* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 08th January, 2020
Pronounced on: 17th February, 2020

\+ FAO(OS) (COMM) 301/2019, CM APPL. 47045/2019, CM APPL. 47046/2019, CM APPL. 47047/2019

RELIANCE INDUSTRIES LTD ..... Appellant

Through: Mr. Paras Kuhad, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Shubhranshu Padhi, Mr. Ajith Karunakaran, Mr. Jitin Chaturvedi Mr. Shuaib Hussain and Mr. Vishnu Sharma, Advs.

versus

GAIL (INDIA) LTD ..... Respondent

Through: Mr. Dhruv Mehta, Sr. Adv. with Ms.Manmeet Arora, Mr. Harkirat Singh, Mr. Rishabh Surekha and Ms. Anupama, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J

1. The present Appeal under Section 13 of the Commercial Courts Act, 2015 (hereinafter 'Commercial Courts Act') read with Section 37(1) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") assails the judgment dated 16.07.2019 passed in O.M.P. 597/2012, whereby the learned Single Judge has upheld the Arbitral Award dated 25.05.2012

passed by Hon'ble Mr. Justice B. P. Jeevan Reddy (Retd.), Sole Arbitrator, and consequently dismissed the challenge under Section 34 of the Act.

Factual Background:

2. The facts in brief leading to the filing of the present appeal are as follows:

2.1. Reliance Industries Limited (hereinafter "Appellant") is engaged in the business of manufacturing and sale of petrochemicals.

2.2 Gail (India) Limited (hereinafter "Respondent") is a Public-Sector Undertaking under the administrative control of the Ministry of Petroleum & Natural Gas and is engaged *inter alia*, in the business of transportation and marketing of Natural Gas, LPG production and City Gas Distribution.

2.3. The parties entered into a Gas Supply Agreement (GSA) dated 30.03.2000 (hereinafter "Agreement") for sale of 'natural gas' for the purpose of extraction of C-2 (Ethane) and C-3 (Propane) fractions, after removal of CO_2 in Respondent's petrochemical plant located at Dahej (Gujarat). In terms of the Agreement, after processing the gas, the Appellant would return the balance lean gas to the Respondent. The Agreement also contained provisions for determining the quantity and price for payment of gas utilized/shrunk by the Appellant. The original term of the Agreement was to end on 01.01.2005, however, it was extended on a number of occasions and the last extension expired on 31.08.2008. As per Clause 4 of the Agreement, the supply of gas was to be made in two phases: (i) Phase-1 from 01.01.2000 to 31.12.2000, and (ii) Phase-2 from 01.01.2001 onwards. The dispute between the parties pertains to Phase-2 viz. the period

commencing from 01.01.2001 and ending on 31.08.2008.

2.4. During the aforenoted period, Respondent started supplying gas to the Appellant from the gas Metering Station No. 4, in its LPG plant at Gandhar (hereinafter "Point of Onward Delivery"). The Appellant was to process the gas after removal of CO_2 and deliver the balance quantity of Gas back to the Respondent at the Gas Metering Station No. 5 in the Respondent's LPG Plant (hereinafter "Point of Return Delivery").

2.5. Respondent raised fortnightly invoices for the supply of gas, calculated on the basis of the difference between Gas supplied [recorded at the Point of Onward Delivery] and the Gas returned by the Appellant after extraction [recorded at the Point of Return Delivery]. This continued upto February 2008, when after a lapse of almost eight years, Respondent started raising Supplementary Invoices/ Debit Notes for the period April 2000 to February 2008. Respondent claimed the additional amounts on the basis of the difference between the shrinkable volume calculated as per the formula stipulated in the Agreement, and the consumption measured by noting the difference between gas supplied and gas returned. Appellant protested against the raising of debit notes, pointing out that for more than seven years of continuous operation of the contract, payment has been made strictly as per the Agreement. In the past, Respondent had not raised any debit note or even made a mention about it in its communication exchanged with the Appellant. It clarified that the debit notes are based on the terms of the Agreement. Respondent specifically relied upon clause 11.02 of the Agreement and argued that invoicing has to be on the basis of quantity of gas utilized for process/ shrinkage as per formula under Article 5.02 or on

the basis of the difference between the actual quantity of gas supplied at the point of onward delivery and the balance quantity of gas received back from the Appellant at the Point of Return Delivery, or the minimum guarantee charges as per Article 5.03, *whichever is higher*.

2.6. Further correspondence was exchanged between the parties. Eventually, on 11.07.2008, the Respondent made a final demand to the tune of Rs. 87,37,98,265/- coupled with a threat that on Appellant's failure to make the payment by 19.07.2008, the gas supplies would be disconnected. This was followed by further correspondence and discussions between the parties which, ultimately, lead the Appellant to furnish a Bank Guarantee of Rs. 76,50,53,870/- and make a deposit of Rs.11,06,25,539/-. Thereafter, parties entered into a fresh gas sale agreement.

2.7. Pursuant to aforenoted understanding, Respondent raised disputes and the parties agreed to the appointment of a Sole Arbitrator for adjudication of the disputes. The Respondent filed its claim for recovery of Rs. 79,98,03,129/-, based on the supplementary invoices/ debit notes and also claimed interest on the said amount. In addition, thereto, Respondent also claimed damages and release of the Bank Guarantee. The Appellant filed its Statement of Defense and raised several objections. The central issue in the arbitration revolved around the interpretation of the terms of the Agreement, and as to whether the additional amount claimed by the Respondent by way of supplementary invoices/ debit notes was permissible in terms of the contract.

Arbitral Award and Decision of the learned Single Judge:

3. The learned Arbitrator vide award dated 25.05.2012 allowed the claim of the Respondent, holding that it was entitled to raise Debit notes for additional amounts on the basis of *"whichever is higher"* principle stipulated under Article 11.02 of the Agreement. However, the plea of limitation, raised by the Appellant was accepted and the award of claim was restricted to a period of three years i.e. from 01.08.2005 to 31.08.2008. Interest was awarded at the rate of 9% per annum from the date of Award till realization.

4. The Arbitral Award dated 25.05.2012 was challenged by the Appellant under Section 34 of the Act by filing O.M.P. No. 597 of 2012. Concurrently, Respondent also challenged the Award *inter alia* to the extent its claim was rejected by the Ld. Arbitrator. The learned Single Judge, taking note of the contentions raised by the parties, dismissed both the petitions and confirmed the Arbitral Award vide the common impugned order dated 16.07.2019.

Controversy in the case:

5. Before proceeding with the merits of the case, it would be apposite to lay out the controversy before us in the present case.This can be done by noting the principal contentions of the parties. Mr. Paras Kuhad, learned senior counsel for the Appellant, at the outset, has clarified that the applicability and interpretation of Article 11.02 is not in doubt. He submits that the wrangle is over the workability of the said provision in view of non-availability of the readings required for the application of the formula. He submitted that the observations of the Arbitrator, also subsequently affirmed

by the Single Judge, to the effect that the distinction between 'Gas made available' and 'Gas actually processed' is a matter of '*academic interest'*; and that there is no difference in the two quantities is fallacious. The contention of the Respondent that Gas supplied is same as Gas Actually processed, is in contradiction to the case set up by the Respondent in their pleadings and evidence produced before the Arbitral Tribunal. Relying upon the doctrine of estoppel, it was further argued that Respondent deviated from the format of the invoice provided under the Agreement from the very first invoice, and since the Appellant acted upon the said deviations and discharged its obligations in terms thereof for almost 8 long years, it cannot be now asked to pay as per the unaltered position.

6. Per Contra, Mr. Dhruv Mehta, learned senior counsel for the Respondent, argued that the scope of challenge under Section 37 of the Act is extremely narrow, having regard to the scheme of the Act. The Appellant has not been able to establish any of the grounds on which a challenge can be made to an arbitral awardunder Section 34 of the Act and, therefore, the learned single judge has rightly dismissed the petition. The application and evaluation of evidence, and findings of facts falls within the exclusive domain of the Arbitral Tribunal. The Tribunal arrived at the conclusion on the basis of evidence on record, and that cannot be analyzed by the Court under Section 34 of the Act. It is a settled position of law that if the view taken by the Arbitral Tribunal is a plausible one, then it is not open for the Court to interfere with the award under Section 34 or 37 of the Act, unless the same could be said to be suffering from a manifest error on the face of it, or wholly improbable, or perverse. On merits, he supported the findings of the

Tribunal and further submitted that Appellant's plea of waiver is misconceived and untenable in law. There is no relinquishment or waiver on the part of the Respondent, either express or implied- a conclusion reached on the basis of the facts of the case.

7. The grounds of challenge, raised by the Appellant can be broadly categorized as under:

1. Whether the impugned award and the judgment of the learned single judge ignore the pleadings, admission and the evidence on record?

2. Whether there is any inconsistency in the pleadings of the Respondent? If so its effect?

3. Whether the doctrine of estoppels - waiver restricted Respondent from making a claim before the arbitrator?

FINDINGS AND CONCLUSION:

Scope of challenge under Section 34 and 37 of the Act:

8. Before we venture into the consideration of the grounds of challenge in detail, we would like to briefly reflect and comment upon the preliminary jurisdictional objection raised my Mr. Dhruv Mehta. It needs no emphasis that the jurisdiction of the Court while dealing with challenge to an award under Section 34, and especially Section 37 of the Act, is acutely narrow. The Supreme Court in several recent judgments, including in the case of ***Associate Buildervs. v. DDA,*** **2015 3 SCC 49** has interpreted and crystallized the scheme of the Act. In this case, and several others authoritative pronouncements, the Apex Court has conclusively held that the

findings of fact and appreciation of evidence are not amenable to judicial interference under Section 34 and 37 of the Act. We feel the contours of court's jurisdiction are well illuminated and further delineating the jurisdiction of the Court under the aforenoted provisions may not be necessary. *Ex-facie* perversity in the decision can persuade the Courts to intervene and exercise its jurisdiction. Here again, the Court is not expected to sit in appeal over the award of the Arbitral Tribunal and reassess or re-appreciate the evidence to discover as to whether the same would result in a different conclusion and if so, substitute its view with that of the Arbitral Tribunal. The Court would exercise its jurisdiction with circumspection, subject to there being a glaring or shockingly perverse view, or patent illegality in the award. Pertinently, when the Court is exercising jurisdiction under Section 37 of the Act, a stage where the Court has the benefit of two views- one by the Arbitral Tribunal, and another by the Court that has scrutinized the arbitral award, the scope of scrutiny gets further restricted and limited. At this stage, the Court has to only assess and appraise the view and opinion expressed by the Court dealing with objection petition, on the touchstone of exercise of jurisdiction within the ambit of Section 34 of the Act. While looking at the impugned judgment of the court, the Appellate Court has to use the prism of judicial review, attentive to the fact that the order impugned before it has been passed within the well-defined narrow confines of Section 34 of the Act.

9. The Court while deciding the appeal under Section 37 of the Act also has to bear and remind itself that the impugned decision has not been passed while exercising an Appellate jurisdiction, and that the law itself restricts

ambit of such jurisdiction. Therefore, in appeal proceedings, the Court ought not venture into re-hearing the case on merits, and instead should remain focused on the question as to whether the exercise of jurisdiction by the Court at the first stage of Section 34 has been within the purview of the provision. In a situation where the findings of the Arbitral Tribunal have been disturbed by the Court while exercising jurisdiction under Section 34 of the Act, perhaps, a little deeper scrutiny is required, for the purpose of assessing whether the first Court has exercised its jurisdiction within the permitted and defined limits, or not. However, in the event the findings of the Arbitral tribunal have been upheld, the principle of the concurrent findings of fact would also weigh with the Court while exercising appellate jurisdiction under Section 37 of the Act.

10. The scope of jurisdiction of this Court as noted above, would work as a compass that we will be using to navigate while dealing with the contentions raised by the parties, in order to ascertain whether the Appellant has indeed raised any ground that would fall for consideration of this Court within the limited and restricted scope of the present proceedings.

1. Whether the impugned award and the judgment of the learned single judge ignored the pleadings, admissions and the evidence on record?

11. The main thrust of Mr. Kuhad's arguments revolved around the applicability and workability of Article 11.02 and the joint gas ticket, provided in Article 11.06, which formed the basis for the Respondent to have raised the supplementary invoices/ debit notes. In order to fully comprehend the contention urged by Mr. Kuhad, we would have to,

necessarily, take note of certain clauses of the contract and then expound briefly the contentions urged by the Appellant. The relevant clauses are as follows:

"*ARTICLE - 5 QUANTITY OF GAS*

5.01 XXXXXXXXX

5.02 The quantity of GAS shrinkable by the BUYER foreach day shall be worked out as follows:

XXXX

(b) During Phase Two;
S = Ax 1.0l (0.003 Cl+0.92 C2+C3+C4+C5 and highers+C02)/100*
Where
S- Daily Shrinkable Quantity of Gas

A-i) Shall mean the Quantity of GAS made available bythe SELLER to the BUYER on each such day for the purposeofMGO calculation; and
(ii) Shall mean the Quantity ofgas actually processedby the Buyer on each such day for the purpose ofcalculatingactual shrinkage.

C1 Daily average Mole %ofMethane in composition of GAS supplied by the SELLER.

C2 Daily average Mole % of Ethane in composition of GAS supplied by the SELLER.

C3 Daily average Mole % of Propane in composition of GAS supplied by the SELLER.

C4 Daily average Mole % of Butane in composition of GAS supplied by the SELLER.

C5 and highers - Daily average Mole % of Pentane and highers in composition of GAS supplied by the SELLER.

C02 Daily average Mole % of carbon-di-oxide in composition of GAS supplied by the SELLER

The C5 and higher fractions contained in the Feed Gas supplied to the BUYER would be spiked back into the gas returned to the SELLER after processing by the BUYER. In such a case the C5 and higher fractions shall not be considered for calculating the shrinkage as above. However, the C5 and higher fractions contained in the aforesaid formula shall be considered for calculation if the same is not spiked back into the gas returned to the SELLER and all such instances, whenever they occur, shall be immediately informed by the BUYER to the SELLER.

5.03 The BUYER shall pay to the SELLER for the quantity of GAS utilized/ shrunk by the BUYER subject to a minimum of the fortnightly sum of Eighty (80) percent of the daily shrinkable quantity (calculated in accordance with the formula mentioned at Article 5.02) hereinafter referred to as the Minimum Guaranteed Offtake (MGO) quantity. The quantity of gas utilized/shrunk by the BUYER shall be arrived at by measuring the difference in the readings taken at the Points of Onward Delivery and the Points of Return delivery (subject to the provisions contained under article 4.09). The quantity of gas made available by the SELLER to the BUYER on any day shall be arrived at by a summation of the measurements taken at the Points of Onward Delivery for supply of Feed Gas and the measurements taken at the meter installed on the bye-pass pipeline connecting Feed Gas and Return Gas pipelines. In case the BUYER is unable to take all the quantity of gas made available by the SELLER on any day(s) for processing, the quantity of gas made available by the SELLER, as above, shall be considered for calculating the MGO charges as provided hereinabove; Provided further that during Phase One of supply of gas from Gandhar fields, the MGO charges as above shall be calculated on the basis of the quantity of gas actually supplied by

the SELLER to the BUYER. Provided further that during the period 01.01.2000 to 31.03.2000 the shrinkage formula as above shall not be applicable and billing to the Buyer shall be based on the difference of the measurements taken at the Points of Onward Delivery and Points of Return Delivery. Provided further that if on any day(s), the Seller is unable to supply a total of at least 3.80 MMSCMD of Gas to the Buyer's plant, the Buyer shall have the option not to take delivery of gas on such day(s) and in such an event MGO charges shall not be applicable. If, however, the Buyer opts to take Gas when the Seller is unable to supply a total of at least 3.80 MMSCMD, the shrinkage shall be calculated as per formula provided under articles 5.02 for supply under Phase One and Phase Two;

XXXXXXXXXXX

ARTICLE - 11 BILLING AND PAYMENT

11.01 XXX

11.02 Subject always to the provisions contained under article 4.09, the SELLER shall raise invoice for each fortnight covering the quantity of GAS utilized for process / shrinkage as per the formula provided under article 5.02 or for the difference in the total quantity of gas supplied by the Seller at the Point of Onward Delivery and the balance quantity of gas received back from the Buyer at the Points of Return Delivery or for the Minimum Guaranteed charges as perarticle 5.03, whichever is higher. These invoices shall be raised in accordance with Article 5, Article 6 and Article 10 of this contract. The SELLER will raise the invoices for each fortnight and the BUYER agrees to pay the invoices so raisedin full within three (3) working days of presentation of the said invoice. If for any reasons, the payment is delayed orany disallowance is made from the invoice, the SELLER will present the invoice for full amount or for the amount not paid as the case may be to the Bank against the letter of credit and draw the amount. The BUYER will make arrangements with the bank in a manner that in such an eventuality the full L/C amounts gets

automatically reinstated. An illustrative example of a fortnightly invoice is attached as annexure VII to this contract.

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11.06 The measurement of GAS quantity delivered by the Points of Onward Delivery and at the Points of Return Delivery will be jointly certified by the BUYER and the SELLER for billing purposes."

12. Mr. Kuhad has argued that the Agreement dated 30.03.2000, contemplated four kinds of contractual incidents which are distinct concepts and their values can never be same, viz:

(a) gas supplied: gas delivered at invert Point of Onward Delivery [Article 5.03],
(b) gas made available: summation of gas supplied and gas measured at by pass meter [Article 5.03],
(c) gas processed: gas processed at RIL plant and measured thereon [Article 5.02] (Annexure VII) and,
(d) gas utilized: gas supplied less gas returned [Article 5.03].

13. The Agreement contemplated setting up of a 35 Km pipeline for transportation of Gas from Point of Onward Delivery to the Appellant's plant. Since the gas was required to travel for a long distance, it is subject to variables factors such as temperature difference, quality deviations, volume variations etc. and therefore the quantity of Gas supplied by the Respondent at the Point of Onward Delivery on a given day may not reach for processing at the plant of the Appellant on the same day. For this reason, the

Agreement provided for four different incidents noted above. This also demonstrates that the gas supplied need not necessarily be the same as the gas processed on the same day. Based on commercial and technical realities, the Agreement also makes provision for fortnightly calculation of the invoices. He further submitted that in terms of various clauses of the Agreement, the parties agreed for setting up of meters at four different locations viz:

(i) Point of Onward Delivery; (ii) by pass meters; (iii) point of processing and (iv) Point of Return Delivery.

14. The responsibility for setting up and maintaining 3 of the above-mentioned meters was that of the Respondent, and the Appellant was responsible for setting up and maintaining the meter at the processing stage i.e. at the plant. Though, the Agreement provided for recording of four different readings at four different meters, but admittedly, in fact, only two readings, one at the point of Onward Delivery and second at the point of Return Delivery were recorded. No other readings i.e. by-pass quantity and processed quantity were actually recorded. The Agreement also envisaged that the seller was to raise invoice and the buyer had to pay the same within a period of three working days of presentation of the said invoice. The format of invoice was prescribed under Annexure VII and also forms part of the Agreement. Article 11.06 (joint gas ticket) provides that the reading at the Point of Onward Delivery and at Point of Return Delivery would be noted and jointly certified by both the parties for the purpose of billing.

15. Mr. Kuhad argued that the parties completely understood the distinction

between quantity of gas supplied and the quantity of gas actually processed. The joint gas ticket nowhere records the quantity of gas actually processed, and the learned Arbitrator committed patent illegality in equating gas supplied with gas actually processed. Respondent's demand by way of debit notes- in absence of the measurement of gas actually processed, is untenable and contrary to the contractual provisions. Elaborating his contentions on this aspect, he also argued that the failure on the part of the Arbitrator in appreciating the two well defined and marked concepts, exhibits non-consideration of the issues and, ultimately, also demonstrates non-application of mind. He further argued that values of A (i) and A (ii) in Article 5.02 are always two different figures and reflects two different events, based on the purpose for which they are to be applied. The distinctness of the two is explicitly contemplated for and forms the foundation of the Agreement. For the purpose of A (i), quantity of Gas Made Available is relevant, whereas Gas Actually processed is required for the purpose of A (ii). Since the quantity of gas actually processed is not known, it is not possible to quantify 'actual shrinkage' by applying A (ii) in terms of Article 5.02. The Arbitrator has virtually re-written the contract by holding that there is only one formula quantity; A (i) maximum shrinkable MGO quantity and (A)(ii) actual shrinkage quantity are same; the distinction is merely academic in nature.

16. Mr. Mehta, on the other hand, submitted that the Respondent had raised debit notes on the basis of the formula stipulated in Article 5.02 of the Agreement, which formed the subject matter of the claim before the arbitrator, resulting in the impugned award. Article 5.02 read with Article

11.02 of the Agreement prescribes '*whichever is higher*' and the same would be applicable.

17. The demand raised by the Respondent under the debit notes is for the payment of gas supplied on the basis of the letters dated 24.04.2008, 13.06.2008 and 02.07.2008. Respondent has pressed into service Article 11.02, extracted in the preceding paragraphs to claim on the basis of higher of the three figures arrived at by applying the methodologies mentioned therein. In fact, Mr. Kuhad categorically asserted that the applicability of Article 11.02 is not in dispute, and restricted his argument to the workability of the said clause.

18. The question, before us is whether by equating gas supplied and the gas processed, the computation of three different variable quantities envisaged in Article 11.02 would become redundant and hence unworkable. Respondent has claimed payments in accordance with the three methodologies envisaged under Article 11.02. There is no dispute about the correctness of any of the figures mentioned in the joint gas ticket by either party. The joint gas ticket records the total quantity of gas supplied by the Respondent to the Appellant which are (both rich and semi rich), recorded in columns 1 to 5, the quantity of gas returned/ shrunk by the Appellant which is recorded in column 10. Further, the quantity of gas shrinkable in terms of the formula provided in Article 5.02 is mentioned in columns 21 and 32. The minimum guarantee offtake i.e. 80% of the gas shrinkable as per the formula is also recorded in the joint gas ticket in columns 21 and 32. It is further conspicuous that the figures listed in columns 21 and 32 as the shrinkage quantity have been arrived at by applying the formula contained in

Article 5.02. The parties also do not dispute this fact. Taking notice of this, the learned Arbitrator considered and rejected the contentions of the Appellantin the following words:

> *"After giving my earnest consideration to the rival submissions, I find it difficult to agree with Mr. Uday Lalit that the methodology (I) in Article 11.02 is mentioned only for the limited purpose of ascertaining the MGO mentioned in methodology (III) and that it is not an independent methodology. The language of Article 11.02 is clear and unambiguous. Leaving aside the opening parenthetical clause (subject always to the provisions contained under 4.09, which, both parties agree, is of no relevance on the question at issue), Article 11.02 says:*
>
> > *"the seller shall raise invoice for each fortnight.Covering the actual quantity of gas supplied for process/ shrinkage as per the formula provided under Article 5.02; or for the difference in the total quantity of gas received back form the buyer at the points of return delivery; or*
> >
> > *For the minimum guaranteed charges as per the Article 5.03 Whichever is higher."*
>
> *Indubitably, therefore, all the tree methodologies mentioned in Article 11.02 are bases for payment and whichever methodology yields the higher price, it has to be adopted in the invoice issued. Accepting Mr. Lalit's submission would mean doing violence to the express language in Article 11.02; indeed to re-writing of the said provision. It may also be seen that MGO charges mentioned in methodology (III), can always be ascertained with reference to Article 5.03 read with Article 5.02 and it is not necessary to resort to methodology (i), in Article 11.02 for this purpose. Once the gas made available is known (ascertained as set out in third sentence of Article 5.03) and the gas actually shrunk is also known (as indicated in the second sentence of Article 5.03) the formula mentioned in Article 5.02 can be applied to find out the*

MGO quantity. In other words, it is not necessary to limit the scope and ambit of the methodology (i) in Article 11.02, as suggested by Mr. Lalit for the purpose of ascertaining the MGO quantity mentioned in methodology (iii). The specific and unambiguous language employed in Article 11.02 does not permit any such curtailment. 'Shrinkage as per formula' (language used in columns 21 and 32 of joint gas tickets) is,indisputably, "the quantity of gas shrinkable by the Buyer" within the meaning of Article 5.02, 5.03, 5.04 and 11.02. It is equally relevant to notice that column 33 (MGO applicable) clarifies that it is 80% the quantity mentioned in column 32 and that it does not say that it is 80% of the first methodology in Article 11.02. The floor guaranteeing the minimum payment and the ceiling mentioned in Article 5.04 (and which excess invites a penal rate) are worked out with reference to the quantity arrived at by applying the formula in Article 5.02 - and not on any other basis. All this shows that for ascertaining the MGO quantity whether for the purposes of Article 5.03 or Article 11.02, it is not necessary to cut down the purport and scope of methodology (i) in Article 11.02 and that it (MGO Quantity) can be ascertained with reference to the formula in Article 5.02 read with Article 5.03; similarly the 'ceiling' aforementioned can also be ascertained with reference to Article 5.02 read with Article 5.04 and Article 5.01.

Be that as it may, it is sufficient to say that adopting the interpretation sought to be placed by Mr. Lalitupon Article 11.02 would do violence to clear language in Article 11.02. When the Article says that the invoice shall be raised on the basis of any of the three methodologies mentioned therein, one cannot read the methodology (i) as having been evolved merely forascertaining the quantity under methodology (iii), thereby practically in effectuating methodology (i).

I am therefore, of the opinion that where the shrinkable quantity/ shrinkage as per formula mentioned in columns 21 and 32 happened to be higher than the quantity mentioned in column 10 (quantity actually shrunk/ consumed), the invoice has to be

prepared adopting the shrinkage formula figure. Mr. Vasisht submitted that he Debit Notes sent in the year 2008 were prepared adopting this basis alone. He also points out with reference to the correspondence that passed between the parties in the year 2008 that at no point of time had the Respondent disputed the correctness of the calculation on the basis of which the demand for additional amount was raised; only the basis/ methodology on which the additional amount was demanded was disputed and I am inclined to agree with Mr. Vasisht.

I may also mentionthat in view of the entries in Joint Gas Tickets which were jointly recorded and signed by both the parties, the distinction sought to be raised between 'gas made available' and 'gas actually processed' is only of academic interest. The Joint Gas Tickets recorded in column 5 the 'total gas GPC to IPCL', which means to total gas sent to and processed by the Respondent."

19. Regarding the Appellant's contention that the interpretation of the said provision by the Respondent amounts to re-writing of the contract, the learned arbitrator has rejected the same in the following words:

"This brings to me the submission of Mr. Lalit - a submission which gave me a pause that if shrinkage quantity i.e., the methodology (i) mentioned in clause 11.02 is treated as a basis for invoicing, it would make the words "or for the minimum guaranteed charges as per 5.03" superfluous and otiose. His submission is that the minimum guaranteed charges (in methodology (iii)) can never be higher than the amount chargeable for the shrinkage quantity (as per the methodology inasmuch as the MGO quantity is always 80% of the shrinkage quantity; If so, it is argued, the test of "whichever is higher" has no meaning. I cannot say that this submission of Mr. Lalit is without substance. But the paradox is that if I accept Mr. Lalit's interpretation/ submission, it would make the words "covering the quantity of gas utilized for process/ shrinkage as per the

formula provided in Article 5.02" (methodology (i) in Article 11.02) superfluous and otiose. In this context, my attention is invited by Mr. Vasisht to the Minutes of the Meeting between GAIL and IPCL held on 07.02.2000 (prior to the entering into the Contract) on the question of metering of gas consumed by the Respondent (at page 74 to 46 of CV1) which letter is also referred to in the Claimant's letter dated and thereafter with phase II, While dealing with phase II, it says:

"The guaranteed figure for C2 recovery is 90.5% as per IPCL letter dated 01.02.2000. Based on this C2 recovery factor is considered as 92% since it has been the industry practice to design for a recovery higher than guaranteed figure and also it is generally observed that recovery of higher hydrocarbons in actual plant operation is higher than guaranteed figure. Accordingly there are two alternatives for shrinkage formula."

After setting out the two alternative formulae, which the same are practically as are mentioned in Article 5.02 of the Contract, the Minutes of the Meeting proceeded to state:

> *"Billing to IPCL will be based on the higher of the following two values:*
>
> *a) Difference between rich gas and lean gas meters at GPC and lean gas meter at GGS-IV.*
>
> *b) As calculated by above mentioned formula."*
>
> *GPC stands for "Gas Processing Complex", belonging to the Claimant. GGS stands for "Gas Processing Complex", belonging to the Claimant. GGS stands for "Gas Getting Station" which too belongs to the Claimant.*

What I am trying to point out is that, at this stage of discussion between the parties (about seven weeks prior to the execution of the Contract on 30.03.2000) only methodologies (i) and (ii) in Article 11.02. It is not clear as to how the third methodology/

basis came to be mentioned in Article 11.02. It is relevant to notice that these Minutes of the Meeting were recorded after 01.01.2000, the date on which "supply of gas under this Contract shall be deemed to have commenced" (as per Article 2 of the Contract) and the parties were in the process of evolving the basis for determining the prince payable by the Respondent for the gas supplied. I am aware of the fact that the virtue of Article 16 of the Contract, the discussion held earlier to the date of Contract are not admissible for the purpose of interpreting the terms of Contract. But I am not basing my conclusion on the said letter but referring to it only by way of supplying the background to Article 11.02. Article 16 reads as follows:

"ARTICLE-16 PREVIOUS CORRESPONDENCE

16.01 All discussion and meetings held and correspondence exchanged between the BUYER and the SELLER in respect of the CONTRACT and any decision arrived at therein in the past and before the coming into force of the CONTRACT are hereby superseded by the CONTRACT and no reference of such discussion or meetings or past correspondence will be entertainedby either the SELLER or the BUYER for interpreting the CONTRACT or otherwise."

Now, I may go back to the basic issue.

While it is true that no words in the Contract can be treated as superfluous or unnecessary, I am faced with a tricky situation where I am obliged to disregard one of the three methodologies mentioned in Article 11.02. To wit, either I accept Mr. Lalit's interpretation and In effectuate methodology (i) or accept Mr. Vasist's interpretation and in effectuate methodology (iii). On this question, the following considerations make me prefer the interpretation urged by Mr. Vasisht in preference to the interpretation urged by Mr. Lalit.

A: Firstly, the objective behind and the significance of the concept of 'shrinkable quantity' specified in Article 5.02 ('the formula'). The objective behind prescribing this formula is that it was understood and stipulated as the optimum quantity whichthe Respondent is expected to consume/shrink. The minimumand the maximum were prescribed based on this concept viz., the consumption/ actual shrinkage should not go below 80% of the shrinkable quantity and it should not also go beyond 110% of the said shrinkable quantity. If the consumption was below 80% of the shrinkable quantity of the Respondent had necessarily to pay the charges based upon 80% of the shrinkable quantity; correspondingly, if the gas consumed/ shrunk was more than 110% of the shrinkable quantity, it had to pay charges at an enhanced rate which can be called penal rate as well. It is, therefore, clear that the shrinkable quantity specified in Article 5.02 is a central and an important concept in this Contract. It is for his reason that the Respondent was describing the formulae of shrinkage quantity contained in Article 5.02 as a theoretical formula in its letters dated 13.06.2008, 02.07.2008 and 09.07.2008. It may also be emphasized that the formula prescribed in Article 5.02 is repeatedly referred to as 'the formula' in the other provisions ofthe Contract viz., the last sub-para in articles 5.02 (b), 5.03, 5.04, 10.02 and 11.02. This repeated reference to the formula in Article 5.02 indicates its central significance.

B: If the objective behind the aforesaid formula of shrinkable quantity is of such central importance in the Contract, it is only just and proper that the Respondent honours the said commitment by observing and implementing the 'whichever higher' basis prescribed by Article 11.02. Article 11.02 prescribes three methodologies of which the first one is the 'shrinkable quantity' as per the formula in Article 5.02. The contents of the Minutes of the Meeting dated 07.02.2000 though not strictly admissible as mentioned herein above, yet furnishes the background and the reasons for which the particular formula in Article 5.02 was stipulated in the Contract.

C: As against the central importance for the formula relating to shrinkable quantity, the concept of minimum guarantee is of far less importance. Faced with the choice, the language and spirit behind the contract impels me to accept the interpretation placed by the Claimant upon Article 11.02 in preference to the interpretation place by the Claimant upon Article 11.02 in preference to the interpretation contended for by the Respondent.

For the above reasons, I am of the opinion that the Respondent was bound to pay the charges in accordance with the 'whichever higher' basis among the three methodologies specified in Article 11.02. The demands for the higher amounts raised by the Claimant in the year 2008 were, therefore, valid and in accordance with the terms of the Contract, subject, of course, to the plea of limitation which I shall deal with presently. Accordingly, issues 2 and sub-issues (a) and (b) of issue 3 are answered in favour of the Claimant but subject to the plea oflimitation as discussed hereinafter."

20. The learned Single Judge, taking note of the contentions raised by the Appellant, rejected the same in the following words:

"17. A reading of the above would clearly show that the Arbitrator has given primacy to "whichever is higher" basis mentioned in Article 11.02 for the payment for the gas supplied by the respondent to the petitioner. This being an interpretation of the Contract by the Arbitrator, which in no manner can be said to be arbitrary or fanciful, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

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23. I have considered the submissions made by the learned senior counsels for the parties. While theoretically the learned senior counsel for the petitioner may be right in his submission that the

quantity of Gas made available by the respondent may vary from the quantity of Gas actually processed by the petitioner, a perusal of the Joint Gas Tickets shows that the parties have proceeded on the basis that there was no such difference in the two quantities. The Arbitrator has also observed so in the Impugned Award in the following words:-

> *"I may also mention that in view of the entries in Joint Gas Tickets which were jointly recorded and signed by both the parties, the distinction sought to be raised between 'gas made available' and 'gas actually processed' is only of academic interest. The Joint Gas Tickets record in column 5 the 'total gas GPC to IPCL', which means the total gas sent to and processed by the Respondent."*

24. I find no reason to disagree with the above observation of the Arbitrator. I may only note that if the above quotation is disputed, then the parties have no way of working out even Clause 5.04 of the Agreement, however, it is an admitted case that the same was worked out and the payment made by the petitioner for the excess quantity of gas utilised by the petitioner.

25. For the above reason, I do not find any merit in the submission made by the learned senior counsel for the petitioner that Article 11.02 of the Agreement is not workable due to certain information being not recorded in the JGT.

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32. I am unable to agree with the said submission of the learned senior counsel for the petitioner. In the present case, Article 11.02 of the Agreement clearly provides that the petitioner was liable to pay the higher of the three figures mentioned in Article 11.02 of the Agreement. By mere failure of the respondent to raise the invoices strictly in accordance with Article 11.02 of the Agreement, it cannot be said that a new Contract came into being between the parties."

21. The findings of the learned arbitrator are purely dealing with aspects that are exclusively within his domain. These findings are not just based on facts and evidence led before him, but is also in relation to the interpretation of the terms of the Agreement. The law does permit the Arbitrator to interpret the contract, whenever the workability is in dispute. Apparently, originally the parties had structured the contract in such a manner that there were to be multiple meters and the quantity of gas processed was to be measured independently. However, what was intended at beginning was not actually put into operation. The format of the invoice was also never put in practice and the parties adopted a modified format. Nevertheless, the irrefutable fact remains that the joint gas tickets were jointly signed by the parties. This undisputed document was made use of for the purpose of arriving at the figures that were required for raising the invoices in terms of the Agreement. In this factual background, learned Arbitrator proceeded to evaluate the application and relevance of the figures captured in the Joint Gas ticket for the purpose of invoicing, as envisaged under Article 11.02 of the contract. Since the Appellant did not dispute its applicability, the only question that was required to be considered, was whether there was any substance or foundation for applying the formula provided in Article 5.02.

22. The learned Arbitrator taking note of the communications exchanged between the parties, observed that only methodologies (i)&(ii) in Article 11.02 were discussed prior to the execution of the contract, indicating the intent of the parties. Yet, he did not solely rely upon the same for the purpose of interpreting the contract. Instead, he proceeded to delve into the question of the objective behind, and the significance of the concept of

"shrinkable quantity", specified in Article 5.02. Having appreciated the central scheme of the Agreement and the concept of the formulae of shrinkage quantity contained in Article 5.02, he concluded that implementing the "*whichever higher basis*" prescribed under Article 11.02 should be in accordance with the formula in Article 5.02, stipulated in the contract. Once the arbitrator determined the applicability of the formula, the figures in the joint gas ticket- which are indicative of shrinkable quantity, prevailed upon the Arbitrator to hold that the Appellant's debit notes are in accordance with "*whichever higher*" basis specified in Article 11.02.

23. The learned Single Judge has also examined the terms of the contract and concurred with the findings arrived at by the learned arbitrator. The learned Single Judge has further noted that though theoretically, the quantity of gas made available by Respondent could vary from the quantity of gas actually processed by the Appellant, however there was no actual difference in the same, as the entries in the joint gas ticket-that were jointly recorded, were not disputed. Thus, there are concurrent findings on facts and on interpretation of the contract.

24. One of the key questions is whether the interpretation given by the Arbitrator can be impugned under Section 34 of the Act. The learned single judge relied upon the decision of the Supreme Court in ***Associate Builders (supra)***, wherein it has been held that, *"the construction of terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair mind need or reasonable person could do"*. In the said judgment, the Supreme Court referred to the earlier judgments in the case of

Mcdermott International INC vs. Burn Standard Company Limited and Ors, (2006) 11 SCC 181, wherein it has been held that ***"once, thus it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award".*** In ***MSK Projects India (JV) limited vs. State of Rajasthan, (2011) 10 SCC 573,*** the Supreme Court has held that if an Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with the matter not allotted to him, he commits a jurisdictional error.

25. In ***Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran (2012) 5 SCC 306*** the Apex Court has held thatif a clause was capable of two interpretations and the view taken by the arbitrator was clearly a possible one if not a plausible one, it is not possible to say that the arbitrator had travelled outside his jurisdiction or that the view taken by him was against the terms of the contract. In the case of ***NHAI vs. Progressive-MVR(JV), (2018) 14 SCC 688,*** the Supreme Court after considering catena of judgments, held that even when the view taken by the arbitrator is a plausible view, and / or when two views are possible, a particular view taken by the Arbitral Tribunal, which is also reasonable, should not be interfered with, in proceedings under Section 34 of the Act. In ***Maharashtra State Electricity Distribution company Ltd. Vs. Datar Switchgear Ltd., (2018) 3 SCC 133,*** the Court has held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrator on the basis of evidence on record are not to be scrutinized as if the Court was

sitting in appeal.

26. Mr. Kuhad candidly agrees to the above noted proposition and also concurs that under Section 37 Court has a limited scope of enquiry for interference. However, he submits that Arbitrator travelled beyond the contours that have been laid down by the Apex Court in ***ONGC vs. Western Geco International Ltd., 2014 9 SCC 263 and Associate Builders vs. DDA (supra).*** In our opinion this is not the case. The findings and interpretation of the Agreement, rendered by the Arbitrator were within the domain of the Arbitrator. The observations of the Arbitral Tribunal on the issue relating to readings available in the Joint Gas ticket and their relevance are pure findings of fact, and if we were to interfere with the award, it would amount to re-appreciating of evidence and interpreting the Agreement, which is impermissible. The Award of the Arbitral Tribunal has been affirmed by the learned Single Judge, after dealing with each and every argument raised by the Appellant in detail. We permitted Appellant's counsel to argue the matter at sufficient length, and the hearings spanned over days, yet no perversity in the findings of the Arbitrator or in the approach of the learned single judge, has been brought to light.

27. Mr. Kuhad also relied upon the decisionof the Supreme Court in ***Transmission Corporation of Andhra Pradesh Ltd. and Another vs. GMR Vemagiri Power Generation Ltd and Anr., (2018) (3) SCC 716*** and argued that a commercial contract cannot be interpreted in a manner so as to arrive at a conclusion that is in complete variance of what may have been originally the intent of the parties. In particular, the observations made in paragraph 25 and 26 therein, which reads as under:

"25. In the facts and circumstances of the present case, there can be no manner of doubt that the parties by their conduct and dealings right up to the institution of proceedings by the respondent before the Commission were clear in their understanding that RLNG was not to be included within the term "Natural Gas" under the PPA. The observations in GedelaSatchidanandaMurthy [GedelaSatchidanandaMurthy v. Commr., Deptt. of Endowments, (2007) 5 SCC 677] are considered apposite in the facts of the present case: (SCC pp. 688-89, para 32)

> *"32. ...'The principle on which Miss Rich relies is that formulated by Lord Denning, M.R. in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd., 1982 QB 84 : (1981) 3 WLR 565 (CA)] , QB at p. 121:*
>
> ***"… If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it—on the faith of which each of them—to the knowledge of the other—acts and conducts their mutual affairs—they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not—or whether they were mistaken or not—or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."***

26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a

situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in Satya Jain v. Anis Ahmed Rushdie [Satya Jain v. Anis Ahmed Rushdie, (2013) 8 SCC 131 : (2013) 3 SCC (Civ) 738] , as follows: (SCC pp. 143-44, paras 33-35)

"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock [Moorcock, (1889) LR 14 PD 64 (CA)] . This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same….."

(Emphasis supplied)

28. The proposition advanced by Mr. Kuhad cannot be disputed and indeed, the principle of business efficacy while interpreting the contract is normally invoked only if it is necessary to give efficacy to the contract. However, we are unable to appreciate as to how the said principle would advance the case of the Appellant. Here, the learned arbitrator has not introduced a term in the agreement by way of implication. The viability and feasibility of the readings recorded has been given effect to by interpreting the clauses. He proceeded to apply Article 11.02, which aspect-as noted earlier, is not in

dispute. The interpretations advanced by both parties were considered and the contention of the Respondent was upheld, having regard to several factors discussed above. This interpretation does not in any manner vary the understanding of the parties as originally arrived at. Since the Agreement originally contemplated the recording of meter readings in a different fashion, than what was actually operationalized, the learned arbitrator has given an exposition, having regard to the true intention of the parties, which to our understanding, does not violate the intendment of the parties or any of the term of the Agreement in as much, as, one of the methodologies provided in Article 11.02 would not become superfluous and, therefore, we are not inclined to interfere in the same.

2. Whether there is any inconsistency in the pleadings of the Respondent? If so, its effect?

29. Mr. Kuhad has laid much emphasis on the point that during the course of oral submissions, the Respondent did a complete somersault in its arguments and adopted a completely new stand contrary to what was set up by them in their pleadings and evidence. At the later stage, Respondent submitted that the quantity of gas supplied at the Point of Onward Deliver was to be treated as the quantity of Gas Actually Processed. Further, the quantity Supplied as recorded at the Point of Onward Delivery also had to be treated as the quantity of Gas Made Available. He argued that the new case set up orally and recorded in the written submissions, has no basis in the pleadings or in the evidence.

30. We are unable to agree with Mr. Kuhad on this aspect as well. The

Respondent's stand is that the gas passing through the point of Onward Delivery would eventually reach the inlet point at the Appellant's plant and therefore, Gas Actually Processed and Gas Made Available are one and the same. Mr. Mehta, learned senior counsel for the Respondent, drew our attention to the evidence led by the parties on this issue and referred to the affidavit of Mr. A.K. Saxena, who appeared on behalf of GAIL and *inter alia* deposed by way of affidavit in examination chief to the following fact:

> *"16. That I submit that the Fortnightly Joint Gas Tickets, the supporting documents of invoices generated while raising Exhibit PW- 1/3 provisional invoices for each fortnight, are comprehensive and contains all necessary calculations such as (i) shrinkage as per formula, (ii) actual shrinkage, (iii) MGO applicable, (iv) 110 of calculated shrinkage, and (v) excess quantity. The said Fortnightly Joint Gas Tickets had been served to the Respondent when Exhibit PW - 1/3 provisional invoices were actually delivered to it, which had been agreed to and signed by the Respondent. That I submit further that it is evident from the Fortnightly Joint tickets that the gas processed/actual shrinkage quantity has always been recorded.*
>
> *Copies of the said Fortnightly Joint Gas Tickets have been annexed with the Rejoinder to the Written Statement as Annexure - P26 (Colly) and the same may be marked as Exhibit PW -1/4. (Colly)."*

31. During the course of cross examination, he *inter alia* deposed as under:

> *"Q.2 Please refer to Para 16 of your Affidavit. The second sentence in that paragraph states that the said fortnightly Joint Gas Tickets have been served to the respondent, when Ext. P-1/3 provisional invoices were delivered to the respondent. When you refer to the fortnightly Joint*

Gas Tickets, are you referring to Annexures Ex.P-26 (Colly.) or Annexures Ext.P- 28(Colly.)?

Ans. Along with the provisional invoices, we served upon the Respondent Annexure P-28, which are the signed Joint Gas Tickets.

Q.3 Did you serve the Joint Gas tickets comprising Ext. P-26 upon the Respondent?

Ans. We have not served Ext.P-26 along with the provisional invoices or at any other time."

32. Further Mr. Dinesh Kumar S, another witness who appeared on behalf of the Respondent, deposed in his affidavit as under:

"13. That I submit that the illustration of invoice given at Annexure VII to the Exhibit PW - 1/1 GSA dated March 30, 2000 amply brings out the understanding between the parties thereto about the Shrinkage Formula under Article 5.02 and billing and payment on 'whichever is higher' basis. Therefore, the billing could only be done on the 'whichever is higher' basis as contemplated under the terms of the Exhibit PW - 1/1 GSA dated March 30, 2000, which was agreed upon by both parties thereto.

14. That I submit that in terms of the Shrinkage Formula enshrined in Article 5.02 and also in terms of Annexure VII to the Exhibit PW -1/1 GSA dated March 30, 2000, shrinkable volume can be arrived based on the formula out of the GAS processed by the Respondent. The said formula also provides for the MGO payable by the Respondent based on the formula out of the GAS made available. Further, difference in measurement between the meters located at 'Point of Onward Delivery' and 'Points of Return Delivery' provide the actual GAS shrunk by the Respondent. The Respondent is required to pay for the higher of the three in terms of Article 11.02 of Exhibit PW-1/1 GSA dated March 30,2000.

15. That I submit that the pipeline totransport the GAS from the 'Point of Onward Delivery' to the Respondent's plant and from there to the 'Point of Return Delivery' is owned and maintained by the Respondent. The Respondent had been maintaining a data acquisition system to access and monitor the measurement data from the respective custody meters. Further, it is also the responsibility of the Respondent to keep record of GAS actually processed at its plant and the Claimant's responsibility ends with making available GAS for processing at the 'Point of Onward Delivery'. The Respondent has to process such GAS and return the balance quantity at the 'Point of Return Delivery'.

16. That I submit that quantity of GAS actually processed at the Respondent's plant on each day has always been recorded and kept by the parties which is evident from Exhibit PW - l/29and PW - 1/4 Fortnightly Joint Gas Tickets."

33. During his cross-examination he deposed as under:

"Q.10. May I invite your attention to para 8 of your Affidavit-evidence. The last sentence in the said paragraph reads: " that I further submit that the 'gas processed' is required to be equal to 'gas made available but may or may not be equal to the 'gas made available' at the point of onward delivery". On what basis do you say that the 'gas processed' is required to be equal to 'gas made available'?

Ans. In normal course of operation, ideally whatever quantity is made available to RIL the total quantity they are supposed to process. That is why I say that the gas processed is required to be equal to gas made available.

Q.11 I ask you on the basis of what particular record do you say so?

Ans. *I refer to clause 5.03 of the contract Ext.PW.1/1 where it is mentioned that "the quantity of gas made available by the seller to the buyer on any day shall be arrived at by summation of themeasurement taken at the points of onward delivery for supply of Feed Gas and the measurements taken at the meter installed onthe bye-pass pipeline connecting Feed Gas and Return Gas. In case the buyer is unable to take all the quantity of gas made available by the Seller on any day for processing, the quantity of gas made available by the Seller, as above,shall be considered legating the MGO charges as provided herein above". The above extract from the contract is the basis for my aforesaid statement.*

Q.12. *The above extract refers to meter installed on the bye-pass pipeline. Can you say whether any readings of such meter are reflected in the Joint Gas Tickets and if so, in what manner?*

Ans. *The readings reflected in the Joint Gas Tickets are the total Gas GPC (Gas Processing Complex) to IPCL. The readings of the meter installed on the bye-pass pipelines are not separately and specifically mentioned in the Joint GasTickets. However, the readings of the meter installed on the bye-pass pipeline as and when recorded are included in the total gas GPC to IPCL.*

Q.13 *I call upon you to show any such record of the readings of the meter installed on the bye-pass pipeline as and when recorded and included in the total gas GPC to IPCL and whether such record was ever communicated to the respondent?*

Ans. *The fact of the matter is that the readings of meter installed on the bye-pass pipeline have been zero. That is why there is no separate record available of such readings in the Joint Gas Tickets. The readings recorded in the Joint Tickets as total gas to RIL were same as recorded by the onward delivery meter.*

Q.14 I suggest it to you that as a matter of fact there is no such meter installed on the bye-pass pipeline. What do you say?

Ans. I do not agree. There is a meter installed on the bye-pass pipeline."

34. Further the Appellant's witness Mr. Kishore Jhalaria, in his affidavit by way of evidence deposed as under:

"16. I say that the Respondent's Gas cracker complex was built at aconsiderable cost on the assurance of 8-9 MMSCMD of gas tobe made available by the Claimant. However, due to lower gas produced by ONGCL and other reasons, right from the first day of operation, the actual gas supplied by the Claimant to the Respondent has been far lower than the assured supply and the Respondent's facilities were starving of its primary feed viz. Natural Gas. It is therefore unthinkable that the Respondent would not fully utilize the gas made available to it and leave even the smallest quantity of gas unused and un-utilised."

35. When he was cross examined he deposed as under:

"Q.No.39 Was there any requirement of preparing and signing the Joint Gas Tickets, under the contract dated March 30, 2000?

Ans. I could not locate such a requirement in the said contract.
(The witness gives his answer after going through the contract for sometime).

Q.No.40 Would I be correct in saying that such Joint Gas Tickets are required to be prepared and signed in terms of Clause 11.06 of the said contract?

Ans. Yes.

Q.No.41 Is it correct that once the Gas passes through the

onward delivery meter, it is received at the R.I.L. Plant through the pipeline owned by RIL?

Ans. *Over a period of time, the gas which passes through from onward delivery meter is indeed received at the Respondent's plant.*

Q.No.42 *What does the Respondent do with the gas received at the Respondent's Plant in the manner referred to in the previous question?*

Ans. *The gas received at the Respondent's plant is used to extract CO2, ethane, propane and higher hydrocarbons present in the gas received. The remaining portion of the gas is sent back to the claimant.*

Q.No.43 *Would I be correct in assuming from the first sentence of your answer to the previous question that the action taken by the Respondent at| its plant on the gas can also, be referred to as processing the gas?*

Ans. *Yes.*

Q.No.44 *Is it correct that the gas received by the Respondent ex- Hazira under the Gas Supply Agreement dated November 9, 2001 is also processed in the same manner as mentioned in your answer to question No.42, at theRespondent's plant?*

Ans. *Yes.*

Q.No.45 *Is it correct that after processing the gas received Ex- Hazira, the remaining gas is returned to Hazira?*

Ans. *Yes."*

36. From the above, it is clearly discernible that the Respondent has maintained its stand all throughout that the Gas Supplied was Gas Processed

for the purpose of raising invoices in terms of Clause 5.02. Furthermore, the Sole Arbitrator has identified the real controversy between the parties and given his findings on the key issues after appreciating the entire agreement and it does not appear that the findings rendered are beyond the pleadings of the parties. We are unable to see any inconsistency in the stand of Respondent as has been suggested by the Appellant.

3.Whether the doctrine of estoppels- waiver restricted the Respondent from making a claim before the arbitrator?

37. Mr. Kuhad has argued that the format of invoice provided for under Article 5.03 and 11.02 was deviated from the very first invoice. The invoice to be raised by the Respondent had to necessarily reflect all the values mentioned in Article 11.02. He contended that a bare perusal of the invoice issued and the joint gas ticket bears out that from the very first day, the value of the quantity of Gas Actually Processed was not recorded and consequent thereto, the derivative values of quantity actually shrunk as per formula, value of gas processed and quantity to be taken for billing were also neither recorded nor supplied. He argued for the purpose of debit notes, the baseline value of the quantity optimally consumable i.e. maximum consumption permissible-100% has been worked out by Respondent not with reference to the input value of the quantity of Gas Processed, but with reference to the input value of the quantity of Gas Supplied.

38. He further argued that since the Respondent took a conscious decision to raise the invoices based on the actual consumption, the Appellant cannot now be asked to pay as per the original understanding. This would lead to

anomalies, as the Appellant has irreversibly altered its position and is now not in a condition to do anything to match the proposed formula quantities. If the Respondent, at any time prior to the issuance of debit notes, disclosed its intention of charging for the quantity of gas arrived at by applying the shrinkage formula to the quantity of gas supplied and measured at the Point of Onward Delivery, on a "*whichever higher*" basis, the parties would have recorded the "gas actually processed" to arrive at the theoretical shrinkage from Article 5.02 (a) sub clause (ii). In such an event, whenever the Agreement fell for renewal, Appellant would have ensured that the contractual provisions are suitably framed to avoid anomalies and hardships, resulting on account of construction of the Agreement, now proposed by GAIL. In support of his submission, he relied upon the case of ***Amalgamated Investment Property (in Liquidation) vs. Texas CommerceInternational Bank Ltd. (1982) (1) QB (84),*** wherein it has been held as under:

> *"If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it-on the faith of which each of them-to the knowledge of the other-acts and conducts their mutual affairs- they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not-or whether they were mistaken or not or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."*
>
> *"Conclusion*

The doctrine of stoppels is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: pro- B prietarystoppels, stoppels by representation of fact, stoppels by acquiescence, and promissory stoppels. At the same time it has been sought to be limited by a series of maxims: stoppels is only a rule of evidence, stoppels cannot give rise to a cause of action, stoppels cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties Q to a transaction proceed on the basis of an underlying assumption - either of fact or of law-whether due to misrepresentation or mistake makes no difference on which they have conducted the dealings between them- neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands: " (Pg. 119-122) stoppels by"

39. He also relied upon *Chitty on Contract 32nd Edition Volume-I (General Principle)* in respect of equitable mitigations to contend that equitable doctrine can be applied taking into account the conduct of the Respondent and its effect on the Appellant. He also relied upon the case of ***ING Bank NV vs. Ros RocaSA (2011) EWCA civ 353,*** the relevant portion extracted here in below:

"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: K Lokumal& Sons (London) Ltd v Lotte Shipping Co

Pty Ltd (The August Leonhardt) [1985] 2 Lloyd's Rep 28; Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord) [1988] 2 Lloyd's Rep 343; Treitel, The Law of Contract, 9th ed (1995), pp 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

Later in the same passage, he referred to "estoppel by acquiescence", pp 913-914:

"That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890. Lord Wilberforce said, at p 903, that the question is 'whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known...' at p 903. Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence."

Lord Steyn rejected the suggestion that the two concepts should be treated as aspects of "one overarching principle", in order not to blur "the necessarily separate requirements, and distinct terrain of application" of the two kinds of estoppel"

40. Mr. Dhruv Mehta, on the other hand, argued that the doctrine of waiver in the realm of contracts has to be examined in the context of Section 63 of the Contract Act, 1872. Unless there is a clear intention to relinquish a right that is fully known to a party, it cannot be said to have waived it. He further submitted that without prejudice, even if such is the situation, since there is

public interest involved, waiver cannot be given effect to as it would be contrary to such public interest. The Respondent is a public-sector entity. The question of waiver or acquiescence is a question of fact, and the finding on this aspect by the Arbitral Tribunal, which has been upheld by the learned Single Judge cannot be questioned in an appeal under Section 37 of the Act. In support of his submissions he relied upon the judgment of this Court in ***Rail Land Development Authority vs. Parsvnath Developers Ltd. (2019) SCC OnLine DEL 7609*** and ***All India Power Engineer Federation and Ors vs. Sasan Power Limited, (2017) 1 SCC 487,*** wherein the Court referring to its earlier decision has held that waiver is an intentional relinquishment of a known right and therefore unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to have waived it. It has been further observed that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to, if it is contrary to such public interest. The learned Arbitrator has rejected the plea of estoppel and waiver, holding that the facts placed before the Tribunal does not attract the ingredients relating to estoppel and there is also no evidence that the Respondent had consciously abandoned any part of its claim so as to attract the principle of waiver. The findings of the learned Arbitrator on this issue are as under:

> *"Issue No.4; Estoppel; A Plea of estoppel has been raised in the written statement (para E of the preliminary submissions at page 6). A plea of estoppel applies where the person to whom the representation is made is not aware of the true state of facts and acts, in good faith on the representation and alters his position in such manner that if the representation is withdrawn, /he will*

suffer loss/ prejudice. In this case, no facts are placed before the Tribunal attracting the above ingredients of the rule of estoppel.Issue No.4 is accordingly answered against the Respondent.

Issue 5; Waiver; The plea of waiver is contained in the very same para E of preliminary submissions at page 6. Waiver contemplates a conscious abandonment of a particular claim. In this case there is no evidence that the Claimant had consciously abandoned any part of its claim. Therefore, the issue is also answered against the Respondent."

41. The learned single judge has also confirmed the findings of the arbitrator, and held as under:

"28. I am in agreement with the above findings ofthe Arbitrator. In the present case, merely because the respondent has failed to raise the invoices strictly: in accordance with Article 11.02 of the Agreement, it cannot be said that the respondent either waived its rights to do so or is estopped from doing so. It is not denied bythepetitioner that the invoices in question weremarked"provisional". As held by the Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. & Ors., (1979)2 see 409, 'waiver' is aquestion of fact and it must be properly pleaded and proved. 'Waiver' means abandonment of aright and its basic requirement is that it must be an intentional act with knowledge. In the present case, the respondent by its conduct of not raising the invoices strictly in accordance with the Article 11.02 ofthe Agreement, cannot besaid to have waived its rights under Article 11.02 of the Agreement.

29. Estoppel again is arule of evidence and can be invoked when one person has by his declaration, act or omission caused or permitted another person to believe athing to be true and to act upon that belief. In the present case, I do not find that by mere failure to raise invoices strictly in accordance with Article 11.02 of the Agreement, the respondent gave any such representation that this Article would not be invoked in future thereby giving,

riseto a plea ofestoppel against it.

30. In any case, plea ofwaiver and estoppel is matter of inference to be drawn from the evidence led by the parties. They are question of fact. As has been repeatedly warned, including in the case of ***Associate Builders*** *(Supra), when the Court isapplying"public policy" test to an arbitration award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected. A possible view of the Arbitrator on facts has to be accepted as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon and for the inferences to be drawn thereform."*

42. The findings returned by the Arbitrator on the plea of waiver and estoppel, are purely factual in nature. After appraisal of the evidence led by the parties, these factual evidences have not been interfered by the learned single judge and we sitting in appeal, are not inclined to interfere with the same.

43. In view of aforesaid discussion, we find no ground to interfere in the impugned judgment. The appeal is dismissed along with all the pending applications. The Respondent shall be entitled to recover the cost of this litigation from the Appellant which is assessed at Rs.3 lacs.

SANJEEV NARULA, J

VIPIN SANGHI, J

FEBRUARY 17,2020.
v/nk