

Santosh/Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
COMMERCIAL APPEAL NO.12 OF 2019

State of Goa

Through Electricity Department,
represented by its Chief Electrical Engineer,
Major of age, Indian National,
having office at Vidyut Bhavan,
Panaji Goa.

..... Appellant.

Versus

Reliance Infrastructure Ltd.,
a Company incorporated under the provisions
of the Companies Act, 1956,
having its registered office at H Block,
1st Floor, Dhirubhai Ambani Knowledge City,
Navi Mumbai 400 719

..... Respondent.

Mr. D. J. Pangam, Advocate General with Mr. Deep Shirodkar,
Additional Government Advocate for the Appellant.

Mr. J. J. Bhat, Senior Advocate with Ms. A. Chandurkar, Mr. Bhargav
Khandeparkar, Mr. S. Khot, and Ms. A. Som, Advocates for the
Respondent.

**Coram:- M. S. SONAK &
BHARATI H. DANGRE, JJ.**

**Reserved on :- 1st March 2021
Pronounced on :- 8th March 2021**

JUDGMENT (Per M. S. Sonak, J)

Heard Mr. D. Pangam, learned Advocate General with Mr. Deep Shirodkar, learned Additional Government Advocate for the Appellant, and Mr. J. J. Bhat learned Senior Advocate with Ms. A. Chandurkar and Mr. Bhargav Khandeparkar, learned Advocates for the Respondents.

2. This appeal is instituted under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015 (Commercial Courts Act) challenging the judgment and order dated 12th September 2019 (impugned judgment and order) made by the Principal District Judge, North Goa, Panaji Goa (Commercial Court) dismissing the Appellant's application under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) questing the arbitral Award dated 16th February 2018 (impugned Award) made by the learned sole Arbitrator concerning the disputes arising out of Power Purchase Agreement dated 10th January 1997 (PPA) and Supplementary Power Purchase Agreements dated 10th September 1997, 20th September 2000 and 5th November 2001.

3. The Respondent, by filing its statement of claim on 14th January 2016 before the learned Arbitrator, had raised a claim in an

amount of ₹ 280.50 crores, as against the Appellant. The Appellant, in its statement of defence along with counterclaim filed before the learned Arbitrator on 29th February 2016 denied the claim of the Respondent and raised a counterclaim, without specifying any precise amount. However, the statement of defence and counterclaim was amended by the Appellant quantifying counterclaim at ₹ 1241 crores.

4. By the impugned Award, learned Arbitrator has directed the Appellant to pay to the Respondent an amount of ₹ 278.29 crores (principal amount) together with interest for the period up to 31st October 2017. The Appellant was also directed to pay further interest from 31st October 2017 at the rate of 15% per annum from the date of Award till the date of full payment of the amount including interest as on the date of the Award until effective payment/realization. The impugned Award clarified that in case the Appellant pays to the Respondent the entire amount together with interest awarded within two months from the date of the Award then, it shall not be liable for payment of interest after the date of the Award.

5. The Appellant, instituted Arbitration Petition No.9/2018 before the learned Commercial Court questioning the impugned Award under Section 34 of the Arbitration Act. By the impugned judgment and order dated 12th September 2019, the learned Commercial Court was

pleased to dismiss the said Arbitration Petition. Hence, the present appeal by the Appellant under Section 13 of the Commercial Courts Act read with Section 37 of the Arbitration Act.

6. Mr. D. Pangam, learned Advocate General firstly submitted that the impugned judgment and order is *ex facie* vitiated by failure on the part of the learned Commercial Court to consider and deal with the contentions raised by the Appellant in support of their petition. He submitted that the learned Commercial Court has, in most instances only paraphrased the contentions of the parties and thereafter in a line or two, without independent application of mind or reasoning, proceeded to reject the contentions of the Appellant. He submits that it is quite difficult to discern where the record of contentions of the parties concludes and reasoning, howsoever brief, of the learned Commercial Court, commences and concludes. He submitted that there has been virtually no consideration of various contentions raised by the Appellant or for that matter even the Respondent by the learned Commercial Court and on this ground alone the impugned judgment and order deserves to be set aside.

7. Mr. D. Pangam submitted that there has been a gross violation of principles of natural justice in making the impugned Award. He pointed out that the Appellant had filed an application under Section 26

of the Arbitration Act before the learned Arbitrator seeking the appointment of Commissioner/expert. The learned Arbitrator had recorded in the proceedings that such application would be considered and disposed of at a later stage. However, without disposing of this application even though the written submissions had been filed by both the parties, learned Arbitrator proceeded to make the impugned Award.

8. Mr. Pangam submits that this means that the Appellant was deprived of the opportunity to avail of Commissioner's/expert report, in support of the Appellant's case. He submits that this also implied that the Appellant's application under Section 26 of the Arbitration Act came to be rejected without assigning any reasons and possibly, as a result of an oversight. He submits that this is a clear instance of the failure of natural justice, which is a formidable ground for setting aside the impugned Award.

9. Mr. Pangam submits that the Appellant had made an application seeking directions to the Respondent for the production of documents that were relevant and material to the issues in the arbitration proceedings. Again, no orders were made by the learned Arbitrator on this application, thereby depriving the Appellant, an opportunity of referring to and relying upon such documents in the possession of the Respondent. He submits that this is the second instance of the failure of

natural justice and denial of equal opportunity to the Appellant.

10. Mr. Pangam submits that the learned Arbitrator took into consideration the written submissions dated 1st November 2017 filed by the Respondent, without affording any opportunity to the Appellant despite the Appellant repeatedly seeking such opportunity. He submits that this is the third instance of the failure of natural justice. He submits that even after the amendment of the Arbitration Act, failure of natural justice is very much ground for setting aside an arbitral Award. He submits that since the learned Commercial Court has failed to seriously advert to this aspect, both the impugned judgment and order as well as the impugned Award are liable to be set aside.

11. Mr. Pangam submitted that the Respondent, in breach of clauses 12.1.4 to 2.1.7 of the PPA entered into contracts and acquired fuel without obtaining prior approval of the Appellant or even involving the Appellant in the process of acquisition of such fuel. He submits that variable charges payable by the Appellant for purchase of electricity from the Respondent were mostly dependent upon the fuel charges. He submits that this is the reason why the PPA made a specific provision for obtaining approvals from the Appellant if the fuel supply contracts were to be amended and increased rates payable to the fuel supply agencies. He pointed out that this is the precise reason why the contractual clauses

also stipulated the involvement of the Appellant in the process of negotiations with the fuel suppliers, leading to the execution of fuel supply contracts.

12. Mr. Pangam pointed out that though these contentions were specifically raised before the learned Arbitrator, the same were not even adverted to, much less considered by the learned Arbitrator. He submits that failure of the learned Arbitrator to even advert to, much less consider the contractual provisions, including clauses 12.1.4 to 12.1.17 of the PPA amounts to total perversity, as well as patent illegality. He submitted that since the Commercial Court has also glossed over this aspect both, the impugned Judgment and Order, as well as the impugned Award are liable to be set aside.

13. Mr. Pangam submitted that the Commercial Court failed to consider or answer the Appellant's contention based on non-consideration of the contractual provisions of Clauses 12.1.4 to 12.1.7. Besides, he pointed out that the Commercial Court has committed an error apparent on the face of record by observing in paragraph 52 of the impugned Judgment and Order that the Appellant had cleared the bills of the Respondent from time to time despite being allegedly aware of the transactions entered into by the Respondent with the fuel suppliers

without any approval or consultation with the Appellant. He pointed out that admittedly, no such bills were ever cleared and the observation to the contrary by the Commercial Court, is an error apparent on the face of the record. He relied on *Bombay Intelligence Security (India) Ltd. Vs. Oil & Natural Gas Corporation Limited*¹; *Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd.*²; *Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation*³ and *Bhanumati Jaisukhbhai Bhuta vs. Ivory Properties & Hotels Pvt. Ltd. & Anr.*⁴

14. Mr. Pangam submitted that in terms of the PPA, the contracted capacity was specified to be 39.402 KW in the first year of the commercial production and downrated annually as per the Original Equipment Manufacturers' (OEM) recommendations in successive years. He submitted that in terms of the supplementary PPA, it is true that the contracted capacity was reduced from 39.402 KW to 19.900 KW. However, this neither meant nor implied that the principle of downrating which is akin to the principle of depreciation, was given up or that the contractual provisions which provided for such downrating, were either expressly or impliedly amended. He submitted that the

1 MANU/MH/2013/2015

2 AIR 2020 SC 2488

3(2006) 4 SCC 445

4 Comm. Arb.Pet. No.350 of 2017 dt. 28-1-20

learned Arbitrator, after noting that the parties had agreed to reduce the contracted capacity, committed patent illegality in holding that the contractual provisions concerning downrating were done away with. He submits that this amounts to ignoring the contractual provisions and consequently, there is both, perversity, as well as patent illegality in the making of the impugned Award.

15. Mr. Pangam submits that it was not even the clear case of the Respondent that post the reduction of the contracted capacity, the contractual provisions relating to downrating were done away with. Rather, the Respondent attempted to urge that the communication dated 8.11.2005 constituted recommendations of the OEM and since, these recommendations had made it clear that there was no degradation of the plant, the principle of downrating ought not to apply. He submits that the Respondent, in response to the Appellant's application for production of documents, had clearly and unequivocally stated that they do not have the OEM recommendations. In any case, the communication dated 8.11.2005 was quite irrelevant for billing post-2007, including, in particular, the bills which extended up to March-April, 2013. He submits that there is perversity and patent illegality on this score as well.

16. Mr. Pangam submits that the contractual provisions clearly

provided that in case of any unscheduled shutdown, the Appellant would supply energy to the consumers of the Respondent. For this supply, the unit of backup energy would have to be netted off using the ratio of 1:1.25. He submits that admittedly, the shutdown from 19/4/2014 to 13/8/2014 was unscheduled. Before this period, no figures were available to determine the exact per unit cost. Therefore, the Appellant determined such a rate at ₹ 3.78 per unit. He submits that in terms of the contractual provisions and the principle of netting out, this power unit rate had to be netted out in the ratio of 1:1.25. However, the learned Arbitrator by totally misconstruing the communication dated 18.9.2014, gave a go-by to the contractual provisions for netting out in the ratio of 1:1.25. He submits that this is a case of total perversity and patent illegality, for which the impugned Award ought to be set aside.

17. Mr. Pangam submits that in the present case, the Appellant permitted the Respondent to supply 4 MW power to private parties i.e. other than the Appellant. He submits that since in terms of the contractual provisions the Appellant was required to pay the fixed component charges irrespective of whether or not the Appellant purchases the power generated by the Respondent, the Appellant had made it clear that in respect of 4 MW power, the Appellant will not be liable to pay the fixed component charges. He submits that from this, the learned Arbitrator concluded that the Appellant had agreed to pay

the variable component charges even in respect of 4 MW power, which was not even being supplied to the Appellant but was supplied to the private parties. He submits that the question of payment of variable component charges would arise only in the event of supplies being made to the Appellant and not otherwise. He submits that this was very clear from the contractual provisions which did not admit even the slightest doubt. He submitted that the reasoning of the learned Arbitrator is not only vitiated by perversity and patent illegality but further, the impugned Award is contrary to the public policy since it permits unjust enrichment of the Respondent at the cost of the State exchequer. He relied on *Angerlehner Structural & Civil Engineering Co. and ors. Vs. The Municipal Corporation of Greater Mumbai and ors.*⁵

18. Mr. Pangam submits that it is inconceivable that the Appellant be made to pay variable charges in respect of 4 MW power which the Appellant had permitted the Respondent to sell to private parties. He submits that there is virtually non-consideration of this ground by the Commercial Court in the impugned Judgment and Order.

19. Mr. Pangam submits that for all these reasons, both, the impugned Judgment as well as the impugned Award are liable to be set aside.

⁵ MANU/MH/0554/2017

20. Mr. Pangam submits that there are patent illegalities in matters of award of interest by the learned Arbitrator. He submits that there were errors in the bills initially submitted by the Respondent. He submits that the bills were later on rectified. He submits that the question of payment of interest, if any, would arise only from the date of submission of the corrected bills. He submits that this aspect has neither been considered by the learned Arbitrator, nor by the Commercial Court. He submits that even the contractual provisions providing for compound interest or interest in terms of the contract are provisions in terrorem. He submits that such punitive provisions in a contract, can never be enforced and since the learned Arbitrator has chosen to enforce the same, there is patent illegality involved. He relied on *Kailash Nath Associates vs. Delhi Development Authority*⁶ and *Carl Estate Private Limited and ors. Vs. Jagdish J.N. Counte and ors.*⁷ in support of these contentions.

21. Mr. Pangam submitted that in any case, the award of interest at the rate of 15% per annum, should the Appellant not pay the awarded amounts within two months from the date of Award, is *ex facie* perverse and unconscionable. He pointed out that at least for 120 days from the date of the Award, the learned Arbitrator ought not to have provided for

⁶ (2015) 4 SCC 136

⁷ 2005 (4) Bom.C.R. 630

payment of any interest. He submitted that there are no reasons whatsoever in the impugned Award justifying the award of interest at the rate of 15% per annum. He submits that award of such exorbitant interest, which is punitive, and contrary to the law laid down by the Hon'ble Supreme Court in *Vedanta Ltd. Vs. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*⁸.

22. Mr. Pangam, in support of his contention that the grounds urged by him were sufficient to set aside the impugned Award, relied on *Ssangyong Engineering and Construction Company Ltd. vs. National Highways Authority of India (NHAI)*⁹; *MMTC Ltd vs. Vedanta Limited*¹⁰; *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*¹¹ and *Union of India vs. Recon*¹².

23. Mr. Pangam also urged that the summary of computations at Schedule 2 to the impugned Award is also not correct and no sufficient opportunity was given to the Appellant to place on record the correct computations. He submits that the same was the position about the interest calculations. He submitted that the learned Arbitrator ought not to have left such a vital issue of computation to the parties and this is yet

8 (2019) 11 SCC 465

9(2019) 15 SCC 131

10 (2019) 4 SCC 163

11 (2006) 11 SCC 181

12 MANU/MH/2181/2020

another instance of violation of the principles of natural justice, as well as non-application of mind. He submits that this is also an additional ground for setting aside the impugned Award.

24. Mr. Pangam, for all the aforesaid reasons, submits that the impugned Judgment and Order made by the Commercial Court, as well as the impugned Award made by the learned Arbitrator, deserve to be set aside by this Court, exercising the powers vested in it by the Commercial Courts Act, as also the provisions of Sections 34 and 37 of the Arbitration Act.

25. Mr. J.J. Bhat, the learned Senior Advocate for the Respondent, at the outset, defended both, the impugned Judgment and Award made by the Commercial Court and the impugned Award made by the learned Arbitrator based on the reasoning reflected therein. He submitted that the scope of interference with the Arbitration Award is extremely limited and none of the grounds urged by the Appellant are sufficient to warrant interference with the impugned Award. He also referred to some of the decisions relied upon by Mr. Pangam and pointed out that even, in terms of these decisions, the impugned Award was immune from interference on the grounds now urged by and on behalf of the Appellant. He pointed out that as long as the learned Arbitrator had taken a plausible view, there was no question of any interference, either

under Section 34 or Section 37 of the Arbitration Act. He, therefore, submitted that this appeal may be dismissed.

26. Mr. Bhat submitted that there was no failure whatsoever of the principles of natural justice before the learned Arbitrator and, therefore, no case is made out for interference with the impugned Award on this ground. He pointed out that the application under Section 26 of the Arbitration Act was virtually abandoned by the Appellant after the Appellant engaged services of an expert and based on the report of such expert, amended their Statement of Defence and counterclaim. He points out that brief written submissions filed by the Respondents were only like clarifications and it is not as if any opportunity was denied to the Appellant to file further submissions, should they find such filing to be necessary. He pointed out that most of the documents sought for by the Appellant were furnished and it is only some of the documents which it did not have, that were not furnished. He submitted that there was no serious grievance made in the course of the arbitration proceedings on the aspect of any alleged failure of natural justice. He submits that no prejudice whatsoever has been demonstrated by the Appellant and, therefore, the plea of any alleged failure of natural justice may not be entertained in the abstract.

27. Mr. Bhat submitted that in the statement of defence even the

Appellant did not raise any plea based on the alleged noncompliance with the contractual provisions in clauses 12.1.4 to 12.1.7 of the PPA. He submitted that such contentions were raised belatedly in the sur-rejoinder and the written statement filed before the learned Arbitrator. He submits that even in these pleadings/arguments, the contention was never raised in the form in which it is now sought to be raised.

28. Mr. Bhat submits that merely because the impugned Award makes no specific reference to the contractual provisions in Clauses 12.1.4 to 12.1.7, the same does not mean or imply that the learned Arbitrator has not considered the same. He relies on *Santa Sila Devi and anr. vs. Dhirendra Nath Sen and ors.*¹³ and *Arunodaya Co-Operative Group Housing Society Ltd. vs. R.G. Desai & Associates Pvt. Ltd.*¹⁴ in support of his contention that the Arbitrator is not bound to give an award on each point and even a lump sum consideration is a valid consideration.

29. Mr. Bhat submitted that in any case, the provisions of Clauses 12.1.4 to 12.1.7 were to apply only in respect of 'Fuel Supply Contract', which means any contract entered into between the Respondent and any fuel suppliers for the supply of naphtha pursuant to Clause 12 of the

¹³ AIR 1964 SC 1677;

¹⁴ (2007) 99 DRJ 72

PPA. He submits that admittedly for the disputed period, the parties had stopped using naphtha as fuel for the plant and had switched over to Re-gasified Liquefied Natural Gas (RLNG) with effect from 1/4/2013. He, therefore, submits that the contractual provisions in clauses 12.1.4 to 12.1.7 were no longer applicable to the fuel supply contracts for procuring RLNG.

30. Mr. Bhat submits that there is material on record that has been taken into consideration by the learned Arbitrator that RLNG was sourced by the Respondent from the Public Sector Undertakings. He submits that necessary invoices were shared with the Appellant and at no stage, were any objections raised by the Appellant. He, therefore, submits that even though the learned Arbitrator may not have made specific reference to the contractual clauses, the impugned Award indicates quite correctly that the learned Arbitrator was satisfied with compliances of the contractual provisions. He, therefore, submits that taking into consideration the limited scope for interference with the arbitral Award, no case is made out to interfere with the arbitral Award, in the present case.

31. Mr. Bhat submits that consequent upon the reduction in the contracted capacity from 39.400 KW to 19.800 MW, there was no question of resorting to any downrating. He submits that the

Respondent did not have the OEM's recommendations at the stage at which the production was sought. He, however, submits that the communication dated 8.11.2005 makes it clear that there was no degradation of the plant and, therefore, there was no question of any downrating involved. He submits that the view taken by the learned Arbitrator that in the absence of degradation of the plant, there can be no downrating, is immensely a reasonable view, based upon the consideration of the contractual provisions, as well as the other material on record. He, therefore, submits that no case is made out to interfere with the impugned Award on this ground as well.

32. Mr. Bhat submits that the correspondence on record makes it very clear that the Appellant had only secured an exemption from payment of fixed component charges in lieu of permitting the Respondent to trade 4 MW power from out of its quota. He submits that in the entire correspondence, there is no reference to the exemption from payment of variable component charges contractually payable by the Appellant. He submits that the learned Arbitrator was quite right in holding that the Appellant may not be liable to pay the fixed component charges, but was certainly liable to pay the variable component charges. He submits that there is nothing unreasonable in the view taken and such a view is not even remotely opposed to the public policy. He, therefore, submits that there is no ground made out to interfere with the

impugned Award on this score as well.

33. Mr. Bhat submits the correspondence on record is quite clear, in that the Appellant agreed to the consolidated rate of ₹ 3.78 per unit for the supplies made to the consumers of the Respondent, during the unscheduled shutdown from 1/5/2014 to 13/8/2014. There was no reference to the multiplication of this rate by 1.25 and, therefore, there is no perversity or patent illegality in the view taken by the learned Arbitrator that the rate of ₹ 3.78 per unit was the final rate to net out. He, therefore, submits that no case is made out to interfere with the impugned Award on this ground, as well.

34. Mr. Bhat submits that computation of interest is entirely consistent with the contractual provisions. He submitted that in fact, the learned Arbitrator granted an opportunity to both the parties to submit their interest calculations since there was some dispute as to the manner of computation of interest. Ultimately, there was a difference of ₹ 0.49 lakhs between the calculations submitted by the Appellant and the calculations submitted by the Respondent. The learned Arbitrator accepted in entirety, the calculations submitted by the Appellant, thereby depriving the Respondent further interest to the extent of ₹ 0.49 lakhs. Mr. Bhat submits that there is nothing unconscionable or perverse in the contractual provisions relating to the computation of interest. He

submits that the principles set out in the decisions relied upon by Mr. Pangam are in the context of Section 74 of the Contract Act and the same are inapplicable in the facts of the present case. He submits that such contentions were neither seriously pressed before the learned Arbitrator, nor before the Commercial Court. He submits that by taking into consideration the limited scope for interference with the arbitral Award and even, otherwise, there is no case made out to interfere with the computation of interest.

35. Mr. Bhat submits that in the facts of the present case, there is nothing unreasonable in the award of interest at the rate of 15% per annum. He submits that the decision in *Vedanta Ltd.* (supra), is distinguishable because that was a matter where some rate of interest was awarded in respect of INR – Euro component. He submits that in the said decision, the Hon'ble Supreme Court was concerned with the International Arbitration and judicial notice can always be taken of the fact that the interest rate abroad is much lower than the interest rates prevalent in India. He submits that there was nothing unreasonable or unconscionable in awarding interest at the rate of 15% per annum for the post-award period. He, therefore, submits that no ground is made out to even interfere with the impugned Award on the aspect of interest.

36. Mr. Bhat relied on *HRD Corporation (Marcus Oil and*

*Chemical Division) vs. GAI (India) Limited (Formerly Gas Authority of India Limited)*¹⁵; *Sutlej Construction Limited vs. Union Territory of Chandigarh*¹⁶; and *Fermenta Biotech Limited vs. K.R. Patel*¹⁷ in support of his contention that an arbitral Award can be interfered with only on extremely limited grounds and none of such grounds have been made out by the Appellant, in the present case.

37. Mr. Bhat submitted that since the Commercial Court has affirmed the impugned Award, there was no necessity of any elaborate reasoning and in that sense, there is no illegality in the impugned Judgment and Order made by the Commercial Court. Mr. Bhat submits that both the parties were fully heard in the Commercial Court and even written submissions were filed by the parties. He points out that since the entire matter writ large before this Court, no case is made out to interfere with the impugned Judgment and Order made by the Commercial Court.

38. Mr. Bhat submits that for all the aforesaid reasons, this appeal may be dismissed and the amounts deposited by the Appellant before this court may be ordered to be paid to the Respondent, with accrued interest. He submits that further directions may be issued to the

¹⁵ (2018) 12 SCC 471

¹⁶ (2018) 1 SCC 718

¹⁷ Arb. Pet.No.545 of 2017 decided on 11-10-2018

Appellant to pay the awarded amounts within a time-bound manner, together with interest as awarded.

39. We have considered the rival submissions made by the learned Counsel for the parties. We have also considered the material on record, which includes the impugned Award, as well as the impugned Judgment and Order made by the Commercial Court. Based on the rival contentions, the following points now arise for our determination :

(A) The scope of the provisions of Section 34 of the Arbitration Act (as amended in 2017).

(B) Whether the Appellant has made out a case of breach of natural justice in the course of the arbitral proceedings warranting interference with the impugned Award?

(C) Whether the Appellant has made out a case that the impugned Award on the aspect of variable charges for ₹ 24.66 crores is required to be set aside?

(D) Whether the Appellant has made out a case that the impugned Award on the aspect of downrating for ₹18.53 crores is required to be set aside?

(E) Whether the Appellant has made out a case that the impugned Award on the aspect of variable charges on 4 MW power which was permitted to be traded for ₹ 3.94 crores is required to be set aside?

(F) Whether the Appellant has made out a case that the impugned

Award on the aspect of netting out for ₹ 2.36 crores is required to be set aside?

(G) Whether the award of interest for the period up to the making of the impugned Award as well as the post Award period, warrants interference?

(H) Whether the computations at Schedules 2 and 3 to the impugned Award are *ex facie* incorrect and were made without affording sufficient opportunity to the Appellant?

(I) Whether the impugned Judgment and Order made by the Commercial Court upholding the impugned Award is *ex facie* erroneous and warrants interference?

40. We shall now proceed to consider the above points which arise for our determination in this appeal.

SCOPE OF PROCEEDINGS UNDER SECTIONS 34 & 37 OF ARBITRATION ACT.

41. At the very outset, we have to remind ourselves of the limited scope of jurisdiction which is to be exercised in such matters, particularly after the amendment to the Arbitration Act. The limited grounds on which the Court may interfere with the arbitral Award, have been explained by the Hon'ble Supreme Court in *Ssangyong Engineering and Construction Company Ltd.* (supra) by taking note of the amendments to the Arbitration Act.

42. The effect of the amendments to the Arbitration Act, as also the several rulings on the subject of interference with the arbitral Award, including the ruling in *Ssangyong Engineering and Construction Company Ltd.* (supra), was recently analyzed by the learned Single Judge of our Court in *Recon* (supra) and the results of such analysis have been set out in paragraphs 17.4 and 18 of his Judgment, which read as follows:

“ 17.4. This yields the following result:

(i) A lack of a 'judicial approach', being the Western Geco expansion, is not available per se as a ground of challenge.

(ii) A violation of the principles of natural justice is a ground for challenge as one under section 18 read with section 34(2) (a)(iii) - that is to say, not under the 'fundamental policy' head nor the 'patent illegality' head, but distinctly under this sub-section.²⁴

(iii) A lack of reasons is a patent illegality under section 34(2-A).

(iv) In interpreting the contract, the arbitral view must be fair-minded and reasonable. If the view is one that is not even possible, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.

(v) 'Perversity' as understood in Associate Builders, is now dishoused from 'fundamental policy' (where Western Geco put it), and now has a home under 'patent illegality'. This includes:

(A) a finding based on no evidence at all;

(B) an award that ignores vital evidence; and

(C) a finding based on documents taken behind the back of the parties.

I believe this is not an exhaustive listing.

Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the Wednesbury unreasonableness standard (introduced in Western Geco) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the interpretation of the contract is utterly unreasonable and totally implausible - the view taken is not even possible - a challenge lies. Therefore: an award that was impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc) or in its result (returning a finding that is not even possible), then a challenge on the ground of 'perversity' lies under section 34(2-A) as a dimension of 'patent illegality'.

18. *It is in Ssangyong Engineering that we see an explicit acceptance of an underlying principle, one that has long informed thinking globally in the context of international arbitrations: the impermissibility of a merit-based review of an arbitral decision.²⁵ To put it in a nutshell: the previous expansiveness of judicial interference in challenges to arbitral awards has been eliminated. Merit-based interference is proscribed. This means, of course, that it is not permissible to set aside an award merely because on the merits another view was possible, or even preferable; or, as we saw, a correctly invoked and stated law was erroneously applied. There can be no re-appreciation of evidence. A reasonable and fair interpretation of the contract will invite no interference. It*

therefore now must behoove a section 34 Court to say, "Perhaps this award before me is not done as I might have done it. I might have preferred another, or even opposing, view. But neither is in itself a permissible reason to interfere." This is so because the window of recourse, previously being widened, has now shrunk. And that is not only as it should be, but as the statute would now have it. The entire ethos of arbitration as an alternative dispute resolution mechanism, one essentially private and contract-based, is founded in this quaternion: contractual fidelity; speedy disposal; finality; enforcement."

43. The contentions of Mr. Pangam will, therefore, have to be evaluated by keeping in mind the aforesaid principles.

BREACH OF THE PRINCIPLES OF NATURAL JUSTICE AND DENIAL OF EQUAL OPPORTUNITY

44. To begin with, we will have to consider Mr. Pangam's contention about the breach of the principles of natural justice. No doubt, the breach of the principles of natural justice, if made out, is a good ground for challenging the arbitral Award, given the provisions in Section 18, read with Sections 34(2)(a)(iii). Section 34(2)(a)(iii) of the Arbitration Act stipulates that an arbitral Award can be set aside if the party making the application was not given proper notice of appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case. Besides, Section 18 of the Arbitration Act mandates that the parties shall be treated with equality and each party

shall be given a full opportunity to present its case. Therefore, if the case of violation of the principles of natural justice is made out, then, certainly, that would be a good ground to set aside the arbitral Award.

45. In the present case, there was no complaint that the Appellant was not given proper notice of the appointment of the Arbitrator or the arbitral proceedings. The grievance of the Appellant is that it was otherwise unable to present its case on account of the failure of the learned Arbitrator to consider and dispose of the Appellant's application under Section 26 of the Arbitration Act and the Appellant's application seeking production of documents by the Respondent. Mr. Pangam contended that non-consideration and consequently non-disposal of these two applications prevented, or in any case, seriously prejudiced the Appellant from presenting its case. He submitted that non-consideration or non-disposal of such applications, virtually amounts to a dismissal of such applications, without assignment of any reasons whatsoever. He submits that assignment of reasons is an essential concomitant of the principles of natural justice. He submits that the very making of the unreasoned award constitutes patent illegality appearing on the face of the Award, as provided in Section 34(2)(a) of the Arbitration Act. He submitted that the learned Arbitrator also took into consideration the written submissions filed by the Respondent without the offer of the corresponding opportunity to the Appellant and this amounts to treating

the Appellant unequally and denying the Appellant full opportunity to present its case. He invokes the provisions of Section 18 of the Arbitration Act to contend that all this establishes failure on the part of the learned Arbitrator to observe the principles of natural justice and to treat the parties equally and to give full opportunity to the parties to present their case. He, therefore, submits that on these grounds, the impugned arbitral Award is liable to be set aside.

46. The Appellant, in the present case, filed its Statement of Defence and Counter-claim on 29/2/2016 before the learned Arbitrator. In the Counter-claim, the Appellant did not specify any particular amount which was being claimed. However, the Appellant pleaded that all the transactions and invoices raised by the Respondent from 14/8/1999 were required to be reexamined through a technical cum financial expert, to ascertain the correctness of the bills/invoices in terms of Section 26 of the Arbitration Act. The Appellant further pleaded that after such bills are verified and corrected, the arbitral Tribunal be pleased to award appropriate amounts and even direct refund of the excess amounts paid by the Appellant to the Respondent, with interest in terms of the PPA.

47. The aforesaid is evident from the prayer clauses of the Statement of Defence and Counter-claim, as originally filed. The same

reads as follows :

“a. that all the transactions and invoices raised by the Claimant from 14/08/1999 on the Respondent be re-examined through a technical cum financial expert so as to ascertain the correctness of the bills/invoices in terms of Section 26 of the Arbitration and Conciliation Act;

b. that after the bills are verified and corrected, this Hon'ble Tribunal be pleased to award as such; that the excess amount paid by the Respondent to the Claimant be refunded to the Respondent with interest in terms of the PPA:”

c. that this Hon'ble Tribunal may award Costs of the presents proceedings in favour of the Respondent; and

d. any other relief as this Hon'ble Tribunal deems fit in the interest of justice and equity;

48. The Appellant, thereafter, on 22/6/2016, applied Section 26 of the Arbitration Act, seeking the appointment of an expert to ascertain correctness and veracity of the invoices raised by the Respondent and to submit a report in that regard to the Arbitral Tribunal within a specific time frame. Again, this is evident from the prayer clause (a) of the application dated 22/6/2016, seeking the appointment of an expert under Section 26 of the Arbitration Act.

49. After replies were filed by the Respondent, the learned Arbitrator did make an order to the effect that the Appellant's application under Section 26 of the Arbitration Act will be disposed of at

a later point in time. The record also indicates that this application was not formally disposed of by the learned Arbitrator at any point in time before making the impugned Award. Though a formal order disposing of this application under Section 26 of the Arbitration Act may have been appropriate, absence of such formal order, in the facts and circumstances of the present case which are referred to hereafter, can hardly lead to any interference about non-observance of the principles of natural justice or denial of any equal treatment or opportunity to the Appellant to fully present its case.

50. Before the Appellant's application under Section 26 of the Arbitration Act could be disposed of by the learned Arbitrator, the Appellant applied under Section 23 of the Arbitration Act, seeking leave to amend the Statement of Defence and Counter-claim, along with the schedule of the proposed amendments. After hearing both the parties, the learned Arbitrator, vide order dated 17/1/2016, granted the Appellant's leave to amend the Statement of Defence and Counter-claim.

51. Now, if the amended paragraph 36(a) is perused, it is evident that the Appellants themselves pleaded that they had engaged services of an expert and with the assistance of such expert, the Appellant had completed the exercise of reworking/correcting of the bills and invoices

raised by the Respondent since the inception of the PPA. The amended paragraph proceeds to state that the Appellant had now arrived at a figure of ₹ 1241.7347047 crores, as the amount due and payable by the Respondent to the Appellant by way of a counterclaim.

52. Further, the Appellant, by way of an amendment, specifically deleted the prayer clause (a) of the Statement of Defence and Counterclaim, which was the prayer clause seeking appointment of an expert in terms of Section 26 of the Arbitration Act, precisely for verifying or reworking or correcting of the invoices raised by the Respondent from the inception of the PPA. As a result of this deletion, it was reasonable for the learned Arbitrator to proceed on the basis that the Appellant's application under Section 26 of the Arbitration Act was either rendered infructuous or was abandoned by the Appellant. The Appellant has not been able to demonstrate any prejudice whatsoever on account of non-disposal of its application under Section 26 of the Arbitration Act by making some formal order. Possibly, this is the reason why the Appellant did not even bring it to the notice of the learned Arbitrator that no formal orders were made to dispose of the application under Section 26 of the Arbitration Act. Thus, the principles of natural justice cannot be said to have been breached by the learned Arbitrator in not formally disposing of the Appellant's application under Section 26 of the Arbitration Act in the facts and circumstances of the present case.

53. Similarly, when it comes to the non-disposal of the Appellant's application for production of documents by the Respondent, we are unable to hold that this resulted either in breach of the principles of natural justice or that this disabled the Appellant from presenting its case or that this amounted to a denial of a full opportunity to present its case.

54. The Appellant, vide its application dated 30th March 2016, had requested the learned Arbitrator to issue directions calling upon the Respondent to produce 13 documents. Out of these 13 documents, the record of the arbitral proceedings indicates that almost 10 documents were furnished to the Appellant at some stage or the other of the arbitral proceedings. In so far as the documents at serial nos. 11 and 12 of the application dated 30th March 2016 are concerned, it was the case of the Respondent that such documents do not exist and, therefore, there was no question of requiring the Respondent to furnish the same to the Appellant. The documents at serial nos. 11 and 12 were authentic copies of all drafts of progress and developments in the negotiations of each fuel supply contract and authentic copies of minutes of all negotiations, meetings with fuel suppliers in terms of clauses 12.1.4 of the PPA. Now, since it was the case of the Respondent that no such documents were available, there was no question of requiring the Respondent to produce such documents.

55. Again, in so far as the document at serial no.5 of the application dated 30th March 2016 is concerned, it was the case of the Respondent that by the relevant time, they did not have the Original Equipment Manufacturers' recommendations towards the downrating of the net generating capacity in terms of clause 2(v) of the SPPA. The question is not whether the Respondent did not have these documents or not, the question is whether any prejudice was occasioned to the Appellant by not ordering production of these documents when it was the case of the Respondent that such documents were not even available with the Respondent at the time when its production was sought by the Appellant. According to us, the Appellant cannot urge or at least establish the failure of natural justice, merely because the learned Arbitrator failed to make a formal order disposing of the Appellant's application for production of the documents. No doubt Appellant could always have and has urged that adverse inference needs to be drawn.

56. As noted earlier, most of the documents were made available to the Appellant. At least three of the documents sought for by the Appellant were not made available to the Appellant because the Respondent clearly stated that such documents were not available with it at the relevant time or that such documents did not even exist at the relevant time. Thus, in absence of the Appellant establishing any serious

prejudice, we are not prepared to hold that there was a breach of the principles of natural justice, merely because at the relevant time the learned Arbitrator failed to make a formal order disposing of the Appellant's application for seeking production of documents by the Respondent.

57. The record does indicate that brief written submissions were filed by the Respondent in response to certain clarifications sought by the learned Arbitrator. Now, these written submissions were filed only clarifying the calculations submitted by the parties, and these written submissions, in that sense, had no serious nexus with the issues that had arisen for determination in the arbitration proceedings. Both the parties had filed detailed written submissions on the merits of the matter and there is no complaint whatsoever by the Appellant that such opportunity was ever deprived to the Appellant.

58. Even after written clarifications were filed by the Respondent, there were at least two meetings/hearings before the learned Arbitrator. In neither of these meetings/hearings did the Appellant file or seek leave to file written submissions in response to the written clarifications/submissions filed by the Respondent. From this, it is quite clear that there was no breach of the principles of natural justice or in any case, there was no prejudice whatsoever to the Appellant to hold that there

was any serious breach of the principles of natural justice. It is well settled that there can be no mere technical breach of the principles of natural justice. The Appellant, complaining about the breach of natural justice must plead and establish some prejudice. In the absence of the Appellant being able to demonstrate any breach or any serious prejudice, we find ourselves unable to agree with the contention of the learned Advocate General that there was any breach of the principles of natural justice in the present case, to warrant setting aside of the impugned Award on the ground contemplated by Section 34(2)(a) (iii), read with Section 18 of the Arbitration

59. Accordingly, for all the aforesaid reasons, we hold that the Appellant has failed to make out a case of breach of natural justice in the course of the arbitral proceedings warranting interference with the impugned Award on the said ground.

AWARD TOWARDS VARIABLE CHARGES FOR ₹ 24.66CR.

60. In terms of PPA, the Respondent had undertaken to establish a power plant and thereafter supply power to the Appellant. In respect of each unit of power supplied, the Appellant had agreed to pay “*fixed charges*” and “*variable charges*”. The PPA provided a formula for the determination of these charges.

61. The fixed charges were payable by the Appellant to the Respondent irrespective of whether the Appellant purchased the minimum specified quantity of power from the Respondent. The variable charges became payable only on the actual purchases made by the Appellant from the Respondent. The variable charges were substantially dependent upon the price at which the Respondent procured fuel for the power plant. Accordingly, the main component in the formula for determining the variable charges was the price of fuel procured by the Respondent.

62. As noted earlier, the fixed charges were payable by the Appellant to the Respondent, irrespective of actual supplies to the extent of the minimum specified quantity of power. This was mainly to compensate the Respondent for providing infrastructure for power generation by setting up the power plant. Since the variable charges had a direct nexus with the actual supplies, such variable charges were determined and became payable on actual supplies. The price of fuel procured by the Respondent, therefore, played a dominant role in the determination of variable charges on the actual supplies.

63. Since, the fuel prices were the dominant factor in the determination of variable charges payable by the Appellant to the

Respondent, naturally, the Appellant wished to retain the control on the fuel supply contracts entered into by the Respondent with its suppliers. But for such control, the Appellant would be forced to pay exorbitant variable charges based on the fuel supply contracts between the Respondent and its suppliers. Such a situation would result in the Appellant having to pay substantially high rates for the purchase of power from the Respondent. Precisely to avoid such a situation, the provisions were made in the PPA to ensure that the Appellant retains sufficient control over the fuel supply contracts which the Respondent might choose to enter into with the fuel suppliers.

64. Such contractual provisions are to be found in various sub-clauses to Clause 12 of the PPA and the same read as follows:-

“FUEL SUPPLY

12.1.1 RSPCL shall procure Fuel as required for the operation of the Power Station and shall use all reasonable endeavors to procure such Fuel on the best available terms (including terms as to price, minimum take or pay quantities transportation, handling, delivery to and receipt at the Fuel Facility) consistent with Good Industry Practice.

12.1.2 GOG shall deliver to RSPCL so as to enable RSPCL to plan its procurement of Fuel.

(a) no later than 7 days after the Entry into Commercial Service of the Power Station, the anticipated levels of Active Energy and Reactive Power required by GOG from the Power Station for the period from Entry into Commercial Service of the Power Station to the end of the Current

Accounting Year;

(b) thereafter, no later than 30 days prior to the commencement of each Accounting Year, the anticipated levels of Active Energy and Reactive Power required by GOG from the Power Station for such Accounting Years; and

(c) At least 7 days prior to the end of the month following the Entry into Commercial Service of the Power Station and at monthly intervals, thereafter GOG shall notify RSPCL in writing of the updated anticipated levels of Active Energy and Reactive Power required by GOG from the Power Station for the month.

12.1.3 RSPCL shall within 90 days prior to the Target Date for Entry into Commercial Service of Power Station prepare, and from time to time thereafter revise, a Fuel Supply Plan in respect of the operation of the Power Station from the anticipated date of Entry into Commercial Service of the Power Station.

12.1.4 RSPCL shall :-

(a) enter into Fuel Supply Contracts (other than Initial Fuel Supply Contracts) as may be contemplated in the Fuel Supply Plan;

(b) keep GOG fully informed of progress and developments in the negotiation of each Fuel Supply Contract;

(c) promptly provide GOG with copies of all drafts thereof and with correspondence with potential suppliers; and

(d) allow representatives of GOG to participate in all negotiation meetings with potential suppliers.

12.1.5 The Fuel Supply Plan, or amendments or variations thereof shall be subject to the approval of

GOG, which approval shall be given or withheld by notice to RSPCL within 14 days of receipt by GOG of the execution draft of the particular Fuel Supply Contract. If GOG does not give such notice within the 14 days period described above, GOG shall be deemed to have approved such Fuel Supply Contract or amendments or variations thereof.

12.1.6 Where a Fuel Supply Contract is amended by RSPCL without the prior approval of GOG in contravention of clause 12.1.5, and where such amendment increases the costs to GOG in any respect, GOG shall only be obliged to pay such portion of the costs in respect of the amended Fuel Supply Contract as would have been payable by GOG prior to the amendment.

12.1.7 Notwithstanding clause 12.1.4, RSPCL may enter into any other contract for the supply of Fuel for a term not exceeding 7 days in duration if and so far as the Fuel Supply Plan currently in force contemplates the formation of such a contract provided that the price of fuel under any such contract shall not be more than 105% of the price of fuel under the most recently negotiated arm's length Fuel Supply Contract entered into by RSPCL, RSPCL may enter into a maximum of 6 such contracts in any Accounting Year provided that such contracts do not have consecutive terms. In addition, however, RSPCL may enter into further contracts for the supply of Fuel provided that the prior written approval of GOG has been obtained.

12.1.8 (a) GOG's failure to approve Initial Fuel Supply Contracts pursuant to clause 12.1.5 shall not be a Dispute pursuant to clause 18:

(b) In relation to Fuel Supply Contracts which are not Initial Fuel Supply Contracts, or amendments or variations to the Fuel Supply Contracts. GOG's approval shall not be unreasonably withheld. Any dispute or difference between the parties as to whether this approval was unreasonably withheld by GOG shall be referred to an Expert pursuant to clause 19.3.

12.1.9 Change in fuel:

In the event of -

*(a) Non-availability of fuel beyond the control of RSPCL:
or*

(b) Steep increase in the prices of fuel being used: or

(c) Availability of alternate fuel

GOG and RSPCL shall mutually discuss about the use of Alternate Fuel in the power station and such use of Alternate Fuel shall be mutually agreed only if it does not involve additional capital expenditure and the Alternate Fuel is available in requisite quantities and use of such fuel does not violate environmental laws. In respect of change over to Alternate Fuel, due regard shall be had to the existing Fuel Supply Contract approved by GOG and the liabilities of RSPCL under such contract. The use of Alternate Fuel shall be certified by an independent engineer mutually acceptable to both GOG and RSPCL, that such fuel is compatible with the equipment in use and does not lead to accelerated degradation of the equipment.

In case RSPCL desires to use an Alternate Fuel for the reason mentioned as above in (a),(b),(c), GOG shall allow the same provided that it's impact is favourable to GOG and the use of Alternate Fuel does not violate any of the prevailing environmental laws.

In case that gas is available in Goa from the Southern Gas Grid, consideration shall be given for the use of the same by

RSPCL in this power plant and GOG shall allocate the required quantity of gas to RSPCL.

Fuel Payment

12.2 GOG shall perform its obligation under clause 11.8.1 to pay Variable Charges to RSPCL at the time and in the manner specified in clause 11.7.1 in relation to the Fuel combusted in the Power Station to produce Delivered Energy in accordance with clause 3.1 of Schedule 8.”

(Emphasis supplied)

65. Particular reference is necessary to clauses 12.1.4, 12.1.5, 12.1.6, and 12.1.7 of the PPA which explain the extent and nature of control retained by the Appellant on the fuel supply contracts that might be entered into by the Respondent with fuel suppliers.

66. In entering into fuel supply contracts, the Respondent, was contractually bound to keep the Appellant fully informed of the progress and the developments in the negotiation of each fuel supply contract; promptly provide the Appellant with copies of all drafts thereof and with the correspondence with potential suppliers, and even allow the representatives of the Appellant to participate in all negotiation meetings with potential suppliers. All these contractual provisions were made so that the Appellant is fully kept in the loop when it comes to the Respondent entering into a fuel supply contract with its suppliers. Again, all these provisions were made so that the Appellant is not forced

to pay an exorbitant rate for power which it was obliged to purchase from the Respondent. As noted earlier, the fuel prices formed a dominant component of the variable charges payable by the Appellant for the purchase of power from the Respondent.

67. Clause 12.1.5 of the PPA then went to the extent of providing that the fuel supply plan or the amendments or variations thereof will be subject to the approval of the Appellant, which approval shall be given or withheld by the notice to the Respondent within 14 days of the receipt by the Appellant of the execution draft of a particular fuel supply contract. This also provided that if the Appellant does not give such notice within 14 days period, the Appellant shall be deemed to have approved such fuel supply contract or amendments or variations thereof. This means that the approval of the Appellant was necessary though, a provision was made for deemed approval in case of specified eventualities.

68. Clause 12.1.6 provided consequences should the Respondent proceed to amend a fuel supply contract without prior approval of the Appellant in contravention of clause 12.1.5 and where such amendment increases the costs payable by the Appellant in any respect. This clause provided that the Appellant would then only be obliged to pay such portion of the costs in respect of amended fuel supply contract, as would

have been payable by the Appellant “*prior to the amendment*”.

69. The aforesaid means the Respondent was contractually bound to involve the Appellant in all stages of negotiation with its potential suppliers before it entered into any fuel supply contract (other than initial fuel supply contract as were contemplated in the fuel supply plan). Further, the Respondent, before entering into such a fuel supply contract or amending the fuel supply contract with its potential suppliers were contractually bound to obtain prior approval of the Appellant, unless the Respondent was in a position to make out a case of deemed approval. Finally, the contractual clauses provided that where the Respondent proceeded to amend a fuel supply contract, without prior approval of the Appellant and where such amendment increases the costs to the Appellant in any respect, then, the Appellant, would be obliged only to pay such portion of the costs in respect of the amended fuel supply contract as would have been payable by the Appellant prior to such unapproved amendment.

70. Clause 12.1.7, which begins with a non- obstante clause does permit the Respondent to enter into a short-term contract for fuel supply (for a term not exceeding 7 days in duration). However, this is subject to several restrictions set out in clause 12.1.7 itself. It is not the case of the Respondent that the fuel supplies during the disputed period

were in terms of clause 12.1.7 of the contract and therefore, it is not necessary to address this issue in any detail.

71. Now there is no serious dispute between the parties that the contractual provisions in clause 12 of the PPA applied with all vigor for the period before June 2013, when, the Respondent operated the power plant with fuel Naphtha. The issue today is not whether these contractual provisions were complied with or not for the period before June 2013. However, what is important is that it is not even the case of the Respondent that these contractual provisions did not apply before June 2013. The Respondent accepts that these contractual provisions applied with full vigor for the period before June 2013.

72. Now since the Appellant by the year 2013 found that the variable charges, of which, the fuel component formed a major part were too exorbitant. Therefore, the Appellant, vide notice dated 20th March 2013 informed the Respondent of its intention to stop purchasing power from the Respondent as it could no longer bear the financial burden of variable charges. The issue as to whether the Appellant was entitled to or justified in issuing such a notice was not the subject matter of dispute before the learned Arbitrator.

73. The Respondent, in response replied on 21st March 2013 and

submitted a proposal to switch to the alternate fuel i.e. RLNG from 1st April 2013 if agreed to by the Appellant. The Respondent, in its response dated 21st March 2013 also held out that change from Naphtha to RLNG will result in a minimum substantial reduction of power tariff by nearly 40% as compared to the current tariff based on fuel Naphtha.

74. The Respondent, also indicated the rate of RLNG, by taking into consideration the prevailing dollar rate and proceeded to demonstrate how the Appellant, based on such rates would be required to pay a substantially reduced power tariff. Now it is the case of the Respondent that its proposal as found in the response dated 21st March 2013 was accepted by the Appellant and based on such acceptance, the Respondent, with effect from June 2013, commenced generation of power by using fuel RLNG instead of Naphtha.

75. Despite the change of fuel from Naphtha to RLNG and representation held out by the Respondent about a substantial reduction of power tariff to the extent of nearly 40%, the Respondent continued to raise invoices which were substantially the same or even higher.

76. The Appellant had contended before the learned Arbitral Tribunal that the Respondent for the period June 2013 to 30th August 2014 acted in total breach of the contractual provisions to be found

under clauses 12.1.4 to 12.1.7 and as a result, the Appellant was not at all involved in the process of procurement of fuel RLNG by the Respondent from its suppliers. The control which was vested in the Appellant in terms of the contractual provisions in clause 12 of the PPA could, therefore, not be exercised by the Appellant. The Appellant pointed out that the Respondent entered into fuel supply contracts with various suppliers without even bothering to obtain any approvals from the Appellant.

77. The Appellant, therefore, invoked the provisions of Clauses 12.1.4 to 12.1.6 to submit that the Appellant should not be made to bear the increased costs but the Appellant can be obliged only to pay such portion of costs in respect of amended fuel supply contract as would have been payable by the Appellant prior to the amendment. The Appellant contended that the rate indicated by the Respondent at the time of securing the approval for change of fuel from Naphtha to RLNG had to be regarded as the original rate before the amendment. Since the subsequent fuel supply contracts or the amendments thereto were without any compliance with the provisions of clauses 12.1.4 and 12.1.5, the Appellant could not be made bound to pay to the Respondent the increased costs in any respect.

78. The pleadings to the aforesaid effect may not have been very

elaborate in the statement of defence filed by the Appellant before the learned Arbitrator. However, in paragraph 43 of the statement of defence, the Appellant did plead that the Respondent did not furnish copies of any agreements with RLNG fuel suppliers. In paragraph 44, the Appellant did make a grievance about failure on the part of the Respondent to obtain any approvals as contemplated by clause 12.1.9. Therefore, Mr. Bhat is not right in his submission that such defenses were never taken by the Appellant. In any case, such a specific issue was raised by the Appellant in paragraph 44 its sur-rejoinder filed before the learned Arbitrator on 17th March 2016 about which there is no dispute.

79. Again, such a plea based on contractual provisions in clauses 12.1.4 to 12.1.7 was specifically raised in the written submissions filed before the learned Arbitrator. This is evident from the perusal of paragraphs 30, 31, 32 of such written submissions dated 19th October 2017. The circumstance that the pleadings on this issue were not quite elaborate in the statement of defence of the Appellant is not at all sufficient to hold that such a plea was never raised by the Appellant or that the Respondent was taken by surprise in dealing with such a plea. This is because the Respondent, in its pleadings has taken cognizance of this plea. This is evident, *inter alia* from the detailed response offered by the Respondent in its written submission before the learned Arbitrator. In particular, reference can be made to the detailed arguments set out in

Part II of the written submissions comprising paragraphs 3, 4.1 to 4.16, 5, 6, 7, and 8.

80. In response to the Appellant's contentions based on non-compliance with clauses 12.1.4 to 12.1.7 of the PPA and the impact of such non-compliance on the variable charges during the period June 2013 and 30th August 2014, the Respondent submitted that throughout this period, the Respondent submitted its bill/invoices from time to time along with all supporting documents showing the landed cost of fuel and prevailing exchange rates. It was also the case of the Respondent that the bills were duly checked on behalf of the Appellant and the correctness thereof was verified. At no stage was any dispute raised.

81. Before the learned Commercial Court as also this Court the learned Counsel appearing on behalf of the Respondent urged that the contractual provisions in clauses 12.1.4 to 12.1.7 were to apply in respect of '*fuel supply contract*' as defined under the PPA. The learned counsel pointed out that the expression "*fuel supply contract*" has been defined in the PPA to mean any contract entered into between RSPCL (Respondent) and any fuel supplier "*for the supply of Naphtha pursuant to clause 12*". The contention, therefore, was that once the fuel switched from Naphtha to RLNG, the contract for the supply of fuel RLNG, ceased to be "*fuel supply contract*" as defined under the PPA

and consequently, the provisions of Clause 12 of the PPA would not apply.

82. On behalf of the Respondent, the learned counsel also contended that RLNG was procured mostly from public sector undertakings like GAIL, GSPC, and BPCL implying that such fuel supply contracts were above board and consequently there was no necessity of involving the Appellant in the process of negotiation or seeking approval of the Appellant before entering into any fuel supply contract with these agencies.

83. Now much could be said about the Respondent's contention regards non-applicability of the contractual clauses 12.1.4 to 12.1.7. Mr. Pangam pointed out that the PPA defines "*Alternate Fuel*" to mean any fuel other than Naphtha which shall be used in the power station based on mutual agreement between the parties. He submitted that from this it is clear that even a fuel supply contract to procure alternate fuel like RLNG would be governed by the contractual clauses in 12.1.4 to 12.1.7. He submitted that as between various public sector undertakings, there was a price difference as well as a difference in terms of supply. He submitted that the PPA did not envisage the Appellant being completely excluded from negotiation with fuel suppliers, merely because such fuel suppliers may be public sector undertakings. He

submitted that if there was to be an increase in fuel supply rates, then, the contractual provisions obliged the Respondent to secure prior approval from the Appellant. He pointed out that failing such prior approval, the Appellant would not be obliged to bear the increased cost as was clearly provided in clause 12.1.7 of the PPA.

84. But Mr. Pangam's fundamental challenge to the impugned arbitral Award was not that the learned Arbitrator took one view or the other on the rival contentions raised by the parties in the context of non-compliance with the contractual clauses 12.1.4 to 12.1.7. His fundamental challenge was based on failure on the part of the Arbitrator to even advert to, much less consider the serious issue of non-compliance with the contractual clauses 12.1.4 to 12.1.7 by the Respondent. He submitted that the complete non-consideration of these most relevant and vital issues that arose for determination before the learned Arbitrator renders the impugned Award perverse and vitiated by patent illegality on the face of the Award.

85. From the record, it is apparent that the issue of non-compliance with the contractual clauses 12.1.4 to 12.1.7 was squarely raised by the Appellant. This issue was more than adequately responded to by the Respondent in the course of the arbitral proceedings. Therefore, it will not be correct to hold that such an issue was never

raised or that such an issue never arose before the learned Arbitrator, or that the Respondent was in any manner prejudiced in responding to such issue. The learned Arbitrator in such circumstances was obliged to consider this serious issue since it related to compliance or non-compliance with specific clauses of the contract i.e. clauses 12.1.4 to 12.1.7 of the PPA.

86. If the impugned Award is perused then, the discussion on the issue of variable charges is to be found in paragraphs 24, 35, 36, 37, 38, 39, 40, 41, 42, and 43 of the Award. The entire discussion revolves around the issue as to whether there was the unconditional and unqualified acceptance of the proposal submitted by the Respondent for the operation of the power plant by switching fuel from Naphtha to RLNG. There is also some discussion on whether the tariff of ₹8.58 per unit based on the prevalent RLNG price was only a sample calculation or the initial rate, post the fuel switch. However, in all these paragraphs of the impugned Award the learned Arbitrator has not even adverted to much less considered the issue of applicability or non-applicability or for that matter, the compliance or non-compliance with the contractual provisions to be found in clauses 12.1.4 to 12.1.7 of the PPA. There is no reference to be found in these paragraphs or for that matter in the entire arbitral Award to the contractual clauses 12.1.4 to 12.1.7 or the issue of applicability and non-compliance of such clauses even though,

such issue was squarely raised by the Appellant and even responded to by the Respondent.

87. Therefore, the question which arises for determination is not whether the contention raised by the Appellant based on the applicability and non-compliance of the contractual provisions to be found in clauses 12.1.4 to 12.1.7 is correct or not. So also the question is not whether the defenses raised by the Respondent to such contentions are correct or not. The question is whether the learned Arbitrator was obliged to at least consider such a vital contention that was squarely raised and put into the issue before him.

88. According to us, the issue about the applicability and the non-compliance of contractual clauses 12.1.4 to 12.1.7 was one of the most relevant and vital issues which arose before the learned Arbitrator. A substantial claim was made by the Respondent towards variable charges, of which, the fuel component was the most dominant. Ultimately, the learned Arbitrator has made an Award in an amount of ₹24.66 crores (approximately) towards variable charges post the switch of the fuel from Naphtha to RLNG. Such a substantial award has been made without even adverting to, much less considering or evaluating the issue raised by the Appellant about applicability and non-compliance with the contractual clauses 12.1.4 to 12.1.7. This amounts to patent illegality

because the Award to that extent can be said to have been made ignoring or even disregarding contractual provisions to be found in clauses 12.1.4 to 12.1.7 of the PPA. The Award to this extent will have to be held as vitiated by patent illegality because Award ignores vital evidence on the issue of applicability and non-compliance with the contractual provisions in clauses 12.1.4 to 12.1.7.

89. The Award on the issue of variable charges can also be regarded as an unreasoned Award because the same is made without even advertent to much less taking into consideration the most relevant and vital issue raised by the Appellant. Since this issue is neither adverted to much less considered, there are obviously, no reasons to be found in the Award either in support or against such an issue. Without any reason, therefore, this issue which was most vital and relevant has been answered against the Appellant. The Award to this extent is, therefore, an unreasoned Award and warrants interference on this score as well.

90. Mr. Bhat did try to urge that even if the learned Arbitrator were to have adverted to or considered the contractual clauses 12.1.4 to 12.1.7, his conclusion would have been no different than the conclusion now arrived at by him. He submitted that defence raised by the Respondent to the charges of applicability or non-compliance with the contractual clauses 12.1.4 to 12.1.7 were formidable and even if this

Court were to take the same into account, the conclusion would be no different from that arrived at by the learned Arbitrator.

91. According to us, it is not open for us to undertake such exercise as suggested by Mr. Bhat. The parties had chosen to resolve their disputes through the mode of arbitration. This is because a very relevant and vital issue was raised before the learned Arbitrator and the learned Arbitrator without even adverting to this issue, much less, considering the same or deciding the same one way or the other, has chosen to award the Respondent an amount of ₹24.66 crores. If the learned Arbitrator, were to consider this issue of applicability and non-compliance then, in deference to limits of our jurisdiction under Section 34, interference on merits might have been difficult. However, as pointed out earlier, this is a case of failure to even advert to the most relevant contractual provisions. An Award of this nature is vulnerable on the ground of perversity, patent illegality, and even failure to give reasons.

92. Besides, as held in *Bhanumati Bhuta* (supra), a party who has succeeded before the Arbitral Tribunal cannot be permitted to supplant reasons in support of the conclusion drawn by the Arbitrator. In that case, the Arbitrator had not given any reasons but the party tried to provide such reasons in proceedings under Section 34 of the Arbitration Act which was not permitted. Thus, it is not open to the parties to

supplant reasons or for the first time provide reasons either in proceedings under section 34 of the Arbitration Act or in appeal arising therefrom. If the Award contains no reasons, then it is not for the parties to supply such reasons in proceedings to challenge such Award. Similarly, if the Arbitrator does not even advert to the contractual provisions or completely ignores vital evidence on record, it is not for Court to consider for the first time the impact of the ignored contractual provisions or evidence. In entertaining challenges to arbitral awards, the Courts do not exercise any appellate jurisdiction.

93. *Santa Sila Devi* (supra) was not a case where the learned Arbitrator had failed to advert to or consider the contractual provisions. It was also not a case where the relevant and vital issues squarely raised before the Arbitrator were glossed over or missed by the Arbitrator. That was a case where the Award was not made claim-wise, but a lump sum award was made in respect of several claims which were raised. In this context, the Hon'ble Supreme Court held that where the Award, on its face intends and purports to decide all the disputes raised for its adjudication, the Court will assume that the Arbitrator has considered and disposed of every claim made or every defence raised. The silence of the Award as regards the claim for accounting must, therefore, be taken to be intended as a decision rejecting the claim.

94. Besides, it is necessary to note that *Santa Sila Devi* (supra) was a case arising under the Indian Arbitration Act, 1940, and under the provisions of the said Act, there was no legal obligation on the Arbitrator to make a reasoned Award. Therefore, it was quite open then to the Arbitrator to reject a claim by implication, without assigning any reasons. Even the Civil Procedure Code stipulates that if relief is not specifically granted by a Court, then, by implication such relief is to be deemed to have been rejected. The position under the 1996 Arbitration Act is, however, quite different, in that the Arbitrator is bound to make reasoned Award unless, of course, the parties to the arbitration agreement agree otherwise. *Santa Sila Devi* (supra) can, therefore, not assist the Respondent in the facts of the present case.

95. To the same effect is the ruling of the learned Single Judge of the Delhi High Court in *Arunodaya Co-Operative Group Housing Society Ltd.* (supra). There it is held that the Arbitrator is not bound to give an award on each point, but may award one sum generally in respect of all the money claims. The Court noted that 11 issues were framed and except for the issues which were abandoned, the Arbitrator discussed the issues and made the lump sum award. Such is not even remotely the position in the present case. Therefore, the decision in *Arunodaya Co-Operative Group Housing Society Ltd.* (supra) can be of no assistance to the Respondent.

96. In contrast, the reliance placed by the learned Advocate General on the decision of the learned Single Judge of this Court in *Bombay Intelligence Security (India) Ltd* (supra), is quite appropriate. Therein the impugned Award had indicated that the learned Arbitrator had not dealt with the oral, as well as documentary evidence led by the parties at all while dealing with the specified claims. Though there was an uncontroverted affidavit of the Petitioner (deposition) and though the Petitioner had produced documents regarding ESI payment, the learned Arbitrator had ignored the material and crucial part of the evidence. The learned Single Judge, in such circumstances, set aside the impugned Award in respect of the specified claim by refusing to consider the material attempted to be handed in at the stage of hearing the application under Section 34 of the Arbitration Act. Thus, the arbitral Award was set aside for completely ignoring the vital and relevant evidence in that regard. In the present case as well, the learned Arbitrator has ignored the contractual provisions and the serious issues raised by the Appellant concerning the breach of such contractual provisions by the Respondent.

97. *Ssangyong Engineering and Construction Company Ltd.* (supra), as analyzed in *RECON* (supra) holds that lack of reasons is patent illegality under Section 34(2A). So also where an Arbitrator

wanders beyond the contract, it would amount to patent illegality. Although “*perversity*” as understood in *Associate Builders Vs Delhi Development Authority*¹⁸ is now dishoused from the fundamental policy the same finds a home under “*patent illegality*”. The ground of patent illegality is made out where a piece of vital evidence is completely ignored or where the relevant contractual provisions are not even adverted to or otherwise considered or where a serious issue going to the root is simply glossed over.

98. According to us, all these predicates are attracted when it comes to impugned Award concerning the variable charges. The interference is by no means, merit-based. Interference is because the Arbitrator in the present case has failed to even advert to much less go into the merits of one of the most vital and relevant issues concerning the applicability and non-compliance with the contractual provisions. The interference is not because the interpretation of the contractual clauses by the learned Arbitrator is wrong or because we disagree with such interpretation. The interference is because the learned Arbitrator failed to even look into the contractual provisions to find out if the same were given a go by post the switch of fuel from Naphtha to RLNG. The interference is because the learned Arbitrator failed to take note of and interpret the contractual clauses to find out whether they were breached as alleged by the

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Appellant though denied by the Respondent. Without even adverting to much less taking into consideration the contractual provisions which governed the relationship between the parties, the learned Arbitrator was not justified in making an Award of ₹24.66 crores in favour of the Respondent. Accordingly, we set aside the impugned Award to the extent it awards ₹24.66 crores to the Respondent towards the variable charges.

AWARD FOR ₹18.53 CRORES IGNORING THE DOWNRATING PRINCIPLE

99. There is no dispute that the PPA had defined the contracted capacity as 39.402 KW in the first year of commercial operation and downrated annually for the successive years as per the Original Equipment Manufacturers' (OEMs') recommendations. It was the Appellant's case before the learned Arbitrator that the Respondent while submitting the invoices/bills failed to take into account the downrating factor in terms of the OEMs' recommendations. As a result, inflated bills/invoices came to be raised by the Respondent, which were not payable by the Appellant. The Appellant also contended that the Respondent, in response to the Appellant's application seeking production of the OEMs' recommendations had stated that such OEMs' recommendations are not available with the Respondent and, therefore, cannot be furnished. The Appellant also relied upon draft notification issued by the Ministry of Power and submitted that in the absence of

OEMs' recommendations, at least the said draft notification be taken into account for downrating purposes.

100. The Respondent did not dispute that the PPA, in the context of contracted capacity of 39.402 MW in the first year of commercial operation had provided for annual downrating as per the OEMS' recommendations in the successive years. However, the Respondents contended that at a later point in time, a second supplementary agreement was entered into between the parties on 20/9/2000, reducing the contracted capacity from 39.402 MW to 19.8 MW. As a result, the earlier definition of the contracted capacity became *irrelevant*. The Respondent also contended that the subsequent written agreements had amended the original PPA on the aspect of downrating and, therefore, there was no question of any further downrating.

101. The Respondent also placed reliance on a Certificate issued by the OEM namely "BHEL-GE Gas Turbine Services Pvt. Ltd." dated 8th November 2005, certifying that there was no degradation of the power plant, which was found to be generating its rated output without any degradation. The Respondent, based on this Certificate dated 8th November 2005, contended that degradation of the plant and downrating, are interrelated because downrating becomes necessary only if there is a degradation of the plant. The Respondent further submitted

that in the meeting held between the parties on 5th April 2007, this issue of downrating vis-à-vis OEMs' recommendations was discussed in detail and it was agreed that the issue of downrating will no longer arise because of the OEMs' certificate date 8th November 2005.

102. The learned Arbitrator in the impugned Award has not recorded any findings whatsoever on the contention that the contractual clause of the PPA regarding downrating was amended by subsequent amendments between the parties. However, the learned Arbitrator has relied on the certificate dated 8th November 2007 and the statement therein that there was no degradation of the plant as of 8th November 2005. Based upon this, the learned Arbitrator has held that the issue of downrating can arise only if there is a degradation of the plant. Since the certificate dated 8th November 2005 states that there was no degradation of the plant, there was no issue of downrating involved.

103. The learned Arbitrator has also relied on the minutes of the meeting dated 5th April 2007 and concluded that the issue relating to the downrating of the capacity of the plant "*appears to have been settled between the parties*" and should not be allowed to be raised in these proceedings. Accordingly, the Appellant's defence that the Respondent ought to have raised invoices or demanded amounts only by adhering to the contractual provisions regarding downrating, was rejected by the

learned Arbitrator.

104. The discussion on the issue of downrating is to be found mainly in paragraphs 53 and 54 of the impugned Award and the same reads as follows :

“53. The Respondent submitted that the certificate refers to there being no degradation of the plant. The degradation and down rating are two different and distinct concepts which cannot be confused with one another. It is not possible to accept this contention because down rating becomes necessary only if there is degradation of the plant.

54. The Claimant has also referred to the meetings held between the parties, on 5th April, 2007, when the Respondent was duly satisfied on the issue relating to down rating of contracted capacity as per OEM's recommendation which were discussed in the said committee. The Claimant explained that the plant was maintained as per OEM's recommendation and there had been no down rating of contracted capacity. The Claimant had already submitted OEM's letter in this regard, which is dated 8th November, 2005. The parties agreed at the said meeting that the invoices were to be reconciled as per what was stated in the said meeting and all future invoices were to be calculated in the same manner. The minutes of the said meeting dated 5th April, 2007 have been placed on record. Thus the question of down rating of contracted capacity is completely irrelevant. It is not disputed that, based on the minutes of the said meeting and the agreement arrived there at, the invoices for the period April 2004 to April 2007 were reconciled and the reconsideration was duly approved by the Respondent and the payment was made on the basis thereof by the Respondent to the Claimant. All future invoices were

raised on the basis of the said agreement arrived at the meeting and the invoices were duly approved by the Respondent and have been paid by the Respondent for the period up to March 2013 and a part of April 2013. In the circumstances, therefore, the issue relating to the down rating of capacity of the plant appears to have been settled between the parties, and should not be allowed to be re-agitated in this proceeding, This claim is accordingly, rejected.”

105. Now, the PPA defines the “contracted capacity” in the following terms :

*“‘Contracted Capacity’ means net generating capacity (net auxiliary load) guaranteed by RSPCL to the GOG at the Delivery Point and for the Project, it shall equal 39.402 Kilowatts in the first year of commercial operation and **down rated annually thereafter as per original equipment manufacturer OEM’s recommendations in successive years**”.*

(emphasis supplied)

106. The above definition indicated that the parties to the PPA had agreed that the capacity which was contracted by the Respondent for the supply of power to the Appellant would have to be downrated annually based on the recommendations of the OEM. The concept of downrating as explained by the learned Advocate General accounts for the reduction in the efficiency of the power plant in that sense, it is akin to the concept of depreciation. This is because it cannot be expected that any plant will function at its optimum capacity for a period spread over 15 years. There

can be no comparison between the efficiency levels in the first year of the plant's commercial production and the successive years. Therefore, the parties had stipulated that the contracted capacity had to be downrated annually in terms of the OEMs' recommendations.

107. Now that the parties had specifically agreed to resort to downrating and even inserted specific terms in the PPA (contract) to ensure the same, there is no necessity of adverting to the logic behind the concept of downrating. The concept of downrating is premised on the circumstance that the efficiency levels of any plant are unlikely to remain constant over a working life of about 15 years, as was intended in the present case. On account of such reduced efficiency, the plant consumes extra fuel. This consumption of extra fuel results in increased costs for the generation of every unit of power. Since the PPA provides direct nexus between the charges for the fuel consumption and the power generated, annually the Appellant would be required to pay higher rates for the purchase of power in such a situation. To take into account this factor, the parties agreed and provided for the downrating of the contracted capacity annually in terms of the OEMs' recommendations.

108. As noted earlier, there is no dispute whatsoever that the original contract i.e. PPA provides for the annual downrating of the contracted capacity in terms of OEMs' recommendations. Clause 23.1

of the PPA provides that except as otherwise provided therein, the PPA may not be amended *except by a signed agreement in writing between the parties*. Clause 23.1.1 of the PPA makes provisions about ‘waiver’. This clause makes it clear that even waiver shall not be effective unless it is in writing and executed by a duly authorized representative of the party.

109. As noted earlier, on the issue of downrating, the Respondent had raised two pleas:- (a) that this requirement of the downrating was done away with (amended) by supplementary PPAs when the contracted capacity was reduced to 19.8 MWs; and (b) that in any case, there was compliance with the provisions for downrating upon the Respondent furnishing OEMs’ certificate dated 8th November 2005 which, according to the Respondent was accepted by the Appellant and issue of the downrating was settled between the parties.

110. Now, if the supplementary PPAs are perused, then, it is true that the contracted capacity was reduced to 19.8 MWs. However, the supplementary PPAs have neither amended, nor done away with the concept of annual downrating which is specified in the original PPA. There is nothing in the supplementary PPAs to indicate either expressly or even impliedly that the parties intended to do away with the requirement of downrating. Therefore, there is no material whatsoever

on record to suggest that through any subsequent agreement in writing between the parties, the concept of the downrating was done away with at the time of reduction of the contracted capacity to 19.8 MWs. Despite this, the learned Arbitrator has proceeded to hold that the issue of downrating became irrelevant after the contracted capacity was reduced to 19.8 MWs.

111. From the perusal of the impugned Award, it is not quite clear whether this is the actual finding arrived at by the learned Arbitrator, or whether the learned Arbitrator has merely recorded the contention of the Respondent that the concept of downrating became '*irrelevant*' after the contracted capacity was reduced to 19.8 MWs. Be that as it may, there is no material whatsoever on record to suggest that the requirement of the downrating was done away with by the parties, consequent upon the reduction of the contracted capacity to 19.8 MWs. Therefore, if at all it is considered that the impugned Award records finding of '*irrelevancy*', then, such a finding is based on no evidence whatsoever and consequently, such a finding is perverse and suffers patent illegality on the face of the record.

112. Therefore, the first limb of the Respondent's defence that the requirement of downrating which was clearly stipulated in the PPA was deleted by way of an amendment to the PPA, has no legs to stand. None

of the supplementary PPAs refers to the deletion of this term agreed to by and between the parties in the original PPA. The supplementary PPAs only refer to the reduction in the contracted capacity, but the clause that the contracted capacity was required to be downrated annually based on the OEM's recommendations, was never amended or deleted. Though there is no finding in the impugned Award that such a term was amended or deleted, the fact remains that the learned Arbitrator has not accepted the Appellant's case that the bills or invoices could have been raised by the Respondent only after applying the principle of downrating.

113. As noted earlier, there is also an unclear observation that the issue of downrating became irrelevant upon reduction of the contracted capacity to 19.8 MWs. Since, there is no material whatsoever on record suggesting any amendment to the original PPA on the issue of downrating, any finding to the effect that requirement of the downrating was deleted or amended, would be an *ex facie* perverse finding. This constitutes patent illegality on the face of the record.

114. Now, the PPA, in terms provides for annual downrating "*as per the Original Equipment Manufacturers' (OEM's) recommendations in successive years*". The Respondent did not contend that there existed no OEMs' recommendations. That might have been a too extreme position

to take. However, when the Appellant took out an application before the learned Arbitrator, seeking directions to the Respondent to produce, *inter alia*, the OEMs' recommendations, the Respondent responded by stating that the OEMs' recommendations are not in their possession and, therefore, they are not in a position to produce the same. Mr. Bhat, the learned Senior Advocate for the Respondent clarified that the OEMs' recommendations were not available with the Respondent at the time when their production was sought by the Appellant in the arbitral proceedings but it was not the case of the Respondent that such recommendations never existed. He explained that the plant was set up sometime in the year 1997-98 and, therefore, the Original Equipment Manufacturers' recommendations were not available during the arbitral proceedings, which held almost 8 to 10 years later.

115. At the same time, the Respondent has successfully urged before the learned Arbitrator that the Certificate dated 8th November 2005 be treated as OEMs' recommendations since the Certificate had been issued by the Original Manufacturers of the turbine. This certificate dated 8th November 2005 was produced by the Respondent in the meeting held between the representatives of the parties on 5th April 2007.

116. Now, this Certificate dated 8th November 2005 issued by the

BHEL-GE Gas Turbine Services Pvt. Ltd. reads as follows:

“November 8, 2005

TO WHOMSOEVER IT MAY CONCERN

Subsequent to the commissioning of REL, Goa Plant in August 1999, recommended inspection of Gas Turbine (Hot Gas : Path Inspection in September 2001 and Major inspection in September 2003) were carried out by BHEL-GE Gas Turbine Services Pvt. Ltd. and turbine was found to be generating its-Rated Output with out any degradation.

Similarly BGGTS had carried out the Hot Gas Path Inspection of GT during Annual Inspection in September 2005. All operating parameters were checked and the Turbine was found to be generating its Rated Output with out any degradation.

For BHEL-GE Gas Turbine Services Pvt. Ltd

Sd/

M.S. Kumar

General Manager – Services.”

117. The aforesaid certificate can, under no circumstances, be regarded as the recommendations of the OEM, which the Respondent failed to produce in the arbitral proceedings on the specious plea that the same were unavailable. Since the contractual provisions clearly provide for annual downrating based on the OEMs' recommendations, it is inconceivable that the Respondent did not have in their possession such a relevant and vital document, like the OEMs' recommendations. In any case, based on such alleged non-availability, the Respondent could not have given a complete go bye to the requirement of downrating that is

specifically provided in the contract. Therefore, an adverse inference should have been drawn against the Respondent for failure to produce the OEMs' recommendations. Had such recommendations been produced, it is reasonable to infer that the downrating would have to be done in terms of the recommendations. The above certificate dated 8th November 2005 can hardly be regarded as a substitute to the contractually stipulated OEMs' recommendations.

118. The learned Arbitrator rejected Appellant's attempt to rely on the draft notification issued by the Central Government for downrating in similar industries on the ground that it was only a draft and therefore, had no legal efficacy whatsoever. But the draft notification was produced, not because it had any legal efficacy, but to offer some reasonable alternative to assessing downrating in the absence of OEM's recommendations. Based on the plea of non-availability of OEM's recommendations and without establishing that the contractual term for downrating had been altered or amended, the Respondent was not entitled to simply avoid downrating. The learned Arbitrator has also proceeded on the basis that such term was either irrelevant or stood deleted after the contracted capacity was reduced to 19.8 MW. This reduction in the contracted capacity did not, in any manner, either specifically or even by implication do away with the contractual provision for downrating.

119. In any case, the certificate dated 8th November 2005 only makes a bald statement that all operating parameters were checked and the turbine was found to be generating the rated output without any degradation. This bald statement was based on the annual inspection in September 2005. Therefore, at the highest, the certificate explained the position of the plant in September 2005 or November 2005.

120. The above certificate dated 8th November 2005 was not at all relevant in the year 2007 or for that matter, even thereafter. Based upon the certificate, it was not open to the Respondent to contend that there was no degradation of their plant even beyond November 2005 or for that matter, in the year 2007 and thereafter. Such an inference, with respect, would be quite perverse and, therefore, based on the certificate dated 8th November 2005, there was no question of giving a go-by to the specific contractual stipulation about the annual downrating. Again, reliance on the certificate dated 8th November 2005 for doing away with the express contractual stipulation regards downrating, would amount to patent illegality on the face of the record.

121. In the minutes of the meeting held on 5th April 2007, no doubt, the issue of downrating appears to have been discussed by the representatives of the parties. Mr. Bhat emphasized on the following

portion of the minutes of the meeting held on 5th April 2007, dealing with the issue of ‘rated capacity’:

“1. Rated Capacity

(A) It was agreed to revert back to the original calculation of new Rated Capacity as per the Third Supplementary Agreement (TSA), i.e. considering a Diversity factor of 1.5 subject to Govt. approval. Accordingly, the calculation of New Rated Capacity for fixed charge payment for all the earlier invoices shall be revised. The present Rated Capacity shall be 19.8 MW. Dispatch Instruction shall be revised accordingly to minimum 16 MW respectively.

(B) The issue of down rating of Contracted Capacity as per OEM's recommendation was discussed and REL explained that the Plant is maintained as per the OEM's recommendations and there has been down rating of Contracted Capacity. REL has already submitted OEM's letter in this regard.”

122. According to us, from the aforesaid minutes, no inference could have been drawn that the concept of the downrating was given a complete go-by and the Respondent was at liberty to raise bills or invoices ignoring the contractual stipulation about the downrating. At the highest, the minutes suggest that there was some talk on the issue of downrating. However, this is far from inferring that this issue of the downrating was settled that there was no further requirement of complying with the contractual stipulation of downrating.

123. Based on the minutes like the aforesaid, neither parties can amend the contract, nor can act in derogation of the contractual terms. Clause 23.1 of the original PPA provides that the agreement may not be amended, except by a signed agreement in writing between the parties. Further, Clause 23.1 of the PPA provides for how waiver shall be made or inferred. Therefore, the impugned Award by ignoring these contractual provisions, could not have inferred that the issue of the downrating of the capacity of the plant appeared to have been settled between the parties. This tentative finding that the parties had settled this issue is also vitiated by perversity and patent illegality on the face of the record.

124. The impugned Award has recorded a finding based on the bald statement in the certificate dated 8th November 2005 and there was no degradation of the plant and further, in the absence of degradation of the plant, the concept of downrating will not apply. Again, this is, with respect, patent illegality. The certificate could hardly have been regarded as a recommendation of OEM. In any case, the certificate referred to the absence of degradation in the year 2005, and based on such a certificate, there was no question of inferring that there was no degradation of the plant even thereafter. Therefore, the contractual stipulation regards downrating, which was never amended or deleted by any subsequent agreements, could not have been ignored or bypassed based on the

certificate dated 8th November 2005 or the minutes of the meeting dated 5th April 2007.

125. The impugned award to the extent it rejects the Appellant's contention based on the downrating, will, therefore, have to be set aside on the ground that the same is vitiated by patent illegality on the face of the record. The findings recorded in the impugned Award are based only on the certificate dated 8th November 2005 and the minutes of the meeting dated 5th April 2007. None of the documents suggests that the contractual term of the downrating was either done away with or complied with. This is not a case of either reappreciation of the evidence on record or a case of insufficiency of evidence. This is a case of no evidence. This is a case of ignoring the contractual provision by incorrectly assuming that such provision was amended or deleted. The tentative findings to the contrary are, therefore, *ex facie* perverse and suffer from patent illegality on the face of the record. The impugned Award, to the extent it rejects the defence of the Appellant on the issue of downrating and proceeds to make an award of ₹ 18.53 crores in favour of the Respondent is liable to be set aside on the ground of perversity and patent illegality.

AWARD OF ₹ 3.94 CR. TOWARDS VARIABLE CHARGES ON 4
MW POWER

126. In terms of the PPA, as well as the supplementary PPAs, the Respondent was bound to supply minimum units of power to the Appellant for a price to be determined by the various formulas set out in the PPA and the supplementary PPAs. After making provisions for the supply of minimum specified quantify of power (quota), the Respondent was at liberty to sell the power to third parties.

127. In terms of the formulae prescribed, the price for every unit of power generated by the Respondent comprised broadly of two components i.e. (a) fixed costs component, and (b) variable costs component. As noted earlier, the fixed price component was payable by the Appellant irrespective of whether or not the power to the minimum specified extent (quota) was purchased by the Appellant from the Respondent or not. The rationale behind such provision was to re-compensate the Respondent for providing the infrastructure and setting up the plant. The variable costs were, however, payable only in respect of the power actually purchased by the Appellant from the Respondent. This is why the variable costs were linked to the fuel prices, fuel being the major and vital component in the production of power. The PPA had made it clear that even if the agreement was terminated by the Appellant before the expiry of the specified period for no fault on the

part of the Respondent, the Appellant, would still be liable to pay the Respondent the fixed costs, since, such fixed costs had nexus with the infrastructure provided by the Respondent in the generation of power. There was no requirement of payment of variable costs, which were made to depend on the actual purchase power by the Appellant from the Respondent.

128. At the request of the Respondent, the Appellant permitted the Respondent to sell/trade 4 MW power from out of the minimum specified quantity (quota), which the Respondent had committed to the Appellant. In the communication dated 19/1/2009, the Chief Electrical Engineer of the Appellant clarified that in respect of this 4 MW power which the Respondent was permitted to sell/trade to the third parties, the fixed costs would not be payable. This letter also made it clear that the Respondent will be liable to bear the transmission losses and all other charges as may be applicable.

129. Acting on such permission, the Respondent actually traded 4 MW power to third parties. The Respondent did not raise any bills or invoices in respect of the fixed costs corresponding to this 4 MW power. However, the Respondent raised bills and invoices, claiming variable costs in respect of this 4 MW power on the specious plea that the communication dated 19/1/2009 had only exempted the Appellant from paying the fixed costs, but nothing was said in respect of the variable

costs. Based on such reasoning, the Respondent raised a claim for ₹3.94 crores, which has been awarded to the Respondent in the impugned Award.

130. The entire reasoning on this aspect is to be found in paragraph 58 of the impugned Award and the same reads as follows :

“58. The Claimant submitted that the entire approach of the Respondent is erroneous. The contention that in calculating the invoice for the entire period commencing from 19.1.2009, 4 MW was required to be deducted from the Rated Capacity for calculation of Part Load Percentage and of Tariff Heat Rate is erroneous. The said contention is based on the letter dated 19.1.2009 whereby trading was permitted subject to daily reduction in 4 MW power in dispatch instructions by the Respondent during the period mentioned in the said letter. - However, the aforesaid letter has also referred to letter dated 2.1.2009 of the Claimant to the Respondent, which clearly show that the provisions of the PPA based on which the Tariff Heat Rate was to be arrived at including Part Load Percentage were not changed and same was based on Rated Capacity which remained 19.8 MW. Even the letter of approval dated 19.1.2009 by which there was a daily reduction of 4 MW power in dispatch instructions for 12 hours, it in no way affected the committed power supply by the Claimant to the Respondent. / The Claimant had not, in its invoice, taken into consideration fixed charges as stated ‘in the letter of approval.

However, the rated capacity of the plant was maintained as 19.8 MW as per the Third Supplementary Agreement (TSA), and the Respondent had reserved its right to revert back to the arrangement existing prior to issue of the approval and there was no mention of reduction in the rated capacity for computation of variable charges. In these circumstances, the

contention of the Respondent based on Good Industry Practices cannot be sustained. The letter of approval dated 19.1.2009, while it mentioned that no fixed charges would be payable for the units corresponding to 4 MW reduction in dispatch instructions, there was no provision for reduction in other charges. The claim of the Respondent is, therefore, not based on any contractual provisions. The reduction of 4 MW power in dispatch instructions did not affect the commitment of the Claimant to maintain the rated capacity of the plant as 19.8 MW as per TSA. The letter of approval also does not provide for such reduction, since it did not mention any reduction in the rated capacity for computation of variable charges. In these circumstances, it may not be logical to argue that as a result of daily reduction of 4 MW, the available capacity of the plant stood reduced vis. .vis the Respondent. The commitment of the Claimant to maintain the available capacity of the plant at 19.8 MW was maintained, The Respondent has itself in the SOD stated that the Respondent was supposed to off-take power é corresponding to installed capacity 19.8 MW from the Claimant. The submission therefore, that the available capacity of the plant stood – – reduced vis.a.vis the Respondent is not justified. The contention of " the Respondent must, therefore, be rejected "

131. The learned Arbitrator has relied on the communication dated 19/1/2019 and reasoned that since there was a specific reference to the exemption from payment of fixed costs and there was no reference to the exemption from payment of variable costs, the Appellant must pay the variable costs in respect of 4 MW power, which was admittedly sold by the Respondent to some third parties or, in any case, it was admittedly never even supplied to the Appellant. According to us, with respect, such

reasoning constitutes perversity, patent illegality, and conflicts with the most basic notions of morality and justice.

132. Since the entire reasoning in the impugned Award on this aspect is based on the communication dated 19/1/2009, the same is transcribed below for the convenience of reference:

*“Chief Electrical Engineer,
Government of Goa,
Vidhut Bhavan, 3rd floor,
Panaji, Goa
Dated:- 19/01/2009*

*To,
The Reliance Infrastructure Limited,
Goa Power Station,
Opp. Sancoale Industrial Estate,
Zuarinagar – Goa 403 726*

*Sub : Trading of power.
Ref:- Letter No.REL/GPS/COG/2009/004
dated 02/01/2009.*

Sir,

Your proposal submitted vide above referred letter and the endorsement therein has been examined and the following is approved by the Government.

Reliance Infrastructure Ltd. is permitted to trade their surplus power with effect from 17/01/2009 from their 48 MW Naptha based Power Plan at Sancoale with following maximum limits:

- ci. 9 MW for the period from 09.00 hours to 17.00 hours;
and*
- cii. 14 MW for the period from 17.00 hours to 09.00 hours.*

This approval is subject to the following conditions:

- i) Daily reduction of 4 MW power in dispatch instructions by the Electricity Department during the period from 23.00 hours*

to 24.00 hours; 00.00 hours to 09.00 hours and 13.00 hours to 15.00 hours except on Sundays;

ii) No fixed cost charges is payable by the Electricity Department for the units corresponding to the 4 MW reduction in dispatch instructions;

ciii. No objection to trading of surplus power by Reliance Infrastructure Ltd. however, it shall in no way affect their committed power supply to the Government of Goa;

civ. Reliance Infrastructure Ltd. will be liable to bear the transmission losses and all other charges as may be applicable; and

cv. Government of Goa reserves the right to revert back to the arrangements existing prior to issue of this approval as and when found necessary.

Yours faithfully,

Sd/-

(NIRMAL BRAGANZA)

CHIEF ELECTRICAL ENGINEER

Copy submitted for information to :

13. The O.S.D. To Hon'ble Power Minister, Porrima.

14. The Chief Secretary, Secretariat, Porrima,

Copy for necessary action to :-”

133. Although it is true that Clause (ii) of the aforesaid communication dated 19/1/2009 clarifies that no fixed costs charges shall become payable for the units corresponding to the 4 MW reduction in dispatch instructions, this does not mean or imply that in respect of such 4 MW power which was not even supplied to the Appellant but rather sold to some third parties for a profit, it is the Appellant which would have to bear the variable costs, which were even otherwise payable in terms of the PPA only on the units of power actually supplied or

purchased by the Appellant. Besides, Clause (iv) of the communication dated 19/1/2009, had made it clear that the Respondent will be liable to bear the transmission losses and *“all other charges as may be applicable”*. Assuming that there was no necessity of excluding the payment of other charges, including variable costs, Clause (iv) of the communication dated 19/1/2009 had provided for such an exclusion.

134. Besides, the communication dated 19/1/2009 was in response to the Respondent's communication dated 2/1/2009 on the issue of permission to reduce 4 MW power at specified timings, from out of the quota of power to be supplied to the Appellant. In paragraphs 5(a) and 7 of this communication dated 2/1/2009, the Respondent had proposed a methodology for power reduction in the context of the existing PSA. These paragraphs read as follows:

“5(a) Fixed cost for the units corresponding to 04 MW reduction in dispatch will not be charged.

7. All other Clauses in the PSA and the subsequent supplementary Agreements shall remain the same.”

135. Thus, the Respondent, in its communication dated 2/1/2009 had made it clear that it would not insist on the payment of fixed costs for the units corresponding to 4 MW reduction and further, all other clauses in the PSA and subsequent supplementary agreements shall

remain the same. The clauses of the PSA, as well as the supplementary agreements, made it clear that variable costs were only in respect of the units of power actually supplied to and purchased by the Appellant. The PSA and the supplementary agreements had however provided that fixed costs will be payable on the minimum quota prescribed, irrespective of actual supplies to or purchases by the Appellant. That is the reason, the parties were particular about specifying that in respect of this 4 MW power, which was to be sold to third parties (private parties), even fixed costs will not be payable by the Appellant to the Respondent. There was never any doubt that in respect of this 4 MW power, which was not even to be supplied to the Appellant, the Appellant would be liable to pay the variable costs. The impugned Award, according to us, has not only ignored the communication dated 2/1/2009 but, even the construction of the communication dated 19/1/2009 is quite perverse and suffers from patent illegality.

136. As a result of the aforesaid construction of the communication dated 19/1/2009, the Respondent is sought to be quite unjustly enriched. In the first place, the Respondent has secured the permission to divert 4 MW power from out of the quota prescribed for the Appellant and sell such 4 MW power to third parties (private parties) obviously for profits. Secondly, even though under the PPA or PSA or the supplementary agreements, the Respondent was not to receive the

variable costs in respect of power which was never supplied or purchased to and by the Appellant, under this construction, the Respondent is held entitled to such variable costs. This is a clear case of unjust enrichment neither contemplated by the contractual provisions which govern the relationship between the parties, nor in terms of the communications dated 2/1/2009 addressed by the Respondent to the Appellant and the communication dated 19.1.2009 addressed by the Appellant to the Respondent.

137. The circumstance that there was a specific clause excluding the payment of fixed costs, could not lead to the inference that the Appellant had agreed to bear the variable costs in respect of this 4 MW power, which variable costs were even otherwise not payable by the Appellant to the Respondent in terms of the original PPA or PSA and the supplementary PPAs. If there was any proposal for encumbering the Appellant with any charges over and above the charges undertaken by it under the contract, then surely this ought to have been specified. Such an additional burden cannot be imposed by implication. Therefore, the reasoning that because there was no reference to variable charges in the communication dated 19.1.2009, the same was agreed to be paid by the Appellant is quite perverse and constitutes patent illegality on the face of the record. According to us, the impugned Award to the extent it so unjustly enriches the Respondent to the extent of ₹ 3.94 crores conflicts

with the most basic notions of morality and justice. The impugned Award, to this extent, is also vitiated by unreasonableness, perversity, and patent illegality apparent on the face of the record.

AWARD FOR ₹ 2.36 CRORES IGNORING NETTING OUT
PRINCIPLE

138. The contractual provisions, which govern the relationship between the parties had provided that in the event of a shut down of the power plant by the Respondent then, the Appellant would supply power to the consumers of the Respondent on terms and conditions as specified. The contract provided that if the shut down of the power plant by the respondent was a scheduled one, then, the Respondent would supply power to the Appellant, once the plant recommences production, in the ratio of 1:1. This means that the Respondent would have to supply one unit of power for every one unit of back-up power supplied by the Appellant to the consumers of the Respondent on account of a scheduled shut down of the power plant by the Respondent. This is also referred to as the “*netting out*” of units in the ratio of 1:1.

139. The contractual provisions which govern the relationship between the parties also provided that in the event the shut down of the power plant by the Respondent was an unscheduled one, then, the netting out would be in the ratio of 1:1.25. This means that the Respondent would have to return 1.25 units of power for every one unit

of back-up power supplied by the Appellant to the consumers of the Respondent, where the shut down of the Respondent's power plant was unscheduled.

140. The contractual provisions which governed the relationship between the parties had also provided that the rate at which the billing was to be done or the invoices raised, was the rate per unit during the relevant billing period (month-to-month). The record of the arbitral proceedings indicates that this was how the provisions about netting out were construed and implemented by the parties. The learned Advocate General pointed out an instance reflected in the minutes of the meeting held on 10/4/2017 where the rate per unit was taken at ₹ 12.57 during the relevant billing period and the same was multiplied by 1.25, since, the netting out pertained to the period of an unscheduled shutdown. The minutes of the meeting held on 10/4/2017 in the arbitral proceedings establish that this was how both the parties not only understood the contractual provisions but also implemented the same.

141. Even before us, there was no dispute whatsoever raised about the manner of construction and implementation of the contractual provisions for the disputed period which was originally from 19/4/2014 to 13/8/2014. The minutes of the meeting held on 10/4/2017, during the arbitral proceedings, make it clear that for the period between

1/4/2014 to 18/4/2014, the Respondent had actually supplied power to the Appellant, and hence, the rate per unit during this billing period was available. The Respondent even agreed with the Appellant's contention that this rate of ₹ 12.57 per unit was, therefore, required to be taken as the base rate and, thereafter the same was to be multiplied by 1.25 to net out in the context of the number of units of back up power supplied by the Appellant to the consumers of the Respondent for the period between 19/4/2014 and 30/4/2014.

142. The dispute before the arbitral Tribunal for the original disputed period from 19/4/2014 to 13/8/2014 was, thus, partially resolved (for the period between 19/4/2014 and 30/4/2014) as is evident from the minutes of the meeting held on 10/4/2017. For this resolution, the parties, abided by the contractual provisions of first determining the available rate proximate to the supplies made by the Appellant to the consumers of the Respondent on account of shut down of the power plant by the Respondent. Thereafter, this rate was multiplied by 1 or 1.25 depending upon whether the shutdown of the power plant by the Respondent was scheduled or unscheduled.

143. None of the parties had any grievance whatsoever on the resolution of the dispute for the period between 19/4/2014 and 30/4/2014 on this basis.

144. For the balance disputed period from 1/5/2014 to 13/8/2014, there was no rate per unit readily available as, the Respondent, had failed to supply power to the Appellant during the passed proximate billing period. Hence, there was the necessity of determining the per-unit rate, so that the same could be multiplied by 1 or 1.25 for purposes of netting out depending upon whether the supply made by the Appellant to the consumers of the Respondent was on account of a scheduled or unscheduled shut down of the power plant by the Respondent.

145. Accordingly, a file was moved by the Department of the Appellant proposing a rate of ₹ 3.78 per unit. This rate was much lesser than the unit rate of ₹ 12.57 which was accepted by both the parties for a portion of the originally disputed period between 19/4/2014 and 30/4/2014. The note proposed a per-unit rate of 3.78 ₹ KWh, which was the then per unit average selling rate of the Department as approved by JERC. This rate was approved by the concerned Minister of the Department. Finally, the Chief Electrical Engineer addressed a communication dated 18/9/2014 to the Respondent informing the Respondent that the Government of Goa has approved a rate of ₹ 3.78 per KWh for backup power supplied by the Electricity Department of the Appellant from 1.5.2014 and up to the midnight of 13/8/2014. This communication also made it clear that all the rest backup power supplied

by the Electricity Department is to be charged as per the provisions of the PPAs.

146. The learned Arbitrator by reference to the note dated 13/8/2014 and the communication dated 18/9/2014 has concluded that the rate of ₹ 3.78 P. KWh was the final rate or the fixed rate for purposes of netting out and there was no further requirement of multiplying this rate by 1.25, even though, there was no dispute whatsoever that the shut down during the period from 1.5.2014 to 13/8/2014, was an unscheduled shutdown.

147. The impugned Award reasons that since the note dated 13/9/2014 and the communication dated 18/9/2014 did not refer netting out by multiplying the determined rate by 1.25, the Appellant must be deemed to have agreed to give a go-by to the clear and specific contractual terms which had stipulated that such rate had to be multiplied by 1.25 for supplies made to the consumers of the Respondent during unscheduled shut down for purposes of netting out.

148. According to us, the impugned Award on the aspect of netting out is again vitiated by perversity and patent illegality. The note dated 13/8/2014, as well as the communication dated 18/9/2014 on its plain terms, refers only to the determination of a rate of ₹ 3.78 P. KWh. for

applying the contractual provisions concerning netting. This note or this communication was necessitated because for the relevant proximate billing period there were no supplies made by the Respondent to the Appellant and therefore there was no ready rate available based on which the contractual provisions could be worked for netting out. Therefore, the Appellant determined the rate of ₹ 3.78 P. KWh. as the base rate for purposes of netting out. There is nothing either in the noting or in the communication dated 18/9/2014 to even remotely suggest that by determining such base rate, the parties intended to give a complete go-by to the clear and specific contractual provisions for the multiplication of this base rate into 1.25 for purposes of netting out in the eventuality of an unscheduled shut down of the power plant by the Respondent. Therefore, based on the noting and the communication dated 18/9/2014, the finding or the conclusion that the parties had agreed to do away with the clear and specific contractual provisions, is not even a plausible finding or conclusion. Such a finding or a conclusion is vitiated by perversity and patent illegality on the face of the record. The Award of an amount of ₹ 2.36 crores (approximately) to the Respondent on this score is, therefore, liable to be set aside on the grounds of perversity and patent illegality on the face of the record.

AWARD ON INTEREST

149. The impugned Award determines the principal amount

payable by the Appellant to the Respondent at ₹ 119.32 crores for the period up to 31.10.2017. The arbitral Tribunal has added an amount of ₹ 158.98 crores by way of interest to this principal amount. Thus, the impugned Award provides that Appellant shall pay to the Respondent an amount of ₹ 278.29 crores towards the principal amount, together with interest for the period up to 31.10.2017. This represents the pre-reference period.

150. The impugned Award then provides that the Appellant shall pay to the Respondent interest on the aforesaid amount of ₹ 278.29 crores for the period from 31.10.2017 till the date of the Award *i.e.* 16.2.2018. This represents the interest component during the pendency of the proceedings before the arbitral Tribunal.

151. The impugned Award then proceeds to direct the Appellant to pay to the Respondent interest on the total amount awarded together with interest payable as of 31.10.2017 at the rate of 15% per annum from the date of the Award till full payment of the amount, including interest as on the date of the Award until the same is paid/realized. This represents the period post the making of the impugned Award until actual payment/realization.

152. The impugned Award also provided that in case the Appellant

fails to pay the Respondent entire amount, together with interest awarded within two months from the date of the Award, then, it shall not be liable to pay interest for the period after the date of the Award.

153. Mr. Pangam's first contention on the issue of interest concerns the interest for the pre-reference period. He submitted that the material on record establishes that invariably there were inflated bills/invoices raised by the Respondent on the Appellant. In most instances, the Respondent submitted revised bills/invoices which again, were far from correct. He submits that the liability to pay interest would arise only on submission of correct bills or invoices and this aspect has not been considered by the learned Arbitrator.

154. According to us, having regard to the limited scope of our jurisdiction under Sections 34 and 37 of the Arbitration Act, it will not be possible for us to reappreciate the material on record and determine the date or dates on which the corrected bills or invoices were raised by the Respondent on the Appellant. Besides, the material on record does not indicate that the Appellant paid to the Respondent the amounts which, according to the Appellant may have been due and payable. Record also indicates that such contentions were either not seriously raised or pressed before the learned Arbitrator. The record indicates that sets of calculations were furnished by the parties before the learned

Arbitrator who accepted the set submitted by the Appellant. Accordingly, the first contention on the issue of interest has to be rejected.

155. Mr. Pangam then contended that even the contractual provisions for payment of interest at compounded rates were provisions in terrorem and, therefore, could not have been enforced by the learned Arbitrator, having regard to the provisions of Section 74 of the Contract Act.

156. According to us, no such contention appears to have been seriously pressed before the learned Arbitrator. That apart, there is nothing *per se* unconscionable in the parties agreeing to provide for compound interest. The rulings in *Kailash Nath Associates* (supra) and *Jagdish J.N. Counte* (supra) turn on their facts that are not comparable to the facts of the present case.

157. *Kailash Nath Associates* (supra) was concerned with forfeiture of earnest money and *Jagdish J.N. Counte* (supra) was concerned with damages that were found to be punitive. Based on these two decisions, as also the material on record, therefore, even the second contention on the issue of interest will have to be rejected.

158. Mr. Pangam then submitted that the learned Arbitrator, in this

case, outsourced its duty to make the interest calculations. He submitted that such outsourcing vitiates the impugned Award. He also submitted that no sufficient opportunity was granted to the Appellant to submit its calculations on the issue of interest or to contest the calculations submitted on behalf of the Respondent.

159. According to us, none of the aforesaid contentions can be accepted given the record of the arbitral proceedings. This record indicates that full opportunity was granted to both parties to submit their interest calculations. There was no question of any outsourcing involved and there is nothing wrong if the learned Arbitrator requires the parties to furnish their sets of calculations as an aid to the decision-making process. The impugned Award indicates that the ultimate decision is that of the learned Arbitrator.

160. The record also indicates that the interest calculations of Appellant and the Respondent diverged only to the extent of ₹ 49 lacs or thereabouts. The learned arbitrator in fact accepted the lower figure submitted by the Appellant. Therefore, we find no merit even in this third contention on the issue of interest.

161. Having regard to the contractual provisions and the provisions in Section 31(7) of the Arbitration Act, we are satisfied that no ground

has been made to interfere with the award of interest for the pre-reference period or the period during which the proceedings were pending before the learned arbitrator. No ground as contemplated under Section 34 of the Arbitration Act has been made out by the Appellant to interfere with this part of the impugned Award.

162. Mr. Pangam then contended that the award of interest at the rate of 15% per annum from the date of the Award till full payment, warrants interference because no reasons whatsoever have been indicated in the impugned Award to justify such award of exorbitant interest. He pointed out that a minimum of 120 days should have been granted for payment of the awarded amount without the liability of payment of any interest since this is the maximum time limit prescribed under the Arbitration Act for questioning the Award in terms of Section 34 of the Arbitration Act. He submitted that the arbitral Tribunal has failed to take into account the relevant factors as have been set out in *Vedanta Ltd.* (supra) and, therefore, this award of interest at the rate of 15 % per annum is liable to be set aside.

163. In *Vedanta Ltd.* (supra), the Hon'ble Supreme Court has held that '*Interest*' is defined as "*the return or compensation for the use or retention by one person for a sum of money belonging to or owned by any person to another*". In essence, an award of interest compensates a

party for its forgone return on investment or money withheld without a justifiable cause. Although the Court was concerned with international commercial arbitration, it was held that in the absence of agreement between the parties, the rate of interest awarded would be governed by the law of the seat of arbitration *i.e.* India.

164. The Court explained that Section 31(7) is in two parts: Clause (a) pertains to the award of interest for the pre-reference and pendente lite period, which is subject to the agreement between the parties. This would be evident from the opening words of Section 31(7)(a) – “*unless otherwise agreed by the parties*”. Absent an agreement between the parties, the arbitral tribunal has the discretion to award interest it deems reasonable. Interest may be awarded either on the whole, or any part of the sum awarded.

165. Section 31(7)(b) pertains to the post-award period *i.e.* from the date of the Award to the date of realisation and is not subject to party autonomy or an agreement between the parties. This would be apparent from how Clause (b) of Section 31(7) is framed. The phrase “*unless otherwise agreed by the parties*” is absent from this provision. The statutory rate of interest is 2% higher than the current rate of interest prevalent on the date of the Award.

166. The Court has also held that the discretion of the arbitrator to award interest must be exercised reasonably. An arbitral Tribunal while making an award for interest must take into consideration a host of factors, such as (i) the “*loss of use*” of the principal sum; (ii) the types of sums to which the interest must apply; (iii) the period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic standpoint; (vii) the rates of inflation; (viii) proportionality of the amount awarded as an interest to the principal sums awarded.

167. The Court further held that on one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable, or usurious. The Courts may reduce the interest rate awarded by an arbitral Tribunal where such interest rate does not reflect the prevailing economic conditions or where it is not found reasonable or promotes the interests of justice

168. Finally, the Court held that the award of a much higher rate of interest after 120 days is arbitrary since the award-debtor is entitled to challenge the award within a maximum period of 120 days as provided

by Section 34(3) of the 1996 Act. If the award-debtor is made liable to pay a higher rate of interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the award by filing objections under Section 34 of the said Act.

169. Now, if the impugned award is perused, then, no interest is made payable if the Appellant were to pay the entire amount, together with interest awarded, within two months from the date of the award. However, if the entire amount together with the interest awarded was not paid within two months, from the date of the award, then, interest at the rate of 15% per annum was made payable from the date of the Award, till full payment of the amount. Applying the law laid down in *Vedanta Ltd.* (supra), that the award of such higher rate of interest after 120 days is arbitrary, it will have to be held that the Appellant should have granted at least 120 days to pay the determined amount without the liability of having to pay any further interest thereon. However, be that as it may, the real issue is whether there are any reasons in the impugned Award in support of the award of interest at the rate of 15% per annum from the date of the Award till the full payment of the amount as determined.

170. From the perusal of the Award, it is quite clear that there are no reasons whatsoever for the award of interest at the rate of 15% per

annum. But it would not appropriate to simply set aside this part of the impugned Award on the ground that the same suffers from patent illegality for want of any reasons. Instead, as was pointed out in *Vedanta Ltd.* (supra), a Court may reduce the interest rate awarded by the learned Arbitrator particularly when such interest rate does not reflect the prevailing economic condition or where it is not found reasonable or where it promotes the interests of justice.

171. Out of the several considerations referred to in paragraphs 9 and 10 of *Vedanta Ltd.* (supra), reference is necessary to the 'loss of use' of the principal sum, commercial prudence, prevailing economic conditions, and the proportionality of the amount awarded as an interest to the principal sums awarded. In exercising such discretion, the Courts must keep in mind that the rate of interest must be compensatory as it is a form of reparation granted to the award-holder and it must not be punitive, unconscionable, or usurious.

172. The consideration of the above factors warrants a reduction in the interest at the rate of 15% awarded by the learned Arbitrator. The learned Arbitrator has determined the principal amount at ₹119.32 crores and the interest amount, even for the pre-reference period, has been determined at ₹ 158.98 crores. In *Vedanta Ltd.* (supra) where the interest component of the award amounted to almost 50% of the sum,

awarded, the Court held that the grant of 15% interest was excessive and contrary to the principle of proportionality and reasonableness. Finally, after taking note of the prevailing economic conditions in the year 2017 (because the date of the award was 9/11/2017) the Court awarded simple interest at the rate of 9% per annum on the INR component by deleting the interest rate of 15% post 120 days from the date of the Award.

173. Mr. Bhat however, submitted that the *Vedanta Ltd.* (supra) was distinguishable because it was decided in the peculiar facts and circumstances of the said case. He submitted that the Court in the said matter was dealing with international commercial arbitration, which involved both, the INR component, as well as the EUR component. He, therefore, submitted that the principles set out in *Vedanta Ltd.* (supra) could not be applied to the present case.

174. According to us, although the Hon'ble Supreme Court was indeed dealing with an international commercial arbitration that involved both, the INR and EUR components, the principles cannot be said to be inapplicable in the present case. No doubt, sufficient allowance will have to be made to the observations concerning EUR component payment.

175. Mr. Bhat handed in a statement indicating the interest rates

(Benchmark Prime Lending Rates) of the State Bank of India. For the period 2017-18, the rates indicated range around 13 to 14% per annum. This is no doubt one of the factors to be taken into consideration for determining the prevailing economic conditions when the impugned Award was made. Again, reference is also necessary to the principle of proportionality of the amount awarded as an interest to the principal sums awarded. Having cumulative regard to all the factors referred to above, we feel that in the facts and circumstances of the present case, the award of interest at the rate of 15% per annum is excessive and contrary to the principle of proportionality and reasonableness and the same will have to be scaled down to 10 % per annum. In *Vedanta Ltd.*(supra), the Award was dated 9/11/2017 and the Court awarded interest at the rate of 9% per annum for the INR component. The impugned Award, in our case, was made on 16/2/2018.

176. Accordingly, we set aside the impugned Award to the extent it awards 15% interest from the date of the Award till full payment of the amount, including interest as on the date of the Award, is paid/realised and instead, substitute this with interest at the rate of 10% per annum for the said period.

COMPUTATIONS AT SCHEDULES 2 AND 3.

177. Schedule 2 to the Award is the summary of computations for

principal and interest amount payable by the Appellant to the Respondent. The same is transcribed below for the reference of convenience:

Summary of Computations for Principal and Interest (Revised as per Respondent's Written Submission) Amount Payable by GoG to Rinfra.

All figures in Rs.Crore

Scenario	Down-rating	4MW	Fuel Formula	FFC	Rs 3.78/kWh x1.25	Principal	Interest till 08.12.2016		Interest till 31.10.2017	
							Int Amount	Total	Int Amount	Total
Scenario 1	GoG	GoG	GoG	GoG	GoG	70.58	60.22	130.80	81.39	151.97
Scenario 2	GoG	GoG	GoG	GoG	RInfra	72.94	61.42	134.36	83.17	156.10
Scenario 3	GoG	GoG	RInfra	GoG	GoG	93.96	75.66	169.63	103.11	197.08
Scenario 4	GoG	GoG	RInfra	GoG	RInfra	96.32	76.87	173.18	104.89	201.21
Scenario 5	GoG	GoG	RInfra	RInfra	GoG	96.03	77.06	173.09	105.07	201.10
Scenario 6	GoG	GoG	RInfra	RInfra	RInfra	98.38	78.26	176.65	106.85	205.24
Scenario 7	GoG	RInfra	GoG	GoG	GoG	74.83	64.60	139.42	87.16	161.99
Scenario 8	GoG	RInfra	GoG	GoG	RInfra	77.18	65.80	142.98	88.94	166.12
Scenario 9	GoG	RInfra	RInfra	GoG	GoG	98.38	80.16	178.53	109.05	207.43
Scenario 10	GoG	RInfra	RInfra	GoG	RInfra	100.73	81.36	182.09	110.83	211.56
Scenario 11	GoG	RInfra	RInfra	RInfra	GoG	100.45	81.56	182.02	111.02	211.47
Scenario 12	GoG	RInfra	RInfra	RInfra	RInfra	102.81	82.76	185.57	112.80	215.60
Scenario 13	RInfra	GoG	GoG	GoG	GoG	89.56	98.91	188.47	130.23	219.79
Scenario 14	RInfra	GoG	GoG	GoG	RInfra	91.92	100.10	192.02	132.01	223.93
Scenario 15	RInfra	GoG	RInfra	GoG	GoG	113.02	114.27	227.29	152.04	265.06
Scenario 16	RInfra	GoG	RInfra	GoG	RInfra	115.38	115.46	230.84	153.82	269.20
Scenario 17	RInfra	GoG	RInfra	RInfra	GoG	115.09	115.66	230.75	154.00	269.09
Scenario 18	RInfra	GoG	RInfra	RInfra	RInfra	117.45	116.85	234.29	155.78	273.23
Scenario 19	RInfra	RInfra	GoG	GoG	GoG	92.31	101.56	193.87	133.78	226.09
Scenario 20	RInfra	RInfra	GoG	GoG	RInfra	94.66	102.75	197.41	135.56	230.22
Scenario 21	RInfra	RInfra	RInfra	GoG	GoG	116.96	118.13	235.10	157.20	274.16
Scenario 22	RInfra	RInfra	RInfra	GoG	RInfra	119.32	119.32	238.64	158.98	278.29
Scenario 23	RInfra	RInfra	RInfra	RInfra	GoG	119.04	119.53	238.57	159.18	278.22
Scenario 24	RInfra	RInfra	RInfra	RInfra	RInfra	121.40	120.72	242.12	160.95	282.35

GoG-In Favour of Government of Goa
RInfra – In favor of Reliance Infrastructure.

178. Again, we cannot accept the contention that this was a case of outsourcing or that the computations in Schedule 2 are incorrect. The record indicates that sufficient opportunity was granted to both parties to submit their computations taking into account various scenarios. Accordingly, it will not be correct to say that the Appellant was denied effective opportunity to either submit its computations or to contest the computations submitted by the Respondent. In paragraph 72 of the impugned Award, the learned Arbitrator has explained the basis of the computations in Schedule 2. Therein, it is stated that Schedule 2 was a jointly prepared document and the matter was considered in detail by the parties in respect of virtually all claims and the amounts payable by way principal and interest under different heads has been determined. Thereafter, a table was prepared to envisage 24 scenarios. This jointly prepared table has considered the possibilities of some issues being decided in favour of the Appellant and some being decided in favour of the Respondent.

179. Accordingly, we see no merit in the contention that there is any infirmity in the computations set out in Schedule 2 of the impugned Award or that the computations in Schedule 2 warrant any interference.

180. Similarly, when it comes to the computations in Schedule 3, again for reasons indicated earlier, we find no ground to fault the computations on the grounds urged. As noted earlier, the computations submitted by the Appellant have been accepted in preference to the computations submitted by the Respondent. Accordingly, the contention regards Schedule 3 to the impugned Award will also have to be rejected.

IMPUGNED JUDGMENT AND ORDER IN
ARBITRATION PETITION NO.9 OF 2018.

181. The learned Commercial Court vide impugned judgment and order dated 12/09/2019 had dismissed the Appellant's application under Section 34 of the Arbitration Act.

182. The discussion on the issue of variable charges, which was the first point urged by the learned Advocate General in this matter, is to be found in paragraphs 50, 51, and 52 of the impugned Judgment and Order. In paragraph 50, the learned Commercial Court in a few lines has referred to the contentions on behalf of the Appellant. In paragraph 51, a brief reference is made to clauses 12.1.4 to 12.1.7 of the PPA. Finally, in paragraph 52 this is what the learned Commercial Court has held:

“52. It is contended on behalf of GOG that before obtaining fuel GOG was required to be involved in every negotiation in entering into fuel supply contract and this was not done

by the claimant. It is submitted on behalf of the claimant that RLNG became the primary fuel and admittedly all the fuel has been purchased from Government undertakings namely GAIL, GSPC and BPCL. This fuel was purchased from notified persons and no any individual contracts for purchase of fuel were entered into. Along with the bills of every period, the dollar rate of the fuel and the certificate from the Government undertaking seller was duly enclosed. The dollar conversion rate is a bank notified rate and the claimant do not have any control on the fuel price nor on the dollar conversion rate. After the bills were submitted, they were duly certified by the officers of GOG. It is contended by the claimant that at no point of time when the matter was pending before the Ld. Arbitrator, did the GOG raise any contention regarding non-involvement of GOG officials in negotiation for purchase of fuel as regards the conversion rate. The GOG had cleared the bills of the claimant from time to time which means GOG was aware of the transactions entered by the claimant with the third parties.”

183. According to us, what is set out in paragraph 52 is perhaps the briefest summary of what was urged on behalf of the Respondent in its written submissions. This is hardly a satisfactory manner of dealing with the objections under Section 34 of the Arbitration Act. Besides, the learned Commercial Court has observed that the Appellant had cleared the bills of the claimant from time to time and this means that the Appellant was aware of the transactions entered into by the Respondent with third parties. Now the material on record indicates that bills had not been cleared which is why claims were raised by the Respondent in

respect of such bills. The observations that the bills were cleared and the inference drawn therefrom, is therefore an error apparent on the face of the record. In any case, we are satisfied that there was no consideration of a vital and serious issue of non-compliance with the contractual provisions found in clauses 12.1.4 to 12.1.7 of PPA.

184. The issue of downrating has been discussed in paragraphs 79 to 84 of the impugned judgment and order. In paragraphs 79 the learned Commercial Court has recorded the contentions on behalf of the Appellant. In paragraph 80 the reasoning from the impugned Award has been transcribed. In paragraph 81 there is a reference to relevant clauses of the agreement in the context of downrating. In paragraph 82 there is a reference to some factual aspects about the reduction of contracted capacity. In paragraph 83, the learned Commercial Court has agreed with the reasons set out in the impugned Award for non-acceptance of draft notification on downrating.

185. Therefore, the only discussion, original to the Commercial Court is to be found at paragraph 83 on this issue of downrating, and the same reads as follows:

“83. Parties would be bound by contractual provisions and the various Supplementary PPAs executed between the parties clearly show that the rated capacity was subsequently reduced to 19.8 MW and the obligation of

the claimant was restricted to assuring supply upto 19.8 MW without any reference to degradation of such capacity.”

186. Again, this is hardly how a serious issue of downrating could have been considered and disposed of. True, the parties would be bound by the contractual provisions and the various supplementary PPAs. Also true that the supplementary PPAs have reduced the contracted capacity to 19.8 MW. However, there was nothing in the supplementary PPAs based on which it could be said that the contractual clauses for downrating were either deleted or done away with. Even the finding that the obligation on the Respondent was restricted to assuring supply up to 19.8 MW “*without any reference to degradation of such capacity*” is perverse and with respect, indicative of non-application of mind. Neither the supplementary PPAs nor any other material on record can sustain such a finding or observation.

187. The discussion on the issue of variable charges on 4 MW power which was permitted by the Appellant to be traded is to be found in paragraphs 74 to 78 of the impugned judgment and order.

188. Again in paragraph 74, the Commercial Court has summarized in brief the contentions of the Appellant. In paragraph 75 a brief reference is made to the meaning of rated capacity. In paragraph 76

there is a brief reference to what is decided in the impugned Award. In paragraph 77 there is a reference to Appellant's communication dated 19.1.2009. Even this reference is superficial.

189. Finally in paragraphs 78 this is what is held by the learned Commercial Court.

“78. Above documents show that the provision of the PPA based on which tariff heat rate was to be arrived at including part loan percentage was not changed and the same was based on rated capacity which remained at 19.8 MW. There was no mention of reduction in the rated capacity in both the letters. The claimant’s letter dated 02.01.2009 also maintained that rated capacity of plant shall be 19.8 MW. GOG had specifically reserved its right to revert back to arrangements rating prior to giving approval on 19.01.2009 as and when found necessary. This reduction was claimed by GOG purely based on good industry practice but contrary to the agreed position. The Ld. Arbitrator rightly considered the two letters and did not agree to the case set out by the GOG.”

190. Again, we are constrained to observe that this is not how such a serious issue should have been dealt with. This is almost a verbatim reproduction from the impugned Award without any independent application of mind to the contentions raised.

191. The issue of netting out has been discussed in paragraphs 70 to 73 of the impugned judgment and order of the learned Commercial

Court. Again paragraphs 70 and 72 records the contentions of the Appellant. Paragraph 71 records the finding in the impugned Award. Finally, in paragraph 73 this is what the learned Commercial Court has held.

“73. Perusal of the memo dated 13.08.2014 as well as letter dated 18.09.2014 show that the backup energy during the shutdown was to be supplied by GOG at the rate of ₹3.78 per unit. The cost of the backup power which was supplied was to be charged as per the provisions of PPA i.e. in the ratio of 1:1 for power supplied during scheduled outage and 1:1.25 for power supplied during unscheduled/forced outage. This related to the period during which the claimant was generating power and a rate was available for considering the ratio. However, it is apparent from the memo dated 13.08.2014 referred above that the prerequisites of availability of average cost of energy supplied by the claimant did not arise in view of the shutdown and determination of average cost of energy supplied by the claimant became irrelevant. Therefore the rate of ₹3.78 per unit was not required to be multiplied by 1.25 times as the determination of average rate had become irrelevant. That means the facts given by the Ld. Arbitrator have not resulted in unjust enrichment to the claimant.”

192. Again, for the reasons pointed out above, this is hardly a satisfactory manner of dealing with the serious issue raised by the parties. The discussion in paragraph 73 is an almost verbatim reproduction from the impugned Award.

193. The discussion on the issue of interest is to be found in

paragraphs 66 to 69 of the impugned judgment and order. Again, except for observing that the interest amount is not exorbitant, there is no discussion on the issue raised.

194. Although the learned Commercial Court has indeed affirmed the impugned Award, such affirmance does not absolve the requirement of at least considering the rival contentions and responding to the same. According to us, there is hardly any consideration of the issues raised by the parties and the learned Commercial Court has only adopted some paragraphs from the impugned Award as its reasoning. This according to us is not the manner of disposing of an application under Section 34 of the Arbitration Act.

RELIEFS & DIRECTIONS

195. For all the aforesaid reasons, we partly allow this appeal and set aside both the impugned judgment and order as well as the impugned award on the issues of variable charges (₹ 24.66 crores approx), downrating (₹ 18.53 crores approx.), variable charges on 4MW power (₹ 3.94 crores approx.), and netting out (₹ 2.36 crores approx.). We reduce the interest rate from 15% to 10% per annum, payable from the date of Award till the date of payment of the determined amount. The rest of the impugned Award is however not interfered with.

196. Since we have rejected the challenge to the summary of computations in Schedule 2 of the impugned Award, even after holding the issues of downrating, 4 MW power, fuel formula, facilitation fuel charges, and netting out in favour of the Appellant, the Appellant is still due and payable principal amount of ₹ 70.58 crores together with interest component with which we have not interfered with. This amount comes to ₹ 151.97 crores as of 31.10.2017. On this amount of ₹ 151.97 crores, the Appellant will have to pay interest at the approved rate for the period from 31.10.2017 till the date of the Award i.e. 16.2.2018. Thereafter, however, the Appellant will have to pay interest at the rate of 10% per annum from the date of Award till the payment of the amount to the Respondent.

197. The Appellant had already deposited an amount of ₹ 25 crores before the Commercial Court as a condition for a stay on the execution of the impugned Award. Thereafter, the Appellant deposited a further amount of ₹ 94 crores in this Court in terms of our order dated 8.11.2019. The Respondent was permitted to withdraw both these amounts by furnishing bank guarantees of a Nationalized Bank. The Respondent was directed to keep alive such bank guarantees until the disposal of this Commercial Appeal and for 15 days thereafter.

198. Though we have partly allowed this appeal, it is unlikely

that the Respondent might have to bring back any portion of the amounts withdrawn by it. The Respondent to, therefore, assess this position and deposit such amount, if any, in this Court within 14 days from today. Only if no amount is to be brought back, the Respondent need not keep the bank guarantees alive beyond 15 days from today.

199. Further, if despite our order partly allowing this appeal, the Appellant is still due and payable to the Respondent the amounts over and above those which the Respondent has already withdrawn against bank guarantees, then, obviously, the Respondent need not keep the bank guarantees alive for more than 15 days from today. The Appellant to then deposit the balance amount in this Court within four weeks from today. The Respondent will have the liberty to withdraw such amount, once the same is deposited.

200. The appeal is partly allowed in the aforesaid terms. There shall be no order for costs.

BHARATI H. DANGRE, J

M. S. SONAK, J.

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