

(2019) 07 DEL CK 0592

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 597, 648 Of 2012 & IA 11956 Of 2012

Reliance Industries Limited

APPELLANT

Vs

Gail(India) Limited

RESPONDENT

Date of Decision : 16-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 28(3), 34
Sale of Goods Act, 1930 — Section 4(3), 55
Indian Contract Act, 1872 — Section 73, 74

Citation : (2020) 1 R.A.J. 526 : (2019) 5 ArbLR 480

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Paras Kuhad, K.R.Sariprabhu, Shubranshu Padhi, Jitin Chaturvedi, Aditi Tripathi, Shuaib Hussain, Vishnu Sharma, Kavin, Dhruv Mehta, Manmeet Arora, Sarad K Sunny, Harkirat Singh

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging the Arbitral Award dated 25.02.2012 passed by the Sole Arbitrator (hereinafter referred to as "Impugned Award"), as corrected by the order dated 24.03.2012. Hereinafter, "Reliance Industries Limited" shall be referred to as the petitioner and "GAIL (India) Limited" shall be referred to as the respondent.

2. The Impugned Award partially allowed the claim of the respondent towards additional amounts claimed vide Debit Notes raised by the respondent in 2008 for the amount of gas supplied, representing the difference between amount remitted by the petitioner for the period between 01.08.2005 to 31.08.2008 and amount found payable by virtue of Article 11.02, along with interest @ 9% p.a. from the date of the Award, on the aforesaid amount to be determined by the

respondent.

3. The disputes between the parties arose in relation to the Gas Supply Agreement (hereinafter referred to as the "Agreement") dated 30.03.2000 for supply of Natural Gas by the respondent to the petitioner for extraction of C2 (Ethane) and C3 (Propane) fractions after removal of CO2 (Carbon Dioxide) in the petitioner's Petrochemical Plant located at Dahej, Gujarat. The Agreement was initially executed between the respondent and "Indian Petrochemicals Corporation Limited" ("IPCL"), however, on IPCL being taken over by the petitioner in 2002, the petitioner assumed all the rights and obligations of IPCL under the Agreement. The original period of the Agreement was upto 01.01.2005, however, the same was extended on a number of occasions, the last extension being upto 31.08.2008.

4. As per Clause 4 of the Agreement, which provides for the mechanism for delivery and return of gas, the supply of gas by the respondent was to be made in two phases; Phase I period was from 01.01.2000 upto 31.12.2000; and Phase II period was from 01.01.2001 onwards. The disputes between the parties pertain to Phase II of the Agreement.

5. During Phase II, the Gas was to be supplied from the respondent's LPG plant in Gandhar to the petitioner at the outlet of the Gas Metering Station No. 4 in the respondent's LPG plant in Gandhar (hereinafter referred to as the "Point of Onward Delivery"), whereafter the petitioner was to process the gas for extraction of C2 (Ethane) and C3 (Propane) fractions after removal of CO2 (Carbon Dioxide) in its plant at Dahej and deliver back the balance quantity of the Gas to the respondent at the outlet of Gas Metering Station No. 5 in the respondent's LPG Plant at Gandhar (hereinafter referred to as the "Point of Return Delivery"). The processing of the Gas by the petitioner through extraction is referred to as "Shrinkage" of the Gas and the resultant Gas denuded of C2 and C3 hydrocarbons is referred to as "Lean Gas".

6. Article 5 of the Agreement provides for terms relating to the Quantity of Gas. It provides for the Daily Shrinkable Quantity of Gas to be calculated as per formula given in Article 5.02. It refers to the "Minimum Guaranteed Offtake" quantity, which is the minimum sum of 80% of the Daily Shrinkable Quantity, as well as the charges to be paid for overdrawal of the Gas by the petitioner, that is, if the difference in the quantity of gas measured at the Point of Onward Delivery and Point of Return Delivery/quantity of gas utilised by the petitioner is more than 110% of the quantity of gas calculated under Article 5.02. Article 5 of the Agreement is reproduced below:

"ARTICLE -5 QUANTITY OF GAS

5.01 Subject always to the quantity of Gas made available by ONGC from Gandhar fields and SELLER'S ability to supply the same to the BUYER after processing of the same for recovery of LPG at the SELLER'S Gandhar Plant, the SELLER agrees to sell and deliver the gas at the Points of Onward Delivery to the

BUYER for extraction of C2 and C3 fractions after removal of C02 in the BUYER'S plant. Provided that out of the daily quantity of GAS supplied to the BUYER from the Gandhar fields, the consumption shall not exceed the quantity of GAS shrinkable as calculated in accordance with the formula given under Article 5.02 herein below. Provided further that BUYER shall build alternative fuel capabilities for meeting their requirement.

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

b) During Phase Two

$$S = A \times 1.01 (0.003 C1 + 0.92 C2 + C3 + C4 + C5 \text{ and higher } s^* + C02) / 100$$

S-- Daily Shrinkable Quantity of GAS

A i) Shall mean the Quantity of GAS made available by the SELLER to the BUYER on each such day for the purpose of MGO calculation; and

ii) Shall mean the quantity of gas actually processed by the Buyer on each such day for the purpose of calculating actual shrinkage.

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

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

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

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

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

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

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

In case the total supply of gas by the Seller to the Buyer's plant is less than 3.80 MMSCMD on any Day(s), the C2 recovery factor in the above formula shall be taken as 0.88.

5.03 The BUYER shall pay to the SELLER for the quantity of GAS utilized/shrunk

by the BUYER subject to a minimum of the fortnightly sum of Eighty(80) percent of the daily shrinkable quantity (calculated in accordance with the formula mentioned at Article 5.02), hereinafter referred to as the Minimum Guaranteed Off take (MGO) quantity. The quantity of gas utilized/ shrunk by the BUYER shall be arrived at by measuring the difference in the readings taken at the Points of Onward Delivery and the Points of Return delivery (subject to the provisions contained under article 4.09). The quantity of gas made available by the SELLER to the BUYER on any Day shall be arrived at by a summation of the measurements taken at the Points of Onward Delivery for supply of Feed Gas and the measurements taken at the meter installed on the bye-pass pipeline connecting Feed Gas and Return Gas pipelines. In case the BUYER is unable to take all the quantity of gas made available by the SELLER, on any Day(s) for processing, the quantity of gas made available by the SELLER, as above, shall be considered for calculating the MGO charges as provided herein above. Provided further that during Phase One of supply of gas from Gandhar fields the MGO charges as above shall be calculated on the basis of the quantity of gas actually supplied by the SELLER to the BUYER. Provided further that during the period 01.01.2000 to 31.03.2000 the shrinkage formula as above shall not be applicable and billing to the Buyer shall be based on the difference of the measurements taken at the Points of Onward Delivery and Points of Return Delivery. Provided further that if, on any Day(s) , the Seller is unable to supply a total of at least 3.80 MMSCMD of Gas to the Buyer's plant, the Buyer shall have the option not to take delivery of gas on such day(s) and in such an event MGO charges shall not be applicable. If, however, the Buyer opts to take Gas when the Seller is unable to supply a total of at least 3.80 MMSCMD, the shrinkage shall be calculated as per formula provided under article 5.02 for supply under Phase One and Phase Two.

5.04 Subject always to the provisions contained under Article 4.09, in case on any Day(s), the difference in the quantity of gas measured at the Points of Onward Delivery and the Points of Return Delivery ie, the quantity of gas utilized by the BUYER, is more than One Hundred and Ten Percent (110%) of the quantity of Gas as calculated through the formula provided under Article 5.02 hereinabove, the Buyer shall pay to the SELLER, for the difference in the quantity of gas utilized and the quantity of gas calculated as per formula, at one and a half (1.50) times the average price of gas calculated with reference to the quantity of gas shrunk utilized by the BUYER (co1.18 of the Annexure VII to the contract).

5.05 The BUYER shall draw and SELLER shall supply daily the quantity of GAS agreed to in Article 5.01 above at a uniform rate spread over a period of 24 (twenty four) hours."

(emphasis supplied)

7. Article 11 of the Agreement, which is of particular importance to the dispute, provides for the billing and payment on "whichever is higher" basis out of three

methods mentioned herein, and is quoted below:

"ARTICLE -11 BILLING AND PAYMENT xxx

11.02 Subject always to the provisions contained under Article 4.09 the SELLER shall raise invoice for each fortnight covering the quantity of GAS utilized for process/ shrinkage as per the formula provided under Article 5.02 or for the difference in the total quantity of gas supplied by the Seller at the Points of Onward Delivery and the balance quantity of gas received back from the Buyer at the Points of Return Delivery or for the Minimum Guaranteed charges as per Article 5.03 whichever is higher. These invoices shall be raised in accordance with Article 4, Article 5, Article 6 and Article 10 of this contract. The SELLER will raise the invoices for each fortnight and the BUYER agrees to pay the invoices so raised in full within 3 (Three) working days of presentation of the said invoice. If, for any reasons, the payment is delayed or any disallowance is made from the invoice, the SELLER will present the invoice for full amount or for the amount not paid as the case may be to the Bank against the letter of credit and draw the amount. The BUYER will make arrangements with the bank in a manner that in such an eventuality the full L/C amount gets automatically reinstated. An illustrative example of a fortnightly invoice is attached as Annexure VII to this contract.

11.03 In case of any discrepancy / dispute, the BUYER shall lodge a quantified claim with the SELLER within the period of 14 (Fourteen) days from the date of receipt of the related invoice. To the extent the claim is admitted by the SELLER, the SELLER shall issue a credit note in favour of the BUYER and adjust the same in the next invoice to be raised. The SELLER undertakes to settle the claim of the BUYER within a period of 30 (Thirty) days from the receipt of such claim, if found acceptable. Failure of the BUYER to put forward any claim within the time above specified shall be an absolute waiver of any claim as also the BUYER's right to refer the matter to arbitration.

11.04 The BUYER shall always, during currency of the CONTRACT, keep a revolving Letter of Credit(L/C) operative as stipulate in clause 11.01 and 11.02 above. In case L/C is not operative and payment is delayed, an interest at a rate of Three (3%) percent higher than the Prime Lending Rate (State Bank of India) shall be charge on all delayed payments. Delayed payment means any payment not received within the period provided in Clause 11.02 above. In case of default in making payments by the BUYER or failure of BUYER to keep L/C operative, without prejudice to other rights under the CONTRACT the SELLER shall be at liberty to stop supply of GAS without any L/C restored. The provisions of Clause 5.03 would be applicable for billing and payment for the period during which the supply of GAS is stopped on account delayed payment or L/C not being reinstated by the BUYER.

xxx

11.06 The measurements of GAS quantity delivered at the Points of Onward

Delivery and the Points of Return Delivery will be jointly certified by the BUYER and the SELLER for billing purposes."

(emphasis supplied)

8. In terms of Article 1.11 of the Agreement, "Contract", meant the Contract alongwith Annexure-I to Annexure-VII. Annexure-VII was the "Illustrative Gas Billing to IPCL" and had the following fields of information:

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S.No.

Quantity

Maximum

MGO

Quantity

Calorific
Quantity
Applicable
Value of gas
Quantity
Calorific
Applicable
Value of gas
Amount
Measured
Quantity
Balance
Price to
MGO
Excess Qty
Made
Shrinkable
Applicable
Processed
Value
Actually
Processed
Returned
Value
Price
Returned
Payable
Consumption
Be taken for
Qty if any

IPCL per
Quantity
If beyond
Available
Quantity
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Shrinkable
Including 15%
By IPCL
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(5-10)

(7 or 15)

(16-15)

(14/15)

16 and 4)

15 & 7)

9. During the period of the Agreement and upto 2008, the billing and payment for the supply of Gas was made on the basis of determination of cost of supply of Gas as per the differentials of Gas supplied and recorded at the Point of Onward Delivery and the Gas returned by the petitioner after extraction as recorded at the Point of Return Delivery. However, on 15.02.2008, the respondent served upon the petitioner a Debit Note for Rs. 1,49,42,163/- for the period of the first fortnight of February 2008, purportedly for the differential amount between quantity of shrinkable gas determined under Article 5.02 and quantity of gas

calculated as per Point of Onward Delivery and Point of Return Delivery differentials. Thereafter, further Debit Notes were sent for additional amounts for the gas supplied to the petitioner in the years 2001-2008, claiming balance payment on the basis of amount determined on "whichever is higher" principle envisaged in Article 11.02 of the Agreement. This led to the disputes between the parties that have been adjudicated by the Sole Arbitrator through the Impugned Award.

10. The learned Arbitrator by his Impugned Award has held that the respondent was entitled to raise the Debit Notes by applying the concept of "whichever is higher" principle provided in Article 11.02 of the Agreement. At the same time, the Arbitrator accepted the plea of limitation raised by the petitioner and has held that the respondent shall be entitled to the Debit Notes raised only for the period on and from 01.08.2005, which shall be reworked by the respondent. The respondent has further been held entitled to interest on the amount so worked at, at the rate of 9% p.a. from the date of the Award.

11. Both parties aggrieved of the Impugned Award have challenged the same. While the petitioner challenges the applicability and interpretation of Article 11.02 and the right of the respondent to raise Debit Notes by invoking the said Article of the Agreement, the respondent challenges the restriction of such right by applying the Law of Limitation as also the refusal of the Arbitrator to award interest as claimed by the respondent before him.

12. The learned senior counsel for the petitioner submits that Article 5.03 of the Agreement is the "Charging" Article of the Agreement while Article 11.02 merely provides for the raising of the invoices and payment thereof. He submits that the Agreement provides for various distinct concepts with regard to quantity of gas, which are as under:

- (i) Gas Made Available i.e. the summation of the Gas measured at the Point of Onward Delivery and the Bye Pass Meter;
- (ii) Gas Supplied i.e. the Gas measured at the Point of Onward Delivery;
- (iii) Gas Actually Processed i.e. Gas which was processed at the plant of the Petitioner;
- (iv) Gas actually consumed/Utilized/Shrunk i.e. the difference between the Gas measured at the Point of Onward Delivery and the Point of Return Delivery.

13. Learned senior counsel for the petitioner further submits that for Article 11.02 to be worked out, the quantity of gas utilized for process/shrinkage as per formula provided under Article 5.02, the difference in the total quantity of gas supplied at the Point of Onward Delivery and at the Point of Return Delivery, and the Minimum Guaranteed Offtake as per Article 5.03, which was again based on the value of the gas made available, are necessary inputs. However, in the course of operation of the Agreement, the respondent deviated from the contractual format, including Annexure-VII, and instead of providing all

information relevant for calculating the figures under Article 11.02, only provided the information relevant for calculating the actual consumption of gas.

14. Based on the above, the learned senior counsel for the petitioner submits that an expressly stipulated modality for operation of the Contract cannot be substituted with another modality on the presumption that substituted methodology would possibly serve the same intended purpose; a party to the Contract cannot unilaterally seek the substitution of stipulated modality in the Contract by some other modality which it claims to be identical.

15. On the other hand, the learned senior counsel for the respondent submits that all relevant information as prescribed in Annexure-VII to the Agreement was available in the "Joint Gas Tickets" and therefore, the submission of the petitioner is ill-founded. He submits that before the Arbitrator the plea taken by the petitioner was that the quantity mentioned in methodology (i) in Clause 11.02 should be understood not as an independent methodology for payment, but a formula evolved for the limited purpose of ascertaining the MGO. The Arbitrator rejected the said arguments and it is not open to this Court to interfere with such interpretation of contractual terms by the Arbitrator.

16. Before proceeding further with the submissions made by the learned senior counsels for the parties, it would be advisable to quote the relevant findings of the Arbitrator in this regard:

"After giving my earnest consideration to the rival submissions, I find it difficult to agree with Mr.Uday Lalit that the methodology (i) in Article 11.02 is mentioned only for the limited purpose of ascertaining the MGO mentioned in methodology (iii) and that it is not an Independent methodology. The language of Article 11.02 is clear and unambiguous. Leaving aside the opening parenthetical clause ("subject always to the provisions contained under 4.09", which, both parties agree, is of no relevance on the question at issue), Article 11.02 says:

"the seller shall raise invoice for each fortnight. Covering the actual quantity of gas supplied for process / shrinkage as per the formula provided under Article 5.02; or for the difference in the total quantity of gas received back from the buyer at the points of return delivery; or for the minimum guaranteed charges as per Article 5.03, Whichever is higher".

Indubitably, therefore, all the three methodologies mentioned in Article 11.02 are bases for payment and whichever methodology yields the higher price, it has to be adopted in the invoice issued. Accepting Mr.Lalit's submission would mean doing violence to the express language in Article 11.02; indeed to re-writing of the said provision. It may also be seen that MGO charges mentioned in methodology (iii), can always be ascertained with reference to Article 5.03 read with Article 5.02 and it is not necessary to resort to methodology (i) in Article 11.02 for this purpose. Once the gas made available is known (ascertained as set out, in third sentence of Article 5.03) and the gas actually shrunk is also known (as indicated in the second sentence of Article 5.03) the formula mentioned in

Article 5.02 can be applied to find out the MGO quantity. In other words, it is not necessary to limit the scope and ambit of the methodology (i) in Article 11.02, as suggested by Mr Lalit for the purpose of ascertaining the MGO quantity mentioned in methodology (iii). The specific and unambiguous language employed in Article 11.02 does not permit any such curtailment. 'Shrinkage as per formula' (language used in columns 21 and 32 of joint gas tickets) is, indisputably, "the quantity of gas shrinkable by the Buyer" within the meaning of Article 5.02 referred to as the "formula" in Articles 5.02, 5.03, 5.04 and 11.02. It is equally relevant to notice that column 33 (MGO applicable) clarifies that it is 80% the quantity mentioned in column 32 and that it does not say that it is 80% of the first methodology in Article 11.02. The floor guaranteeing the minimum payment and the ceiling mentioned in Article 5.04 (and which excess invites a penal rate) are worked out with reference to the quantity arrived at by applying the formula in Article 5.02 - and not on any other basis. All this shows that for ascertaining the MGO quantity whether for the purposes of Article 5.03 or Article 11.02, it is not necessary to cut down the purport and scope of methodology (i) in Article 11.02 and that it (MGO Quantity) can be ascertained with reference to the formula in Article 5.02 read with Article 5.03; similarly the "ceiling" aforementioned can also be ascertained with reference to Article 5.02 read with Article 5.04 and Article 5.0.1.

Be that as it may, it is sufficient to say that adopting the interpretation sought to be placed by Mr Lalit upon Article 11.02 would do violence to the clear language in Article

11.02. When the Article says that the invoice shall be raised on the basis of any of the three methodologies mentioned therein, one cannot read the methodology (i) as having been evolved merely for ascertaining the quantity under methodology (iii), thereby practically ineffectuating methodology (i).

I am, therefore, of the opinion that where the shrinkable quantity / shrinkage as per formula mentioned in columns 21 and 32 happened to be higher than the quantity mentioned in column 10 (quantity actually shrunk / consumed), the invoice has to be prepared adopting the shrinkage formula figure. Mr Vasisht submitted that the Debit Notes sent in the year 2008 were prepared adopting this basis alone. He also points out with reference to the correspondence that passed between the parties in the year 2008 that at no point of time had the Respondent disputed the correctness of the calculations on the basis of which the demand for additional amount was raised; only the basis / methodology on which the additional amount was demanded was disputed and I am inclined to agree with Mr Vasisht.

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

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Now, I may go back to the basic issue.

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

A: Firstly, the objective behind and the significance of the concept of 'shrinkable quantity' specified in Article 5.02 ('the formula'). The objective behind prescribing this formula is that it was understood and stipulated as the optimum quantity which the Respondents expected to consume I shrink. The minimum and the maximum were prescribed based on this concept viz., the consumption/ actual shrinkage should not go below 80% of the shrinkable quantity and it should not also go beyond 110% of the said shrinkable quantity. If the consumption was below 80% of the shrinkable quantity the Respondent had necessarily to pay the charges based upon 80% of the shrinkable quantity; correspondingly, if the gas consumed / shrunk was more than 110% of the shrinkable quantity, it had to pay charges at an enhanced rate which can be called penal rate as well. It is, therefore, clear that the shrinkable quantity specified in Article 5.02 is a central and an important concept in this Contract. It is for this reason that the Respondent was describing the formula of shrinkage quantity contained in Article 5.02 as a theoretical formula in its letters dated 13.6.2008, 2.7.2008 and 9.7.2008. It may I also be emphasized that the formula prescribed in Article 5.02 is repeatedly referred to as the formula in the other provisions of the Contract viz., the last sub-para in Articles 5.02 (b), 5.03, 5.04, 10.02 and 11. 02. This repeated reference to the formula in Article 5.02 indicates its central significance.

B: If the objective behind the aforesaid formula of shrinkable quantity is of such central importance in the Contract, it is only just and proper that the Respondent honours the said commitment by observing and implementing the "whichever higher" basis prescribed by Article 11.02. Article 11.02 prescribes three methodologies of which the first one is the "shrinkable quantity" as per the formula in Article 5.02. The contents of the Minutes of the Meeting dated 7.2.2000 though not strictly admissible as mentioned hereinabove, yet furnishes the background and the reasons for which the particular formula in Article 5.02 was stipulated in the Contract.

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

interpretation contended for by the Respondent.

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

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

18. In *Associate Builders v. DDA*, (2015) 3 SCC 49 the Supreme Court has reiterated the limitation on the powers of the Court in matter of interpretation of Contract in the following words:

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads: xxxxxx

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

"112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected

themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and *D.D.Sharma v. Union of India*.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram*, AIR 1954 SC 689, *Thawardas Pherumal v. Union of India*, AIR 1955 SC 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 SC 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 SC 214 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679: AIR 1985 SC 1156)"

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

19. Even otherwise, the Joint Gas Tickets that were prepared by the parties for purposes of raising the invoices had the following fields of information:

Date

SEMI RICH GAS TO IPCL

RICH GAS TO IPCL

TOTAL GAS TO IPCL

LEAN GAS IPCL TO GPC

LEAN GAS IPCL TO GGC-IV

IPCL SHRINKAGE

ENERGY CONSUMED

QTY

C.V

QTY

C.V

QTY

QTY

C.V

QTY

C.V

QTY

BY IPCL

1

2

3

4

5=1+3

6

7

8

9

10=(5-(6+8))

11=((1*2)+(3*4))- (6*7)+(8*9))

-Cont.-

SEMI GAS ANALYSIS

SEMI RICH GAS

C1

C2

C3

C4

C5

C6

CO2

0.003*C1

0.88*C2 OR 0.92*C2

Shrinkage as Per Formula

12

13

14

15

16

17

18

19=0.0003*12

20=0.88*13 OR 0.92*13

21=1*1.01*(14+ 15+16+17+18+19+20)/100

RICH GAS ANALYSIS

RICH GAS

SHRINKAGE AS PER FORMULA

110% Of Calculated Shrinkage

C1

C2

C3

C4

C5

C6

CO2

0.003*C1

0.88*C2 OR 0.92*C2

Shrinkage as Per Formula

RICH + SRG 32=31+21

33=0.8*32

34=1.1*32

EXCESS QUANTITY 35=10-32

22

23

24

25

26

27

28

29=0.03*22

30=0.88*23 OR 0.92*23

31=3*1.01* (24+25+26+27+28+29+30)

32=31+21

33=0.8*32

34=1.1*32

35=10*32

20. Though a comparison of the above Joint Gas Tickets with Annexure-VII to the Agreement may on first blush show a difference in the fields, a careful perusal of the same shows that this difference is merely superficial in nature and the Joint Gas Tickets, in fact, provide relevant information required for working out the methodology mentioned in Article 11.02 of the Agreement. Mr.Dhruv Mehta, learned senior counsel for the respondent has explained this as under:

- i. Column 5 of the Joint Gas Ticket (JGT) = Column 2 of Annexure-VII;
- ii. Column 6 + Column 8 of JGT = Column 10 of Annexure-VII;
- iii. Column 32 of JGT = Column 3 of Annexure-VII;
- iv. Column 33 of JGT = Column 4 of Annexure-VII;
- v. Column 35 of JGT = Column 20 of Annexure-VII

21. Learned senior counsel for the respondent submits that the parties had clearly proceeded on the premise that there was no difference between the quantity of gas made available by the respondent to the petitioner and quantity of gas actually processed by the petitioner, and it is on this basis that Article 5.04 of the Agreement was also worked out by the parties.

22. On the other hand, the learned senior counsel for the petitioner submits that the assumption of the respondent that Gas made available is equivalent to the Gas actually processed is fallacious. These are two different concepts and although "gas actually processed" has not been defined in the Agreement, the same can only mean the quantity of gas actually processed by the petitioner at its plant. He submits that the gas actually processed by the petitioner would always vary from the "gas made available" by the respondent because of various reasons like buffer quantity of gas in the pipeline, which was approximately 35 km long, variation in pipeline processor and temperature as well as general weather conditions, operational parameters at petitioner's plant etc.

23. I have considered the submissions made by the learned senior counsels for the parties. While theoretically the learned senior counsel for the petitioner may

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

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

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

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

26. Learned senior counsel for the petitioner further contended that by not raising invoices in terms of Article 11.02 of the Agreement but raising invoices only on the basis of quantity of gas actually consumed, that is the difference in the quantity of gas at the Point of Onward Delivery and at the Point of Return Delivery, the respondent had clearly deviated from the terms of the Agreement thereby abandoning the other methodologies provided in Article 11.02 of the Agreement. The respondent knew of the contractual terms, however, by its conduct not only waived the same but is also estopped from enforcing the same inasmuch as, based on such conduct, the petitioner has irreversibly altered its position by not recording the "gas actually processed"; renegotiated the terms of the contract at the time of its renewal; and structured its business and the processing of the plant. He places reliance on the following judgments in support of his contentions:

a. Sha Mulchand & Co. Ltd. (in liquidation) by the Official Receiver, High Court, Madras v. Jawahar Mills Ltd., Salem 1953 SCR 351;

b. Jagad Bandhu Chatterjee v. Smt. Nilima Rani & Ors., (1969) 3 SCC 445;

c. B.L. Sreedhar & Ors. v. K.M.Munireddy & Ors., (2003) 2 SCC 355;

d. Supdt. Of Taxes, Dhubri & Ors. v. M/s Onkarmal Nathmal Trust, (1976) 1 SCC 766

e. ZVI Construction Co. LLC v. University of Notre Dame, (USA) in England (2016) EWHC 1924(TCC)

27. The Arbitrator has considered the plea of waiver and estoppel and has held as under:

"Issue No.4: Estoppel: A plea of estoppels has been rasied in the written statement (para E of the preliminary submissions at page 6). A plea of estoppels applies where the person to whom the representation is made is not aware of the true state of facts and acts, in good faith on the representation and alters his position in such a manner that if the representation is withdrawn, he will suffer loss/prejudice. In this case, no facts are placed before the Tribunal attracting the above ingredients of the rules of estoppels.

Issue No.4 is accordingly answered against the Respondent.

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

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

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

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

31. Learned senior counsel for the petitioner has further placed reliance on the judgments in *Amalgamated Investment and Property Co. Ltd. (In Liquidation) v. Texas Commerce International Bank Ltd.*, (1982) 1 QB 84 and *Transmission Corpn. of Andhra Pradesh Limited & Ors. v. GMR Vemagiri Power Generation Limited & Anr.*, (2018) 3 SCC 716 to contend that by the subsequent conduct of the parties, the parties should be deemed to have evolved a new methodology of billing and should be held bound by it.

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

33. Learned senior counsel for the petitioner has further submitted that the Agreement dated 30.03.2000 was in the nature of an Agreement to Sell within the meaning of Section 4(3) of the Sale of Goods Act, 1930. He submits that "sale" took place with the supply and consumption of gas and raising of the invoice for the same by the respondent. He submits that there was no provision for raising a supplementary invoice or a Debit Note thereafter. He submits that in terms of Section 9 of the Sale of Goods Act read with Article 11.02 of the Agreement, the determination of price took place with the raising of the invoice by the respondent and the Contract of Sale stood discharged by performance. The invoices so issued and when paid, therefore, discharged the Contract by performance. He further submits that in terms of Section 55 of Sale of Goods Act, 1930 it is only an unpaid seller who has a right to sue for the price remaining unpaid for the supply effected. In the present case, as the petitioner had paid the invoices raised by the respondent in full, the claim of the respondent before the Arbitrator was not maintainable.

34. At the outset, I may note that the plea based on the provisions of Sale of Goods Act, 1930 was not raised by the petitioner before the Arbitrator, though a plea of lack of provision for raising supplementary invoices/Debit Notes in the Agreement was raised. In my view, as this plea, is not one of lack of jurisdiction of the arbitrator, but one of merit of the claim of the respondent, it cannot be allowed to be raised for the first time in challenge to the Award under Section 34 of the Act.

35. Even otherwise, as far as the plea based on lack of a provision in the Agreement for raising supplementary invoice/Debit Notes is concerned, the same is stated to be rejected. If a party makes a mistake in the invoice raised, it can certainly amend the same by raising a supplementary invoice/debit/credit note to make the invoice in conformity with the terms of the Agreement. It is not denied by the petitioner that, infact, such Debit/Credit notes were raised by the parties on other issues as well.

36. Similarly, the arguments of the learned senior counsel for the petitioner based on the provisions of the Sale of Goods Act, 1930 cannot be accepted. All the terms of the sale of Gas, including the price on which it was so supplied, were mentioned in the Agreement. Article 11.02 of the Agreement, in terms of Section 9 of the Sale of Goods Act, 1930, provided for the manner in which the price of Gas was to be determined. The Agreement, therefore, did not stand discharged by payment of an invoice that has not been raised in accordance with Article 11.02 of the Agreement. It is only with the payment of the invoice raised in terms of Article 11.02 of the Agreement that the price as mentioned in Section 9 of the Sale of Goods Act, 1930 would be paid by the buyer.

37. The learned senior counsel for the petitioner then contended that the first methodology provided under Article 11.02 of the Agreement was a stipulation for payment of damages by the buyer to the seller for failing to make full extraction of the constituents of Gas. He submits that clause 11.02, therefore, did not provide for the price of Gas but for damages, which need to be proved by the respondent before claiming the same.

38. I am unable to agree with the said submission of the learned senior counsel for the petitioner. Article 11.02 of the Agreement provides for the manner of the determination of "price" of the gas supplied by the respondent to the petitioner. It is not in form of damages for breach of contract and therefore, Section 73 and 74 of Indian Contract Act, 1872 would have no application to such determination of the price of gas.

39. For the reasons stated hereinabove, I find no merit in the petition filed by the petitioner.

40. This now brings me to the petition filed by the respondent to challenge the Impugned Award. Learned senior counsel for the respondent submits that the Arbitrator has erred in holding that the claim raised by the respondent for the period prior to 01.08.2005 is barred by the law of limitation. He submits that all invoices were marked "provisional" and were subject to adjustment through debit and credit notes. Therefore, the claims were not barred by the law of limitation.

41. I am unable to agree with the submissions made by the learned senior counsel for the respondent. By merely marking an invoice "provisional", the parties cannot extend the period of limitation. Article 11.02 of the Agreement clearly provides that the respondent shall raise invoice for each fortnight, which the petitioner shall pay within three working days of presentation of the invoice. Therefore, the period of limitation would accrue from the raising of each fortnightly invoice and on expiry of three days thereafter, whether marked provisional or otherwise.

42. Learned senior counsel for the respondent further challenges the Award of Interest at the rate of 9% p.a from the date of award till realization. Placing reliance on Article 11.04 of the Agreement, he submits that the respondent was entitled to interest at the rate of 3% higher than the Prime Lending Rate of the

State Bank of India on each of the Debit Notes raised by the respondent. In this regard he places reliance on the following judgments:

- a. Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, (1992) 1 SCC 508;
- b. Simplex Concrete Piles (India) Pvt. Ltd. v. Union of India, 2007 (3) Arb LR 394;
- c. D.C. Kapur v. Delhi Development Authority & Anr., (2006) 130 DLT 94;
- d. Sunagro Seed Pvt. Ltd. v. National Seeds Corporation Ltd., 2018 SCC OnLine Del 13053.

43. The Arbitrator, on the question of interest, has held as under:

"ISSUE 8-Interest: The Claimant has asked for interest @3% higher than the prime lending rate of the State Bank of India on the amount of Rs.79,98,03,129/- (at page 42 of the Statement of Claim). Having regard to the facts and circumstances of the case, I direct that the interest shall be payable @ nine per cent per annum, from the date of this Award. The issue is answered accordingly."

44. A reading of the above would clearly show that the Arbitrator was aware of the claim of the respondent, however, having regards to the facts and circumstances of the case, thought it proper to award interest in favour of the respondent at the rate of 9% p.a. only from the date of the Award.

45. In terms of Section 31(7) of the Act, the Arbitrator has the discretion to award pendente lite interest. Though such discretion cannot be arbitrarily exercised by the Arbitrator, at the same time, if the Arbitrator restricts or refuses grant of such interest having considered the facts and circumstances of the case, it would not be open for this Court to set aside the Award or grant additional interest merely because it may find it to be more just and proper to do so.

46. In the present case, the respondent had not raised the Debit Notes for additional amounts for a period of almost eight years. The petitioner challenged the Debit Notes raising pleas which cannot be said to be completely baseless. The Arbitrator having considered the facts thought it fit to award interest only from the date of the Award. I do not, therefore, consider it fit to interfere with such Award.

47. For the reasons stated hereinabove, I find no merit in the petition filed by the respondent.

48. Consequently both the above petitions are dismissed. The parties shall bear their own costs.