

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **O.M.P. (COMM) 322/2017**

***Reserved on: 26.04.2019***  
***Date of Decision: 03.07.2019***

**AIR LIQUIDE NORTH INDIA PVT. LTD. & ANR**

**..... Petitioners**

Through: **Mr.Gopal Subramaniam, Sr. Adv.**  
**with Mr.Percival Billimoria,**  
**Mr.Ankur Kashyap, Mr.S.P.**  
**Singh, Mr.Atul Kumar, Ms.Komal**  
**Jain and Ms.Mansi Jain, Advs.**

**versus**

**INDIAN OIL CORPORATION LTD. .... Respondent**

Through: **Mr.V.N. Koura, Ms.Mona Aneja**  
**and Mr.Nikil Mundeja, Advs.**

**CORAM:**  
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners challenging the Arbitral Award dated 27.03.2017 read with order dated 25.05.2017 making certain corrections therein, passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the agreement executed between the parties for installation of Oxygen and Nitrogen Plant on Build-Own-Operate (BOO) basis by the petitioners for the Panipat Naphtha Cracker Project (PNCP) of the respondent at Panipat (Haryana).

2. The respondent had invited bids for the above project by a letter inviting bid on 30.09.2005. Clause 2 of the letter described the scope of work as under:

**“2. BRIEF SCOPE OF WORK**

*The scope of work shall include installation of Cryogenic Oxygen and Nitrogen (N<sub>2</sub>O<sub>2</sub>) plant on a site licensed by IOCL within Naphtha Cracker Complex, as per the requirement, conditions and specifications mentioned in the technical volume enclosed elsewhere in Bidding Document. The seller shall install the facilities own and operate the same under the terminology and conditions commonly known as BUILD-OWN-OPERATE (BOO).”*

3. The letter inviting bid contained annexed therewith, certain other documents including Instructions to Bidders (ITB) as also the Conditions of Agreement (COA).

4. On 21.01.2006 the respondent issued Amendment No.1 to the bidding document. An amendment was made to Clause 7.4 in Section V (i)(a) of the ITB which reads as under:

**“7.4 Section V**

**Para 7.4, Section-V (i)(a) stand replaced by the following:**

**a) Design capacity of the proposed Plant including intended Merchant Sale (Separate figures to be furnished for gaseous oxygen, gaseous nitrogen, liquid oxygen and liquid nitrogen for each of Buyer’s consumption and for Merchant sale).”**

5. The said amendment also introduced Sub-Article 17.2.8 to the COA in the following words:

*“17.2.8 (New Sub-Article)*

*Following is added as sub-article 17.2.8 to Conditions of Agreement:*

*“17.2.8 Seller has the option to source power from Buyer's captive power plant (Maximum 20 MW) under open access policy after obtaining permission from Haryana Electricity Regulatory Commission (HERC). Buyer will provide electrical power at 33KV voltage level through two 33 KV feeders up to battery limit of N2/O2 substation.*

*Power Tariff shall be equivalent of prevailing tariff of 132 KV level of Haryana State Electricity Board (UHBVNL) for Industrial use plus surcharge. Cost of Power at above rate shall be adjusted from Seller's invoice by the Buyer. While surcharge shall be paid by Buyer directly to UHBVNL.*

*Measurement of Power shall be done at Buyer's Source end.*

*However, bidders presently may prepare their price bid considering the cost of electrical power as Rs. 3.95 per unit which is equivalent to UHBVNL HT power tariff (132 KV power factor 0.90) for industrial loads as on date.”*

6. On 01.09.2006 the respondent made a second amendment to the bidding document. Sub-Article 2.7 was added in the COA in the following terms:

*“2.7 (New)*

*Following is added as new sub-Article 2.7:*

*Sellers shall be allowed to sell to Merchant Market the Product at any rate to be decided by the Seller, subject to meeting the maximum hourly instantaneous demand specified by the Buyer for each month. The Seller shall also have the option of disposing off the Product rejected by the Buyer for any reason, in the Merchant Market at any rate decided by the Seller.”*

7. On 08.12.2006 the respondent addressed the following email to the petitioner:

*“This has reference to your bid & various discussions held with you for the subject work.*

*AA) Enclosed please find following documents:*

*i) Revised Invitation for Bid.*

*ii) Revised Conditions of Contract.*

*iii) Revised Land License Deed.*

*BB) Based on above please submit the following:*

*i) Compliance to the Bidding Document.*

*ii) Revised Deployment Schedule of Construction equipment tools & tackles proposed for execution of works based on revised time schedule.*

*iii) Details of concurrent commitment as one date as per Proposal Form-F.*

*Please extend validity of your bid upto 31.01.2007 & extend validity of Bank Guarantee towards Bid Security upto 30.04.2007.*

*Above shall reach us latest by 15.12.2006.”*

8. The email attached therewith the revised conditions of the Contract which admittedly did not contain Clause 17.2.8 which had been introduced in the first amendment on 21.01.2006. Instead Clause 8.3.1 was introduced in the COA which reads as under:

*“8.3.1 The prices payable by the Seller to the Buyer for the Oxygen and Nitrogen supplied during each Billing Period shall be adjusted by deduction/reduction on the basis of the power supplied, determined from the following formula:*

*Power Adjustment = Z x x Power*

*Where Z= KW hours of power consumed by the Seller during the Billing period (Including emergency power) from Buyer's Captive Power Plant measured at the meters at Buyer Source.*

*Power = the cost of power generation as fixed by the Buyer for the relevant period (including all applicable taxes and surcharges) for power supplied (including emergency power) from the Buyer's Captive Power Plant."*

9. The primary dispute between the parties is to the submission of the petitioners that the respondent was entitled to charge for the power supplied by it from its Captive Power Plant only on the basis of the bulk tariff rate of the UHBVNL.

10. Learned senior counsel for the petitioners, relying upon Amendment No.1 to the bidding document, submits that not only was the bidder permitted, pursuant to such amendment to carry out merchant sale but also the bidder was given an option to source power from respondent's Captive Power Plant and the tariff thereof to be charged by the respondent was to be based on the tariff/cost of the electrical power which is charged by the Haryana State Electricity Board (UHBVNL) for industrial use plus surcharge.

11. Learned senior counsel for the petitioners further submits that the second amendment in the COA re-emphasised the decision of the respondent to all the bidders to sell to merchant market the gases at the rate to be decided by the bidder. This submission of the learned senior counsel for the petitioners is to counter the plea of the respondent that in

the ultimate/amended COA that was floated by the respondent on 08.12.2006 and accepted by the petitioners, the cost of power was left to be decided by the respondent alone as the petitioners were no longer obliged to supply all gas products only to the respondent but could have sold them in the open market as well. Learned senior counsel for the petitioners submits that as the bidder was permitted to carry out said open market sale even by the second amendment referred to hereinabove, the justification urged by the respondent is fallacious and could not have been accepted by the Arbitral Tribunal.

12. Learned senior counsel for the petitioners submits that the deletion of Clause 17.2.8 from the revised COA would have no effect inasmuch as Clause 33 of the revised ITB, which was attached alongwith email dated 08.12.2006, clearly stipulated that the Final Contract Agreement shall be formed out of the documents, including the Original Bidding Document issued with its enclosures, including Form of Contract, Form of Agreement and Form of Licence Agreement as also amendment thereof, which in turn necessarily included the Amendment No.1 to the COA.

13. Clause 33 of the Revised Instructions to the Bidders is reproduced hereinbelow:

**“33.0 CONTRACT AGREEMENT**

*33.1 The final Contract Agreement shall be formed out of the following documents and the structure of agreement will be decided with successful entrepreneur post award.*

*a) Original Bidding Documents issued with its enclosures including Form of Contract, Form of Agreement and Form of License Agreement.*

- b) Amendments, if any, issued to the Bidding Documents.*
- c) The notification of Acceptance of Bid.*
- d) The Detailed Letter of Acceptance including Statement of Agreed Variations, if any, and accepted Price-Schedule.*

*33.2 A Statement of Agreed Variations shall be prepared based on the finally agreed deviations, if any, to the Bidding Documents. All other correspondence and terms and conditions or other stipulations forming part of the offer prior to issue of Notification of Acceptance of Bid shall be treated as null & void.*

*33.3 The statement of Agreed Variations shall form part of the Detailed Letter of Acceptance which shall be issued within 15 (fifteen) days of the Notification of Acceptance of Bid.*

*33.4 Any deviations or stipulations made and accepted by the BUYER after Acceptance of the Bid shall be treated as amendment(s) to the Contract and shall be governed by the conditions relating to amendment of Contract.”*

14. Learned senior counsel for the petitioners submits that even the Revised COA in Clause 29.1 stated that the Original Bidding Document and the amendment thereof shall constitute a Contract Agreement and therefore, even the Revised COA clarifies that notwithstanding the deletion of Clause 17.2.8 or inclusion of Clause 8.3.1, the first amendment to COA shall continue to remain a contractual document. Revised COA interprets Clause 17.2.6, which reads as under:

*“17.2.6 Seller has the option to source operating power from Buyer’s Captive Power Plant up to a Maximum 21 MW under open access policy after obtaining permission from Haryana Electricity Regulatory Commission (HERC). Buyer*

*shall assist Seller in obtaining the permission from HERC. Buyer will for the purpose of the supply provide electrical power at 33 KV voltage level through two 33 KV feeders up to battery limit of N2/O2 substation.*

*To the extent Seller sources power from Buyers Captive Power Plant (CPP) within the above limit. Buyer shall provide such power irrespective of the Gas requirement of the Buyer subject to adjustments under Article 8.2 hereof and Power availability from CPP.”*

15. Clause 29.1 of the Revised COA is reproduced hereinbelow:

*“29.1 The following documents shall constitute the Contract documents namely:*

- (a) Original Bidding Documents issued with their enclosures, drawings etc.*
- (b) Amendment(s)/Addenda/Corrigenda (if any) issued to bidding documents and agreed by Seller.*
- (c) Letter of Acceptance/Notification of Acceptance of Bid.*
- (d) the Detailed Letter of Acceptance including statements of Agreed variation, if any.*
- (e) Duly filled in signed and stamped Conditions of Agreement.*

*To the extent there is any conflict between the above-mentioned documents, the terms of the Conditions of Agreement shall govern.”*

16. The petitioners by the letter dated 12.12.2006 expressed concern about the Revised Bidding Documents and COA and sought certain changes including a minor correction in Clause 8.3.1, however,

importantly did not seek re-introduction of Clause 17.2.8 in the Revised COA.

17. Learned senior counsel for the petitioners submits that there was no necessity to seek such amendment in the Revised COA as Clause 33 of the Revised ITB and Clause 29.1 of the Revised COA already incorporated Amendment no.1 and consequently Clause 17.2.8 in the Contract document.

18. The respondent, by its letter dated 14.12.2006, accepted certain changes in the Revised COA suggested by the petitioners, including correction of the error in Article 8.3.1 thereof and further highlighted that apart from these corrections “no other deviations are acceptable”.

19. The respondent by a subsequent letter dated 22.12.2006 called upon the petitioners to submit a “Letter of Waiver” apart from other documents. Paragraphs 1 and 2 of this letter are important and are reproduced hereinbelow:

*“1. Enclosed herewith please find the following documents:*

*a) Letter of Waiver : Appendix-I*

*b) Check list for submission of Revised*

*Price : Appendix-II*

*c) Formats for Revised Schedule of Price: Appendix-III*

*d) Amendment to Instructions to Bidders,  
Conditions of Agreement and Deed  
of License issued on 08.12.2006 and Schedule of  
Prices : Appendix-IV*

*2. In order to accept your bid for further evaluation, you shall not stipulate new deviation or retain any variation(s)/ deviation(s) to the Bidding Documents other than those accepted and modified by IOCL/EIL as per following documents:*

*i) Original Bidding Document except Instructions to Bidders, Conditions of Agreement, Deed of Licence and Schedule of Prices.*

*ii) Revised Instructions to Bidders, Conditions of Agreement, Deed of License issued on 08.12.2006.*

*iii) Amendment to Instructions to Bidders, Conditions of Agreement and Deed of License issued on 08.12.2006 and Schedule of Prices.*

*iv) Technical Amendment Nos.1,2,3 & 4.”*

20. Paragraph 2(i) of the letter reproduced hereinabove clearly excluded from the Original Bidding Documents the Instructions to the Bidders, Conditions of Agreement, Deed of Licence and Schedule of Prices. The learned senior counsel for the petitioners places reliance on the comma between “Instructions to Bidders” and “Conditions of Agreement” to submit that the exclusion from the Original Bidding Document is confined only to Instructions to Bidders and not to the Conditions of Agreement. I am unable to agree with the said submission.

21. A bare reading of the paragraph 2(i) of the letter shows that the Original Bidding Document except the attachments therewith in form of Instructions to Bidders, Conditions of Agreement, Deed of Licence and Schedule of Prices was to be binding on the parties. This is clarified in paragraph 2(ii) and 2(iii) of the letter which states that the Revised Instructions to Bidders, COA, Deed of Licence issued on 08.12.2006 and

the amendment thereto issued on the same date shall bind the parties. The Revised ITB and Revised COA were not merely in the nature of an amendment to the Original Bidding Document but were freshly created documents full and complete in themselves. Reliance of the petitioners on Clause 33 of the Revised Instructions to Bidders, which has been reproduced hereinabove, can be of no avail as the document having been issued afresh in a complete form, could never have intended the vagueness of the various amendments and the discussions to have persisted or again get incorporated by this general clause in the said document. This also applies to Clause 29.1 of the Revised COA.

22. The petitioners submitted the “Letter of Waiver” as demanded by the respondent. The Letter of Waiver reads as under:

**“LETTER OF WAIVER FOR TECHNO -  
COMMERCIAL REQUIREMENTS**

**NAME OF WORK:- OXYGEN AND NITROGEN  
PLANT ON BUILD OWN OPERATE (BOO) BASIS  
FOR PANIPAT NAPHTHA CRACKER PROJECT  
(PNCP) OF M/s INDIAN OIL CORPORATION  
LIMITED AT PANIPAT (HARYANA).**

**(BIDDING DOCUMENT NO. 6556/T-294/04-  
05/SKK/08).**

*We, Air Liquide Industries Belgium S.A. hereby agree to fully comply with, abide and accept, without variation, deviation or reservation all technical and other conditions whatsoever of the Biding document and all Amendments issued by Engineers India Ltd. listed below:*

*a.) Original Bidding Document except Instructions to Bidders, Conditions of Agreement, Deed of License and Schedule of Prices.*

*b.) Revised Instructions to Bidders, Conditions of Agreement, Deed of License issued on 08.12.2006.*

*c.) Amendment to Instructions to Bidders, Conditions of Agreement and Deed of License issued on 08.12.2006 and Schedule of Prices.*

*d.) Technical Amendment Nos. 1, 2, 3 & 4.*

*We further hereby waive, withdraw and abandon any and all deviations, variations, objections, reservations or assumptions whatsoever hereto set out, given or indicated in our offer, clarifications, correspondence, communications or otherwise with a view that the Revised price (to be submitted) shall be treated to conform in all respects with the terms and conditions of the said Bidding Document including all Amendments as mentioned above.”*

23. A reading of the above letter shows that the parties binded themselves to the Original Bidding Document except Instructions to Bidders, Conditions of Agreement, Deed of Licence and Schedule of Prices. They further agreed to the Revised Instructions to the Bidders, Conditions of Agreement and Deed of Licence issued by the respondent on 08.12.2006 and amendment thereof as also the Schedule of Prices. The Letter of Waiver further excluded from consideration all previous clarifications, correspondences, communications, etc.

24. The respondent issued a Detailed Letter of Acceptance (DLOA) in favour of the petitioners on 16.04.2007. Clause 12 of DLOA described “Contract document”. It included within it, in form of Clause 12.4, the Letter of Waiver and in Clause 12.5, the ITB, which was the Revised ITB issued on 08.12.2006 identical to the Revised COA that was circulated by the email dated 08.12.2006.

25. The Arbitral Tribunal in the Impugned Award has rejected the claim of the petitioners relying *inter-alia* upon the Letter of Waiver and the correspondences exchanged between the parties. The Arbitral Tribunal has held as under:

*“11.20 It is thus, in our opinion, clear that the ITB, CoA and Land License Deed (i.e. original tender documents) and commercial amendments were all completely scrapped and fresh and revised CoA, ITB and Land License Deed were admittedly prepared and issued by EIL on 8/12/2006 to all bidders including the Claimant. It is equally evident from the Claimant's letter dated 12/12/2006 seeking amendment inter alia to Clause 8.3.1 of the revised Conditions of Agreement that the Claimant was fully aware of the revised Conditions of Agreement and the changed methodology for costing and recovery of the cost of power supplied from IOCL's Captive Power Plant and of the omission of 17.2.8 introduced by Commercial Amendment No. I from the revised CoA. From EIL's letter to the Claimant dated 14/12/2006 which is an admitted document that the Claimant was aware that except two deviations, all other Claimant's suggestions to the CoA, ITB and Land License Deed (circulated by EIL on 8/12/2006) were rejected. The Claimant fully understood and accepted this position in its Letter of Waiver submitted with its offer dated 27/12/2006. The Claimant's bid was accepted on basis of these revised bidding documents. The CoA was formally signed on the basis of the revised CoA circulated on 8/12/2006. The Tripartite Agreement was thereafter entered into on the basis of this signed CoA. The Billing Methodology was agreed to in the signed Minutes of 13/11/2010 on the basis of the signed CoA, and this billing procedure was adhered to by the Claimant for more than two years from February, 2010 to March 31, 2012.*

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*11.23 A reading of Article 30 of the signed contract in writing between the parties shows that it is an 'Entire*

*Agreement Clause' as the term is known and understood in the law of contract and principles of interpretation of deeds. The article is specific, explicit and unambiguous. It says:*

- i) that contract is the 'entire contract' between the parties;*
- ii) that the parties are denied the luxury of relying upon any previous representation, expressed or implied, (written or oral) which may depart from the recitals incorporated in the contract;*
- iii) that any inducements, understanding or agreements of any kind which are not included within the present contract are excluded;*
- iv) that all prior negotiations, representations, contracts and/or agreements and understandings (if they so exist) are cancelled by the present contract.*

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*11.31 We also do not find any merit in the submissions made on behalf of the Claimant that the bidding documents and all amendments (though of a date, previous to the date of the contract (i.e. 16.09.2009) constitute the contract as per Article 29.1 of the contract. This we say for two broad reasons; firstly, what has been accepted by LoA dt. 16.04.2007 is the revised bid of the Claimant dt. 27.12.2006. The proforma of bids and ITB of a date prior to 27.12.2006 become irrelevant and lose all their efficacy; secondly, the submission made on behalf of the Claimant does not take note of last part of Article 29.1 which is akin to a proviso having an over-riding effect for the purpose of interpreting clause 29.1, according to which if there be any conflict between bidding documents (with amendments/ LoA/detailed LoA with schedule of prices) on the one hand and the duly executed terms of Conditions of Agreement on the other hand, to the extent there is any conflict, it is the later which will prevail and govern.*

xxxx

*11.42 We are satisfied that the Clause 17.2.8 which was introduced in the previous CoA by amendment No. I, had*

*ceased to exist and had neither existence nor relevance with regard to the Contract dt. 21.05.2007. The Claimant was not justified in representing to the Respondent's personnel that there was such a clause. Unmindful of the correct facts, the Respondent's officials sought for legal opinion which too was based on incorrect facts placed before the consultants. Such legal opinion was totally uncalled for.*

*xxxx*

*11.48 We are very clear in our mind and in forming an opinion that the parties are bound by the terms and conditions of the contract entered into on 21.05.2007. Their rights and obligations have to be decided by reference thereto only.*

*11.49 We have no hesitation in holding that the entire case of the Claimant is founded on reading Article 17.2.8 in the text of the contract which it is not there and by placing an interpretation on the language of Article 8.3.1 in a manner in which the language of the Article does not permit. The text of the Contract on both the aspects is clear and does not admit of any doubt or ambiguity. As the very foundation of the Claimants' case itself is missing, the case of the Claimants must fall to the ground. We hold it accordingly."*

26. A reading of the above finding of the Arbitral Tribunal clearly shows that the Arbitral Tribunal has also held that with the issuance of the Revised Instructions to Bidders and the COA being accepted by the petitioners, the petitioners could not have relied upon the earlier amendments to the Original Bidding Documents as all such amendments had finally merged together or stood revised in the Revised Bidding Documents that were circulated on 08.12.2006. It is for this reason that even the Letter of Waiver expressly mentioned that all previous

correspondences and clarifications etc. would not bind the parties. The Letter of Acceptance also sought confirmation from the petitioners only to the Revised Instructions to Bidders and the Revised COA amongst other documents. Reliance on the Clause 29 of the Revised COA as also Clause 33 in the Revised Instructions to Bidders can be of no avail to the petitioners in the matter of interpretation of the said document inasmuch as the express provision of Clause 8.3.1 and 17.2.6 in the revised document as also the Contract would clearly overrule Clause 17.2.8 that was sought to be introduced in the Amendment No.1 to the Original COA.

27. The Arbitral Tribunal having interpreted the terms of the Agreement, which is not found to be unreasonable or perverse in any manner, it is not open for this Court to interfere with the said interpretation. In ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677, the Supreme Court has reiterated the limits on powers of a Court exercising jurisdiction under Section 34 in the following words:-

*“35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would*

*be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).*

*36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

*37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.*

*38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

*39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

*40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act that would certainly amount to a patent illegality on the face of the award.*

*41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A)."*

28. Learned senior counsel for the petitioners further submits that even in the Revised Bidding Instructions, the bidders were called upon by the respondent to bid on the basis of price of power being Rs.3.95 per kwh. He submits that this itself indicates that the rate was still being charged by the respondent on basis of what had been clarified in Amendment No.1 and charged also by UHBVNL. Learned senior counsel for the petitioners has placed reliance on paragraph 2.1.13(iii) of the reply filed by the respondent in support of his contention.

29. In paragraph 2.1.13(iii) of the reply of the respondent filed before the Arbitral Tribunal, the respondent had *inter-alia* stated that to enable the bidders to bid on a common platform, the bidders were called upon to quote the price of gas assuming the cost of power to be Rs.3.95 per kwh. This cannot be read to mean that the respondent had fixed the price of power to be Rs.3.95 per kwh. It is further important to note in this regard that even in Clause 8.1.2(i) of the final contract, as far as variable cost of gas is concerned, the price of gas was adjusted on the basis of the price of power that is determined by the respondent under Clause 8.3.1 and Rs.3.95 per kwh, the rate on the basis of which the bidders were asked to submit their bids. Therefore, Rs.3.95 per kwh was merely a base price taken by the respondent on the basis of which the bids were to be submitted and cannot be considered as an admission of the respondent or as a stipulation of the contract that only Rs.3.95 per kwh shall be taken as the price of power or that the variation will be confined only to the variation in the price of power as declared by UHBVNL. I therefore, find no merit in the submissions of learned senior counsel for the petitioners in this regard.

30. The next challenge of the petitioners is to the grant of counter claim of the respondent. Learned senior counsel for the petitioners, relying upon the counter claim filed by the respondent before the Arbitral Tribunal, submits that the counter claim was merely in form of a chart without any material pleadings to substantiate the same. This was highlighted by the petitioners not only in their reply to the counter claim but also in form of an application under Section 16 of the Act before the

Arbitral Tribunal. He further draws reference of the Court to the procedural hearing recorded in the Procedural Order No.4 dated 21-24.09.2015 wherein the Arbitral Tribunal had decided to consider the application of the petitioners under Section 16 of the Act at the commencement of the final hearing. He submits that thereafter detailed submissions were made by the petitioners on the said application before the Arbitral Tribunal on 4-5.08.2016 and by the respondent on 06.08.2016. He submits that in the entire Award, however, there is no discussion on the application of the petitioners. On the other hand, the Arbitral Tribunal has proceeded to award the counter claim on the basis of the chart that had been submitted by the respondent without any proof of the contents thereof.

31. I am unable to agree with the submissions made by the learned senior counsel for the petitioners. The Arbitral Tribunal has held that the quantity of gas supplied and power used are jointly measured in terms of the Contract. Annexure R-1, that was filed by the respondent in support of its counter claim, contained the quantity of oxygen and nitrogen, including that of supplemental oxygen and supplemental nitrogen on the basis of such joint reading. Based on the fuel cost and utility cost, the cost of power charged for each month was determined by the respondent and invoices were raised for monthly power charges by the respondent. The Arbitral Tribunal further relied upon the testimony of two witnesses examined on behalf of the respondent to prove the correctness of the contents of the Annexure R-1. As far as the plea of vagueness and non-specificity in the counter claim is concerned, the Arbitral Tribunal held

that the petitioners could not demonstrate as to how the figure taken in Annexure R-1 is incorrect. The Arbitral Tribunal places reliance on the fact that all documents and data which have been relied upon by the respondent have been shared with the petitioners regularly from time to time and it seems that no timely objection had been taken by the petitioners to such data.

32. Learned senior counsel for the petitioners submits that the finding of the Arbitral Tribunal that the figures had not been disputed by the petitioners is incorrect. He submits that pursuant to the application filed by the respondent calling upon the petitioners to produce *inter-alia* statement of accounts giving details of unit of oxygen and nitrogen supplied and price thereof, the unit of power drawn by the petitioners from the respondent's Captive Power Plant, and the price payable thereof, the petitioners had filed an affidavit of Mr.Sanjay Pant (Annexure B) enclosing therewith the required information. A perusal of the Annexure-B shows that the entries that have been made by the respondent were different.

33. Learned senior counsel for the petitioners has also during the course of hearing handed over a chart showing the difference in figures in the GN2 quantity taken by the respondent in Annexure R-1 vis-à-vis that disclosed by the petitioners in Annexure-B to the affidavit of Mr.Sanjay Pant.

34. In my opinion, the submissions of the petitioners cannot be accepted. Apart from the fact that the findings of the Arbitral Tribunal are based on appreciation of evidence led by the parties before the

Arbitral Tribunal, which cannot be interfered with and are final in nature, a bare perusal of the written submissions filed by the petitioners before the Arbitral Tribunal would show that the petitioners never highlighted the differences between the quantity taken in Annexure R-1 of the respondent and Annexure-B of the petitioners before the Arbitral Tribunal for the Arbitral Tribunal to have considered the same while passing the Impugned Award. Even a perusal of the sample chart which has now been produced before this Court would also show that the difference in various months is only in a single unit, that is, almost negligible so as to warrant any interference of this Court with the Impugned Award.

35. Learned senior counsel for the petitioners next submits that the respondent by its email dated 21.11.2013 had communicated to the petitioner the final power cost as per the audited cost sheets. The respondent, therefore, is not entitled to charge any amount in excess of such rate relying upon the vagueness and arbitrariness of Clause 8.3.1 of COA.

36. I do not find any merit in the submission of the learned senior counsel for the petitioners. Clause 8.3.1 of the contract has been reproduced hereinabove. The same empowers the respondent to fix the price of the supply of power from its Captive Power Plant. Clause 8.1.2 (i) read with Section 8.1.2(ii) of the Agreement provides for the formula on the basis of which unit price of gas is to be determined taking into account the price during the relevant period. The price adjustment is to

be made on a bi-monthly basis. Clause 8.1.2(i) and 8.1.2 (ii) are reproduced hereinbelow:

*“8.1.2(i) The Unit Prices for items 2 and 3 (Units Prices of Nitrogen and Oxygen) of Schedule of Prices Part-I and Schedule of Price Part-III shall be subject to adjustment as follows, namely:*

$$G_n = G_o \times (\text{Power}_n / \text{Power}_o)$$

*Where:*

*G<sub>n</sub> = New Unit Price of Gas after adjustment*

*G<sub>o</sub> = Base Unit Price of Gas as indicated in the Letter of Acceptance*

*Power<sub>n</sub> = the cost per KWH of electric power supplied during the relevant Billing Period, as determined by supplier of Power.*

*Power<sub>o</sub> = Rs.3.95 (Rupees three and ninety five paise only) per KWH of electric power.*

*(ii) The price adjustment under the preceding formula will be made bi-monthly commencing from the First Delivery of the Product.”*

37. Clause 8.5 of the contract further provides for the adjustment/payment of the invoices for gas supplied by the petitioners to the respondent against the power supplied by the respondent to the petitioners and reads as under:

*“8.5 If the total of the adjustment under Articles 8.2, 8.3 and 8.4 hereof (hereinafter for the purpose of this Article referred to as the 'total said adjustments') in respect of any billing period are in excess of the amount otherwise payable on the Seller's Invoice for that period so as not to permit the entire adjustment, the unadjusted balance shall be carried forward*

*for adjustment from the Seller's Invoice for the next billing period, and so on until adjusted in full, provided that:*

*(i) If the amount payable by the Buyer to the Seller in respect of any billing period is NIL, the total said adjustments shall be deemed to be an amount payable by the Seller to the Buyer and shall be paid within the same time in which the amount payable on the Seller's Invoice would have been payable to the Seller, and failing such payment shall carry interest at the same rate payable by Seller to Buyer as the Buyer's failure to timely pay Seller's Invoice would have carried, or*

*(ii) Any amount out of the total said adjustments remains unadjusted after any 3 (three) consecutive billing period, such amount shall be deemed to be an amount payable by the Seller to the Buyer to be paid within the same time as the Seller's last of the 3 (three) Invoices aforesaid was payable by the Buyer with the same consequences arising out of the Seller's failure to timely pay as specified in para (i) hereof above."*

38. A reading of the above Clause clearly shows that the basis for charging of power supplied has to be necessarily determined on a bi-monthly basis and there is no provision for readjustment thereof based on the audited figure that may be achieved only on completion of the accounting year. The Arbitral Tribunal had noted that the rate of power has been fixed by the respondent on well known basis of the cost accounting methodology. Such basis has been reproduced by the Arbitral Tribunal in paragraph 11.59 of the Impugned Award in the following words:

*"11.59 It will be useful to extract and reproduce the detailed methodology set out in para 11 & 12 of the witness Mr.P.V.Muralikrishna which is done as under.*

*11 (i) IOCL 's Captive Power Plant uses RLNG as fuel and steam for power generation, although other fuels ie. internal fuels generated at Panipat Refinery Complex are also used as back up fuels to meet emergent requirements.*

*(ii) The fuel cost forms the predominant portion (more than 80%) of the cost of power generation at the Plant.*

*(iii) RLNG is predominantly being used as fuel for generating power at the Captive Power Plant since October, 2010. RLNG is sourced from GAIL and is supplied through its Dadri-Panipat Pipeline and the delivery is metered. Other liquid fuels (like fuel oil) are delivered in measured quantities and the quantities of these fuels used are also known.*

*(iv) Power is generated in two sets of generators at the Captive Power Plant, namely Gas Turbine Generators (GTG) and Steam Turbine Generators (STG). During the process of power generation, steam is generated both from the Utility Boiler and the Heat Recovery Steam Generators (HRSG) which recover heat from the exhaust gases and of Gas Turbine Generators. Besides heat recovery, supplemental fuel firing is also carried out in the Heat Recovery Steam generators to maximize the efficiency of the steam generation system.*

*(v) The fuel fed to power the steam generating equipment is measured separately.*

*(vi) Since the fuel burnt in the Gas Turbine Generators and Heat Recovery Steam Generators gives both power and steam, the fuel equivalent to energy value of steam is deducted from the total fuel input to the Gas Turbine Generators and the Heat Recovery steam Generators. Since the power is generated in Steam Turbine Generator(s) also, the equivalent value of fuel used to*

*generate the steam used in Steam Turbine Generator(s) is calculated.*

*(vii) Therefore, the total fuel consumed for power genera is comprised of fuel used in Gas Turbine Generator for power generation less the equivalent fuel used for steam generated from the Heat Recovery Steam Generator, the equivalent fuel for steam used in Steam Turbine Generator(s), and the quantity of fuel consumed for cooling water and air used as utilities in power generation.*

*(viii) Other materials and inputs involved in the generation of power are also taken into account for calculating the cost of power. These include chemicals, repair and maintenance, depreciation, overheads, administrative expenses salaries and wages and insurance.*

*(ix) Based on the said factors, the Finance Department at the Naphtha Cracker Complex periodically determines the cost of generating power the Captive Power Plant which is at intimated to the Claimants.”*

39. In any case and as noted by the Arbitral Tribunal, it is evident from a reading of Clause 8.1.2(ii) and 8.3.1 that the price of power as fixed by the respondent would have a reciprocal effect on the price of gas payable by the respondent to the petitioners. It is not the case of the petitioners that the price taken by the respondent for the power supply is different from the price that has been taken for determining the variable cost of gas in Clause 8.1.2 (i) of the contract. I therefore, find no merit in the submissions made by the learned senior counsel for the petitioners in this regard.

40. The next challenge of the petitioners is to the award of *pendente lite* interest on the amount awarded in the counter claim of the respondent. Learned senior counsel for the petitioners submits that the counter claim raised by the respondent itself had included interest, however, the Arbitral Tribunal still allowed interest on amount of counter claim from 13.12.2013 in the following directions:

*“(c) The Claimant shall pay the above said amount of Rs.90,26,53,588/- with interest calculated @ 12% per annum with effect from 13.12.2013 till the date of passing of this award.”*

41. Learned senior counsel for the petitioners submits that as the amount of Rs.90,26,53,588/- also included the compound interest on the principal amount claimed by the respondent, the Arbitral Tribunal has awarded *pendente lite* interest on interest as well, which is not permissible.

42. Learned counsel for the respondent does not dispute this position and submits that as far as the direction in paragraph-c quoted hereinabove is concerned, the respondent is entitled to interest only on the principal amount as claimed in Annexure R-1.

43. In view of the above, the award shall stand set aside only to a limited extent that it has awarded interest component in Rs. 90,26,53,588/- with effect from 13.12.2013 till the date of passing of the Award.

44. The last challenge of the petitioners is to the rate of interest awarded by the Arbitral Tribunal in favour of the respondent. Learned

senior counsel for the petitioners submits that the rate of interest awarded is excessive and could not have been more than 12% p.a. and it is on this basis that the petitioners had also made the deposit pursuant to the order dated 14.01.2019 passed by this Court.

45. I am unable to agree with the submissions made by the learned senior counsel for the petitioners. In terms of Section 31(7) of the Act, the rate of interest is to be determined by the Arbitral Tribunal at its discretion. In Section 31(7)(b) of the Act, as it stood prior to its amendment in 2015, the legislature itself found interest at the rate of 18% p.a. to be reasonable. I therefore, find no reason to interfere with the discretion exercised by the Arbitral Tribunal.

46. In view of the above, the petition partially succeeds.

47. The petitioners deposited certain amounts pursuant to interim orders of this Court, portion of which had been released in favour of the respondent subject to furnishing of Bank Guarantee. The parties will rework the amounts payable to the respondent in terms of the Award as upheld by this Judgment. The remaining amount lying deposited with the Registrar of this Court, if any, shall be released in favour of the party(ies) in accordance with such calculation. In case, upon such calculation, excess amount is found released in favour of the respondent, the respondent shall refund such amount to the petitioners within four weeks from today. On such refund or if no payment is found due from the respondent to the petitioners, the Bank Guarantee(s) shall be released in favour of the respondent by the Registry of this Court.

48. The petition is disposed of in the above terms, with no order as to cost.

**NAVIN CHAWLA, J**

**JULY 03, 2019/vp**

