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O.P.No.156 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.10.2025	Delivered on : 04.11.2025
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Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Original Petition No.156 of 2020

M/s.INOX Air Products Pvt.
Ltd., Chennai-68 rep.by
its Authorized Signatory

...Petitioner

Vs

M/s.Steel Authority of India
Ltd., New Delhi.

...Respondent

PETITION under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 07.11.2019 passed by the learned Arbitral Tribunal, allow the claims of the petitioner as prayed for before the Arbitral Tribunal and award costs to the petitioner.

For Petitioner : Mr.Rahul Balaji &
Mr.Sachin Mandlik
For Respondent : Mr.Sricharan Rangarajan, SC for
Ms.Krithika Jaganathan &
Ms.Shweta Vasudevan for
M/s.Lakshmi Kumaran &
Sridharan Attorneys

ORDER



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This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 assailing an arbitral award dated 07.11.2019 passed by the Arbitral Tribunal.

2. Heard both.

3. The facts leading to filing of this petition are as follows:

(i) The petitioner and the respondent entered into an agreement dated 27.12.2008, under which, the petitioner was required to supply Oxygen, Nitrogen and Argon to the respondent. In respect of the supply of Oxygen and Nitrogen, a Minimum Take or Pay (MTOP) quantity has been fixed under Article 15.3 of the agreement and the petitioner has to be paid a minimum amount for the quantity committed regardless of quantum of gases drawn. The respondent was also required to pay Fixed Facility Charges (FFC) under the agreement to the tune of Rs.1,58,00,000/- per month.

(ii) As per the agreement, the petitioner is bound to meet the Argon requirement of the respondent upto the contracted capacity i.e. 11,200 Nm³ per day with an occasional drawal upto 19,600 Nm³ per day, however, subject to a monthly cap of 3,34,133 Nm³, in such a



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way that the daily average consumption was maintained at 11,200 Nm³, that it should not exceed 19,600 Nm³ per day and that it should not exceed the monthly consumption of Argon gas of 3,34,133 Nm³.

(iii) According to the petitioner, these limits of supply and consumption of Argon have been unambiguously set out in the agreement, in the tender document, in the correspondence prior to signing the agreement and in the subsequent correspondences. In this connection, the petitioner specifically relied upon Article 1.15, Article 1.52, Article 7, Annexure II and Article 16.7 of the agreement.

(iv) This requirement and supply of Argon gas was for the entire contract period of five years and upon satisfaction, it could be extended for a further period of 5 years on mutually agreed terms and conditions.

(v) The respondent was said to have drawn Argon gas in excess of the contracted quantity by consuming above 19,600 Nm³ per day on 41 occasions from April 2011 to November 2016. Furthermore, the respondent was said to have consumed Argon gas above 3,34,133 NM³ per month on six occasions from April 2011 to November 2016. This, according to the petitioner, was in breach of the agreement. Consequently, the petitioner claimed that the respondent must



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compensate them for the excess consumption of Argon gas at the rate of Rs.45.51 Ps per Nm³, which would amount to Rs.2,41,04,593/- along with interest till 30.11.2016.

(vi) The respondent was under an obligation to reimburse the petitioner all taxes, duties, cess and similar payments made by the petitioner to the Governmental Authorities in respect of the supplies made under the agreement including any such levies imposed on the petitioner in respect of the FFC. The petitioner relied upon Article 12.4 of the agreement in this regard.

(vii) The excise duty was payable not only on the actual supply of gases, but also on the entire FFC and the MTOP, irrespective of the quantity of gas that was drawn. From October 2011 onwards, the respondent began to unilaterally deduct the excise duty component before making payments against the invoices and the respondent failed and neglected to reimburse the excise duty on the MTOP and on the proportionate FFC. On this count, a sum of Rs.1,24,10,103/- along with interest was payable to the petitioner till 30.11.2016 on the MTOP and a further sum of Rs.1,22,01,507/- along with interest till 30.11.2016 was payable on the proportionate FCC under Article 12.4 of the agreement.



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(viii) It was under those circumstances, the dispute was referred to the Arbitral Tribunal and the petitioner made the following final and interim claims against the respondent :

"(a) Declare that the claimant is bound to supply Argon gas upto and the respondent is bound to limit its drawal of Argon gas to 11,200 Nm³ per day; and that the respondent may draw an increased quantity of Argon gas upto 19,600 Nm³ per day, subject to a monthly cap of 3,34,133 Nm³ (such that the daily average consumption of Argon gas is maintained at 11,200 Nm³ per day);

(b) Issue a permanent injunction restraining the respondent, by itself and through its agents, servants, employees, officers and assigns from drawing Argon gas in excess of the limits set forth in prayer clause (a) above;

(c) Order and direct the respondent to pay to the claimant, a sum of Rs.2,41,04,593/- along with interest thereon at a rate of 15% per annum from the dates of the excess drawal which interest amounts to Rs.1,13,52,860/- till 30 November 2016, and further interest at 15% p.a. from 30 November 2016 till payment and/or realisation thereon, on account of excess drawal of Argon gas, as per the particulars of claim;

(d) Declare that the Respondent is bound to pay/reimburse the excise duty paid by the



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claimant under the agreement, including the excise duty on minimum take or pay price and on the proportionate fixed facility charges, including for months where the minimum stipulated quantity of gases is not drawn by the respondent;

(e) Issue a permanent injunction restraining the respondent by itself and through its agents, servants, employees, officers and assigns from deducting and/or withholding any part of the excise duty paid by the claimant under the agreement, on minimum take or pay price and/or on proportionate fixed facility charges, including for months where the minimum stipulated quantity of gases is not drawn by the respondent;

(f) Order and direct the respondent to pay the claimant :

i. A sum of Rs.1,24,10,103/- as reimbursement of excise duty on minimum take or pay price along with interest thereon at the rate of 15% per annum from the dates on which the said payment accrued which amounts to Rs.66,78,714 till 30 November 2016 and further interest at 15% p.a. from 30 November 2016, till payment and/or realisation, as per the particulars of claim;

ii. A sum of Rs.1,22,01,507/- as reimbursement of excise duty on proportionate fixed facility charges along with interest thereon at the rate of 15% per annum from the dates on



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which the said payment accrued which amounts to Rs.66,05,950/- till 30 November 2016 and further interest at 15% p.a. from 30 November 2016 till payment and/or realisation as per the particulars of claim.

(g) Order and direct the respondent to pay to the claimant a sum of Rs.3,45,68,362/- towards unpaid invoices for outstanding fixed facility charges and for supply of gases under the agreement along with interest thereon at the rate of 15% per annum from the due dates of payment which amounts to Rs.25,19,344/- till 30 November 2016 and further interest from 30 November 2016 at 15% p.a. till payment and/or realisation, as per the particulars of claim;

(h) Order and direct the respondent to pay to the claimant a sum of Rs.2,87,86,698/- towards interest on delayed payments at the rate of 15% per annum from the respective due dates till actual payment on account of the delayed payments under the agreement as per the particulars of claim;

(i) Order and direct the respondent to pay to the claimant a sum of Rs.62,00,000/- towards other costs and expenses (including legal cost), along with interest thereon at the rate of 15% per annum from 30 November 2016 till payment and/or realisation;



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(j) Pending the hearing and final disposal of the present proceedings, the Hon'ble Tribunal be pleased to issue a temporary injunction restraining the respondent by itself and through its agents, servants, employees, officers and assigns from drawing Argon gas in excess of the limits set forth in prayer clause (a) above;

(k) Pending the hearing and final disposal of the present proceedings, the Tribunal be pleased to issue a temporary injunction restraining the respondent by itself and through its agents, servants, employees, officers and assigns from deducting and/or withholding any part of the excise duty paid by the claimant under the agreement on minimum take or pay price and/or on proportionate fixed facility charges including for months where the minimum stipulated quantity of gases is not drawn by the respondent;

(l) Interim and ad-interim reliefs in terms of the prayer clauses above; and

(m) Costs of the present proceedings to the claimant."

(ix) Before the Arbitral Tribunal, the respondent filed a statement of defence wherein they took the following stand :

(a) The petitioner did not complete the commissioning and stabilization of the production facility before the scheduled date fixed under the agreement. Hence, pending this commissioning and



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stabilization, the respondent issued a tender dated 05.11.2009 for procurement of liquid oxygen, liquid nitrogen and liquid Argon for the steel melting shop (SMS) of Salem Steel Plant (SSP).

(b) A separate tender was floated in this regard for the purpose of undertaking a trial run of the SMS plant of the respondent. Accordingly, the respondent issued a purchase order dated 15.3.2010 to the petitioner for the supply of liquid oxygen, liquid nitrogen and liquid argon to the respondent. After successful commissioning of the production facility in January 2011, the petitioner commenced its supply of gases to the respondent. The supplies and the corresponding prices were made in accordance with the agreement.

(c) As per the agreement, approximately, 4 tonnes of Argon gas should be produced from the unit. To the extent of production of Argon gas at the unit fell short of the respondent's requirement, the petitioner should supplement the same by sourcing from outside. The agreement itself fixed the base price of gases supplied by the petitioner to the respondent and it also provided for variation in price of gases under Article 12.2.

(d) Article 12.4 stated that all the applicable statutory taxes and duties on the supplies made by the petitioner to the respondent should



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be reimbursed by the respondent on the production of documentary evidence for availing credit of the taxes/duties paid. A combined reading of recital 'C', Articles 7.1, 7.3, 7.5, 9.1 and 9.2 and also Annexure II gives a clear indication about the likely average requirement in a normal production regime and it indicates the average quantity that may be required by the respondent. The petitioner was expected to meet the entire demand of Argon gas even by sourcing the balance from outside.

(e) It was the specific stand of the respondent that the agreement never fixed any maximum quantity to be supplied by the petitioner and it always mandated the petitioner to supply the entire quantity of Argon gas to meet the fluctuating requirement of the respondent. Only to enable the petitioner to establish the production facility, the agreement indicated the likely average requirement for Argon gas. Since there was no question of excess consumption of Argon gas, there was no liability on the part of the respondent to pay the price demanded by the petitioner under the previous purchase order dated 15.3.2010. Only Article 12 of the agreement governed the price payable for the supply of Argon gas.

(f) In so far as the reimbursement of taxes and duties and denial



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of CENVAT credit were concerned, the petitioner was expected to provide the entire documents pertaining to it and the petitioner failed to support the claim by placing the relevant documents. That apart, the petitioner was taking divergent stance on the excisability of the MTOP and the FFC. For some period, the petitioner paid excise duty on the MTOP and the FFC under protest and for other periods, the petitioner paid duty and parallelly claimed refund of the duty on the ground that those charges were not includable in the transaction value. The disputes raised by the petitioner/claimant were barred by limitation for the claims for the period until November 2013.

(g) The respondent also made a counter claim for payment of a sum of Rs.7,51,17,240/- and for costs.

(x) The Arbitral Tribunal, based on the claim made by the petitioner and the defence taken by the respondent, passed the impugned award rejecting the claims made by the petitioner and the counter claim made by the respondent and further directed the petitioner to pay the entire costs incurred by the respondent to the tune of Rs.42,32,982/-. It also directed the petitioner to supply the gases strictly in accordance with the agreement. Aggrieved by that, the petitioner/claimant came before this Court challenging the award



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by filing the above petition.

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4. The learned counsel appearing for the petitioner submitted as follows :

(a) The impugned award suffers from patent illegality in arriving at a wrong conclusion on the quantity of Argon that the petitioner was obligated to supply in terms of the agreement and the price, at which, the petitioner was obligated to supply excess Argon by ignoring the vital evidence. The petitioner would be entitled to receive reimbursement of the excise duty irrespective of the respondent receiving the CENVAT credit. The Arbitral Tribunal went wrong in rejecting the claim of the petitioner on the ground that the petitioner did not provide the relevant evidence to substantiate their claims.

(b) The findings of the Arbitral Tribunal are opposed to the fundamental policy of Indian law since the Arbitral Tribunal failed to appreciate the specific intent of the parties while entering into the agreement without considering the pre-contract correspondences and also the specific Articles under the agreement.

(c) The Arbitral Tribunal did not consider post contract correspondences in this regard.



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(d) The Arbitral Tribunal must interpret the provisions of the contract and has virtually re-written the clear stipulations in the agreement.

(e) The Arbitral Tribunal was bent upon rejecting the entire claim made by the petitioner and that is the reason as to why apart from rejecting the claim on merits, the Arbitral Tribunal also rejected it on the ground of limitation.

5. Per contra, the learned Senior Counsel appearing on behalf of the respondent submitted as follows :

(a) There was no cap on the supply of Argon gas as was claimed by the petitioner. This was clear from the terms of the agreement. As a consequence, there was no question of paying any excess price to the petitioner for the alleged excess quantity supplied by the petitioner. The petitioner cannot rely upon the rates fixed in the earlier purchase order dated 15.3.2010, which was based on the earlier tender dated 05.11.2009 floated for the specific purpose of undertaking a trial run of the SMS plant of the respondent.

(b) The finding rendered by the Arbitral Tribunal on reading the terms of the agreement is a possible view on the interpretation of



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various clauses in the agreement and therefore, this Court cannot sit on appeal against such findings just because an alternative view is possible on the same terms of the contract.

(c) The petitioner failed to fulfil their primary obligation by providing necessary documents to the respondent for availing the credit towards statutory duties and taxes. That apart, the petitioner was adopting contradictory stances towards payment of excise duty, and it caused grave prejudice to the respondent.

(d) Further, as per the agreement, the petitioner was entitled to reimbursement only for the actual supplies made and not for certain imaginary claims, which were not supported by relevant documents.

(e) The monetary claims for the supply of gases and for reimbursement of statutory duty prior to 07.10.2013 were clearly barred by limitation and it could not be saved under Section 22 of the Limitation Act.

(f) The award passed by the Arbitral Tribunal did not suffer from any perversity or manifest illegality warranting the interference of this Court and the respondent ultimately sought for dismissal of this petition.

6. This Court has carefully considered the submissions of the



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learned counsel on either side and perused the materials available on record and more particularly the impugned award. Though obvious, it does not require reiteration that the aforesaid contentions must be tested within the parameters of Section 34 of the Act.

7. The entire case hinges upon the only issue as to whether the agreement between the parties fixes/imposes any cap on the supply of Argon by the petitioner to the respondent and if that is so, what would be the price payable to the petitioner for the excess Argon so supplied over and above the maximum quantity fixed under the agreement.

8. To decide the above issue, it will be relevant to take note of certain important clauses in the agreement, which are extracted as hereunder :

"(i) Recital "C" :

The seller has also committed with necessary tie up to organise and meet the total requirement of Argon gas of the buyer on regular basis for the entire period of contract.

"(ii) Article 1.3 :

'Gases' shall mean Oxygen, Nitrogen and Argon produced in the production facility installed



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by the seller in gaseous or liquid form, including additional supply of Argon to be organised by the seller by sourcing from outside.

(iii) Article 1.15 :

'Contracted Capacity' shall mean the capacity of the plant expressed in Nm³/day of Oxygen & HP-Nitrogen gases as mentioned under Article 7 considering continuous operation of the plant and supply of Argon upto 19,600 Nm³ per day as mentioned in Article 7 to be organised by the seller by sourcing the balance quantity from outside.

(iv) Article 1.24 :

'Gaseous Argon' shall mean Argon which is produced in a gaseous form or by vaporization of liquid Argon by seller and delivered without further conversion of state as specified in this agreement.

(v) Article 1.27 :

'Liquid Argon' shall mean Argon in liquid form.

(vi) Article 1.52 :

'Stipulated Demand' shall be the quantum of the gases (Oxygen, HP Nitrogen and Argon gases) required by the buyer at any given point of time for meeting the fluctuating requirement of the buyer.



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It shall be within the maximum contracted quantity of gases (Oxygen & HP Nitrogen) and Argon upto 19,600 Nm³ per day as per Annexure II of this contract agreement.

(vii) Article 7 - Supply :

7.1 The seller shall supply Oxygen, Nitrogen and Argon Gases of stipulated parameters and quantity and the buyer shall purchase the same throughout the contract period. Within the total annual quantity the periodic requirement (weekly/ fortnightly/monthly) shall be intimated by the buyer well before time. The seller indicated that approximately 4 TPD of Argon gas shall be produced from the Air Separation Unit (ASU) to be established on BOO basis at SAIL, Salem Steel Plant. To the extent production of Argon gas from the Air Separation Unit falls short of buyer's regular requirement, seller shall supplement the same sourcing from outside. The seller shall supply the entire quantity Argon as per Annexure-II. In the event of the buyer purchasing liquid Argon in any month, the seller shall supply liquid Argon as per the modality indicated in Annexure-X of this Contract Agreement.

Contracted Quantity of the Gases is indicated in Annexure II.

Contracted Peak Flow rate of the Gases is indicated at Annexure-III.



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7.2 For any planned repair and shut down of the Production Facility (scheduled outage), seller shall co-ordinate with buyer as to match their scheduled shut down with buyer's consuming facilities annual shut down in order to minimize the impact on buyer's operation and give written notice. The initial planning of maintenance shut down shall be co-ordinated with buyer at least six (6) months in advance. However, the final maintenance schedule shall be decided with buyer at least two (2) months before shut down.

7.3 Seller shall meet SAIL, Salem Steel Plant's full demand of Gases by operating and maintaining the production facility and also augmented by outside procurement during the period of strike or lockout within seller's premises.

7.4 PURITY & PRESSURE: Gases supplied pursuant to this contract agreement shall conform to the specifications with respect to purity and pressure at the delivery point as detailed in Annexure-II.

7.5 SAFETY STOCK FOR LIQUID PRODUCTS: For the purpose of this contract agreement, safety stocks of liquid products reserved for supply to SAIL, Salem Steel Plant by the seller shall be Oxygen, Nitrogen and Argon gases for a minimum of 72 hours of continuous agreed requirement rate as detailed in Annexure-IV. In the event of



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evaporation from the minimum stock level meant for meeting buyers requirement, seller shall get reasonable time after each shut down of the plant to refill the tank to the minimum specified safety stock level again. However seller shall not withdraw any liquid from storage tank for outside sale until minimum specified safety stock is achieved. However seller will continue to supply all the gases as per the requirement of buyer without affecting buyer's production.

(viii) Articles 9.1 and 9.2 :

9.0 Seller's Scope of Work and Related Obligations

9.1 The scope of work of the seller shall be to supply the required quantity of Gases of specified purities at required pressure range at the Battery Limit specified in Annexure-II & Annexure-III by setting up the Air Separation Unit (ASU) of suitable capacity supplemented by outside procurement of liquid Argon. The seller shall supply the entire quantity of Argon as per Annexure II. In the event of the buyer purchasing liquid Argon in any month, the seller shall supply liquid Argon as per the modality indicated in Annexure X of this contract agreement. Provision for storage of the gaseous Oxygen, LOX, LIN & LAR, vaporization system as described in Annexure-IV, operation and maintenance of production facilities and supply of



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Gases of specified purity at the required pressure on continuous basis is to be ensured. The required gaseous buffer storage vessels & pressure reducing stations are to be installed to take care of peak requirements.

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9.2 Design Basis

Seller shall set up a Production Facility to meet the demand of Gases specified in Article-7. The facilities to be provided by the Seller shall be so designed as to ensure continuous and reliable supply of Gases at all times at the specified parameter(s) of average consumption, purity and pressure specified in Annexure-II and the same shall be measured at the joint metering room. Production Facility shall be designed to operate in the range of 50-105% of the contracted capacity of the Oxygen & HP-Nitrogen Gases and to meet the buyer's stipulated demand of Argon without affecting the purity and be capable of meeting the fluctuating demand patterns as per Annexure-III. Also, from the Production Facility, there shall be minimum 8% liquid production of Oxygen & HP Nitrogen. Back up liquid storage shall also be provided as per Article-9.3 to meet the demand of Gases during peak requirement/outages/shut down of Production Facility due to unforeseen reasons as well as for planned maintenance.



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(ix) Article 12 :

12.0 PRICE FOR GASES SUPPLY

12.1 Base Price of Gases based on the Base cost of power shall be:

Oxygen @ Rs...4.61 /Nm³ (Rupees Four and paise sixty one only)

HP Nitrogen @ Rs...1.00/Nm³ (One Rupee only)

Argon @ Rs...5.00/Nm³ (Rupees Five only)

The Base Price of Argon includes transportation, loading, unloading upto battery limit.

Low pressure Nitrogen (LP Nitrogen) shall be supplied free of any charge. All applicable taxes and duties on free supply of Gases shall be reimbursed against documentary evidence as per Article Nos.12.4 and 12.5.

12.2 Price Variation

12.2.1 Variation in price of gases on account of power cost shall be applicable for O₂, N₂& Argon Gases.

12.2.2 The Base Price of Gases (Oxygen & HP-Nitrogen) (Article 12.1) is based on power cost of Rupees Four and Paise eighty six (Rs 4.86/-) per KWH (Base cost of power). For any increase/decrease in the Base cost of power, there will be revision of the Price of Gases based on the Actual Cost of Power (prevalent power tariff) as per the



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following formula:

Price variation formula applicable to Gases shall be linked with Power Tariff as below:

(i) Price Variation for Oxygen and HP Nitrogen:

Price Variation for Oxygen and HP Nitrogen:

$$\begin{aligned} \text{Revised price of Oxygen/} \\ \text{HP Nitrogen} &= \frac{\text{Price of O}_2/\text{N}_2 \text{ (base price) on} \\ &\quad \text{base date} \times \text{Revised power} \\ &\quad \text{cost}}{\text{Power cost on base date}} \end{aligned}$$

(ii) Price Variation for Argon:

Price Variation Formula applicable to Argon Gas shall be linked with the Power Tariff of the State from where the liquid Argon is sourced.

$$\begin{aligned} \text{Revised price} \\ \text{of Argon} &= \frac{\text{Price of Argon (base price)} \\ &\quad \text{on base date} \times \text{Revised power} \\ &\quad \text{cost of State}}{\text{Power cost of State on base} \\ &\quad \text{date}} \end{aligned}$$

Note:

For computation of escalation of corresponding cost of Argon Gas on the date of supply, power cost on base date shall be the prevailing power tariff of Karnataka State and any revision of Power Cost shall be applicable only when there is a change in the power tariff of Karnataka State

Power tariff of Source of Argon and
Karnataka state on the base date



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Power cost of Argon on the base date	State	Power cost of the source from where Argon is supplied (Rs. per unit)	Power cost of the State from where Argon is supplied (Rs. per unit)
	Karnataka	Rs.2.55 (Rupees two and paise fifty only)	Rs.4.80 (Rupees four and paise eighty only) *

** Model Calculation shown in Annexure VII*

12.3 No other price escalation parameters would be applicable for Oxygen, He Nitrogen and Argon gases.

12.4 All applicable statutory taxes and duties on supplies made by the seller to the buyer shall be reimbursed by the buyer on the production of documentary evidence. Seller shall provide necessary document to buyer for availing the CENVAT and other credit. In case of waiver/ concession of statutory taxes and duties admissible under Law/Act, for which, seller will make sincere efforts, the benefit of the same shall be passed on to the buyer.

12.5 If at any time during the tenure of this Contract any tax, excise, duty, cess, impost or levy is newly imposed on seller by any Governmental authority chargeable on Monthly Facility Charge or supply of Gases to buyer hereunder, then buyer shall reimburse seller against documentary evidence.

(x) Article 16.7 - Security Deposit :



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Seller shall deposit within 15 days from the effective date of contract in Buyer's format a Security Deposit of Rs.2,11,04,760/- (Two crore eleven lakhs four thousand seven hundred and sixty only) an amount equivalent to :

(a) 5% of the total value of contracted quantity of gases including taxes any duties for twelve (12) months and

(b) fixed facilities charges including taxes and duties, if any, for 12 (Twelve) months, in the form of Bank Guarantee.

The Bank Guarantee shall be from the State Bank of India or any other Nationalized/Scheduled Bank other than co-operative and Gramin bank valid till, initially for a period of twenty-four (24) months and shall have to be renewed thereafter till the end of contract period. Subsequent renewals of the Bank Guarantee shall be based on the revised values of the gas supplies at prevailing then.

The Security Deposit shall be for the due and faithful performance of the contract by Seller.

It will be the obligation of Seller to have the Bank Guarantee extended at least one month before the expiry of the validity period of the existing Bank Guarantee and to forthwith intimate in writing to the Buyer of such extension along-with the confirmation from Bank of such extension or else the Buyer shall have the right to en-cash



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the Bank Guarantee and retain this amount against Security Deposit without any interest.

(xi) Article 28.4 : Entire Contract Agreement:

This contract agreement including all annexures thereto, represents the entire understanding between the parties with respect to the subject matter hereof and supersedes any and all previous oral or written agreements or understanding between the parties or the promoters in respect of the project.

(xii) Annexure II :

Contracted Quantity of Gases

(At the Battery Limit of Production Facility)

Sl. No.	Product	Parameters	Unit	Value
1	Gaseous Oxygen	Purity	% O ₂ (balance Argon)	99.6 to 99.8
		Pressure	Kg/Cm ² (g)	24
		Average consumption	Nm ³ /day	75600
2	High Pressure Gaseous Nitrogen	Purity	Ppm	2 Ppm O ₂ Maximum
		Pressure	Kg/Cm ² (g)	22
		Average Consumption	Nm ³ /day	28800
3	Gaseous Argon	Purity	Ppm	<2ppm O ₂ <2ppm N ₂ & maximum total impurities 5 ppm
		Pressure	Kg/Cm ² (g)	22
		Average Consumption	Nm ³ /day	11200

Note :



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- (1) Average consumption for Oxygen and Nitrogen denotes the requirement considering maximum of the average consumption while making different grades of stainless steel and will be the basis of plant capacity of Oxygen and Nitrogen.
- (2) Average consumption for Argon denotes the likely average requirement considering a normal production regime. However, buyer may draw the indicated peak flow rate (as per Annexure III) with increased average daily requirement occasionally upto 19,600 Nm³ per day (35 TPD) in the same unit price through the same liquid storage pumping and vaporiser system, in case buyer decides to make a particular grade of stainless steel throughout the day in future. The seller shall ensure the increased requirement of Argon as required by the buyer.

(xiii) Annexure III :

Peak Flow Rate of Gases

S.No	Product	Unit	Value	Remarks
1	Gaseous Oxygen	Purity (%)	%O ₂ (balance Argon) 99.6 to 99.8	Interval of the peak flow rate will be at every 80 minutes. Buffer vessel, PRV and pipe work to be designed to cater to the peak flow rate
		Peak flow rate in NM ³ /hr	12500	
		Pr. In Kg/Cm ² (g)	24	
		Duration in minutes	17	
2	High Pressure	Purity (%)	2 ppm O ₂ maximum	Interval of the peak flow rate will be at



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3	Gaseous Oxygen	Peak flow rate in NM ³ /hr	6000	every 80 minutes. Buffer vessel, PRV and pipe work to be designed to cater to the peak flow rate
		Pr. In Kg/ Cm ² (g)	22	
		Duration in minutes	15	
		Purity	<2 ppm O ₂ <2 ppm N ₂ and maximum total impurities 5 ppm	
3	Argon	Peak flow rate in NM ³ /Hr	4000	Interval of the peak flow rate will be at every 80 minutes. Vaporiser & pipework/ PRV to be designed to cater to this peak flow rate
		Pr. In Kg/Cm ² (g)	22	
		Duration in minutes	12	

Non-Peak Flow Rate of Gases

S. No	Product	Unit (Non Peak Flow Rate)	Value	Remarks
			Minimum	
1	Oxygen	NM ³ /hr	300	Pressure & Purity remain same as peak requirement
2	HP-Nitrogen	NM ³ /hr	300	--do--
3	Argon	NM ³ /hr	50	--do--

Note : These figures are only for indicative purposes and for PRV selection and will vary depending upon the operation of down stream plant units.

(xiv) Annexure IV :

Safety Stock of Liquid Products

S. No	Product	Purity (%)	Minimum back-up storage Capacity reserved for SAIL-SSP
1	Liquid Oxygen	99.6 to 99.8 % O ₂ (balance Argon)	360 MT
2	Liquid Nitrogen	2ppm O ₂ maximum	100 MT
3	Liquid Argon	<2ppm O ₂ <2ppm N ₂ and maximum total impurities 5 ppm	100 MT



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Note : Argon will be supplied to buyer from the above liquid Argon tanks in all operating conditions

Pumping and Vaporisation Capacity

S.No	Product	Adequate pumping and vaporisation capacity to be provided by the seller to meet the gaseous requirement of the buyer as per Annexure II and Annexure III of this contract agreement
1	Oxygen	
2	Nitrogen (HP)	
3	Argon	

and

(xv) Annexure X :

"Modality for supply of Liquid Argon to other SAIL Units:

In the event of the BUYER purchasing liquid Argon in any particular month for supplying to other SAIL units, the Seller shall supply liquid Argon during that month as per the modality indicated below:

1. The Seller shall meet SSP's requirement of 11,200 Nm³/day of Argon gas. In case SSP's requirement of Argon gas is less than 11,200 NM³/day, SSP shall have the option of taking Liquid Argon from Seller's Storage Tanks to supply only to other SAIL owned units via SAIL/SSP's transportation vehicles. The measurement of the quantities of Liquid Argon taken out by SSP for onward supply to other SAIL owned units, shall be made on weighment basis. The procedure for the same and the mechanism for billing such quantities shall be discussed and mutually agreed.



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2. *The maximum quantity of Liquid Argon that SSP will be allowed to take out for other SAIL owned units in a day shall be 11,200 Nm³ less the amount of Gaseous Argon consumed by SSP during the previous day. If this Liquid Argon is not lifted by SSP, the same shall be carried over to the subsequent day, till such time Seller's Liquid Argon Storage tank is full. Once the Liquid Argon Storage tank is full, no additional Liquid Argon shall be carried over to the subsequent day. Such accumulated quantity of Liquid Argon on daily basis will be adjusted against any higher consumption of Argon gas beyond 11,200 Nm³/day on any subsequent day during the month.*

3. *The peak flow rate of 4000 Nm³/hr of gaseous Argon is a process requirement in Steel Melting Shop in each heat cycle for a short duration of 10 to 12 minutes and the Seller shall meet this requirement, for which a minimum stock level of 50 Tons shall be maintained in the Liquid Argon Storage Tank and the Buyer shall not consume any liquid if the level falls below 50T.*

4. *Whenever, the increased daily requirement of Argon gas goes above 11,200 Nm³ and upto 19,600 Nm³, the seller shall meet such increased Argon gas requirement of SSP. However, on these days, no quantity of Liquid Argon shall*



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accrue to SSP's account. The quantity of Liquid Argon accumulated by means of carry over, shall be adjusted against higher consumption.

5. The Seller shall not be obliged to supply Liquid Argon on any particular day when SSP's requirement of Oxygen and Nitrogen Gases is "Zero" on that day.

6. The frequency of supplying accumulated liquid Argon to other SAIL owned units as highlighted at para 2 above will be decided suitably by SSP.

The Seller's obligation to supply Argon to SSP shall be limited to 11,200 Nm³ per day X 358 Days/12 Months, which equals 334,133 Nm³ per month or 596 Tons per month."

9. The nub of this case rests on the proper interpretation of the terms of the contract. The question is whether the interpretation taken by the Arbitral Tribunal is one, which exemplifies perversity ie., a conclusion that cannot or could not be reached if the contract is construed by a reasonable person acquainted with the facts of the case.

10. The principles governing contractual interpretation,



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particularly in the arena of commercial contracts, are well settled. Ordinarily the Courts will go by the plain language of the words used in the contract. The whole exercise is to ascertain what exactly did the parties agree upon. In other words, "**on what terms did the parties arrive at a consensus ad idem**"?

11. In undertaking this exercise, certain principles have been deduced by the Supreme Court in **Nabha Power Ltd. Vs. Punjab SPCL [reported 2018 (11) SCC 508]** wherein Justice S.K.Kaul, who spoke for the Court, has ventured to observe as under:

"Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test" [Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery



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(Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of



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the contract.”

12. In the above judgment authored by **Justice S.K.Kaul**, paragraph 49 succinctly captures the essence of construction/ interpretation of a commercial contract and it has been held that the explicit terms of the contract are always a final word with regard to the intention of the parties and that they should be interpreted in such a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract. At the end of the said judgment, the Hon'ble Apex Court also extended a word of caution that the Commercial Courts should be very careful to assume the implied terms unless a particular contract necessitates such implied terms to be read into the contract by applying the PENTA test namely **(1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract.**



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13. To complete the narrative, it is necessary to take note of certain developments in English law.

14. In ***Antaios Compania Naviera SA Vs. Salen Rederierna AB [reported in 1985 AC 191]***, Lord Diplock had famously declared that "***if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense.***" It appears that for quite some time, nobody took Lord Diplock seriously and the Courts went about interpreting the terms in line with the past i.e., by focussing only on the words.

15. The decision of the House of Lords in ***Investors Compensation Scheme Ltd Vs. West Bromwich Building Society [reported in 1998 1 WLR 896]***, which has been adverted to by the Supreme Court in ***Nabha Power***, saw Lord Hoffman reformulating the old principles. His second principle allowed consideration of the whole relevant factual background available to the parties at the time of the contract, which some perceived as signalling a break with the past.



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16. Then in ***Rainy Sky SA Vs. Kookmin Bank [reported in 2011 UKSC 50]***, the UK Supreme Court went further to say:

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

17. In the next decision in ***Wood Vs. Capita Insurance Services [reported in 2017 UKSC 24]***, the UK Supreme Court reaffirmed the above approach and held as follows:

"To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter



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whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties,



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failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.”

18. Judges and commercial lawyers in the United Kingdom appear to be divided on the issue with some preferring a more conservative approach (See Jonathan Sumption, a Question of Taste : The Supreme Court and the Interpretation of Contract, 2017)

19. Unlike the United Kingdom, in India, the Courts have always leaned on examining relevant material that would assist the Court in interpreting the terms of the contract. By interpretation, I mean aiding and not supplanting or overriding the express words.

20. In the decision of the Hon'ble Apex Court in ***Union of India***



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Vs. D.N. Revri & Co. [reported in (1976) 4 SCC 147], P.N.

Bhagwati,J (as he then was), speaking for the Bench of two Judges, said in para 7 as under: (SCC p. 151)

"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. ..."

21. In the process of arriving at the true meaning, the Court is entitled to take into consideration the surrounding circumstances as well as the correspondences, which are relevant as pointed out by the Hon'ble Supreme Court in **D.D.Sharma Vs. Union of India [reported in 2004 (5) SCC 325]** wherein paragraph 24 reads thus:



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"24. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

22. The Hon'ble Apex Court in the case of **McDermott International Inc. Vs. Burn Standard Co. Ltd. [reported in 2006 (11) SCC 181]** has reiterated the same principle as under:

"122. "It is trite that the terms of the Contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of consideration of a contract.... It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a Contract."

23. In the decision in **Board of Trustees of Chennai Port Trust Vs. Chennai Container Terminal (P) Ltd., [reported in 2014 (2) MLJ 132]**, a learned Single Judge of this Court considered the question in extenso and held as under:

"In Bank of India v. K.Mohandass, (2009) 5 SCC 313, the Supreme Court again held that the true construction of a contract must depend upon



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the import of the words used and not upon what the parties choose to say afterwards or before. The Court made it clear that subsequent conduct of the parties in the performance of the contract would not affect the true effect or the clear and unambiguous words used in the contract. But, nevertheless, the Court made it clear in Paragraph 28 of the opinion that the intention of the parties must be ascertained from the language they had used, considered in the light of the surrounding circumstances and the object of the contract. Interestingly, the last observation in Paragraph 28 is of great significance and it reads thus:

"The nature and purpose of the Contract is an important guide in ascertaining the intention of the parties."

Therefore, it appears that the opinion of the Court on this aspect, developed stage by stage. From the original position of strict adherence to the language employed in the contract, the Courts moved on to the stage of considering the surrounding circumstances. From that stage, the Courts appeared to have moved towards looking into the correspondence between the parties that took place before the contract. Ultimately, in Bank of India, the Court has moved over to the question of "the object of the contract".

Therefore, it is clear that there is no



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absolute embargo for looking into the pre-contract correspondence, for finding out the matters on which the parties were ad idem. As a matter of fact, the minority Arbitrator relied upon the Sixth Proviso to Section 92 of the Evidence Act and I think that is the correct exposition of law, with regard to the pre-contract correspondence, as seen from the decisions listed above.”

24. Keeping in mind all the above clauses of the agreement and the principles of law noticed above, this Court will now venture into examining whether the interpretation arrived at by the Arbitral Tribunal suffers from any perversity.

25. On a scrutiny of the award, it is evident that the Arbitral Tribunal came to a conclusion that the petitioner has to satisfy the entire requirement of Argon gas, as demanded by the respondent from time to time, on regular basis during the entire contract period. It must be pointed out that under the terms of the contract, the maximum targeted quantity of gases has been fixed only for Oxygen and Nitrogen. In so far as Argon is concerned, for supplies upto 19,600 Nm³ per day, it has to be organized by the petitioner from the plant



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established and in case of any excess requirement, it has to be sourced from outside. Only for the supply of Oxygen and Nitrogen, the term '**maximum targeted quantity**' is used. But, for the supply of Argon, the term used is '**upto 19,600 Nm³ per day**'. There was no cap fixed for withdrawal of Argon gas.

26. Under Article 7.3 of the agreement, it is the obligation of the petitioner to meet the full demand of the gases for the SSP and no upper limit or maximum limit has been mentioned. Even in so far as safety stock for liquid products mentioned in Article 7.5 is concerned, the petitioner is expected to keep a daily requirement of 18,667 Nm³ per day and the minimum back up storage capacity is the absolute minimum that is expected to be stored by the petitioner. Therefore, if the cap is fixed as 11,200 Nm³, it will violate the terms of Article 7.5 of the agreement. In fine, the view taken by the Tribunal is that the petitioner is obligated to supply 11,200 Nm³ per day, which would occasionally go up to 19,600 Nm³ per day and if the required quantity exceeds the said limit, the petitioner is obliged to outsource and supply the demand made by the respondent.

27. In so far as Annexure X that was relied upon by the



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petitioner is concerned, it was found that the said Annexure only dealt with liquid Argon and that it had nothing to do with Argon gas.

28. This Court is aware of the proposition of law that a mere possibility of an alternative view on the facts or interpretation, does not call for a reversal of the findings rendered in the award. Useful reference can be made to the judgments of the Hon'ble Apex Court in ***Konkan Railway Corporation Ltd. Vs. Chenab Bridge Project Undertaking [reported in 2023 (11) SCR 215]*** and ***Dyna Technologies Pvt. Ltd. Vs. Crompton Greaves Ltd. [reported in 2019 (20) SCC 1]***.

29. Keeping the above settled principles of law in mind, this Court must now examine as to whether the decision arrived at by the Arbitral Tribunal is a possible view based on the terms of the agreement or whether such a view taken by the Arbitral Tribunal amounts to re-writing the terms of the contract or whether the conclusions arrived at are divorced from commercial and technical reality.

30. The petitioner, under the agreement dated 27.12.2008, was



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required to supply the contracted capacity of Oxygen, Nitrogen and Argon to the respondent on a build, own and operate (BOO) basis from the cryogenic Air Separation Unit (ASU) at the SSP. In terms of the agreement, while the contracted capacity of supply of Argon was 11,200 Nm³ per day, the respondent was allowed to draw up to 19,600 Nm³ per day occasionally. A monthly cap has also been fixed at 3,34,133 Nm³.

31. It is pertinent to take note of the fact that in the case of Oxygen and Nitrogen, the MTOP has been fixed under Article 15.3 and hence, a minimum amount must be paid by the respondent regardless of the quantum of gases drawn.

32. It is also relevant to take note of the fact that the respondent is required to pay FFC under the agreement at Rs.1,58,00,000/- per month. Ex.R.40 is the data sheet showing the yearly consumption of Argon gas from April 2011 till March 2016, which was prepared and produced on record by the respondent. On going through the same, it is seen that a quantity of 11,200 Nm³ per day is the entitlement of the respondent, which occasionally would go



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up to 19,600 Nm³ per day and which is capped at 3,34,133 Nm³ per month. The view taken by the Arbitral Tribunal is that the petitioner must supply Argon whenever called upon to do so by the respondent. If that is so, then the aforesaid figures would have no relevance whatsoever.

33. If the respondent has contractual right to make a demand of Argon up to infinity, then the fixation of a cap of 3,344,133Nm³ would have no relevance at all. The figures of 11,200 Nm³ and 19,600 Nm³ fixed for Argon can be gathered from various contractual provisions namely Article 1.15, Annexure II, Article 1.52, Article 12.2.2, Article 16.7 and Annexure X. Surely, the parties who were assumed acting with commercial sense, could not have intended those figures to be of no consequence as has been done by the Tribunal.

34. In so far as Annexure X is concerned, the Arbitral Tribunal rendered a finding that it only deals with liquid Argon and it had nothing to do with Argon gas. On carefully reading Annexure X, it is seen that the heading alone stated that it pertained to supply of liquid Argon. However, while reading the body of Annexure X, it is seen that



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it is not limited to sale of liquid Argon. It also includes multiple independent provisions. Points Nos.1 and 2 are concerned with entitlement and the petitioner's obligation to meet the plant's requirements and they will be applicable only when the respondent does not consume 11,200 Nm³ per day. Point No.3 deals with peak flow rate of gaseous Argon and point No.4 states that there was no entitlement to liquid Argon when the daily gas needs exceed the quantity of 11,200 Nm³. Point No.7 also states the obligation of the petitioner to supply Argon, which includes gas and liquid with monthly limit of 3,34,133 Nm³. Thus, Annexure X contains various points that have nothing to do with modality of supply to the other SAIL Units. The Tribunal appears to have completely misdirected itself by looking at the heading of the Annexure instead of perusing what lay beneath it.

35. The learned Senior Counsel appearing on behalf of the respondent, by relying upon Article 28.4 of the agreement, submitted that all previous oral and written agreements/understanding would stand terminated since the agreement dated 27.12.2008 supersedes the same. This Court has already noticed the decisions in **Mcdermott** and **Chennai Container Terminal**, which lay down the principle that



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surrounding circumstances including the pre-contractual correspondences can be looked at.

36. Pre-contractual correspondences exchanged between the parties throw light on the intention of parties which is after all the true object of contractual interpretation. The only caveat is that such material cannot be pressed into aid to countermand the express terms of the agreement.

37. The deposition of R.W.1 and more particularly the answers given to question Nos.13 to 15 would show that the contracted quantity of Argon was 11,200 Nm³. The consensus *ad idem* between the parties was to fix a cap for the supply of Argon gas as 11,200 Nm³ with an occasional increase subject to a monthly cap of 3,34,000 Nm³. It is also relevant to take note of the minutes of the meeting dated 15.4.2008 and the e-mail of the respondent dated 12.8.2008, which confirm the entire quantity as 11,200 Nm³ per day for the bid evaluation. These were meetings and correspondences that took place in the pre-bid negotiations. The Preliminary Information Memorandum dated 04.7.2019 also gives an indication that the daily contracted



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quantity is 11,200 Nm³.

38. The tender document and the evaluation criteria would show that a cap existed from the very beginning for Oxygen at 75,700 Nm³ per day; for Nitrogen at 28,800 Nm³ per day; and for Argon at 11,200 Nm³ per day.

39. The Arbitral Tribunal has completely disregarded all the aforesaid material, including the vital evidence of RW-1 and failed to appreciate the inescapable conclusion that the respondent would be entitled to only 11,200 Nm³ Argon per day. As a logical consequence, the respondent would be entitled to 3,34,133 Nm³ Argon per month. This is considering the ASU operations for 358 days in a year = 11,200 Nm³ X 358 days/12 months. The contractual provisions and the pre-contract and the post contract correspondences along with the evidence of R.W.1 would clearly indicate the daily limit of supply of Argon by the petitioner to the respondent as 11,200 Nm³, which may be increased to 19,600 Nm³ subject to a monthly limit of 3,34,133 Nm³.



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40. In the considered opinion of this Court, from the material on record, this is the only possible conclusion which can be arrived at. On the contrary, in the given aforesaid material, all of which have been cast aside, the conclusions arrived at by the Tribunal do not even measure up to a possible view let alone a plausible view.

41. That apart, the Arbitral Tribunal appears to have wandered into areas that were far away from its remit. The Arbitral Tribunal commented upon the petitioner's profitability from the contract on a completely speculative financial analysis based on absolutely no legal evidence and purely on the basis of surmises and conjectures. The Arbitral Tribunal adopted the bare assertions that were made by the respondent of a net profit of Rs.11.80 Crores and future FCC revenue of Rs.284 Crores when there was no evidence to back up these findings.

42. It is now well settled that a finding based on no evidence would be illegal and without jurisdiction (See ***State of Rajasthan v. Ferro Concrete Construction (P) Ltd. [reported in 2009 (12) SCC 1]***). That apart, this Court is at loss to understand why the



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Tribunal had ventured into these issues when the petitioner's overall profitability was not even an issue that was agitated to be considered.

43. For some reason, the issue of profitability had troubled the mind of the Arbitral Tribunal while deciding the issue. Such conclusions are irrational and wholly perverse. The Tribunal appears to have forgotten that it was adjudicating a commercial contract. A citizen is entitled to do business with the State. With business comes profit. The Tribunal appears to have been greatly troubled by the fact that the petitioner was making profits by contracting with the State, forgetting the fact that there was no material before it to support such presumptuous observations. Such conclusions are wholly perverse and resemble the clueless charge of Don Quixote, who sought to find the windmills.

44. Therefore, the finding rendered by the Arbitral Tribunal to the effect that no cap was fixed for the supply of Argon suffers from a clear case of perversity since it ignores both the vital evidence as well as the terms of the contract. The conclusion reached is one, which no person, who is reasonably acquainted with the terms of the contract,



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could reach on a proper appraisal of the materials. Hence, the same is patently illegal within the meaning of Section 34-2A of the Act.

45. The next issue pertains to the excise duty/CENVAT credit. On a careful reading of the terms of the agreement, it is seen that the petitioner's entitlement to receive reimbursement of excise duty was not conditional on the respondent receiving the CENVAT credit. In the e-mail dated 23.11.2011 issued by the respondent to the petitioner, it has been stated that if the petitioner obtains a written clarification from the Central Board of Excise and Customs (CBEC) or the Commissioner of Central Excise, Salem to the effect that the SSP is eligible for CENVAT credit for the quantity of the MTOP, the respondent would be in a position to reconsider the issue further. Such a clarification was issued by the CBEC dated 10.11.2014 regarding the applicability of excise duty on the MTOP and the FFC. This uncontroverted documentary evidence was not considered by the Arbitral Tribunal.

46. The respondent raised a defence that the claim of excise duty made by the petitioner was not sustainable since the petitioner



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was simultaneously pursuing their claim for refund of excise duty before the Revenue Authorities while agitating their claim for reimbursement of the very same amount before this Court.

47. Article 12.4 makes the reimbursement conditional only on the production of documentary evidence. However, there is no mention about the CENVAT credit. Therefore, the attempt of the Arbitral Tribunal to read an implied condition of CENVAT credit causes violence to the plain language used under Article 12.4. The Arbitral Tribunal added the word '**actual**' before the word '**supplies**' whereas once the CBEC had provided the clarification through the circular dated 10.11.2014, the inference that the liability of the respondent to reimburse taxes and duties is confined to actual supplies made is clearly an egregious error. It ignores the express terms of the CBEC's circular that the charges of the FFC and the MTOP are directly linked with manufacture and supply of gases and that the components of payments are to be included in the transaction value of the gases manufactured and supplied.



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48. The petitioner approached this Court on the issue pertaining to entitlement of the respondent as to the CENVAT credit. However, the issue before the Arbitral Tribunal was as to whether the petitioner would be entitled for reimbursement of the amount of excise duty under Clause 12.4 of the agreement. The Arbitral Tribunal mixed up both the issues and as a result, had come to an erroneous conclusion.

49. The Arbitral Tribunal also did not consider the fact that the respondent had also taken a contradictory stand before the Customs and Excise and Service Tax Appellate Tribunal (CESTAT), Chennai. In the appeal filed before the CESTAT, the respondent admitted that the excise duty on the MTOP and the proportionate FCC was an additional consideration for the quantity supplied and not for the quantity vented in the air. The petitioner provided a detailed quantification for each of the claims under this head.

50. In the considered view of this Court, the decision of the Arbitral Tribunal to link reimbursement of the CENVAT credit availability with the reimbursement of the amount of excise duty under Article 12.4 of the agreement goes against the express terms of the



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contract. Article 12.4 only insists for production of documentary evidence and it does not mention about the CENVAT credit. Therefore, the finding of the Arbitral Tribunal is perverse to the extent that the excise duty is payable not only on the actual supply of gases, but also on the entire FFC and the MTOP irrespective of the quantity of gas that was drawn. This was subsequently clarified by the CBEC.

51. Consequently, the stand of the respondent in unilaterally deducting the excise duty component from April 2011 onwards before making payments against the invoices, violates the terms of the agreement. In view of the same, the finding of the Arbitral Tribunal also suffers from patent illegality and perversity warranting the interference of this Court under Section 34 of the Act.

52. The last issue pertains to limitation. It is not known as to why the Arbitral Tribunal considered the issue of limitation as a last issue after having dealt with the claims on merits. If, according to the Arbitral Tribunal, the claim is barred by limitation, it should have been considered as a preliminary issue. In any case, since the Arbitral Tribunal dealt with the issue of limitation, this Court must go through



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the grind of considering as to whether the finding of the Arbitral Tribunal is sustainable.

53. The Arbitral Tribunal rendered a finding that the monetary claims regarding price of gases sold prior to 07.10.2013 and also the claim regarding reimbursement of statutory taxes and duties would be barred by limitation.

54. In turn, the respondent has taken the following stand:

The petitioner did not raise any invoices for the alleged excess consumption of Argon until November 2013. That will not save the period of limitation under Section 22 of the Act since, at the best, it can only be construed as a continuance of the effects of a wrong and not as a continuing wrong. The petitioner ought to have invoked the arbitration clause within three years reckoned from the date of accrual of the cause of action and the petitioner cannot be allowed to revive dead claims by asserting continuous breach.

55. The monetary claims for excess Argon supplied and interest thereon commenced from 04.3.2015 when the respondent



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communicated their disagreement in relation to the issues concerning excess supply of Argon and payment obligations towards supply of Argon. The recurring overdrawal of Argon started from April 2011 and it went upto November 2016. In the same manner, the deduction of the excise duty started from October 2011 onwards. The dispute crystallized only on 04.3.2015 when the respondent refused to make payment. Therefore, till then, the breach on the part of the respondent continued and it reached a fruition only on 04.3.2015. The petitioner had invoked the arbitration clause on 07.10.2016 and the claim statement was filed on 17.1.2017. This clearly falls within the limitation period of three years.

56. The finding of the Arbitral Tribunal to the contrary is in clear violation of the substantive law of India on the issue of limitation under the Limitation Act, 1963. Hence, the said finding also stands vitiated due to fundamental contravention of the substantive law and patent illegality. The upshot of the above discussions leads to the only conclusion that the award passed by the Arbitral Tribunal is liable to be interfered by this Court in exercise of its jurisdiction under Section 34 of the Act, on all counts.



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57. In view of the decision in **McDermott International Inc.,** this Court must necessarily annul the award leaving it open to the parties to resort to arbitration afresh if so advised.

58. Accordingly, the above original petition is allowed and the award dated 07.11.2019 is set aside. As this is matter in the Commercial Division, the petitioner would be entitled to costs, which is assessed at **Rs.5,00,000/- (Rupees five lakhs only)**. Consequently, the connected applications are closed.

04.11.2025

Index : Yes
Neutral Citation : Yes

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04.11.2025