

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****APPEAL NO. 263 OF 2015****IN****ARBITRATION PETITION NO. 729 OF 2012**

M/s.Balaji Pressure Vessels Limited	)	
4th Floor, Hotel Sreenidhi Nivas,	)	
No.8-2-229/230, Red Cell Road,	)	
Secunderabad – 500 003	)	...Appellant
		Ori.Petitioner

....Versus....

Bharat Petroleum Company Limited	)	
a Government of India Undertaking,	)	
having its office at Bharat Bhuvan,	)	
4 & 6, Currimbhoy Road,	)	
Ballard Estate, Mumbai – 400 001.	)	...Respondent
		...Ori.Respdt.

WITH**APPEAL NO.256 OF 2016****IN****ARBITRATION PETITION NO.817 OF 2011**

NCC Limited, Formerly known as	)	
Nagarjuna Construction Company Ltd.	)	
Having its registered office at	)	
Sy.No.64, NCC House, Madhapur,	)	
Hyderabad – 500 081.	)	...Appellant

....Versus....

1). Bharat Petroleum Company Limited	)
having its office at Bharat Bhuvan,	)
4 & 6, Currimbhoy Road, Ballard	)
Estate, Mumbai – 400 001.	)

2). Vinod Giri,)
 The Learned Sole Arbitrator,)
 having his office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard)
 Estate, Mumbai – 400 001.) ...Respondents

**WITH
 APPEAL NO.446 OF 2015
 IN
 ARBITRATION PETITION NO.815 OF 2011**

North India Wires Limited)
 A Company incorporated under the)
 Companies Act, 1956, having its)
 registered office at 12, Government Place)
 East, Kolkatta – 700 069.) ...Appellant
 Ori.Petitioner

....Versus....

1). Bharat Petroleum Company Limited)
 having its office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard)
 Estate, Mumbai – 400 001.)

2). Vinod Giri of Mumbai,)
 India Inhabitant having his office at)
 Bharat Bhuvan, 4 & 6, Currimbhoy)
 Road, Ballard Estate,)
 Mumbai400 001) ...Respondents
 Ori.Respdts.

**WITH
 APPEAL NO.284 OF 2015
 IN
 ARBITRATION PETITION NO.737 OF 2010**

M/s.Super Industries)
 A Proprietorship concern, having its)

registered office at 82/3, Badrikeshwar)
 Building, First Floor, “E” Road, Marine)
 Lines, Marine Drive, Mumbai – 400 002.)

...Appellant
 Ori.Petitioner

....Versus....

Bharat Petroleum Company Limited)
 a Government of India Undertaking,)
 having its office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard Estate,))
 Mumbai – 400 001.)

...Respondent
 ...Ori.Respdt.

**WITH
 APPEAL NO.283 OF 2015
 IN
 ARBITRATION PETITION NO.736 OF 2010**

Expo Gas Containers Limited)
 A Company incorporated under the)
 Companies Act, 1956, having its registered)
 office at Expo House, 150, Sheriff Devji)
 Street, Mumbai – 400 003.)

...Appellant
 Ori.Petitioner

....Versus....

Bharat Petroleum Company Limited)
 a Government of India Undertaking,)
 having its office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard Estate,))
 Mumbai – 400 001.)

...Respondent
 ...Ori.Respdt.

**WITH
 APPEAL NO.265 OF 2015
 IN
 ARBITRATION PETITION NO.730 OF 2012**

Karnataka Pressure Vessels Limited)
 having registered office at 264,)

**1st Main Road,Chamarajeet,)
Bangalore – 560 018.)**

**...Appellant
Ori.Petitioner**

....Versus....

**Bharat Petroleum Company Limited)
a Government of India Undertaking,)
having its office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard Estate,)
Mumbai – 400 001.)**

**...Respondent
...Ori.Respdt.**

**WITH
APPEAL NO.444 OF 2015
IN
ARBITRATION PETITION NO.809 OF 2011**

**Haldia Precision Engineering Pvt. Ltd.)
A Company incorporated under the)
Companies Act, 1956, having its)
registered office at 3B, Ronaldshay Road,)
Kolkatta – 700 027.)**

**...Appellant
Ori.Petitioner**

....Versus....

**1). Bharat Petroleum Company Limited)
having its office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard)
Estate, Mumbai – 400 001.)**

**2). Vinod Giri of Mumbai,)
India Inhabitant having his office at)
Bharat Bhuvan, 4 & 6, Currimbhoy)
Road, Ballard Estate,)
Mumbai400 001)**

**...Respondents
Ori.Respds.**

**WITH
APPEAL NO.445 OF 2015**

**IN
ARBITRATION PETITION NO.762 OF 2011**

**J.R. Fabricators Limited)
A company incorporated under the)
Companies Act, 1956, having its)
registered office at 3/F Shree Building,)
Ranade Road, Dadar, Mumbai – 400 028.)**

**...Appellant
Ori.Petitioner**

....Versus....

**Bharat Petroleum Company Limited)
a Government of India Undertaking,)
having its office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard Estate,)
Mumbai – 400 001.)**

**...Respondent
...Ori.Respdt.**

**WITH
APPEAL NO.295 OF 2016
IN
ARBITRATION PETITION NO.335 OF 2012**

**M/s.Allampally Brothers Limited)
Having its registered office at)
P.B. No.63, Puthen Veedu Palace Road)
Aluva – 683 101, Kerala)**

**...Appellant
Ori.Petitioner**

....Versus....

- 1). Bharat Petroleum Company Limited)
a Government of India Undertaking,)
having its office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard ,)
Estate, Mumbai – 400 001.)
)**
- 2). Shri P.S. Bhargava, Sole Arbitrator)
having his office at Bharat Bhuvan,)**

4 & 6, Currimbhoy Road, Ballard)
 Estate, Mumbai – 400 001.) ...Respondents
 ...Ori.Respdt.

**WITH
 APPEAL NO.297 OF 2016
 IN
 ARBITRATION PETITION NO.905 OF 2011**

Metalfab Hightech Private Limited)
 A Company registered under the)
 Companies Act, 1956, having its)
 registered office at E21-25 & 33B/2)
 MIDC Industrial Area, Hingna Road,)
 Nagpur – 440 028 duly amalgamated)
 with the Transferor Company)
 Metalfab Hightech Private Limited) ...Appellant
 Ori.Petitioner

....Versus....

- 1). Bharat Petroleum Company Limited)
 a Government of India Undertaking,)
 having its office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard)
 Estate, Mumbai – 400 001.)
- 2). Mr.Vinod Giri)
 of Mumbai, Indian Inhabitant)
 having his office at Bharat Bhuvan,)
 4 & 6, Currimbhoy Road, Ballard)
 Estate, Mumbai – 400 001.) ...Respondents
 ...Ori.Respdts.

**WITH
 APPEAL NO.299 OF 2016
 IN
 ARBITRATION PETITION NO.821 OF 2011**

Sahuwala Cylinders Private Limited)
 A Company incorporated under the)

**Companies Act, 156, having its registered)
office at 242-D Block, Autonagar,)
Vishakhapatnam – 530 012.)**

**...Appellant
Ori.Petitioner**

....Versus....

**1). Bharat Petroleum Company Limited)
a Government of India Undertaking,)
having its office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard)
Estate, Mumbai – 400 001.)**

**2). Mr.Vinod Giri)
of Mumbai, Indian Inhabitant)
having his office at Bharat Bhuvan,)
4 & 6, Currimbhoy Road, Ballard)
Estate, Mumbai – 400 001.)**

**...Respondents
...Ori.Respds.**

Mr.Zain Mookhi with Mr.N.C. Parekh, Mr.N.J. Marjadi and Ms.Janhavi D. Doshi I/b Mansukhlal Hiralal & Company for the Appellant in Appeal Nos.263 of 2015, 265 of 2015, 283 of 2015, 284 of 2015, 444 of 2015, 445 of 2010, 446 of 2015, 295 of 2016, 297 of 2016 and 299 of 2016.

Mr.Kedar Wagle with Mr.Sagar Wagle for the Appellant in Appeal No.256 of 2016.

Mr.Pankaj Sawant, Senior Counsel with Mr.Ali Abbad Delhiwalla and Mr.S.A. Bhalwal I/b Vyas & Bhalwal for the Respondent.

**CORAM : R.D. DHANUKA &
A.K. MENON, JJ.**

RESERVED ON : 1st NOVEMBER, 2018

PRONOUNCED ON : 15TH MARCH, 2019

JUDGMENT (PER R.D.DHANUKA, J.) :

By consent of parties, all the aforesaid appeals were heard together finally and are being disposed of by a common judgment. Learned counsel appearing for the parties jointly state that the facts in Appeal No.263 of 2015 which is the lead matter are identical with the facts in the remaining appeals and thus the judgment of this court in Appeal No.263 of 2015 would apply to the other appeals. We would summarize the facts and submissions in Appeal No.263 of 2015. Learned counsel appearing for the appellant in Appeal No.256 of 2015 has adopted the submissions made by the learned counsel for the appellant in Appeal No.263 of 2015 and have made few additional submissions which would be dealt with in the later part of the judgment.

Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The appellant was the original claimant before the learned arbitrator and was the original petitioner before the learned Single Judge whereas the respondent herein was the original respondent before the learned arbitrator and also before the learned Single Judge.

The learned arbitrator has rejected the claims made by the appellant. The said arbitral award has been upheld by the learned Single Judge by dismissing the arbitration petition filed by the appellant.

3. It is the case of the appellant that the appellant had established its factory with a sole object of manufacturing LPG Cylinders for three Government of India undertaking, i.e. the Hindustan Petroleum Corporation Limited, Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited. It is the case of the appellant that during the period between 1980 and 1992, the tenders were used to be invited by the three petroleum corporations including the respondent for purchase of cylinders from manufacturers of cylinders.

4. Sometime in the year 1994, the oil companies including the respondent had proposed cost plus basis formula which was duly approved by the Ministry of Petroleum and Natural Gas which is known as "The New Pricing Formula" or "cost plus system" i.e. in short 'MOP & NG Formula'. It is the case of the appellant that even before introducing the same MOP & NG Formula, the respondent had

communicated to the cylinders manufacturers the basis to determine the prices of cylinders with complete details as to price-mechanism, calculation formula along with illustrations of calculations for calculating various cost components in formula, including mechanism for calculating escalation/de-escalation in price etc. The said formula was duly incorporated in annual contract prospectively i.e. 1st April, 1994 onwards.

5. It is the case of the appellant that pursuant to the said cost plus system, the appellant and the respondent entered into separate yearly purchase agreements since the year 1994. The respondent entered into standard form of contract with the manufacturers/suppliers of the cylinders and except for change in figures, manufacturers/suppliers were always required to sign the contract provided in the prescribed format by the oil companies. By their purchase order dated 1st May, 1999, the respondent placed an order for supply of 27509 LPG cylinders of 14.2 kg at the provisional price of Rs.678.77.

6. It is the case of the appellant that in a meeting between the

oil manufacturers companies and the MOP & NG on 6th April, 1999, at the request of the respondent herein, MOP & NG granted permission to go into the review of the existing pricing formula only on two variable factors i.e. the price of steel and the interest rate going down from 22.5% to 18%. It is the case of the appellant that there was no mention of a provisional price in relation to the proposed changes in the MOP & NG formula enshrined within the first purchase order dated 1st May, 1999. By an unilateral letter dated 28th June, 1999, the respondent planned revision and brought to the notice of the appellant. However, in the said letter dated 28th June, 1999 also there was no mention of such a change to be effected enshrined within the second purchase order dated 29th March,2000.

7. On 29th March,2000, the respondent had issued another purchase order for supply of 28125 gas cylinders at the provisional price of Rs.699.29 for the period between 1st April, 2000 to 30th June, 2000 on similar terms and conditions of the earlier purchase order issued. The said purchase order was expressly stipulated to be read with the communication dated 28th June, 1999.

8. It is the case of the appellant that the said general circular dated 29th June, 1999 was not received by the appellant at the relevant time. The appellant learnt about the said circular much later after various deductions were already effected by the respondent. The respondent thereafter issued change order vide its letter dated 30th July, 1999 by which the respondent changed the application price of cylinders from Rs.678.77 to Rs.699.29. The respondent thereafter issued a letter dated 2nd August,1999 informing the appellant about revised procedure for issuing invoices.

9. It is the case of the appellant that under the said second purchase order dated 29th March,2000, the appellant was to supply at the provisional price of Rs.699.29 irrespective of the sources of steel i.e. SAIL/TISCO/ESSAR/LLOYDS/ISPAT/SALEM. The pending calculation of the price effective 1st April, 2000, the appellant was to charge the respondent the provisional rate of Rs.699.29 per cylinder. It is the case of the appellant that the appellant completed the contract to the fullest satisfaction of the respondent and supplied the requisite quantity of cylinders within the stipulated time.

10. On 30th October, 2000, the respondent issued a circular informing the appellant and the other cylinder suppliers that the industry had undertaken a study to review the existing cylinder pricing with the assistance of M/s. Price Waterhouse Coopers. Accordingly, the price of 14.2 kg LPG cylinder was maintained provisional w.e.f. 1st July, 1999. M/s. Price Waterhouse Coopers had already submitted a draft report to industry on the price revision. It was mentioned that pending finalization of the report and the short time available to recover the cost due to the proposed cylinder tender, industry had decided to revise the provisional basic price of 14.2 kg cylinder at Rs.645/- w.e.f. 1st July, 1999 and accordingly the respondent would be recovering the differential amounts from the bills of the suppliers. It was further stated that the final adjustments would be made later on after finalization of the cylinder price. The suppliers were also informed that w.e.f. 1st November, 2000, all the suppliers shall have a provisional basic price of Rs.645/- per cylinder.

11. The final report of M/s. Price Waterhouse Coopers was thereafter received by the oil companies and the Task Force accordingly finalized the price of the cylinder. The price for 14.2 kg

cylinder was fixed at Rs.645/- per cylinder whereas the price of 19 kg cylinder was fixed at Rs.765/- per cylinder. By communication dated 31st January,2001, the respondent communicated this final price to all the suppliers. The respondent started effecting recoveries from the suppliers including the appellant on the basis of the respective prices fixed for LPG cylinders at Rs.645/- per cylinder for 14.2 kg and Rs.765/- per cylinder for 19 kg cylinder.

12. It is the case of the appellant that on 25th December,2000, the MOP & NG vide its circular in reply to the letter dated 5th December,2000 addressed by the Indian Oil Corporation Limited on behalf of the industry directed to continue the existing cost plus system i.e. that of MOP & NG 1994 and for procurement of cylinder upto 31st January,2001. On 20th February, 2001, the respondent by MOP & NG referred to the correspondence between the MOP & NG and the oil companies to go on review of the cylinder price with M/s.Price Waterhouse Coopers as the consultants. By the said letter, the Indian Oil Corporation Limited informed the MOP & NG that based on the information report submitted by M/s.Price Waterhouse Coopers, the oil companies had advised the revised provisional price of Rs.645/- per

cylinder applicable was to be advised after the completion of the review by the industry Task Force. Accordingly the recoveries were made for the differential amount between the uniform price of Rs.645/- per cylinder vis-a-vis actual paid on provisional basis. The oil company accordingly requested for approval of the MOP & NG for implementation by the oil industries.

13. It is the case of the appellant that in the month of March 2000, an internal meeting of the MOP & NG was held to discuss the review of the cylinder price. In the minutes of the said meeting, it was recorded that approval of the said Ministry was not required in the matter and the matter was between the suppliers and the purchasers only. The Ministry had only advised the oil companies to make a revision of the pricing of cylinder in view of the reduction in the prices of raw material for cylinder manufacturing. It was recorded in the said minutes that in case the oil industry required any approval of the Government, the report should have come to the Ministry immediately after receipt of the report.

14. On 15th March,2001 the MOP & NG replied to the letter

dated 20th February, 2001 from the oil company stating that the approval of the MOP & NG was not required at that stage when the oil industry had already started making recovery on the basis of the report stated in the letter dated 15th March, 2001.

15. It is the case of the appellant that the respondent thereafter held a meeting with the manufacturers of the cylinders on 18th April, 2001. The appellant raised an objection to the report of M/s.Price Waterhouse Coopers before the respondent on 24th April, 2001. M/s.Price Waterhouse Coopers sent an e-mail dated 10th May, 2001 to the respondent dealing with the points raised by the suppliers of cylinders. The MOP & NG addressed a letter on 3rd February, 2002 in reply to the letter dated 7th January, 2002 to the Indian Oil Corporation Limited and after referring to its letter dated 15th March,2001 stated that the approval of MOP & NG on M/s.Price Waterhouse Coopers report was not required.

16. The oil companies including the respondent finally declared the uniform price of Rs.645/- in respect of 14.2 kg per cylinder. The respondent herein declared a firm price on 1st

August,2002. The Hindustan Petroleum Corporation Limited declared a firm price on 16th October,2002 whereas Indian Oil Corporation Limited declared a firm price on 13th November,2002. On 22nd March, 2003 the appellant invoked the arbitration agreement by addressing a letter to the Director (Marketing) of the respondent. Pursuant to the said notice, the respondent appointed an arbitrator. The appellant herein filed a statement of claim before the learned arbitrator inter alia praying for refund of Rs.8,029,840/- towards the amount deducted/withheld on account of M/s.Price Waterhouse Coopers report with interest thereon and various other claims. The statement of claim filed by the appellant was resisted by the respondent on various grounds.

17. The parties did not lead any oral evidence before the learned arbitrator. Both the parties filed written submissions before the learned arbitrator. In the written submissions filed by the appellant, the appellant also prayed that the learned arbitrator shall consider and apply the MOP & NG formula to the appellant and to fix the price of the cylinders as per the terms of the contract. The appellant also applied for a direction to the respondent to pay the amount

deducted/withheld/adjusted by the respondent by applying PWC report from various bills for the supply made by the appellant and for various reliefs.

18. On 13th March, 2012, the learned arbitrator made an award directing the respondent to pay an amount of Rs.14,08,422/- towards balance price payable at the rate of 17.20 per cylinder for 81885 cylinders supplied by the appellant between 1st April 2000 and 31st March 2001 and interest at the rate of 12% per annum on the said amount from the date of respective invoice till the date of payment. The said amount directed to be paid to the appellant by the respondent was towards the admitted difference of 17.20 per cylinder in respect of 81885 cylinders supplied during 1st April 2000 to 31st March 2001. The learned arbitrator rejected the rest of the claims made by the appellant.

19. Being aggrieved by the said arbitral award dated 13th March, 2012, the appellant herein filed an arbitration petition (729 of 2012) before this court under section 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act). The respondent did not challenge the impugned award allowing part of the claim in

favour of the appellant. By an order dated 15th November, 2014 passed by the learned Single Judge of this court, a learned Single Judge of this court rejected the said Arbitration Petition No.729 of 2012 along with other 10 arbitration petitions filed by various suppliers impugning the similar awards.

20. Being aggrieved by the said order and judgment dated 15th November, 2014 passed by the learned Single Judge, all these 11 suppliers filed these 11 appeals. Several petitions were filed by several other suppliers of cylinders to Indian Oil Corporation Limited and Hindustan Petroleum Corporation Limited. Some of those suppliers of cylinders to Hindustan Petroleum Corporation Limited and Indian Oil Corporation Limited who had not succeeded before the learned Single Judge filed separate appeals before the Division Bench of this court. Similarly Indian Oil Corporation Limited as well as Hindustan Petroleum Corporation Limited also filed separate appeals arising out of the orders passed by the learned Single Judge granting various reliefs in favour of the suppliers. All these appeals filed by the suppliers or the oil companies were heard together.

21. During the course of hearing of those appeals, insofar as the suppliers of various cylinders to Indian Oil Corporation Limited are concerned, a Division Bench of this court passed an order on 20th July, 2015 directing that instead of remanding the matter to the sole arbitrator MOP & NG shall be directed to determine the reasonable price of supply 14.2 kg LPG gas during the contractual period after giving of an opportunity to the Indian Oil Corporation Limited as well as the appellant, since the contractual price were subject to the price of MOP & NG. The Division Bench of this court was of the view that this course would resolve the dispute finally which is pending for last more 15 years. It was directed that MOP & NG shall make a fresh determination after hearing parties which would also put an end to the other pending arbitral proceedings. Pursuant to the said order passed by the Division Bench of this court, the MOP & NG heard the matters.

22. On 28th April, 2016 the MOP & NG passed an order holding that the interest of natural justice would be served if the Ministry's direction conveyed vide letter dated 21st December, 2000 is given effect and the oil manufacturing companies were advised to determine the price of LPG cylinders as per the then existing cost plus

system for the period 1st July 1999 to 31st March 2001.

23. Those group of appeals in which the Indian Oil Corporation Limited were the parties, the learned Additional Solicitor General on notice appeared before this court on 1st August, 2018. This court passed an order in those matters, recording the agreement arrived at between the parties that the Ministry of Petroleum and Natural Gas shall hear all the parties whose matters were pending either before this court or before the Arbitral Tribunal pertaining to the same issue and shall pass an order after complying with the principles of natural justice and determine the formula for determination of price of LPG cylinders in question for the period 1st July, 1999 to 31st March, 2001. This court did not express any views on the merits of the matter and more particularly on the determination of the formula and kept all the questions on fixation of formula on merits open. This court accordingly directed the Indian Oil Corporation Limited to apply the said formula after determination of the formula by the Ministry of Petroleum and Natural Gas and to decide the final price per cylinder in each of the individual case after complying with the principles of natural justice. This court also directed that the claims of all the

suppliers who were parties before the arbitral tribunal to be decided.

24. The Division Bench of this court in the said order made it clear that the amount already deducted by the Indian Oil Corporation Limited from the bills of the appellants/suppliers would be subject to the outcome of fixation of price by the Indian Oil Corporation Limited and subject to the final orders as may be passed in appropriate proceedings. This court accordingly was pleased to set aside all the arbitral awards which were subject matter of those appeals/cross-objections.

25. Insofar as these appeals are concerned, the respondent made a statement before this court on 8th June, 2015 that the issues raised in these appeal are not identical to the issues raised in the other group of appeals and more particularly the requirement of obtaining approval from MOP & NG.

26. Mr. Zain Mookhi, learned counsel appearing for the appellant in Appeal No.263 of 2015 made various submissions which is the lead matter. Learned counsel invited our attention to various

annexures to the appeal including the correspondence exchanged between the parties, the arbitral award rendered by the learned arbitrator, the averments made in the arbitration petition, affidavit in reply filed by the respondent in the arbitration petition, the pleadings filed by the parties and the order passed by the learned Single Judge.

27. It is submitted by the learned counsel that according to the provisions of the contract entered into between the appellant and the respondent and more particularly under the price clause, the price applicable to the appellant was as per formula of MOP & NG 1994. The price payable by the respondent to the appellant was to be determined on the basis of the some pricing formula which was already mentioned in both the agreements i.e. the cost plus system basis. The appellant had supplied large number of cylinders pursuant to the purchase orders issued by the respondent from time to time.

28. The respondent had paid the consideration to the appellant as per the said invoices raised by the appellant from time to time. The appellant had satisfactorily performed all its obligation under the agreements arrived at between the parties fully. It is submitted that the

agreements already entered into between the parties could not have been altered by an unilateral writing dated 31st October,2000 and circular dated 28th June, 1999 issued by the respondent. The so called report prepared by M/s.Price Waterhouse Coopers unilaterally obtained by the respondent without consent of the petitioner was not binding upon the petitioner. The entire recovery thus made by the respondent from the invoices of the appellant based on such report unilaterally obtained by the respondent was totally contrary to the agreement entered into between the parties. The reliance thus placed by the learned arbitrator on the report of M/s.Price Waterhouse Coopers while accepting the submissions made by the respondent was *ex-facie* perverse. The learned Single Judge thus ought to have interfered with the impugned award rendered by the learned arbitrator.

29. It is submitted that in view of the illegal and arbitrary clause in the second agreement, inspite of the illegal demand made by the respondent threatening to recover the alleged excess payment from the invoices of the appellant in the first agreement, the appellant was bound to continue the supply under the second agreement. Learned arbitrator thus could not have rejected the claims made by the appellant

on the ground that inspite of the demand made by the respondent from the appellant, the appellant continued supply of cylinders to the respondent. The impugned award showed total perversity.

30. It is submitted by the learned counsel for the appellant that even if the respondent could rely upon the reports submitted by the Price Waterhouse Coopers, the respondent could not have fixed the basic rate of supply of cylinders with retrospective effect.

31. Insofar as rejection of the arbitration petitions filed by the appellant, by the learned single Judge is concerned, it is submitted by the learned counsel that the learned single Judge did not consider various documents referred to and relied upon by the appellant and dismissed the arbitration petitions causing serious prejudice to the case of the appellant. He submits that various recoveries effected by the respondent from the invoices of the appellant were contrary to the terms of the agreement. The respondent had acted beyond the terms of the agreement. The revision of the price by the Task Force was not the part of the agreement entered into between the parties. He submits that the price of the cylinder already fixed at Rs.699.27 ps. per cylinder

could not be further revised as the said price was already a fixed price subject to escalation.

32. Insofar as the plea of accord and satisfaction raised by the respondent and accepted by the learned arbitrator is concerned, the learned counsel for the appellant submits that there was no occasion to raise any bills for the supply effected under the first agreement after completion of supply period.

33. Learned counsel for the appellant submits that there was an economic duress upon the appellant by the respondent and as a result thereof, the appellant was required to continue to supply the cylinders though the respondent had decided to obtain the report from the Price Water House Coopers during the existence of the contract. Learned counsel for the appellant however, fairly stated that no such ground was raised by the appellant in the arbitration petition filed by his client under section 34 of the Arbitration Act.

34. It is lastly submitted by the learned counsel for the appellant that this Court by an order dated 20th July, 2015 followed by

the order dated 1st August, 2018 has already directed the Ministry of Petroleum and Natural Gas to determine the formula for determination of the price of LPG cylinder in the matters of suppliers to the Indian Oil Corporation Limited. It is submitted that without prejudice to the rights and contentions raised in these appeals, similar order be passed by this Court also in respect of the supply of cylinders effected by the appellants to the respondent herein.

35. Mr.N.C.Parekh, learned counsel for the appellants in Appeal Nos.265 of 2015, 283 of 2015, 284 of 2015, 444 of 2015, 445 of 2015, 446 of 2015, 295 of 2016, 815 of 2016, 297 of 2016 and 299 of 2016 adopts the submissions made by the Mr.Zain Mookhi and did not make any additional submissions.

36. Mr.Kedar Wagle, learned counsel for the appellant in Appeal No.256 of 2016 adopted the submissions made by Mr.Zain Mookhi, learned counsel for the appellant in Appeal No.263 of 2015 and would submit that the respondent could not have obtained any opinion from the Price Waterhouse Coopers for the purpose of fixation of the price for supply of cylinders. He submits that the report of the

said consultant even otherwise could not have been considered by this Court since the said consultant was allegedly involved in the fraud committed by Satyam Consumer Limited. He submits that insofar as the facts in Appeal No.256 of 2015 are concerned, the same are identical to the facts in Appeal No.263 of 2015.

37. Mr.Pankaj Sawant, learned senior counsel for the respondent invited our attention to various documents annexed to the compilation of Appeal No.263 of 2015, various findings of fact rendered by the learned arbitrator in the impugned award, various findings rendered by the learned single Judge and would submit that the findings of fact rendered by the learned arbitrator cannot be interfered with in the arbitration petitions filed under section 34 of the Arbitration act. He submits that the scope of section 37 is absolutely limited. There is no question of any re-appreciation of findings of fact or the evidence already appreciated by the learned arbitrator. After rendering reasons, the learned single Judge has already passed a detailed judgment dismissing all these arbitration petitions. Learned senior counsel tendered a compilation of various judgments and also tendered a written submissions for the consideration of this Court.

38. It is submitted by the learned senior counsel that Appeal Nos.263 of 2015 and 265 of 2015 filed by the two suppliers arise out of a common award dated 13th March, 2012. Appeal Nos.283 of 2015 and 284 of 2015 arise out of a common award dated 29th October, 2009. Six appeals bearing Nos.444 of 2015, 445 of 2015, 446 of 2015, 256 of 2016, 299 of 2016 ad 297 of 2016 filed by six of the suppliers arise out of a common award dated 21st April, 2011. Appeal No.295 of 2016 arises out of the award dated 7th May, 2016.

39. Learned senior counsel invited our attention to a letter dated 30th July, 1999 and would submit that the said letter did not indicate that the price mentioned therein was a final price. He placed reliance on the letter dated 28th June, 1999 addressed by the respondent to all the cylinder manufacturers informing that it was decided by the Oil Industry that the price of the LPG cylinders shall be kept provisional from 1st July, 1999 onwards and that firm prices shall be advised to them on completion of review by the Industry Task Force. He also invited our attention to a letter dated 7th April, 2000 from the respondent to the appellant in Appeal No.263 of 2015 informing that in

furtherance of the letter of intent dated 29th March, 2000, the revised “provisional price” was applicable, effective from 1st April, 2000 at Rs.684.41 ps. Irrespective of source of steel being SAIL / TISCO / ESSAR / LLOYD / ISPAT / SALEM. It was further conveyed in the said letter that pricing review of the LPG cylinder was under progress and final price would be advised on completion of review.

40. Learned senior counsel invited our attention to paragraph 19 of the written arguments filed by the appellant before the learned arbitrator accepting the fact that in respect of supplies for the year 1999-2000 and from 1st April, 2000 onwards, the respondent by its respective purchase orders and further by change order had fixed the revised provisional prices of the LPG cylinders i.e. by a letter dated 1st May, 1999 for the period 1st April, 1999 to 31st March, 2000 at Rs.678.77 ps. and by amendment of purchase order dated 30th July, 1999 at Rs.699.29 ps. By a letter dated 29th March, 2000, the rate was revised to Rs.699.29 ps. He submits that it is thus admitted position that the price of the LPG cylinder was provisional and not fixed price till the same was communicated subsequently after considering the report of the Price Waterhouse Coopers.

41. Learned senior counsel invited our attention to the findings rendered by the learned single Judge in paragraph 5 of the impugned order that the respondent had communicated the amended price of the cylinders to the appellant. The appellant was issued a circular dated 28th June, 1999 which indicates that the firm price in accordance with the communication letter dated 28th June, 1999 was communicated. There was no plea raised by the appellant in the pleadings before the learned arbitrator that the price fixed by the respondent initially itself was a firm price. Learned single Judge has rendered a finding that it is apparent from the price communicated on 30th July, 1999 was also a provisional price and that the said price was subject to finalization after review by the Industry Task Force upon obtaining the report of the Price Waterhouse Coopers. Neither a report of the Price Waterhouse Coopers was received by 30th July, 1999 nor any price was fixed by the Industry Task Force as on that date.

42. No arguments have been advanced by the learned counsel for the appellant that the finding rendered by the learned single Judge in paragraph 5 of the impugned order is incorrect or erroneous. He

invited our attention to the grounds (p) and (q) in the appeal memo and would submit that even those grounds would not indicate that the price of the cylinders conveyed to the appellant was a fixed price and was not subject to any review.

43. Learned senior counsel invited our attention to the representation made by the Indian LPG Manufacturers Association dated 24th April, 2001 to the Chief LPG Equipment Manager of the respondent and would submit that even in the said representation, it was not the case of the Association that the respondent had fixed the firm price by communication dated 30th July, 1999.

44. Learned senior counsel invited our attention to the written arguments filed by the appellant and more particularly paragraph 29 thereof and would submit that even in the written arguments the appellant admitted that the respondent had declared the firm price only on 1st August, 2002.

45. Learned senior counsel for the respondent submits that no reliance could be placed by the appellant on the orders passed by the

learned arbitrator, learned single Judge and the order passed by the Division Bench of this Court in the matters arising out of the agreements entered into between the suppliers of various LPG cylinders and the Indian Oil Corporation Limited. He submits that the provisions of these agreements are different from the provisions of the agreement in case of the suppliers of cylinders to the Indian Oil Corporation Ltd. He submits that insofar as the agreements between the suppliers and the Indian Oil Corporation Limited are concerned, it was specifically provided in the said agreement that the suppliers could charge a provisional price of Rs.684 for 14.2 k.g. cylinder. The price formula was under review by the Government and the price applicable after 1st July, 1999 would be only as per the approval of MOP and NG.

46. Learned senior counsel also invited our attention to the circular dated 28th June, 1999 insofar as the agreements which are subject matter of these appeals are concerned and would submit that it was specifically provided in the said circular that it was decided by the industry that the price of LPG cylinder shall be kept provisionally from 1st July, 1999 onwards. The firm price shall be advised to the suppliers on completion of review of the Industry Task Forum". It is submitted

by the learned senior counsel that the respondent had thus never informed the cylinder manufacturers that the final price will be only as per the approval of MOP and NG.

47. It is submitted by the learned senior counsel that the price of the LPG cylinder in these group of appeals where Bharat Petroleum Corporation Limited is a party cannot be referred to the Ministry of Petroleum and Natural Gas for the purpose of determination of the final price of LPG cylinder in question. It is submitted by the learned senior counsel in all the arbitration matters concerning Bharat Petroleum Corporation Limited, the claims of the suppliers / manufacturers have been rejected by the learned arbitrators as well as by the learned single Judge of this Court.

48. It is submitted by the learned senior counsel that in case of ***Lite Containers Private limited vs. Bharat Petroleum Corporation Limited & Anr.***, this Court by a judgment dated 10th March, 2011 in Arbitration Petition No.365 of 2008 in an identical matter has dismissed the arbitration petition filed by the said party. The said party has accepted the said judgment rendered by the learned single Judge

upholding an arbitral award. The said judgment of this Court has attained finality.

49. Learned senior counsel placed reliance on the judgment of the learned single Judge of this Court in case of *M/s.JCL International Ltd. vs. Bharat Petroleum Corporation Limited, AIR 2013, Bombay 23* and would submit that in the said arbitration petition arising out of the similar award and similar agreement, this Court by a reasoned judgment, has dismissed the said arbitration petition and upholding the arbitral award rendered by the learned arbitrator.

50. Learned senior counsel placed reliance on sections 9 and 10 of the Sale of Goods Act, 1930 and would submit that the contract by which a price has to be determined at later point of time as per the agreed methodology is valid and cannot be questioned in the arbitration or before any Court by law. He placed reliance on a passage in paragraph 674 of the 4th Edition of Halsbury's Laws of England. He also placed reliance on the judgment of the Hon'ble Supreme Court in case of *M.S. Madhusoodhan vs. Kerala Kaumudi, AIR 2004 SC 909*

and in particular para 28, judgment in case of ***Kurapati Venkata Mallayya & Anr. vs. Thondepu Ramaswami & Co. & Anr. AIR 1964 SC 818*** (paragraph 14), the judgment of this Court in case of ***JCL International Limited*** (supra) and the judgment of the Madras High Court in case of ***OPG Energy Pvt. Ltd. vs. GAIL (India) Limited, 2014(1) CTC 225***.

51. It is submitted by the learned senior counsel that various findings of fact have been rendered by the learned arbitrator while rejecting the claims made by the appellant. Those findings of fact are upheld by the learned single Judge of this Court while dismissing the arbitration petitions filed under section 34 of the Arbitration Act. He submits that the powers of the Court for interference in an appeal under section 37 are minuscule. He submits that the scope of enquiry in an appeal under section 37 of the Arbitration Act is very restricted, narrower and limited than before the Court dealing with objections in petition under section 34 of the Arbitration Act. The Appellate Court can interfere only if it inescapably concludes that a firmly established principle of law has been infringed or ignored. The Appellate Court cannot interfere with the concurrent findings of fact and arrived at by

the learned arbitrator and by the learned single Judge under section 34 of the Arbitration Act.

52. Learned senior counsel submits that the Appellate Court cannot permit a party to take a plea which was either not taken before the learned arbitrator nor before the learned single Judge. He further submits that a party cannot be permitted to argue contrary to the arguments advanced before the learned single Judge. The Appellate Court cannot consider the ground not specifically raised before the lower Court. If the Appellate Court entertains such a ground, the same would amount to denial of justice to the other side. If the ground is available and not specially raised, it would amount to waiver on the part of such party.

53. It is submitted by the learned senior counsel that the appellant had raised only two contentions before the learned single Judge i.e. (i) the respondent had by their letter dated 30th July, 1999 amended the price of the cylinders and the said letter indicated the firm price in accordance with the circular dated 28th June, 1999 and (ii) that MOP & NG approval was required for final price determination by the

Industry Task Forum. Learned senior counsel invited our attention to the findings of the learned single Judge on both these contentions raised by the appellant. He submits that insofar as first contention raised is concerned, it was rejected by the learned single Judge. No ground is raised by the appellant in the appeal memo. He submits that in any event, the said ground was rightly rejected by the learned single Judge. The said ground had been given up. In grounds (p) and (q), the appellant specifically has admitted that the firm price was communicated to the appellant by the respondent only in the year 2002 and thus cannot be allowed to urge across the bar that the price communicated to the appellant in the year 1999 was a firm price and could not subject to any review.

54. Insofar as the second contention which was raised before the learned single Judge by the appellant is concerned, learned senior counsel submits that the learned single Judge after considering the documents on record and more particularly the circular / letters dated 28th June, 1999, 28th February, 2001, 7th March, 2001 and 15th March, 2001 has specially held that the approval of the Ministry was not required to the agreements between suppliers and the Bharat Petroleum

Corporation Limited. He submits that the said finding of fact rendered by the learned single Judge cannot be termed to be perverse. No specific ground has been raised by the appellant to show as to how and in what manner the said findings can be termed as perverse.

55. Learned senior counsel for the respondent submits that the bank guarantee furnished by the appellant in favour of the respondent was for a limited purpose. Since the money of the appellant was available with the respondent, the said bank guarantee furnished by the appellant was returned.

56. Insofar as the issue of economic duress urged by the learned counsel for the appellant during the course of arguments is concerned, learned senior counsel invited our attention to the findings rendered by the learned single Judge in paragraphs 12 and 13 of the impugned judgment and submits that the said findings of fact are not perverse and thus cannot be interfered with by the Appeal Court. The allegation that the economic duress was alleged to have been made by the respondent upon the contractor at the time of execution of the contract, if any, could be made only with proof then and not during the

course of execution of the contract subsequently.

57. Insofar as the submission of the appellant that finalization of the firm price or revision of price already communicated in a letter of intent subject to the opinion of Price Waterhouse Coopers or that the said condition could not have been decided unilaterally by the respondent is concerned, it is submitted that this argument was neither urged before the learned arbitrator nor before the learned single Judge by the appellant and thus cannot be allowed to be raised for the first time across the bar in these proceedings. It is submitted by the learned senior counsel that since the interpretation of the agreement by the learned arbitrator in any event even if possible interpretation, this Court cannot substitute such possible interpretation of the learned arbitrator by another possible interpretation.

58. In support of the submission that the scope of section 37 of the Arbitration Act is very limited, learned senior counsel for the respondent placed reliance on the following judgments :-

a). ***Sanyukt Nirmala vs. Union of India, 2002 SCC***

Online Del 214 : ILR (2002) 1 Del 479 page 485,

- b). *MTNL vs. Fujitsu India P. Ltd., 2015(2) Arb.L.R. 332,*
- c). *ADTV Communication vs. Vibha Goel, 2018 SCC Online Del 8843 (paragraphs 29 to 35),*
- d). *Shree Vinayak Cement Clearing Agency vs. Cement Corporation of India, 2007 SCC OnLine Del 1012 : ILR (2008) 1 Del 347 at page 349,*
- e). *Union of India vs. Col. L.S.N. Murthy, 2006 SCC OnLine AP 414 : (2006) 2 AP LJ 170 : (2006) 4 ALD 368 : (2006) 4 ALT 256 : (2006) 3 Arb LR 552 at page 175.*

59. In support of this submission, it is submitted that the party cannot be allowed to urge a new point for the first time in an appeal under section 37 of the Arbitration Act which point was not raised before the learned arbitrator or before the learned single Judge, learned senior counsel placed reliance on the judgment of the Calcutta High Court in case of *Premchand Manickchand vs. Fort Gloster Jute Manufacturing Co., AIR 1969 Cal. 620.*

60. It is submitted by the learned senior counsel that the appellant cannot be allowed to argue contrary to the arguments advanced before the learned single Judge in this appeal filed under section 37 of the Arbitration Act. In support of this submission, learned senior counsel placed reliance on the judgment of this Court in case of ***Manganese Ore (India) Ltd. vs. Ram Bahadur Thakur Ltd., 2006 SCC OnLine Bom. 507, para 9(c)***. He also placed reliance on the judgment of the Orissa High Court in case of ***State of Orissa vs. Kirtan Charan Mohanty, 1982, SCC OnLine Ori.67 : AIR 1983 Ori.170*** at page 172.

61. It is submitted by the learned senior counsel that since the appellant raised various issues for the first time in this appeal which issues could have been raised before the learned single Judge, it would amount to waiver under section 4 of the Arbitration Act. In support of this submission, he placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Union of India vs. Susaka (P) Ltd., (2018) 2 SCC 182 : 2017 SCC OnLine SC 1436 – paras 19 to 27***.

62. Mr.Zain Mookhi, learned counsel for the appellant in

rejoinder submits that the facts before this Court in case of *Lite Containers Private Limited* (supra) were different than the facts before this Court and thus the said judgment is clearly distinguishable in the facts of this case. Similarly he also made an attempt to distinguish the judgment of this Court in case of *M/s.JCL International Ltd. AIR 2013 Bombay 23* on the ground that though same documents were considered by the court in the said judgment, the arguments advanced by the manufacturers in the said judgment were totally different. He submits that there was a patent illegality in the impugned award and thus the learned single Judge ought to have interfered with the impugned award. This Court while hearing this appeal under section 37 of the Arbitration Act has thus ample powers to interfere with the impugned award as well as with the impugned order passed by the learned single Judge.

REASONS AND CONCLUSIONS :-

63. It is not in dispute that appellant and the respondent had entered into separate yearly purchase agreements under which the appellant had agreed to supply cylinders to the respondent. The respondent had issued a purchase order placing an order for supply of

requisite quantities of LPG cylinders of 14.2 kg at the provisional price of Rs.678.77 and also at the provisional price of Rs.699.29 for different periods.

64. A perusal of the record further indicates that the respondent had issued a circular dated 30th October 2000 informing the appellant and the other cylinder suppliers that the industry had undertaken a study to review the existing cylinder pricing with the assistance of M/s.Price Waterhouse Coopers. M/s.Price Waterhouse Coopers submitted a draft report to the respondent on the price revision. It was mentioned by the respondent that pending finalization of the report, the respondent had decided to revise the provisional basic price of 14.2 kg cylinder at Rs.645/- w.e.f. 1st July, 1999 and accordingly the respondent would be recovering the differential amounts from the bills of the suppliers. The appellant including other suppliers were informed that the final adjustments would be made later on after finalization of the cylinder price. The respondent informed all the suppliers that w.e.f. 1st November, 2000, all the suppliers shall have a provisional basic price of Rs.645/- per cylinder. It is not in dispute that the final report of M/s.Price Waterhouse Coopers thereafter was

received by the oil companies recommending the final price of the cylinder.

65. The respondent vide letter dated 31st January 2001 informed the appellant and other suppliers of the final price for 14.2 kg fixed at Rs.645/- per cylinder whereas the price of 19 kg cylinder was fixed at Rs.765/- per cylinder. The respondent thereafter started recovering from the suppliers including the appellant on the basis of the respective prices fixed for LPG cylinders at Rs.645/- per cylinder for 14.2 kg and Rs.765/- per cylinder for 19 kg cylinder.

66. Insofar as the dispute between the suppliers of Indian Oil Corporation Limited and the said company is concerned, there was certain correspondence exchanged between the suppliers of Indian Oil Corporation Limited and the said company with the Ministry of Petroleum and Natural Gas. Those proceedings arising out of the dispute between the suppliers of Indian Oil Corporation Limited and the said companies were subject matters of the separate appeals which are already disposed of by this Court.

67. On 1st August 2002, the respondent herein declared a firm contract. The suppliers thereafter invoked the arbitration agreement and filed statement of claim before the learned arbitrator claiming various amounts towards the amounts deducted/withheld by the respondent on account of the report submitted by M/s.Price Waterhouse Coopers with interest thereon and various other claims. It is not in dispute that none of the parties led oral evidence before the learned arbitrator. However, both the parties filed written submissions before the learned arbitrator. A perusal of the written submission filed by the appellant indicates that the appellant herein had also prayed that the learned arbitrator shall consider and apply 'MOP & NG Formula' mentioned in the purchase order and to fix the price of the cylinders as per the terms of the contract and shall direct the respondent to pay the amount deducted/withheld/ adjusted by the respondent by applying PWC report from various bills for the supply effected by the appellant and for various reliefs.

68. A perusal of the arbitral award rendered by the learned arbitrator which is the subject matter of Appeal No.263 of 2015 clearly indicates that the learned arbitrator directed the respondent

only to pay an amount of Rs.14,08,422/- towards balance price payable at the rate of 17.20 per cylinder for 81885 cylinders supplied by the appellant between 1st April 2000 and 31st March 2001 with interest at the rate of 12% per annum on the said amount from the date of respective invoice till the date of payment and rejected all other claims made by the appellant.

69. A perusal of the said award clearly indicates that learned arbitrator after considering the documentary evidence produced by both the parties rendered a finding that the Oil Industry Task Force together with M/s.Price Waterhouse Coopers visited several cylinder manufacturers' premises and had collected various details and data. The appellant was fully aware of the study being conducted by the said group pursuant to the letter dated 28th June 1999, 29th March 2000 and 7th April 2000. The said review of New Pricing Formula was completed in the month of October 2000 opining that the price of cylinders supplied w.e.f. 1st July 1999 would not exceed Rs.645/- per cylinder.

70. All the cylinder manufacturers including the appellant

were informed by the respondent about the final price for supply of cylinders determined on the basis of newly revised pricing formula. Learned arbitrator also recorded a finding that according to the said revised formula, the final price for the cylinders supplied between 1st July 1999 to 31st March 2000 was Rs.645/- per cylinder and for the cylinders supplied for financial year April 2000 to March 2001 was Rs.662.20 per cylinder.

71. Learned arbitrator also recorded a finding that the appellant had acted on the terms of the contract and did not dispute the fact that various supplies were effected by the appellants during the contractual period and held that the appellants were bound to return the excess amount received by them. Learned arbitrator further held that after receipt of the letter dated 30th October 2010 from the respondent intimating the appellants that M/s.Price Waterhouse Coopers had submitted a draft report on the price revision and based on the said report, the respondent had revised the provisional price of 14.2 kg cylinder to Rs.645/- per cylinder w.e.f. 1st July 1999 and that the respondent would be recovering the differential amounts from their dues. The appellant accepted such price and continued to make

supplies to the respondent and had also started billing @ Rs.645/- per cylinder for the cylinder supplied w.e.f. 1st November 2000.

72. Learned arbitrator also recorded a finding that the final provisional price determined by the Oil Industry Task Force after review study was lower than the provision price at which the respondent had made the payment to the appellant for the cylinders supplied between 1st July 1999 to 31st March 2000 and thus the respondent had made the excess payment to the appellant. The respondent was entitled to recover the excess payment made to the appellant by adjusting the same from the pending bills of appellant from 1st November 2000. Learned arbitrator also placed reliance on Section 9 of the Sale of Goods Act, 1930 providing that the price need not be mentioned in the contract but can be determined if the method of determination of the same was indicated. Learned arbitrator also held that the appellant was put to notice vide letter dated 28th June 1999 regarding pricing of LPG cylinders and that the price would be kept provisional from 1st July 1999 till firm price was intimated after completion of the said review by the Oil Industry Task Force. The consultant, M/s.Price Waterhouse Coopers was engaged for

assisting the Oil Industry Task Force.

73. It is not disputed by the appellant that even after receipt of the letter dated 31st October 2000 intimating the appellant about final price of cylinders and that excess payment made earlier was adjusted, the appellant continued to supply cylinders to the respondent after billing the respondent @Rs.645/- per cylinder for cylinders supplied w.e.f. 1st November 2000. Learned arbitrator rendered a finding that both the parties were thus clear that the price w.e.f. 1st July 1999 was to be provisional. A firm price was to be determined and fixed by the respondent after completion of the review by Oil Industry Task Force with assistance of M/s.Price Waterhouse Coopers and the same would be binding on the parties.

74. Learned arbitrator has held that the firm price determined and fixed by Oil Industry Task Force is binding on both the parties and thus the appellants herein could not subsequently dispute such downward revision and also recovery of excess amount paid by the respondent from the pending bill. Learned arbitrator also placed reliance on the judgment of this Court in Arbitration Petition

No.259 of 2005 filed by Suburban Industries Ltd. Vs.Hindustan Petroleum Corpn. Ltd. and also in the matter of Arbitration Petition No.365 of 2008 filed by M/s.Lite Containers Pvt. Ltd. Vs. Bharat Petroleum Corporation Ltd. & Anr. holding that the petitioners could not have raised any objection to down pricing of the contract because as per the terms of the contract, the same was a provisional price subject to the determination of the final price after the price was to be fixed by the committee. In the said judgment, this Court confirmed the findings of the learned arbitrator which were recorded after taking into consideration the final price of the steel and held that the said findings were in consonance with the terms of the contract.

75. The learned Single Judge of this Court in the judgment dated 15th November 2014 after considering various findings of facts rendered by the learned arbitrator held that the conclusion arrived at by the learned arbitrator was clearly a possible view. Learned arbitrator had interpreted the letter dated 28th June 1999 followed by the conduct of the parties and treated the same to be a variation of the original contract contained in the two purchase orders which were the subject matter of the said arbitration proceedings. Learned Single

Judge held that there was nothing on record to show that the learned arbitrator did not take into account any material document or that his conclusion was perverse in any manner having regard to the pleadings and documents referred in the said order.

76. Learned Single Judge rejected the submissions made by the appellant through its senior counsel that in this case, there was no approval of Ministry of Petroleum and Natural Gas for final price determined by Oil Industry Task Force. The appellants had placed reliance on the letter dated 28th February 2001 addressed by the respondent to the Ministry of Petroleum and Natural Gas requesting the said ministry to approve the report of Oil Industry Task Force fixing the price of cylinders. It is held by the learned Single Judge that seeking of such approval was not a term of contract. This Court considered the circular dated 8th June 1999 followed by the conduct of the cylinder manufacturers including the appellant and held that the said circular did not suggest that there was any such requirement on the part of the respondent to seek an approval from Ministry of MOP & NG before the price was fixed and communicated to the cylinder manufacturers. This Court has also considered the letter of the

Ministry of MOP & NG in response to the request made by the respondent for seeking approval from the Ministry of MOP & NG stating that no approval was required and that the fixation of price was a matter between the suppliers and purchasers alone.

77. Leaned Single Judge also referred to the judgment of this Court in the case of (i) *M/s.Lite Containers Private Limited Vs. Bharat Petroleum Corporation Limited* (supra), (ii) *M/s. Suburban Industries Ltd. Vs.Hindustan Petroleum Corpn. Ltd.* (supra) and (iii) *M/s.JCL International Ltd. Vs. Bharat Petroleum Corporation Limited* (supra) and held that in those matters, the same communications about provisional and final price fixation between the parties were considered and the similar contentions of suppliers have been rejected by this Courts.

78. Insofar as the judgment of this Court relied upon by the appellant's counsel before the learned Single Judge is concerned, learned Single Judge rightly distinguished the said judgment on the ground that the said contract between the suppliers and Indian Oil Corporation Limited itself required to seek approval of Ministry of

MOP & NG before final price was fixed and communicated to the cylinder manufacturers.

79. Insofar as the Arbitration Petition No.762 of 2011 is concerned, learned Single Judge rejected the submissions of the petitioner (appellant in one of the appeals) that case of 19 kg. Cylinders was on altogether different footing on the ground that there was no such plea raised by the petitioner in that arbitration petition. It is held that the statement of claim filed by the suppliers clearly indicated that the rates were accepted to be provisional even in that case and were to be subject to upward/downward revision on account of revised steel price and rail freight. There was no distinction drawn in the petition between 14.2 kg. cylinders and 19 kg. cylinders. It is held that it was the report of M/s.Price Waterhouse Coopers on price which was considered on merits before the learned arbitrator. Learned Single Judge has rightly held that it was not open for this Court to go into this issue for the first time in a challenge to an arbitration award.

80. Insofar as the Arbitration Petition No.375 of 2012 is

concerned, the petitioner in that arbitration petition had raised an issue of economic duress across the bar before the learned Single Judge. This Court after considering various judgments referred to and relied upon by the parties rendered a finding that there was absolutely nothing to show that any illegitimate pressure was brought on the petitioners by the respondent so as to coerce the former's will or that the petitioners were pressurized into entering the contract against its Will. It is held by the learned Single Judge that once this stipulation is accepted, the petitioners had no choice left in the matter as to any particular fixation of price. The petitioners had already agreed to such price, as may be fixed by the respondent after review by the Oil Industry Task Force. Learned Single Judge held that this being a commercial contract accepted by the petitioners, a plea of unequal bargaining power is hardly open to the petitioners. Learned Single Judge rightly placed reliance on the judgment of the Supreme Court in the case of *S.K. Jain Vs. State of Haryana, (2009) 4 SCC 357*.

81. Learned counsel for the appellant could not demonstrate before this Court in these appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 as to how the impugned

judgment rendered by the learned Single Judge warrants any interference. Learned counsel also could not point out any provision in the agreement entered into between the parties to show that the provisional price communicated by the respondent to the appellant in the purchase orders could not have been subjected to any change in future or that the fixation of final price after obtaining report from Oil Industry Task Force was contrary to the terms of the contract or without authority. On the contrary, a perusal of the record clearly indicates that the learned arbitrator as well as the learned Single Judge after considering the documents on record have rendered a finding that the appellant had accepted the fact that the respondent was entitled to revise provisional price after obtaining report from Oil Industry Task Force assisted by M/s.Price Waterhouse Coopers. The appellant had not only accepted the final price communicated by the respondent but had supplied the cylinders at the revised price and had also issued invoices from time to time.

82. Learned counsel for the appellant could not point out any provision in the agreement, in so far as the contracts with the respondent herein is concerned, providing that the approval of

Ministry of Petroleum and Natural Gas was to be obtained by the respondent before fixing the final price for supply of cylinders. In our view, learned Single Judge thus rightly rejected the said contention raised by the appellant. The provision for obtaining prior approval from the Ministry of Petroleum and Natural Gas before fixation of final price provided in the agreement entered into between the suppliers and Indian Oil Corporation Limited cannot be extended to the contract between the appellant and the respondent Bharat Petroleum Corporation Limited. We are thus not inclined to accept the submission of the learned counsel for the appellant that in these matters also, this Court shall revert the matter back to the Ministry of Petroleum and Natural Gas for reconciliation of price of supply of cylinders as directed by this Court in those group of matters.

83. In our view, the findings of the facts rendered by the learned arbitrator after appreciating the documentary evidence being not perverse, the learned Single Judge rightly did not interfere with such findings of facts. In our view, even if a different interpretation of the terms of the agreement was possible, according to the learned Single Judge, the interpretation of the learned arbitrator being a

possible interpretation cannot be substituted by another possible interpretation of the agreement entered into between the parties by this Court. The learned Single Judge rightly placed reliance on the judgments of this Court in the above referred three arbitration petitions which matters were identical to the facts in the arbitration petitions which are subject matters of these appeals.

84. In our view, Mr.Sawant, learned senior counsel for the respondent rightly placed reliance on paragraph 19 of the written arguments filed by the appellant before the learned arbitrator in support of the submission that it was an admitted position that the price of the LPG cylinder was provisional and not fixed price till the same was communicated by the respondent to the appellant subsequently after considering the report of M/s.Price Waterhouse Coopers and that the letter dated 30th July 1999 did not indicate that price mentioned therein was a final price. Be that as it may, a perusal of the record clearly indicates that there was no plea raised by the appellant before the learned arbitrator that the price fixed by the respondent initially itself was a firm price.

85. A perusal of the grounds (p) and (q) raised by the appellant in the appeal memo filed in Appeal No.263 of 2015 would clearly indicate that it was not the case of the appellant that the price of the cylinders conveyed to the appellant earlier itself was a fixed price and not subject to any review. The representation made by the Indian LPG Manufacturers' Association dated 24th April, 2001 to the Chief LPG Equipment Manager of the respondent also clearly indicates that it was not the case of the Association that the price conveyed to appellant by letter dated 30th July 1999 was itself a firm price. A perusal of averments made in paragraph 29 of the written arguments filed by the appellant also clearly indicates that even according to the appellant, the respondent had declared a firm price only on 1st August 2002 and not earlier. In our view, Mr.Sawant, learned senior counsel for the respondent is right in his submission that it was not the case of the appellant that the respondent had ever informed the appellant in this case that the final price will be only as per the approval of MOP and NG.

86. Learned counsel for the appellant did not dispute that in an identical matter filed by *Lite Containers Private Limited Vs.*

Bharat Petroleum Corporation Limited in Arbitration Petition No.365 of 2008, this Court has dismissed the said arbitration petition which judgment has not been impugned by the supplier who is one of the appellant in these group of matters. The judgment of this Court in the case of ***M/s.JCL International Ltd.*** (supra) which is also based on the identical facts rejecting the petition filed by the supplier and upholding the arbitral award rendered by the learned arbitrator is rightly followed by the learned Single Judge.

87. In our view, Mr.Sawant, learned senior counsel for the respondent has rightly relied upon Sections 9 and 10 of the Sale of Goods Act, 1930 in support of his submission that the contract by which the price has to be determined by later point of time as per the agreed terms is valid and cannot be questioned in the arbitration or before the Court by law. In our view, Sections 9 and 10 of the Sale of Goods Act, 1930 would clearly apply to the facts of this case. The firm price fixed by the respondent subsequently was in conformity with Sections 9 and 10 of the Sale of Goods Act, 1930. Thus the impugned award rejecting the claim of the appellant with a finding that the provisional price conveyed by the respondent to the appellant

initially was subject to the firm price to be declared subsequently was rightly not interfered by the learned Single Judge. Since the price of cylinders conveyed to the appellant was clearly a provisional price from the date of commencement of supply of cylinders, fixation of firm price later on for the entire period could not be faulted with.

88. Learned counsel for the appellant urged various submissions before this Court which are recorded aforesaid for the first time which were not urged before the learned arbitrator or even before the learned Single Judge. In our view, those submissions cannot be allowed to be urged before the Division Bench in these group of appeals under Section 37 of the Arbitration and Conciliation Act, 1996. Insofar as the issue of economic duress urged by the learned senior counsel for the appellant during the course of the arguments is concerned, learned Single Judge has rightly rejected the said issue urged in one of the matters for the reasons recorded in the judgment. We do not find any infirmity in the impugned judgment rendered by the learned Single Judge even on this issue urged by the appellant across the bar.

89. Insofar as various judgments relied upon by Mr.Sawant, learned senior counsel for the respondent in support of his submission that scope of Section 37 of the Arbitration and Conciliation Act, 1996 is very limited and thus the Appellate Court cannot interfere with the findings of the facts rendered by the learned arbitrator or by the learned Single Judge is concerned, we are in agreement with this submission made by the learned senior counsel. In our view, since the findings of facts rendered by the learned arbitrator being not perverse cannot be interfered with by this Court under Section 34 of the Arbitration and Conciliation Act, 1996. The question of exercising any powers by the Appellate Court under Section 37 of the Arbitration and Conciliation Act, 1996 to interfere with the findings of facts which are not perverse does not arise. The judgment relied upon by the learned senior counsel for the respondent in this judgment would apply to the facts of this case and would assist the case of the respondent. In our view, Mr.Mookhi, learned counsel for the appellant in Appeal No.263 of 2015 could not distinguish the judgment of the learned Single Judge in the identical matter in the case of ***Lite Containers Private Limited Vs. Bharat Petroleum Corporation Limited (supra)*** and in the case of ***M/s.JCL International Ltd. (supra)***.

90. Insofar as the submissions made by Mr.Parekh, learned counsel for the appellants adopting the submissions made by Mr.Mookhi, learned counsel for the appellant in Appeal No.263 of 2015 are concerned, this Court has already dealt with the submissions of Mr.Mookhi, learned counsel for the appellant in the earlier paragraphs of this judgment and thus need not deal with the submissions of Mr.Parekh, learned counsel for the appellants in Appeal Nos.265 of 2015, 283 of 2015, 284 of 2015, 444 of 2015, 445 of 2015, 446 of 2015, 295 of 2016, 815 of 2016, 297 of 2016 and 299 of 2016 once again. For the reasons recorded by this Court while dealing with the submissions made by Mr.Mookhi, learned senior counsel for the appellant in Appeal No.263 of 2015, the arguments advanced by Mr.Parekh, learned counsel for the appellants are also rejected.

91. Insofar as the submissions of Mr.Wagle, learned counsel for the appellant in Appeal No.256 of 2016 are concerned, Mr.Wagle also adopted the submissions made by Mr.Mookhi, learned senior counsel for the appellant in Appeal No.263 of 2015 which are already

rejected by this Court. Insofar as the additional submissions made by Mr.Wagle that the respondent could not have obtained opinion of M/s.Price Waterhouse Coopers for the purpose of fixation of price for supply of cylinders is concerned, in our view, there is no merit in this submission of the learned counsel. Each of the appellants had accepted the price recommended by Oil Industry Task Force assisted by M/s.Price Waterhouse Coopers and thus cannot challenge the said report.

92. Insofar as the submission of Mr.Wagle that the opinion of the said M/s.Price Waterhouse Coopers even otherwise could not have been considered as the said consultant was allegedly involved in the fraud committed by Satyam Consumer Limited is concerned, neither such plea is raised by the appellant before the learned arbitrator nor before the learned Single Judge nor in the appeal memo filed in Appeal No.263 of 2015 and thus this submission cannot be allowed to be urged for the first time across the bar at this stage.

93. In our view, learned arbitrator has considered all the relevant facts and the documents. The findings of facts rendered by the

learned arbitrator and the learned Single Judge and the conclusions drawn do not warrant any interference by this Court.

94. We therefore pass the following order : -

(i) Appeal Nos.263 of 2015, 256 of 2016, 265 of 2015, 283 of 2015, 284 of 2015, 444 of 2015, 445 of 2015, 446 of 2015, 295 of 2016, 297 of 2016 and 299 of 2016 are dismissed.

(ii) There shall be no order as to costs.

(A.K.MENON, J.)

(R.D. DHANUKA, J.)