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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
[COMMERCIAL DIVISION]

COMMERCIAL ARBITRATION PETITION NO.484 OF 2017
ALONG WITH
COMMERCIAL NOTICE OF MOTION NO.59 OF 2018

Niko Resources Limited,	]	
a company incorporated in Canada,	]	
under the laws of Canada,	]	
having a project office at 4th Floor,	]	
Landmark, Race Course,	]	
Baroda – 390007, Gujarat.	]	…. Petitioner/Applicant
V/s.		
Gujarat State Petroleum Corporation Ltd.,	]	
a company incorporated under	]	
the Companies Act, 1956,	]	
having its registered office at	]	
GSPC Bhavan, Behind Udyog Bhavan,	]	
Sector 11, Gandhinagar – 382010, Gujarat.	]	…. Respondent

Mr. Rohit Kapadia, Senior Advocate, with Mr. Karl Shroff, Mr. Sourasubha Ghosh and Mr. Samarth Chaowdhary, i/by Hariani and Co., for the Petitioner/Applicant.

Mr. Shiraz Rustomjee, Senior Advocate, with Mr. M.H. Kane and Ms. Harsha Uppal, i/by W.S. Kane and Co., for the Respondent.

CORAM : A.K. MENON, J.

RESERVED ON : 5TH MARCH, 2020.

PRONOUNCED ON : 9TH JUNE, 2020.

[THROUGH VIDEO CONFERENCE]

JUDGEMENT :

1. This Judgement is being pronounced through the video conferencing facility provided by the registry in view of restrictions placed on the personal hearings in a court room and in view of the social distancing requirements resulting from the COVID-19 pandemic.

2. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an arbitral award dated 16th June 2017 passed by a Three Member Tribunal consisting of retired Judges of the Supreme Court of India. The petitioner and respondent are companies incorporated in Canada and in India respectively. They were joint-venture partners in the field of gas exploration in what is known as Hazira Field. In the course of their business, they entered into a Production Sharing Contract dated 23rd September, 1994. It was a Tripartite Agreement between the petitioner, the respondent and the Government of India. The tripartite agreement was followed by a Joint Operating Agreement ***(JOA)*** dated 5th December, 1994. The JOA set out the rights and obligations of the parties as regards the field activity in Hazira. As part of the respective obligations of the

parties, the petitioner was nominated as the operator and was to carry out exploration development and production of gas from the Hazira Field. The respondent herein was in-charge of marketing, sale and distribution of gas and controlled various gas pipelines, which were used for supplying gas to various customers. Gas was procured from various sources including the joint-venture Hazira Field Gas Resource. The parties had a defined share in the Hazira Field business; the petitioner-company having 33.33% participating interest and the respondent holding 66.67% participating interest.

3. In pursuance of the Production Sharing Contract and the Joint Operating Agreement, as aforesaid, the parties entered into 13 Hazira Gas Sales Agreements ***(GSAs)*** with various customers, who had agreed to purchase diverse quantities of gas from the joint-venture. The aforesaid GSAs provided for a minimum guaranteed of-take of gas, which the petitioner and the respondent was obliged to supply. If the joint-venture fails to supply gas to the purchasers and to the extent of the minimum guaranteed off-take, the customers would claim liquidated damages. The record indicates that the production of gas from the Hazira field commenced sometime in 1995. As time passed and sometime in 2006, the Hazira Field started producing water and as a result, the operations were suspended. Several attempts were reportedly made by the parties to re-negotiate contracts and to avoid the incidence of liquidated damages claims. The petitioner was unable to reduce

the losses, but given their commitment to the business, it was proposed that the Hazira GSA customers would have access to gas produced by the KG-D6 Field. It is pertinent to mention that the petitioner - Niko Resources Limited, *(hereinafter referred to as **"Niko"**)*, had access to gas produced by the KG-D6 Field by virtue of different production sharing contracts, wherein the petitioner had a participating interest.

4. As a result of the reduced supply of gas from the Hazira Field, Niko offered to procure gas from the D6 Field. According to the petitioner-Niko, the supply of gas from the D6 Field was not intended to be a method of settling the shortfall arising from the Hazira Field. This proposal led to negotiations between the parties and the fact that the respondent-GSPC had supplied gas on behalf of the joint-venture to the various customers in order to prevent any claims from these customers for short supply of gas. It is not in dispute that the methodology agreed upon between the parties after negotiations required the Niko to supply five times the shortfall of quantity of gas supplied.

5. In order to facilitate the sourcing of gas from the D6 Field, Niko proposed that a term-sheet be entered into between Niko, GSPC and Reliance Industries Limited ***(RIL)***, with whom Niko had an on-going business relationship in relation to production of gas at the D-6 Field. It is not in dispute between the parties that in order to avoid claims for liquidated

damages from the customers, GSPC, on its own, procured certain quantities of gas from its trading portfolio and supplied the same to the customers, apparently at the prices which were higher than the contractual price agreed under the Hazira Gas Sales Agreements with customers.

6. Niko and RIL entered into a Production Sharing Contract, under which the Government of India was also a party. This was intended to be the joint development, for exploitation of the Krishna-Godavari Basin, also known as Block KG DWN-98/3 *(hereinafter referred to as **"D6"**)*. Production from the Hazira Field having declined from January, 2006, the obligations under the Gas Sales Agreements ***(GSAs)*** fell overdue and gas having fallen short, the parties were required to ensure that contracted volumes of gas were supplied from their respective gas portfolios. GSPC took on the initiative to supply gas which fell short from its own portfolio, reportedly at prices that were higher than the price at which the GSAs contemplated. GSPC has been supplying the Shortfall Gas. Negotiations took place between the parties, namely, Niko and GSPC, (excluding the government), in relation to the obligation to supply shortfall gas under the GSAs. Pursuant to these negotiations, an understanding was arrived at between Niko and GSPC, under which GSPC having supplied the shortfall gas was liable to receive contributions from Niko by way of gas from the D6 Field under an agreement executed between RIL and Niko and GSPC (D6 GSA). If Niko was unable to supply the said quantity of gas from D6 Field, it was obliged to procure the gas from any

other source. If Niko was not successful in procuring gas from any other source in order to make up the shortfall gas to be provided to customers under GSAs, Niko was obliged to make a one-time payment, as described under the agreement, to GSPC. The negotiations between the parties in relation to supplying the shortfall gas through the modalities set out above or making the one-time payment led the parties to execute what was described as the Balancing Gas Agreement ***(BGA)***.

7. The BGA recorded the understanding between the parties, which contemplated three alternatives, as aforesaid. On 2nd May 2008, the BGA was sent by Niko to GSPC. In that communication, it was suggested that the BGA was being executed subject to two conditions; firstly, GSPC was required to execute a term sheet with respect to the proposed supply of gas from D6 along with the BGA and submit a signed copy of the said term sheet along with the BGA to Niko. Secondly, GSPC was required to agree under the said term sheet that a formal gas sales agreement would be executed between RIL, Niko and GSPC on terms that were similar to those applicable to customers purchasing gas from the D6.

8. The communication dated 2nd May 2008 elicited a response dated 26th May 2008, by which GSPC confirmed the terms suggested by Niko on 2nd May 2008. GSPC accordingly is said to have executed the BGA and the D6 term sheet and provided the same to Niko.

9. Soon after this exchange was completed, on or about 25th June 2008, the Government of India, acting through an empowered group of Ministers, published guidelines regarding sale of natural gas, under what was then known as New Exploration Licensing Policy, under which the contractors were bound to honour the order of priority for the gas supplied from D6. As a result of the new development, GSPC would be required to submit and declare the identity of customers, to which GSPC intended to sell the gas sourced from D6. GSPC did so. Consequently, Niko took a view that some of these customers could not be treated on priority and requested an alternate list of customers. This was accordingly done and GSPC provided an alternate list to Niko.

10. GSPC claims that pursuant to the terms of the BGA, it procured gas at higher prices in order to enable it to supply the shortfall gas to the Hazira customers and in order to ensure that the GSAs were fully compliant as far as supply of gas is concerned. This quantity of shortfall gas, as we have seen, included Niko's share of the gas to be supplied by the JV under the GSAs. The BGA inter alia provided that if Niko was unable to provide the shortfall gas from D6 and to the extent that was required, Niko would be obliged to provide five times the gas that it was unable to deliver from D6. The obligation to provide five times the gas was therefore indicative of the fact that there would be liabilities to meet as between Niko and GSPC. It transpires that in view of the gas utilization policy, Niko was unable to obtain necessary

approvals or obtain exemptions in order to enable it to supply gas from D6 to GSPC's customers and in view of the inability of Niko to so supply, GSPC, vide a letter dated 6th January 2011, invoked clause (6.1) of the BGA, which required Niko to supply the gas from "any other source" i.e. other than the D6 gas. This was one of the obligations performance of which Niko owed to GSPC.

11. Pursuant to the letter of 6th January 2011, a meeting was held between the parties on 7th March 2011, at which the parties reviewed pending issues as between GSPC and Niko. The representatives of GSPC requested Niko to respond to the invocation of clause (6.1) of the balancing gas agreement and Niko contended that it was actively pursuing the issues with the Government of India, prima facie indicating that Niko was attempting to ensure supply of gas from D6 itself. Be that as it may, after the meeting of 7th March 2011, GSPC received a letter dated 8th March 2011 from Niko contending that the BGA was subject to several conditions precedent, which had not been complied, and that the D6 Gas Sales Agreements entered into between RIL, Niko and GSPC and the gas utilization policy announced by the Government of India would not permit exercise of rights under the BGA. That the BGA and its invocation by GSPC was premature since the agreement itself had not come into force.

12. Understandably, GSPC denied the contentions of Niko and recorded

that under clause 6.2 of the BGA, Niko was required to pay to GSPC the one-time payment, then said to be a sum of USD 17.78 million, and thereby discharged Niko's obligations under the BGA. Niko rejoined on 28th May 2011, denying liability to pay the amounts claimed. According to Niko, since the BGA had not come into operation, there was no question of invoking the provisions of the BGA and Niko was steadfast in its denial of GSPC's invocation of clauses (6.1) and (6.2). In other words, Niko contended that it was not obliged to procure shortfall gas from "any other source" in the face of inability to supply gas from D6. Secondly, Niko contended that the BGA not having come into force, there was no obligation to make the one-time payment. In effective terms, Niko denied liability in toto. As a result of denial, it appears that GSPC invoked the arbitration clause vide a notice dated 1st November 2011 and that is how the arbitration proceedings commenced.

13. The record indicates that GSPC filed a Statement of Claim dated 23rd March 2012, seeking an award in a sum of USD 18,722,463 towards the One-time Payment under clause (6.2) of the BGA along with interest thereon @ 12% p.a. I am informed that this translates, in effective terms, to about Rs.125 crores. Niko filed its written statement on 23rd June 2012, pursuant to which GSPC amended its statement of claim and included a claim for reimbursement of costs allegedly incurred by GSPC in relation to the shortfall gas obligations. This claim was for a sum of Rs.91,86,79,457/-. GSPC revised this claim to Rs.79,50,13,644/- in the course of the hearing of the arbitration

proceedings and through an additional affidavit filed by one of its witnesses, which was dated 28th January 2014. It is on the basis of these pleadings that issues were framed by the tribunal on 24th September 2013. Amongst the various issues framed by the tribunal, GSPC was required to satisfy the tribunal that the tribunal had jurisdiction to entertain the claim. This is because Niko filed an application under Section 16 of the Arbitration Act seeking rejection of the claim for want of jurisdiction. The tribunal held that it did have jurisdiction to try the claims and pursuant thereto, Niko amended its written statement contending inter alia that the BGA was void for uncertainty.

14. Niko carried out a further amendment contending that clause (6.2) of the BGA was in effect a provision to enable GSPC to seek liquidated damages and as a result of these amendments, the tribunal framed an additional issue. It would be appropriate at this stage to reproduce the issues framed by the arbitral tribunal, which are set out below for ease of reference.

(i) Whether the Arbitral Tribunal has no jurisdiction to adjudicate upon the dispute including claim and alternative claim raised in the Statement of Claim ?

(ii) Whether the claim and alternative claim is barred by the law of limitation ?

(iii) Whether the Balancing Agreement was subject to several conditions precedent and that the Balancing Agreement, including the arbitration agreement contained therein, has not come into force and/or operation due to non-fulfilment of the conditions precedent ?

(iv) Whether the Balancing Agreement is and/or has become void for reasons mentioned in the written statement or has not come into existence or operation or is not enforceable?

(v) Whether the Balancing Agreement was an agreement to enter into an Agreement for Sale of gas by respondent of its entitlement of gas (if and when available and possible from D6 Field) to the JV of the claimant and the respondent, which later agreement never came into existence ?

(vi) Whether the Balancing Agreement stood frustrated under Section 56 of the Contract Act, 1872 ?

(vii) Whether the supply of shortfall gas quantity by the claimant to the customers of JV for the purposes of alternative claim was :-

(a) for and behalf of JV;

(b) with the knowledge or consent of the respondent ? and/or;

(viii) Whether the claimant is entitled to claim an amount of USD 18,722,463 (United States Dollars Eighteen Million Seven Hundred and Twenty Two Thousand and Four Hundred and Sixty Three only), under Clause 6.2 of the Balancing Gas Agreement, along with an amount of USD 9,91,551 (United States Dollars Nine Million Ninety One Thousand and Five Hundred and Fifty One only) being interest at the rate of 12% p.a. and further interest at the rate of 12% p.a. till payment thereof ?

(ix) In the event of point no.8 being answered in the negative, whether in the alternative to the claim amount of USD 18,722,463, the claimant is entitled to claim an amount of INR 918,679,457/- (Indian Rupees Ninety One Crore Eighty Six Lakhs Seventy Nine Thousand Four Hundred and Fifty Seven only) towards meeting the shortfall gas obligation on the part of the respondent along with interest at the rate of 12% p.a. thereon ?

(x) What Award ?"

Additional Issue

> "If the answers to Issues 3, 4, 5 & 6 are in the negative, then whether Clause 6.2 of the GBA is a stipulation by way of a provision for liquidated damages and/or penalty?"

15. At the stage of closing submissions in the arbitral proceedings, Niko amended their written statement to include the aforesaid plea that clause (6.2) effectively acted as a provision for liquidated damages or penalty and it is in these circumstances that the additional issue came to be framed at that belated stage. The parties led evidence. The claimant i.e. GSPC examined the General Manager one Ravindra Agarwal; Manager (Commercial) Ms. Amrita Modi and Piyush Chauhan and also one Rajesh Sivadasan. On behalf of Niko, the Country Manager of their Trinidad and Tobacco Operations, Ajith Muralidharan was examined, since he was at the relevant time stated to be the Executive Director of Business Operations stationed in Baroda. Niko also examined Under Secretary, Ministry of Petroleum and Natural Gas, one S.P. Agarwal. The amended written statement was also taken on record, but the claimant did not take any further steps to amend. After the amendment of the written statement, although Niko disclosed further documents, these were taken on record but GSPC did not lead any further evidence. Evidence thus came to be closed. As far as the first issue is concerned, the tribunal held that

it had the jurisdiction to entertain the claim, since according to the tribunal, the BGA had come into force and was held to be operational. The alternative claim however was held to be barred by the law of limitation and therefore issue no.2 was answered against GSPC.

16. Issue no.3 was subject matter of a substantial contest. It is ultimately answered in the negative, holding that the BGA was valid and negating the contention on behalf of Niko that the BGA, including the arbitration clause, had not come into effect due to alleged non-fulfilment of the conditions precedent. The fourth issue as to whether the BGA had become void therefore was also answered in the negative. The fifth issue whether the BGA never came into existence was consequently also answered in the negative. One of the other pleas taken up by Niko is that the BGA stood frustrated by virtue of Section 56 of the Contract Act. This was subject matter of issue no.6 and the tribunal has answered issue no.6 in the negative against Niko. Issue no.7 required the tribunal to decide whether the supply of shortfall gas was for and behalf of the joint-venture consisting of Niko and GSPC and whether such supply of shortfall gas was with a knowledge or consent of Niko. After considering the record and the factual aspects, the issue has been answered in the affirmative in favour of GSPC.

17. This led to the tribunal deciding the additional issue as to whether clause (6.2) of the BGA was a stipulation by way of a provision for claiming

liquidated damages or penalty. This issue was answered in the negative consequent to issue nos.3 to 6 being answered in the negative. Issue no.8 pertains to the quantified claim of USD 18,722,463 million and the additional claim of USD 9,91,551 million and interest thereon @ 12% p.a. After considering the claims and the defence, the tribunal held that GSPC was entitled to an amount of USD 17,798,643 million as a one-time payment, contemplated under clause (6.2) of the BGA. The tribunal awarded interest @ 10% p.a. on the said amount from 2012 till date of the award and a further sum in interest @ 10% p.a. from the date of the award till payment or realization. The rate of conversion, it was specified, would be applicable as per the actual date of payment. As a consequence of issue no.8 being so answered, the alternative claim of Rs.91,86,79,457/- and interest thereon towards meeting a shortfall gas obligation on behalf of Niko has been rejected. That issue has been answered in the negative. In conclusion, the tribunal awarded a sum of USD 17,798,643 million, as aforesaid, along with costs of the proceedings.

18. According to the petitioner – Niko, the following broad propositions arise for consideration. These are listed below for ease of convenience.

(i) Whether the BGA was at all enforceable in view of the fact that the conditions precedent had not been complied; more particularly, the D6 Gas Sales Agreement was never signed as between RIL and Niko's principals on account of the government's gas utilization policy, over which Niko had no control ?

(ii) Secondly, since liquidated damages had been agreed upon in terms of nomenclature, it was termed as one-time payment, but that could not change the nature of the amount involved, which continued to be liquidated damages, as contemplated under clause (6.2) or a penalty for that instance?

(iii) Thirdly, whether GSPC could be permitted to recover liquidated damages under clause (6.2) without the quantum of loss being ascertained? That one person who would have knowledge of actual loss was Devendra Agarwal but instead, Ms. Amrita Modi, who had no personal knowledge, was called upon to depose and even she tried to suppress details of the procurement contracts on the basis that those were confidential.

(iv) The fourth issue is whether it would be just or reasonable and/or permissible in law to permit GSPC to recover an amount, which, according to Niko, was "hugely disproportionate" as compared to the amount which GSPC could earn by selling five times the gas at a margin of 5 to 10 cents per unit?

(v) The fifth question that Mr. Kapadia raised in support of the challenge is whether a person who is unable to prove loss actually suffered by him should be awarded liquidated damages under the garb of a one-time payment?

(vi) Whether such a hugely disproportionate amount could be awarded for making up supplies of shortfall gas?

(vii) Whether it would be permissible for GSPC to recover the one-time payment, which would be in excess of the quantum that it would be entitled to, after considering the amendment carried out by GSPC under quantum of shortfall, with or without adjustment of excess gas available from the Hazira Field after December, 2007?

(viii) Whether the supplies of shortfall were made in rupee terms or whether GSPC could recover the same in dollar terms and at a rate of exchange of the dollar applicable on the date of payment, when, in fact, the shortfall supply was said to have been made between 2006 and 2008? The claim for interest also would therefore be questionable.

(ix) Whether allowing a claim for escalation without cogent reasons is permissible in law ?

and lastly,

(x) Whether the arbitral tribunal was correct in ignoring the fact that the alternate claim was barred by limitation and not giving any finding thereon when the alternate claim and the claim for one-time payment were both intended to achieve the same purpose?

19. These are the aspects that Mr. Kapadia pressed into service in support of his challenge in the present petition.

20. Emphasis was laid by Mr. Kapadia on issue nos.3 and 7 which the arbitral tribunal decided against Niko and in favour of GSPC. As far as the submissions in support of the challenge are concerned, I will briefly set out the heads of challenge that were urged before me at the hearing of this petition. I may state here that both sides agreed that the petition may be disposed at the stage of admission itself.

21. Mr. Kapadia submitted that the claim made by GSPC is essentially one for compensation and therefore a claim for damages and that the order of compliance with the requirements of clause (6) provides for alternate mechanisms, which are not optional but were to be selected by GSPC. The obligation to compensate the claimant for making up shortfall gas is per the mechanism under clause (6.1) and/or (6.2). There was no obligation to pay money save and except as compensation under clause (6.2). That compensation is by way of a penalty. The third submission being that under Section 74 of the Contract Act, only actual loss suffered is capable of being recovered and GSPC had not proved the loss, if any, suffered by them. Thus, it is the stated case of the petitioner-Niko that the claim for one-time payment is in the nature of a penalty and/or liquidated damages. The fourth issue that was sought to be canvassed is that credit had not been given for excess gas allegedly supplied. These are the four main planks of challenge that Mr. Kapadia pressed into service.

22. In his opening, Mr. Kapadia submitted that the key commercial terms embodied in clause (6) encompasses three situations; firstly, supply of gas from D6 and depending upon the willingness of D6 to provide the gas. This was subjected to the government's Gas Utilization Policy, which was a supervening event. Alternatively, gas was to be supplied from any other source, failing which payment was to be made under a formula. He submitted

that GSPC did not receive any claims from third-parties. According to Mr. Kapadia, the first method of 'gas for gas' was an attempt to compensate from a known source. If such D6 gas was unavailable or could not be procured, gas could be procured from some other source. It is only failing these two eventualities, that payment of money could have been contemplated. According to Mr. Kapadia, quantum of gas supplied was not proved. Equally, the quantum of gas said to have been procured by GSPC has not been proved. Furthermore, the recitals of the agreement itself make reference to the word "compensation" and the obligation is for GSPC to continue to supply from the balancing start date. The recitals demonstrate that the idea was to compensate for loss suffered by GSPC, if any, by delivering gas to be supplied. According to him, compensation can only be by way of a reimbursement. It remains to be damages unless decreed by a court. Does it not remain to be damages, even if decreed by a court? He submitted that the third option under clause (6), namely, making of the one-time payment, does not assume the character of a debt. It is his submission that the amount awarded is by way of liquidated damages and not an ascertained sum by way of a debt. He relied upon the contents of the agreement and the recital in support of his contention that all the methods contemplated therein are by way of compensation. Such compensation cannot transform into a debt. Furthermore, he relied upon paragraphs 96, 97 and 98 of the award to contend that there is a clear finding that the amount awarded is by way of damages and agreed method had been arrived at to compute damages and therefore the claim remained one for damages although the amount itself is not specified.

23. Continuing his submissions, Mr. Kapadia elaborated on the Niko's contention that the claim made in the arbitration proceedings was really one for compensation. He submitted that of the two competing notions "compensation" and "debt", "compensation" is defined in Black's Law Dictionary and the expression "compensation" does not make any mention of the word "debt". He submitted that GSPC had not called its claim a debt, but had chosen to describe it as a one-time payment and that the claimant-GSPC adopted the term "debt" only in its rejoinder, probably because the tribunal had used the expression in the course of proceedings. GSPC has tried to equate the word "debt" with the claims under the arbitral proceedings and also tried to equate the term "debt" with performance, price and consideration. He submitted that the word "compensation" is used repeatedly in the recitals of the GBA and the entire purpose of the GBA is to provide for compensation method of compensating GSPC. He further submitted that the claimant-GSPC has itself referred to Article 55 of the Limitation Act in its written submissions, probably realizing that the claim in the present case would be one to recover compensation for breach of contract. He submitted that the best method of interpreting a contract is to ascertain the meaning of the words used by the parties themselves and in this respect, he submitted

that the intention of the claimant-GSPC is evident and that is to claim compensation, which is not the same as a debt. The word "debt", Mr. Kapadia submitted, has been dealt with in numerous judgments. He relied upon the judgments in the case of *Iron and Hardware India Company Vs. Shamlal and Brothers*[1]; *Union of India Vs. Raman Iron Foundry*[2]; *Indiabulls Properties Pvt. Ltd. Vs. Treasure World Developers Pvt. Ltd.*[3]; and lastly, *Kailash Nath Associates Vs. Delhi Development Authority*[4].

24. Mr. Kapadia submitted that the tribunal has made out a case for GSPC, which has not even been pleaded that there is no finding as to how the amount awarded is in the nature of debt. He submitted that the award is against all the notions of law and is directly covered by the principle laid down by the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd Vs. National Highway Authority of India*[5]. According to Mr. Kapadia, the methods contemplated in clause (6) of the GBA are all methods of compensation and clearly ascertainment of the need to compensate for price or the price at which compensation would have to be made and/or the compensable quantities would all be matters of ascertainment by the courts and unless these amounts are effectively ascertained, a claim would not convert itself to a debt. He questioned the manner in which GSPC had

1 *1954 AIR Bombay 423*
2 *(1974) 2 SCC 231*
3 *2014 SCC OnLine Bombay 4768*
4 *(2015) 4 SCC 136*
5 *(2019) SCC OnLine SC 677*

proceeded in its attempt to prove the claim. He submitted that the order of compliance with requirements of clause (6) is described by the claimant-GSPC itself as a performance under alternative mechanisms. According to Mr. Kapadia, the three mechanisms set out are not optional viz. they are not to be selected by GSPC. Its compliance is contemplated in the order in which it is set out in clause (6). He submitted that the letters received from GSPC invoking liability under clause (6) makes it clear that GSPC contemplated liabilities to be discharged by Niko alone in the order specified in clause (6). Reference is made to the written submissions filed by GSPC and to the effect that Niko had agreed to compensate GSPC for the shortfall gas as per the mechanism provided in the contract. Mr. Kapadia further submitted that the amount mentioned in clause (6.2) is obviously a penalty. He buttress this argument by making reference to the fact that the usual marketing margin for a marketing business in gases would be 10 cents per MMBtu. He further submitted that five times the quantum of shortfall gas contemplated to be supplied from the D6 would have earned GSPC five times the marketing margin i.e. not more than USD 0.50, whereas what has been awarded is equivalent to USD 2.5 per unit. This, he submitted, translates to a huge marketing margin of USD 0.50 and the cross-examination of GSPC's witness Ravindra Agarwal reveals that the witness has himself spoken of marketing margins varying between USD 0.50 per MMBtu and USD 2.00 per MMBtu. It also makes reference to the GBAs of 2009 to 2014. Mr. Kapadia further submitted that the money equivalent of compensation with a multiplier of 2.5 is clearly in the nature of a penalty and under Section 74 of the Contract Act, only a maximum amount, which can be claimed, is provided for in the contract, but that would be subject to proof to the satisfaction of a court of law. Elaborating further Mr. Kapadia submitted that the production in Hazira Field having declined, there was a time when quantum of gas was in excess of the supplies of gas to the GSA customers. The reason, he submitted, is that the requirement of the GSA customers had also reduced in the meantime. Excess gas, he submitted, had been taken possession of by GSPC, who disposed the same and according to Mr. Kapadia, it was obvious that credit had to be given for such amounts of excess gas that had been appropriated and sold by GSPC. D6 has not commenced delivering gas.

25. Mr. Kapadia further submitted that in view of the fact that compensation, as a concept, would attract the application of Section 74 of the Contract Act, a reasonable measure of compensation could have been ascertained and ordered. The sum stipulated in the contract was the maximum amount that could have been ordered. Mr. Kapadia submitted that the sum awarded was totally contrary to the findings and the tribunal was wrong in rejecting the application of Section 74 to the facts of the case. He submitted that the reasonable compensation is subject to an upper limit, as set out in the formula, and this would also be subject to pleadings and proof. The

pleadings in the present case claimed a sum of about Rs.19 crores, lower than the alternate claim. The evidence, he submitted, was replete with substance to show what amounted to reasonable compensation. It was incumbent upon the tribunal to consider whether the evidence of reasonable compensation was sufficient to grant an order against Niko. According to Mr. Kapadia, all evidence has been ignored and the objections raised to the structure of the award should prevail. He submitted that even if the alternate claim was barred by limitation, the evidence ought to have been discussed by the tribunal. The tribunal has omitted to do so. This was important because the discussions in relation to the evidence led on behalf of GSPC would clearly establish that the claim allowed under clause (6.2) as a one-time payment also could not have been so awarded. He submitted that claim for reasonable compensation was also barred by the law of limitation. He invited my attention to the relevant portions of the award in this respect.

26. Mr. Kapadia then invited my attention to the issues and submitted that it is incumbent upon the tribunal to consider the evidence and not rule it out completely, as was done in the instant case. The fact whether the gas was supplied or not was an important aspect of the evidence, which the tribunal could not have ignored; yet, it has not arrived at any finding on that aspect. He submitted with reference to the affidavit-of-evidence of Ms. Amrita Modi and in particular clause (3.1) thereof that the tribunal had held that the claim

was barred by limitation. He further submitted that the alternate claim had been revised downward and the tribunal had two figures; firstly, that of the formula payment and, secondly, the reasonable claim, which had been barred. Despite this, the higher amount, as reflected in the formula, was allowed. Quantification, he submitted, is ascertainment of pecuniary liability and therefore, evidence was a must in the facts of the present case. In support of his submissions, he relied upon the aforesaid judgments, to which I have already made reference of all. Clause (6.2), he reiterated, was a penalty and therefore in the absence of evidence and the tribunal considering such evidence, no award could have been made in that behalf.

27. Mr. Kapadia and Mr. Shroff continued in contending that the award based on the formula is incorrect. He submitted that one of the factors involved in the computation is Q. Q, he submitted, was not sustainable in the present form inasmuch as the claim that has been allowed is if much higher figure, then that could have been allowed. This he attributed to the nature of Q and the computation based on the formula. Mr. Shroff submitted that while GSPC had not given credit in respect of the excess gas used, these are the aspects which had not been considered by the tribunal.

28. Continuing to elaborate upon the challenge, Mr. Shroff submitted that the claimant-GSPC had asked for compensation for something said to have been done on behalf of Niko. It was actually a claim for loss suffered and one

for compensation for breach of contract. He submitted that the tribunal itself came to such a finding of a breach having been committed. He has relied upon an interpretation of the relevant clauses in this respect. Mr. Shroff further submitted that if a formula has been arrived at, this formula required determination of the quantum after analyzing the various elements that comprise the formula and unless such a quantum is fixed by the parties in advance, the formula would have to be worked out with reference to the individual elements of the formula and as a result, the present claim cannot be a debt. Mr. Shroff further submitted that certain aspects in the evidence had not been considered by the tribunal. He invited my attention to the written statement in volume-4 at page 788 and the witness's statement therein and contended that these aspects, which had been highlighted, have not been taken into consideration by the tribunal.

29. On behalf of the claimant-GSPC/respondent in the present petition, Mr.Rustomjee submitted that the principal challenge mounted by Niko is on the basis that the BGA did not come into effect. Secondly, that clause (6.2) of the BGA is in the nature of liquidated damages and/or penalty. However, the case that is now canvassed before the court was quite different. He submitted that considering the scope of interference under Section 34 and keeping in mind the broad parameters of challenge, as set out in the case of *Associate Builders (supra)*, no interference was called for. Mr. Rustomjee submitted that

the award was a well-reasoned award. The parties had arrived at a bargain. The petitioner-Niko did agree to provide five times the gas, because the shortfall gas, that had been supplied, had been paid for by GSPC. He submitted that Niko was at all times aware of performance by GSPC inasmuch as the shortfall gas supply was made with the knowledge and consent of Niko at all material times. Nothing had been suppressed from Niko. Niko was aware that GSPC was incurring costs and had incurred costs. Niko had obviously not been able to deliver gas from the D6, nor did Niko succeed in delivering gas from any other source, as contemplated by clause (6). In this background, it was submitted that the one-time payment, as contemplated in the contract, was indeed payable and it was not in the nature of liquidated damages or damages at all. It is the case of GSPC that there has been no breach of the agreement in the first place. The question of damages or of liquidated damages arise only if there had been a breach of contract. In the present case, clause (6) of the BGA contemplated different options. Firstly, the shortfall gas was to be supplied by Niko from the D6, where it had an on-going arrangement with RIL. The second option was to procure gas from other sources. In view of the government's gas utilization policy and since it had become difficult to supply gas from the D6 in view of the policy requirements, the parties had already contemplated an option that Niko would supply gas from an alternate source. This is something that Niko had in mind even at the stage of execution of the agreement. It was also in the contemplation of parties that Niko may not be able to secure gas supplies from other sources and it is this contingency that had been provided for in clause (6.2), namely, a one-time payment would be made based on a pre-agreed formula. That formula takes into account the quantum that would have been payable. No doubt, this was an amount to be quantified in accordance with the formula at a future date and that by itself does not make the claim one for damages. It was at all material times and continues to be an obligation of Niko to make these payments.

30. Mr. Rustomjee submitted that the obligation to make remittances has been acknowledged by Niko in numerous admitted documents, including its statutory filings, and this, he submitted, was an indictment of Niko inasmuch as no amount of submissions to the contrary would enable Niko to regal out of this obligation. He submitted that the petitioner-Niko had repeatedly acknowledged the fact that there is a liability to pay certain amounts to GSPC on account of the fact that Niko had been unable to provide the gas. The statutory filings, he submitted, also quantified certain amounts on a projected basis and all of this was an estimation carried out by Niko on its own and is damming evidence of the fact that Niko would have to bear this sum upon quantification. Mr. Rustomjee further submitted that the quantum by itself may have been crystalized thereafter, but the fact that the amount payable as one-time payment was not damages, liquidated or unliquidated, is evident

from the fact that the parties had contemplated such liability in the event gas was not supplied. Mr. Rustomjee then submitted that the three modalities were contemplated to compensate GSPC. None of these were in the nature of damages. Supply of gas cannot be by way of damages even though it is supposed to be five times the gas that GSPC was required to supply as part of its obligation.

31. Mr. Rustomjee submitted that supplying gas could never be equated to damages and clause (6) provided three alternatives, the third of which has now been actioned and the award recognizes the entitlement of GSPC to recover the monetary value of the gas computed in accordance with the formula. Mr. Rustomjee contended that Niko has not contended that all the three options under clause (6) are in the nature of damages. He submitted that Niko has admitted that the compensation offered in kind under option 1 and 2 and the 3rd option is compensation in cash. All these three options represent consideration for GSPC's performance of obligations under the Hazira Gas Sales Agreement by supplying gas including the shortfall gas. Mr. Rustomjee submitted that Niko had not disputed the fact that acting for and behalf of the joint-venture, GSPC had, in fact, supplied gas on behalf of Niko as well and thereby, Niko was thus protected from any potential claims from the Hazira GSAs. Mr. Rustomjee further submitted that the contention of Niko that option 1 and 2 amounted to compensation to GSPC and option 3

amounted to liquidated damages for breach of options 1 and 2 under clause (6.1) was incorrect. He submitted that the contention is ex-facie false inasmuch as this is not how the petitioner-Niko presented its case before the arbitral tribunal, nor was it the manner in which Niko understood it at the relevant time. Niko has admitted that option 2 is certainly not damages and in the contract, clauses (6.1) and (6.2) on a fair reading require that if gas is provided in lieu of the shortfall gas, there was no question of that act being to remedy any breach.

32. Mr. Rustomjee thereafter submitted that, in effect, the challenge has no merits, because there has been no breach of contract at all. The contract itself contemplates three options to compensate GSPC. In the absence of any breach, there could not be any question of any damages and therefore the contentions of Niko were not relevant. The learned counsel submitted that no attempt was made during the arbitration to equate the compensation awarded with damages and now the submission before this court is completely different. He further submitted that the contention of the Niko that the amount awarded is not by way of debt and that the tribunal had made a serious error in holding that the amount was payable as a debt and that the contention that damages was the only measure of compensation, is incorrect. Referring to the contentions of the Niko that the formula provides for certain elements, which had to be computed in future and therefore, the compensation contemplated

could not be a debt and was in the nature of damages, is of no avail. He sought to differentiate the judgments relied upon by the Niko. According to Mr. Rustomjee, none of the case laws cited by Niko help in establishing that the amount awarded is a result of a claiming damages. He submitted that the witness Amrita Modi did not modify shortfall figures at all in the original agreement. He relied upon the observations of the arbitral tribunal in the award in support of his contention that all these aspects had been considered with specific reference to the contention that no credit had been given. Mr. Rustomjee submitted that the evidence of Ravindra Agarwal clearly established that the credit for gas appropriated had indeed been given. Mr. Rustomjee further submitted that the basic understanding arrived at between the parties is that Niko would be required to supply the shortfall gas from D6, failing which it would source such gas from other locations. In the absence of providing gas either from D6 or from other sources, Niko was bound to make remittance of the one-time payment. According to Mr. Rustomjee, the contention that the BGA was subject to conditions precedent and did not come into force at all was of no consequence. He submitted that the BGA came into effect immediately upon its execution and was not dependent upon any other document, as sought to be contended by Niko. He submitted that the correspondence between the parties would make it clear that GSPC had not agreed with the suggestions of Niko that the BGA would be conditional upon any other event. In either view of the matter, Mr. Rustomjee submitted that

GSPC had complied with both the conditions contemplated in the letter of 2nd May 2008. He submitted that the D6 Term Sheet and annexures to the covering letter, along with the BGA, had been executed by GSPC and returned to Niko. Reliance on the D6 Terms Sheet, he submitted, was completely erroneous since it had nothing to do with the alternatives provided in clause (6.2) of the BGA. The D6 Term Sheet was only relevant, in my view, to the extent it concerned supply of gas from D6. If no such supplies were effected, it is obvious that the term sheet would have no meaning. This contention of Niko must therefore be negated. It has no substance whatsoever.

33. One of the contentions raised on behalf of Niko is the use of the expression "in principle" in paragraph 47(b) of the award, where the tribunal had observed that execution of a formal gas sales agreement was contemplated to take place in future and that it would be executed going forward. The use of the words "in principle agreement" was sought to be exploited by Niko to contend that the term sheet was a draft; that the initial supply date was not fixed etc. This, in my view, is of no consequence. In fact, Niko had repeatedly acted upon the BGA and acknowledged potential liability under the BGA. The award deals with it in some detail as I will shortly advert to the relevant portions of the award, where these aspects had been considered. One of the important factors to be borne in mind is that Niko has benefitted from the BGA. One cannot lose sight of the fact that the tribunal was alive to the performance of obligations under the Hazira GSAs by GSPC,

which also protected Niko from claims for liquidated damages. It is contended that the findings of the tribunal are beyond the scope of challenge for the aforesaid reasons. Furthermore, the only other plea of some substance, is that clause (6.2) of the BGA is a stipulation by way of liquidated damages. That aspect, Mr. Rustomjee submitted, is a non-issue in view of the fact that GSPC had, in fact, managed the shortfall gas on behalf of Niko as well. Niko has knowledge of the same and has gone on record admitting this fact. In view of this factual position, Niko was bound to compensate the claimant-GSPC for having taken on the obligation to supply shortfall gas to the Hazira GSA customers. The BGA had been signed by the parties and it records the fact that the compensation is payable. The compensation was to be paid in three forms; either by providing gas from D6; gas from any other source or in cash, as per the agreed formula. Mr. Rustomjee contended that till 8^{th} March 2011, Niko had no doubts about the fact that such compensation had to be worked out under clause (6.2) as cash compensation in accordance with the formula. Niko made no representations contrary to this position. He submitted that the question of damages would arise only in case of breach of contract and in the present case, there has been no breach of contract. It is simply one of the methods by which a compensation was payable in the event of failure to provide gas. It is well settled and indeed one of the basic tenets of law that damages would be payable for a breach or a violation, which would entitle the party to compensatory damages.

34. In the present case, the tribunal has considered the fact that GSPC was not concerned with compensatory damages at all. The tribunal found that GSPC was concerned with recovery of an amount due under specific commercial terms payable under a commercial transaction. In commercial transactions, compensation would also encompass reimbursement of sorts as a consequence of work done, services rendered or acts performed. In the present case, the tribunal found that Niko had taken advantage of GSPC's actions by supplying the shortfall gas to the consumers of gas under the Hazira GSAs. Once this fact is acknowledged and indeed it is not disputed, the fact that such costs had to be reimbursed or GSPC was required to be compensated is a forgone conclusion. Niko could not, by any stretch of imagination, contend that it was not liable to compensate GSPC. The manner of compensating GSPC is embodied in the contract itself in clause (6) and that option was to be exercised by Niko and not by GSPC. The question that I asked myself is whether GSPC could have chosen to claim the one-time payment without having exhausted the earlier two options and it is this crucial factor that the arbitral tribunal has considered and has formed an opinion that GSPC could have been compensated by providing shortfall gas, which Niko evidently failed to do and indeed the correspondence and the record is reflective of the fact that Niko had clearly come to the conclusion within its organization that it was not possible to supply gas from D6 under the BGA. That source failing, it was open to Niko to secure gas supplies from other

sources and provide the same to GSPC. This also was found to be unviable and these are aspects that the statutory filings of Niko have recorded repeatedly from the years 2008-09 and onwards, the last of which is seem to be the statutory filing viz the Auditor's Reports. In this scenario, Niko had acknowledged the fact that it may be liable to pay compensation to GSPC and this compensation has not been contemplated as having the quality of liquidated damages.

35. The one-time payment claimed by GSPC certainly could not have been damages since I am in agreement with the submission made on behalf of GSPC that the one-time payment in contemplation and in accordance with a stated formula is one of the modes of paying compensation upon Niko's inability to provide the shortfall gas. In my view, Mr. Rustomjee is right when he submits that Niko has before this court adopted a different stand than that taken before the tribunal by seeking to contend that the amount of compensation is synonymous with the term damages and that this required evidence, which was lacking in the present case. The tribunal's view cannot be faulted.

36. Having considered the rival contentions, it is now time to examine the challenge, which is essentially two fold. Although multiple versions of the same issue have been raised in support of the petition, I find that the principal contentions are firstly that the Balancing Gas Agreement was not enforceable,

because the formal D6 Gas Sales Agreement was not signed by RIL, Niko – principals of the present petitioner - due to the Indian Government's gas utilization policy, over which Niko – the petitioner had no control. Secondly, a broad proposition that essentially is an omnibus objection to the award on the basis that the amount awarded towards one-time payment is actually an award for liquidated damages and that the nomenclature makes no difference. Therefore, it is the case of Niko that clause (6.2) is a provision for payment of liquidated damages and/or is a penalty provision.

37. This omnibus argument contains several elements. Mr. Kapadia and Mr. Shroff had both pressed into service these individual elements in support of the liquidated damages argument. Let me briefly set out these for the sake of convenience.

(i) A person who would have been expected to have personal knowledge, Mr. Devendra Agarwal, was not examined on this aspect. The only witness who deposed on the aspect of actual loss/damage is Ms. Amrita Modi, who had no personal knowledge. Therefore, it is the contention of Niko that there was no evidence at all in support of the claim.

(ii) GSPC could have earned only 5 to 10 cents mark-up, which may have been the damages suffered. Therefore, five times the gas would effectively mean five times of the mark-up between 5 and 10 cents per MMBtu. A multiplier of USD 2.5 applied was not justified

(iii) Efforts were made to prove this loss, but these efforts failed and a party which failed to prove the actual loss suffered, should not be rewarded by payment of liquidated damages styled as "One-time Payment".

(iv) The unproven claim for damages is the sum of Rs.79.50 crores approximately for having supplied shortfall gas. Having failed to prove this, the arbitral tribunal could not award a hugely disproportionate amount of Rs.114 crores approximately.

(v) When supplies were made between 2006 and 2008, GSPC could not recover the amount in dollars; especially in relation to a rupee payment and at a rate applicable on the date of payment.

(vi) Escalation was not permissible, yet, has been considered by the tribunal.

(vii) The alternatives claimed having failed on the ground of limitation, the tribunal rendered no findings on this aspect. If the one-time payment awarded was for the same purpose, it could not have been allowed.

38. This, in short, is the case of Niko. In support of this case, Mr. Kapadia elaborated the submissions, which are as follows :-

(i) According to Mr. Kapadia, there are essentially two competing notions; one of "compensation" and the other of "debt". GSPC adopted the expression "debt" only in the rejoinder submission, because the arbitral tribunal had contemplated the concept of "debt", GSPC took up the very same plea. Mr. Kapadia has relied upon the definition of "debt" in Black's Law Dictionary in support of his contention. According to the learned senior counsel, a debt could never be in the form of compensation, because both operate in different fields. He relied upon the meaning of the expression "debt" in the four judgements that he cited in support of his case. According to him, the tribunal had created a case for GSPC by classifying the one-time payment as a debt. In fact, the one-time payment was not in existence at the relevant time. It was yet to be computed. He submitted that the one-time payment was, at best, a contingent claim since there was no liability arise on the date that the award was made and the arbitration was invoked. Furthermore, he was of the view that GSPC itself had contemplated the claim to be one for damages for breach of contract since it had made reference to Article 55 of the Limitation Act. In this behalf, it is necessary to examine whether Niko could take advantage of a wrong impression that GSPC may have carried. In my view, that must be answered in the negative. Niko cannot take advantage of a mistaken impression that GSPC may have carried at the relevant time. What is of relevance is the manner in which the arbitral tribunal has treated the claim and the manner in which the claim was supported by reasons.

(ii) His next submission was that clause (6.2) provides for options, which are not for GSPC to choose from. Built into this submission is an admission that it was upto Niko to comply with the provisions of clause (6.2); firstly, by providing gas from D6, failing which, providing gas from some other source and failing that, the one-time payment was to be made. This aspect needs to be considered in further detail, as I have done below. In the meantime, Mr. Kapadia submitted that the case at hand is clearly covered by the decision of the Supreme Court in *SsangYong Construction Company Pvt. Ltd. (supra)*. Mr. Kapadia then submitted that clause (6.2) providing for a one-time payment is a penalty. Basically, it is only a marketing margin that GSPC could have claimed and this marketing margin in the present case has been awarded with a multiplier of 2.5, when, in fact, all that GSPC could have earned is a sum of 5 cents and upto maximum of 10 cents per MMBtu. According to Mr. Kapadia, under Section 74 of the Contract Act, only an amount subject to proof of the claim could be awarded, provided the court was satisfied that the amount was payable In the instant case, no attempt was made to establish the actual loss suffered and the attempt made to prove the alternate claim failed. The alternate claim was rejected only on the ground of limitation and therefore the tribunal did not examine the merits of the claim and the strength of the evidence. In the absence of such evidence, the claim under clause (6.2) for the one-time payment would continue to be a penalty.

(iii) Mr. Kapadia then submitted that no credit was given for the amount of excess gas provided to GSPC. In fact, it is the case of GSPC that credit was indeed given and the contention of Niko was incorrect, reference being had to volume-5 at page 1206 and 1208, which reproduces Exhibits C-45 and C-46. This is supported by the evidence of Mr. Ravindra Agarwal. The claimant-GSPC has therefore contended that credit was in fact given and this ground of challenge is baseless.

(iv) The last point that Mr. Kapadia canvassed was that the shortfall figures under the GBA were revised by the claimant's witness Ms. Amrita Modi, which fact the arbitral tribunal had omitted to mention.

39. The tribunal, after having considered the preliminary issue, answered the same in favour of GSPC. The preliminary issue was decided after considering the GBA, the correspondence, the relevant statutory filings and after perusal of these records, the tribunal was also of the view that the BGA

was firmly an operation and the challenge on that basis was rejected. This issue having been dealt with, issue no.3 also is significant. I must remember here that the main plank of challenge mounted and as canvassed by Mr. Kapadia is the manner in which issue nos.3 and 7 were dealt with. Issue nos.3 and 7 are reproduced below for ease of reference :-

> Issue No.3 : Whether the Balancing Agreement was subject to several conditions precedent and that the balancing agreement, including the arbitration agreement contained therein, has not come into force and/or operation due to non-fulfilment of these conditions precedent ?

> Issue No.7 : Whether supply of shortfall gas quantity by the claimant to the customers of JV for the purposes of alternative claim was; (a) for and behalf of JV; (b) with the knowledge or consent of the respondent?

40. Before entering upon the discussion on the merits of the challenge, I must remind myself of the scope of interference with an arbitral award under Section 34. Mr. Kapadia and Mr. Shroff on behalf of the petitioner-Niko sought to support the challenge on the basis of grounds (a) to (m), (w), (z),

(mm), (ss), (tt), (vv) and (ww). I am afraid all these grounds relate to a decision of the arbitral tribunal on the merits of the case. The grounds of challenge in this petition are akin to grounds of appeal, which a Section 34 petition is not. The singular other plea is adverting to misapplication of the principles laid down in *Kailash Nath Agrawal (supra)*; however, this contention has no merits, as I will shortly deal with.

41. It is by now well settled that wrong application of law by an arbitral tribunal or improper appreciation of evidence cannot be a ground that can be urged successfully to assail an award under Section 34 of the Act. An arbitral tribunal may have applied a correct principle of law, but inappropriately. The resultant error, if any, is not susceptible to a challenge under Section 34. Reference may be made in this behalf to sub-section 2(a) of Section 34, which immediately clarifies this aspect. It is also well settled that given the facts, two views are possible. If the arbitral tribunal choses one, the award cannot be assailed on that ground. In this behalf, the decision of the Supreme Court in *SsangYong Engineering and Construction Company Ltd. (supra)* is relevant and decisively binding. It is also useful to consider what the Supreme Court has held in the case of *Associate Builders Vs. Delhi Development Authority*[6] wherein the Supreme Court has dealt with the power of the court to interfere with an arbitral award in great depth. Here in the present case, considering a challenge to a domestic award, Section 34(2A) under the Amendment Act of

6 *(2015) 3 SCC 49*

2015 is relevant to this aspect of the case. A patent illegality is required to be demonstrated. In the present case, what the petitioner-Niko has invited me to do is to re-appreciate evidence, which is impermissible and that is only for an appellate court to do. As held in the case of *Associate Builders (supra)*, contravention of substantive law of India is not a ground available to assail an award.

42. In the present case, the arbitral tribunal has given clear, lucid reasons for the conclusions that it has reached and hence, the award, in my view, does not fall foul of Section 31(3) of the Act. The ground of patent illegality on this basis has certainly not been established. Paragraphs 42.3 to 45 of the judgment in the case of *Associate Builders* translates into the change in Section 28(3) of the Amendment Act. By this reasoning, the construction of the terms of a contract are held to be for the arbitral tribunal to decide. The present case is not one where the arbitral tribunal has committed any error of jurisdiction, as contemplated by Section 34(2A). The arbitral tribunal has dealt with all aspects of the disputes referred to it and has considered all the issues in depth and with reasons. The findings of the arbitral tribunal in the case at hand are not without any basis in evidence, nor does the tribunal ignored or failed to consider material evidence. In other words, there is no perversity that the award displaced in order to invite the ground of patent illegality. It is indisputable that the arbitral tribunal is the sole Judge of the quantity and quality of the evidence before it.

43. In the course of submissions and in support of his contention that the tribunal could not have awarded a one-time payment as a debt, Mr. Kapadia relies upon the decision in *Iron and Hardware (India) (supra)*. This judgment clearly deals with unliquidated damages and I do not see the relevance of that judgment in the facts of the present case. The petitioner-Niko's case that there is no proof of damages and that till such a finding on damages is arrived at by the tribunal, will not be of any assistance to Niko. The suggestion that the one-time payment is an amount payable as a consequence of breach of contract also cannot be accepted. The decision also does not take into consideration an earlier decision of the Division Bench of this court in the case of *P.R. & Co. Vs. Bhagwan Das*[7], in which this court has held the fact that a party to a contract may, when the other side has refused to perform, put an end to it and sue for compensation because the breach does not oblige him to take that course of action at his peril. He may, if he prefers it, sue to recover any debt due to him, which has arisen from execution of his part of the contract. This decision was, in my view, supportive of the case of GSPC and I am in agreement with Mr. Rustomjee that in the present case, there is no question of the amount awarded being liquidated damages of any sort and the tribunal has correctly dealt with the petitioner's argument.

44. It is pertinent to mention that the definition of "*debt*" is also to be found

[7] *1909 ILR Vol-34 Page 192*

in the Black's Law Dictionary, which defines it as "*a liability on a claim, a specific sum of money due by agreement or otherwise*". It is an *"aggregate of all existing claims against a person"*. Amongst the numerous kinds of debts that are explained as a part of the definition is one of a contingent debt, which is defined as a debt that is not presently fixed but that may become fixed in future with the occurrence of some event, e.g. non-supply of "gas for gas". In the present case, the petitioner-Niko has contended that the liability was in the form of damages, a contingent liability and that it had to be established. The tribunal found that is an incorrect interpretation of the provision of the contract. The tribunal has considered and interpreted in a manner that is certainly a possible view and it is not possible to fault the tribunal's interpretation on the footing that the amount of One-time Payment was not a debt but merely compensation in the nature of damages, which the claimant-GSPC would have to prove by leading evidence.

45. In support of the Niko's case, Mr. Kapadia had also referred to the decision of *Indiabulls Properties Pvt. Ltd. Vs. Treasure World Developers Pvt. Ltd.*[8], in which a Single Judge of this court has made reference to the decision of the Delhi High Court in *Tower Vision India Pvt. Ltd. Vs. Procall Pvt. Ltd.*[9], which observed inter alia that remote or indirect damages and losses are not recoverable. A mere breach absent proof of damage does not entitle the other

8 *(2014) SCCOnline Bom 4768*

9 *(2014) 183 Company Cases 364 Delhi*

party to claim damages. Mr. Kapadia sought to place reliance upon these observations in addition to the reliance on *Raman Iron Foundry (supra)*. On the other hand, Mr. Rustomjee had contended that the decision in *Tower Vision India Pvt. Ltd. (supra)* had also relied upon an earlier decision of this court in *E-City Media Private Limited Vs. Sadhrta Retail Limited*[10], wherein the claim was for losses and damages and of a minimum guaranteed amount. This claim was held to be in the nature of damages and hence a debt, which could justifying filing of a winding-up petition would not arise. The court had also observed that a debt is a sum of money, which is now payable or will become payable in future by reason of a present obligation. This is an aspect which we have already seen in the definition of "debt", as referred above in *Web Vs. Stenton, (1883) 11 QBD 518. E-City Media Private Limited (supra)*, in turn, had relied upon and cited a decision of the Karnataka High Court in *Grey Hills Export Private Limited Vs. Coffee Board, [2001] 106 Comp Cases 391 (Kar)* inter alia holding that damages is money claimed by or ordered to be paid to a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a debt when a court awards it. In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to claim for damages arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has

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[10] *(2010) 153 Company Cases 326 Bombay*

incurred a liability to compensate the plaintiff for the loss and then assess the quantum of such liability. It further observes as follows :-

> "An alleged default or breach gives rise only to a right to sue for damages and not to claim any debt".

46. A claim for damages becomes a debt due, not when the loss is quantified by the party complaining of the breach but when a competent court holds on enquiry that the person against whom the claim for damages is made has committed breach and incurred a pecuniary liability towards the party complaining of the breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach. Further reliance was placed upon decision in the case of *Kesoram Industries and Cotton Mills Vs. C.W.T.*[11], which has been dealt with in *Indiabulls (supra)*. Mr. Rustomjee is right when he supports the claim on the strength of the very observations in *Indiabulls* in paragraph 53, wherein the court finds that *Indiabulls* claimed a sum of money now payable, expressed at the time of execution of the agreement to be payable, but only on happening of a contingency and that contingency having happened, the amount is ascertained as payable immediately and therefore a debt owed sufficient to sustain a winding-up petition. The court was of the view that the obligation was ever *eo instanti* at

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[11] *(1966) 59 ITR 767 SC*

the time of execution of the agreement, *solvendum in futuro*. The contingency contemplated in the contract had occurred and therefore it was *solvendum in praesenti*. This would correctly apply to the facts of the present case inasmuch as clause (6.2) provided for different methods by which Niko would provide compensation to GSPC; firstly, by way of procuring the shortfall gas from D6; failing which it would procure the gas from other sources; failing other sources, it was bound to make the one-time payment. Thus, the provision for payment of the one-time compensation was already existing in the contract. This, in my view, is also supported by the statutory filings, in which the petitioner-Niko has clearly admitted the potential liability.

47. In my view, *Indiabulls* is of no assistance to the case sought to be canvassed by Mr. Kapadia. In support of the challenge, Mr. Shroff had occasion to refer to the decision of the Supreme Court in *Associate Builders (supra)*. He submitted that the award clearly suffered from non-application of mind. It lacked a judicial approach. It was contrary to a statutory provision, namely, Section 74 of the Contract Act and the award was clearly contrary to clause (6.2) of the contract itself. These are the aspects, which *Associate Builders* has dealt with in depth. The petitioner-Niko has also relied on the decision of the Supreme Court in *Kailash Nath Associates (supra)*. I will shortly advert to the relevant portions of *Associate Builders* after dealing with the decision in *Kailash Nath*. The decision in *Kailash Nath* was relied upon by

Mr. Kapadia in support of the contention that under Section 74 of the Contract Act, proof of loss and damage arising out of breach of contract was necessary and where the damage or loss is difficult or impossible to prove, the court is empowered to award liquidated amount named in the contract as a genuine pre-estimate of the loss or damage. Mr. Kapadia submitted that under Section 74, it was incumbent upon the court, namely, the arbitral tribunal, to arrive at a finding on the quantum based on evidence but in the present case, no evidence was forthcoming. He relied upon the observations of the Supreme Court apropos the requirement to prove damages. Mr. Kapadia submitted that under Sections 73 and 75 of the Contract Act, compensation is payable for breach of contract under Section 74 of the Contract Act, only where damage or loss is caused by such breach. In the present case, he reiterated that there was no evidence of the loss being caused. More particularly, reliance was placed on the fact that the alternative claim itself had not been established. I do not see how the decision in *Kailash Nath* comes to the assistance of Niko. As observed in the said judgment, Section 74 declares the law as to liability upon breach of contract, where compensation is predetermined by agreement of the parties or where there is a stipulation by way of penalty. It also observes that the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. It does not confer a special benefit upon any party but merely declares a law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property bay way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount specified or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. The Supreme Court further observed that the court has to adjudge in every case reasonable compensation, to which the plaintiff is entitled from the defendant on breach of the contract and such compensation has to be ascertained after having regard to the conditions existing on the date of the breach. These portions are extracted in *Kailash Nath* from the decision of the Supreme Court in *Fateh Chand Vs. Balkishan Das*[12]. Mr. Kapadia sought to press this aspect into service; however, considering the facts of the present case, I am of the view that the arbitral tribunal has already formed an opinion that claim does not arise from breach of contract and to that extent, I do not find that view as one that could not have been taken in the facts and circumstances of the case. The claim does not arise from breach of contract but the claim is admissible by virtue of the contract itself. Since reference has been made to *Kailash Nath Associates*, it would be appropriate to consider the conclusions of the court on the law on compensation for breach of contract under Section 74. These are to be found in paragraph 43.1 onwards of the judgment. It will be useful to briefly set out the principles culled out by the Supreme Court.

[12] *AIR 1963 SC 1405*

(i) Firstly, it holds that the liquidated amount or penalty is the upper limit, beyond which the court cannot grant reasonable compensation.

(ii) Next it holds that reasonable compensation would be fixed on well-known principles that are applicable to the Law of Contract and which are to be found in Section 73 of the Contract Act.

(iii) Para 43.3 holds that Section 74 awards reasonable compensation for damage or loss caused by breach of contract. Damage or loss caused is a sine qua non for the applicability of the section.

(iv) Para 43.4 states that the section applies whether a person is a plaintiff or defendant in the suit and the sums spoken of may already be paid or may be payable in future.

(v) The court observed that the expression "whether or not actual damage or loss is proved to have been caused" means that where it is possible to prove actual loss or damage, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove, that the liquidated amount named in the contract,

if a genuine pre-estimate of loss or damage, can be awarded.

(vi) Lastly, it holds that Section 74 will apply to the cases of forfeiture of earnest money under a contract. Where however forfeiture takes place under the terms and conditions of a public auction before an agreement is reached, Section 74 would have no application.

48. The Supreme Court's decision in *Kailash Nath*, in my view, does not come to the assistance of Niko for the simple reason that the judgment would apply in cases of claims arising from breach of contract; whereas, the case at hand is one of compensation claimed within the terms of the contract and by way of enforcement of a specific term of the contract. The claim does not arise from breach of contract and hence, the principles of Section 74 would not apply.

49. Relying upon *Associate Builders (supra)*, Mr. Shroff submitted that, as observed in *ONGC Limited Vs. Saw Pipes Limited*[13], the award is liable to be set aside on the ground that it is contrary to the fundamental policy of Indian Law and that it is patently illegal. According to Mr. Shroff, the observations in paragraph 31 of *ONGC (supra)* were clearly attracted in the present case. He

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[13] *(2003) 5 SCC 705*

submitted that the arbitral tribunal had decided contrary to the law in India. He also placed reliance upon the decision of *Hindustan Zinc Limited Vs. Friends' Coal Carbonization*[14], quoted in *Associate Builders (supra)*. The learned counsel submitted that the principles in *Saw Pipes* have been reiterated time and again. That it was open for the court to consider whether an award is against a specific terms of the contract and if so, interfere with it on the ground that it is patently illegal and oppose to the public policy of India. He submitted that the observations in *Hindustan Zinc*, which have been cited with approval in *Associate Builders*, would clearly apply to the facts of the present case and the arbitral tribunal had committed a patent illegality in having granted the claim without proof of actual damages. Adverting to the argument based on Section 74 of the Contract Act, Mr. Shroff relied upon the observations in *D.D.A. Vs. R.S. Sharma & Co.*[15], which has been quoted in paragraph 24 of *Associate Builders*, and submitted that the award in the present case also is against the substantive provisions of law and the contract. It is patently illegal and prejudicial to the rights of Niko. He, therefore, submitted that it is open for the court to interfere under Section 34(2) of the Arbitration Act. The award was contrary to the fundamental policy of Indian Law and therefore so unreasonable, unfair and that it would shock the conscience of the court. He further submitted that it is open for the court to consider where the award is against the specific terms of the contract, as in

[14] *(2006)4 SCC 445*

[15] *(2008) 13 SCC 80*

the present case, and interfere with it as being patently illegal and oppose to the public policy of India. The decision in *Associate Builders*, in my view, does not come to the assistance of Niko at all; in particular, the aspect of fundamental policy of Indian Law has been dealt with in great detail from paragraph 27 onwards of the judgment. The Supreme Court has held that the first and foremost is the principle that in every determination by a court or the authority, the court is bound to adopt what is in legal parlance known as a judicial approach and that the arbitral tribunal therefore in the present case would be bound to adopt a judicial approach. The Supreme Court has observed that what must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court or tribunal or authority exercising powers, that affects the rights and obligations of parties before them, which shows fidelity to judicial approach. They cannot act in an arbitrary, capricious or whimsical manner. A judicial approach would ensure that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner. The principle of *audi alteram partem* is to be followed without exception; so also, the principles of W*ednesbury reasonableness* would also require to be followed and decisions falling short of the standards of reasonableness are open to challenge in a court. The Supreme Court inter alia observed that it is not possible to place the expression "Fundamental Policy of Indian Law" in a straitjacket and the authority in question, such as the arbitral tribunal in the present case, would be expected to act fairly and reasonably to ensure that there is no miscarriage of justice. The juristic principle of judicial approach, the court held, demands a decision to be fair, reasonable and objective and on the obverse, anything arbitrary or whimsical would not be fair, reasonable or objective. Equal treatment of parties was required to be observed and an arbitral award could be set aside under Section 34 only if the party making an application furnishes proof that he was put to a disadvantage, as contemplated in the section including by an unequal treatment. The second juristic principle is that of *audi alteram partem*, as aforesaid. Thirdly, a decision, which is perverse or irrational, such that no reasonable person would arrive at the same, is liable to be interfered with. In *Associate Builders*, the Supreme Court adverted to a good working test of perversity by referring to the judgment in the case of *Excise and Taxation Officer Vs. Gopinath and Sons*[16]. The Award at hand reveals no such faults.

50. In *Associate Builders*, the Supreme Court also considered the views of that court in *Rashtriya Ispat Nigam Ltd. Vs. Dewanchand Ramsaran*[17], wherein the court considered a situation where the Arbitrator interpreted a contractual clause holding that, if the view taken by the Arbitrator was a possible one, if not a plausible one, it is not possible to say that the Arbitrator had travelled outside his jurisdiction or that the view taken by him was

16 1992 Supp(2) SCC 312

17 (2012) 5 SCC 306

contrary to the terms of the contract. If that be so, the court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the Arbitrator. In the instant case, I find that the arbitral award has, in depth, considered the various submissions and contentions canvassed by the parties and has taken a view that can certainly be said to be a possible view and in that sense, I find no reason to interfere with the award on that count.

51. Having considered these aspects, I must also point out that in *Associate Builders*, the court observed in paragraph 106, after dealing with various formulae that could have been applied in different circumstances, that the question as to whether damages should be computed by taking recourse to one or the other formulae and in the facts of the case, would eminently fall within the domain of the Arbitrator. In the facts of the instant case, clause (6.2) and the key commercial terms provided for a formula to be applied. That formula was applied. It is not in dispute that the formula applicable was the one that the arbitral tribunal took into consideration. The tribunal was presented with computations based on the formula. Parties were heard thereon and the tribunal has taken a view. The view taken by the tribunal cannot be interfered with in a challenge under Section 34, simply because that is a possible view and as long as it is not an impossible one. In the present case, the formula has been applied. The views of the Arbitral Tribunal cannot be faulted. In this context, it would be appropriate to consider the award

itself and the manner in which the claim has been dealt with, including the objections to the claim. However, before dealing with the award itself, it would be appropriate to deal with the observations of the Supreme Court in *Ssangyong Engineering (supra)*. The Supreme Court has, from paragraph 35 onwards in *Ssangyong*, dealt with one of the expression "the public policy of India" and observed that as far as domestic awards are concerned, the fundamental policy of Indian Law has been dealt with in paragraphs 18 and 27 of *Associate Builders*. That an award would have to be against the basic notions of justice and morality, as contemplated therein. The additional ground available in case of domestic awards is under sub-section 2(a) inserted by the Amendment Act of 2015, which requires a patent illegality appearing on the face of the award. In the interregnum, it is also made clear that re-appreciation of evidence is only for an appellate court to do and not for a court hearing a challenge under Section 34. The various conclusions in *Associate Builders* have been once again reiterated in *Ssangyong*. Suffice it to say, that there is no occasion for this court to interfere on any of the grounds that are available to an aggrieved petitioner. In the course of submissions, Mr. Rustomjee had sought to distinguish between claims for payment of an agreed sum of money and claims for damages, which he sought to support by citing Chitty on Contracts (27th Edition), paragraph 26-005. The distinction between a debt payable by one party in return for performance of a specified obligation or upon occurrence of some specified event has been distinguished from damages, which may be claimed from a party who has broken his contractual obligation in some way or the other. Other than failure to pay such debt, the observation is that the relevance of the distinction that rules on damages do not apply to a claim on debt. A plaintiff, who claims payment of a debt, need not prove anything more than his performance or the occurrence of an event or condition. There is no need for him to prove any actual loss suffered by him. This submission of Mr. Rustomjee perfectly fits the bill in the present case.

52. In Butterworths Common Law Series on the Law of Contract, 4th Edition, paragraph 8.24 refers to an action in debt to recover an agreed sum and how such an action shares features with several other remedies available for breach of contract. An action in debt is said to predate the action for damages for breach of contract and so it is very different in its language and purpose. The main inquiry is simply whether the debt is due under the terms of the contract rather than whether there has been any breach of contract, which caused loss to the claimant. In my view, the explanation provided in Butterworths clearly applies to the facts of the present case, where key commercial terms provided for payment of a one-time payment as the last alternative in the event Niko did not deliver gas from D6 or from any other source. The claim is within the contractual provisions and not arising out of a breach of any contractual provision.

53. At the cost of repetition, Niko had the option of either supplying gas from D6 or other sources. In the alternative, it could make the one-time payment, which was always in its contemplation and this is what the tribunal has upheld. In this behalf it would be apposite to consider paragraph 1103 of Halsbury's Laws of England, 4th Edition which sets out that damages are to be distinguished from other kinds of money payments. Damages are defined as the disadvantage suffered by a person as a result of an act or default of another injuria is damage, which gives rise to a legal right to recompense and damages are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him. In the instant case, I find that the one-time payment is certainly not pecuniary recompense for an actionable wrong done to GSPC by Niko. On the other hand, it is merely a payment due under an express provision of the contract. The quantification of that payment is a matter of application of the formula, which has been done in the instant case and has been considered by the arbitral tribunal. The view of the arbitral tribunal must prevail. This court cannot substitute that view with its own view, nor can the petitioner-Niko be heard to suggest that an alternate view could have been taken. As long as it was a possible view, the working of the formula cannot be interfered with.

54. Paragraph 1103 of Halsbury's distinguishes between kinds of money payments. Damages, as dealt with earlier, are said to be distinguishable from debts and from a sum of money payable under a contractual liability to pay a

sum on a given event. In fact, damages are sought to be distinguishable from compensation and from a penalty and from costs. In the present case, once we come to the conclusion that the amount awarded is not damages and for breach of contract, the petitioner-Niko has no case whatsoever to challenge the award. It will be also beneficial to consider Anson's on the Law of Contract, which, in Chapter 18, deals with actions to recover an agreed sum. The claim in that case was for a liquidated amount and the defendant was obliged under the contract to pay money. Although in that sense, it is said to be similar to specific performance, it is distinguishable and does not attract the same bar in law. The Law of Contract draws a clear distinction between a claim for an agreed sum and a claim for damages for breach of contract. The claimant need not prove loss where a claim is for payment of an agreed sum and remoteness of damages and mitigation of loss are irrelevant in such situations. In the instant case, the formula is meant to provide for such payment. The application of the formula is a matter which was before the tribunal and which the tribunal has considered. The formula was admittedly applicable being within the contractual scope and was not extraneously sourced. There is no question of any further proof of loss caused.

55. In *Divisional Controller, KSRTC Vs. Mahadeva Shetty & Anr.*[18], the court had occasion to consider the meaning of the expression "compensation", as stated in the Oxford Dictionary, and observed that it signifies that which is

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18 *(2003) 7 SCC 197*

given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another. Its primary signification is equivalence and the secondary and more common meaning is something given or obtained as an equivalent of sorts. Pecuniary damages are to be valued on the basis of full compensation. This concept was believed to be first stated by Lord Blackburn in *Livingston Vs. Rawyards Coal Company*[19]. The court further observed that the Rule of Law requires that wrongs should not remain unredressed. All the individuals or persons committing wrongs should be liable for an action and damages for breach of civil law or for criminal punishment. Compensation means anything given to make things equivalent, a thing given or to make amends for loss. It need not therefore be in terms of money. Compensation is an act which court orders to be done or a money which court orders to be paid by a person, whose acts or omissions have caused loss or injury. The term "compensation" is not ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damages. In the instant case, the expression "compensation" is used in several places throughout the contract. However, as rightly suggested, the purpose of making the one-time payment is to balance

[19] (1880) 5 AC 25.

the non-supply of gas from D6 or from other sources. It is not damages for breach of contract, as contemplated. There is no question of an action for damages of breach of civil law or criminal punishment in the instant case. The compensation payable by way of one-time payment was a contractual payment and not beyond the terms of the contract or for breach of contract and hence cannot be questioned at this stage.

56. The two essential aspects in the award that have been assailed are whether the Balancing Gas Agreement came into operation and whether the supply of shortfall gas was made with the knowledge and consent of Niko. Mr. Kapadia has submitted that these are the two issues, which would decide the fate of the claim and the challenge in this petition. These had been answered in favour of GSPC. The rest of the issues would be determined on the basis of these two issues.

57. Issue no.3 has been decided after a detailed analysis, as evident from the award paragraphs 35 to 74.The tribunal held that the BGA had come into force. In doing so, the tribunal considered clauses (2.1), (3.1.1), (3.1.2), (33) and (41) of the contract. It also considered clauses (10.1), (11.1) and (13.2). As far as the evidence is concerned, the tribunal considered the deposition of Shri Ravindra Agarwal on behalf of GSPC at some length. Likewise, the evidence of one Ajith Murlidharan on behalf of Niko was also considered. Ajith Muralidharan admitted that Niko had not objected to GSPC meeting the

shortfall gas obligation of the GSA customers from GSPC's trading portfolio. Ajith Muralidharan also admitted that shortfall gas supplied to GSA customers was as a direct result of production from the Hazira Field declining. The tribunal analyzed the correspondence between the parties; in particular, the letter at Exhibit C-49 being the letter dated 16th March 2007, whereby Niko agreed to compensate GSPC by providing gas. The reply to that letter dated 3rd May 2007 and the rejoinder thereto dated 5th June 2007 from Niko (Exhibit C-51) was also considered. Numerous other letters and e-mails between the parties have also been considered by the tribunal and these established that the conditions precedent suggested on behalf of Niko were not acceptable to GSPC. Furthermore, the arbitral tribunal, after considering Exhibits C-53, C-54, C-56, C-57, R-79 and C-5, concluded in paragraph 47 that Niko had given up the contention that the Balancing Gas Agreement was subject to the execution of the D6 Term Sheet. In any event, it transpires that the term sheet was executed by GSPC at its end. The tribunal thus negated Niko's contention that the term sheet should come into existence in order to enable the BGA to become operational.

58. The term sheet was relevant only for supply of gas from D6. This had not happened. Once this is an admitted fact that no gas was supplied from D6, the relevance of the term sheet pales into insignificance and need not engage our attention. In paragraph 50, the arbitral tribunal considered the important provisions of the BGA, the key commercial terms in clauses (6),

(10.1), (11.1) and (13.2). Clause (10.1) provided that any modification to the BGA would be required to be in writing and signed by the parties. Clause (11.1) provided for reference of unresolved disputes and differences to arbitration and clause (13.2) provided that the BGA represented the entire agreement between the parties by superseding all documents, letters, oral statements etc. Thus, clauses (10.1), (11.1) and (13.2) were agreed between the parties as provisions that would survive the expiry of termination or termination of the BGA. The award also reveals that the arbitral tribunal has considered detailed e-mail exchanged between the parties, effective at-least, from May, 2008. Reference has been made to Exhibits C-9 to C-12 and C-14 to C-18 and all of these were considered while determining the fact that the BGA had become operational. There was no doubt as to the validity of the agreement or the fact that the BGA had come into effect. Therefore, in my view, there is no patent illegality that has been pointed out. The manner in which the arbitral tribunal proceeded to determine this issue is well within the framework of law. After hearing both sides, a fair opportunity was granted to Niko to respond to the contentions. In fact, the findings are partly on the basis of admissions in the documentation provided by Niko itself such as the statutory reports and also admissions of its witness Ajith Muralidharan. In that view of the matter, I find no reason to find fault with the findings on these aspects.

59. To the extent it concerns the supply of shortfall gas and the likelihood

of a claim, the award has dealt with it in some detail in paragraphs 62 to 74. The tribunal has dealt with the admissions on behalf of Niko in their statutory filings, all of which indicate that they were making provisions for the liability in relation to the one-time payment. Various estimates have surfaced in the course of the trial and as evident from the record. For instance, the provisioning has ranged from USD 27 million for the year ended 2008, as evident from Exhibit C-31; USD 11.2 million as of March 2009, as evident from Exhibit C-34; USD 10 million for the year ended March 2010, as seen from Exhibit C-35 and; USD 11 million as of March 2011, as seen from Exhibit C-36. In answer to questions 178 to 181, the witness Muralidharan on behalf of Niko confirmed that the Balancing Gas Agreement or the Gas Swapping Agreement, referred to in the Auditor's Reports/statutory filings, are the same documents, namely, the Balancing Gas Agreement between Niko and GSPC. Thus, it is well-nigh impossible to dispute the fact that the likelihood of making payments under the provisions of clause (6.2) was very much alive and there is no substance in the challenge to that finding. It is material to note here that none of the admissions have been questioned and all prima facie appear to be unconditional. Paragraph 79 of the award records the fact that the Balancing Gas Agreement was in existence and that its contents are admitted by Niko and GSPC. The tribunal holds that it is a commercial contract and one that was entered into voluntarily. Furthermore, the arbitral tribunal has recorded in paragraph 93 that documentary evidence comprising Exhibits C-49, C-51, C-53, C-54, C-55, C-56, C-57, C-61, C-64, C-68 and C-70, R-37 and R-62, all show that supply of shortfall gas was made with the knowledge and consent of Niko. There have been attempts by Niko to contend that the particulars of the gas supplied have not been submitted, but these have been rejected by the tribunal while observing that no purpose would be served by complaining about it at this stage. All of these were available, if Niko chose to seek these particulars. While dealing with the additional issue, the arbitral tribunal has concluded that the contention of Niko that the one-time payment claim is a claim for liquidated damages is unsustainable. This has been negated effectively. The view of the arbitral tribunal is certainly a possible view and one that is not perverse or otherwise representing any patent illegality. The arbitral award is well-reasoned and as seen from paragraph 97 and onwards, appreciates the evidence, analyzes the effect of the various provisions and comes to a possible and a very likely conclusion. The conclusion is certainly one which cannot be faulted as being improbable. The decision on merits cannot be questioned in a proceeding under Section 34 and this aspect has been repeatedly established before our courts. In the circumstances, the challenge to the award must fail and as a consequence, I pass the following order :-

(i) Arbitration Petition is dismissed.

(ii) The petitioner-Niko shall pay costs of Rs.5,00,000/- to the respondent-GSPC within a period of twelve weeks from the date of uploading of this judgment.

(iii) In view of disposal of the petition itself, Notice of Motion No.59 of 2018 has become infructuous and the same is also disposed.

60. At this stage, Mr. Shroff on behalf of the petitioner seeks stay to the operation of this order. The petition is being pending since 2017 and has been at the stage of admission, no stay has been operating thus far. In the circumstances, request for stay to the operation of this order is declined.

(A.K. MENON, J.)

Sneha A. Dixit Digitally signed by Sneha A. Dixit Date: 2020.06.09 20:39:47 +05'30'