

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

Reserved on: 21.02.2018
Pronounced on: 05.04.2018

+ **FAO(OS) (COMM) 21/2018, CAV.99/2018, C.M. APPL.4549-4551/2018**

M/S JAYASWAL NECO INDUSTRIES LTD Appellant
Through : Sh. Sandeep Sethi, Sr. Advocate with Sh.
Devashish Bharuka, Sh. Ravi Bharuka and Sh. Sameer
Rohatgi, Advocates.

versus

M/S GOYAL MG GASES PVT LTDRespondent
Through : Sh. Parag. P. Tripathi, Sr. Advocate with Sh.
Simran Mehta and Ms. Mishika Bajpai, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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Facts

1. The appellant has approached this Court under Section 37(1)(c) of the *Arbitration and Conciliation Act, 1996* (“the Act”) impugning the order of the learned Single Judge dated 21.12.2017 (‘impugned order’), which dismissed its application under Section 34 confirming the arbitral award dated 04.08.2017 read with correction order dated 15.09.2017 (collectively the “award”).

2. The relevant facts of the case are that the respondent (hereafter “Goyal MG”) agreed to lease its 70 TPD (tonne per day) Air Separation Plant to the

appellant (hereafter “Jayaswal”). The Agreement was for 10 years from the date of commissioning of the plant; lease charges were capped at ₹30 lakhs per month plus taxes. In terms of Article 6(f) of the Agreement, lease charges were payable on *pro rata* basis from the date of plant commissioning till the date of performance test. On 14.03.2003, the parties entered into another agreement pursuant to which Goyal MG undertook to operate and maintain the Plant. The O&M Agreement was for a period of 10 years from the date of commissioning of the Plant, and O&M charges were ₹11 lakhs per month plus taxes. The plant was commissioned in March 2005, and, therefore, the Lease Agreement and the O&M Agreement would both continue till March 2015.

3. Under Article 15 of the Lease Agreement and Article 3 of the O&M Agreement, the Plant was required to produce 2040 Nm³/hour of oxygen and power consumption had to be limited to 0.82KWH/Nm³. Between 23.12.2009 and 27.08.2013, Jayaswal wrote several letters requesting Goyal MG to (a) take the performance test, (b) repair the new oxygen compressor and replace the old oxygen compressor, and (c) replace the main air compressor motor which was prone to frequent breakdowns. In these letters, Jayaswal claimed that it was suffering significant losses due to short supply of oxygen and excess consumption of electricity. This includes letters by Jayaswal dated 23.12.2009 and 13.05.2011, requesting Goyal MG to take the performance test. On 24.07.2012, Goyal MG replied stating that it had been continuously requesting Jayaswal to conduct the performance test since 2006. Goyal MG disavowed any responsibility for excess power consumption because Jayaswal had failed to conduct a performance test. On

12.06.2014, Goyal MG asserted that the performance test would be deemed to have been conducted because the Plant was producing required quantity and quality of oxygen. Goyal MG also relied on the Minutes of the Meeting dated 04.02.2015, in this regard. The other issue was with respect to oxygen compressors. Jayaswal informed Goyal MG on 07.01.2012 that the old oxygen compressor was causing loss of ₹3.2 lakhs per month due to excess consumption of 8000 units of electricity. On 19.05.2012, Jayaswal informed the Goyal MG that its 70 TPD Plant was consuming as much electricity as its 100 TPD Plant. On 18.09.2013, Goyal MG requested Jayaswal to pay ₹75 lakhs for purchase of new oxygen compressor, and it agreed that the amount could be adjusted against the insurance claim or any outstanding amount due at the end of the lease period. However, on 16.12.2013, Goyal MG stated that Jayaswal was responsible for replacement of burnt equipment pursuant to Article 18(b) of the O&M Agreement. Through letter dated 26.12.2013, Jayaswal insisted that compressor replacement was Goyal MG's responsibility, and it placed reliance on Articles 2(d) and 16 of the O&M Agreement to support its position. Finally, on 27.03.2014, Goyal MG agreed to an arrangement whereby Jayaswal would provide ₹75 lakhs as an interest free advance for the purchase of the new compressor and this advance would be repaid at the time of sale of the Plant. Goyal MG specified that it had agreed to this arrangement to maintain good business relationship with Jayaswal. However, on 12.06.2014, Goyal MG once again adopted the stance that Article 18(b) of the O&M Agreement cast an obligation upon Jayaswal to replace the burnt oxygen compressor.

4. On the question of the main compressor motor (another controversy between parties) on 21.03.2011 and 13.05.2011, Jayaswal complained to Goyal MG that the main air compressor motor had failed four times and requested for its replacement. On 22.08.2011, Jayaswal informed Goyal MG that it had lost 52 days of production in Feb-April 2011 because of frequent failure of the motor. Again, between 09.09.2013 and 16.10.2015, Jayaswal debited Goyal MG's account for extra cost of electricity. The amounts debited are set out below:

- On 09.09.2013, ₹1.72 crores was debited for excess electricity consumption between June 2011 and August 2013.
- On 21.01.2014, ₹45,32,000 was debited for excess electricity consumption between September 2013 and December 2013.
- On 09.09.2014, ₹66,45,052 was debited for excess electricity consumption between January 2014 and August 2014.
- On 20.03.2015, ₹36,78,738 was debited for excess electricity consumption between September 2014 and 14 March 2015.
- On 16.10.2015, ₹6,63,60,685 was debited for excess electricity consumption between April 2005 and March 2015.

5. Jayaswal admits that it made a calculation error, and that the actual loss incurred due to excess consumption of electricity between April 2005 and March 2015 is ₹5,76,15,993. On 16.10.2015, Jayaswal also raised a demand for ₹8,88,38,754 spent on purchasing oxygen from the open market. It, however, clarified that it actually suffered a loss of ₹10,08,57,971 due to short supply of oxygen between April 2005 and March 2015, and that the figure of ₹8,88,38,754 was a calculation error. Finally, on 24.10.2015,

Jayaswal initiated arbitration proceedings pursuant to Article 25 of the Lease Agreement and Article 9 of the O&M Agreement. After considering the written pleadings and oral arguments of both parties, the Arbitrator passed the Arbitral Award on 04.08.2017 which rejected all of Jayaswal's claims and partly allowed counterclaims of Goyal MG. Jayaswal's application under Section 34 challenging the award was rejected by the impugned order.

Contentions

6. Learned Senior Counsel for Jayaswal, Mr. Sandeep Sethi broadly made six submissions. First, it was argued that an actual performance test was never conducted. In paragraph 34 of the Arbitral Award, the Arbitrator had held that an actual performance test had been conducted. However, at paragraph 16 of the impugned Order, this finding was erroneously reversed, and it was held that a formal performance test had not been conducted. It was secondly contended that there was no deemed performance test because all parameters mentioned in Clause 15(B)(b) of the Lease Agreement remained unfulfilled. The Arbitral Award only considered two parameters: production and power requirement. Similarly, the impugned order only considered three parameters: production, power requirement and purity. Moreover, Goyal MG never pleaded that a deemed performance test was conducted, and this contention was only raised during arguments before the Arbitrator. Goyal MG did not pursue its plea that an actual performance test was conducted on 03-06.08.2006 as it knew that Ex. RW 1/23 was forged and would fail scrutiny. Thirdly, counsel highlighted that the arbitrator and the learned Single Judge both overlooked Article 6(f) of the Lease Agreement which provides for *pro-rata* payment of lease charges from the

date of commissioning of the Plant till the date of performance test. It was argued that the deemed performance test could not have taken place in August 2006 because Goyal MG continued raising *pro-rata* bills even after that date.

7. It was argued, fourthly, that the use of the old oxygen compressor and frequent breakdown of the main air compressor motor were responsible for short supply of oxygen and excess power consumption. The old oxygen compressor consumed 630 KWH whereas the new oxygen compressor only consumed 400 KWH. The old oxygen compressor was also incapable of running at 30Kg/Cm² pressure and it could only run at maximum pressure of 20Kg/Cm². Goyal MG breached its duties under Article 7(d) of the O&M Agreement by citing non-availability of spare parts as the reason for using the old oxygen compressor.

8. Jayaswal urges that the Tribunal erroneously ignored its plea that Ex. RW 1/23 was forged, and failed to seek proof of the document. Mr. K.K. Dhar's deposition could not be used to prove the document in terms of Section 60 of the Evidence Act as he did not witness the performance test or the execution of the document. Goyal MG should have examined Sudhir Bhat and S.R. Garg or proved their signatures, but it failed to do so. The Tribunal erroneously placed the burden of calling these witnesses or a handwriting expert on Jayaswal. In any case, Ex. RW 1/23 does not show that specific power requirements and delivery pressure parameters in terms of Article 15A were satisfied. It was lastly urged that the Tribunal erroneously relied on ledger entries to allow the counterclaim. The award, held that ledger entries could not be relied upon because primary evidence in

the form of cash bills etc. was not produced and the person who maintained the ledger was not examined. Yet, in paragraph 32, the award relied on the same ledger for accepting Goyal MG's counterclaim. The ledger was unaudited, and was neither primary nor secondary evidence. Therefore, the Tribunal had failed to follow Sections 34 and 65B of the Evidence Act. Further, the Tribunal erroneously placed the burden of proof on Jayaswal to produce its own accounts to prove that there were no outstanding dues. In support learned counsel relied on *Indian Oil Corporation Ltd. Mumbai v Kadbrotee Engineering Industries, Navi Mumbai* (2011 2 Mah LJ 659) to argue that Section 19 does not empower the Arbitrator to waive-off the requirement of proof for material documents which go to the root of the case.

9. Learned Senior Counsel for Goyal MG, Mr. Parag Tripathi firstly relied on Annexure C-1 to Jayaswal's Statement of Claim and pointed out that here, Jayaswal admitted that during August 2006, the Plant was operating at 100% production capacity, there was no excess power consumption and that the oxygen purity was 99.5%. This was also in paragraph 34 of the award and paragraph 16 of the impugned order. Therefore, the performance test can be deemed to have been conducted in accordance with Article 15(B)(b) of the Lease Agreement. Learned counsel next highlighted the Tribunal's finding that Jayaswal did not produce any documentary evidence of excess power consumption. It has not submitted any meter readings or proof of payment of actual bills. Further, it has not produced any account of Goyal MG maintained with Jayaswal to show that money was regularly debited for excess power consumption.

10. Mr. Tripathi pointed out that Jayaswal complained about short supply of oxygen for the first time in 2009, and even in that letter, it did not quantify or specify the shortage. Further, Jayaswal did not produce any bills showing purchase of oxygen from the open market. During oral arguments, he highlighted that Annexure C-1 to the Statement of Claim, revealed that in some months between March 2005 and March 2015, there was in fact excess production of oxygen. Learned counsel also submitted that pursuant to Article 8 of the O&M Agreement, Jayaswal could have deducted upto ₹2.5 lakh per month from O&M charges if there was short supply of oxygen or excess power consumption. This option was not exercised which showed that Jayaswal's claim for short supply of oxygen and excess power consumption was a convenient afterthought. Even under Article 31 of the Lease Agreement, maximum deduction for short supply of oxygen is limited to ₹1.5 crores for the total lease period. It was argued that under Article 16 of the O&M Agreement, Goyal MG was only obliged to replace the burnt oxygen compressor with another compressor that was in good working condition, and the old oxygen compressor satisfied this requirement. Under Article 18 of the Lease Agreement, Jayaswal was liable for any loss or damage caused by fire. Therefore, Goyal MG was not obligated to replace the burnt oxygen compressor at its own cost.

11. Mr. Tripathi furthermore urged that in an arbitration proceeding, the Tribunal is not bound by the requirements of the Civil Procedure Code or the Evidence Act. Therefore, the arbitrator could have relied upon the ledger entries supplied by Goyal MG to uphold the counterclaim. During the oral arguments, he pointed out that as noted in paragraph 20 of the impugned

order, even before the learned Single Judge, it was not disputed that these ledger entries were incorrect.

Analysis and Conclusions

12. For our purposes, the relevant statutory provision is Section 19 of the Arbitration & Conciliation Act, 1996, which reads as follows:

“Section 19. Determination of rules of procedure-

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

13. Since this is an appeal under Section 37(1)(c) of the *Arbitration & Conciliation Act, 1996*, the Court should first consider the scope of the Court’s power in appeal under this provision. The leading case which explains the Court’s role at Section 37 stage is *Associated Builders v. Delhi Development Authority* 2015 (3) SCC 49. Cautioning against setting-aside arbitral awards on public policy grounds unless there was a patent error of law or a manifestly unreasonable finding, the Supreme Court held:

“33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the

ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

14. Recently, in *Sutlej Construction Ltd. v. Union Territory of Chandigarh*, (2018) 1 SCC 718, the Supreme Court reiterated this view and held:

“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice.” (Associate Builders v. Delhi Development Authority)

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. The Government of Kerala; Harish Chander & Co. v. State of U.P. and Swan Gold Mining v. Hindustan Copper Limited).

13. The learned single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case the learned single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

15. The above authorities, therefore, clarify that appreciation of facts and evaluation of evidence is the exclusive domain of the arbitrator. Next, the

court has to examine the degree of discretion granted to an arbitral tribunal under Section 19 for determining evidentiary standards. In *Pradyuman Kumar Sharma v Jaysagar. M. Sancheti*, 2013 (4) Mah LJ 86, the Bombay High Court considered whether a Petitioner could dispute the veracity of a document that it had previously relied upon, and it held as follows:

“38. Question then arises for consideration of this Court is whether by rejecting application made by the petitioner seeking permission to apply in this Court for issuance of writ of summons or for referring the disputed document to handwriting expert at belated stage, would be at all in violation of principles of natural justice and no prejudice would have been caused to the petitioner by rejecting his application to lead oral evidence. The petitioner wanted to apply for permission to file proceedings in this Court for issuance of witness summons or to refer the disputed document to handwriting expert at belated stage for the purpose of proving his allegation that the documents relied upon by the respondents were forged and fabricated documents. Though an opportunity was given by the learned arbitrator earlier, petitioner did not examine the Expert witness, though his affidavit was filed. Perusal of record indicates that the petitioner himself had relied upon the same agreements in various proceedings filed by him and/or did not deny existence and contents of the said agreements in criminal proceedings. The petitioner also admitted the correctness of certified copy produced by the respondents before the learned arbitrator. If both the parties have relied upon the same documents in various proceedings without raising any dispute in respect of the existence and/or contents thereof, and not having disputed the correctness of the certified copy thereof in the proceedings before the learned arbitrator, in my view, the application made by the petitioner for referring the said disputed document to handwriting expert or to get the writ of summons issued by this Court at belated stage was nothing but one more attempt to delay and frustrate the outcome of arbitration proceedings which was pending for quite some time.

The petitioner having admitted the agreements relied upon and annexed to the proceedings in several other proceedings between the same parties, petitioner in my view, could not have proved any fact contrary to one that was already admitted by him in series of proceedings.”

16. In *Akbarally's v Indian Oil Corporation* (2015) 5 Mah LJ 338, the Bombay High Court considered whether an arbitral tribunal was entitled to draw an adverse inference in case of non-production of evidence, and it held as follows:

“17. In my view, once the parties have agreed to the procedure of hearing required to be followed by the learned arbitrator including the agreement not to lead any oral evidence before the learned arbitrator, the learned arbitrator was empowered to decide the matter on the basis of documents produced by the parties including admissibility of the contents thereof. Since the petitioners have chosen not to lead oral evidence to prove the disputed contents of the document, the learned arbitrator was empowered to consider the effect of not leading oral evidence by the petitioners to prove the contents thereof and come to a conclusion that the alleged plea of the petitioners in such correspondence could not be considered as a proof. In my view, the learned arbitrator has interpreted the terms of the document and has rendered findings of fact which are not perverse and no interference of such findings of fact is warranted under Section 34 of the said Act.”

17. In *Aidek Tourism Services Pvt Ltd v. Aditya Birla Nuvo Ltd* (2016) SCC Online Bom 5352, in a case involving allegations of forgery, the Bombay High Court held that an arbitral tribunal had considerable latitude to weigh the evidence and held as follows:

“92. Insofar as the submission of the learned senior counsel for the petitioners that the hire purchase agreement was fabricated and though the petitioners had examined the handwriting

expert to prove such allegations and that the respondent neither controverted such allegations by amending their statement of claim nor by examining any other handwriting expert to controvert the allegations made by the petitioners is concerned, a perusal of the impugned award indicates that the learned arbitrator has considered the entire evidence led by both the parties and has rendered a finding of fact that the documents were not fabricated or forged as alleged by the petitioners. In the first written statement filed by the petitioners, no such allegations were made by the petitioners. Only in the amended written statement filed subsequently, the petitioners made such allegations. The respondent had examined the witnesses to prove the existence and contents of the hire purchase agreement as well as the loan agreement.

93. The learned arbitrator in my view has rightly rendered the findings that the documents were not fabricated or forged which cannot be interfered with by this Court.”

18. In *Govt of NCT of Delhi v. Shri Khem Chand*, AIR 2003 Delhi 314, the Delhi High Court held that non-consideration of certain evidence by the arbitrator would not constitute a violation of principles of natural justice. It refused to set aside the arbitral award and held as follows:

“In the present context, there is neither any allegation of non-adherence to the principles of natural justice nor that the Arbitrator acted contrary to any agreement between the parties as to the procedure to be followed by him. In the circumstances, the award in question cannot be set aside simply on the ground that the Arbitrator according to the petitioner-objector excluded certain evidence placed before him by it.”

19. This Court would now address the five broad heads of challenge to the award, by the appellant Jayswal. The first head of challenge is the allegation with respect to absence of a performance test. At this stage, it is irrelevant

whether an actual performance test was conducted because Goyal MG has chosen to adopt the lower burden of proving that a deemed performance test in terms of Article 15(B)(b) was conducted. Therefore, this Court finds it unnecessary to go into the question of whether Ex. RW 1/23 was forged. However, it notes that when both parties have access to the relevant documents and the ability to call the relevant witnesses or experts, then the Tribunal may choose on which party the burden of proof should be imposed upon. Therefore, the arbitrator could have legitimately required Jayaswal to prove forgery by examining Mr. Sudhir Bhat or a handwriting expert, given that it contested the veracity of the document. Moving on to the next question of whether a deemed performance test was conducted in August 2006, this Court finds no error in the award and impugned order in placing reliance on Annexure C-1 to Jayaswal's Statement of Claim. This document was submitted by Jayaswal, and constitutes an admission on Jayaswal's part that during August 2006, the plant satisfied three out of the four production parameters listed in Article 15A of the Lease Agreement. Annexure C-1 shows that the plant was operating at 100% production capacity, there was no excess power consumption and the oxygen produced was 99.5% pure. It is true that Annexure C-1 to the Statement of Claim does not indicate whether the plant satisfied the delivery pressure requirement of 30Kg/Cm²(g) under Article 15A. That, however, is by itself insufficient to set aside the arbitral award, particularly in appeal under Section 37. There is, significantly, nothing on record to show that Jayaswal contemporaneously objected to low delivery pressure in August 2006. In fact, delivery pressure was brought up for the first time by Jayaswal in its letter dated 27.09.2012. Here, Jayaswal complained that the old oxygen compressor could not

withstand pressure of more than 20Kg/Cm² as against the required 30Kg/Cm². The Arbitrator has, however, separately addressed Jayaswal's claim relating to the oxygen compressor and found that Goyal MG was not contractually obligated to provide a new oxygen compressor.

20. Jayaswal's claim that *pro-rata* billing done pursuant to Article 6(f) is proof of the performance test not being conducted is unconvincing. Before the Tribunal, Goyal MG argued that the so called *pro-rata* bills were only used for the purpose of Jayaswal's own internal management. Goyal MG explained that prior to August 2006, it had devised a table for computation of *pro-rata* bills but even after the performance test, Jayaswal continued to have its (i.e. Goyal MG's) employees working on its site and filled up the same table for comparison. Since the nature of the alleged *pro-rata* bills and the circumstances in which they were made are primarily questions of fact, this Court cannot go into this question at Section 37 stage.

21. On the next question, i.e excess power consumption, the court notices that the arbitral tribunal rejected Jayaswal's claim for excess power consumption and reasoned in this regard as follows, in the award:

“25. After going through the record and evidence led by the parties it is evident that the Claimant has not filed any document relating to excess power consumption i.e., Meter readings, proof of payment of power bill actually paid and also has not produced any account of the Respondent which was maintained by the Claimant to show that against the Respondent debit entry was made from time to time on the account of alleged power consumption, nor the Claimant examined any witness to prove, the excess power consumption. As per Article 8 of O&M Agreement the Claimant's right is there in case any, excess power of consumption is there, to

deduct up to Rs.2.5 lakh per month for that month, but, no such deduction was evermade from 2005 to 2015. This further shows that there was no excess power consumption which is evident from the conduct of the Claimant, as such the Claim of the Claimant is an afterthought and is rejected.”

22. In a letter dated 24.04.2015, Goyal MG admitted that average power consumption was 0.919KWH/Nm³ from January 2009 to May 2011, and 0.935KWH/Nm³ from June 2011 to February 2015. Jayaswal contended that the Tribunal erred by overlooking this admission. However, it is important to note that these figures were provided by Goyal MG to prove that there was negligible increase in power consumption after reintroduction of the old oxygen compressor. Moreover, this Court does not find the learned Arbitrator’s approach unreasonable. Pursuant to Section 19 of the *Arbitration & Conciliation Act*, the Arbitrator has the power to determine the admissibility, relevance, materiality and weight of any evidence. In this case, his insistence on meter readings and proof of payment of power bills, was not unreasonable and his decision not to solely rely on Goyal MG’s admission *per se* cannot be faulted. Producing meter readings and proof of payment of power bills for the last 3 years is not an unduly onerous requirement, and industrial units routinely maintain such records. Therefore, Jayaswal’s claim for excess electricity consumption was plausibly and not unreasonably rejected.

23. Jayaswal's next plea was regarding the finding with respect to short supply of oxygen. The award, while rejecting Jayaswal’s claim for short supply of oxygen, held as follows:

“28. On the basis of the record and evidence, in the circumstances which have come on record, the claim for short

supply of gases is an afterthought, as admittedly, the plant/equipment was commissioned in March 2005 but it is for the first time the Claimant wrote a letter to the Respondent in the year 2009 for short supply of gases. In this letter too, no quantification or specification for short supply of gases was made. Besides, as per Article 8 if there is any short supply of gases by the Respondent the Claimant has a right to deduct upto Rs.2.5 lakh per month as per O & M Contract but, that was not done. Further, the Claimant has not adduced any evidence by examining the witness or producing the bills of purchase of supply of gases that the gas was purchased from the open market. This shows the claim of the Claimant for short supply of gases is an afterthought and is liable to be rejected and accordingly is rejected.”

24. This Court finds nothing perverse or shocking about the Ld. Arbitrator demanding bills of purchase of oxygen from the open market. Certain invoices for purchase of oxygen from the open market in 2013 and 2014 have been attached with the present appeal as Annexure P-35 (Colly). However, since these invoices were not produced before the arbitrator, they cannot be considered at this stage.

25. On the next aspect, i.e repair and replacement of the Oxygen Compressor, it is to be seen that Jayaswal has relied upon Article 7(d) to contend that Goyal MG was responsible for repairing the burnt oxygen compressor. Article 7(d) of the O&M Agreement provides that Goyal MG shall maintain stock of spare parts at its own cost for normal running of the Plant. However, by letter dated 24.04.2015, Goyal MG clarified that the burnt oxygen compressor had been completely destroyed, and it could not be repaired using new spare parts. Therefore, the Court is of opinion that the Tribunal's conclusion with respect to Article 7(d) of the O&M Agreement is reasonable. Further, Article 16 of the O&M Agreement only obliges Goyal

MG to repair or replace the damaged equipment with another equipment in good working condition. Whether the old oxygen compressor was in good working condition is a purely factual question which has already been decided by the Tribunal in favour of Goyal MG. Both parties have adduced contradictory evidence on power consumption by the old oxygen compressor, and this Court cannot engage in a fact-finding enquiry at this advanced stage.

26. The next question pertains to admissibility of ledger entries. On this score, the Tribunal allowed Goyal MG's counterclaim based on ledger entries which were not proved in accordance with Section 34 and 65B of the Evidence Act. To justify his decision, the arbitrator's reasoning is as follows:

“32. True the Respondent has produced the witness who has not maintained the accounts however, it is not disputed that there was a relationship of supplier and customer between the Respondent and the Claimant, therefore, the Claimant also must be maintaining the accounts but the Claimant in fact has not adduced the best evidence available with him of supply of the gas, its receipt and payments made therein by cheque or otherwise. It is well settled that irrespective of the burden of proof if the accounts are maintained then the best available evidence i.e. the accounts are to be produced. Therefore, in a case like, this the Claimant was to prove that the Claimant has paid all the amounts and nothing is due to him that having not done it cannot be said that the Claimant was not liable to pay the amount as claimed by the Respondent. On the other hand, the Respondent to prove its Claim has examined Shri K.K. Dhar who was cross examined on his affidavit Annexure A exhibited as RW 1/39. A ledger account commencing from 30.3.2005 to 31.5.2016 wherein credit and debit entries after showing balance payable by the Claimant is of Rs.13,65,22,510/-.”

27. This Court does not find the arbitrator's decision to shift the burden of disproving the ledger entries on to Jayaswal to be unconscionable. In its written submissions, Jayaswal has claimed that certain ledger entries were incorrect but even before this Court, it did not produce their own accounts which reflect the correct state of affairs. In light of this, the Tribunal's decision to allow Goyal MG's counterclaim cannot be faulted.

28. In view of the foregoing analysis and reasoning, it is held that the present appeal is unmerited; it fails and is accordingly dismissed. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 05, 2018

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