

(2019) 02 DEL CK 0394

In the Delhi High Court

Case No : First Appeal From Order (OS)(COMM) 284 Of 2018, Civil
Miscellaneous Application No. 37455 Of 2017

Ledvance Private Limited

APPELLANT

Vs

GAIL (India) Limited

RESPONDENT

Date of Decision : 28-02-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 23, 23(3), 28(3), 34, 34(2)(ii), 37, 38(3)
Indian Contract Act, 1872 — Section 39

Citation : (2019) 5 R.A.J. 631

Hon'ble Judges : S. Ravindra Bhat, J; Prateek Jalan, J

Bench : Division Bench

Advocate : Dayan Krishnan, Diwakar Maheshwari, Sanjeev, Shreyas Edupuganti, Sridharan Ram Kumar

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J

1. The question urged in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") is that given the nature of the contract between the parties, could the Gas Authority of India (the respondent, hereafter referred to as "GAIL") have validly encashed the bank guarantees furnished by Osram India (P) Ltd, the claimant (the name of which has undergone a change, and consequently would be referred to as "Ledvance").

2. The parties to this dispute entered into a Gas Transmission Agreement ("GTA") on 01.05.2007; valid for 15 years i.e. up to 31.12.2022. In the GTA, the respondent was described as the "Shipper" and GAIL as the "Transporter". By Clause 2.2 of the GTA, the Shipper and the Transporter had to enter into transactions in relation to the "redelivery point" which required the Shipper to contract for "specified capacity for a specified duration for transportation of the gas through the Transporter's facilities and the Transporter shall provide Gas

Transmission services for such duration." This transaction was to be governed by the GTA and by other terms agreed between the parties confirming the transaction. By Clause 2.7(iii) of the GTA, the gas supplied was subject to Shipper's "termination security" in terms of Clause 13.3. The GTA could be terminated prior to 31.12.2022 on few grounds outlined in Clause 5.5. The grounds were detailed in Clause 11.8/Clause 13.

3. The GTA also required the Shipper to provide a bank guarantee ("BG") covering 60% of its agreed liability in the event of premature termination of the GTA and a letter of credit ("LC") under Clause 8.10 covering regular payment for use of facilities. A "termination" BG was submitted by the shipper/claimant to GAIL on 01.11.2007 for an amount of Rs. 3,34,34,568/-. On 08.11.2007, gas transportation began after connection of the "Spur Line" with the shipper's delivery point. GAIL's position is that the estimated cost of the Spur Line, at the time of commissioning was Rs. 4.88 crores. Fixed Spur Line charges in the GTA was computed on that estimated cost by using the discounted cash flow method to ensure a return of 12% post tax over a 15 year period. Clause 6.1 of the GTA provided for transmission charges. Apart from the transmission charges, the Shipper had to pay "fixed monthly charges towards Spur Line" as well. Annexure-I to the agreement provided that "in addition to the transmission charges to be paid in transmission of the said Annexure, the Shipper shall pay fixed monthly spur line charges of Rs.9,28,738 and these charges shall be payable by the Shipper irrespective of gas transmission/drawl from the start of the first CT agreement till the term of this agreement or its extension."

4. The LC in terms of Clause 8.0 was to be opened in favour of GAIL for an amount determined in any contract year by reference to the first day of such contract or equivalent in aggregate to Rs. (16 X redelivery upon MDQ X the sum of the transmission rate and Spur Line charges per day + applicable taxes and duties). Under Clause 8.2, the Shipper was to make a security deposit of Rs. 9,28,738/-.

5. Clause 13 provided for termination and Clause 13.3 provided for premature termination; that was conditioned upon the shipper paying an agreed amount, according to a formula indicated, depending upon the unexpired period of the GTA. The provision inter alia, read as follows:

"If Agreement is terminated prior to the term of this Agreement as per clause 13.2 a), then transporter has the right to suspend the supplies and shipper shall make the termination payment as per Exhibit E within 15 days of such termination. Shipper will submit an irrevocable and uncontrolled bank guarantee as per the format at Exhibit C. In case the shipper fails to make the termination payment as per this clause 13.3 then the transporter has the right to encash such bank guarantee. However, the shipper shall be liable for payment of balance 40% of respective five or three or two years tariff of spur line as the case may be for contracted quantities, in accordance with Exhibit E, if this agreement is terminated by transporter on the occurrence of default by the shipper as per the

clause 13.1

(a) during the period of the contract"

6. Thus, in terms of Clause 13.3, the shipper had to submit an irrevocable and unconditional BG. In case of its failure to pay under Clause

13.3, GAIL was entitled to encash such BG. In that event, the shipper was liable for payment of the balance 40% of respective five or three or two years' tariff of Spur Line, as the case may be, for contracted quantities in accordance with Exhibit E. That document (Exhibit E) specified the termination payment. For example, if the termination was during the first five years of operation (from the start date), the payment was for a sum equivalent to 5 years of tariff of Spur Line for contracted quantities.

7. The Petroleum and Natural Gas Regulatory Board (hereafter "PNGRB") which was in the meanwhile constituted in 2007, issued the Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines Regulations, 2008 [hereafter referred to as "Regulations, 2008"]. The GTA stipulated that the transmission charges for the trunk line and the spur line were to be in terms of the PNGRB's recommendations. The GTA was amended in March 2010 between the parties. The supplies continued after the amendment. On 25.08.2010, PNGRB decided that additional spur line tariff should not be charged. GAIL informed Ledvance by a letter dated 02.09.2011 that it would charge tariff for the spur line as per the transmission rate with effect from March 2011.

8. Upon expiry of the termination BG dated 01.11.2007, Ledvance submitted a fresh BG for the same amount on 22.10.2011 (valid till 16.09.2012) and renewable on 01.10.2012. GAIL emphasizes that this is an acknowledgment by Ledvance of its obligation to maintain a BG to cover the termination payment in terms of Clause 13.3 in the absence of any liability to pay the spur line charges. It was also acknowledgment that both parties understood that the value of the BG shall be in terms of the quantum already determined under Exhibit E of the agreement. On 01.08.2012, Ledvance stopped drawing gas. GAIL complained that this was in violation of the procedure agreed in Clause 13.2 of the GTA since none of the conditions envisaged in Clauses 11.8 or 13 of the GTA existed. On 06.08.2012, GAIL pointed out to Ledvance there was no gas consumption by it and sought reason for such stoppage of gas. By its letter dated 28.08.2012, Ledvance informed GAIL that it had stopped production at Sonapat Plant and did not require any gas. The supplier of the gas IOCL too was informed likewise. The letter dated 28.08.2012 stated that it should be treated as Ledvance's notice for termination of the GTA.

9. On 04.10.2012, GAIL replied to the said letter inviting attention of Ledvance to Article 13.3 of the GTA which bounded the latter to settle the payment following which GAIL would encash the BG. GAIL also requested Ledvance to settle the balance 40% of the termination payment. GAIL proceeded to invoke the BG on 05.10.2012. This led to Ledvance invoking the arbitration clause by the notice

dated 01.04.2013 and seeking the appointment of a three member Arbitral Tribunal ("AT").

10. Before the tribunal, Ledvance made a number of claims; GAIL denied the claim, justified the invocation of bank guarantee and also preferred a counter claim. GAIL insisted that the termination payment under Clause 13.3 "is to compensate the Transporter for quantified damages in the event contract comes to an end prematurely" in response to Ledvance's submission that there was no question of treating the defunct charges as then recoverable, towards termination charges.

11. The tribunal observed that the spur line from which gas was being supplied had ceased to be a dedicated pipeline because PNGRB had (on 23.08.2010) directed that GAIL could not charge any additional tariff for that line. The tribunal, therefore, held that:

"The fact that the termination payment is based upon the spur line charges calculated for the period of 5 years.

We are clearthat after the issue of notification by the Regulatory Board prohibiting the gas companies from recovering spur line charges, GAIL would not be entitled to claim any termination payment on the based upon spur line charges. Since in our view the Respondent was not entitled to termination payment, it had no right to recover the same by encashing the bank guarantee."

12. Accordingly, the Tribunal ordered the BG amount to be refunded to Ledvance. It further held that Ledvance was not liable to pay the balance 40% of the termination payment. Interest @ 12% per annum was allowed on the above sum. No further claim of OIPL (Ledvance) including the claim for loss of reputation was allowed. GAIL's counter claims were rejected altogether; it was held that GAIL would not be entitled for balance termination payment. Only counter claim No. 3 to the extent of Rs. 5,02,654.35/- was allowed. This was directed to be adjusted against the BG sum which was encashed.

13. GAIL petitioned under Section 34 of the Act, questioning the tribunal's interpretation of the intention of parties as erroneous assumptions. The tribunal, according to GAIL re-wrote the GTA which was against fundamental policy of India thus attracting Section 34 (2)(ii) of the Act. It was further argued that although the spur line charges were removed with effect from March 2011 and the contract was amended in September 2011, the renewed BG was not submitted by Ledvance thereafter. The dispute arose only in August 2012 when Ledvance unilaterally stopped drawing the gas without any prior intimation to GAIL; it relied on *ONGC v Garware Shipping Corporation Ltd* (2007) 13 SCC 434; *Provash Chandra Dalui v Biswanath Banerjee* AIR 1989 SC 1834; *Bharat Coking Coal v. Lalchand Ltd. v. Annapurna Construction* AIR 2003 SC 3660 and *Arosan Enterprises Ltd v Union of India* AIR 1999 SC 3804 to argue that the tribunal could not have relied on evidence outside the terms of the agreement; it also referred to Section 38(3) of the Act.

14. Ledvance resisted the petition, urging that the tribunal did not commit any error and its findings were justified. It was argued, on its behalf that in accordance with Clause 8.10, an LC had been opened by the shipper in the sum of Rs. 39,40,000/-. The LC was also calculated on the basis of the monthly fixed spur line charges. This also formed the basis of the termination BG. Once, PNGRB decided that the spur line charges were unjustified, GAIL stopped charging the said monthly fixed spur line charges from March 2011. A fresh LC of Rs. 6,10,319/- was opened by the shipper. However, despite regular follow up and reminders, GAIL refused to return its original termination BG which had to be reworked. Ledvance also pointed out that it was constrained to close its operation at Sonapat Plant on 01.08.2012. It submitted that GAIL was kept duly informed of the inability of Ledvance to continue to avail the gas supply transported through the GAIL pipelines.

15. Ledvance argued that the failure to observe the procedure under Clause 13.2(a) of the GTA vitiated GAIL's act invoking the termination BG; it maintained that the termination BG originated from Exhibit E. The only basis for calculating the amount for which the BG was furnished was the monthly fixed spur line charges which itself stood withdrawn from March 2011. It was submitted that the Court could not sit in appeal over the decision of the tribunal. The interpretation of the contract by the AT was final unless it was so perverse as to shock the judicial conscience of the Court. Reliance is placed on *Associate Builders v Delhi Development Authority* 2015 (2014) DLT 204 (SC) and *National Highways Authority of India Ltd* (2015) 14 SCC 21. It was also urged that the plea that termination payment was being claimed as "liquidated damages" was not pleaded before the tribunal. Decisions were cited to urge that GAIL could not better its case in a petition under Section 34 and go beyond the pleadings before the tribunal. Reliance was placed on the decision in *Rashtriya Ispat Nigam Ltd v. Dewan Chand Ram Saran* (2012) 5 SCC 306 to urge that even if AT construes the terms of a contract in an unreasonable manner it would not mean that the Award would be set aside on that ground.

16. The learned single judge, after noticing the main arguments, as well as stand of the parties before the tribunal and the pleadings (as well as evidence led) set aside the award. The relevant findings are extracted below:

"...32. A perusal of Clause 13.3 of the GTA reveals that termination payment had to be calculated in terms of Exhibit E which in turn referred to spur line charges. However there is nothing in Clause 13.3 which indicates that in the absence of any spur line charges, no termination payment would be recoverable. In other words, the right of GAIL to recover termination payment under Clause 13.3 did not hinge on whether the spur line charges continued to operate. Merely because Exhibit E refers to spur line charges would not mean that it is determinative of the entitlement of GAIL to the termination payment. The spur line charges under Exhibit E only provide the measure for quantification of the termination payment and nothing more.

33. The parties did not dispute the GTA as far as GAIL's entitlement to recover termination payment. Even if the spur line charges were withdrawn there was no reworking of the GTA by the parties to dispense with the clause relating to termination payment. The correspondence exchanged between the parties also do not show that OIPL ever demanded that the clause relating to termination payment be done away with only because the spur line charges had stood withdrawn. In this regard, a reference may be made to the letters written by OIPL after the withdrawal of its spur line tariffs in March 2011.

34. The fact remains that a renewed BG was in fact submitted by OIPL to GAIL on 22nd October 2011 in terms of Clause 13.3. If the understanding of the parties, as claimed by OIPL, was that after the withdrawal of the spur line charges no termination payment was liable to be made then the question of renewing the BG for that purpose did not arise. In fact the BG is an additional one.

35. The second aspect of the matter is that while the LC amount was reworked, the amount of the termination BG was not. After the PNGRB's order dated 19th October 2010 and clarification issued by it on 21st October 2010, both parties continued Clause 13.3 of the termination BG in terms thereof.

36. The third aspect of the matter is that OIPL has never attempted to defend its unilateral termination of the GTA. The plea that the procedure under Clause 13.1(a) was not followed by GAIL, in the circumstances, appears to be misconceived. It is, in this context, be noted that sub-heading of Clause 13.2(a) is "termination by Transporter? whereas Clause 13.2(b) is "termination by Shipper". In the present case the termination was by the Shipper but without following the procedure under Clause 13.2(b). There was no occasion for GAIL to deliver any Shipper default notice under Clause 13.2(a) for the simple reason that OIPL persuaded the GAIL with a *fait accompli*. It is not even denied by OIPL that it stopped availing of gas supply through the pipeline with effect from 1st August 2002. On 20th August 2012, it attributed this to incurring of heavy financial losses and the consequential stoppage of production from the Sonapat Plant. It simply asked GAIL to treat the said letter as notice for termination of GTA. Earlier to this also the letter written by OIPL was simply asking for return of the BG due to losses suffered by OIPL and not because of the withdrawal of the spur line charges.

37. Consequently, the Court is of the view that there was no occasion for the AT to have interpreted Clause 13.3 as ceasing to operate only because the spur line charges stood withdrawn. This was a wholly erroneous interpretation consistent with what is intended by the parties. Apart from being contrary to Section 38 (3) of the Act, the Court is also of the view that the interpretation is so perverse that it cannot be sustained in law. It has to be held to be opposed to the fundamental policy of India as understood under Section 34 (2)(b) (ii) of the Act and explained by the Supreme Court in *Associate Builders v DDA* (supra).

38. The Court would also like to observe that the statement made in the impugned Award to the effect that there was no dispute that the termination payment is only to recover the cost of laying the spur line appears contrary to the written submissions filed by GAIL before the AT."

Arguments on behalf of the parties

17. Mr. Dayan Krishnan, learned senior counsel for Ledvance, urged that the impugned judgment is in error of law. He relied on *Associate Builders* (supra) to say that the learned single judge could not have re-appreciated the documents and contract conditions contrary to the arbitral record and findings of the tribunal. It was emphasized that contract interpretation is within the exclusive domain of the tribunal and the court has to, under Section 34 satisfy itself that the award is not tainted by patent illegality, procedural unfairness or for returning a finding that no reasonable person in like situation would subscribe to.

18. It was argued that the learned Single Judge has erroneously held that there was no occasion for the tribunal to have interpreted Clause 13.3 as ceasing to operate only because the spur line charges stood withdrawn. It is submitted that the entire basis for calculating the amount for which the BG was issued was only the monthly fixed spur line charges which were aimed at recovering the cost of the Spur Line and which, admittedly, stood withdrawn from March 2011 by virtue of the order dated 25.08.2010 issued by PNGRB. It was argued, further, that since the pipeline used to supply gas to Ledvance ceased to be a dedicated pipeline, as was admitted by GAIL before the tribunal, there was no mandate to pay termination payment. Mr. Krishnan also argued that the impugned judgment failed to appreciate that GAIL has for the first time pleaded before the court, that the Termination Payment was a liquidated damage- an averment which was not made before the tribunal. GAIL could not have been allowed to better its case in a Section 34 petition and go beyond the pleadings made in arbitration proceedings.

19. Counsel submitted that the impugned judgment failed to observe that the procedure prescribed under Clause 13.2 (a) of the Agreement was not followed before encashment of the Bank Guarantee, which has vitiated GAIL's action encashing the Bank Guarantee. Further, the learned Single Judge erred in setting aside the Award of the tribunal to the extent that the tribunal allowed the claim of Ledvance for return of the Bank Guarantee amount with interest. That the Termination Payment was no more recoverable is evident from the fact that spur line charges were specifically reduced from the calculation of the Letter of Credit which was opened under Clause 8.10 of the Agreement. By the same calculation, the amount of Bank Guarantee given under clause 13.3 of the Agreement ought to have been reduced to the extent of the said fixed spur line charges. Since the entire calculation of the Bank Guarantee was based on the said charges, the natural consequence of the same was that the entire Bank Guarantee had to be returned.

20. It was urged that the impugned judgement failed to appreciate the correct factual finding of the tribunal when it held that GAIL could not have recovered the cost of laying down the gas pipeline (spur line charges) under the Agreement, once the spur line had ceased to be a dedicated/exclusive pipeline. Withdrawal of Spur Line charges, was pursuant to an order of the PNGRB, which was never challenged by GAIL, it could not have recovered the cost of the said Spur Line indirectly, under the head of Termination Payment or any other head whatsoever.

21. It was contended that the learned Single Judge failed to appreciate that it was unfair on the part of GAIL to recover monies from Ledvance even if the plant was not functioning. The dispute in any event under the present proceedings is in relation to the Termination Payment. Since the GAIL did not suffer any loss on account of the termination, it cannot claim damages under the Agreement as the same would amount to unjust enrichment and would be against the public policy of India.

22. Learned senior counsel relied on Delhi Jal Board v Kaveri Infrastructure P. Ltd 206 (2014) DLT 136 to argue that GAIL could not in Section 34 travel beyond its pleadings before the tribunal, in arbitral proceedings. Reliance was placed on Rashtriya Ispat Nigam Ltd v Dewan Chand Ram Saran (2012) 5 SCC 306 to urge that if a tribunal interprets the terms of a contract in an unreasonable manner per se the award does not have to be set aside. It was also argued that the court does not have jurisdiction to modify the Award under Section 34 of the Act. Reliance is also placed on the decisions in McDermott International Inc (2006) 11 SCC 181 and Puri Construction Pvt Ltd v Larsen & Toubro Ltd 2015 (SccOnline) 9128 (Del).

23. Learned counsel for the GAIL argued that the learned Single Judge's findings do not call for interference. It was argued that the tribunal could not have accepted the contentions by the shipper (Ledvance) linking up the termination payment with the fixed spur line charges. GAIL relied on Clause 13.3, to say that in the event of a premature termination of the agreement, it had the right to recover the termination payment. It was submitted that Exhibit E only indicated the measure for quantification of the termination payment. The statement in the impugned Award that there was no dispute that the termination payment is only for recovering the cable cost of laying the spur line was denied; it was submitted that this was based on an erroneous assumption by the tribunal. In fact there no such concession made by GAIL. Counsel argued that the tribunal misinterpreted the written submissions of GAIL as well. He submitted that there was a clear breach of contract committed by the shipper (Ledvance) attracting Section 39 of the Indian Contract Act [hereafter referred to as "ICA"]. The termination was traceable to Clause 13.1 (a) of the GTA.

24. Counsel relied on the pleadings in the reply to the statement of claim, to say that spur line charges and termination payment, were independent. It was argued by GAIL that the reference to spur line charges, in Clause 13.3 and

Exhibit E was only as a reference point. Counsel highlighted that the argument that GAIL went beyond the pleadings and argued that the conditions related to payment of liquidated damages, is incorrect; it was pointed out that the reply to the statement of claim clearly stated that there was no linkage and payment in terms of Exhibit E in the event of premature termination. The following extracts of the reply were relied on:

"For the purpose of calculation what should, be the value of the Termination Bank Guarantee, the same was calculated in terms of Clause 13.3 of the main agreement read with Exhibit dealing with the value of the termination payment. It is very clearly mentioned there in Exhibit E that the shipper shall provide bank guarantee as termination payment security for an amount of 60% of the value as per the clause (a) (i), (b)(i), or (c)(i) as applicable. It was mere imagination of? the Claimant that the requirement for maintaining the SG by Claimant automatically ceased to exist, upon withdrawal of spur line charge based on which' wrong notion the Claimant started disputing the terms of the agreement. It needs to be seen that even as per the Capacity Tranche #1 signed on 06.03.2010 the claimant was required to submit the Bank Guarantee as per the Exhibit E. It is humbly submitted that maintaining of the termination bank guarantee has absolutely no connection with withdrawal 'of the spur' line charges by the respondent. The entire case of the claimant seems to be on an erroneous application of connecting, the two issues which are completely separate and independent of each other; It may further be not out of place to state herein that the claimant never had the intention to maintain the BG. The contents of the aforesaid paragraphs 9 to12 in the preliminary submissions are reiterated herein with respect to the conduct of the claimant regarding the Termination Bank Guarantee. The same are not being repeated herein for the sake of brevity."

25. It was further urged that Ledvance's main claim was that the procedure laid out under Clause 13 had not been followed by GAIL and, therefore, it was not entitled to the termination payment. Analyzing the conditions, it was explained that Clause 13.1 titled "Termination" (CD Page 37 to 40) has two conditions, i.e. 13.1 (a) and 13.1 (b). Clause 13.1 (a) relates to the Shippers event of default, the shipper in the present case being Ledvance. Clause 13.1.(b) relates to the transporter's default. There was no allegation that the transporter, namely GAIL, committed any material breach of any obligation whatsoever under the GTA. It was entirely blameless. GAIL submitted that Clause 13.1 (a) is engaged as it is a clear case of material breach by the Claimant/ Ledvance under the agreement which resulted in repudiation of the contract by purporting to unilaterally terminate the GTA and by not replacing or extending the bank guarantee which was due to expire on 16.10.2012. In these circumstances GAIL was compelled to accept unilateral termination by its letter dated 04.10.2012 to encash the bank guarantee on 04.10.2012. GAIL submits that it was constrained by circumstances as its only security would have vanished in four days. It was submitted that the case is relatable to Clause 13.1 (a). Ledvance had urged that the termination was not under Clause 13.1 (a) but by

its letter dated 28.08.2012 and not by the GAIL. GAIL refutes that by saying that this was not correct understanding of the legal position. As regards Clause 13.3, which provides for Termination Payment, it is submitted that the entire purpose of that condition was to compensate the transporter for quantified damages in the event the contract comes to an end prematurely. It is submitted that the present case falls squarely within Clause 13.3.

26. It is argued that termination payment is required to be quantified as per Exhibit B; it is provided for the purpose of quantification of value of termination payment. It is further argued that the structure of the termination payment is that if there is termination within the first 5 years of operation, for the purpose of quantification, 5 year's tariff of spur line for contracting quantities is the termination payment. It is submitted that it is not the case that the entire balance period of 10 years or more tariff is being demanded. The reason for this is that what is sought is to be compensated in an agreed manner. During the course of submissions, (before the tribunal) an inquiry was made as to the basis of calculation of fixed tariff charges. The calculations were provided to the tribunal. It is contended that the accepted legal position is that the calculations which go to the final figure are not to be considered. It is only the final figure which is reflected in the GTA and which is the basis for quantification of the termination payment. This aspect it is highlighted, supports GAIL. Explaining that it is only to be expected that during a long term contract of 15 years, the tariff may change and be varied in different ways, the logical conclusion to be drawn is that it is impossible to predict the exact amount of loss in case the contract is prematurely terminated at some point during the 15 year period. It is, in these circumstances, that the concept of quantified termination payment was introduced which is nothing more than liquidated damages. Nor does it make any difference that though the spur line was initially designed as a dedicated pipeline, it has subsequently been put to use for other customers. The fact which remains and is uncontroverted is that had the contract continued to its full term, GAIL would have continued to recover transportation charges from the claimants for the contracted quantities and consequently would have made profits which it has been deprived of for about 10 years. In these circumstances, the claim of termination payment is fair and just and has been properly quantified. In any event, GAIL is entitled to reasonable damages for breach of the GTA. It was, therefore, submitted that counter claim no. 1 deserves to be allowed. There being no opposition to Claim Nos. 2 and 3, they also deserve to be allowed.

Analysis and Conclusions

27. The material facts, then are that the GTA was for a period of 15 years, and was to end on 31.12.2022. On 25.08.2010, PNGRB decided that the additional spur line tariff should not be charged. GAIL, therefore, informed the shipper, by a letter dated 02.09.2011 that it would charge tariff for the spur line as per the transmission rate with effect from March 2011. Ledvance had furnished the termination BG dated 01.11.2007. Upon its expiry, after the discontinuation of

spur line charges, Ledvance submitted a fresh BG for the same amount on 22.10.2011 valid up to 16.09.2012 and became renewable on 1.10.2012. GAIL urges, and quite correctly that this amounted to acknowledgment by Ledvance of its obligation to maintain a BG to cover the termination payment in terms of Clause 13.3 even in the absence of any liability to pay the spur line charges. It was also acknowledgment that both parties understood that the value of the BG shall be in terms of the quantum previously determined under Exhibit E of the agreement. On 01.08.2012, Ledvance stopped drawing gas. GAIL's position is, this was in violation of the procedure laid down in Clause 13.2 of the GTA since none of the conditions visualized in Clauses 11.8 or 13 of the GTA existed.

28. On 06.08.2012, GAIL enquired from Ledvance that there was no consumption of gas as far as Ledvance was concerned ; it sought reason for such stoppage of gas. Ledvance, by its letter dated 28.08.2012 informed GAIL that it had stopped production at Sonapat Plant and, therefore, did not require any gas. The supplier of the gas IOCL had also been informed likewise. The letter dated 28.08.2012 stated that it should be treated as the shipper's (i.e Ledvance) notice for termination of the GTA.

29. The main argument on behalf of Ledvance before this court, has been that without proof (or in the absence of any contention) that clause 13.3 amounted to a genuine pre-estimation of damages agreed to by the parties, the learned single judge could not have held it that it was one such. The secondary contention is that arguendo, clause 13.3 was conditional upon the existence (or rather, the continued existence of) spur line charges; however, that charge was statutorily deleted. The question of payments upon premature termination - by the shipper, then would not arise.

30. Clause 13 which is relevant for the present purpose, is extracted below:

"Clause 13-Termination 13.1 Termination of Agreement:

(a) In addition to the other provisions in this Agreement, Transporter may serve a notice of its intention to terminate this Agreement which the Transporter believes is the cause of the Event of Default upon the occurrence and continuation of any of the following event (each a "Shipper Event of Default"), unless any such event occurs as a result of a breach by the Transporter of its obligations under this Agreement or by an event of Force Majeure or, except as provided for in Clause 12:

i. the shipper fails to pay when due any amounts owed to the Transporter under this Agreement for which shipper has received the fortnightly invoice and where such failure continues for not less than 30 (thirty) days following the date on which such payment is due:

ii. the shipper fails to issue, extend, replenish or replace any shipper LC and Bank Guarantee as per Exhibit-E within the time period specified in this Agreement.

iii. The Shipper commits any other material breach of its obligations under this Agreement;

iv. If shipper become insolvent.

(b) In addition to the other provisions in this Agreement, Shipper may serve a notice of its intention to terminate either this Agreement which the Shipper believes in the cause of the event of default upon the occurrence and continuation of any of the following events (each a "Transporter Event of Default"), unless any such event occurs as a result of a breach by the shipper of its obligations under this Agreement or by an event of force majeure or, except as provided for in clause 12:

i. the transporter commits any material breach of its obligations under this agreement.

ii. When, under this agreement, during any 90 (ninety) days, the shortfall quantity occurs for 5 (five) consecutive days or during any 365 (three hundred and sixty five days, the shortfall quantity occurs for consecutive 20 (twenty) days.

iii. If transporter becomes insolvent.

13.2 Termination procedure

a) Termination by the transporter

i. Upon the occurrence and continuation of any shipper event of default, the transporter may deliver a notice (the "Shipper default notice") to the shipper. Following a shipper event of default, the transporter shall have the right to suspend the performance of its obligations under the agreement until such default has been cured in accordance with the provisions of this clause 13.2. Any non-performance by the transporter of its obligations under this Agreement, during such period of suspension shall not amount to a transporter event of default. The shipper shall be liable for payment of transmission charges including spur line charges and transporter shall not be liable for any shortfall quantity for such period of suspension.

ii. Following the receipt of any shipper default notice, the shipper shall (1) promptly notify the transporter of the measures it has taken or intends to take to remedy the shipper event of default which is the subject of such notice, and (ii) have a period of 30 (thirty) days from the date of such receipt (or such longer period as the transporter may specify in such notice) (the shipper cure period) in which to remedy such breach or default and shall act as a reasonable and prudent person in doing so.

iii. During any shipper ;cure period, both parties shall, save as otherwise provided herein, continue to perform their respective obligations under this agreement and shall not, whether by act or omission, impede or otherwise interfere with the endeavours of either party to remedy the breach or default to

which such shipper cure period relates. Provided the transporter shall not be required to perform its obligations under this clause 13.2 (a)

(iii). If the transporter has elected to suspend the performance of its obligations as specified in clause 13.2(a)(i) above.

iv. Following the expiry of the shipper cure period, if the shipper event of default to which the shipper default notice relates is continuing, the transporter may terminate this agreement by written notice (a transporter termination notice) to the shipper and this agreement shall terminate with immediate effect on the date of such transporter termination notice and bank guarantee submitted by the shipper shall be encashed/forfeited.

b) Termination by the shipper.

i. Upon the occurrence and continuation of any transporter event of default, the shipper may deliver a notice (the "transporter default notice") to the transporter. Such notice shall specify in reasonable detail the transporter event of default to which such notice relates.

ii. Following the receipt of any transporter default notice, the transporter shall (i) promptly notify the shipper of the measures it has taken or intends to take to remedy the transporter event of default which is the subject of such notice, and (ii) have a period of 30 (thirty) days from the date of such receipt (or such longer period as the shipper may specify in such notice) (the transporter cure period) in which to remedy such breach or default and shall act as a reasonable and prudent person in doing so.

iii. During any transporter cure period, both parties shall, save as otherwise provided herein, continue to perform their respective obligations under this agreement and shall not, whether by act or omission, impede or otherwise interfere with the endeavours of either party to remedy the breach or default to which such transporter cure period relates.

iv. Following the expiry of the transporter cure period, if the transporter event of default to which the transporter default notice relates is continuing, the shipper may terminate this agreement by written notice (a shipper termination notice) to the transporter and this agreement shall terminate with immediate effect on the date of such shipper termination notice.

13.3 Termination payment If this Agreement is terminated prior to the term of this Agreement as per clause 13.2 a), then transporter has the right to suspend the supplies and shipper shall make the termination payment as per Exhibit E within 15 days of such termination. Shipper will submit an irrevocable and uncontrolled bank guarantee as per the format at Exhibit C. In case the shipper fails to make the termination payment as per this clause 13.3 then the transporter has the right to encash such bank guarantee. However, the shipper shall be liable for payment of balance 40% of respective five or three or two years tariff of spur line as the case may be for contracted quantities, in accordance with Exhibit E, if this agreement is

terminated by transporter on the occurrence of default by the shipper as per the clause 13.1 (a) during the period of the contract.

Until the termination of this agreement, the amount of the bank guarantee as mentioned above shall be as per the amount given in Exhibit E for respective contract years and the shipper shall renew the bank guarantee 15 days before its expiry.

Bank guarantee for termination payment for first five (5) years of the contract shall be given by the shipper to the transporter as per the schedule given below:

Time period

Amount of bank guarantee

At the time of signing of GTA

10% of the amount as per Exhibit E.

At the time of award of spur line project

40% of the amount as per Exhibit E

After mechanical completion of spur line

70% of the amount as per Exhibit E.

15 days prior to commissioning of spur line

100% of the amount as per Exhibit E.

If the shipper does not replace the bank guarantee of higher amount as per the schedule and as informed by the transporter above then the transporter shall have unrestricted right to encash the bank guarantee and withheld the development of the project of laying of spur line.

In the event not pertaining to transporter event of default, if the shipper terminates this agreement before the commissioning of spur line or before the commencement of transmission services by the transporter, then the transporter shall forfeit the security deposit and encash that portion of bank guarantee submitted by the shipper. However, shipper shall be liable to pay the termination payment as applicable as per this clause 13.3."

31. At the outset, it is noticed that the GTA (dated 01.05.2007) shows that the intention of parties was to enter into a 15 year long term agreement (Clause 5.1). The GTA, when it was entered into, contemplated construction of a dedicated spur line to the plant of the claimant. See Annexure-1 (CD Page 55 and Page 58). GAIL's case was that though the contract was signed on 01.05.2007, the GTA itself contemplated construction of the pipeline thereafter. The spur line was commissioned on 08.11.2007. At the time the pipeline was commissioned the estimated cost of pipeline was Rs. 4.88 crores. The fixed spur line charges were calculated based on the above estimated capital cost by using

the discounted cash flow method in order to get a return of 12% post tax over the 15-year period. Without doubt, with effect from March 2011, GAIL stopped charging the monthly fixed spur line tariff of Rs. 9,28,738/- on the advice of the PNGRB. It is also not in dispute that consequent upon the said revision, the letter of credit amount was suitably reduced. A Letter of Credit had to be provided under Clause 8.10 of the GTA (CD page 22-26). The reduction of that LC, however, has no bearing on the present dispute. The LC and the Termination Payment operate in two different areas. The Letter of Credit which is required under Clause 8 titled "Billing and Payment" is to secure fortnightly payment of transmission charges in a running contract. In contrast, the issue of Termination Payment only arises under Clause 13 when the contract is unlawfully terminated and liquidated damages are to be paid as compensation for unlawful breach and the fixed payments are to be paid for such premature termination.

32. This court notices that the tribunal rendered the following findings, in the award, in respect of the termination payment charges (under clause 13.3):

" intention of the parties while incorporating the clause regarding termination payment was to recover cost of spur line and consequently spur line charges were fixed to recover the estimated cost of the spur line over a period of 15 years after giving a profit of 10 % to the Petitioner. The question that arises for consideration is, if spur line charges are not payable whether termination payment which is wholly based on spur line charges can still be claimed.....

It is thus clear that the spur line from which gas was supplied to claimant latter on ceased to be a dedicated pipeline. As it ceased to be a dedicated pipeline, the Regulatory Board issued a clarification on 25th August, 2010 that GAIL cannot charge any additional tariff for such spur line. The fact that termination payment is based upon spur line charges calculated for a period of 5 years, we are clearly of the opinion that after the issue of the notification by the Regulatory Board prohibiting the gas companies from recovering spur line charges, GAIL would not be entitled to claim any termination payment based on spur line charges. Since in our view the Petitioner was not entitled to termination payment, it had no right to recover the same by encashing the bank guarantee."

33. In the opinion of the court, the reasoning of the tribunal is contrary to the contract. The parties admittedly contemplated more than one type of payment for the gas transmission services in the GTA: one, the consideration for payment of supplies actually made. Clause 8 dealt with transmission charges, the mode of calculation, its disclosure, billing etc. The parties had also visualized a liquidated damages event, (spelt out in clause 7.3) i.e. shortfall in transmission of gas, for which GAIL, the transporter, was liable to compensate the shipper as and when the event occurred, in the billing, by making appropriate adjustments. Clause 13 dealt with termination of the contract; it provided that the shipper (i.e. Ledvance) could terminate the contract, in certain eventualities:

"(b) In addition to the other provisions in this Agreement, Shipper may serve a

notice of its intention to terminate either this Agreement which the Shipper believes in the cause of the event of default upon the occurrence and continuation of any of the following events (each a "Transporter Event of Default"), unless any such event occurs as a result of a breach by the shipper of its obligations under this Agreement or by an event of force majeure or, except as provided for in clause 12:

i. the transporter commits any material breach of its obligations under this agreement.

'ii. When, under this agreement, during any 90 (ninety) days, the shortfall quantity occurs for 5 (five) consecutive days or during any 365 (three hundred and sixty five days, the shortfall quantity occurs for consecutive 20 (twenty) days.

iii. If transporter becomes insolvent."

34. If one considers Clause 13.3 from this perspective and keeps in mind the background that the contract was to be in force for 15 years, i.e. upto 31.12.2022, the payments towards termination envisioned in Clause 13.3 were by way of fixed charges or consideration for the event of pre-mature termination. Clause 13 provides for different kinds of terminations in various eventualities; Clause 13.2(b) deals with termination by the shipper. In this case, the termination notice does not invoke Clause 13(2)(b). The reason given by the shipper, i.e. the present appellant is that the intake of gas was in excess of capacity it had. Clause 13.3 underlines that if the agreement is terminated "prior to the terms of this agreement as per Clause 13.2, the GAIL had the right to suspend supplies and the shipper had to make the termination payment as per Exhibit E." To cover this eventuality, the bank guarantee in the format provided in Exhibit C was to be furnished. Now, the submission of Ledvance is that Clause 13.30 became unworkable and consequently, the termination payment could not be charged by GAIL. The fallacy in this reasoning is that the linkage which is heavily underlined - between the spur line charges and termination payment is only by way of reference point. In other words, the termination payment is not in respect of payment of spur line charges or has nothing to do with payment related to spur line charge. Rather, the reference to spur line charge and to Exhibit E constitutes the referral points based on which formulation to determine termination charges are made. The Tribunal's view, therefore, was clearly contrary to the contract and to the clear intention of the parties which was that in the event of premature termination by the shipper of the contract, the GAIL was to receive the amounts.

35. This Court notices that in somewhat similar circumstances where the consideration for discontinuance of several contracted services had arisen, the Madhya Pradesh High Court in *Madhya Pradesh Road Development v. M/s Jabalpur Corridor (India)* 2014 (2) MP LJ 276 stated as follows:

"36. The learned Arbitrator and in particular the learned trial court have found

that Clause 32.3, Clause 32.4.2 and Clause 32.6 are independent of each other and if on a combined reading of all these provisions, the Arbitral Tribunal found that in the event of termination of the contract on whatever count it may be or by whomsoever it may be, if the "Termination Payment" under section 32.6 becomes payable, the respondent are duty bound to pay the said amount as the same is as per the stipulations contained in the contract.

37. From paragraph 165 onwards upto paragraph 175, the learned trial court has discussed in detail various aspects of the matter touching to this objection of Shri Naman Nagrath, and after taking note of all the provisions of the agreement, has found that in the light of the statement of the claim submitted by the Contractor and the documents produced by them, what has been claimed is the amount payable on total work done, overhead bank guarantee and these are nothing but "Termination Payment? in accordance with the agreement. That apart, it is taken note that MPRDC denied the payments and stated that "Termination Payment? is not payable and not applicable. The learned trial court took note of Section 23.3 and 28.3 of the Arbitration and Conciliation Act, and held that records do show that the Corporation has not denied the amount of termination payment claimed at Rs.69,67,60,270/-and they only stated that the amount is not payable.

40. Again, in the case of Goa State Vs. Parveen Enterprises (supra), the Hon'ble Supreme Court has laid down a principle to say that all disputes which emerge between the parties about implementation of the contract and are canvassed at the time of arbitration, then the arbitrator has power to dispose of all the disputes provided that the dispute are made in the pleadings and the arbitrator decides the dispute after considering the same.

41. Hon'ble Supreme Court after taking note of Section 23 of the Arbitration and Conciliation Act , holds that when the claimant is required to file a statement of claim and when the respondent files the defence statement before the arbitrator, the claimant is not bound to restrict his claim only to the one's raised in this notice. Such other claim as made can always be adjudicated and considered by the arbitrator until and unless the arbitration agreement provides for otherwise. The learned court below has taken note of all these legal aspects of the matter and we also find from the record that both the parties in the proceedings held before the arbitrator, participated in the hearing pertaining to claim made for "Termination Payment?, the demands made thereunder and after contesting at length, the element of "Termination Payment?, the arbitral Tribunal considered the same and decided it based on the material that came on record.

42. If that be the position, the appellant cannot say that in deciding the dispute pertaining to "Termination Payment", the arbitral Tribunal has travelled beyond the scope of reference or has entered into an area which was not in dispute and, therefore, violated Clause 34(2)(a)(iv) of the Act of 1996. On the contrary, it is a case where the parties contested the matter at length before the arbitrator

specifically with reference to "Termination Payment? and when the Tribunal went into the question based on the contest made before it, we see no reason to hold that this is an act of travelling beyond the scope of reference by the arbitrator. In this regard, the judgments rendered by the Supreme Court in the case of Ramnath International Construction Private Limited (supra); and, Mc Dermott International Inc. (supra) relied upon by Shri Vivek Tankha, learned Senior Advocate, may be taken note of, which goes to law down the principle that when a dispute was expressly referred to arbitration and when both the parties contested the matter at length before the arbitrator and when the arbitrator renders a speaking award giving detailed reasons, then it cannot be said that the arbitrator travelled beyond the scope of the reference. That apart, as laid down in the case of National Steel Corporation Limited (supra), if in this case, the arbitrator taking note of various provisions of the agreement; the dispute between the parties; and, various other aspects came to the conclusion that even if the termination is on whatever ground or count, once a provision is contemplated for payment of "Termination Payment" and it determines the "Termination Payment" due on the basis of contest made by the parties and if this was one possible approach or view taken by the arbitrator, it cannot be said that the act of the arbitrator stands vitiated."

36. The Court furthermore is of the opinion that mere reference to liquidated damages and the fact that Clause 13.3 did not specifically state the termination charges towards liquidated damages did not in any way alter the circumstance that it was a contractual payment to cater to the eventuality of premature termination of the entire agreement and not merely the service of spur line for which the charges seized to be recoverable. In these circumstances, the learned Single Judge's findings cannot be faulted. We also notice further that after the PNGRB's order of 19.10.2010, the parties continued with Clause 13.3. Also, it can be saliently noticed that Ledvance never disputed its termination of GTA, or said it was for reasons spelt out in Clause 13.2. Another important aspect in this case is that on 06.03.2010, the parties had voluntarily entered into extensive amendments to the contract. There too, Clause 13.3 was retained.

37. In view of the above findings, the Court is of the opinion that there is no merit in the appeal; it is accordingly dismissed without order on costs.