IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

BEFORE:

THE HON'BLE JUSTICE ARIJIT BANERJEE
AND
THE HON'BLE JUSTICE OM NARAYAN RAI

AO-COM 30 OF 2024
WITH
AP-COM 281 OF 2024

SRMB SRIJAN LIMITED
-VS-
GREAT EASTERN ENERGY CORPORATION LIMITED

For the Appellant	: Mr. Jayanta Kr. Mitra, Sr. Adv. Mr. Sakya Sen, Sr. Adv. Mr. Arnab Das, Adv. Mr. Rehanuddin Ansari, Adv.
For the Respondent	: Mr. Ratnanko Banerji, Sr. Adv. Mr. Sarvapriya Mukherjee, Adv. Mr. Kanishk Kejriwal, Adv. Mr. Debargha Basu, Adv.
Hearing Concluded on	: 15.01.2026
Judgment on	: 13.04.2026

Om Narayan Rai, J.:-

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the 1996 Act") against a judgment and order dated September 05, 2024, passed by an Hon'ble Single Judge of this Court in AP-COM 281 of 2024 and the connected application being GA 2 of 2023 whereby the challenge thrown to an award under Section 34 of the 1996 Act has been repelled.

FACTS OF THE CASE:

2. Briefly summed up, the facts of the case are as follows:-

a. The appellant (hereafter "SRMB") and the respondent (hereafter "GEECL") had entered into a Gas Sale and Purchase Agreement (hereafter "GSPA") whereunder coal bed methane (hereafter "CBM gas") was to be sold by GEECL to SRMB.

b. The agreement was executed on May 11, 2011 and was to continue for 25 years subject to revision of terms and conditions including price.

c. The said agreement set a maximum limit upto which CBM gas could be sold by GEECL to SRMB. It also obliged SRMB to pay an amount to GEECL equivalent to the price of a certain percentage of the contracted quantity quarterly in terms of the following clause of the GSPA:-

"5.2 Subject to clause 8.3 & 9, in case the SELLER is ready and able to supply the Contracted Quantity of GAS but BUYER purchases GAS less than the k% of the Contracted Quantity or on account of stoppage of supply by the SELLER as prescribed under clause 4.2 results in purchase of Gas less than k%, then BUYER shall have to pay to the SELLER for his quarterly minimum quantity (hereinafter termed as ***'Minimum- Guaranteed Offtake i.e. MGO'****) of k% of contracted quantity. The MGO will be applicable after 45 days from the commencement of supply of CBM gas, will be Known as 'Reading Period'. At the end of Reading period, buyer may amend the Contracted quantity, based on the actual consumption of CBM gas during such period. In case of stoppage or interruption or reduction in gas supply from the SELLER's side as mentioned in clause 5.1, 8.0 and other clauses, the Minimum Guaranteed Offtake will be reduced on pro-rata basis, considering no. of days in a quarter when the supply to the BUYER was less than k% of the daily quantity mentioned in 5.1 due to reduction or stoppage of supply the SELLER. For e.g. in a quarter if the quantity of gas supplied to the BUYER is less than k% of daily requirement mentioned in 5.1 for N days due to reduction or stoppage of supply by the SELLER, Minimum Guaranteed Offtake for the quarter will be as under:*

MGO = Daily Contracted Quantity x (no. of days in a Quarter- N) x k

Where:

k= 80%

No. of days in a quarter is 75 days

The BUYER undertakes to pay for such Minimum Guaranteed Offtake or for actual quantity used during the quarter, whichever is higher."

d. The aforequoted clause was termed as "Minimum Guaranteed Offtake" clause (hereafter "MGO clause").

e. In order to secure payment in respect of the contracted quantity of CBM gas, SRMB was required to furnish a revolving confirmed bank guarantee for the amount of the contracted quantity of one month, which was to be kept alive.

f. Disputes and differences arose between the parties *inter alia* as regards the MGO which ultimately led to the arbitration battle.

g. To state summarily, the dispute pertaining to the MGO clause was that SRMB had written to GEECL on April 22, 2014 seeking waiver of the MGO clause. GEECL wrote back on April 24, 2014, stating that SRMB's request would be considered, as a special case, only if the price of CBM gas was increased by Rs.5/- per SCM (Standard Cubic Metres) on the current price, which would be applicable additionally over and above the price increase in future. SRMB pressed for unconditional waiver. By a letter dated May 23, 2014, GEECL suggested considering reduction of the MGO clause from 80% to 75% instead of the condition proposed by SRMB. There was exchange of correspondences between the parties and thereafter, believing that the MGO clause had been waived, SRMB did not renew the bank guarantee. GEECL therefore suspended the supply of CBM gas while putting SRMB on notice that the stoppage was due to the non-renewal of the bank guarantee.

h. Ultimately, SRMB terminated the agreement on July 07, 2014 as supply of CBM gas had been stopped.

i. Faced with that, GEECL invoked the arbitration clause in the agreement whereupon, a three member Arbitral Tribunal was appointed to adjudicate the disputes that had arisen between GEECL and SRMB.

j. GEECL lodged its claim praying *inter alia* for the following reliefs:-

> *"a) An award for a sum of Rs.86,37,737.69 as pleaded in paragraph 48 above;*
>
> *b) An Award .for a sum of Rs.21,08,661.54 on account of interest on overdue amount as pleaded in paragraph 49 above;*
>
> *c) An Award for a sum of Rs.8,52,47,240.40 on account of MGO for the period July 14, 2014 to December 31, 2014 as pleaded in paragraph 52 above.*
>
> *d) An Award for a sum of Rs. 396,43,22,880/- on account of MGO quantity as pleaded in paragraph 53 above.*
>
> *e) Interest at the rate of 15% per annum upon the awarded sum as claimed in prayer (d) above till actual realization thereof;*
>
> *f) Interim interest and interest pendente-lite upon the awarded sum at the rate of 15% per annum till realization thereof;*
>
> *f) Alternatively, an enquiry into the loss and damages suffered by the claimant and an award for such sum as may be found due upon such enquiry;*
>
> *g) A declaration that the contract/agreement for Gas Sale and Purchase Agreement dated May 11, 2011 is valid subsisting and binding upon the parties;*
>
> *h) Declaration that the termination notice dated July 7, 2014 issued on behalf of the respondent is illegal, null and void and is liable to be cancelled and/or declared void;*
>
> *i) Declaration that the respondent has committed breach of the Gas Sale and Purchase Agreement dated May 11, 2011 and accordingly is not entitled to claim or deduct or adjust any amount from the sum claimed by the respondent from the claimant in any manner whatsoever;*
>
> *j) Permanent injunction restraining the respondent, its men, agents, servants and/or assigns or howsoever from acting in any manner contrary to and/or inconsistent with the Gas Sale and Purchase Agreement dated May 11, 2011;"*

k. SRMB retorted with a counter claim asserting *inter alia* that the MGO clause stood waived by modification of the original contract, SRMB had to furnish bank guarantee in excess of what was required, SRMB had suffered huge loss of profit due to non-switching over to hot billet charging system and that the claimant GEECL had wrongfully encashed the bank guarantee furnished by SRMB.

l. Evidence was led and witnesses were examined. The learned Arbitral Tribunal ultimately passed an award on June 21, 2022, thereby partly allowing the

claims of GEECL and rejecting the counter claim of SRMB in the following words:-

> *"221) The Tribunal therefore awards:*
>
> *(i) Declaration as prayed for by the Claimant in prayer G, H and I of SOC but specific performance of the Contract is declined except permitting the Claimant to remove its underground gas pipelines from the premises of the Respondent upon 7 days' clear notice.*
>
> *(ii) Counter-claim of the Respondent are not awarded and rejected.*
>
> *(iii) The respondent is directed to pay the claimant the aforesaid amount of Rs.58,50,45,169/- together with interest at the rate of 7% from February, 2015, till the date of the Award, within a period of 12 weeks from the date of the Award.*
>
> *(iv) In default of the payment of the aforesaid amount by the Respondent with interest as stated in Clause III within the period mentioned therein, the Respondent will have to pay the aforesaid amount of Rs.58,50,45,169/- + interest at the rate stated above and additionally an interest of 9% on the total amount of principal + interest from the date of default, till the date of actual payment.*
>
> *222) In this matter none of the parties have argued for costs, nor any cost sheet has been provided by either of the parties. This shows that the parties are not pressing for cost. The delay in the conclusion of the proceeding is not attributable solely to the parties and has been largely because of the intervention of the Covid situation. Considering all these and using its discretion the Tribunal does not award any cost to the successful party.*
>
> *223) This is the Award."*

3. Feeling aggrieved by the said award, SRMB approached this Court under Section 34 of the 1996 Act. The application under Section 34 of the 1996 Act has been dismissed by the order dated September 05, 2024. Hence the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT:

4. Mr. Jayanta Kumar Mitra, learned Senior Advocate appearing for the appellant has made the following submissions:-

i. The learned Arbitral Tribunal has ignored relevant evidence and has relied on extraneous material.

ii. In terms of Section 34(2)(b)(ii) of the 1996 Act, an arbitral award would be open to challenge if it was in contravention with the fundamental policy of Indian law.

iii. Paragraph 11 of the judgment of the Hon'ble Supreme Court in the case of ***Bharat Cooking Coal Limited vs. L.K. Ahuja***[1] was cited to demonstrate the scope of interference with arbitral awards. It was asserted that for an award to remain unfazed on a challenge under Section 34 of the 1996 Act, it must be shown that the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract. In the case at hand, the learned Arbitral Tribunal has failed to appreciate relevant evidence in the form of reports of CARE and CRISIL.

iv. Another judgment of the Hon'ble Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority***[2] was pressed into service to assert that the said judgment distils several authoritative *dicta* of the Hon'ble Supreme Court which define *"fundamental policy of Indian Law"* and list its components. It was submitted that this judgment triggered the 2015 amendment to Section 34 of the 1996 Act whereby public policy of India which finds mention in Section 34(2)(b)(ii) of the 1996 Act was explained.

v. Yet another judgment of the Hon'ble Supreme Court in the case of ***Batliboi Environmental Engineers Limited vs. Hindustan Petroleum Corporation Limited & Another***[3] was cited to assert that the expression *"public policy"* is capable of both wide as well as narrow interpretation.

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[1] (2004) 5 SCC 109
[2] (2015) 3 SCC 49
[3] (2024) 2 SCC 375

vi. The Hon'ble Supreme Court ruling in the case of ***Ssangyong Engineering & Construction Company Limited vs. National Highways Authority of India (NHAI)***[4], was relied on to demonstrate the brinks and boundaries of public policy of India as also the scope of Section 34(2A) of the 1996 Act and the contours of *"patent illegality"* in an arbitral award.

vii. The decision of the Hon'ble Apex Court in the case of ***Punjab State Civil Supplies Corporation Limited & Another vs. Sanman Rice Mills & Others***[5] was also relied on to demonstrate the scope of Section 34 of the 1996 Act.

viii. The learned Tribunal has passed the award completely ignoring the principle of mitigation of damages as contemplated under Section 73 of the Indian Contract Act, 1872 (hereafter "the 1872 Act").

ix. Relying on a passage on *"Mitigation of Damage"* from ***"Chitty on Contracts"***[6], it was asserted that there are three rules under the comprehensive head of mitigation i.e. (i) plaintiff cannot recover the loss consequent upon the defendant's breach of contract, if the plaintiff could have avoided the loss by taking reasonable steps; (ii) if the plaintiff avoids or mitigates the loss consequent upon defendant's breach, he cannot recover the same and (iii) where the plaintiff incurs loss or expense by taking reasonable steps to mitigate the loss resulting from the defendant's breach, the plaintiff may recover the further loss from the defendant. The relevant portion of ***"Chitty on Contracts"*** (supra) is quoted hereinbelow:-

> *"**Mitigation.** There are three rules often referred to under the comprehensive heading of "mitigation": they will be considered in turn. First, the plaintiff cannot recover for loss*

[4] (2019) 15 SCC 131
[5] 2024 SCC OnLine SC 2632
[6] 25th Edition; Volume - I

consequent upon the defendant's breach of contract where the plaintiff could have avoided the loss by taking reasonable steps. Secondly, if the plaintiff in fact avoids or mitigates his loss consequent upon the defendant's breach, he cannot recover for such avoided loss, even though the steps he took were more than could be reasonably required of him under the first rule. Thirdly, where the plaintiff incurs loss or expense by taking reasonable steps to mitigate the loss resulting from the defendant's breach, the plaintiff may recover this further loss or expense from the defendant.

Avoidable loss. *The first rule "imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

The position of the plaintiff under this rule is similar to that of a plaintiff whose damages are reduced because of his contributory negligence. The onus of proof is on the defendant, who must show that the plaintiff ought, as a reasonable man, to have taken certain steps to mitigate his loss. Any loss which is directly caused by a failure to fulfil this duty is not recoverable from the defendant. Thus an employee who has been wrongfully dismissed and unreasonably refuses to accept another equally remunerative post to date from the dismissal is only entitled to nominal damage.

The plaintiff is not "under any obligation to do anything other than in the ordinary course of business"; the standard is not a high one, since the defendant is a wrongdoer. "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to his has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken." The plaintiff has a reasonable time after the breach (the length of time depending on all the circumstances) before his duty to mitigate arises. Questions about the reasonableness of the plaintiff's steps to mitigate his loss have arisen in cases (discussed elsewhere) where the defendant has failed to complete the contractual work (e.g. building or repair work) and the plaintiff claims damages for the cost of substitute performances by a third party.

But the plaintiff is under no duty to take risks with his money in attempting to mitigate, nor to take a step which might endanger his own commercial reputation, e.g. by enforcing sub-contracts. The plaintiff is under no duty, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party, nor is the plaintiff required to sacrifice any of his property or rights in order to mitigate the loss. It has been suggested that the plaintiff's duty to mitigate does not require him to guard against the effects of inflation per se, i.e. it does not apply to the risk of pure price increases which may lead to "inflationary increases in damages" after the date of the breach of contract.

> ***Sale of goods.*** *In contracts for the sale of goods, the normal rule for the measure of damages assumes that the innocent party would act immediately upon the breach, and buy or sell in the market, if there were an available market. Where the plaintiff does not accept the defendant's anticipatory breach of contract, there is no duty on the plaintiff to mitigate his loss before the actual breach on the due date for performance.*
>
> *Another instance of mitigation arises where the defendant in breach of contract refuses to accept goods which he has agreed to buy, but the plaintiff is able to sell the foods at the same price to a third person: if the state of the market is such that demand exceeds supply, so that the plaintiff could always find a purchaser for every article he could get from the manufacturer, he is entitled only to nominal damages from the defendant (and not his loss of profit on the repudiated sale) since he sold the same number of articles and made the same number of fixed profits as he would have done if the defendant had duly performed his contract."*

x. Explanation to Section 73 of the 1872 Act grants statutory recognition to the common law principle of mitigation of damages. The same could not have been glossed over by the learned Arbitral Tribunal.

xi. The judgment of the Hon'ble Supreme Court in the case of ***M. Lachia Setty & Sons Limited vs. Coffee Board, Bangalore***[7] was relied on to impress upon the Court that the principle of mitigation or minimization of loss must be borne in mind by the Court while awarding damages.

xii. Three English authorities namely ***British Westinghouse Electric and Manufacturing Company Limited vs. Underground Electric Railways Company of London Limited***[8], ***Payzu, Limited vs. Saunders***[9] and ***Charter vs. Sullivan***[10] were also cited to assert that while granting compensation for loss suffered due to breach of contract, the Court must appreciate the duty imposed on the claimant to take all reasonable steps to mitigate the loss caused by such breach.

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[7] (1980) 4 SCC 636
[8] 1912 A.C.673
[9] 1918 P. 658.
[10] [1957] 2 W.L.R 528

xiii. It was then submitted that it was incumbent upon the respondent to demonstrate that it had suffered loss even if the MGO clause is taken at face value. Notwithstanding the MGO clause in the contract, damage must have been proved and the same could not have been awarded only on the basis of the clause.

xiv. In terms of Section 74 of the 1872 Act, compensation is payable only upon loss caused by breach of contract being proved and not otherwise. The Hon'ble Supreme Court's pronouncement in the case of ***Kailash Nath Associates vs. Delhi Development Authority & Another***[11] was relied on in support of the said proposition.

xv. The judgment of the Hon'ble Supreme Court in the case of ***Unibros vs. All India Radio***[12] was cited to contend that loss of profit must of necessity be proved by evidence and there was no other way out. ***Bharat Cooking Coal Limited*** (supra) was also pressed into service to contend that loss must be shown and proved to have been suffered in order to claim damages.

xvi. The learned Arbitral Tribunal did not consider the CARE Report of October 2014 (marked as Exhibit E-R) and CRISIL Report of February 11, 2014 (marked as Exhibit E-Q) which clearly revealed that the respondent had gained profits out of the business of CBM gas and there was no semblance of any loss suffered by the respondent.

xvii. The learned Tribunal failed to appreciate the returns that had been filed by the respondent before the "Directorate General of Hydrocarbons" (exhibited by the appellant as Exhibit "E-YYYY") regarding gas produced, gas consumed

[11] (2015) 4 SCC 136
[12] 2023 SCC OnLine SC 1366

and gas flared up, which were sufficient to prove that the respondent had suffered no loss at all.

xviii. Referring to the written note of argument submitted on behalf of the appellant, it was pointed out that the returns i.e. Exhibit "E-YYYY" revealed that in June 2014 when gas was supplied by the respondent to the appellant under the GSPA, the respondent had flared up 0.671 CBM gas and that for the rest of the year 2014 [i.e. from July to December 2014] i.e. post termination of GSPA when gas was not being supplied to the appellant, the quantum of gas flared up by the respondent had not increased but had in most of the months substantially reduced. A table appearing at page 5 of the written notes on arguments was placed to show that flaring up of gas had reduced after cancellation of the agreement. The said chart is as follows:-

Month	***Production***	***Consumption***	***Flare***	***Sale Qty***	***Flare %age***
July -14	*11.380*	*1.624*	*0.198*	*9.557*	*1.74%*
Aug- 14	*11.424*	*1.673*	*0.615*	*9.136*	*5.38%*
Sep - 14	*10.042*	*1.517*	*0.134*	*8.391*	*1.33%*
Oct- 14	*8.950*	*1.482*	*0.557*	*6.911*	*6.22%*
Nov- 14	*9.648*	*1.501*	*0.307*	*7.840*	*3.18%*
Dec -14	*10.926*	*1.628*	*0.095*	*9.203*	*0.87%*

xix. The observations of the learned Arbitral Tribunal in paragraph 215 of the award were impeached by asserting that the learned Tribunal had wrongly held that the appellant's contention that the respondent had not suffered any loss had been raised for the first time only in the written notes, the appellant had neither referred to nor disclosed the aforesaid material (i.e. returns that had been filed by the respondent before the "Directorate General of Hydrocarbons") in its statement of defense (hereafter "SOD").

xx. Referring to Section 23 of the 1996 Act, it was submitted that the said provision does not mandate pleading evidence in the SOD. It was submitted that a pleading that no loss was suffered by the respondent was already there in the SOD and the same sufficiently entitled the appellant to lead evidence in support thereof.

xxi. The affidavits of evidence and cross-examination of witnesses were placed in order to demonstrate that there was ample evidence led by the appellant to the effect that no loss had actually been suffered by the respondent. It was then submitted that if there was no pleading at all, the evidence could not have been permitted to be led at all and further that if evidence had been permitted to be led the same ought to have been considered. Answers to question nos. 218 to 223 and 225 to 226 and also 348 in cross-examination of CW1, were placed in support of the contention that there was ample evidence to establish that the respondent had not suffered any loss.

xxii. Referring to paragraph 213 of the award, it was submitted that the learned Tribunal wrongly considered paragraph 83 of the appellant's SOD before the learned Arbitral Tribunal as the one containing pleadings dealing with paragraphs 48, 52 and 53 of the statement of claim (hereafter "SOC"). It was contended that the learned Tribunal relied on a wrong paragraph to conclude that the appellant had not disputed the MGO Bills raised subsequent to the termination of the GSPA by the appellant. Paragraph 83 of the SOD was placed to demonstrate that paragraphs 48, 52 and 53 of the SOC had been dealt with in paragraph 83 of the SOD.

xxiii. Reliance of the learned Arbitral Tribunal on the recording of submission of the parties by the Competition Commission while treating the same as a

finding of the Competition Commission was clearly against the fundamental policy of law.

xxiv. A bare perusal of the order passed by the Competition Commission would reveal that the portion thereof that has been relied on by the learned Arbitral Tribunal was merely recording of the submissions made by the parties before such Commission and the same was not a finding returned by such Commission.

xxv. A bare perusal of Sections 4, 19 (1), 19(2), 19(3), 19(4), 19(5) and 28 of the Competition Act, 2002 (hereafter "the 2002 Act") would show that the scopes of enquiries before the Competition Commission and before the Arbitral Tribunal were different from each other. In such view of the matter, the learned Arbitral Tribunal could not have relied on the findings of the Competition Commission, even if it could be assumed that the recording of submissions of the Competition Commission was actually findings of the said Commission.

xxvi. It was urged that in the arbitration proceeding between the parties only the question of damage was required to be decided and in such view of the matter, findings, if at all any, were irrelevant for the arbitral proceedings and the same, therefore, could not have been relied on by the learned Arbitral Tribunal.

xxvii. Mr. Mitra took us to paragraphs 36 to 41 of the order passed by the Competition Commission and sought to demonstrate by placing the same alongside the arbitral award that the submission of the parties before the Competition Commission has been treated as evidence by the learned Arbitral Tribunal.

xxviii. The object and reasons behind enactment of the 2002 Act was also placed in a bid to point out that the Arbitral Tribunal and the Competition Commission did not have overlapping jurisdiction.

xxix. Sections 26, 27 and 53A of the 2002 Act were placed and it was submitted that the learned Arbitral Tribunal was not correct in applying provisions of Section 61 of the 2002 Act in the award. For such purpose, attention of the Court was drawn to paragraph 212 of the arbitral award and it was submitted that even if, the findings of the Competition Commission were taken to be findings of fact the learned Arbitral Tribunal was not bound by it.

xxx. It was finally submitted that the learned Arbitral Tribunal ought to have dismissed the claim.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

5. Mr. Banerji, learned Senior Advocate appearing for the respondent made the following submissions:-

i. It could not be denied that CBM gas had to be flared up by the respondent. Even if one proceeded on the assumption that the submissions of the appellant was correct and less CBM gas was flared up, the same would not mean that no loss was suffered by the respondent at all.

ii. Clauses 5, 8.1, 11.5 and 15 of the GSPA were placed to demonstrate that the agreement was perfectly nuanced and that the MGO clause was the result of a structured agreement negotiated between the parties.

iii. By the letter dated April 18, 2014, the appellant was clearly put on notice that the existing bank guarantee was due to expire on May 31, 2014 and that renewal of said bank guarantee was necessary for continuance of supply of CBM Gas.

iv. A combined reading of the correspondences between the appellant and respondent from pages 76 to 78, 114 and 120 to 121 of the paper book would clearly reveal that the MGO clause was never waived.

v. Referring to the answers to question nos. 96 and 100 put to RW1 (Sri Ashok Kumar Agarwal) during his cross-examination it was submitted that the appellant made payment in terms of the MGO clause whenever there was a fall/shortage in the MGO.

vi. Referring to the answers to question nos. 51 to 65 and 83 to 89 put to RW4 (Sri. Ashish Beriwala) during his cross-examination it was submitted that the appellant was unwilling to continue with the respondent only because the appellant had already entered into another agreement with another entity named Essar Oil and Gas Exploration and Production Limited.

vii. He took us through several portions of the award passed by the learned Arbitral Tribunal and submitted that all the relevant facts and evidence had been considered in detail by the learned Arbitral Tribunal before reaching the ultimate conclusion.

viii. It was submitted that the principle of awarding of damages is that a person who has suffered due to breach of a contract should be put in the same position where he would have been if the contract had been properly performed.

ix. Mr. Banerji submitted that the question is not one of incurring damages by the respondent but it was one whether the appellant was able to show that the respondent did not have any CBM gas available for supply. He then submitted that notwithstanding the profit that the respondent might have earned, the loss of profit which the respondent could have earned if the

contract had not been terminated despite availability of CBM gas is also akin to damages suffered by the respondent.

x. Referring to page 2212 of the paper book, it was submitted that the CRISIL report pertained to March 2013 and the same was therefore not relevant evidence. Portions of the CARE report were placed and it was contended that the same did not help the appellant at all.

xi. Answers to Question nos. 204 and 206 put to RW 4 at pages 3245 and 3246 of the paper book were also placed to show that the CARE and CRISIL reports were not relevant.

xii. It was further submitted that a forfeiture clause could not be equated to MGO clause.

xiii. It was next submitted that the Competition Commission had returned a finding as regards flaring up of 25% of CBM gas and such finding had been accepted by the appellant. The Competition Commission relied on the report of the Director General of Hydrocarbons which in turn was based on the annual reports of the respondent for the years 2015 and 2016.

xiv. Mr. Banerji further argued that the point of mitigation of damages was never argued before the learned Tribunal.

xv. It was submitted that the MGO clause was a part of agreed bargain and amount payable under such clause could not have been lost at the instance of the appellant. It was submitted that in a restricted supply market the MGO clause was inserted to ensure supply to the appellant and now upon termination of the contract, the appellant cannot be permitted to walk away from the MGO clause.

xvi. On the point that Courts may assess loss of future profits due to wrongful termination of a contract, the following judgments were cited :-

a. M/s. A.T. Brij Paul Singh & Others vs. State of Gujarat[13]

b. MSK Projects India (JV) Limited vs. State of Rajasthan & Another[14]

c. Mohd. Salamatullah & Others vs. Government of Andhra Pradesh[15]

d. Dwaraka Das vs. State of M.P. & Another[16]

e. Crest Education (P) Ltd. vs. Career Launcher (I) Limited[17]

xvii. On the issue that evaluation of quality and sufficiency of evidence is a matter within the jurisdiction of the Arbitral Tribunal and the same cannot be interfered with in a Section 34 proceeding, the following judgments were placed:-

a. Ssangyong Engineering & Construction Company Limited (supra)

b. Atlanta Limited vs. Union of India[18]

xviii. On the issue of validity and enforceability of the MGO clause, the following judgments were relied on:-

a. Bihar State Electricity Board, Patna & Others vs. M/s Green Rubber Industries & Others[19]

b. Orissa State Electricity Board vs. Orissa Tiles Limited[20]

c. M & J Polymers Limited vs. Imerys Minerals Limited[21]

d. Port of Tilbury (London) Limited vs. Stora Enso Transport & Distribution Limited & Another[22]

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[13] (1984) 4 SCC 59
[14] (2011) 10 SCC 573
[15] (1977) 3 SCC 590
[16] (1999) 3 SCC 500
[17] 2023 SCC OnLine Del 3801
[18] (2022) 3 SCC 739
[19] (1990) 1 SCC 731
[20] 1993 Supp (3) SCC 481
[21] [2008] EWHC 344 (Comm), decided on February 29, 2008

e. ***Universal Resource Corp. vs. Panhandle Eastern Pipe Line Co.***[23]

f. ***Prenalta Corp. vs. Colorado Interstate Gas Co.***[24]

g. ***Orient Power Company (Private) Limited vs. Sui Northern Gas Pipelines Limited***[25]

xix. A Bench decision of this Court in the case of ***Shaila Bala Ray vs. Chairman, Darjeeling Municipality***[26] was cited in support of the contention that a minimum charge agreed to be payable by the first party to the other in certain supply contracts ensures flow of interest on the capital outlay of the other party who has developed the infrastructure in order to supply the agreed commodity to the first party. The said judgment was considered with approval by the Hon'ble Supreme Court in the case of ***Bihar State Electricity Board, Patna & Others*** (supra).

xx. In order to demonstrate that the scope of interference is too restricted in an appeal under Section 37 of the 1996 Act, the following authorities were pressed:-

a. ***Somdatt Builders-NCC-NEC(JV) vs. National Highways Authority of India & Others***[27]

b. ***Punjab State Civil Supplies Corporation Limited & Another*** (supra)

c. ***B.B.M. Enterprise vs. State of West Bengal***[28]

xxi. The following judgments were pressed to assert that while awarding damages, the Court should attempt to award such sums as would place the sufferer in the same position as he would have been had the contract been performed:-

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[22] [2009] All ER (D) 165 (Jan) : [2009] EWCA Civ 16, decided on January 23, 2009
[23] 813 F. 2d 77 : 1987 U.S. App. LEXIS 3989, decided on March 31, 1987
[24] 944 F. 2d 677 : 1991 U.S. App. LEXIS 21476, decided on September 04, 1991
[25] LEX/LHPK/0294/2019, decided on June 17, 2019
[26] Civil Revision No. 757 of 1935, decided on February 10, 1936
[27] (2025) 6 SCC 757
[28] 2025 SCC OnLine Cal 6087

a. Thompson (W.L.) Ld. vs. Robinson (Gunmakers) Ld.[29]

b. Union of India & Others vs. Sugauli Sugar Works (P) Limited[30]

xxii. The judgment of the Hon'ble Supreme Court in the case of ***Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited & Another***[31] was cited in support of the proposition that guesstimates and best judgment assessment of damages were permissible in cases where damages were to be awarded and that calculation of damages with mathematical precision was not necessary.

REJOINDER SUBMISSIONS ON BEHALF OF THE APPELLANT:

6. Mr. Mitra rejoined by making the following submissions:-

i. It was incumbent upon the respondent-claimant to lead evidence to demonstrate that it had suffered damages.

ii. Since there was tell-tale evidence of the respondent having earned profits, it could not be said that the respondent suffered any loss or damage.

iii. It was reiterated that the mandate of Section 73 of the 1872 Act must of necessity be followed and that being so it was the duty of the respondent to mitigate the losses and prove that reasonable steps were taken by the respondent to mitigate the losses that the respondent is alleged to have suffered.

iv. A Kerala High Court judgment in the case of ***S.K.A.R.S.M. Ramanathan Chettiar vs. National Textile Corporation Ltd., New Delhi & Another***[32] was also cited to demonstrate that the principle of mitigation of damages has

[29] [1955] 2 WLR 185
[30] (1976) 3 SCC 32
[31] (2022) 1 SCC 753
[32] 1985 SCC OnLine Ker 34

been employed by Courts treating it to be a duty on the part of the plaintiff/claimant to take all reasonable steps to minimize the loss suffered.

v. The judgment of the Hon'ble Supreme Court in the case of ***Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited***[33] was cited to demonstrate the scope of interference with arbitral awards and to assert that overlooking or ignoring vital evidence that goes to the root of the matter would render an award perverse warranting interference under Section 34 of the 1996 Act.

vi. An English authority ***Lazenby Garages Ltd. vs. Wright***[34] was pressed to demonstrate that ***Thompson (W.L.) Ld.*** (supra) may not be a panacea for all cases of damages and that award of damages should be restricted to the particular loss which was sustained on a particular transaction and nothing more.

7. Both the parties have attempted to distinguish the judgments cited by each other.

ANALYSIS & DECISION:

8. We have heard the learned Senior Advocates for the respective parties and considered the material on record.

9. Before proceeding to answer the issues that may be framed on the basis of the pleadings and the submissions made by the parties, we deem it necessary to record that although only three points were urged and argued before us by Mr. Mitra in his attempt to impeach the order dated September 05, 2024, (with which we shall be dealing hereafter), the written note of arguments filed on behalf of the appellant, contains arguments spanning over twenty seven pages

[33] (2024) 6 SCC 357
[34] 1.W.L.R 459

(less the annexures) on various other points namely "GSPA being vitiated by fraud", appellant's counter claim and perverse findings of arbitrator as regards the various issues raised in the counter claim etc., which were never argued in the Court. We have consciously refrained from dealing with the same since taking the same into consideration would cause injustice to the other side who never had the opportunity to counter such arguments.

10. At the outset, we may remind ourselves of the scope of interference in a Section 37 appeal. ***Punjab State Civil Supplies Corporation Limited & Another*** (supra) serves as a useful guidance on the point. The relevant paragraphs thereof are quoted hereunder:-

> *"**13.** In paragraph 11 of Bharat Coking Coal Ltd. v. L.K. Ahuja, it has been observed as under:*
>
> > *"**11.** There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."*
>
> **********
>
> ***15.** In Dyna Technology Private Limited v. Crompton Greaves Limited, the court observed as under:*
>
> > *"**24.** There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy*

to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. *Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."*

****

20. *In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.*

21. *It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."*

11. The contours of our powers under Section 37 of the 1996 Act having thus been drawn, we may now proceed further. Three issues which may be framed for determination in the present matter are as follows:-

I. Whether the respondent-claimant has discharged its duty of mitigation of losses?

II. Whether the respondent has proved that it has suffered damages?

III. Whether the award is perverse for not taking into consideration relevant evidence?

AS REGARDS ISSUE NO.I:-

12. Although we have framed this issue since Mr. Mitra had urged the point of failure on the part of the respondent to mitigate the losses, yet, we must record that in the case at hand the issue has not actually arisen. We say so because this issue was not actually urged before the learned Arbitral Tribunal. It has not been demonstrated to us by the appellant that this issue was urged before the learned Tribunal. In fact what was urged was as to whether the respondent could at all be said to have suffered any loss in view of the fact that the respondent had earned profits during the material point of time or the relevant period. The two aspects are entirely different and may be mutually destructive as well.

13. If a person earns profits by employing all avenues that he has, he cannot be said to have failed in mitigating his damages. But, can such earning of profit alone always lead to the conclusion that there has been no damage at all? The answer has to be in the negative as there can be situations where a person could be entitled to more profits than what he has actually earned but has been

deprived of the further profit element due to the breach of the contract complained of.

14. A question as regards mitigation of damages is one of fact. It therefore, must of necessity be urged before the first forum of facts or at least before one of the forums (fora) of facts, where there are more than one in the hierarchy. We are dealing with an arbitration proceeding where the arbitrator is the final arbiter of facts and law as well unless it is vitiated by any of the debilitating grounds mentioned in Section 34 of the 1996 Act. The scope of interference with an arbitral award in a Section 34 proceeding is cruelly restricted and the scope of enquiry in an appeal under Section 37 of the 1996 Act cannot exceed that of the Section 34 proceeding as already indicated hereinabove.

15. When a point of fact was not urged before the learned Arbitral Tribunal, we at this stage cannot and should not countenance such argument at all.

16. Furthermore, while it is well settled that the claimant has a duty to mitigate the damages, it is equally well settled that the burden of proof that the claimant did not discharge its duty of mitigation of damages lies on the defendant. Such position was clarified more than six decades back by the decision of a Bench of this Court in the case of ***Prafulla Ranjan Sarkar vs. Hindusthan Building Society Limited***[35] upon taking note of several English authorities and a judgment of the Hon'ble Madras High Court on the point. The following paragraphs of the said judgement are relevant to the context:-

> *"**32.** But I need not enter into this discussion at all. The question what is reasonable for a plaintiff to do in mitigation of damage is not question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant; Halsbury's Laws of England, 3rd Edition, Vol. 11. Article 476, page 290. In the*

[35] 1959 SCC OnLine Cal 55 : AIR 1960 Cal 214

footnotes under these observations have been cited the cases of Clayton-Greene v. De Courville, (1920) 36 TLR 790 at page 791 where the question was whether an actor should have mitigated the damages for breach of an agreement to take a leading part in a play by accepting the part of another character in the same play and Waterhouse v. H. Lange Bell and Co. Ltd., (1952) 1 LI Rep. 140 where damages were reduced because the plaintiff failed to mitigate by taking an alternative suitable employment.

33. *On the burden of proof has been cited in these footnotes the case of James Finlay and Co. v. N.V. Kwik, (1928) 2 KB 604. In this case it was held that for breach of a contract for sale of goods a plaintiff's duty to minimise damage was limited to doing what was reasonable in all the facts of the case, the onus of showing a breach of that duty being on the defendant. This decision of Wright was affirmed by the Court of Appeal (see 1929-1 K.B. 400).*

34. *I find these principles were applied by Leach, C.J. (Laskshmana Rao, J. agreeing with him) in Sundaram v. Chokalingam, AIR 1938 Mad 672. At page 674 Leach, C.J. has observed that*

> *"in a case like the present where the employment was for a definite period, the employer is bound to pay the stipulated salary unless he shows that the discharged servant had an opportunity of other employment but he refused to avail himself of it. In other words, the principle that a person must do what he can to mitigate damages applies to a contract of service just as it applies to an ordinary commercial contract."*

35. *The learned Chief Justice then quoted the passage in Halsbury referred to above and went on to say that the authority for the statement that the burden of proof was upon the defendant was to be found in Roper v. Johnson, (1873) 8 C.P. 167 and (1928) K.B. 604.*

36. *In the present case the defendant has adduced no evidence at all to show what the plaintiff should have done to mitigate the damages. Indeed questions Nos. 530 to 536 were put to the plaintiff in cross-examination but he was not pressed to give particulars of the efforts that he had made to find another job. In these circumstances it appears to me that the plaintiff is entitled to nine months' salary in lieu of notice aggregating to Rs.6750/- without any deductions therefrom."*

[Emphasis supplied]

17. Even otherwise the situation is not different in the case at hand, from the one mentioned in paragraph 36 of ***Prafulla Ranjan Sarkar*** (supra) inasmuch as here too, the appellant before us (i.e. the respondent in the arbitration proceeding) *has adduced no evidence at all to show what the plaintiff should have done to mitigate the damages.*

18. In view of the reasons cited hereinabove the ratio of the judgment of the Hon'ble Supreme Court in the case of ***M. Lachia Setty & Sons Limited*** (supra); the three English authorities ***British Westinghouse Electric and Manufacturing Company Limited*** (supra), ***Payzu, Limited*** (supra) and ***Charter*** (supra) and the judgment of the Hon'ble Kerala High Court in the case of ***S.K.A.R.S.M. Ramanathan Chettiar*** (supra) cannot be applied to the facts of the present case.

19. Issue no.I thus stands answered against the appellant.

AS REGARDS ISSUE NO.II:-

20. There is unimpeachable evidence on record to suggest that the respondent has had to flare up CBM gas. In fact the e-mail sent to the appellant's employee on the employee's application under the Right to Information Act, 2005, which have been relied on by the appellant as Exhibit "E-YYYY" (page 3024 to 3027 of the paper book) clearly reveals that there has been flaring up of CBM gas. In fact the learned Arbitral Tribunal too has taken note of the fact that as per the chart produced by the appellant itself before the learned Arbitral Tribunal, there was flaring up. There is a clear factual finding to that effect in paragraph 215 of the award where the learned Tribunal says *"Even then it shows from the chart produced by the Respondent, that there is flaring up"*. The clamour of the appellant was never to the effect that there was no flaring up at all. It was rather to the effect that the flaring up was less and therefore the respondent should not be entitled to damages or only to the extent of flaring up.

21. ***Lazenby Garages Ltd.*** (supra) had been cited to assert that award of damages should be restricted to the particular loss which was sustained on a particular transaction and nothing more. The suggestion implicit in such argument was

that damages could not have been more than the loss suffered by flaring up of less gas. The argument arrests attention more in novelty than difficulty in dealing with it in the facts of the present case.

22. It cannot be lost sight of that CBM gas is not an ordinary commodity and there is no *spot market* for such gas. Such fact has been clearly spelt out by the Competition Commission in paragraph 67 of its order dated July 16, 2017. We are mindful of the vehement objection of the appellant that the learned Tribunal has treated recording of submissions by the Competition Commission as its findings as regards flaring up of CBM gas with which we shall deal a little later. However, at the moment we hasten to clarify that the observations of the Competition Commission in paragraph 67 of its order are not recording of submissions but factual findings. The relevant portion thereof is quoted hereinbelow:-

> *"**67.** On a careful consideration of the mater, it may be observed that production of CBM gas production is a continuous process that starts once a well is dug and stops only when the well goes dry. GEECL plans its production based on contracted quantity agreed with customers on a long term basis. Once the CBM is produced, it cannot be stored and if the customer fails to off-take the contracted quantity, GEECL has no option but to flare up the gas. There is no spot market for CBM gas where GEECL can sell the gas which is not consumed by a customer. MGO liability is a standard clause across most long term supply contracts of producers and is intended to cover the risk of the seller in committing to sell a fixed quantity on a long term basis to assure the buyer firm of supply of gas……."*

23. Flaring up of CBM gas is restricted to gas that was produced but could not be sold due to lack of buyers. There is nothing on record to suggest that there was lack of producing capability or capacity by reason whereof no further CBM gas could have been produced by the respondent. In this connection, the following answers given by the respondent's witness CW-1 (Mr. Monik Parmar) to

Question Nos. 218 and 219 (at page 84 of the written notes of argument submitted by the appellant) during his cross examination may be noticed:-

> *"218. Is the gas production by the claimant in excess of what the claimant's clients required for supply? / I had already mentioned that CBM production is a continuous process. CBM gas once produced cannot be stored and if not consumed is to be flared. Claimant tries for increase in production on continuous basis that increased in production wells.*
>
> *219. Why does the claimant, according to you, continuously strive to increase the production of CBM gas? Is it because the demand for supply of CBM gas has been increasing continuously? / Claimant needs to adhere to the commitment that it made to the Government as well as contracted customers."*

[Emphasis supplied]

24. It is nobody's case that the respondent lacked the ability or capacity to supply CBM gas to the appellant. It is rather the case of the respondent that it was ready and willing to supply CBM gas to the appellant but could not do so due to termination of the contract. In fact the CRISIL report of February 2014 relied on by the appellant clearly evinces that at the relevant point of time, the respondent had the capacity to increase its production and supply CBM gas more than earlier. The following extract of the said report which was marked as Exhibit E-Q (at page 33 of the written notes of argument submitted by the appellant) deserves notice:-

> *"GEECL's operating income grew 61% CAGR over FY11-13 to Rs. 1.6bn, primarily due to increase in production volume, given by an increase in the number of producing wells. For FY13 as a whole, the EBITDA margin improved to 64% from 5% in FY11 as increase in revenues absorbed fixed costs. PAT turned positive for the first time at Rs.358mn on the back of strong growth in EBITDA, despite an increase in depreciation charge and interest cost. RoE for the year was low at 12.9% as more than 50% of the wells drilled are in the dewatering stage and thus, not producing gas. CRISIL Research expects RoEs to improve going ahead on the back of increase in the ramp-up of production from existing wells as well as increase in the number of producing wells."*

25. This reveals that at a point of time when the report was prepared (i.e. in and around February 2014) 50% of the CBM gas wells were not producing gas since they were at de-watering stage which means the same were to start producing gas once they were dewatered. At that point of time the GSPA was alive and the respondent was being supplied CBM gas. Seen in such context it cannot be said that the respondent could not have had the ability or capacity to supply CBM gas to the appellant later on when its capacity would get enhanced upon the said 50% of the CBM gas wells, which were at the dewatering stage earlier, got dewatered.

26. While we are mindful of the legal position that while exercising our power under Section 37 of the 1996 Act, we cannot re-appreciate evidence, we hasten to add that the above exercise was not one to re-appreciate evidence but to find out as to whether there was any evidence to support the ultimate conclusion of the learned Arbitral Tribunal and we find there indeed is some evidence to support the ultimate conclusion.

27. The MGO clause clearly indicates that "*Subject to clause 8.3 & 9, in case the SELLER is ready and able to supply the Contracted Quantity of GAS but BUYER purchases GAS less than the k% of the Contracted Quantity or on account of stoppage of supply by the SELLER as prescribed under clause 4.2 results in purchase of Gas less than k%, then BUYER shall have to pay to the SELLER for his quarterly minimum quantity (hereinafter termed as* ***'Minimum- Guaranteed Offtake i.e. MGO'****) of k% of contracted quantity.*

28. In such view of the matter, it cannot be said that the respondent would not be entitled to any compensation since it did not suffer loss or since it earned profits.

29. There is yet another way to look at into the matter. As instructed by the authoritative *dictum* of the Hon'ble Supreme Court in the case of ***State Electricity Board, Patna & Others*** (supra) while approving the judgment of this Court in the case of ***Shaila Bala Ray*** (supra) cited by the respondent, clauses akin to the MGO clause are meant to reimburse the costs regularly incurred by the supplier for maintaining the supply infrastructure and it is not actually in the nature of a liquidated damages clause in a contract. The relevant paragraph of ***State Electricity Board, Patna & Others*** (supra) may be noticed in this context:-

> *"**18.** In Saila Bala Roy v. Chairman, Darjeeling Municipality [AIR 1936 Cal 265 : 40 CWN 789 : 162 IC 811] , it was held by a learned Single Judge that the minimum charge was not really a charge which had for its basis the consumption of electric energy. It was really based on the principle that every consumer's installation involved the licensee in certain amount of capital expenditure in plant and mains on which he was to have a reasonable return. He could get a return when the energy was actually consumed, in the shape of payments of energy consumed. When no such energy was consumed by the consumer, or a very small amount was consumed in a longer period, the licensee was allowed to charge minimum charges by his licence, but those minimum charges were really interest on his capital outlay incurred for the particular consumer."*

30. Viewed in the light of the judgment of the Hon'ble Supreme Court, it would be at once noticed that the Hon'ble Single Judge has while upholding the award followed the same reasoning. The relevant paragraphs of the judgment of the Hon'ble Single Judge are quoted hereinbelow:-

> *"**85.** The premise of the MGO Clause is not an actual occasion of loss suffered by the supplier. It is a prevalent practice in such long-term contracts for supply of energy, by way of electricity, gas, etc. to introduce a minimum consumption clause, which is in the nature of an assurance to the supplier that the huge investment in grid and other infrastructure for supply to consumers, which is undertaken by such supplier, is justified by long-term supply. Premature termination would not only entail loss of the minimum guaranteed*

amount, which is the MGO value in the present case, but also may be detrimental to the maintenance of the supply grid itself.

86. *Also, it is irrelevant whether the same amount of gas as consumed before by SRMB was flared up even after termination of the contract with SRMB. As long as there was even a small amount of flare-up, it would indicate that at least some of the gas produced by the supplier is not used up. It is not a relevant question whether the gas earmarked for the consumer (SRMB) was being supplied to some other consumer, since supply to one consumer is not mutually exclusive with supply to some other. It may very well be that the supplier enhances its infrastructure and/or on the basis of the same infrastructure caters to more consumers, thereby increasing its earnings. Even if SRMB was continued to be supplied with gas, it was open for the claimant/supplier to increase its supply and/or to maintain its previous supply and go on supplying gas from its network/grid to other new consumers, which would fetch more profits 27 to the supplier. There was no exclusivity clause in the agreement between the parties, restricting supply only to SRMB. Hence, even if the claimant went on supplying to others over and above the quantity supplied to SRMB, it would have earned more profit, to which there is no bar.*

87. *Thus, as long as there is even a wee bit of flare-up of gases, there is a wastage of gas produced by the supplier and, consequentially, there cannot be any dilution of the MGO loss suffered by the supplier. Theoretically, after the termination, the supplier might have started supply to new consumers. Even then, as long as the entire amount of produced gas was not exhausted, the supplier would continue to suffer loss due to termination of the contract for the particular amount of gas which was to be supplied to SRMB. It is not that the gas earmarked for SRMB is being supplied to others. The claimant is a producer of gases and can very well supply to many other consumers than SRMB.*

88. *Hence, the argument of SRMB linking the quantum of post termination flare-up of gases to absence of loss is irrational and not acceptable. Even if the flare-up remained the same, the supplier suffers loss to the extent of the MGO amount as long as there is flareup of any amount.*

89. *Hence, such argument of SRMB/petitioner is specious but not acceptable.*

90. *The concept of MGO, in any event, is to provide certainty to the supplier and to ensure that the grid infrastructure installed on the basis of a long-term supply agreement is utilised to the full, which would justify the infrastructure and maintenance expenses of the said supply grid as well. It acts as a long-term insurance to cover the infrastructure and allied expenses and does not necessarily require proof of actual future loss as such. The rudiments of such future loss are embedded in the MGO Clause of the agreement itself, which has been wrongfully terminated by the present petitioner. 91. Hence, on a comprehensive perusal of the impugned award, I am unable to find any infirmity or illegality in the same."*

31. The Hon'ble Single Judge has taken a plausible view and we find no reason to differ at all.

32. There was a lot of dissatisfaction in the appellant on the learned Arbitral Tribunal having accepted certain recordings by the Competition Commission in its order by treating them as the findings of fact by the Competition Commission.

33. We agree with the appellant on such score that the Competition Commission has recorded the submissions of the respondent at paragraph 41 of its order dated February 16, 2017 and has not returned any finding as regards flaring up but we still hold that the award would not be vitiated by the acceptance of such recording of the Competition Commission as its findings. The reason therefor is that it stands admitted by the appellant as well that there has been flaring up of CBM gas. The finding of the Competition Commission was relevant only for such purpose. In view of the reasons given hereinabove, the quantum or percentage of gas that was flared up hardly matters.

34. Even otherwise, it is well settled that the question as regards awarding of damages must be decided on the basis of the terms of the contract. If the contractual terms clearly indicate that the stipulation as regards liquidated damages is not in the nature of penalty but a genuine pre-estimate of loss, actual loss need not be proved. In this context the observations of the Hon'ble Supreme Court in the case of ***Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited***[36] may be noticed:-

> *"**68.** From the aforesaid discussions, it can be held that:*

[36] (2003) 5 SCC 705

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

[Emphasis supplied]

35. The judgments of the Hon'ble Supreme Court in the case of ***Kailash Nath Associates*** (supra), ***Unibros*** (supra) and ***Bharat Cooking Coal Limited*** (supra) cannot come to the aid of the appellant in the case at hand inasmuch as firstly there is clear proof of damage or loss suffered and secondly, the MGO clause is one which entitles the respondent to a certain sum by way of reimbursement of the costs regularly incurred by the respondent for maintaining the supply infrastructure. It may be recorded that Mr. Mitra had sought to assert that the principle applied by the Hon'ble Supreme Court in the case of ***State Electricity Board, Patna & Others*** (supra) and this Court in the case of ***Shaila Bala Ray*** (supra) would not apply to the instant case inasmuch as here, the learned Arbitral Tribunal has allowed the respondent to take away the pipes and infrastructure set up for supplying CBM gas to the appellant. We are not impressed with such argument for the simple reason that the damages awarded

by the learned Arbitral Tribunal are upto a date prior to the date of removal of such infrastructure.

36. Issue no.II thus stands answered against the appellant.

AS REGARDS ISSUE NO.III:-

37. The main thrust of the appellant's argument was in support of the ground that the award was perverse and that the same had been passed in ignorance of vital evidence like the CARE and CRISIL Reports.

38. We have analysed the award and find that indeed the learned Tribunal has not discussed the Reports despite the same being exhibited in evidence before it. Such evidence has indeed been ignored. The question now would be as to whether such glossing over of evidence is fatal to the award?

39. The answer to such question would depend on whether the CARE and CRISIL Reports constitute vital evidence that go to the root of the matter or at least relevant evidence that would have led to a contrary fate of the arbitral *lis*.

40. As regards the CARE report, the same was marked as Exhibit E-R and it dates back to October 2014. The same reveals as follows:-

> *"Credit Risk Assessment*
>
> *Comfortable financial risk profile led by higher gas production and sales*
>
> *The financial risk profile of the company has witnessed significant improvement during FY14.*
>
> *The total income increased by approximately 30% during FY14 on account of 25% increase in volume of gas sold (94.38 MMSCM against 75.75 MMSCM during FY13) and better sales realization (Rs.21,54/SCM as against Rs.20.85/SCM in FY13; refers to period April 01 to March 31). The realization improved primarily on account of favourable demand-supply scenario, PBILDT margin witnessed improvement of 500 bps during FY14 (to 69,11% as against 63.98% during FY13) on account of increasing prating income absorbing higher capital cost. GEECL's PAT turned positive in FY13 and has doubled since then. During FY14 company reported a PAT of Rs.77,61 crore, leading to a PAT margin of 38.09% as against a PAT of Rs.38.96 crore and PAT margin of 24.63% during FY13, During Q1-*

FY15 the company reported a PAT of Rs.23.87 crore on a total operating income of Rs.58.05 crore as against a PAT of R5,11,97 crore on a total operating income of Rs.41.97 crore during Q1-FY14."

41. The same reveals that the respondent clocked substantial profits during the FY 2013 – 2014 and first quarter of FY 2015.

42. The CRISIL Report which was marked as Exhibit E-Q and which is dated February 11, 2014 similarly shows that the respondent earned profits during FY 2011 to 2014.

43. To be precise both are strong indicators of the fact that the respondent had earned profits out of its business of selling CBM gas. However, the question which was posed before the learned Arbitral Tribunal was not as to whether the respondent had made profits from its CBM gas business or not but as to whether the breach of the GSPA by the appellant had caused loss to the respondent or not. Such question has been answered by the learned Arbitral Tribunal based on the factual finding that the respondent has had to flare up CBM gas inasmuch as the same could be of no use to the respondent or for that matter for anybody as it could not be stored after being produced. In such context the finding of the Competition Commission in paragraph 67 of its order dated February 16, 2017 and the answers to Question Nos. 218 to 223 put to the CW-1 (Mr. Monik Parmar) during cross examinations are relevant.

44. The same prove the fact that the respondent had indeed suffered loss. In such view of the matter non-consideration of the CARE and CRISIL Reports cannot be said to have vitiated the award so as to call for any interference with the same. The ratio of ***Delhi Metro Rail Corporation Limited*** (supra) would therefore not apply to the facts of the present case inasmuch as it cannot be said that any vital evidence has been ignored by the learned Arbitral Tribunal while passing the award.

45. Thus Issue no.III also stands answered against the appellant.

46. As regards the judgments of the Hon'ble Supreme Court in the case of ***Bharat Cooking Coal Limited*** (supra), ***Associate Builders*** (supra), ***Batliboi Environmental Engineers Limited*** (supra) and ***Ssangyong Engineering & Construction Company Limited*** (supra) cited by the appellant, the same are salutary authorities on the scope of Section 34 of the 1996 Act. We have tested the award within the scope of the provisions of Section 34 of the 1996 Act and we have found no reason to interfere therewith. To wit, the view of the learned Arbitral Tribunal is a possible and plausible view and its conclusion can be supported by the evidence already on record. We draw support from the following observations of the Hon'ble Supreme Court in the case of ***Batliboi Environmental Engineers Limited*** (supra) in such regard:-

> *"**45.** Referring to the third principle in Western Geco, it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons (for short, Gopi Nath & Sons) and Kuldeep Singh v. Commissioner of Police should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions*

are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the arbitral tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, 'patent illegality' refers to three sub-heads: (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the arbitral tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

[Emphasis supplied]

CONCLUSION:

47. The learned Arbitral Tribunal has rightly awarded damages taking into consideration the principles laid down by ***Kailash Nath Associates*** (supra) as well as ***M/s. A.T. Brij Paul Singh*** (supra) and the same does not call for any interference.

48. We have found that the conclusions reached by both the learned Arbitral Tribunal as well as the Hon'ble Single Judge are plausible and appropriate. In terms of the law obtaining, both Section 34 and Section 37 Courts would be

mandatorily required to uphold a plausible view of an Arbitral Tribunal. Apart from the fact that we are exercising powers under Section 37 Court of the 1996 Act, we must not forget that even otherwise while sitting in appeal against an order of an Hon'ble Single Judge of this Court even in ordinary appellate proceedings, the appellate Court would interfere only when the order impugned is clearly wrong and not when it is not right. In the case at hand, we do not find any reason to disagree with the Hon'ble Single Judge even to the slightest degree.

49. For all the reasons aforesaid, we are unable to find any reason to interfere with the order impugned. AO-COM 30 of 2024 stands dismissed. There will be no order as to costs.

50. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Arijit Banerjee, J.) **(Om Narayan Rai, J.)**

Later:

51. After judgment is delivered in Court, learned Advocate for the appellant prays for stay of operation of the judgment and order. Such prayer is considered and refused.

(Arijit Banerjee, J.) **(Om Narayan Rai, J.)**