

O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015 and
O.P.Nos.438, 664,526, 696 and 102 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	20.11.2019
Judgment pronounced on	19.02.2020

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THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.690 of 2014
and
O.P.Nos.86, 407, and 533 of 2015
and
O.P.Nos.438, 664,526, 696 and 102 of 2016

M/s.GAIL (India) Limited,
No.16, Bhikaji CAMA Place,
R.K.Puram, New Delhi.

... Petitioner
(in O.P.Nos.690 of 2014, 533 of
2015, 664 of 2016, 696 of
2016 and 102 of 2016 and
Respondent in other OPs.)

Vs.

M/s.ArKay Energy(Rameswaram)Limited,
Rep. by its President (Commercial and Legal)
Mr.R.Jarard Kishore,
New No.20, Old No.129, Chamiers Road,
Nandanam, Chennai – 600 035.

... Respondent
(in O.P.No.690 of 2014 and
Petitioner in 86 of 2015)

M/s.Coromandel Electric Co. Ltd
No.93, Santhome High Road,
Karpagam Avenue, R.K.Puram,
Chennai – 600 028.

... Respondent
(in O.P.No.533 of 2015 and
Petitioner in O.P.No.407 of 2015)

O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015 and
O.P.Nos.438, 664,526, 696 and 102 of 2016

Saheli Exports Pvt. Ltd.
No.25, Sri Madhavan Nair Road,
Mahalingapuram, Nungambakkam,
Chennai – 600 034.

... Respondent
(in O.P.No.664 of 2016 and
Petitioner in O.P.No.438 of 2016)

Kaveri Gas Power Ltd
No.5, Ranganathan Garden,
Anna Nagar,
Chennai – 600 040.

... Respondent in
(in O.P.No.696 of 2016 and
Petitioner in O.P.No.526 of 2016)

M/s.OPG Energy Pvt Ltd,
A Pvt Ltd Company incorporated
Having its registered office at
No.167, St. Mary's Road, Alwarpet,
Chennai – 600 019.

... Respondent
(in O.P.No.102 of 2016)

PRAYER IN O.P.No.690 OF 2014: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 22.06.2014 passed by the learned Arbitral Tribunal in between M/s.Arkey Energy(Rameswaram) Limited and M/s.GAIL (India) Limited; allow the counter claim of the Petitioner for damages for a sum of Rs.1,00,00,000/-; and dismissed the claims of the first Respondent and for costs.

PRAYER IN O.P.No.86 OF 2015: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 22.06.2014 in so far as it relates to the directions that the Respondent is entitled to demand the declared price from 16.11.2011.

PRAYER IN O.P.No.407 OF 2015: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award of the learned Sole Arbitrator dated 09.03.2015.

PRAYER IN O.P.No.533 OF 2015: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 09.03.2015 passed by the learned Arbitral Tribunal in between M/s.Coromandel Electric Co. Ltd., and M/s.GAIL (India) Limited in so far as Petitioner's claim for the Principal sum due for the period 01.07.2005 to 15.11.2008 and the interest due from 01.07.2005 till 28.11.2011 has been disallowed and allow the counter claim of the Petitioner in full as prayed for and dismiss the claim of the first Respondent and for costs.

PRAYER IN O.P.No.438 OF 2016: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 04.06.2016 passed by the learned Arbitral Tribunal in so far as it awards in favour of the first Respondent and entitles the First Respondent to recover from the Petitioner difference in price of gas from the period from 30.11.2008 to 31.05.2010 along with interest 12% per annum if paid within 30 days of demand made by the first Respondent and at 18% if paid after 30 days of the demand from the date of Award till the date of payment.

PRAYER IN O.P.No.664 OF 2016: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 04.06.2016 passed by the learned Arbitral Tribunal in Arbitration between M/s.Saheli Exports Pvt. Ltd. and M/s.GAIL (India) Limited in so far as the

Petitioner's claim for the principal sum due for the period 06.06.2006 to 29.11.2008 and the interest due at 24% per annum amounting to Rs.2,54,34,732/- as on 10.01.2013 together with further interest at contractual rate of SBI standard PLR as base rate + additional 2% has been disallowed.

PRAYER IN O.P.No.526 OF 2016: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 09.06.2016 passed by the learned Arbitral Tribunal in so far as it awards in favour of the First Respondent and entitles the first Respondent to recover from the Petitioner difference in price of gas for the period from 20.12.2008 to 31.05.2010 along with interest at 10% per annum from 31.05.2010 till the date of payment.

PRAYER IN O.P.No.696 OF 2016: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 09.06.2016 passed by the learned Arbitral Tribunal in Arbitration in between M/s.Kaveri Gas Power Limited and M/s.GAIL (India) Limited in so far as the Petitioner's claim for the principal sum due for the period 06.06.2006 and 19.12.2008 and the interest due amounting to Rs.2,07,54,548/- as on 15.04.2013 with further interest 18% per annum from 15.04.2013 till realization together with damages of Rs.1,00,00,000/- has been disallowed and allow the counter claim for the Petitioner in full as prayed for and dismiss the claim of the Respondent and for costs.

PRAYER IN O.P.No.102 OF 2016: Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 02.09.2015 passed by the learned Arbitral Tribunal in

O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015 and
O.P.Nos.438, 664,526, 696 and 102 of 2016

Arbitration between M/s. OPG Energy Pvt Ltd and M/s.GAIL (India) Limited to allow the counter claim of the Petitioner including interest in full as prayed for and dismiss the claim of the first Respondent and for costs.

For Petitioner/
Respondent : Mr.P.V.S.Giridhar
for M/s.Giridhar and Sai
(Petitioner in
O.P.Nos.690/2014,664/2016 and
696/2016 and 102 of 2016
and Respondent in O.P.No.86/15,
438/2016 and 526/2016)
Mr.T.R.Rajagopalan, senior counsel
(Petitioner in O.P.No.533/2015 and
Respondent in 407 of 2015)
Mr.Harishankar
(Respondent in O.P.No.533 of 2015
and Petitioner in O.P.No.407 of 2015)
Mr.Anirudh Krishnan
(Respondent in O.P.No.690/2014
and Petitioner in O.P.No.86 of 2015)
Mr.Vinodkumar
(Respondent in O.P.No.664/2016 and
696/2016
Petitioner in O.P.No.438/2016 and
526 of 2016 and Respondent in
O.P.102 of 2016)

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COMMON ORDER

In these nine Petitions, five separate arbitral awards in disputes between GAIL (India) Limited (GAIL), on the one hand, and five

different private counter parties, on the other, are challenged. Nonetheless, contract documents, which are *in pari materia*, and common clarifications were interpreted, in these five arbitrations, thereby necessitating a common order in the interest of all concerned. For the sake of convenience, the private counter party is referred to, specifically, as Arkay, Coromandel, Saheli, Kaveri and OPG, respectively, and generically or collectively as the Private Counter Party/Parties. The arbitration/Award in each of these five arbitrations is referred to for convenience as the Arkay Arbitration/Award, Coromandel Arbitration/Award, Saheli Arbitration/Award, Kaveri Arbitration/Award and OPG Arbitration/Award, respectively.

2. In the Arkay Arbitration, in Parts-I and II, Arkay prayed for declarations that the demand under Debit Note No.33 dated 19.12.2011 in respect of gas supplied between 01.07.2005 and 31.12.2010 and 01.04.2011 and 15.11.2011 are illegal, untenable and unenforceable and for consequential injunctions to restrain GAIL from claiming the difference between APM and non-APM price for the above period. In addition, Arkay made a claim for refund of Rs.4,67,67,809/- for the period 16.11.2011 till the date of claim statement. GAIL, in turn, made counter claims for a sum of about Rs.85.55 crore towards such difference in price and for damages

of Rs.1 crore with interest on both counter claims. By Award dated 22.06.2014 (the Arkay Award), the Arbitral Tribunal rejected the debit note for the period prior to 01.01.2011 and for the period from 01.01.2011 to 15.11.2011 and upheld GAIL's right to charge the non-APM price from 16.11.2011. The Arkay Award is challenged, in toto, by GAIL and, in part, by Arkay as regards the rejection of its claim as regards the period commencing from 16.11.2011.

3. In the Coromandel Arbitration, Coromandel prayed for a declaration that GAIL's letter dated 29.11.2011 is against the terms of the agreements between the parties and, therefore, illegal, invalid and void and for a direction to GAIL to refund a sum of Rs.3,62,90,023/- with interest thereon at 18% per annum from the date of payment till the date of refund, being monies paid by Coromandel under protest for the period up to December 2012, and to further direct GAIL to refund the further sums paid by Coromandel from January 2013 onwards with interest thereon at 18% per annum. In turn, GAIL counter claimed a sum of Rs.42,91,54,646/- towards the difference in gas price for the period 01.07.2005 to 31.12.2010(Rs.40,47,05,498/-) and 01.01.2011 to 15.11.2011 (Rs.2,44,49,148/-) along with interest of Rs.35,36,36,749/- from 01.07.2005 onwards. By Award dated 09.03.2015 (the Coromandel

Award), the Arbitral Tribunal held that GAIL is entitled to charge the non-APM price from 16.11.2008 to 15.11.2011 and to claim interest on the amount payable from 29.11.2011. Coromandel challenged the Award, as a whole, whereas GAIL challenged the Award insofar as its claim was rejected for the period up to 15.11.2008.

4. In the Saheli Arbitration, Saheli requested relief in respect of the period extending from 06.06.2006 to 29.11.2008 and the period subsequent thereto and, in specific, requested for a declaration that the applicable price in the aforesaid period is the APM price of Rs.3200/- per SCMD and not the non-APM price of Rs.3840/- per SCMD. Consequently, the debit note of GAIL for Rs.3,19,59,256/- was challenged. In response, GAIL counter claimed Rs.3,19,59,256/- with interest thereon. By Award dated 03.06.2016 (the Saheli Award), Saheli was directed to pay at the non-APM price from 30.11.2008 along with interest thereon at 12% per annum and, in case of default in making payment, at the enhanced interest rate of 18% per annum. The Saheli Award is challenged by Saheli as regards the period commencing from 30.11.2008 and by GAIL as regards the period prior thereto.

5. In the Kaveri Arbitration, Kaveri requested relief in respect of the period extending from 06.11.2006 to 29.11.2008 and the period subsequent thereto and, in specific, requested for a declaration that the applicable price in the aforesaid period is the APM price of Rs.3200/- per SCMD and not the non-APM price of Rs.3840/- per SCMD. Consequently, the debit note of GAIL was challenged. In response, GAIL counter claimed Rs.2,55,10,181/- in respect of the aforesaid period along with interest and damages. By Award dated 22.06.2016 (the Kaveri Award), the Arbitral Tribunal allowed the claims of Kaveri for the period up to 19.12.2008 and rejected the claims of Kaveri for the period 20.12.2008 to 31.05.2010 and sustained the corresponding counter claims of GAIL except for the claim for damages. Kaveri challenged the Award insofar as it allowed the counterclaim of GAIL for the period commencing from 20 December 2008 and ending on 31.05.2010 along with interest at 10% per annum. GAIL challenged the Award in respect of the period from 06.06.2006 to 19.12.2008 and also in respect of the disallowed interest and damages claims.

6. In the OPG Arbitration, OPG requested relief in respect of the period from 01.07.2005 to 30.06.2010 and for the period commencing from 01.06.2010 by way of a declaration that GAIL's debit

notes charging non-APM prices are illegal, null and void. By way of counter claims, GAIL requested that the debit notes be upheld and that interest be paid on amounts payable up to 28.01.2013 and for further interest. By Award dated 02.09.2015 (the OPG Award), the Arbitral Tribunal held that the claim for APM price is invalid for the period prior to 16.11.2011 but is valid for the period commencing from 16.11.2011. GAIL has challenged the OPG Award.

7. I heard Mr.P.V.S.Giridhar, the learned counsel who appeared for GAIL, in all the cases, and the learned senior counsel, Mr.T.R. Rajagopalan, who made submissions for GAIL in the Coromandel Arbitration. As regards the Private Counter Parties, I heard Mr. Vinod Kumar, learned counsel who appeared for Saheli, Kaveri and OPG but assisted Mr. Yashod Vardhan, learned senior counsel, in GAIL's challenge to the OPG Award; Mr. Harishankar, learned counsel who appeared for Coromandel; and Mr. Anirudh Krishnan, learned counsel who appeared for Arkay.

8. The main contentions of Mr.P.V.S. Giridhar were as follows. His first contention was that the Private Counter Parties utilised the gas for captive consumption and did not supply power to the general public.

Consequently, he submitted that these Private Counter Parties were not entitled to the supply of gas at APM price. In support of this contention, he referred to various definitions under the Electricity Act, 2003 (the Electricity Act), such as the definitions of grid under section 2 (32), wheeling under section 62 (c) read with section 2 (76), etc. He also submitted that wheeling is akin to using the grid for transportation and that the Private Counter Parties used the grid only for such purpose. His second contention was that gas is a scarce natural resource, which vests with the Union of India as per Article 297 of the Constitution on behalf of the people of India, and is subject to the public trust doctrine. He also pointed out that the Government owns the gas till it reaches the end consumer and that, therefore, GAIL deals with the gas as the custodian and trustee of a public resource. As a consequence, he contended that GAIL cannot waive or acquiesce in the supply of gas at APM price to persons like the Private Counter Parties who do not supply power to the general public. In order to substantiate the submission on the public trust doctrine, he referred to the judgment of the Hon'ble Supreme Court **Reliance Natural Resources Ltd. v. Reliance Industries Ltd. (2010) 7 SCC 1 (RNRL)** and, in specific, paragraphs 75, 114,117, 122, 127, 128, 151 and 152 thereof. As regards waiver and estoppel, he submitted that GAIL is a marketing agent of ONGC/MoPNG and does not have the

authority to waive the right to claim non-APM prices and that an estoppel does not operate, in this regard, against GAIL. On this issue, he referred to paragraph 159 of the judgment of the Gujarat High Court in **Essar Steel Ltd. v. Union of India 2005 SCC Online Guj 194** and to paragraph 20 of the judgment of the Kerala High Court in **Mahindra Holiday Resorts India Ltd. v. State of Kerala (2019) 3 KLJ 166**. From a contractual perspective, his contention was that Article 10 empowers the Central Government/MoPNG to fix the price and that parties can agree on the method of price fixation as per Section 9 of the Sale of Goods Act, 1930. According to the learned counsel, once price fixation by the Central Government/MoPNG was agreed to as the method, the conduct of GAIL and its communications on price are irrelevant. His fourth contention was that the Private Counter Parties misrepresented the nature of their business to GAIL and thereby derived unfair benefits or, at a minimum, there was a mistake with regard to the applicability of APM price to the Private Counter Parties. In this connection, he also submitted that there cannot be acquiescence when there is misrepresentation or mistake and that, in any event, acquiescence can only be from the date of knowledge and that GAIL and/or the MoPNG did not have the requisite knowledge that the Private Counter Parties were merely using the grid for wheeling purposes for its captive consumers. Consequently, GAIL is

entitled to the benefit of excluding time under Section 17 of the Limitation Act, 1963(the Limitation Act). In support of this proposition, he relied on paragraph 21 of the judgment of the Hon'ble Supreme Court in **Mahabir Kishore v. State of M.P. (1989) 4 SCC 1** and on paragraph 48 of the judgment in **Pallav Sheth v. Custodian (2001) 7 SCC 549**. His fifth contention was that the circular dated 20.06.2005 and the clarification dated 27.06.2006 of the Ministry of Petroleum and Natural Gas (MoPNG) clarified beyond doubt that the Private Counter Parties cannot claim the benefit of APM price. The sixth contention of the learned counsel was that all the monetary claims of GAIL, which were within the period of limitation by extending the benefit of Section 17 of the Limitation Act or otherwise, should have been upheld by the Arbitral Tribunal concerned. The seventh contention of the learned counsel was that the Private Counter Parties were unjustly enriched by paying APM price and, thereafter, selling power at market prices. In this connection, he referred to paragraph 159 of the judgment in **Indian Council for Enviro-Legal Action v. Union of India (2011) 8 SCC 161** and to paragraph 14 of the judgment in **Chandi Prasad Unniyal v. State of Uttarakhand (2012) 8 SCC 417**.

9. With specific reference to the Arkay Award, he pointed out that the finding at paragraph 25 that the power sector is entitled to APM

price, as per the Price Control Order, is totally erroneous especially in light of the clarification dated 27 June 2006. Similarly, as regards the OPG Award, he pointed out that the conclusions in the OPG Award at pages 147, 149 and 150 of the typed set that there was no misrepresentation, that GAIL waived its right to claim non-APM price and that Section 17 of the Limitation Act is inapplicable are patently erroneous and liable to be interfered with. By referring to Clause 2.2 of the Gas Sales and Transmission Agreements, which were entered into in December 2010, he pointed out that the said clause enables GAIL to collect dues pertaining to the previous agreement.

10. The learned senior counsel, Mr.T.R.Rajagopalan, made submissions next for GAIL in the Petitions relating to the Coromandel Award. He first pointed out that the conclusions in the Award at pages 79 to 89 are on the basis of a reasonable construction of the Price Control Order and the clarification. As regards limitation, he referred to the conclusion at page 90 that Articles 58 and 113 of the Limitation Act apply, whereas Section 17 thereof does not apply. According to the learned senior counsel, this conclusion is patently flawed because GAIL permitted the Private Counter Party to pay at APM price either on account of fraud or mistake. In support of his submissions, he referred to the judgment of the

Supreme Court in **Salonah Tea Company Ltd. v. The Superintendent of Taxes, Nowgong (Salonah Tea Company), AIR 1990 SC 772**, and, in particular, paragraphs 13 to 15 thereof to the effect that in the absence of undue laches or abandonment of right, the claim should not be rejected. He also referred to the judgment in **Commissioner of Customs, New Delhi v. Punjab Stainless Steel Industries (Punjab Stainless Steel Industries) (2001) 6 SCC 284** to the effect that the extended period of limitation under section 28 of the Customs Act would be available in cases of misstatement and suppression. He next adverted to the judgment in **Pallav Sheth v. Custodian (Pallav Sheth) (2001) 7 SCC 549**, wherein, at paragraph 48, the Hon'ble Supreme Court held that the period of limitation under Section 17 of the Limitation Act would run from the date of knowledge of fraud or mistake. The learned senior counsel concluded his submissions by pointing out that the finding of the Arbitral Tribunal that interest can be claimed only from 29.11.2011 is liable to be interfered with.

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11. In response and to the contrary, the learned counsel for the respective Private Counter Party made submissions. The learned counsel, Mr. Vinod Kumar, made submissions in respect of the Saheli and Kaveri Awards. The learned counsel stated that both Saheli and Kaveri are

small consumers. With specific reference to the Saheli Award, he pointed out that the MoPNG issued the Pricing Order dated 20.06.2005 stipulating that only consumers in sectors such as power and fertilizers would be entitled to APM price and that pursuant thereto, by side letter dated 28.06.2005 (page 56 of Saheli's typed set), GAIL fixed the price at Rs.3200/- per 1000 SCMD by incorporating the APM price as the price payable by Saheli. Thereafter, by letter dated 06.06.2006, MoPNG increased the APM price for consumers, other than power and fertilizer sector consumers, including small consumers. In that factual context, GAIL requested for a clarification by letter dated 12.06.2006 from the MoPNG in respect of small power producers (page 111 of volume II of Saheli's typed set). Accordingly, he contended that the clarification should be interpreted in light of the letter requesting clarification. When so interpreted, he submitted that it is beyond doubt that the effect of the clarification was not to bring power producers, such as Saheli, within the ambit of non-APM price. For this purpose, he adverted to the letter dated 12.06.2006 and invited my attention to the fact that the clarification was in respect of four small consumers, including two which adopted wheeling, thereby underscoring that GAIL was acutely conscious that there were captive consumers who availed APM price and that there was no misrepresentation in that regard. However, he pointed out that such

material evidence was disregarded. In fact, he pointed out the assumption of the Arbitral Tribunal that the clarification dated 27.06.2006 is clear is contradicted by GAIL's subsequent letters to MoPNG, including the letter dated 24.11.2011, wherein the MoPNG was informed that APM price would be charged pending clarification from the MoPNG. His next contention was that the word "supply" in the Gas Supply Agreement cannot be interpreted with reference to the Electricity Act. In support of the submission, he referred to the judgment in **Tata Power Co. Ltd. v. Reliance Energy Ltd. (2009) 16 SCC 659**, wherein, at paragraph 96-100, it was held that the word "supply" is used in different senses even within the Electricity Act. He also countered the submission that the supply should be made to the grid and not through the grid by pointing out that the grid is not a person and, therefore, cannot be the buyer or seller. On the issue of interpretation, he referred to the judgement in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2016) 4 SCC 126 (BALCO)**, wherein the appropriate interpretive method as regards different classes of documents was elucidated. By referring to the CAG Report and the letter dated 24.11.2011, at page 223, he pointed out that there was no allegation of fraud or misrepresentation as against Saheli. On the question of limitation, he pointed out that the period of limitation should be computed from the due date of respective

invoices and that the invoices were payable within three days. He relied upon paragraphs 15 and 16 of the judgment of the Hon'ble Supreme Court in **Union of India v. M.K. Sarkar (M.K. Sarkar)(2010) 2 SCC 59** in support of the principle that a demand made after the expiry of the period of limitation does not create a fresh cause of action or extend the limitation period. He also relied on the judgments in **State of Goa v. Praveen Enterprises (State of Goa)(2012) 12 SCC 581** and **Voltas Ltd. v. Rolta India Ltd. (Voltas) (2014) 4 SCC 516** in support of the contention that the counter claim of GAIL, which was made in January 2013, is barred by limitation.

12. With specific reference to the Kaveri Award, he pointed out that there is a categorical finding, in the Award, at page 280 of the typed set of pleadings that the cause of action arose on 19.12.2011 when GAIL issued a debit note demanding the differential price and that it could be claimed for the three year period that preceded the claim, i.e. from 20.12.2008. This conclusion is patently contrary to the Limitation Act according to Mr. Vinod Kumar. He also pointed out that the Kaveri Award is patently flawed because the Arbitral Tribunal relied on the Coromandel Award (paragraph 11 of the Award at page 288 of the typed set).

13. The learned senior counsel, Mr. Yashod Vardhan, made submissions, thereafter, in respect of the OPG Award. He invited my attention to specific documents in the additional typed set of papers so as to establish that GAIL and the MoPNG were fully aware of the nature of the business of OPG. Notwithstanding such knowledge, he pointed out that gas was supplied at APM price. In specific, he referred to the letter dated 27.03.2004 (page 32) whereby wheeling permission was granted to OPG by TNEB. He also referred to the letter dated 14.02.2005 from TNEB to GAIL regarding wheeling of power from OPG's captive power plant to its joint venture companies through the TNEB grid and pointed out that GAIL cannot maintain and certainly cannot sustain the allegation of misrepresentation or mistake in light of this communication. He also referred to the Pricing Order dated 20.06.2005 (page 43) and that dated 05.06.2006 (page 46), the request for clarification (pages 47 to 51) and the clarification at page 53. He also referred to the letter dated 04.07.2006 whereby OPG was requested for a clarification and to the reply from OPG at page 55. Based on the aforesaid, he submitted that there can be no doubt at all that both GAIL and the MOPNG were fully aware about the nature of business of OPG and in spite of such knowledge, they continued to supply gas at APM price. Consequently, he contended that it is

completely untenable to subsequently take the position that there was misrepresentation, fraud or mistake.

14. By adverting to the findings in the OPG Award at pages 143, 145, 146, 147, 148, 149 and 152, he submitted that there are categorical findings, on the basis of appraisal of evidence, that OPG did not misrepresent and that GAIL, in any event, waived its right to claim the differential price. He concluded by submitting that the levy of non-APM rate from 16.11.2011 is not under challenge by OPG. In support of his submissions, he referred to and relied upon judgments of the Hon'ble Supreme Court in **Bhupendra Singh Bhatia v. State of MP (2006) 13 SCC 700** and paragraphs 16, 24-28 in **Bharat Petroleum Corporation Ltd. v. Maddula Ratnavali (2007) 6 SCC 81** for the principle that reasonableness and non-arbitrariness should inform State action even in a contractual context. He concluded by referring to paragraphs 22-24 of the judgment of the Hon'ble Supreme Court in **Kanchan Udyog Ltd. v. United Spirits Ltd. (Kanchan Udyog)(2017) 8 SCC 237**, wherein the concepts of waiver and acquiescence were explained and to the conclusion of the Hon'ble Supreme Court in paragraphs 66 and 67 in **Arun Kumar Agarwal v. Union of India (2013) 7 SCC 1** that the court should not grant relief by relying upon the CAG report.

15. The learned counsel, Mr. Harishankar, made submissions next in respect of the Coromandel Award. His first submission was that all power sector consumers of gas were entitled to such supply at APM price and that there was consensus ad idem as regards this on the part of GAIL, MoPNG and Coromandel. Consequently, there was no fraud or misrepresentation and mistake was neither pleaded nor argued before the Arbitral Tribunal. He pointed out that the agreement was originally with India Cements and not with Coromandel and that, subsequently, by letter dated 24.06.2002, the allocation was transferred to Coromandel and a tripartite assignment agreement was executed for this purpose. In order to establish that APM price was committed to all power sector consumers, including captive power producers, he referred to the letter dated 07.04.2003 from the MoPNG to GAIL, wherein India Cement's request to transfer the allocation to Coromandel for captive power purposes was accepted (page 55). He also referred to the letter dated 02.05.2005 (page 75) and the communication dated 20.06.2005 (the Pricing Order) from the MoPNG to GAIL, ONGC and Oil India regarding the continuation of APM price for the power and fertilizer sector (page 78) albeit at the revised price of Rs.3200/- per 1000 SCMD and the consequential letter to Coromandel dated 28.06.2005 by which the said price was incorporated in Article 10.01(a) of the Agreement between GAIL and Coromandel (page

82). He also referred to the letters dated 05.06.2006 (page 88), the letter dated 12.06.2006 seeking clarification (page 90) and the clarification on 27.06.2006 (page 94) so as to emphasise that the clarification should be interpreted in light of the letter requesting such clarification. By adverting to the request for confirmation dated 04.06.2006 based on the letter dated 05.06.2006, reply thereto dated 06.07.2006 (page 100), the Pricing Order dated 31.05.2010 regarding APM price revision (page 129) and the subsequent Gas Supply and Transmission Agreement dated 15 December 2010 (pages 135 to 181), he pointed out that it is abundantly clear that it was intended to supply gas at APM price to Coromandel. He also referred to the letter dated 24.11.2011 (page 189), which reflects the understanding of GAIL that Coromandel is entitled to APM price. Nonetheless, as evidenced by the said letter, he submitted that action was taken to claim the differential price based on the CAG Report and the MoPNG letter dated 17.11.2011.

16. By referring to the Pricing Order, he submitted that there is nothing therein to indicate that APM price is applicable only to a defined set of power producers. He further submitted that both GAIL and Coromandel were ad idem on this issue and that the contract should govern and that no superior power was vested in GAIL or the MoPNG.

With regard to the affidavit of the MoPNG, in independent legal proceedings before the Andhra Pradesh High Court, he submitted that the said affidavit should not have been relied upon by the Arbitral Tribunal especially because it was not affirmed by GAIL and there was no opportunity to cross-examine the deponent. Mr.Harishankar concluded his submissions by relying upon the judgment of the Hon'ble Supreme Court in **Associate Builders v. DDA (Associate Builders)(2015) 3 SCC 49** on the scope of Section 34 of the Arbitration Act and on the judgment in **Radhakrishnan Agarwal v. State of Bihar (1977) 3 SCC 457** for the proposition that the contract governs the relations between parties and that extra-contractual authority cannot be exercised.

17. I next heard Mr. Anirudh Krishnan, the learned counsel for Arkay. He submitted that the pricing order dated 20.06.2005 and, in particular, clause (iii) thereof applies to all power and fertiliser sector consumers. Therefore, the burden of proof, as per Article 10.01 (b) of the GSA, was on GAIL to establish that a directive or notification was issued by the Government of India to modify or fix the price. He also pointed out that the rate charged by captive power producers is lower than the TNEB rate and that, therefore, the contention that there would be unjust enrichment is untenable. His next contention was that GAIL failed to

discharge the burden of proving that the CAG report covers the Private Counter Parties, including Arkay. With regard to fraud, he pointed out that Orders VI, Rule 4 of the CPC stipulates that particulars of fraud should be pleaded and that these principles also apply to arbitration proceedings. In this regard, he referred to and relied upon paragraph 27 of the judgement in **Ladli Prasad Jaiswal v. Karnal Distillery AIR 1963 SC 1279**. As regards misrepresentation, he contended that there are no contemporaneous documents that evidence an allegation of misrepresentation. He further submitted that Article 10.1 (b) of the GSA is prospective and not retrospective. By referring to paragraph 17 of the judgment in **Kalpna Trading Co. v. Executive Officer, Town Panchayat, Tiruchirapalli AIR 1999 Mad 371**, he pointed out that section 17 of the Limitation Act does not apply to the situation. On unjust enrichment, he relied upon paragraph 6 of the judgment in **Mahanagar Telephone Ltd. v. Tata Communication AIR 2019 SC 1233**. With regard to the public trust doctrine, he contended that the said doctrine was formulated to protect public resources and not payment obligations relating thereto. With regard to the course of dealing doctrine, he relied upon paragraph 28 of the judgment in **Ajmer Vidyut Viteran Nigam v. Rajasthan Electricity Regulatory Commission 2008 ELR (APTEL) 447** and paragraph 32 of the judgement in **Gedela S.Murthy v. Deputy**

Commssioner, Endowments Department (2007) 5 SCC 677. On the question of parties' understanding of a contract, he referred to paragraph 112 of **McDermott International Inc. v. Burn Standard Co. (2006) 11 SCC 181** and to paragraph 25-27 of **Pure Helium India Pvt. Ltd. v. ONGC (2003) 8 SCC 593** and concluded his submissions.

18. By way of rejoinder, Mr. T.R. Rajagopalan, submitted that the government is empowered to fix the price as per article 10 of the GSA and that the claims of GAIL are on the basis of such price fixation, which does not violate the contract. He referred to and relied upon a judgment of the Division Bench of this Court in **Ramanathapuram Market Committee, Virudhunagar v. East India Corporation Ltd., Madurai 89 LW 426** and, in specific, paragraph 9 thereof on the scope and ambit of section 17 of the Limitation Act.

19. Mr.Giridhar made the following submissions by way of rejoinder. GAIL does not fix the price and it is done by the government. The ownership of gas is with the people/Government of India and GAIL, as a trustee, is not entitled to waive or acquiesce. He further submitted that the conduct of GAIL is irrelevant in the determination of price and that the implication of the pricing orders should be judicially determined.

By referring to the pricing order and the clarification, he submitted that it is completely clear and would operate as a directive as per Article 10. With reference to fraud, misrepresentation and mistake, he submitted that there is no magic with regard to the word mistake and that it should be interpreted in common sense terms.

20.The oral and written submissions of the respective learned counsel/senior counsel were considered and the records were examined. The principal question that arises for consideration is whether GAIL is entitled to claim the differential amount, as between the APM price and non-APM price, from the Private Counter Parties and, if so, from which date. The starting point of this exercise should be the GSA and, in particular, Article 10 thereof, which is identical in all cases. Article 10 reads as under:

"10.01 Present price of 1000 (One Thousand) Standard Cubic meters of GAS w.e.f. 1.10.1997 is applicable as per Government Pricing Order No. L-12015/3/94-GP dated 18.9.1997 (Annexure III). After 31.3.2000 the SELLER shall have right to fix the price of GAS which may be as per directive, instruction, order, etc. of the Government of India etc which is likely to be market related in accordance with current policy of liberalization of

the Government of India and the BUYER shall pay to the SELLER such price of GAS. Provided further, the price of GAS so fixed is exclusive of Royalty, Taxes, Duties, Service/Transportation (Transmission) charges and all statutory levies as applicable at present or be levied in future by the Central or State Government or Municipality or any other local body or bodies payable on purchase of GAS from ONGC/other Producer(s) by the SELLER or on sale from SELLER to the BUYER and these shall be borne by the Buyer over and above the aforesaid price."

Upon examining the GSA, it is clear that the GSA does not specify that APM or non-APM price would be charged for the supply of gas by GAIL. The GSA, however, enables and empowers GAIL to fix the price after 31.03.2000 and further provides that such price may be fixed as per the directive, instruction or order of the Government of India. By Pricing Order dated 20.06.2005, APM price was fixed at Rs.3200/- per 1000 SCMD by the MoPNG and GAIL made the Pricing Order applicable to the GSA with the Private Counter Parties on the probable basis that they are power sector consumers. The Pricing Order reads, in relevant part, as follows:

"(iii).... Accordingly, it has been decided in the public interest that all available APM gas would be supplied to only the power and fertilizer sector

consumers against their existing allocations along with the specific end users committed under Court orders/small scale consumers having allocations upto 0.05 MMSCMD at the revised price of Rs.3200 MCM...."

Accordingly, the Private Counter Parties were charged at the APM price specified in the Pricing Order until the year 2011. During this period, GAIL, by letter dated 12.06.2006, requested for a clarification from the MoPNG with regard to four categories of buyers such as IGL and MGL and four specific small consumers in the power sector who use natural gas for captive generation and the clarification dated 27.06.2006 was received in response. In relevant part, it is stated as under in the clarification:

" APM gas price would be applicable for only those quantities of gas which are used for generating electricity which is supplied to the grid for distribution to the consumers through the public utilities/licensed distribution companies."

21. On receipt of the above clarification, GAIL requested the Private Counter Parties to confirm that they are generating/distributing electricity according to the guidelines of MoPNG and each Private Counter Party provided such confirmation in the year 2006. On different dates in December 2010, GAIL entered into a Gas Supply and Transmission

Agreement (GSTA) with the respective Private Counter Party. Article 10.1 thereof, which is identical in each GSTA, reads as follows:

"10.1 Gas Price

(a) For the supply of Gas against the quantity mentioned at Article 5.1, the price equivalent to US\$ 4.2/MMBTU on Net Calorific Value (NCV) basis (inclusive of Royalty) is applicable as per Government Pricing Order No.L-12015/8/10-GP dated 31.05.2010, and clarifications issued vide letter No.L-12015/8/10-GP dated 23.06.2010, and Letter No.L-12015/12/1-GP dated 24.11.2010 Annexure III). The price is linked to a calorific value of 10000 Kcal/SCM on Net Calorific Value (NCV) basis. The above price shall be converted to Rs./MSCM (at 10000 KCal/SCM) at RBI reference exchange rate of the month previous to the month during which supply of APM gas is made. The RBI exchange rate of the month would be calculated by taking the average of the RBI reference exchange rates for all days in the relevant month for which the rate is available on the RBI website.

(b) Notwithstanding Article 10.1(a), the SELLER shall have right to fix the Gas Price at any time in future as per directive, instruction, order, etc. of the MoP&NG/Government of India issued

*from time to time and the BUYER shall pay to the
SELLER such price of Gas fixed by the SELLER."*

On these facts, the question that arises is whether GAIL was entitled to subsequently claim the differential price as between APM price and non-APM price. Without doubt, the power to claim the differential price cannot be exercised if the limitation period had expired irrespective of whether there is waiver, acquiescence or estoppel. Therefore, the plea of limitation should be examined first. In this case, GAIL cited fraud, misrepresentation or mistake to overcome the plea of limitation by relying on Section 17 of the Limitation Act. Section 17, in relevant part, reads as under:

"S.17. Effect of fraud or mistake

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act-

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(c) the suit or application is for relief from the consequences of a mistake; or

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or mistake or could, with reasonable diligence, have discovered it..."

22. Thus, Section 17 of the Limitation Act enables a party to compute the limitation period from the date of discovery of the fraud or mistake provided it could not have been discovered earlier by exercising

reasonable diligence. However, it does not deal with misrepresentation. As correctly contended by the learned counsel/senior counsel for the Private Counter Parties, I do not find even allegations of fraud or misrepresentation at any point of time prior to the respective arbitrations, including in the demand letters. Moreover, especially in the OPG and Coromandel Arbitrations, I find that the correspondence and, in specific, the letter dated 14.02.2005 from TNEB to GAIL regarding OPG (page 37 of the additional typed set of the Petitioner in O.P. No.102 of 2016) and the letter dated 07.04.2003 from the MoPNG to GAIL regarding Coromandel (page 55 of the typed set of the Petitioner in O.P. No.407 of 2015) evidences that GAIL/ the MoPNG were fully aware about the nature of business that was carried out by the respective Private Counter Party, i.e. purchase of gas at APM price and the use thereof for captive consumption of power. Even as regards Arkay, Saheli and Kaveri, the alleged basis of the claim of misrepresentation is the reply from these Private Counter Parties confirming that the entire quantity of gas is used for power generation and that it is supplied to the TNEB grid for supply to consumers. The first statement regarding use of the entire gas for power generation is not disputed by GAIL. As regards the second statement that it was supplied to the TNEB grid for supply to consumers, each Private Counter Party stands by the statement, whereas GAIL contends that

supply to the TNEB grid means sale to the grid and that consumers means general public and not captive consumers. The entire case on misrepresentation hinges on this interpretive exercise and there is every indication that the interpretation by the Private Counter Parties is bona fide. Therefore, I conclude that there is nothing on record that establishes the claim of fraud or misrepresentation. In any event, as stated above, misrepresentation does not constitute a valid basis to exclude time under Section 17 of the Limitation Act. As regards fraud, as correctly contended by the learned counsel for the Private Counter Parties, the necessary particulars were not pleaded and no evidence was adduced. Thus, it may be concluded that fraud or misrepresentation was not duly established in any of the arbitrations by GAIL.

23. As regards mistake, it was not categorically pleaded although there are statements in the reply statements in the Saheli and Kaveri Arbitrations that the fraud and/or misrepresentation caused the mistake in invoicing at APM rates. Mr.Giridhar contended, in this regard, that there is no magic to the word mistake, the reliance on mistake can be gleaned or inferred from the pleadings and it should be interpreted as including unilateral mistakes. On the contrary, the contention of Mr. Vinod Kumar, in this regard, is that mistake for the purpose of Section 17 cannot mean the unilateral assertion of mistake by GAIL and it should be

interpreted as encompassing only mutual mistakes as in the case of an action for rectification of a contract. I am of the view that Section 17 of the Limitation Act is a provision that deals with exclusion of time in case a fraud is perpetrated by the counter party and established by the party relying on fraud, which is undoubtedly unilateral. As regards mistake, Section 17 mandates that the party relying on mistake should establish the factum of mistake, the date of discovery thereof and the inability to discover it earlier in spite of reasonable diligence. In contrast to Section 20 of the Contract Act, there is no indication at all in Section 17 that it should be mutual; not even in the stipulation that the person relying on it should establish that it could not have been discovered earlier by exercising reasonable diligence. Hence, I conclude that it applies to unilateral mistakes. Mr.T.R.Rajagopalan relied on **Salonah Tea Company** for the proposition that the claim is not to be rejected unless there is undue laches or abandonment. The said proposition is applicable in a public law proceeding where the Limitation Act does not apply and laches is a relevant consideration for the grant of discretionary relief. He relied on **Punjab Stainless Steel Industries** for the principle that the period of limitation commences from the date of knowledge of mistake. The said judgment related to the applicability of the statutorily prescribed extended period of limitation under the Customs Act in cases of established

misstatement. Therefore, **Punjab Stainless Steel Industries** is inapplicable in this context.

24. He also relied on **Ramanathapuram Market Committee** in this regard. In **Ramanathapuram Market Committee**, a Division Bench of this Court held, inter alia, as follows in paragraphs 14 and 15:

"14....If the plaintiff's allegation as to the date of the knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake, 'with reasonable diligence, on a date earlier than that on which the plaintiff bases his cause of action. As is said, it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies according to times and circumstances in which the individual thinks. Thus, the word "reasonable " has always been understood in law as prima facie meaning, reasonable in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know. It is also a fundamental maxim, of things relating to each other, one being known, the other is also known". In the instant case, when the plaintiff knew about

the cancellation of the earlier notification by a later notification, then it is normally and reasonably expected that it knew or with reasonable diligence ought to have discovered that the payments made by it under the earlier cancelled notification were irregular and improper and the payments were made under a mistake of law or of fact. The cancellation of the earlier order is intimately connected with the mistake in the payments made by the plaintiff pursuant to the first withdrawn order. As it knew or ought to have known and with reasonable diligence should have discovered that the earlier notification have become inoperative by its cancellation under the second notification, then that being known, then the other,' namely, that it should seek for the refund of the said amounts on such discovery within the prescribed period of limitation, could have been known also. Such a discovery is possible because of the impact of one event as against the other.

15. The plaintiff in this case does not deny the knowledge of cancellation of the earlier order. He knew that G.O. Ms. No. 1054, dated 30th March, 1962 was cancelled by G.O. Ms. No. 1052, dated 30th March, 1964. The latter was published in the gazette on 27th May, 1964. The payments, which are claimed to have been made under a mistake whether of facts or of law, were during the period

commencing from 22nd October, 1962 till 26th May, 1964. By the publication of the second notification on 27th May, 1964 the plaintiff with reasonable diligence could have discovered the mistake committed by it. It ought to have, therefore, filed the suit for refund of the amounts paid as a consequence of such a mistake within three years from the date when the second notification became effective, that is, the suit ought to have been filed within three years from 27th May, 1964. The plaintiff does not deny the knowledge of the cancellation of the earlier order, nor the publication of the second order cancelling the former. The impact of such knowledge leads to the reasonable inference that the discovery of the mistake in the payment of the cess was contemporaneous with the publication of the second notification. Having regard to the circumstances in which the plaintiff was called upon to act in law, it knew or ought to have known about the mistake in the payments made by it and it ought to have, therefore, been diligent in instituting the action within three years from the date of the second notification."

If the principle laid down in **Ramanathapuram Market Committee** were to be applied to this case, it is clear that the unilateral assertion of mistake by GAIL is not sufficient. GAIL was required to establish the

following: that it supplied gas at APM price to the Private Counter Parties by mistake; the date of discovery of the mistake; and, more importantly, that such mistake could not be discovered earlier in spite of exercising reasonable diligence. From the evidence on record, I conclude that GAIL failed to conclusively satisfy even the primary requirement, namely, that the supply was on account of a mistake. The date of discovery of the mistake is not specified and, significantly, GAIL completely failed to establish that such mistake could not be discovered earlier in spite of exercising reasonable diligence. Indeed, there is evidence to the contrary. Therefore, GAIL is not entitled to the benefit of section 17 of the Limitation Act. It may be noted that none of the Arbitral Tribunals concluded that GAIL was entitled to the benefit of Section 17 of the Limitation Act. Equally, this is not an alleged fraud or misrepresentation during the contract formation stage and, therefore, sections 14 to 19 of the Contract Act are not applicable.

25. The conclusion that GAIL is not entitled to the benefit of Section 17 of the Limitation Act leads to the next question as to what is the starting point of limitation. In an action for recovery of money for the supply of goods, the limitation period would, ordinarily, as per Article 15 of the Limitation Act, run from the date when the bills, in question, became payable. In this case, the relevant invoices were for the payment

of APM price and it is not GAIL's case that the invoices were unpaid or part paid; nevertheless, assuming there was under-invoicing, the revised invoice should have been issued and the differential price claimed by way of legal proceedings within 3 years from the date of supply of goods by applying Article 14 of the Limitation Act, at least by analogy. The enclosure to the debit note, in each case, contains particulars of the period of supply of gas and the differential price claim in respect thereof. Such date of supply would be the starting point for computing limitation. The limitation clock would stop on the date of the notice under Section 21 of the Arbitration Act, if any, by GAIL or the date of counter claim by GAIL. The admitted position is that GAIL did not raise the claim, in any of the Arbitrations, by issuing a Section 21 notice. The judgments of the Hon'ble Supreme Court in **State of Goa** and **Voltas** are apposite in this regard. In those judgments, the Supreme Court held that the date of counter claim is the date when the limitation period stops, as regards the counter claim, except where the counter claimant had also invoked the arbitration clause prior to the arbitration. As a matter of fact and record, GAIL did not invoke the arbitration clause. Therefore, the conclusion in the Kaveri Arbitration to the effect that GAIL comes within the scope of the exception in **State of Goa** and **Voltas** is patently erroneous.

26. Thus, in order to determine the issue relating to limitation, the

dates of the respective Counter Claim by GAIL assume significance. The Counter Claim by GAIL is on 10.01.2013 in the Saheli Arbitration; on 08.03.2013 in the Coromandel Arbitration; in September 2012 in the Arkay Arbitration; on 23.04.2013 in the Kaveri Arbitration; and on 01.04.2013 in the OPG Arbitration. In three of the Awards, namely, Coromandel, Kaveri and Saheli, the Arbitral Tribunal reached the bizarre conclusion that the cause of action arose on the date of demand of the differential amount by GAIL. Accordingly, in the Coromandel Award, after rejecting the contention that Section 17 of the Limitation Act applies, the Arbitral Tribunal, at internal pages 22 and 23 of the Award, computed limitation by starting the clock from 16.11.2008 by working backwards from the date of demand, namely, 17.11.2011. The same mistake was committed in the Kaveri Award, at paragraph 9, wherein the Arbitral Tribunal worked backwards from the date of demand, namely, 19.12.2011 and held that the Counter Claim for the period commencing from 20.12.2008 is within limitation. Likewise, in the Saheli Arbitration, at internal page 42 of the Award, the date of demand on 29.11.2011 was construed as the date of accrual of the cause of action and the Arbitral Tribunal worked backwards by three years to conclude that claims from 30.11.2008 are within limitation. In a supply contract, the conclusion that the cause of action commences from the date of demand is fundamentally

and patently flawed. Moreover, if the cause of action commences on the date of demand, the period of limitation would end three years later and not three years earlier. On this issue, the judgment of the Hon'ble Supreme Court in **M.K. Sarkar**, which was cited by Mr. Vinod Kumar, is clearly applicable and the period of limitation cannot be extended or reckoned with reference to the date of demand. Hence, these conclusions are patently illegal and liable to be set aside.

27. As stated earlier, the dates of supply of gas are on record in the form of data in the enclosures to the respective debit notes. Therefore, if one adopts the method of working backwards from the date of the respective counter claims to determine if the Counter Claims are within the period of limitation, the differential price counter claims for the supply of gas from the first fortnight of June 2006 up to part of the first fortnight in January 2010, i.e. up to 11.01.2010 in the Saheli Arbitration, would be barred by limitation (pages 149-152 in the additional typed set-I of the Petitioner in O.P. No.664 of 2016). As regards the Coromandel Arbitration, the differential price counter claims for the supply of gas from the first fortnight of July 2005 up to part of the first fortnight of March 2010, i.e. up to 09.03.2010, would be barred by limitation (pages 192-199 of the additional typed set-I filed by the Petitioner in O.P. No.533 of

2015). In the Arkay Arbitration, the differential price counter claims for the supply of gas from the second fortnight of December 2005 up to part of the first fortnight of September 2009, i.e. up to 08.09.2012, would be barred by limitation (pages 125 to 133 of the additional typed set-IA filed by the Petitioner in O.P. No.690 of 2014). In the Kaveri Arbitration, the differential price counter claims for the supply of gas from the first fortnight of April 2006 up to part of the second fortnight of April 2010, i.e. up to 24.04.2010, would be barred by limitation (pages 233-238 of the typed set of papers, Volume-II of the Petitioner in O.P. No.526 of 2016). As regards the OPG Arbitration, the differential price counter claims for the supply of gas from the first fortnight of July 2005 up to the second fortnight of March 2010, i.e the entire claim under Debit Note No.29/Power Sector/10353/2011-12 would be barred by limitation, whereas the claim under Debit Note No.35/Power Sector/10353/2011-1201.04.2010 would not be barred by limitation.

28. As regards the claims that are not barred by limitation, the question of waiver, acquiescence and estoppel would be relevant. In paragraph 22-24 supra, I concluded that the evidence on record leads to the conclusion that GAIL and/or the MoPNG was/were aware about the nature of business of the Private Counter Parties or could have ascertained the same by exercising reasonable diligence. Once it is

concluded that GAIL was aware or could have ascertained the correct facts but continued to charge APM price, would it lead to an inference of waiver, acquiescence or estoppel? The defence, in this regard, by the learned counsel for GAIL, was that GAIL's conduct is irrelevant and that GAIL is no more than the marketing agent of ONGC and the custodian or trustee of a scarce natural resource. I am unwilling to accept this contention for two reasons. The first reason is that Article 10 of the respective GSA enables and empowers GAIL to fix the price after 31.03.2000 and further enables it to apply Government directives, orders in that regard. Similarly, Article 10.1(b) of the respective GSTA also confers the right on GAIL to unilaterally fix the gas price albeit as per Government directives or orders in this regard. Accordingly, GAIL's right to apply Government directives on price does not denude GAIL of the contractual prerogative and right to unilaterally fix the price. In this contractual context, I am unwilling to accept the contention that GAIL cannot be held accountable for its conduct with regard to price. Secondly, the GSA and GSTA were entered into by GAIL and not by the MoPNG; therefore, GAIL cannot absolve itself of responsibility for its conduct as the trustee of a public resource. On this issue, it is also pertinent to bear in mind that the Private Counter Parties made business decisions and undertook business risks on the basis of the contractual commitments of

GAIL.

29. Nevertheless, it remains to be seen whether the legal requirements for waiver, acquiescence and estoppel are satisfied. Each of these legal terms are related but distinct requirements should be satisfied before inferences can be drawn. In **Kanchan Udyog**, which was relied upon by the learned senior counsel for OPG, the Supreme Court discussed the concept of waiver in paragraphs 23 and 24. In a nutshell, waiver was defined as an intentional relinquishment of a known right. Both in the Coromandel and OPG Arbitrations, I find that there is sufficient evidence that GAIL was fully aware of the nature of business of the respective Private Counter Party and, consequently, the conduct of GAIL in continuing to invoice at APM prices would qualify as a waiver. In the Arkay, Saheli and Kaveri Arbitrations, the evidence on record is insufficient to draw the inference that there was an intentional or voluntary relinquishment of a known right. This leads to the next term, namely, acquiescence. In **Power Control Appliances Pvt. Ltd. v. Sumeet Machines (1994) 2 SCC 448**, the Supreme Court discussed the meaning and characteristics of acquiescence at paragraphs 26 and 27. In essence, the Supreme Court defined it as standing-by while your rights are infringed. If the facts of this case are examined in this context, I find that even in the Arkay, Saheli and Kaveri Arbitrations, assuming that GAIL was

unaware of the nature of business of the respective Private Counter Party, it certainly had the means to ascertain such facts and clearly failed to exercise reasonable diligence in that regard. In my view, the conduct of GAIL in failing to ascertain facts that could have been easily ascertained and continuing to issue invoices at APM prices over a period of more than 10 years, including for 5 years after the Clarification by MoPNG, constitutes standing-by while its rights were infringed. Such standing-by continued until the CAG Report and the consequential MoPNG communication triggered a response from GAIL and resulted in the issuance of the impugned debit notes. Consequently, it qualifies as acquiescence. As regards estoppel, it is necessary that there should be a holding out or representation and such holding out or representation should have been acted upon by the counter party by altering its position in such a manner that if the party that held out is permitted to resile from the earlier position, it would cause prejudice to the counter party. In this case, GAIL issued invoices at APM prices to the Private Counter Parties for several years and the Private Counter Parties carried on business on that basis. An estoppel operates against GAIL because the Private Counter Parties supplied gas to their consumers by reckoning the purchase price from GAIL and thereby changed their position. Needless to say, grave prejudice would be caused to them if GAIL is permitted to resile. In this

connection, the conclusion in the Coromandel Award to the effect that an estoppel does not operate because there can be no estoppel against a statute is patently erroneous because the estoppel arises, in this case, out of GAIL's contractual decision on price under Article 10 of the GSA/GSTA, including in its understanding and application of Pricing Orders. The conclusion in the Saheli Arbitration that an estoppel does not operate because GAIL is entitled under Article 2.2 is equally erroneous because Article 2.2 deals with arrears and dues, all invoiced amounts were paid and GAIL would be precluded from raising new invoices by estoppel. Hence, I conclude that GAIL waived its right to collect non-APM price, as regards the Coromandel and OPG Arbitrations, and acquiesced in charging APM price from the Private Counter Parties in all the Arbitrations, and that an estoppel operates in this regard. Such acquiescence, waiver or estoppel would operate until GAIL revised the price as it is empowered to do prospectively under Article 10 of the GSA/GSTA.

30. Mr.Anirudh Krishnan had contended that GAIL is not entitled to impose non-APM price even after 15.11.2011 for two reasons. The first is that GAIL did not discharge the burden of establishing that a directive or notification was issued by the Government of India to modify or fix the price as regards power sector consumers, such as the Private Counter Parties. This contention is untenable for the reason that Article

10.01 states categorically that "after 31.03.2000, the SELLER shall have the right to fix the price of GAS which may be as per directive, instruction, order, etc. of the Government of India...." As stated earlier, on a plain reading, this clause enables and empowers GAIL to fix the price of gas after 31.03.2000. In addition, it enables GAIL to fix such price on the basis of the directives and instructions of the Government of India. Merely because GAIL is entitled to fix the price on the basis of instructions or directives of the Government of India does not mean that GAIL loses the contractual prerogative of fixing price at least vis-a-vis the Private Counter Parties. The second contention, in that regard, is that GAIL did not discharge the burden of establishing that the CAG Report applied to the Private Counter Parties. This contention is rejected for two reasons. First, as correctly contended by Mr. Giridhar, the CAG Report turned the spot light on the under-invoicing of the Private Counter Parties by GAIL and the consequential loss of revenue and thereby played a role in the action by GAIL but the validity of GAIL's actions cannot be tested with reference to the CAG Report because it does not have contractual sanctity. Secondly, as stated above, GAIL's contractual right to fix the price of gas is not, in any way, contingent on the CAG's determination that the Private Counter Parties are liable to pay non-APM price. Therefore, this contention of Mr. Anirudh Krishnan is rejected. As a consequence, I conclude that no

interference is warranted with the conclusions in the Arbitral Awards that GAIL is entitled to fix the price with effect from 16.11.2011.

31. In view of the fact that these are generic conclusions based on identical terms in the respective GSA/GSTA and based on a common Pricing Order dated 20.06.2005, as clarified by a common clarification dated 27.06.2006, these conclusions would apply in all the arbitrations. In each case, I hold that the contrary findings in the Arbitral Awards are contrary to the Limitation Act and, consequently, also contrary to Section 43 of the Arbitration Act. As regards acquiescence, waiver and estoppel, the conclusions were arrived at by disregarding vital evidence as expressly adverted to supra. Therefore, it renders the Award either contrary to public policy or patently illegal as held in paragraph 31, 32 and 42.2 of **Associate Builders v. DDA (2015) 3 SCC 49** read with paragraphs 40 and 42 of **Ssyangyong Engineering and Construction Co.Ltd. v. NHA I 2019 SCC online SC 677**.

32. One more aspect remains to be considered, namely, the interpretation of the Pricing Order and the Clarification thereto by the Arbitral Tribunals. The fact that GAIL and the Private Counter Parties executed a GSTA in the year 2010, many years after the Clarification, wherein APM price was expressly stipulated in Article 10.1(a) thereof,

lends credence to the contention of the Private Counter Parties that GAIL and the Private Counter Parties understood the Pricing Order as being applicable to all power sector consumers without excluding captive consumers. This was the conclusion of the Arbitral Tribunals in the Arkay and OPG Arbitrations, whereas the conclusions in the Saheli, Coromandel and Kaveri Arbitrations are to the contrary. However, this issue becomes largely a non-issue in light of the above analysis and conclusion that the Counter Claims of GAIL up to 15.11.2011 are either barred by limitation or not maintainable on account of waiver, acquiescence or estoppel and that GAIL is entitled to demand non-APM price prospectively from 16.11.2011. Therefore, I do not propose to enter definitive findings on the interpretation by the Arbitral Tribunals by also bearing in mind the limited scope of interference with interpretation under Section 34 of the Arbitration Act.

33. Because the conclusions in different arbitrations by the Arbitral Tribunals vary, one needs to examine the implications of these conclusions on an award-specific basis. In the Arkay Award, the debit notes of GAIL were rejected up to 15.11.2011 and affirmed with effect from 16.11.2011. Thus, the Arkay Award is in line with the conclusions herein. Consequently, the Arkay Award is upheld and the challenges

thereto are rejected.

34. In the Coromandel Award, it was held that GAIL is entitled to charge non-APM price from 16.11.2008 to 15.11.2011. In light of the conclusion herein that GAIL's claim is barred by limitation up to 09.03.2010 and by waiver, acquiescence and estoppel up to 15.11.2011, the Coromandel Award is partly set aside.

35. In the Saheli Award, it was held that GAIL is entitled to charge non-APM price from 30.11.2008. In light of the conclusion herein that GAIL's claim is barred by limitation up to 11.01.2010 and by acquiescence and estoppel up to 15.11.2011, the Saheli Award is partly set aside.

36. In the Kaveri Award, it was held that GAIL is entitled to charge non-APM price from 20.12.2008 to 31.05.2010. In light of the conclusion herein that GAIL's claim is barred by limitation up to 24.04.2010 and by acquiescence and estoppel up to 15.11.2011, the Kaveri Award is partly set aside.

O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015 and
O.P.Nos.438, 664,526, 696 and 102 of 2016

37. In the OPG Award, the debit notes of GAIL were rejected up to 15.11.2011 and affirmed with effect from 16.11.2011. Thus, the OPG Award is in line with the conclusions herein. Consequently, the OPG Award is upheld and the challenges thereto are rejected.

38. For reasons set out above, I hold as under:

- (i) O.P. No.690 of 2014 and O.P.No.86 of 2015 are dismissed;
- (ii) O.P. No.407 of 2015 is allowed and O.P. No. 533 of 2015 is dismissed;
- (iii) O.P. 438 of 2016 is allowed and O.P. No.664 of 2016 is dismissed;
- (iv) O.P. No.526 of 2016 is allowed and O.P. No.696 of 2016 is dismissed;
and
- (v) O.P. No.102 of 2016 is dismissed.

In the facts and circumstances, each party shall bear its own costs in each of the Petitions. Consequently, all connected applications are closed.

सत्यमेव जयते

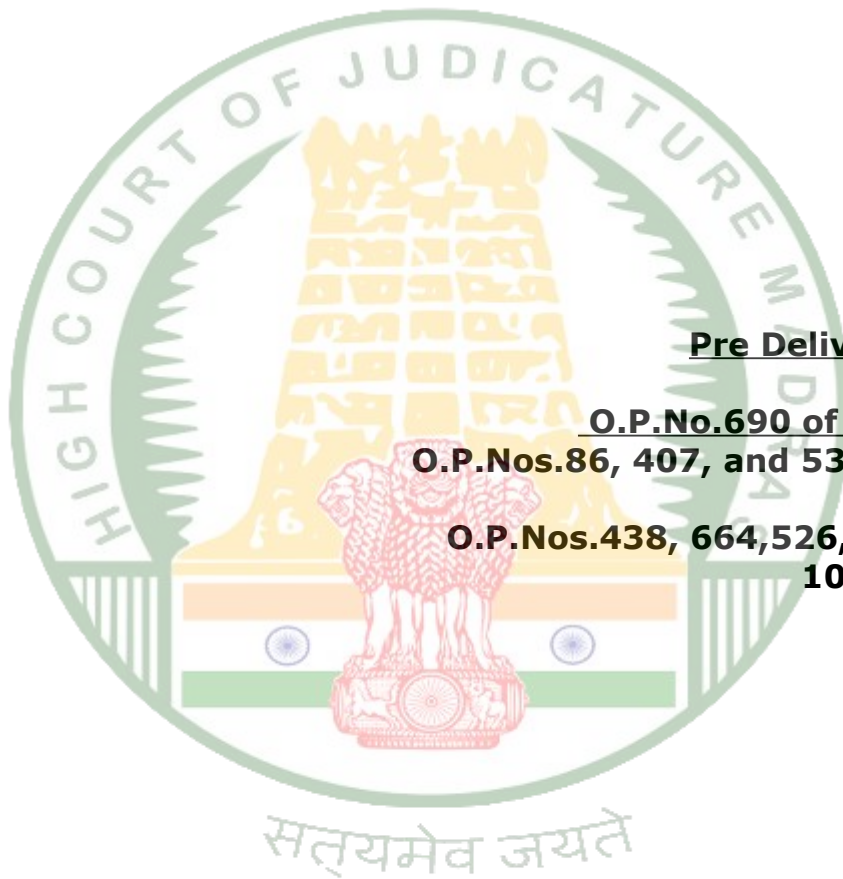
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Speaking order
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O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015 and
O.P.Nos.438, 664,526, 696 and 102 of 2016

SENTHILKUMAR RAMAMOORTHY, J.
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Pre Delivery order
in
O.P.No.690 of 2014 and
O.P.Nos.86, 407, and 533 of 2015
and
O.P.Nos.438, 664,526, 696 and
102 of 2016

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