In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division

The Hon'ble Justice Sabyasachi Bhattacharyya

EC/80/2023
[GA/2/2023]
GREAT EASTERN ENERGY CORPORATION LTD
VS
SRMB SRIJAN LTD

AP-COM/281/2024
[Old No: AP/833/2022]
IA NO: GA/2/2023
SRMB SRIJAN LIMITED
VS
GREAT EASTERN ENERGY CORPORATION LIMITED

For the Petitioner	:	Mr. Aspi Chinoy, Sr. Adv., Mr. Sakya Sen, Adv., Mr. A. Das, Adv., Mr. P. Roy, Adv., Mr. Akash Yadav, Adv.
For the respondent	:	Mr. Ratnanko Banerji, Sr. Adv., Mr. Sarvapriya Mukherjee, Adv., Mr. K. Kejiriwal, Adv., Mr. V.V.V. Sastry, Adv., Mr. D. Basu, Adv., Mr. D. Saha, Adv.
Hearing concluded on	:	27.08.2024
Judgment on	:	05.09.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") arises out of an arbitral award passed in favour of the claimant/respondent in an arbitral proceeding before a three-member Arbitral Tribunal.

The genesis of the dispute is a gas purchase and sale agreement executed on May 11, 2011 between the petitioner SRMB Srijan Limited (for short, "SRMB") and the claimant. By the said agreement, the claimant was to supply Coalbed Methane Gas to SRMB till April 30, 2034. As per the said agreement, SRMB had to consume gas as specified in the Minimum Guaranteed Offtake (MGO), else to compensate the shortfall by paying for the entire amount of MGO. Bank Guarantees were also furnished by SRMB to secure the MGO.

2. During subsistence of the contract, SRMB wrote to the claimant seeking waiver of the MGO Clause. There was correspondence between the parties. According to SRMB, consensus was reached between the parties for the MGO to be waived, subject to increase in the purchase price of gas to the tune of Rs. 5/- per SCM. The claimant/respondent disputes the same, arguing that there was no concluded contract to that effect.

3. Subsequently, proceeding on the premise that MGO had been waived, SRMB stopped renewing the bank guarantee which was, according to the agreement, subject to continued renewal by SRMB. Consequentially, the claimant suspended gas supply upon giving notice to SRMB due to such non-renewal of bank guarantee.

4. On July 7, 2014, alleging stoppage of gas supply, the agreement between the parties was terminated in writing by SRMB.

5. The claimant/respondent invoked the arbitration clause in the agreement. Ultimately, upon hearing both sides, the Tribunal passed

an award declaring that the termination by SRMB was bad and that the agreement between the parties was subsisting. The claim of specific performance was denied; however, permitting the claimant to remove its underground gas pipelines from the premises of SRMB upon seven days' clear notice. The petitioner/SRMB was also directed to pay to the claimant a sum of Rs. 58,50,45,169/- together with interest at the rate of 7 per cent per annum from February 2015 till the date of the award within a period of twelve weeks from the said date. In default, SRMB was to pay an additional interest of 9 per cent per annum on the total amount of principal plus interest from the date of default till the date of actual payment. Costs were not granted. The counter claims of SRMB were also refused.

6. Being aggrieved with the same, the present application has been filed by the petitioner, who was the respondent in the arbitral proceeding.

7. Learned senior counsel appearing for the petitioner assails the finding of the Tribunal that the exchange of correspondence between the parties between April 22, 2014 and May 29, 2014 did not culminate in an agreement to waive the MGO Clause on SRMB agreeing to pay the enhanced price of Rs. 5/- per SCM of gas.

8. It is argued that the said findings and the conclusion based thereon are *ex facie* perverse and tainted by patent illegality. Furthermore, being beyond the pleadings of the parties, such conclusion is without jurisdiction. Also, the said findings disclose an error of law apparent

on the face of the award, thus vitiated on the ground of patent illegality.

9. Learned senior counsel appearing for the petitioner takes the court painstakingly through the correspondence between the parties. According to counsel, the letter dated April 24, 2014 comprised of the offer by the respondent to consider the petitioner's request of waiver of the MGO Clause upon increase of the price by Rs. 5/- per SCM and SRMB's letter dated May 29, 2014, constituted the acceptance thereof, thus giving rise to a concluded contract between the parties for waiver of the MGO Clause on increase of the price by Rs. 5/- per SCM.

10. In support of such contention, learned senior counsel cites *Stevenson Jacques & Co vs. MC Lean,* reported at *(1880) V5 QBD 346* and *Gibson vs Manchester City Council (HL)*, reported at *(1979) WLR 294* which laid down the proposition that if there is nothing specific by way of offer or rejection but a mere inquiry and/or an exploratory exercise regarding possibility of reduction of price, the same cannot constitute a repudiation of the offer. In the present case, the Tribunal, it is argued, proceeded on the premise that the acceptance of the claimant's offer by SRMB was actually a counter offer, based on the premise that the previous exploratory exercise by letters on behalf of SRMB regarding reduction of price was a full-fledged repudiation. Such finding of the Tribunal, thus, is perverse.

11. Learned senior counsel appearing for the petitioner next points out that even as per the pleading in the Statement of Claim (SoC), the

petitioner's letters dated May 16 and May 19 were referred to by the respondent as "requesting the Claimants to reconsider the waiver of MGO". Again, in Paragraph 14 of the SoC, the claimant had referred to the letter of SRMB dated May 29, 2014 as an acceptance of the proposal of the respondent to enhance the price by Rs. 5/- per SCM to waive the MGO Clause. Thus, even as per the pleadings of the respondent, there was a concluded offer and acceptance giving rise to a contract between the parties. It is submitted that there was absolutely no pleading, averment or case made out by the parties to the effect that the letter dated May 29, 2014 was not a valid acceptance of the claimant's offer dated April 24, 2014 or that it constituted a counter offer of the petitioner/SRMB.

12. The findings in the award regarding there being a "counter offer" and "unambiguous rejection" of the claimant's offer are perverse, giving rise to the ground of patent illegality as contemplated in Section 34(2-A) of the 1996 Act.

13. In continuance of the first limb of his arguments, learned senior counsel for the petitioner next contends that the conclusion of the impugned award that the petitioner's termination of the gas purchase agreement by its notice dated July, 7, 2014 was wrongful, is also perverse. The claimant had informed the petitioner that from July 6, 2014, supply of gas to the petitioner would be permanently suspended in view of the petitioner's refusal to renew one of the bank guarantees. In view of the MGO Clause having already been waived, as argued

previously, there was no occasion for renewal of the bank guarantee by the respondent/petitioner. Thus, there was no basis of such permanent suspension, justifying the termination of the contract by the petitioner SRMB.

14. Learned senior counsel argues that although a short notice was given before termination of the contract, thereby deviating from the provisions of the agreement itself, notwithstanding the absence of any contractual clause enabling such termination on the ground of non-supply of gas, the petitioner was entitled to terminate the agreement under Section 39 of the Contract Act, as the claimant had communicated its intention to permanently suspend gas supply from July 6, 2014, which constituted a refusal by the claimant to perform its obligations under the agreement.

15. Learned senior counsel next argues that the award of Rs.58,50,45,169/- as damages for breach of the MGO Clause from July, 2014 is *ex facie* perverse and vitiated by patent illegality, being based on no evidence of any loss or damage suffered by the claimant.

16. The award, it is submitted, fails to advert to relevant materials and evidence produced by the petitioner which in fact established that the claimant was able to sell/allot the gas meant for the petitioner to third parties and, thus, suffered no loss or damage. The award of damages is perverse, being based on no evidence whatsoever.

17. The Tribunal proceeded on the premise of the recording in paragraph 41 of the CCI Judgment, in a proceeding initiated by an

employee/associate of the petitioner before the CCI impugning the various clauses of the gas purchase agreement, to the effect that the claimant/respondent has had to flare up to 28.48 per cent of the gas produced in 2015-2016 as it had no market for the same in the face of competing products. The impugned award holds that these findings of fact were affirmed by the High Court at Delhi.

18. It is argued by the petitioner that Paragraph 41 of the CCI observations did not refer to any loss or damage caused to the claimant by the alleged breach of the MGO Clause but was merely a general observation. Thus, such findings were not conclusive within the contemplation of Section 61 of the Competition Act, 2002 as erroneously held by the Arbitral Tribunal.

19. That apart, the percentage of gas produced by the respondent being flared in 2015-16 is not relevant, nor does it establish that the claimant was not able to supply the contracted quantity of gas to other parties after termination, which is the determinative test for considering whether the termination has resulted in any loss or damage to the claimant.

20. Since the seller/respondent, even after termination of the contract, was able to sell the contracted goods to third parties, there could not have been any loss or damage suffered by the seller.

21. The award relies on the judgment of the Delhi High Court dated October 10, 2019 which itself holds that the quantity of gas which was earlier supplied by the claimant to SRMB was, after termination of the

contract, being supplied by the claimant to other purchasers. The Delhi High Court records that it is nobody's case that gas could not be supplied to other consumers and that the fact that the quantity of gas which was earlier supplied to SRMB was, after termination of the contract, being supplied to other purchasers, does not in any manner render Clause 5.2A of the agreement unfair or discriminatory.

22. Thus, the award is also perverse on such count, being contrary to the findings of the Delhi High Court.

23. The documents produced by the petitioner which show that the flaring of gas decreased after the termination of contract was not considered by the Tribunal. Further, it is argued by the petitioner/SRMB that the Tribunal declined to refer to the material evidence on such count on the premise that SRMB had neither referred nor disclosed those materials.

24. However, in the Statement of Defence (SoD), the petitioner denied the averment in the SoC that any loss or damage had been suffered in respect of the MGO or any amount was payable as quantified at the MGO from 2014 to 2034. The aforesaid pleading in the SoD enabled the petitioner/SRMB to produce evidence in the form of the returns filed by the claimant before the Directorate General of Hydrocarbons to show that no loss or damage had been suffered by the claimant post-termination of the agreement in July, 2014.

25. The Tribunal completely ignored the evidence adduced by the petitioner, particularly the Reports authored by the CRISIL and CARE,

being credit rating agencies engaged by the claimant to show that the claimant's customers and business had improved considerably post-determination of the contract.

26. It is also contended that the agreement dated May 11, 2011 was executed in violation of an order dated March 18, 2011 passed by the PNGRB and the order passed by the Delhi High Court on March 25, 2011. In such context, learned senior counsel for the petitioner cites *Surjit Singh v. Harbans Singh*, reported at *(1995) 6 SCC 50*, *Bijali Naskar v. Amalendu Saha*, reported at *1999 SCC OnLine Cal 204* and *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, reported at *(1996) 4 SCC 622*.

27. The petitioner contends that the gas purchase agreement is thus vitiated by fraud and misrepresentation as it suppressed Show-Cause Notices dated December 3, 2010 and December 15, 2010 directing the claimant/present respondent to stop any incremental activity with immediate effect till the matter was decided by the PNGRB. The order dated January 4, 2011 passed by the Delhi High Court directing the implementation of the notice dated December 3, 2010, that is, for stopping any incremental activity, was also overlooked.

28. Laying of the pipeline for supply of gas to the petitioner in violation of the orders of court also amounted to fraud, which can be of infinite variety, as it has not been straight jacketed by the definition in Section 17 of the Indian Contract Act. In support of such contention, learned senior counsel for the petitioner SRMB cites *SEBI vs.*

Kanaiyalal Baldevbhai Patel, reported at *(2017) 15 SCC 1*. Also, the agreement, being induced by fraud, was clearly voidable by the petitioner simpliciter on the ground of fraud. To bolster such argument, the petitioner cites *Venture Global Engineering vs. Satyam Computer Services Limited & Anr.*, reported at *(2010) 8 SCC 660*.

29. In reply, learned senior counsel for the claimant/respondent cites *Ssangyong Engg. & Construction Co. Ltd. vs. NHAI*, reported at *(2019) 15 SCC 131* and *Govt. of NCT of Delhi vs. Shonk Technologies International Ltd. & Anr.*, reported at *2023 SCC OnLine Del 8323* to contend that the scope of interference by the court under Section 34 of the 1996 Act is limited to grounds mentioned in the said Section itself. There are three stellar guiding principles. First, the court does not sit in appeal over the decision of the Arbitral Tribunal. Secondly, in the absence of patent illegality, the interpretation of the contract by the Arbitral Tribunal and its conclusion, arrived at by appreciation of evidence, is impervious to interference. Re-appreciation of evidence is not permitted under the ground of patent illegality. Thirdly, the Section 34 court does not embark on its own exercise of interpreting the contract and the court cannot interfere with the award merely because it feels that a different interpretation is possible. In the present case, it is argued, none of the said tests are met.

30. Learned senior counsel for the claimant/respondent argues that it will be evident from the correspondence between the parties that the MGO Clause was never waived by the claimant. The Tribunal, after due

appreciation and consideration of all correspondence exchanged between the parties, including the judgments cited by both parties as also various provisions of the Contract Act, 1972, came to the conclusion that the MGO was not waived or novated. Such finding is supported by settled law that a contract cannot be formed without an unambiguous acceptance of an offer, as held in *Padia Timber Co. (P) Ltd. v. Board of Trustees of Visakhapatnam Port Trust*, reported at *(2021) 3 SCC 24*.

31. The petitioner's argument that the findings of the Tribunal are *de hors* the pleadings in the arbitral proceeding is also incorrect. All the letters have been narrated in the SoC. The allegation of modification/novation of the MGO Clause came about for the first time in the SoD, which was duly dealt with by the claimant in its rejoinder before the Tribunal.

32. Learned senior counsel appearing for the claimant/respondent argues that the facts of the present case are unlike those of *Gibson*'s case and *Stevenson*'s case and more in the lines of the judgment in *Hyde v. Wrench (3 Beav. 334)*, which has considered in both the judgments.

33. The claimant/respondent next argues that the relevant contractual provisions of the Gas Purchase Agreement are contained in Clauses 2.0, 5.1, 11.1, 11.4 11.5 and 15, which provide the specific scenario under which either party may terminate the agreement. Admittedly, none of such events arose to give right to SRMB to terminate the contract. Thus, the termination is contrary to the contract. Knowing

the same fully well, the petitioner has relied on Section 39 of the Contract Act.

34. However, as per Clause 11.5 of the agreement, SRMB was required to submit a revolving confirmed bank guarantee which was to remain in place for the amount of the contracted quantity for one month. Admittedly, such bank guarantee had expired and SRMB had failed to renew the same. In view of such failure, the claimant issued a notice on July 2, 2024, recording SRMB's default of the terms of the agreement in failing to renew the same and further giving three day's notice of discontinuance of the supply of gas. This notice dated July 2, 2014 was pursuant to leave granted by this Court by an order dated July 1, 2014.

35. SRMB, in its notice of termination dated July 7, 2014, did not urge or contend that it was terminating the agreement for any repudiatory breach commited by the claimant. Even in the pleadings of the SRMB in its SoD, no case has been made out as to how any repudiatory breach has been committed by the claimant/respondent which disabled it from performing its promise in the contract in its entirety.

36. To come within the scope of Section 39 of the Contract Act, SRMB was required to aver and prove that the breach goes to the root of the contract. However, there is no such averment or proof on record.

37. The Tribunal dealt with the issue and observed that the suspension of gas for three days with prior notice in the event SRMB does not renew the bank guarantee does not go to the root of the contract.

38. Hence, the argument on Section 39 of the Contract Act is not tenable in the eye of law.

39. The petitioner now seeks this Court to re-appreciate the evidence, which is not permissible under Section 34 of the 1996 Act.

40. Next dealing with the argument of SRMB that the finding of the Tribunal on the quantum of damages is based on no evidence and/or in ignorance of vital evidence, learned senior counsel for the claimant/respondent argues that the Tribunal unequivocally held that the agreement is valid and subsisting till April 30, 2034 and that SRMB had breached the agreement and wrongfully terminated the same. Considering the nature of the contract, the Tribunal refused to grant specific performance but observed that the claimant still has a right to recover compensation in the form of damages for the loss or benefit that it would have received had the agreement survived and continued for its full term, that is, till April 30, 2034.

41. The contention of SRMB that no loss or damage has been suffered by the respondent due to such illegal termination is palpably wrong.

42. The Tribunal relied on the factual finding of the CCI dated February 11, 2017, which was affirmed by the Delhi High Court by its order dated October 10, 2019, to the effect that the claimant had to flare up 28.48 per cent of the gas produced in 2015-2016 as it had no market for the same after SRMB had terminated the contract in July, 2014.

43. Learned senior counsel for the claimant/respondent argues that admittedly, post-termination of the agreement, the claimant had to

flare up gas. The contention that the gas being supplied earlier to SRMB was sold to others was also contended before the Delhi High Court but was turned down in Paragraph No. 53 of the said judgment. The very fact that the gas had to be flared up *ipso facto* means that there was no buyer for the same and had the claimant supplied gas to SRMB, such gas would not have had to be flared up. Thus, flaring up of gas is itself the proof of loss.

44. In Paragraph No. 41 of the CCI Order, it is noted that the claimant had made huge capital investment *inter alia* for licence/lease for exploration of gas and for setting up the pipelines and infrastructure for distribution of gas among others. To recover such capital investment and to cover the risk of the seller of the gas, the global practice is long-term supply contracts to be executed with a commitment to buy a fixed quantity on a long term basis. This being the very basis of the MGO Clause for the entirety of the contract period, the illegal early termination also causes a direct actual loss. It is incorrect to presume that the claimant has a fixed production of gas and it is no one's case that it could not have increased its production to supply more customers. Even the chart relied upon by the SRMB shows that every year production has gone up. The claimant is entitled to the lost revenue from SRMB, the minimum whereof is as stipulated in the MGO value. Moreover, the Tribunal has awarded only 15 per cent of the MGO value.

45. The Tribunal in fact considered the returns filed before the Directorate General of Hydrocarbons, Ministry of Petroleum and Natural Gas and after due consideration held that even then it shows from the chart produced by the SRMB that there is flare-up.

46. The Tribunal, it is argued, took note of all the relevant judgments of the Supreme Court where it was held by the Supreme Court that the liability of the consumer to pay minimum charges continues even after supply was disconnected and, taking guidance from the judgments in *Md. Salamatulla & Ors. Vs. State of Andhra Pradesh*, reported at *(1997) 3 SCC 590*, *M/s A.T. Brijpaul Singh & ors vs. State of Gujarat*, reported at *(1984) 4 SCC 59* as well as *MSK Project vs. State of Rajasthan*, reported at *(2011) 1 SCC 573*, assessed 15 per cent of the amount claimed as damages.

47. The claimant also cites the following judgments in support of its proposition that it is fair to assess future loss or profit expected to be obtained from a wrongfully terminated contract based on guesswork: *Dwarka Das vs. State of M.P. & Anr.*, reported at *(1999) 3 SCC 500*, *Gemini Bay Transcription Pvt. Ltd. vs. Integrated Sales Service Ltd. & Anr.*, reported at *(2022) 1 SCC 753*, *Crest Education Pvt. Ltd. vs. Career Launcher (I) Ltd.*, reported at *2023 SCC OnLine Del 3801* and *Govt. of NCT of Delhi vs. Shonk Technologies International Ltd. & Anr.*, reported at *2023 SCC OnLine Del 8323*.

48. Hence, the finding of the Tribunal on the quantum of damages is based on appreciation of evidence, interpretation of the agreement, the

decision of the CCI and the Delhi High Court as well as established precedence of the Supreme Court of India while assessing future loss of profit of the claimant. Thus, it is argued that there is no scope of interference and the present challenge ought to be dismissed.

49. Upon hearing learned counsel for the parties, the court comes to the following conclusions:

50. The plinth of the case of SRMB/petitioner is that there was a concluded contract between the parties on waiver of the MGO Clause upon consequential increase of the purchase price by Rs. 5/- per SCM. The pillars of such argument are two letters – the letter dated April 24, 2014 by the claimant and the letter dated May 29, 2014 by SRMB/petitioner. According to the petitioner, the said two letters constituted an offer and acceptance respectively, thus giving rise to a concluded contract between the parties regarding waiver of MGO.

51. However, the said letters cannot be seen in isolation but have to be read in proper context. During the relevant period, there were several correspondences between the parties. The Tribunal took into consideration the entire body of correspondence and disbelieved the case of the petitioner/SRMB on such count.

52. On April 22, 2014, SRMB wrote to the claimant/respondent for the first time with a request to waive off the MGO Clause with immediate effect. The letter issued by the claimant on April 24, 2014, touted as an independent "offer" by the petitioner, was actually in reply to the petitioner's letter dated April 22, 2014. Importantly, in the

communication of April 24, 2014, the claimant gave out that in view of the long-term business relations between the parties, as a special case, the claimant "may" consider SRMB's request "only if", in clause 10 of the contract, there will be an increase of price of Rs. 5/- per SCM on the current price of Rs. 21/- excluding VAT. The two key words in the above letter are "may" and "only if", which go on to indicate that the same was not an unqualified offer but retained with the claimant a discretion to accede or not to accede to the request of waiver of the MGO Clause, subject to further response from the respondent/petitioner. Furthermore, the same was qualified with the rider that such request of SRMB would be considered "only if" SRMB acceded to the increase in price by Rs. 5/- per SCM, leaving no scope for further negotiation.

53. The reply to the claimant's "offer" letter dated April 24, 2014 was sent by SRMB on May 16, 2014, much prior to its letter dated May 29, 2014. In the May 16, 2014 letter, SRMB requested the claimant not to press for such "unreasonable increase" which would affect the business of SRMB adversely. SRMB further requested the claimant to review its decision towards withdrawal of the MGO Clause "unconditionally". SRMB further continued that in the absence of such unconditional withdrawal ("or else") it is becoming very difficult to carry out business in compliance of the said agreement.

54. Hence, even if the letter dated April 24, 2014 could be treated to be a proposal/offer by the claimant, SRMB refuted the same. In view of the

rider in the letter dated April 24, 2014 that the claimant may consider waiver of MGO *only if* SRMB agreed to the enhancement of price, the reply of SRMB not agreeing to such enhancement and seeking a review, by labelling the enhancement "unreasonable", clearly tantamounted to repudiation of the offer given by the claimant in its letter dated April 24, 2014. SRMB's letter date May 16, 2014 has been sought to be made out as mere negotiation, of an exploratory nature, for reduction of the price. However, the increment in price component being a non-negotiable rider to the offer, as made clear by the expression "only if" in the offer letter dated April 24, 2014, repudiation of such increase could not merely be brushed off as 'reduction in price' but amounted to refusal to accept the soul of the offer, which was a non-negotiable pre-requisite of such offer.

55. Even in its subsequent letter dated May 19, 2014, SRMB reiterated its stand and went one step ahead, seeking not only a waiver of MGO but a reduction of the base price current market price. Hence, SRMB reiterated its stand by the letter dated May 19, 2014, read with that dated May 16, 2014, giving out that it not only repudiated the enhancement of price, which was the cardinal and non-negotiable premise of the offer dated April 24, 2014, but went one step further in seeking a reduction in the price.

56. Hence, as on May 19, 2014, the offer given by the claimant on April 24, 2014 already stood conclusively repudiated and refuted by SRMB beyond revival.

57. The saga does not stop there. In its letter dated May 23, 2014, the claimant/present respondent clearly communicated to SRMB that the latter's proposal in the letter dated May 19, 2024 was not acceptable to the claimant. A further counter offer was given by the claimant for reduction of the MGO from 80 per cent to 75 per cent provided all other terms and conditions of the agreement remain intact, thereby reiterating that it stands by the continuation of the MGO Clause, thus leaving no manner of doubt that the original offer to waive the MGO Clause on increase of price was no longer alive.

58. Hence, much before May 29, 2014, the chapter which was opened by the letter dated April 24, 2014 had been closed.

59. By way of clever drafting, in its letter dated May 29, 2014, SRMB sought to revive the offer dated April 24, 2014 by purportedly "accepting" the same.

60. It is not the law that after an offer has been repudiated and becomes deadwood, the same can be revived at any point of time by the offeree by arbitrarily choosing a prior date when the offer was made to "accept the same", even after much water has flown and the parties have irreconcilably repudiated the offer. By several letters in between, SRMB had already repudiated the essential terms of the offer, upon which the claimant had closed the offer unambiguously. Hence, as on May 29, 2014, the offer dated April 24, 2014 was not alive any longer for it to be 'accepted' by SRMB.

61. Thus, there could not arise any occasion for 'acceptance' of an already dead offer on May 29, 2014. Thus, the correspondence which ensued thereafter between the parties from May 29, 2014 could only be construed to be a de novo exercise of offers and counter offers between the parties. Hence, the basis on which the Tribunal held that there was a counter offer subsequently cannot be faulted in any manner.

62. Learned senior counsel for the petitioner has hinted that the Tribunal made out a third case contrary to the pleadings with regard to the dates of the offer and acceptance.

63. A careful perusal of the SoC shows that the pleadings therein do not in any manner comprise of an "admission on the part of the claimant" regarding the letter dated April 24, 2014 being 'The' offer and that dated May 29, 2014 being its acceptance. The statements made in the SoC were bald statements, merely narrating the contents of the said documents as they stood and was not any commentary on the stand of the petitioner on the same. A complete reading of the entire SoC clearly shows that the claimant all along denied there being any agreement for waiver of MGO. In fact, as on the date of filing of the SoC, there was no SoD on record at all. The case sought to be made out by SRMB regarding there being a concluded contract for waiver of MGO was made out first in the SoD. Hence, there was no occasion for any admission of such case by the claimant prior to the SoD being filed, in its SoC.

64. In fact, the claimant, in its rejoinder to the SoC, categorically denied the contentions made in the SoD and clearly pleaded the relevant facts, which were the premise of the Tribunal's findings in that regard. Hence, the third-case argument cannot be accepted at all.

65. As per the above discussion, even a careful scrutiny of the correspondence between the parties reveals that there was no 'Aha' moment, when the parties were *ad idem* on the waiver of MGO, giving rise to a concluded contract on such count.

66. Hence, the findings of the Tribunal in that regard are perfectly justified.

67. Also, importantly, the Tribunal interpreted the correspondence in a particular manner which is perfectly plausible in law and on the facts of the case. The proviso to Section 34(2-A) of the 1996 Act clearly precludes the court from coming to the conclusion of patent illegality by re-appreciation of evidence. Even if the court were of a different opinion than the Tribunal on the issue of waiver of the MGO Clause, the court ought not to come to the conclusion that there was patent illegality, by substituting its own view for that of the Tribunal.

68. Thus, this Court finds no scope or occasion of interference with the finding of the Tribunal that there was no waiver of the MGO Clause between the parties at any point of time.

69. The next question which falls for consideration is whether the termination of the contract by SRMB was unlawful. Such termination is admittedly *de hors* the four corners of the agreement. The relevant

provision for termination contemplate prior non-supply for three months, as stipulated in Clause 5.1, which period was admittedly not given by SRMB.

70. Clause 4.2 gives the seller an option to stop supply of gas to the buyer without any notice when an emergency and/or safety issue arises; otherwise a week's notice was to be given by the seller to the buyer to rectify the defects in arrangement or gas using equipments, the decision with respect to which shall be that of the seller alone. Notwithstanding the stoppage of supply as aforesaid, the buyer was to continue to be liable to pay for the MGO of gas in accordance with Clause 5.2 irrespective of the stoppage of gas supply on account of defect or unsafe operation in the buyer's intake arrangements or gas using equipment.

71. Clause 5.2 provided for the MGO and the formula for calculating the same.

72. Thus, the MGO Clause was to operate throughout, even irrespective of emergency stoppage of gas supply.

73. Clause 11.5 of the Agreement mandated that the buyer shall submit a revolving confirmed Bank Guarantee which will always remain in place for the amount of the contracted quantity for one month. In case of shortfall, the buyer would have to pay the same to the seller immediately on demand. This required the buyer to keep the Bank Guarantee in place by renewing it from time to time.

74. In the present case, due to such non-renewal, the claimant give a notice to SRMB on July 2, 2014, recording SRMB's default in renewing the bank guarantee, giving three days' prior notice for discontinuance of supply of gas due to such non-renewal. Such notice was not only pursuant to the leave granted by this Court by an order dated July 1, 2014, the same was also within the contemplation of the agreement itself.

75. Upon non-compliance of the same, the gas supply was terminated.

76. Instead of renewing the bank guarantee, which would have revived the gas supply, SRMB chose to avoid such renewal by issuing a notice of termination on July 7, 2014. There was no averment in the notice dated July 7, 2014 as to any repudiatory breach being committed by the claimant. The said notice was also palpably *de hors* the provisions of the agreement.

77. Upon having chosen to agree on particular terms of the agreement regarding termination, it was not open to SRMB to terminate the contract *de hors* such provisions. Hence, the termination was palpably bad, being *de hors* the provisions of the agreement.

78. The reliance sought to be placed by SRMB on Section 39 of the Contract Act is merely an afterthought. Section 39 does not override the specific terms of an agreement between the parties. Even taken for whatever it is worth in the present context, Section 39 contemplates a termination only when the breach goes to the root of the contract. The Tribunal considered such factor and observed that

suspension of gas supply for three days with prior notice in the event SRMB does not renew the bank guarantee did not go to the root of the contract. As such, the provisions of Section 39 of the Contract Act were held to be not applicable, which conclusion is perfectly justified in the circumstances of the instant case. Hence, in the teeth of non-compliance of the specific termination clause in the arbitration agreement by the respondent/present petitioner, Section 39 of the Contract was not attracted at all, more so since there was no breach on the part of the claimant at all, let alone the breach going to the root of the contract.

79. Hence, the award, to the extent that the termination was bad is also justified, since the non-renewal of bank guarantee by SRMB was entirely unilateral, *de hors* the contract and contrary to law.

80. The last component of argument of SRMB/petitioner is that there was no evidence of loss to justify the award of damages.

81. However, the Tribunal categorically relied on the order passed by the CCI (the conclusion of which was ultimately affirmed on merit by the Delhi High Court) where it was observed that the claimant had to flare up 28.48 per cent of the gas produced in 2015-2016, that i,s after the illegal termination of the agreement by SRMB.

82. The Delhi High Court, in a somewhat different context, held that it was nobody's case that gas could not be supplied to other consumers. In such backdrop, it was observed that it was not the case of SRMB that if customers are available requiring gas at a particular point of

time, gas available to the claimant would not be supplied to them. The MGO liability, it was held, was only to mitigate the risks in committing to a long-term supply and that the fact that the quantity of gas which was earlier supplied was, after termination of the contract, being supplied to other purchasers does not in any manner render Clause 5.2 of the agreement unfair or discriminatory.

83. Hence, it was not a conclusive finding nor was the court so called upon to decide on merits on the issue as to whether the gas earlier supplied to SRMB was being supplied to others. The premise of Paragraph 53 of the Delhi High Court judgment was merely that it was nobody's case that gas could not be supplied to others and even if there was such supply after termination of the contract, it does not render Clause 5.2 unfair or discriminatory. The said observation cannot be blown out of proportion but has to be read in its context. Rather, it was the categorical finding of the CCI order, which was affirmed by the Delhi High court on merits, that there was 28.48 per cent flare-up of the gas produced subsequent to termination of the contract, which was a specific and precisely enumerated value of such flare-up.

84. Even otherwise, if we proceed on the basis of the CRISIL Report and the CARE Report as well as the documents filed by SRMB which, if assumed to go on to show that there was almost equivalent flare-up of gas even after termination of the contract as there was before, the same does not help SRMB in any manner.

85. The premise of the MGO Clause is not an actual occasion of loss suffered by the supplier. It is a prevalent practice in such long-term contracts for supply of energy, by way of electricity, gas, etc. to introduce a minimum consumption clause, which is in the nature of an assurance to the supplier that the huge investment in grid and other infrastructure for supply to consumers, which is undertaken by such supplier, is justified by long-term supply. Premature termination would not only entail loss of the minimum guaranteed amount, which is the MGO value in the present case, but also may be detrimental to the maintenance of the supply grid itself.

86. Also, it is irrelevant whether the same amount of gas as consumed before by SRMB was flared up even after termination of the contract with SRMB. As long as there was even a small amount of flare-up, it would indicate that at least some of the gas produced by the supplier is not used up. It is not a relevant question whether the gas earmarked for the consumer (SRMB) was being supplied to some other consumer, since supply to one consumer is not mutually exclusive with supply to some other. It may very well be that the supplier enhances its infrastructure and/or on the basis of the same infrastructure caters to more consumers, thereby increasing its earnings. Even if SRMB was continued to be supplied with gas, it was open for the claimant/supplier to increase its supply and/or to maintain its previous supply and go on supplying gas from its network/grid to other new consumers, which would fetch more profits

to the supplier. There was no exclusivity clause in the agreement between the parties, restricting supply only to SRMB. Hence, even if the claimant went on supplying to others over and above the quantity supplied to SRMB, it would have earned more profit, to which there is no bar.

87. Thus, as long as there is even a wee bit of flare-up of gases, there is a wastage of gas produced by the supplier and, consequentially, there cannot be any dilution of the MGO loss suffered by the supplier. Theoretically, after the termination, the supplier might have started supply to new consumers. Even then, as long as the entire amount of produced gas was not exhausted, the supplier would continue to suffer loss due to termination of the contract for the particular amount of gas which was to be supplied to SRMB. It is not that the gas earmarked for SRMB is being supplied to others. The claimant is a producer of gases and can very well supply to many other consumers than SRMB.

88. Hence, the argument of SRMB linking the quantum of post-termination flare-up of gases to absence of loss is irrational and not acceptable. Even if the flare-up remained the same, the supplier suffers loss to the extent of the MGO amount as long as there is flare-up of any amount.

89. Hence, such argument of SRMB/petitioner is specious but not acceptable.

90. The concept of MGO, in any event, is to provide certainty to the supplier and to ensure that the grid infrastructure installed on the basis of a long-term supply agreement is utilised to the full, which would justify the infrastructure and maintenance expenses of the said supply grid as well. It acts as a long-term insurance to cover the infrastructure and allied expenses and does not necessarily require proof of actual future loss as such. The rudiments of such future loss are embedded in the MGO Clause of the agreement itself, which has been wrongfully terminated by the present petitioner.

91. Hence, on a comprehensive perusal of the impugned award, I am unable to find any infirmity or illegality in the same.

92. In view of the above discussions, the petitioner's arguments on perversity and patent illegality do not cut ice at all.

93. *Ssangyong Engg. (supra)* as well as *Govt. of NCT of Delhi (supra)* have clearly enumerated the parameters of interference under Section 34. In the guise of patent illegality, the court cannot re-appreciate evidence, as per the proviso to Section 34 (2-A) of the 1996 Act. This Court is not sitting in appeal over the decision of the Tribunal and in the absence of patent illegality, the court cannot enter into an exercise of re-appreciation of the evidence and/or interpreting the contract in a different manner than the Tribunal according to its whims.

94. Thus, the present challenge fails.

95. Accordingly, AP-COM 281 of 2024 [Old No: AP 833 of 2022], along with GA 2 of 2023, is dismissed.

96. EC 80 of 2023 and GA 2 of 2023 shall now be listed under the appropriate heading.

97. There will be no order as to costs.

98. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)