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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 08th November, 2023
Pronounced on: 10th November, 2023

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O.M.P.(I) (COMM.) 353/2023 & CAV. 573/2023
IA 21714/2023

ARCELORMITTAL NIPPON STEEL INDIA LIMITED

..... Petitioner

Through: Mr. Mukul Rohatgi, Dr. A.M. Singhvi, Mr. Rajiv Nayyar, Sr. Advocates with Mr. Nitesh Jain, Mr. Rajat Jariwal, Mr. Atul Jain, Mr. Hridhay Khurana, Ms. Perna Singh & Ms. Sanjana Mehta, Advocates.

versus

GAIL (INDIA) LIMITED

..... Respondent

Through: Mr. Balbir Singh, ASG, Mr. Vivek Kholi, Sr. Advocate with Mr. Susmit Pushkar, Mr. Kartikay Mahajan, Ms. Somiran Sharma, Mr. Bhavya Bhatia, Mr. Juvas Rawal, Mr. Raj Mohan Gupta, Ms. Perna Jain, Mr. Satit Chhabra, Ms. Aayushi Singh, Ms. Aadya Malik & Mr. Dhrubajit Saibia, Advocates & Mr. Bhuwan Yadav & Mr. Deepak Barish, Representatives of GAIL.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.



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1. A petition under Section 9 of the Arbitration & Conciliation Act, 1996 has been filed on behalf of the petitioner seeking urgent interim stay on the Notice dated 21st October, 2023 issued by the respondent purportedly to terminate the Contract and to restrain the respondent from acting on the said Notice in addition to directing the respondent to deliver LNG in accordance with the terms of LNG Sale and Purchase Agreement.
2. The petitioner, a Public unlisted Company having its registered Office at Bandra, Mumbai is a leading manufacturer of steel and has its main operations in largest plant in Hazira, Surat for manufacturing integrated flat carbon steel.
3. The respondent a government Company registered at New Delhi, is primarily engaged in the distribution and marketing of gas and other aspects of gas chain including exploration, production, transmission, sourcing, extraction, processing of natural gas and related process, products and services.
4. The parties entered into a LNG Sale and Purchase Agreement dated 02.06.2022 (LSPA) to secure the supply of LNG at the petitioner's steel manufacturing plant. Pursuant to LSPA, the parties executed a Term Sheet dated 30th October, 2020, whereby the respondent agreed to sell and deliver pre-determined quantities of LNG to the petitioner on "a take or pay basis" from February, 2021 till December 2025. The LSPA provided an Annual Contracted Quantity (ACQ) of LNG i.e. 11.87 TBtu, to be delivered during each Contract Year. Consecutive period of 12 calendar months from 1st January was considered as the Contract Year. The ACQ was to be delivered 100% on a 'take or pay' basis through 3 Cargo Lots (each amounting to 3.4 TBtu) and 1 partial Cargo Lot (comprising of the remaining quantity of



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ACQ for the Contract Year). The LSPA also provided for an Annual Delivery Program (ADP) reflecting the scheduled months of delivery of each Contract Year. As per the agreed ADP for the Contract Year 2022, the respondent was to supply LNG in the months of January 2022, May 2022, August 2022 and December 2022. However, disputes arose on account of respondent's failure to supply LNG in August, 2022 and December, 2022 as per the Schedule. The respondent vide its return email dated 11th July, 2022 informed the petitioner that it would not be able to supply the LNG in August, 2022 allegedly due to operational constraints and claimed "*one of our major LNG suppliers has informed that they will not be delivering LNG Cargoes to GAIL which has adversely impacted GAIL's LNG portfolio with respect to cargo positions*". The petitioner being in dire need of LNG kept requesting the respondent for supplies.

5. The respondent vide its letter dated 02nd November, 2022 for the first time sent a letter stating that "*it is only on account of the Force Majeure event under Clause 13.1(f) (v) that GAIL could not make the supplies scheduled for August 2022 on a high seas basis...*". It belatedly and wrongfully invoked the provisions of *Force Majeure* and also failed to provide any particulars to substantiate its claim of *Force Majeure* as mandated under Clause 13.3 of LSPA. Likewise, vide Notice dated 07th December, 2022 the respondent again invoked *Force Majeure* in respect of remaining Partial Cargo Lot that was to be supplied in December 2022. Owing to the respondent's continuous breach of the provisions of LSPA under the guise of purported *Force Majeure*, the petitioner wrote various letters claiming that the respondent cannot refuse to delivery of LNG on account of *Force Majeure* merely because one single upstream supplier had



allegedly defaulted in supply of LNG to the respondent. Since, the petitioner was not willing to accept the unsubstantiated claim of the respondent, it tried to intimidate the petitioner by alleging “Material Breach” on part of the petitioner for the alleged onward sale of the LNG procured under the LSPA to third party. Various correspondences were exchanged between the parties and petitioner expressed its willingness to engage in good faith discussions.

6. The respondent in its letter dated 03rd March, 2023 refused to provide detailed information about the *Force Majeure* event as mandated under Clause 13.3 of LSPA by claiming such information to be confidential but attempted to unilaterally reschedule the supply of LNG which it had failed to supply in August 2022.

7. As per ADP of the Contract Year, 2023 the respondent was obligated to supply LNG for the months of March 2023, July 2023, September 2023 and November 2023. By resorting to arm twisting tactics, the respondent attempted to make the petitioner accept all their claims of the alleged *Force Majeure* and to agree to the malafide proposals made by them giving a rescheduling of defaulted supply of August 2022. It shared a Confirmation Notice (CN) for supply of LNG in March 2023 unilaterally inserting a clause stating “*it is clarified that the Cargo Quantity in this Confirmation Notice is the quantity scheduled for delivery in August 2022, as per the LSPA, that could not be supplied in August 2022 due to the Force Majeure Event*”. It was asserted that insertion of such clause was contrary to the format for Confirmation Notice (CN) as agreed in LSPA. Several emails were then exchanged between the parties and the March CN was executed without prejudice to the rights, contentions and remedies under LSPA and



independent of party's legal position on whether this supply for March, 2023 of the Full Cargo Lot would be towards Contract Year, 2022 or Contract Year, 2023. The petitioner in its letter dated 24th March, 2023 expressly clarified that this Confirmation Notice was being signed without prejudice to their rights and obligations. Pursuant thereto without reacting to the "*without prejudice*" assertion of the petitioner, respondent supplied LNG in March 2023.

8. On the assurances of the respondent that it had enough LNG to supply in May, 2023 and June 2023 and subject to its letter dated 24th March, 2023 plaintiff shared a suggestive ADP on 12.04.2023 on without prejudice basis which included a supply of four Full Cargo Lots (instead of three) and two Partial Cargo Lots (instead of one).

9. The respondent, however, did not accept the petitioner's proposal vide email dated on 28.04.2023 and instead shared its revised working proposal for "*ADP for CY 2023*" for the petitioner's "*consideration and agreement*" with the caveat that the Force Majeure event under the LSPA was still continuing. It further sent a letter on 8.05.2023 conveying that in case a positive confirmation of the revised ADP was not received, it shall be deemed that the deliveries have been refused and the petitioner shall be obligated to make payment in respect thereof.

10. The petitioner vide its letter dated 17.05.2023 confirmed that it would accept the ADP in so far as it relates to CY 2023 and shared a table with the identified months that comprised of the quantities towards CY 2023 as March 2023, May 2023, September 2023 and November 2023. The petitioner further stated that the dispute with respect to the Contract Year 2022 quantities which the respondent proposed to supply as per the revised



ADP, shall be left for determination at the later stage. The petitioner once again clarified that the revised ADP was without prejudice to its rights “*and shall not be deemed as acceptance of any of GAIL’s position or as waiver of the rights of the petitioner including the 2022 defaults*”. Despite such clarifications by the petitioner, the respondent shared a Confirmation Notice for supply of LNG in May 2023 by inserting arbitrary timelines. The petitioner vide its letter 2nd May, 2023 executed the May, 2023 CN without prejudice to its rights and contentions.

11. Since, the respondent had wrongfully claimed *Force Majeure* and consistently refused to provide any document or information in respect thereof, the petitioner referred all the disputes on 03rd June, 2023 under LSPA between the parties, to Delhi International Arbitration Centre in terms of Clause 20.3 of LSPA. The respondent filed its response on 2nd July 2023 and also raised counter-claims. Despite the arbitration having commenced, respondent continued to act in bad faith and resorted to arbitrary tactics and misused its dominant position. Ignoring all the earlier communications exchanged between the parties, a Confirmation Notice for supply of LNG in July 2023 in modified format was sent with an insertion of a clause stating that any refusal to execute the Confirmation Notice by the petitioner by 26.06.2023 shall be deemed as a failure to take delivery of LNG Cargo by under the LSPA. A similar tactic was adopted by the respondent for the supply of LNG in August, 2023 and they again coerced the petitioner into accepting the Partial Cargo Lot in August, 2023. The petitioner asserted that the respondent was resorting to predatory tactics by arm twisting the petitioner into accepting the respondent’s breaches due to which it suffered losses.



12. Since no indication was received from the respondent for supply of LNG in September, 2023 as per CY 2023, the petitioner on 31st August, 2023 inquired about the same. The respondent with its letter dated 31st August, 2023 shared the Confirmation Notice for supply of LNG in September, 2023 by again inserting a Clause that failure to accept the LNG would amount to refusal to take the delivery and entitle respondent not to make any supply pursuant to this Confirmation Notice and to proceed as per law. Despite petitioner's letters, the respondent refused to supply LNG for September, 2023 till the September CN was executed unconditionally. Left with no alternative, the petitioner executed the CN on 05th September, 2023 without any reservations. The petitioner was compelled to accept all clauses unconditionally including Clause 12 which wrongly stated that petitioner by executing the September CN, would be forgoing on its claim in arbitration. .

13. The respondent inquired about the status of withdrawal of arbitration, on 18th September, 1993 and on 3rd October it agreed to supply LNG scheduled for November, 2023. In response, the petitioner vide letter dated 03rd October, 2023 clarified that the arbitration was continuing and all the disputes between the parties survived but also clarified that the execution of the September, 2023 CN was under duress. **On 21st October, 2023 the respondent again resorted to arbitrary tactics and sent a Notice purporting to terminate the LSPA under Clause 19.3 of the LSPA.**

14. The petitioner has claimed that the respondent has unlawfully terminated LSPA on completely frivolous and wrongful grounds and the Notice of Termination dated 21.10.2023 is invalid, unsubstantiated and contrary to the provisions of LSPA and applicable law. There was no Agreement between the parties in respect of any revised ADP and ACQ.



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The petitioner denied the inability of the respondent to supply LNG in August, 2022 and December 2022 on account of *Force Majeure*. Moreover, the question of existence of *Force Majeure* is subjudice before the Arbitral Tribunal since 03.06.2023. It is claimed that irrespective of the alleged Termination, the respondent is obligated to supply LNG for September, 2023 and November 2023 as per Clause 7.10 of LSPA and this obligation remains irrespective of any Agreement between the parties as per revised ADP or ACQ for the Contract Year 2023. The respondent had breached the LSPA by unilaterally modifying the Confirmation Notice time and again which had been signed and executed by the petitioner under protest or on without prejudice basis. Similarly, the respondent, taking advantage of the petitioner's position, has forced the petitioner to unconditionally accept all the clauses of September CN, a day prior to the Delivery Notice. Moreover, the alleged deemed failure on the part of the petitioner to accept two consecutive months' supply of LNG is not a contemplated ground for termination under Clause 19.1 of LSPA. It is claimed that the petitioner has always been ready and willing to perform its obligations under the LSPA and has accepted all deliveries from March 2023 till the proposed supply for November 2023. Furthermore, the terms as stipulated in September, 2023 CN, cannot be read as part of the original LSPA since it does not form part of LSPA and the petitioner cannot be asserted to be in breach of Clause 16.2(i)(i) of LSPA. Moreover, it has wrongly asserted that the LNG received from the respondent has been sold to the third party in an open market.

15. The petitioner has further claimed that without prejudice to the illegality of the respondent's termination of LSPA, since the obligation to supply LNG for November 2023 had accrued prior to the Termination



Notice dated 21.10.2023, the respondent is obligated to supply LNG for the month of November, 2023 under Clauses 19.2 and 19.3(c) of LSPA.

16. The petitioner has claimed that it relied heavily upon the respondent for supply of LNG for its operation and steel manufacturing. It apprehends that the respondent shall exit or alienate the LNG which is to be sold to the petitioner before the present petition is decided. The damages cannot be an adequate remedy and grave injustice shall be caused to the petitioner if the interim relief is not granted. The petitioner states that it is ready and willing to accept the delivery of LNG in accordance with LSPA which would not cause any prejudice to the respondent. Heavy losses are liable to be incurred by the petitioner in case the respondent fails to discharge its liability.

17. Therefore, the petitioner sought an urgent stay of the operation of the Termination Notice of 21.10.2023 and directions to the respondent to continue to supply the LNG in accordance with ADP agreed between the parties under LSPA and to supply the Partial Cargo Lot for November, 2023. It is asserted that though on 04.08.2023, the Arbitral Tribunal was constituted but certain objections were taken by the respondent and the matter has gone to this Court and some time may be taken before the Arbitral Tribunal is constituted. Hence, the present petition under Clause 9 of the Arbitration and Conciliation Act, 1996 has been filed seeking urgent relief.

18. **The respondent in its detailed Reply** to the petition explained that under the LSPA, it was obligated to supply the annual quantity of 11.87 TBtu (ACQ) for each Contract Year in terms of Clause 5.1(a) of the LSPA in accordance with the Annual Delivery Programme (ADP) as agreed between the parties in terms of the Clause 7.10 of the LSPA. The supply



was to be made in three Full Cargo Lot and one Partial Cargo Lot. Prior to supply of each Cargo, the parties were obligated to execute various agreements/documents including a Confirmation Notice as per Clause 7.8 of the LSPA. The petitioner also exercised its option and converted the Contract Price of LNG quantities to Fixed Sales Price for each Contract Year which was far below the market price of LNG prevalent currently. In addition, the parties also agreed to *A High Seas Sales Agreement* (HSSA) in respect of the delivery of each LNG Cargo.

19. On account of *force majeure* in CY 2022, the respondent was unable to supply the LNG Cargo for August, 2022 and December, 2022. However, the deficit of 5.35 TBtu was agreed by the respondent to be supplied in 2023 and the total quantity of LNG was increased from 11.87 TBtu to 17.35 TBtu in the Contract Year 2023.

20. Accordingly, in terms of the revised/novated ACQ it has already supplied 15.44 TBtu which is in excess by 3.57 TBtu of the contractual quantity of 11.87 TBtu.

21. The petitioner has accepted the delivery in the months of March, May, July and August, 2023 on without prejudice basis, which according to the respondent is contrary to law. Since the respondent has already supplied stipulated ACQ of 11.87 TBtu under the LSPA, the respondent was left with no other option in view of *without prejudice acceptance* of LNG by the petitioner but to seek reconfirmation of its Agreement for revised/ novated ACQ on account of short supply in Contract Year 2022. After exchanging a series of correspondences during August 31, 2023 till 05.09.2023, the petitioner agreed to novated ACQ and execute formal Confirmation Notice *inter alia* agreeing to acceptance of delivery of LNG Cargo based on ACQ



for CY 2023 which would amount to foregoing any claim of the petitioner concerning the short supply of LNG in the year 2022. In addition, High Seas Sales Agreement (HSSA) dated 06.09.2023 has also been signed reaffirming the Confirmation Notice and the revised ADP of ACQ CY 2023. Having accepted the additional delivery of 3.35 TBtu LNG on 07.09.2023, the petitioner belatedly and with mala fide intent has sought to renege from the Agreement on 03.10.2023 and wrongly claimed that the Confirmation Notice dated 06.09.2023 had been signed under economic duress.

22. The respondent has asserted that LNG LSPA dated 21.10.2023 is a Determinable Contract and has been rightly and validly terminated by the respondent in accordance with the Clause 19 of the LSPA. Reliance has been placed on Ksheeraabd Construction Pvt. Ltd. v. National Highways and Infrastructure Development Corporation Ltd. 2023 SCC Online Del 3156.

23. The respondent has further asserted that since 3.57 TBtu has already been supplied in excess in the year 2023 as against the agreed quantity of 11.87 TBtu, the respondent cannot be directed to continue with the supply of partial Cargo Lot for November 2023, in terms of *Section 14(d) read with Clause 41(e)* of the Specific Relief Act. A determinable contract cannot be specifically enforced and therefore, no injunction to prevent the breach of such a contract can be granted. Reliance is placed on Overnite Express Limited v. Delhi Metro Rail Corporation 2020 SCC OnLine Del 2093; GHH Bumi Mining Services Pvt. Ltd. v. Hindustan Zinc Ltd. 2023 SCC OnLine Del 3753 and C Gopal Reddy & Co. v. National Highways and Infrastructure Development Corporation Ltd & Anr. 2023 SCC OnLine Del



2393. It is asserted that since the Contract has been validly terminated, no mandatory injunction can be granted against the respondent.

24. The respondent has further asserted that the petitioner's requirements for its manufacturing facility at Hazira are way in excess of the LNG quantities under the LSPA and which they now seek from this Court. The petitioner has additional sources of supply. In fact, the petitioner has been taking undue advantage of the lower price of LNG under LSPA and is seeking to dispute the Agreement and at the same time, has accepted additional LNG in terms of the novated ACQ for the Contract Year 2023. The petitioner is selling the LNG procured from the respondent in the open market at the prevailing price thereby profiteering from the LNG supplies even though under the LSPA, the petitioner is obligated to use the LNG supplied by the respondent only for the purpose of its manufacturing facilities.

25. It is further claimed that the adequate remedy for any shortfall in LNG under the LSPA Clauses 5.3(f) and 14.2(e) of the LSPA is 'damages' and it is the sole remedy available to the petitioner.

26. In view of the foregoing assertions, the respondent has asserted that no interim injunction can be granted by staying the operation of the Termination Notice nor any direction can be given to the respondent for supply of Partial Cargo Lot in November, 2023. The respondent has placed reliance on Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid 2020 SCC OnLine Del 2485 and GHH Bumi Mining Services Pvt. Ltd. (supra) holding that the relief under Section 9 of the Arbitration Act, 1996 should not be granted when damages are an adequate remedy for wrongful termination.



27. Moreover, it is asserted that Section 23 of the Specific Relief Act as relied upon by the petitioner, is not applicable as it applies only when contract is “*otherwise proper to be specifically enforced*”.

28. It is submitted that there was no Agreement to supply Partial Cargo Lot in November, 2022 and no such right had accrued prior to termination of LSPA. The Agreement to supply the Partial Lot in November, 2023 was pursuant to Confirmation Notice of 06.09.2023. Once the petitioner chose to renege the Confirmation Notice, it had lost all the rights conferred under the said Confirmation Notice. Supply of LNG is thus, relatable to the original LSPA according to which supply of LNG already made, is much more than the Contract amount. There is no further obligation on the respondent to supply additional LNG to what had been agreed in the LSPA. It is claimed that there is no ‘*accrued right*’ in favour of the petitioner in terms of Clauses 19.2 and 19.3(c) of LSPA as the parties did not execute any Confirmation Notice or High Seas Sales Agreement in respect of the delivery of LNG Cargo in November, 2023.

29. In the end, it is asserted that the petitioner has failed to make out any ground for grant of interim mandatory relief. Furthermore, there is no urgency in the matter as the petitioner has not approached the Court with clean hands. The Confirmation Note of 06.09.2023 had been executed out of the free will and commercial prudence without any protest by the petitioner but now it is claiming it under economic duress and is reneging the same. It is therefore, stated that the petition is liable to be dismissed.

30. **Rejoinder was filed by the petitioner** wherein the assertions in the petition were reaffirmed.



31. *Submissions were addressed by the learned Senior Counsel for the petitioner and by the learned Senior Counsel for the respondent. Written submissions have also been filed by the parties.*

32. During the course of arguments, learned Senior Advocate on behalf of the petitioner submitted that since the Arbitral Tribunal is in the process of being constituted, the larger issue of validity of termination of LSPA shall be agitated before the Tribunal. The relief has been limited to grant of interim injunction of directing the respondent to deliver LNG for the month of November, 2023. It is also submitted that the petitioner has sought delivery of LNG on 22.11.2023 instead of 02.11.2023 only because of non-availability of the port and not because of non-requirement of LNG.

33. While agitating all the grounds as stated in the petition, it was asserted that there is an urgency in the delivery of LNG by November, 2023 as it is vital for the running of the manufacturing of the petitioner. The losses otherwise would be insurmountable and damages would be no compensation to the losses suffered by the petitioner. It is also argued that this Agreement was not a determinable contract but could be terminated only on happening of the events as specifically mentioned in Clause 19 i.e. Termination Clause. Since none of the conditions were satisfied, LSPA could not have been terminated.

34. **Learned Senior Advocate on behalf of the respondent** in addition to reaffirming the grounds taken in the reply, had further argued that the supply of LNG under the LSPA is not even 15% of the total requirement of the petitioner; it has been procuring LNG from other sources. Moreover, LNG is easily available in the market but the only interest of the petitioner is that it is being supplied at a much lower rate by the Respondent than what is



available in the market. The petitioner having not complied with LSPA conditions, is trying to make a premium by asserting the delivery of LNG for the month of November, 2023. .

35. Arguments heard and the record perused.

36. Admittedly, the parties executed the LSPA on 02.06.2022 for Sale and Purchase of LNG on *a take or pay basis* for the period starting from 01.01.2021 till 31.12.2025 on the terms and conditions as stipulated therein. Inter alia, the respondent was obligated to supply an Annual Contracted Quantity of LNG i.e., 11.87 TBtu for each contract year in accordance with the Annual Delivery Programme (ADP) agreed between the parties, comprising three full cargo lots and one partial cargo lot. Prior to supply of each cargo, the parties were obligated to execute various agreements/documents, including the Confirmation Notice. Also, the petitioner exercised its option and converted the contract price of LNG quantities to fix sale price for each contract year. In addition, the parties also executed a High Seas Sale Agreement in respect of the delivery of each LNG cargo.

37. It is not in dispute that the LNG was supplied till May, 2022 in terms of the LSPA. However, the differences emerged when the respondent was unable to supply the agreed LNG for the months of August, 2022 and December, 2022 claiming that one of its suppliers was unable to supply LNG on account of Ukraine-Russia War and claimed *force majeure*. The petitioner seriously challenged the non-performance of LSPA for August and December, 2022 by the respondent and sought further details for invocation of *force majeure* Clause, but the respondent was not forthcoming and claimed that the information was confidential in nature. This inability of



the respondent to supply LNG for the months of August, 2022 and December, 2022 triggered multiple correspondences between the parties and the respondent offered to reschedule the Full Cargo Lot of August 2022 to March 2023.

38. According to the petitioner, the respondent attempted to unilaterally reschedule the supply of LNG that it had failed to supply in August, 2022 as is reflected in its Letter dated 03.03.2023. The respondent also claimed that it would be unable to supply LNG for the month of March, 2023 as well owing to the alleged *force majeure* events. The respondent shared a Confirmation Notice to supply of LNG for the month of March, 2023 (*March CN*) by unilaterally inserting clause in CN that the quantity scheduled for the delivery in August, 2022 was being supplied in March, 2023. The petitioner accepted this supply but without prejudice as was reflected in its Letter dated 24.03.2023.

39. The petitioner shared a suggestive ADP on a without prejudice basis, proposing four full cargo lots instead of three and two partial cargo lots instead of one. The respondent did not accept the proposal of the petitioner but shared its revised working proposal for the ADP for Contract Year-2023 for consideration and agreement with a caveat that the *force majeure* was still continuing. The petitioner *vide* its Letter dated 17.05.2023 confirmed that it would accept the ADP as proposed by the respondent insofar as it related to Contract Year-2023 comprising the quantity towards March, 2023, May, 2023, September, 2023 and November, 2023 but rejected the proposal of the respondent for 2022. In respect of the Contract Year-2022 quantities, it was stated that it may be left for determination at a later stage according to the LSPA.



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40. Despite this reservation expressed by the petitioner, similar modus was adopted by the respondent for supplying LNG in the month of May, 2023, July 2023 and August 2023, wherein a default clause was inserted in CA that in case the LNG was not accepted, it shall be deemed as a failure to take delivery by the petitioner. The petitioner thus, accepted LNG for May, 2023, though again, it is asserted that it was without prejudice.

41. The petitioner has claimed that because it was in dire need of LNG, when faced with consistent threats of termination of LSPA by the respondent and because of lack of alternatives, it was compelled to sign the September CN 2023 unconditionally, including Clause 12 which unilaterally stated that the petitioner gives up all foregoing claims in Arbitration and that the petitioner shall withdraw the arbitration proceedings.

42. There is no challenge that the Termination Notice dated 21.10.2023 had been sent by the respondent terminating the LSPA on the grounds that the LNG supplied by the respondent was being sold by the petitioner to the third party and that it had resiled from its unconditional acceptance of September, 2023 CN by accepting all the deliveries in Contract Year-2023 “on a without prejudice basis” and “having failed to withdraw the arbitration proceedings”.

43. According to the petitioner, the termination of the Agreement *vide* Notice dated 21.10.2023 by the respondent is illegal and is in contradiction to the express terms of the LSPA. While the detailed arguments had been addressed on the determinability/termination of the Agreement, but this issue was not pressed during the arguments, and it was stated that the same would be taken up before the learned Arbitral Tribunal. Thus, no findings are being returned on the determinability of the Contract in the light of the



various judgments relied upon by both the parties. The issue is confined to whether considering the entire conspectus of the facts, the respondent can be directed to supply the LNG for the month of November, 2023 to the petitioner since it would otherwise lead to irreparable loss to the petitioner.

44. **At this stage it is pertinent to discuss the scope of enquiry of the courts under Section 9 of the Act, 1996.**

45. This Court in the case of *KSL & Industries Ltd. Vs. National Textiles Corporation Ltd.* in OMP. 581/2010 decided on 14.08.2012 explained that **the scope of inquiry under Section 9 is limited to prima facie examination of the issue raised by the parties.** While dealing with the application under Section 9 of the Act, same principles as applicable to Order XXXIX Rule 1 and 2 shall be applicable. The examination of the submission of the parties, as well as the terms of the MOU, would be made only to assess the strength of the petitioner's case on a prima facie basis. It was clarified that it is the Arbitration Tribunal who has the jurisdiction to determine all such issues of fact and law independently and any observation made during the course of such evaluation would not be binding either on the parties or the Arbitral Tribunal.

46. Thus, this court is confining its observations to determining whether or not a prima facie case for grant of interim relief of mandatory injunction is made out by the Petitioner.

47. **The first aspect** is the contention of the petitioner that this obligation for supply of LNG in the month of November, 2023 had been undertaken before the termination of the LSPA *vide* Letter dated 21.10.2023 and the respondent is obligated to honour the same in terms of Clause 19.2 of LSPA. It may be observed that the validity of the Termination Notice is not being



considered at this interim stage of grant of interim relief. The only circumstance significant for considerations is whether there exists any *prima facie* case in favour of the petitioner entitling it to supply LNG for the month of November, 2023.

48. It is significant to note that the total LNG to be supplied in Contract Year-2022 was 11.87 TBtu. However, there was a shortfall of 3.75 TBtu in the year 2022 which the respondent agreed to compensate in the Contract Year-2023. Therefore, it made the supply in March, 2023 claiming the same to be in lieu of the supply that was to be made for the month of August, 2022. Though the petitioner has seriously contested the revision of Annual Contracted Quantity for the Contract Year-2023 but it has accepted the supply of LNG in March, 2023 without prejudice. Further, it has also accepted LNG for the months of May, 2023, July, 2023, August, 2023, even though as per the Original Contract Year-2023, the three lots were to be made in March, 2023, July, 2023 and September, 2023, while the final partial lot was to be made in November, 2023.

49. Significantly, a fresh unconditional C.N. was executed in September 2023 wherein the petitioner not only signed the CN but also undertook to withdraw the Arbitral proceedings. The petitioner also signed the HSSA in September 2023 and accepted the supply of LNG in September 2023 and thereafter reneged from the CN of September 2023 on the ground of economic duress. At this interim stage, this Court may not question the validity of CN, 2023 and whether it was signed under economic duress, but it cannot be overlooked that the LNG has been accepted under the CN of September 2023; the benefit has been availed by the petitioner. Even if it is accepted that the petitioner had taken delivery of LNG in these months



without prejudice its rights, but it cannot be overlooked that the supply for the year 2023 is more than the agreed contract value of 11.87 TBTu. The petitioner has consistently claimed that the delivery of LNG pertains to the Contract Year-2023 and not to the Contract Year-2022 in respect of which it has raised its claims for damages.

50. If the contention of the petitioner is accepted that original LSPA is existing and is not terminated as claimed by the respondent, then the agreed Annual Contracted Quantity under LSPA for the Contract Year-2023 would continue to prevail and in terms of that, the respondent has already supplied a higher quantity.

51. Further, the petitioner has also denied that it had agreed to any revised Annual Contracted Quantity for the Contract Year-2023. Significantly, the Confirmation Notice for September, 2023 had been signed unconditionally by the petitioner, wherein the revised Annual Contracted Quantity was proposed and accepted. The question of whether it was under economic duress and on account of arm-twisting tactics of the respondent is a debatable point which cannot be adjudicated at this preliminary stage. However, even if the case of the petitioner is accepted, then it cannot insist on delivery of partial cargo lot for the month of November, 2023 which is in terms of the revised Annual Contracted Quantity.

52. Therefore, it is observed that the prima facie case is not in favour of the petitioner who has taken contradictory stands viz., on one hand, it is claiming that the LSPA is existing, but on the other hand, is claiming the benefit of revised Annual Contracted Quantity for the Contract Year-2023. Having already received a supply of 15.44 TBTu which is more than the



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contracted LNG for the Contract Year-2023, no *prima facie* case is made out in favour of the petitioner.

53. The **second aspect** is the balance of convenience. It needs deliberation whether LNG is readily available in the open market from other sources aside from the respondent, for procurement by the petitioner.

54. The respondent has clarified that the LNG being provided by the respondent is only 15% of the petitioner's entire requirements and the remaining LNG is being procured by the petitioner from other sources which has not been refuted on behalf of the petitioner. This is significant in the light of the fact that the LNG could not be supplied for the months of August, 2022 and December, 2022, but the manufacturing facilities of the petitioner have continued even then. Thus, LNG is a product which is available in the market and the respondent is not the only source of supply of LNG and the petitioner can procure this LNG from the open market.

55. Thus, the balance of convenience does not lie in favour of the petitioner who can procure LNG from the open market and is not solely dependent upon the respondent.

56. The **third aspect** for consideration is irreparable loss and injury to the petitioner. It is agitated on behalf of the respondent that the petitioner's insistence on supply of LNG from the respondent is because the respondent is supplying the LNG at much lower rates than the rates at which LNG is available in the open market. As stated above, the non-supply of LNG by the respondent would not lead to cessation of the petitioner's manufacturing facilities and in these circumstances, it can, at best be said that the default in supply of LNG by the respondent may lead to incurring of additional expenditure by the petitioner. The procurement of LNG may become



onerous as had happened in August and December 2022 but no irreparable loss and injury would result to the petitioner. Without prejudice to its rights to claim damages, the petitioner can procure LNG from the open market.

57. In the light of above discussion, it is held that the petitioner is not entitled to mandatory interim relief of directing the respondent to supply the LNG for the month of November, 2023.

58. It may be noted that the observations made herein are not a reflection on the merits of the case and the parties are at liberty to agitate their respective contentions in the appropriate proceedings.

59. Accordingly, the present petition is hereby dismissed, along with the pending applications, if any.

**(NEENA BANSAL KRISHNA)
JUDGE**

**NOVEMBER 10, 2023
va/ss/akb**