the right of GAIL to recover termination payment under Clause 13.3 did not hinge on whether the spur line charges continued to operate. Merely because Exhibit E refers to spur line charges would not mean that it is determinative of the entitlement of GAIL to the termination payment. The spur line charges under Exhibit E only provide the measure for quantification of the termination payment and nothing more.

33. The parties did not dispute the GTA as far as GAIL's entitlement to recover termination payment. Even if the spur line charges were withdrawn there was no reworking of the GTA by the parties to dispense with the clause relating to termination payment. The correspondence exchanged between the parties also do not show that OIPL ever demanded that the clause relating to termination payment be done away with only because the spur line charges had stood withdrawn. In this regard, a reference may be made to the letters written by OIPL after the withdrawal of its spur line tariffs in March 2011.

34. The fact remains that a renewed BG was in fact submitted by OIPL to GAIL on 22nd October 2011 in terms of Clause 13.3. If the understanding of

the parties, as claimed by OIPL, was that after the withdrawal of the spur line charges no termination payment was liable to be made then the question of renewing the BG for that purpose did not arise. In fact the BG is an additional one.

35. The second aspect of the matter is that while the LC amount was reworked, the amount of the termination BG was not. After the PNGRB's order dated 19th October 2010 and clarification issued by it on 21st October 2010, both parties continued Clause 13.3 of the termination BG in terms thereof.

36. The third aspect of the matter is that OIPL has never attempted to defend its unilateral termination of the GTA. The plea that the procedure under Clause 13.1(a) was not followed by GAIL, in the circumstances, appears to be misconceived. It is, in this context, be noted that sub-heading of Clause 13.2(a) is 'termination by Transporter' whereas Clause 13.2(b) is 'termination by Shipper'. In the present case the termination was by the Shipper but without following the procedure under Clause 13.2(b). There was no occasion for GAIL to deliver any Shipper default notice under Clause 13.2(a) for the simple reason that OIPL persuaded the GAIL with a *fait accompli*. It is not even denied by OIPL that it stopped availing of gas supply through the pipeline with effect from 1st August 2002. On 20th August 2012, it attributed this to incurring of heavy financial losses and the consequential stoppage of production from the Sonapat Plant. It simply asked GAIL to treat the said letter as notice for termination of GTA. Earlier to this also the letter written by OIPL was simply asking for return of the BG

due to losses suffered by OIPL and not because of the withdrawal of the spur line charges.

37. Consequently, the Court is of the view that there was no occasion for the AT to have interpreted Clause 13.3 as ceasing to operate only because the spur line charges stood withdrawn. This was a wholly erroneous interpretation consistent with what is intended by the parties. Apart from being contrary to Section 38(3) of the Act, the Court is also of the view that the interpretation is so perverse that it cannot be sustained in law. It has to be held to be opposed to the fundamental policy of India as understood under Section 34(2)(b)(ii) of the Act and explained by the Supreme Court in *Associate Builders v. DDA* (supra).

38. The Court would also like to observe that the statement made in the impugned Award to the effect that there was no dispute that the termination payment is only to recover the cost of laying the spur line appears contrary to the written submissions filed by GAIL before the AT.

Conclusion

39. For the aforementioned reasons, the Court is unable to sustain the impugned Award to the extent it has allowed the claim of OIPL for return of the BG amount together with interest. That portion of the impugned Award is hereby set aside.

40. The Court also sets aside the impugned Award to the extent it rejected the counter claims of GAIL other than Claim No.3 which is only for the reason that the AT erroneously held GAIL not being entitled to recover

termination payment. Consequently, while setting aside the impugned Award to the extent it has rejected GAIL's counter claims other than counter claim No.3, the Court observes that GAIL would be entitled for going in for a fresh arbitration as regards its counter claims (other than Counter Claim No.3).

41. The petition is disposed of in the above terms but in the circumstances with no order as to costs.

MARCH 09, 2017
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S. MURALIDHAR, J

