(2013) 12 MAD CK 0048

In the Madras High Court

Case No : O.A. No. 932 of 2011

M/s. OPG Energy Pvt. Ltd. APPELLANT

Vs

M/s. GAIL (India) Limited RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2014) 1 CTC 225 : (2014) 2 MLJ 660

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Yashodvardhan, for Mr. P. Vinoth Kumar in OAs 932 to 934, 937 and 938/2011, Mr. P.S. Raman, for Mr. K. Harishankar in OAs 985 to 987/2011 and Mr. AR. L. Sundaresan, for Mrs. AL. Ganthimathi in OAs 7 to 9/2012, for the Appellant; M. Ajmalkhan, for Mr. J. Sivanandaraj, for the Respondent

Judgement

V. Ramasubramanian, J.—The applicants, who were allotted a specified quantity of natural gas by the Government of India, Ministry of

Petroleum and Natural Gas, to be supplied by the Gas Authority of India Limited, which is a Government of India undertaking, have come up the

above applications u/s 9 of the Arbitration and Conciliation Act, 1996, seeking interim orders of injunction restraining Gas Authority of India

Limited from raising debit notes for the gas supplied during the period from 06.6.2006 to 31.5.2010, pursuant to the letters issued to each one of

them on 29.11.2011, pending disposal of the arbitration proceedings. I have heard M/s. R. Yashod Vardhan, Mr. A.R.L. Sundaresan, Mr. P.S.

Raman, learned Senior Counsel and Mr. Vinod Kumar, learned counsel appearing for the applicants and Mr. M. Ajmalkhan, learned Senior

Counsel for the respondent.

2. Under separate agreements, entered into in the year 2000, the respondent

agreed to supply to the applicants, a fixed quantity of gas, as allotted

by the Government of India. The period of validity of the agreements was fixed generally as 31.12.2010, though in individual cases, there were

some variations. The agreements provided for the extension of the period of contract. Insofar as the price of gas is concerned, Article 10 of the

agreements stipulated that up to 31.3.2000, the price as fixed by the Government of India under a Pricing Order dated 18.9.1997 would be

adopted. After 31.3.2000, the respondent reserved the right to fix the price as per the directives, instructions or Orders of the Government of

India. It was also stated that the price was likely to be market related in accordance with current policy of liberalization of the Government of

India.

3. In other words, (i) the quantity of gas to be supplied to each of the applicants was determined by the Government of India, by individual letters

of allotment; and (ii) the price payable by the applicants was to be in accordance with the Pricing Orders issued by the Government of India from

time to time. The agreements also contained a clause for resolution of disputes through arbitration.

4. From the time the applicants entered into Gas Supply Contracts with the respondent, till the year 2005, there were no issues. But, on

20.6.2005, the Government of India issued a Pricing Order bearing No. L-12015/5/-4-GP(I), revising the pricing methodology that was in force

from 18.9.1997. The decisions communicated by the Pricing Order dated 20.6.2005, which are relevant for the purpose of our present case, are

as follows:

(iii) Power and fertilizer sectors are critical to the economic development of the country and the output price of these sectors is either controlled or

regulated by the Central and State Governments, who have to bear subsidy to a large extent for any increase in the output price. The specific end

users committed under Court Orders/small scale consumers having allocations upto 0.05 MMSCMD also deserve priority in gas supply.

Accordingly, it has been decided in the public interest that all available APM gas would be supplied to only the power and fertilizer sector

consumers against their existing allocations along with the specific end users committed under Court orders/small scale consumers having allocations upto 0.05 MMSCMD at the revised price of Rs. 3200/MCM. This price would be linked to a calorific value of Rs. 10,000 K.

cal/cubic.metre. However, the gas price for transport sector (CNG), Agra-Firozabad small industries and other small scale consumers having

allocations upto 0.05 MMSCMD would be progressively increased over the next 3 to 5 years to reflect the market price.

(iv) Consumers other than fertilizer, power and specific end users committed under Court Orders/Small scale consumers having allocations upto

0.05 MMSCMD and getting existing gas supplies through GAIL network, would be supplied natural gas at market related price depending on the

producer price being paid to joint venture and private operators at landfall point, subject to a ceiling of ex-Dahaj RLNG (regassified LNG) price

of US $ 3.86/MMBTU for the current year i.e. 2005-06.

5. It may be seen from the relevant portion of the Pricing Order dated 20.6.2005 extracted above, that two different pricing mechanism were

adopted. One was termed as APM meaning ''Administered Price Mechanism''. The second was market related price, which depended upon the

producer price being paid to joint venture and private operators at landfall point. By virtue of Clause 10 of the Gas Supply Contracts that the

parties had entered into, it is obvious that the Pricing Order dated 20.6.2005 was to come into effect.

6. By a letter dated 05.6.2006, the Government of India also sent a communication to the respondent indicating that as per the Pricing Order

dated 20.6.2005, revision of APM gas prices was to be carried out for all consumers, other than those in power and fertilizer sectors, in a phased

manner over the next 3-5 years. Accordingly, the Government of India increased the price of APM gas supplied to City Gas Distribution Projects

and small consumers having allocation up to 0.05 MMSCMD, by 20% over the current APM price of Rs. 3,200/MSCM for general consumers

and Rs. 1,920/MSCM for North-East consumers. The revised prices for other consumers were also indicated in the said letter.

7. Thereafter, the respondent sought a clarification from the Director in the Ministry of Oil, Petroleum and Natural Gas, by a letter dated

12.6.2006. It appears that the respondent had earlier sent a similar letter dated 05.6.2006 for clarification.

8. In response, the Under Secretary to the Government of India sent a reply dated 27.6.2006. The crucial portion of the said reply was as follows:

APM gas price would be applicable for only those quantities of gas which are used for generating electricity, which is supplied to the grid for

distribution to the consumers through the public utilities/licensed distribution companies.

9. Immediately upon receipt of the clarification, the respondent appears to have sent communications to the applicants, seeking a confirmation

about generation and distribution of electricity according to the guidelines issued by the Ministry on 10.7.2006. All the applicants appear to have

informed the respondent as to how they were generating electricity and supplying the same to the TNEB grid for distribution to the consumers.

10. Thereafter, the Government of India issued another Pricing Order dated 31.5.2010, revising the APM price inclusive of royalty to a particular

rate. It was followed by another clarification dated 24.11.2010, wherein it was indicated that the gas is supplied at APM rate only to those

categories of customers mentioned in the Ministry''s letter dated 20.6.2005 and that supply of APM gas produced by National Oil Companies

from the nominated blocks to all other categories will be at non-APM rate decided by the Government.

11. The individual agreements that the applicants had with the respondent, expired, as stated elsewhere, on 31.12.2010. Therefore, the applicants

entered into fresh agreements titled as ""Gas Sales and Transmission Agreement"", in the last week of December 2010. The period of contract

stipulated in the fresh agreements, was five years from 01.01.2011 up to 31.12.2015. These agreements contained an indication about the price of

gas, under Article 10, as fixed by the Government of India in the Pricing Order dated 31.5.2010. However, Article 10.1 also indicated that the

respondent will have a right to fix the gas price at any time in future, as per the Directive, Instruction or Order of the Ministry. It should be pointed

out at this stage that the agreements also contained an article which provided for billing at fortnightly intervals and payments thereafter.

12. It appears that after the fresh contracts were entered into by the respondent with the applicants, for the period from 01.01.2011 to

31.12.2005, the Indian Audit and Accounts Department communicated to the Government of India a draft paragraph titled ""Undue benefit extended to power purchasers relating to GAIL"", in the report of the Comptroller and Auditor General of India. In the draft paragraph, proposed

to be included in the report of the Comptroller and Auditor General, the Audit and Accounts Department had pointed out that there were actually

four categories of consumers. They were (i) Category A - State Electricity Boards and Government companies generating power for supply to grid

for distribution to consumers, (ii) Category B - Private companies generating power and selling to State Boards as IPP, (iii) Category C -

Consumers generating electricity for captive consumption without supplying to grid, and (iv) Category D - Consumers generating electricity and

supplying to various consumers using wheeling arrangement with State Electricity Boards. The objection of the Audit and Accounts Department

was that the respondent charged its customers coming under Category D also at the same rate as the others and that though the respondent sought

clarifications from the Ministry way back in June 2006, no clarification had been issued till September 2011. Therefore, in paragraph 12.2 of

Report No. 3 of 2011-12 of the Comptroller and Auditor General, it was pointed out that the extension of the benefit of APM price to Category-

D consumers who were supplying power at commercially agreed rates, resulted in under-recovery of Rs. 227.37 Crores from seven consumers

during the period from April 2006 to March 2010. This benefit, according to the Comptroller and Auditor General, had increased to Rs. 246.16

Crores by March 2011. The audit report also considered the reply submitted by the respondent to the effect that Category-D consumers were

also utilizing the services of the Electricity Board for wheeling. But, the Comptroller and Auditor General stated that the reply was unconvincing.

13. Upon the receipt of the said draft paragraph from the Audit and Accounts Department, the Government of India sent a communication to the

respondent on 07.11.2011, directing the respondent to take action for recovery of dues from the customers. Immediately thereafter, the

respondent sent individual communications dated 29.11.2011 to all the applicants, pointing out that APM gas price would be applicable only for

the quantity of gas which are used for generating electricity which is supplied to the grid for distribution to the consumers through the public

utilities/licensed distribution companies. Therefore, the respondent indicated to the applicants that the price to be charged for the applicants, for the period from 06.6.2006 up to 31.5.2010 was Rs. 3,840/1000 SCM and that it would be USD 4.2/MMBTU from 01.6.2010 onwards. Following

the said communication, the respondent also raised debit notes.

14. Upon receipt of the debit notes, all the applicants rushed to this Court with the above applications, seeking interim orders of injunction to

restrain the respondent either (i) from issuing/raising fresh invoices for the natural gas supplied to them in terms of agreement, or (ii) from enforcing,

demanding or compelling the payment of amounts as demanded under the debit notes, or (iii) from discontinuing supply of agreed quantity of gas to

their power plants.

15. The above applications came up for ad-interim ex parte orders in the second/ third week of December 2011 and this Court granted a limited

interim order of injunction only in respect of past supplies. In other words, the injunction granted was to restrain the respondent from raising debit

notes in respect of past supplies up to October 2011.

16. Upon being served with copies of the interim orders so passed, the respondent came up with applications seeking interim suspension of the

order of injunction. But, those applications were rejected by this Court. Thereafter, the above main applications were taken up for hearing.

17. Before proceeding to consider the rival submissions, I should bring on record the following facts:

(i) that in respect of some of the applicants herein, Hon''ble Mr. Justice G.N. Ray, Retired Judge of the Supreme Court, had already concluded

arbitration proceedings, heard the arguments finally and reserved award on 05.8.2013;

(ii) that in respect of few other applicants, the arbitration proceedings are at a final stage; and

(iii) that in respect of few others, arbitration proceedings are under progress.

18. As pointed out earlier, the interim order of protection that the applicants obtained in December 2011 in their favour is only to the effect that the

respondent cannot make any demand for an enhanced rate in respect of the past period from 2006 up to October 2011. The applicants have

accepted this order. Therefore, with effect from November 2011, all the applicants are admittedly paying the enhanced rate as demanded by the

respondent. Consequently, the dispute in these applications has now narrowed down to only one question, namely as to whether the applicants

should be continued to be protected till the arbitration proceedings are concluded, from being compelled to pay the revised rates for the period

from 2006 to October 2011 or not.

19. Since the applicants are asking for an interim protective order in the nature of an injunction, the principles that govern the grant of an interim

order under Order XXXIX, Rule 1, CPC would apply. In Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., , the Supreme

Court held that while considering an application u/s 9 for injunction, the Court should apply the same principles that govern the grant of interim

injunction under Order XXXIX Rules 1 and 2, CPC. Therefore, on this position of law, there is no dispute. Hence, let me now apply the triple test

of prima facie case, balance of convenience and irreparable hardship.

20. Drawing my attention to the decision of the Delhi High court in M/s. Sai Regency Power Corporation Pvt. Ltd. vs. Gail (India) Ltd. (OMP

No. 55 of 2012 decided on 20.1.2012), it is submitted by the learned counsel appearing for the applicants that in respect of identical contracts, the

Delhi High Court had granted an interim injunction in so far as the claim for arrears is concerned.

21. It is true that the Delhi High court has granted prohibitory orders in respect of identical claims. But it does not mean that I should not test the

ingredients necessary for the grant of an injunction. Interim orders, especially those passed by other High courts, do not even have persuasive

value, though they deserve respect and we may draw inspiration from them. Therefore, I would proceed to test them independently.

PRIMA FACIE CASE:

22. On the following facts, there is no dispute (i) that till October 2011, the applicants were paying the price which is called the Administered Price

Mechanism rate as fixed by the Government of India, (ii) that the applicants were being granted supplies by the respondent under various Gas

Supply Contracts entered into in the year 2010, which expired on 31.12.2010; (iii) that fresh contracts were entered into in December 2010, by

the respondent with the applicants for a period of five years with effect from 01.01.2011; and (iv) that it was only after the Comptroller and

Auditor General''s report and the letter of the Government of India that the respondent started making a demand in November 2011, for an

enhanced rate, with retrospective effect from 2006.

23. Based on the above admitted facts, the contentions of the applicants are:

(i) that in respect of contracts executed and concluded on 31.12.2010, a demand for an enhanced price cannot be made after 11 months of the

contracts working themselves out;

(ii) that a major portion of the claim of the respondent, is patently barred by limitation;

(iii) that all the applicants are in fact loading the power generated by them, into the grid of the Tamil Nadu Electricity Board for supply to the

consumers and they are entitled to APM price;

(iv) that the respondent was fully aware of the total quantity of power generated by the applicants, the quantity supplied to the grid and the manner

of distribution to their customers and the respondent did not question the entitlement of the applicants so far to the APM price; and

(v) that therefore, the respondent was totally unjustified in making claim retrospectively for an enhanced rate.

24. However, the reply of the respondent is

(i) that as per the Pricing Order issued by the Government of India on 20.6.2005, it is only the consumers who are in the power and fertiliser

sectors, who are entitled to the supply of gas at the APM price, as the output price of their own products are regulated by the Government;

(ii) that when the respondent seeks to rectify a mistake in the pricing adopted, the same cannot be objected to by the applicants; and

(iii) that by virtue of Article 10 of the contract, the applicants have agreed to abide by the Pricing Orders of the Government of India, and that

therefore, they cannot now attempt to wriggle out of the contractual obligations.

25. I have carefully considered the rival contentions. All the contracts entered into in the year 2000 by the applicants with the respondent,

contained a total of about 19 Articles. Article 1 contained definitions and interpretations, Article 2 stipulated the period of contract, Article 3

contained a clause for extension, Article 4 contained prescriptions regarding delivery of gas, Article 5 contained the stipulations as to quantity and

so on and so forth. Article 10 contained the stipulation relating to the price of gas. It reads as follows:

10.01 Present price of 1000 (One Thousand) Standard Cubic meters of GAS w.e.f. 1.10.1997 is applicable as per Government Pricing Order

No. L-12015/3/94-GP dated 18.9.1997 (Annexure III). After 31.3.2000 the SELLER shall have right to fix the price of GAS which may be as

per directive, instruction, order, etc. of the Government of India etc which is likely to be market related in accordance with current policy of

liberalization of the Government of India and the BUYER shall pay to the SELLER such price of GAS. Provided further, the price of GAS so fixed

is exclusive of Royalty, Taxes, Duties, Service/Transportation (Transmission) charges and all other statutory levies as applicable at present or to be

levied in future by the Central or State Government or Municipality or any other local body or bodies payable on purchase of GAS from

ONGCL/Other Producer(s) by the SELLER or on sale from SELLER to the BUYER and these shall be borne by the BUYER over and above

the aforesaid price.

26. Therefore, it is clear that though the parties agreed as between themselves (a) upon the quantity of gas to be supplied, (b) upon the quality of

gas to be supplied, (c) upon the period of supply, and (d) upon the method of measurement and calibration, etc. including billing and payment, the

parties did not indicate in the contract itself, the price at which gas was to be supplied. Since the allotment of gas to the applicants was not made

by the respondent, but made by the Government of India, the applicants and the respondent agreed that the price of gas supplied, will be

determined by the Government of India as per the Pricing Order.

27. What is important to note is that the entire contract does not give an indication as to whether the price payable by the applicants was a

subsidized one or the market rate. Article 10 simply stipulated that the rate payable by the applicants would be as per the Government Pricing

Order dated 08.9.1997 up to 31.3.2000. After 31.3.2000, the discretion was with the respondent to fix the price, which may be as per the

directive, instruction, order etc. of the Government of India and which was likely to be market related in accordance with the policy of liberalization

of the Government of India. Keeping in mind the above provision, let me now take a look at the provisions of the Sale of Goods Act, to which such a contract can be related.

28. Section 9(1) of the Sale of Goods Act, 1930, stipulates that the price in a contract of sale may be fixed by the contract or may be left to be

fixed in a manner thereby agreed or may be determined by the course of dealing between the parties. Sub-section (2) states that if the price is not

determined in accordance with the previous sub-section, the buyer should pay a reasonable price. What is a reasonable price is a question of fact

depending on the circumstances of each particular case.

29. Section 10(1) states that where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party

and such third party cannot or does not make such valuation, the agreement is avoided. But, if part of the goods had been delivered to and

appropriated by the buyer, he should pay a reasonable price.

30. Therefore, it is clear that the agreements that the applicants and the respondent entered into, are agreements which could be traced either to

Section 9 or to Section 10 of the Act. I do not wish to pronounce in categorical terms as to which Section would apply, as it may prejudice the

rights of parties before the Arbitrator, before whom the proceedings are already concluded in some cases.

31. If an agreement to sell certain goods stipulates that the price is to be fixed by a third party, normally, the word of that third party would be final

and binding. It is especially so when the parties agree to abide by directives such as Pricing Orders issued by the Government of India. Therefore,

prima facie, I see nothing wrong in the respondent making a demand.

32. However, drawing inspiration from the decision of the Apex court in Bhupendra Vs. State of Maharashtra and Another, , it is contended by

the learned Senior Counsel for some of the applicants that the price once fixed, can never be altered. In that case, the Supreme Court held that

when a sale of any commodity is made, the seller and purchaser both have to know the sale/purchase price at the time of or before the sale. The

Supreme court made a sweeping statement in that case that ""the fixation of sale/purchase price subsequent to the transaction, is unknown to the

whole world"".

33. But unfortunately, this decision of the Supreme Court does not take note of the provisions of the Sale of Goods Act which I have referred to

above. Therefore, I would not take this decision as laying down the law on the point with respect to the Sale of Goods Act.

34. Since the impugned action of the respondent is on the basis of an audit objection raised by the Comptroller and Auditor General of India, it is

contended by Mr. R. Yashod Vardhan, learned Senior Counsel that the Government Authorities should not act simply on the basis of the reports

of the Comptroller and Auditor General. Placing reliance upon the decision in Arun Kumar Agrawal Vs. Union of India (UOI) and Others, , the

learned Senior counsel contended that unless the reports of the Comptroller and Auditor General are submitted to the President and laid before

each Houses of Parliament and adopted, it is not permissible to rely upon those reports.

35. But the above contention loses sight of an important aspect. The fact that Article 10 of the Contract deals with the pricing aspect and that the

Pricing Orders issued by the Government of India are to be followed by both parties, are not in dispute. The applicants were given the benefit of

supplies at APM rate due to a particular interpretation to the Pricing Orders. The CAG merely pointed out what he thought to be an error in the

interpretation of the contract. The government had accepted the same and directed the respondent to raise revised bills for the recovery of the

differential amounts. Therefore, it is not a case where CAG report was blindly accepted and a levy made by the respondent. The question as to

whether the interpretation given by CAG is correct or not, may be open to adjudication before the Arbitral Tribunal. But the report by itself cannot

be rejected outright and the decision of the Supreme court is of no avail to the applicants.

36. Insofar as the question of limitation is concerned, it is true that by the communications dated 29.11.2011, the respondent raised a demand for

the first time, for the period from 06.6.2006 up to 31.5.2010 and from 01.6.2010 up to the date of the circular. Therefore, the claim is obviously

for a period both within and beyond the normal period of limitation of three years.

37. But, I cannot straight away come to the conclusion that a part of the claim of the respondent is clearly barred by limitation. The reasons are (i)

that when the price determined by the third party, namely, the Government of India, is made clear to the respondent, only by the communication dated 17.11.2011, the starting point for the period of limitation may not be 06.6.2006, and (ii) that in any case, the question of limitation is a mixed

question of fact and law and hence the Arbitral Tribunal may have to see whether the applicants had a mutual, open, running and current account,

which would save them from the plea of limitation or not.

38. The applicants have raised two issues on merits. They are (i) that some of them supplied the entire quantity of electricity generated by them

only for consumption by the Tamil Nadu Electricity Board and its customers, and (ii) that though some of them are supplying to their own

consumers, the same is done only through the grid of the Tamil Nadu Electricity Board. In other words, some of the applicants have taken a stand

that they do not supply electricity generated by them to any consumer other than the Tamil Nadu Electricity Board and its consumers. Some of

them have taken a stand that it was never made clear to them as to what the term ""consumer"" connoted. In the letter of the Government of India

dated 27.6.2006, addressed to the respondent, what was mentioned was only the following:

APM gas price would be applicable only for those quantities of gas which are used for generating electricity which is supplied to the grid for

distribution to the consumers through the public utilities/licensed distribution companies.

39. In pursuance of the said letter, the respondent appears to have sought a clarification from the applicants by a letter dated 04.7.2006. The

applicants replied to the effect that the gas consumed by them was used for generating electricity that is supplied to the Electricity Board grid for

distribution to the consumers. By the term ""consumers"", the applicants meant their own consumers. According to the applicants, the respondent

was aware of this and yet chose to keep quiet. Therefore, they contend that non-APM price is not applicable to them.

40. In addition, the applicants also contend that even the tariff fixed by them, for the supply of electricity to their own consumers is not determined

unilaterally by them. The agreed rates have to be approved by the Tamil Nadu Electricity Regulatory Commission. Therefore, the applicants

contend that their output price of electricity is regulated by statute and hence, they cannot be charged non-APM price.

41. The applicants are partly right and partly wrong. It is true that the rate per unit of electricity supplied by them to their own consumers is to be

approved by the Electricity Regulatory Commission. But, the question is not entirely about this. The original policy of the Government of India, as

stipulated in the Pricing Order dated 20.6.2005 was to supply gas at APM rate, to power and fertilizer sectors, whose output price is either

controlled or regulated by the Central or State Governments and who are made to bear subsidy to a large extent. Insofar as the applicants are

concerned, the output price is not regulated by the Central or State Governments, even though they may be in the power sector. Their output price

does not carry any subsidy, unless the distribution is by the Electricity Board itself.

42. More over, the question as to whether and to what extent the applicants supplied gas to the grid of the State Electricity Board for the

consumption of consumers of the Electricity Board itself, is a question of evidence. Most of the parties have already let in evidence before the

Arbitrator on this aspect. Therefore, today, I cannot proceed on the footing that the entire quantity generated by the applicants was or was not

supplied to the Electricity Board for the consumption of the consumers of the Electricity Board itself.

43. But, the point that the present demand is made by the respondent in respect of the sale and supplies concluded under a contract which expired

on 31.12.2010, tilts the balance in favour of the applicants, in so far as prima facie case is concerned. The test for determining the existence of a

prima facie case in respect of the demand for arrears, is not exactly the same as the test for determining a prima facie case for the supplies to be

effected in future. Fortunately, in respect of supplies for the period from November 2011, the applicants have been refused an order of injunction.

Therefore, I am now testing the existence of a prima facie case only in relation to the demand for the past period.

44. The demand for the past period, raises several questions. In Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power

Pvt. Ltd., , the Supreme Court pointed out that while considering a prayer for injunction, the Court should also look into the conduct of the parties

apart from the elements of prima facie case, balance of convenience and irreparable injury. If the parties had been acting in a particular manner for a long time in interpreting the terms and conditions of a contract, any decision asking the parties to maintain status quo till the final determination of

the lis, cannot be found fault with. Applying this decision, it is seen that upto the issue of the letter dated 29.11.2011, the respondent themselves

were satisfied that the applicants are entitled to the supply of gas at APM price. Therefore, the applicants have a prima facie case for the

maintenance of status quo at least in respect of the arrears for the past period. Hence, I think the prima facie case is in favour of the applicants,

though there are also arguable points in favour of the respondents.

BALANCE OF CONVENIENCE AND IRREPARABLE HARDSHIP:

45. On the question of balance of convenience and irreparable hardship, it is the contention of the applicants (i) that all the applicants have a

positive net worth and hence, the respondent will be able to recover any amount, in the event of the arbitration proceedings being decided in their

favour; (ii) that the applicants depend 100% upon the supply of gas by the respondent and hence, the enforcement of any award passed in favour

of the respondent, is quite easy, since the applicants cannot survive, if the respondent seeks to terminate the contract; (iii) that if the applicants are

made to pay a huge amount towards past arrears, at this juncture, their liquidity will be seriously hampered; and (iv) that in any case, the applicants

maintain an irrevocable standby Letter of Credit as per Article 11.01 and hence, the recovery of the amounts by the respondent in the event of

their success in the arbitration proceedings, is quite easy.

46. In response to the above contentions, it is submitted by Mr. M. Ajmal Khan, learned Senior Counsel for the respondent that in cases of this

nature, the balance of convenience should be construed to be in favour of the respondent and that in so far as the financial position is concerned,

the respondent stands far ahead of the applicants. The respondent is one of the companies considered to be Navaratnas of the Government of

India. Therefore, in the event of the applicants succeeding before the Arbitrators, the applicants can always recover the amounts from the

respondent. But, on the contrary, if the respondent succeeds in the arbitration proceedings, it would be difficult for the respondent to recover the

amount from the applicants.

47. I have carefully considered the rival submissions. There is no doubt in my

mind that even if I reject the prayer for interim relief and the

applicants eventually succeed in the arbitration, the applicants can (i) either recover the excess payments made to the respondent (ii) or at least

have the supply of gas for the value equivalent of the excess payments made. The financial strength and credibility of the respondent is beyond any

pale of doubt.

48. But as rightly contended by the applicants, the rejection of their prayer for interim protection, at least in so far as the past claim is concerned,

would result in a financial paralysis of the applicants. After all, the applicants are not wholly responsible for the present state of affairs. The

respondent as well as the inaction on the part of the Ministry to issue a clarification at the earliest point of time, has resulted in this situation.

Therefore, overall public interest demands that an order crippling several running industries, is to be avoided.

49. In ITC Ltd. Vs. State of Uttar Pradesh and Others, , the Supreme Court brought out the distinction between a transfer, pure and simple,

governed by the Law of Contracts and the Transfer of Property Act, 1882 and a transfer that is in the domain of public law. If a case falls in the

domain of public law, the Court will have to consider two questions before a completed transfer is interfered. The first question is whether the

transferee had any role to play, such as fraud, misrepresentation, undue influence, etc. Even in cases where the transferee had acted bona fide and

was blameless, saving of the transfer would depend upon the further question whether public interest had suffered or not. Therefore, it is necessary

to keep in mind, public interest before an interim order is granted.

50. In the cases on hand, there are 2 elements of public interest at play. One is purely financial and that is in favour of the recovery of money due

to a public corporation such as the respondent herein. Another is purely non-financial and that is in preventing the killing of the goose that lay

golden eggs periodically to the very same respondent Corporation. Public interest operates both ways in these cases. The applicants generate

electricity and distribute the same to various industries. Even if they do so for a profit, several industries that depend on the applicants for electricity

and to whom the State Electricity Boards are unable to supply, would face the threat of closure if the applicants are closed down due to a financial crunch, created by the refusal of an interim order. In other words, the grant of an interim order in favour of the applicants would have only a

financial impact upon the respondent, which is a public corporation. But the refusal of an interim order would have a spiralling effect both upon the

applicants and the industries that depend on them for power. Therefore, the balancing of both should be done, by looking at the consequences that

would flow out of an order one way or the other:

(i) If an interim order is granted in favour of the applicants and they succeed in the arbitration, the respondent may have to refund to the applicants,

the excess amounts collected during the period from November 2011 upto date (2 years).

(ii) If an interim order is not granted in favour of the applicants, but they succeed in the arbitration, the respondent may have to refund to the

applicants, the excess amounts collected during the period from June 2006 onwards upto date (7-1/2 years).

(iii) If an interim order is granted in favour of the applicants, but the respondent succeeds in the arbitration, the applicants would become liable to

pay to the respondent, the differential amount for the period from June 2006 to October 2011.

(iv) If an interim order is not granted in favour of the applicants, but the respondent succeeds in the arbitration, no liability to pay would arise on

either side, since the applicants would have paid the amounts as demanded.

51. In 2 out of the above 4 alternative scenarios, it is the respondent, which would become liable to make payment to the applicants. In the last

scenario, no liability to pay arises on either side. It is only in the 3rd scenario that the applicants would become liable to pay. Therefore, the dice is

cast mostly in favour of the applicants even in respect of balance of convenience.

52. In State of Maharashtra and Others Vs. Nagpur Distillers, Nagpur and Another, , the Supreme Court reversed the unconditional interim order

granted by the Bombay High Court and directed the licensee to pay 50% and to give an undertaking to pay the balance 50% in the event of

success in the main petition, so as to balance the equities and afford protection to the interests of both parties. I think the same formulae would

balance equities between the parties, in view of the alternatives we have seen above.

53. Relying upon the decision of the Supreme court in Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, , the learned Senior

Counsel for the respondent contended that while dealing with excess payment of public money, which is often described as tax payers'' money, the

issue of fraud or misrepresentation is not relevant, for the purpose of directing recovery.

54. But the said decision arose out of a demand for recovery of excess money paid to the employees. The above decision deals with a demand

made after a final determination of liability. But in the cases of this nature, no final determination is made as yet by the arbitral tribunal. Therefore,

the above decision is of no avail to the respondent.

55. Several decisions were also cited with regard to the interim orders of injunction, against the enforcement of bank guarantees. I do not wish to

go into those decisions, as they are not of relevance to the situation on hand.

56. As pointed out above, there is a clash of 2 elements of public interest in the cases on hand. Both have to be balanced.

57. According to the learned Senior Counsel for the applicants, public interest in favour of the respondent is also safeguarded by two things. The

first is that all the applicants have given revolving standby Letters of Credit, which can be invoked by the respondent in the event of success in the

arbitration proceedings. The second is that for the continued existence of the applicants, they have to go only to the respondent for the supply of

gas and that since the applicants cannot buy gas from any other source, they are at the mercy of the respondent. Therefore, it is their contention

that the claim of the respondent will always stand safe and secured.

58. In so far as the first thing pointed out by the applicants is concerned, it is the contention of the respondent that the revolving standby Letter of

Credit covers only the bills outstanding for one fortnight. But, the claim of the respondent is in respect of a period of about 5 years. Therefore, in

respect of the applicants, except the applicants in O.A. Nos. 937 and 938 of 2011, the amount for which the revolving standby Letter of Credit is

given by the applicants, would not cover even 1/10th of the claim. But, it is conceded by Mr. M. Ajmalkhan, learned Senior Counsel for the

respondent that in so far as the applicants in O.A. Nos. 937 and 938 of 2011 are concerned, the value of the standby Letter of Credit is more than

50% of the total claim.

59. In respect of the second contention raised by the applicants, it is stated by the respondent that for testing the balance of convenience and

irreparable injury, the main consideration is as to what will happen if an interim order is refused, but the applicants succeed. Alternatively, the Court

should also see what would happen, if an interim order is granted, but the applicants fail in the arbitration proceedings.

60. I have already examined this aspect in an earlier paragraph. In these cases, none of the applicants dispute the fact that they can always recover

money from the respondent, in the event of their success before the Arbitral Tribunal. On the contrary, the respondent claims that they will not be

able to recover the amount from the applicants, in the event of the respondent succeeding before the Arbitral Tribunal. Therefore, I suggested in

the course of arguments that the applicants could at least furnish security to the extent of the claim of the respondent for the past period.

61. But, all the learned Senior Counsel appearing for the applicants, could not agree, According to them, this is not a case where the respondent

could satisfy the requirements of Order XXXVIII Rule 5 of the Code of Civil Procedure, so as to have security for their claim. Some of the

learned Senior Counsel for the applicants also attempted to draw support from several decisions of this Court and of the Supreme Court to

highlight the parameters, on which, a prayer for furnishing security has to be tested.

62. But, I am unable to sustain the objections of the applicants. The principles of Order XXXVIII Rule 5, CPC would apply, if the respondent had

come up with applications for attachment before judgment. The respondent has not come up before me with a prayer for attachment. Therefore, I

am not obliged to test as to whether the apprehension of the respondent that the applicants would try to do something to delay and defeat the rights

of the respondent in the event of a decree being passed against them, is justified or not. In fact, the respondent is not even asking for security. The

respondent is actually demanding payment of the amounts claimed in the form of debit notes on the ground that the respondent would repay the

excess amount, in the event of the applicants succeeding before the Arbitral Tribunal.

63. Today, it is the applicants who have come up with a prayer to prevent the respondent from making any claim. There are three alternatives open

to a court. The first is to grant an unconditional interim prohibitory order. The second alternative is to dismiss the applications outright. The third

alternative is to grant a conditional order of injunction that will put the interests of both parties on equal scales. This can be done by asking the

applicants to furnish security for the claim relating to the past period. For doing so, I need not apply the principles of Order XXXVIII Rule 5.

Imposing conditions for the grant of an interim order of injunction, is not something unknown to law. There is nothing either in the CPC or in

Section 9 of the Arbitration and Conciliation Act that suggests that the imposition of conditions for the grant of an order of interim injunction should

satisfy the principles behind Order XXXVIII Rule 5. Therefore, I am of the view that these applications can be allowed, subject to the condition

that the applicants furnish security to the extent of the claim of the respondent for the period from June 2006 to October 2011. Accordingly, all

these applications are ordered to the following effect:

(i) There will be an interim order of injunction restraining the respondent from enforcing their claim for the difference between the APM price and

the non APM price only in respect of the period from June 2006 to October 2011;

(ii) However, the interim injunction as ordered in the preceding clause shall be subject to the condition that the applicants furnish security to the

extent of the amount claimed by the respondent for the period mentioned above;

(iii) The applicants shall furnish security to the extent of the said claim, within a period of four weeks from the date of receipt of a copy of this

order;

(iv) While furnishing security, the applicants are also entitled to deduct the amount, for which, they have already given revolving standby Letters of

Credit. In other words, the amount, for which, the applicants shall furnish security, shall be the amount arrived at after deducting the value of the

irrevocable Letters of Credit given by them from the claim amount of the respondent; and

(v) In so far as the future period is concerned, the applicants shall continue to pay as per the earlier orders of this Court dated 23.12.2011, at the

rate as charged by the respondent, pending determination of the lis by the

Arbitral Tribunal.

There will be no order as to costs.

