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(1997) 04 GUJ CK 0015

In the Gujarat High Court

Gujarat State Petroleum Corporation Ltd. APPELLANT

Vs

Gujarat Gas Company Ltd. RESPONDENT

Date of Decision : 25-04-1997

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 3
Constitution of India, 1950 — Article 227

Citation : (1997) 2 GLR 1765

Hon'ble Judges : Sharad D. Dave, J

Bench : Single Bench

Judgement

S.D. Dave, J.—The Appeal From Order came to be admitted by me, yesterday, i.e., 24th April 1997. I have also granted the interim relief in terms of Para 5(B) on the Civil Application. This had happened at about 4-45 p.m. After signing the above said orders, there was a prayer coming from learned Counsel Mr. Shah, saying that, my orders granting the interim relief should be the reasoned orders. Acceding to this request, I had said yesterday, in my orders that, I shall be recording my reasons for the above said orders, today, i.e., 25th April 1997.

2. Accordingly, I proceed to record my reasons for my orders granting the interim relief on the Civil Application in terms of Para 5(B), after admitting the Appeal From Order.

3. There was, at the initial juncture, a debate as to whether the appeal itself would merit admission. The debate was based upon a contention coming from learned Counsel Mr. Shah that, if the appeal itself does not merit admission, there would absolutely be no question for me to grant the interim relief. It would, therefore, be necessary to point out in brief the factual and legal position under which I had come to the conclusion that the Appeal From Order required admission.

4. The appellant before me, Gujarat State Petroleum Corporation Ltd., happens to be the original defendant. The respondent No. 1 Gujarat Gas Co. Ltd., happens to be the original plaintiff. The respondent No. 2 Nico Resources Ltd., happens to

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be the original defendant No. 2. The plaintiff who is the respondent No. 1 before me is a Company duly registered under the provisions of the Companies Act, 1956, being controlled by a Group, known as, Arvind Mafatlal Group. The respondent No. 2 Company which figured as the defendant No. 2 before the Court below is incorporated in Canada as per the laws prevailing in that country and had entered into a joint operating agreement with the appellant-defendant No. 1 Company for the purpose of exploration, operation and development of oil and gas resources of Hazira Gas field along with certain other oil fields in the State of Gujarat. There is a contract dated 18th February 1995 between the parties whereunder the appellant-original defendant No. 1 had agreed to sell and deliver minimum 50,000 standard cubic meter gas per day to the respondent No. 1 Company, with an agreement that the said quantity can be extended upto 1,00,000 standard cubic meter gas per day at the agreed price of Rs. 3/- per standard cubic meter. According to me, two articles of the aforesaid agreement are relevant for the purpose of deciding the matter on hand. They run thus:

5.01. The Seller agrees to sell and deliver minimum 50,000 standard cubic meter per day, which can be extended upto 1,00,000 standard cubic meter per day, for the same price as referred to in Article II.

5.02. If the SELLER is capable to supply the gas in excess of 1,00,000 cubic meter (one lac cubic meter) per day, first right of refusal shall be accorded to the BUYER before offering to any other party provided the terms of purchase proposed by the BUYER are not less favourable to the SELLER than those that may be offered by any other buyer for such excess gas. The SELLER further assures and confirms that, it is in a position and capable of supplying at least 50,000 cubic meter per day during the validity of this contract and shall provide to the BUYER a copy of the report of the survey conducted by an independent agency along with all supporting data, documents and particulars in this behalf as and when carried. It is also agreed that the buyer can carry out if deem fit so similar survey and for that purpose the seller shall extend all assistance and shall also provide all informations, data and particulars etc., as may be necessary.

5. The respondent No. 1 plaintiff had gone before the Court below, by filing the Civil Suit No. 1520 of 1997. The Notice of Motion was taken out and the Application at Exh. 5 was presented. The prayer therein was that, the defendants, namely, the appellant before me, and the respondent No. 2 should be restrained by interim injunction from accepting offers of anybody else, other than the plaintiff-Company, for the supply of additional quantity of gas, "till the terms and conditions of such offers are communicated to the plaintiff and the plaintiff is given an opportunity to submit the terms and conditions and the same are found by the parties hereto to be less favourable to the defendants".

6. The above said prayer appears to have been based upon the consideration which the original plaintiff wanted to place upon Article 5.02. The Court below has accepted the case of the respondent No. 1- plaintiff and accordingly, there have been the orders dated 31st March 1997. These orders would go to say that,

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looking to the facts and circumstances of the case and with a view to see that the contractual rights of the plaintiff are not taken away, ad-interim injunction in terms of Para 17(a) was required to be granted, for the limited period upto 17th April 1997. It should be appreciated that the above said orders came to be passed ex parte. In other words, before pronouncing the above said orders in favour of the original plaintiff and against the original defendants, the opportunity of being heard by issuance of a show-cause notice was not afforded to the original defendants.

7.1 have indicated earlier that, there was a lengthy debate on the question as to whether, the present appeal merits admission at all. I have admitted the appeal and the question thereafter was in respect of according the interim relief as prayed for in the Civil Application. Nonetheless, when there was a tenacious contention coming from learned Counsel Mr. Shah that the appeal itself does not merit admission and that the case would not fall within the category of the "rarest of rare cases", it would be appropriate if the consolidated reasons are given for the admission of the appeal and for according of interim relief as prayed for by the applicant in the Civil Application for stay.

8. It is indeed, true that, it has been said that, ordinarily, the party against whom the ex-parte ad-interim injunction orders have been issued by the Court, could go before the very same Court and can urge before the very same Court, either for vacation of the said orders or for the requisite modification in the same. But, it is not in dispute and learned Counsel Mr. Shah also has not disputed before me that, the party who feels aggrieved, can approach the higher forum by filing the Appeal From Order. The question, therefore, is not in respect of the maintainability of the Appeal on the ground that the appellant before me had the alternative remedy of approaching the very same Court either for the vacation of the said orders or for the modification of the same. The question, precisely, before me was, as to whether, in the facts and circumstances of the case, I could have come to the conclusion that, it would be a case falling within the category which oblige me to admit the appeal and later on, to proceed for considering the question regarding the according of the interim relief.

9. Firstly, making a reference to Andhra Pradesh High Court pronouncement in the case of E. Managamma Vs. A. Muniswamy Naidu, , it requires to be pointed out that, under Order 43 Rule l(r) of the Code of Civil Procedure, the right of appeal has been given to the affected party. This right is not only against the final orders of injunction to be passed by the Court below after hearing both the sides, but this right is also conferred upon the aggrieved party when the party feels aggrieved by an ex parte order of injunction issued by the Court below under Order 39 Rule 1, without hearing the affected party. It is made clear in this pronouncement that, the injuncted party can go to the Appellate Court against the ex parte orders even without first going to the original Court. The pronouncement makes it clear that, so long as the Statute so wills the Courts have to give effect to the intent of the Legislature. This pronouncement of the

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Andhra Pradesh High Court rendered way back in the year 1983, makes clear or a point which is otherwise also appears to be clear, upon a plain reading of the relevant provisions of Order 43 Rule l(r). Thus, it is not incumbent upon the affected party which has been injuncted by the Court below to approach the very same Court and that the party has got a statutory right to avail of the statutory remedy by approaching the higher forum by taking out the Appeal From Order. This is true in respect of the final orders of the Court below after hearing both the sides as well as against those orders which are passed in favour of the plaintiff and against the defendant, ex parte, i.e., without the issuance of a show-cause notice and without hearing the affected injuncted party.

10. The next pronouncement is of this Court in the case of Patel Jasmat Sangaji Padalia Vs. Gujarat Electricity Board, Baroda and Others, . This is the decision on which the learned Counsels appearing on behalf of all the three parties have placed heavy reliance. Learned Counsel Mr. Kamal Trivedi has pressed in service this pronouncement for the purpose of buttressing his contention that, there could be some cases in which this Court can interfere while entertaining the Appeal From Order and that, even ex parte ad-interim orders could be granted by this Court, at the time of admission of the Appeal From Order. Learned Counsel Mr. Nanavati has also pressed in service this pronouncement of this Court, precisely, for buttressing the very same contention. Learned Counsel Mr. Shah, on the other hand, wants to utilise the say coming from this Court in his favour by urging that, this should be done and could be done only in respect of the rarest of rare cases. The other limb of the contention coming from learned Counsel Mr. Shah is that, the case before me cannot be said to be falling within this category. This part of the contention coming from learned Counsel Mr. Shah could be dealt with, at a later juncture. Nonetheless, upon a reading of the above said pronouncement of this Court, it is abundantly clear that, it has been said that, in the rarest of rare cases, this Court would admit such appeals and still more, in the rarest of rare cases, this Court would ex parte suspend the operation of the ex parte tentative injunctions ordered by the Court below. There is no question of the ex parte suspension of the operation of the ex parte orders granted by the Court below because, learned Counsel Mr. Shah is before me on a caveat and has been heard. In view of this situation, a careful reading of this pronouncement of this Court would lead to the conclusion that, in the rarest of rare cases, there could be the ex parte interference also by this Court. The question would be as to what are the cases which would fall within the category of the rarest of rare cases? In my opinion, with a view to decide the question as to whether a particular appeal or a case would fall within this category, the examination of the case of the parties emerging from the pleadings, the material made available to the Court below and the orders passed shall have to be considered. Unless this is done, this Court cannot come to the conclusion as to whether a given case on hand would fall within that category which has been described by this Court as rarest of rare cases.

11. I would prefer to emphasise that the question regarding a particular case or

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appeal falling within the above said category or not cannot be decided without having a careful look to all the particulars which I have indicated above. This repetition comes from me because of a specific reason. Learned Counsel Mr. Shah has repeatedly urged before me that the sole question before me would be as to whether the appeal could be said to be falling within the above said category and that the same cannot be decided on the basis of an examination of the material presented before the Court or upon the consideration of the agreement. According to learned Counsel Mr. Shah, it should appear apparently and clearly without much efforts possibly from the Memorandum of the Appeal that, the case falls within the above said category. I had expressed my inability to agree with learned Counsel Mr. Shah on this part of his submissions. I repeat my inability by saying that, it would not be possible for any Court to come to the conclusion as to whether a particular case falls within the above said category unless and until all the above said aspects of the case are examined by the Court under a careful look. Thus, it is clear that, I shall have to look to the literature which was presented to the Court below with the case of the original plaintiff and the reasoning adopted by the Court below while coming to the conclusion that, ex parte ad-interim orders were required to be given against the present appellant, i.e., original defendant No. 1 before the said Court.

12. Learned Counsel Mr. Shah prefers to be on his legs at this juncture to say that, he did not want to convey this, when he was arguing the matter yesterday, i.e., 24th April 1997. I do not find any reason to make a deviation from what I have said hereinabove. I distinctly remember the contention coming from learned Counsel Mr. Shah that the fact that a particular appeal would fall within the category of the rarest of rare cases should be apparent from the Memo of the Appeal.

13. The reliance was placed by learned Counsels Mr. Trivedi and Mr. Nanavati on the Supreme Court pronouncement in the case of Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors., 1993(2) GLH 778 (SC). The reliance was placed especially on Head Note "C", which has been extracted from paragraph 32 of the judgment. This part of the judgment of the Apex Court makes it clear that, by the CPC (Amendment) Act, 1976, a proviso has been added to Rule 3 Order 39, saying that "where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay". After having made a reference to this pronouncement, there was a contention coming from learned Counsels Mr. Trivedi and Mr. Nanavati that, in fact, such reasons have not been recorded. Learned Counsel Mr. Shah wanted to urge that, it would not be necessary for the Court below to record the reasons in a particular language and that the Statute can never prescribe the language in which the orders are to be couched. Learned Counsel Mr. Shah also wanted to urge that, a bare look to the orders under challenge and especially, the ultimate paragraph of the same would go to show that, such reasons have been recorded. 1 leave the question open for some time which could be taken up for

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consideration at an appropriate juncture. The Bombay High Court pronouncement in the case of Sopan Maruti Thopte and Anr. v.Pune Municipal Corporation and Anr., AIR 1996 Bom. 305 was also heavily relied upon by learned Counsels Mr. Trivedi and Mr. Nanavati, wherein a specific reference has been made to the say of the Supreme Court in the case of Morgan Stanley Mutual Fund v. Kartik Das, 1994(4) SCO 255. The said pronouncement of the Supreme Court lays down certain factors which should always weigh with the Court in the grant of the ex parte injunction. It has been said that, as a principle, ex parte injunction could be granted only under exceptional circumstances. Factor (g) pointed out by the Apex Court says that, general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court. I would prefer to leave the consideration of the facts on record for a while.

14. The Calcutta High Court pronouncement in the case of Dilip Kumar Biswas Vs. Kamalendu Chanda, was cited at the Bar by learned Counsels Mr. Trivedi and Mr. Nanavati, with a view to urge as to what would be the substantial compliance with the provisions contained under Order 39 Rule 3 of Code of Civil Procedure. It has been pointed out that, in that case, had the trial Court cared to consider the aspect of the matter, namely, to issue a notice to the other side and to wait for some time, there could have been no delay in giving notice of the application to the plaintiffs lawyer. It has been pointed out that, obtaining an ex parteorder behind the back of the adversary should not be encouraged.

15. There was a reliance on this High Court pronouncement in the case of P. Chidambaram, General Secretary, Gujarat Mazoor Panchayat and Others Vs. Joint Civil Judge (J.D.), Narol, Ahmedabad and Others, . It was indeed a petition under Article 227 of the Constitution. Naturally, therefore, this Court had said that the matter should be heard by the Court below on the very next date. But, while doing so, this Court has pointed out that, what the consequences of an ex parteorder would be and what would be the consequences of not passing such an ex parteorder but waiting for the other side to appeal, must be weighed by the Court below and only in exceptional cases, where the Court finds, for very good reasons, which it would be advisable for the Court to record in its order, it would be justified in passing an ad interim ex parteorder "of such a grave nature".

16. The Calcutta High Court pronouncement in the case of Kali Charan Shaw Vs. Kissen Lal Choudhury, spells out the duty of the Appellate Court. This has been done while making a reference to the provisions contained under Order 39 Rule 1 of the Code of Civil Procedure. This decision says that, if the trial Court has erred in granting or refusing an order of injunction, it would be the duty of the Court of Appeal to set aside such order and to make its own order and exercise its own discretion when the Court of Appeal is satisfied that there was no exercise of judicial discretion by the trial Court.

17. The above said case law, therefore, would go to show that, the party who has been injuncted by the Court below has got the twin remedies, namely, to appear before the very same Court on the next date of hearing and to urge

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either for the cancellation or the modification of the injuncting orders or to approach the appellate forum by presenting the Appeal From Order, even against the ex parteorders. It is clear that, ordinarily the Court which hears the Appeal From Orders against the ex parteorders issued by the Court, below, should not interfere in the said order lightly, but that exercise should be limited for that category of cases which can be said to be "rarest of rare cases". If the Court of Appeal wants to interfere ex parteagainst the ex parteorders of the Court below, a more cautious view would be required. It is clear that, when the Court proposes to pass the orders of ex parteinjunction under Order 39 Rule 3 proviso, the Court has to record the reasons for its showing own that the object of granting the injunction would be defeated by the delay and that the injunction, therefore, is required to be granted.

18. When the facts of the case are seen in the background of the above said legal position, I am of the opinion that, the Court below was at an error in its orders. The orders dated March 31,1997 which are on the anvil of this Court would go to show that, as recorded in the ultimate paragraph, it was the opinion expressed of the Court that, meanwhile, looking to the facts and circumstances of the case, with a view to see that contractual right of the plaintiff is not taken away, ad interim injunction in terms of paragraph 17(a) is required to be granted. The question is, whether the above said say of the Court below can be said to be providing the reasons as required under the proviso annexed to Rule 3 of Order 39 of the Code of Civil Procedure. The proviso makes it clear that the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. The Court below has not said so in the express terms. It is true that the Statute cannot/ does not expect a Court in all the cases to employ the same language, which has been utilised in the Statute. But of course, it should be apparent from the orders that the Court was live to the situation and the Court says so in its own language. Even accepting this proposition, it appears that the Court below has not said that the requirement of the above said proviso has been complied with.

19. Anyhow, my opinion that the present appeal requires to be admitted and the interim relief as prayed for by the applicant in the Civil Application requires to be granted, is not solely based upon the above said solitary technical aspect. My opinion is based upon a careful analysis of the Articles of Contract or the Agreement which were before the Court below along with other necessary literature.

20. Article 5.02 has been reproduced hereinabove. A reference to the same would go to show that, the first right of refusal is required to be accorded to the buyer (namely, the original plaintiff) before offering to any other party, provided the terms of purchase proposed by the buyer are not less favourable to the seller than those that may be offered by any other buyer for such excess gas. A plain reading of this Article would go to show that, the buyer, namely, the plaintiff was the customer or the buyer and that a first right of refusal has been accorded to

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them before the offer of sale of others is accepted for the additional quantity of gas. But this is subject to the proviso or a qualification, namely, that the terms of purchase proposed by the buyer are not less favourable to the seller. This could be done only if the appellant-defendant No. 1 would receive the offer from the original plaintiff and other prospective buyers. Not only the price rate, but very many other factors which would be guiding the business of selling the gas shall have to be considered. This cannot be done unless and until the offers are studied and weighed carefully. The above said Article does not provide the sequence in which the process should be adopted, initiated and completed by the appellant Company. AH what is apparent, both to a man of ordinary prudence, and to a judicial conscience is that, the first right would be of the original plaintiff and when there is a refusal on the part of the original plaintiff, the additional quantity of gas could be supplied to other buyers provided always that the terms of purchase by the other buyers are not less favourable to the seller. Putting very smoothly the idea behind the said Article on the proper construction of the same is that, the plaintiff Company who was the buyer of the gas from the appellant-defendant No. 1, should be provided with an opportunity of purchasing the additional quantity of gas provided what could they offer for the purchase of the additional quantity of gas is not on a lower strata or a pedestal than proposed by the other prospective buyers. This could be done as I have indicated earlier, only by perusing the offers of the prospective buyers and of the buyer under the contract, namely, the original plaintiff Company.

21. One or two communications which do not appear to be decisive, but appear to have some relevance, should be seen. The appellant, i.e., defendant No. 1 was required to send a communication dated 23rd September 1996 to the original plaintiff Company saying that, there was no natural gas offtake at all by them during the month of July 1996 and further during the month of August 1996, they had failed to fulfil the minimum offtake commitment as they could only withdraw 4.38 lacs m3 against the minimum quantity. It was pointed out that the above said was in breach of the Clause 5.03 of the contract. As I have said, this communication would not be a decisive factor, but the fact remains that the plaintiff Company was not able to have the offtake of the gas to the level prescribed under the Agreement. The communication dated December 12,1996 sent by the original plaintiff Company to the appellant speaks of the willingness and capacity of purchasing more gas subject to the availability and subject to an agreed cap on quantity. This communication would go to show that, though earlier they were not in a position to have the offtake of the agreed quantity of gas, there was an indication for the purchase of more quantity of gas, but that was also qualified by saying that, "there could be an agreed cap on the quantity".

22. The communication dated January 18, 1997 also requires a consideration. Probably, it was found in a meeting that the above said Article according first right of refusal to the original plaintiff Company was required to be done away with. Anyhow, this has not happened and the above said communication cannot be said to be a decisive one which would guide me in taking the final decision.

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Yet, the fact remains that, at one level, it was found by all concerned that such a clause was required to be deleted from the agreement.

23. The communication dated February 28, 1997 by the original plaintiff, i.e., Respondent No. 1 before me, requires to be studied carefully. This communication says that, their minimum requirement for the additional gas would be 7.5 lac CMD. The communication dated March 18/19, 1997 should not escape my notice because, under this communication, it was brought to the notice of the plaintiff Company that there are certain other buyers including the promoters, who have quoted the present price of Rs. 4.80/SCM at wellhead and the royalty, sales tax and other statutory levies shall to be borne by the buyer. It has been pointed out in this communication that, the appellant original defendant No. 1 would consider to sell an additional quantity of 2,00,000 cubic metres per day of natural gas for two years with no supply guarantee thereafter. The plaintiff was put to the notice and was requested to indicate as to whether they would be able to purchase the gas at the above mentioned price, within a period of one week. This communication goes to the root of the matter. The appellant before me had brought to the notice of the original plaintiff respondent No. 1 that, they have certain buyers who have quoted the above said price. This communication speaks of the additional quantity of gas and the period for which the same could be supplied, with no further supply guarantee. The plaintiff was put to a clear notice and was called upon to indicate whether they will be able to purchase the gas at the above mentioned price. The time limit for the reply was also given in the said communication. This communication has been appreciated by the original plaintiff in the proper perspective and, therefore, on March 25, 1997, they had sent a letter to the appellant asking for the following particulars:

1. The period of supply

2. The quantity to be committed

3. The amount of deposit

4. Mode of payment of invoice amount

5. Take-or-pay/Supply-or-pay conditions

6. Other material terms and conditions of supply

This letter also contains request to intimate them in respect of the above said particulars "with the copies of the offers received from other buyers" enabling their Board to take the decision in the matter. All these six particulars have been provided by the appellant before me under letter dated March 26, 1997. Lastly, the appellant before me has requested the original defendant No. 1 to indicate the acceptance of the offer by March 31, 1997.

24. This communication, therefore, would go to show that, all the terms and conditions regarding the offers of other prospective buyers were made known to the plaintiff Company. No other particulars, at any juncture, have been sought

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for. After the last communication going from the appellant to the respondent No. 1, there has been no response saying that they would like to have the additional quantity of gas, upon a particular set of terms including the price.

Therefore, even if it is expected that all the terms and conditions of the offer with other prospective buyers were to be notified to the original plaintiff then also, one cannot say that there was no compliance of the obligations, arising from the above said Article of the Agreement.

25. Learned Counsel Mr. Shah wanted to urge that, firstly, the appellant should have approached the original plaintiff asking for their offer and only thereafter they could have gone for the offers of other buyers. I have indicated that the sequence of obtaining the offers has not been laid down in the Agreement. What all required was to have the offer of the plaintiff and to have the offers of other prospective buyers with a view to have an honest and sincere comparison so that, it could be ascertained as to whether the terms and conditions proposed by the other prospective buyers are or not "less favourable to the appellant Company". This could be done by inviting the offers in sequence or simultaneously. It appears that, this has been done. The matter does not rest here because, all the particulars which the plaintiff wanted to have, have been provided and a request was made to have their own reaction in the matter on or before a particular date, but nothing has been done by the plaintiff Company. There has been a state of total non-reaction.

26. Therefore, it appears that the Court below was at an error in coming to the conclusion that the appellant Company was required to be injuncted from proceeding ahead in finalising the arrangement of sale for the additional quantity of gas unless and until all the particulars of all the offers were made available to the original plaintiff.

27. Moreover, as indicated above, in my view, there has not been the compliance with the proviso of Rule 3 Order 39. I have said earlier, I would not be guided only by the aforesaid technical aspect of the matter. I have also said that, with a view to find out as to whether the case falls within that particular category, 1 shall have to investigate into the case of the parties and the material. 1 have done so and on the careful analysis of the same, 1 am of the opinion that this case will fall in that category because of which, while sitting as a Court of Appeal, 1 am obliged to interfere. This is the reason for the admission of the Appeal and the same are the reasons for my granting orders on the Civil Application as prayed for.

28. To recapitulate, I would say that the present Appeal demonstrates a category of case in which I should interfere with the ex parte ad interim orders granted by the Court below and that the orders of the Court below would tantamount to the re-writing of the terms and conditions of the entire contract which does not envisage the providing the copies of the offers presenting the terms and conditions for the purchase of the additional quantity of gas by other buyers and

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that there has been apparently, transparent, honest and sincere, efforts on the part of the appellant-Company to have the offers from the original plaintiff and from other prospective buyers with a view to have an honest and sincere comparison of the same.

29. After the above said reasons were recorded, there is a plea coming from learned Counsel Mr. Shah that, I should stay my orders for some time so as enable the clients of Mr. Shah to approach the appropriate forum by taking out appropriate proceedings. 1 am unable to accede to this request coming from learned Counsel Mr. Shah. The Appeal From, Order has been admitted and the orders of the Court below have been stayed.

30. All what I have done is to examine the facts of the case in light of the decisions Of the High Courts as well as the Apex Court, and 1 do not see any justifiable reason for doing what has been advised by learned Counsel Mr. Shah. His request, therefore, stands rejected.

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