

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.8263 OF 2013
(Arising out of SLP (C) No. 21932 of 2013)

GAIL (India) LimitedAppellant

versus

Gujarat State Petroleum Corporation LimitedRespondent

J U D G M E N T

G.S. SINGHVI, J.

1. Leave granted.
2. Whether the Division Bench of the Gujarat High Court was justified in entertaining the writ petition filed by the respondent under Article 226 of the Constitution in the matter of fixation of price of the gas supplied by the appellant and whether a mandamus could be issued requiring the appellant to engage itself with the respondent to arrive at the price of gas effective from 1.1.2014 are the questions which arise for consideration in this appeal.
3. The Government of India constituted Petronet LNG Limited (PLL) for marketing liquefied natural gas (LNG) imported from Qatar and other countries.

The Petronet LNG Limited consists of GAIL (India) Limited (the appellant), Indian Oil Corporation Limited (IOC), Bharat Petroleum Corporation Limited (BPCL) and Oil and Natural Gas Corporation Limited (ONGC).

4. On 31.7.1999, Petronet LNG Limited entered into Sale Purchase Agreement (SPA) with Ras Gas, Qatar for supply of 5 MMTPA of LNG for a period of 25 years. In August 2006, the SPA was amended to include additional quantity of 2.5 MMTPA of LNG.

5. In February 2004, the appellant signed Gas Sale Agreement (GSA) with the respondent for supply of re-gasified liquefied natural gas (RLNG) from out of LNG sourced by Petronet LNG Limited. The terms and conditions of supply were incorporated in GSA dated 7.2.2004, paragraphs 3.1, 3.2, 11.3, 11.6, 15.1, 15.5, 15.6 and 20.9 of which read as under:

“3.1 This Agreement shall come into force on the date it is signed and shall remain in force till 0600 Hours of 1.1.2019 (herein called "Basic Period") unless terminated earlier as per the provisions of the Agreement.

3.2 Either party may propose to extend the Agreement beyond the Basic Period by giving notice to the other Party one Year prior to expiry of this Agreement. This Agreement shall be amended accordingly prior to such extension for such period as the Parties may mutually agree, (herein called the "Extension Period").

11.3 The above Contract Price are valid up to 31st December, 2008 and shall be reviewed only and to the extent to which Ras Gas (Supplier of LNG) agrees for a different price.

11.6 Buyer and Seller shall mutually discuss for the Contract Price of Gas to be effective from 1st January 2009. The Seller shall inform not later than 30.06.2008, the revised Contract Price and parties agree to discuss in good faith and finalize the new.

Contract Prices effective from 1.1.2009 not later than 30.09.2008. In case the Parties are unable to agree on the revised Contact Price, the Agreement may be terminated by the Buyer by giving a written notice to the Seller to this effect.

15.1 Amicable Settlement

The Parties shall use their respective reasonable endeavors to settle any Dispute amicably through negotiations. If a Dispute is not resolved within thirty (30) days after written notice of a Dispute by one Party to the other Party then the provisions of Article 15.5 shall apply unless such Dispute is required to be referred to a Sole Expert under Article 15.2.

15.5 Arbitration

Any Dispute arising in connection with this Agreement which is not resolved by the Parties pursuant to Article 15.1 within thirty (30) days of the notice of the Dispute or pursuant to Article 15.4(b), shall be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and rules made thereunder, from time to time. The procedure for appointment of arbitrators shall be as follows.

15.6 (a) After the thirty (30) day period described in Article 15.5, the Dispute shall be referred to a tribunal comprising three (3) arbitrators. Each Party to the arbitration shall appoint one (1) arbitrator and the two (2) arbitrators thus appointed shall choose the third arbitrator who will act as a presiding arbitrator of the Tribunal (together forming the "Arbital Tribunal").

(b) The decision(s) of the Arbital Tribunal supported by reasons for such decision, shall be final and binding on the Parties.

(c) The venue of arbitration shall be Delhi.

(d) If as a consequence of award of Sole Expert or Arbital Tribunal and an amount is determined to be payable by Seller to the Buyer, then the Buyer shall have the option to deduct such amount from the succeeding Invoice(s), likewise if the amount is payable by the Buyer to the Seller, the Seller shall have the right to reflect the same in the Invoice in accordance with Article 12.

20.9 Contract Review

The Parties agree that the Contract Price applicable on and after 1st January 2009 shall be reviewed and agreed by the Parties. In

case the Parties are unable to agree on the revised Contract Price, the Agreement may be terminated by the either Party by giving a written notice to the other Party to this effect.

In the event of assignment of LNG sale directly to Seller by Ras Gas (i.e. LNG supplier), then the Agreement shall be reviewed to be inline with the comfort provided to Seller in the assignment contract.”

(emphasis supplied)

On the same day, the appellant and the respondent executed First Price Side Letter (FPSL) which was to form an integral part of the GSA. Paragraphs 11.1(a), 11.1(b), 11.3 and 11.6 of FPSL are extracted below:

“11.1

(a) The elements of Contract Price payable by the Buyer to the Seller on account of delivery of Gas under this Agreement shall be as follows:

Price elements are:

| Sr.No | Elements of Price | Rs./MMBTU |
|-------|----------------------------------|------------|
| 1. | Foreign Currency Component (USD) | 135.10+2.3 |
| 2. | Indian Rupees Component | 29.5 |
| | Contract Price | 166.90 |

Foreign Currency component is calculated considering the Exchange rate of 1 US\$ = Rs.46.00. However, the actual exchange rate will be as per clause 11.5 below.

(b) The above Contract Price includes basic custom duty and exclusive of all other Taxes & Duties. Buyer shall pay/reimburse Taxes and Duties as applicable in addition to Contract Price from time to time.

11.3 The above prices are valid up to 31st December, 2008 and shall be reviewed only and to the extent to which Ras Gas (Supplier of LNG) agrees for a different price.

11.6 Buyer and Seller shall mutually discuss for the Contract Price of Gas to be effective from 1st January 2009. The Seller

shall inform not later than 30.06.2008, the revised Contract Price and parties agree to discuss in good faith and finalize the new prices effective from 1.1.2009 not later than 30.09.2008. In case the Parties are unable to agree on the revised Contract Price, the Agreement may be terminated by the Buyer by giving a written notice to the Seller to this effect.”

(emphasis supplied)

6. The appellant also sent letter dated 7.2.2004 to the respondent confirming the terms agreed between the parties including the following:

“7. At any time during Contract Period in the event that Seller offers to charge a Price for Gas to any Other Gas Buyer that is lower than Price for such quantity of Gas, Seller shall offer the same to the Buyer also. Price shall mean sum of CIF, Custom Duty and Regasification Charge.”

7. After about three years, the Government of India, Ministry of Petroleum and Natural Gas sent communication dated 6.3.2007 to the Managing Director and CEO, Petronet LNG Limited with copies to Chairman, IOC; C&MD, GAIL; and C&MD, BPCL incorporating therein the policy decision on pooling of RLNG prices. The relevant portion of that letter is reproduced below:

“The question of prices to be charged for RLNG from different customers has been under consideration of the Government. After considering existing practices and to avoid loading high cost of additional RLNG being made available to the prospective customers, it has been decided after examination of all aspects, in public interest, that the gas prices being charged on supply of RLNG procured under long term contracts should be on a non-discriminatory basis and uniform pooled prices should be charged from all the existing and new consumers.”

8. The respondent and other buyers of gas challenged the aforesaid policy decision in Special Civil Application No.18868/2007 and batch matters. All the

petitions were dismissed by a Full Bench of the Gujarat High Court. The writ petitioners challenged the judgment of the High Court by filing special leave petitions which were converted into civil appeals and are pending adjudication.

9. On 2.12.2008, the appellant sent e-mail to the respondent along with draft RLNG contract for discussion indicating that the contract could be effective from 1.1.2009. Similar e-mails and draft agreements were sent by the appellant to 150 other buyers. Paragraphs 'F' and 'G' of the preface, the definition of 'Basic Term' and Article 11 of the draft agreement were as under:

"F. The price under the Earlier GSA is valid until 31 December, 2008 and the Parties have agreed to terminate the Earlier GSA and enter into this Agreement to enable the Buyer to procure, from the Seller, Gas out of the Sellers share of LNG Quantity for use in its plant / premises located at Dahej, Gujarat;

G. The Seller and the Buyer accordingly wish to enter into this Agreement to record the terms and conditions on which; (i) the Seller shall sell and deliver at the Delivery Point, and the Buyer shall purchase, Gas out of the Seller's share of LNG Quantity; and (ii) the Earlier GSA shall cease to be effective from 1 January, 2009, except for the right and obligations specifically referred herein."

"**Basic Term**" means the period beginning at 0600 hours on the Commencement Date and, ending at the end of the last Day of April 2028."

"ARTICLE 11

PRICE

11.1 The Price for Gas

(a) The Price which Buyer shall pay for quantities of Gas to be sold and purchased in a Contract Year, shall be as set out in the Price Side Letter, which shall form an integral part of the Agreement

(b) The above Price includes only those Taxes and Duties

expressly set out in the Price Side Letter.

(c) The Buyer shall also be responsible for, and shall be liable to pay the Seller for any Overdrawn Quantity, as may be applicable and determined from time to time in accordance with Article 8.2(f).

11.2 Change in Law & Other Price Variations

The Buyer acknowledges and agrees that the elements/constituents of the Price set forth in the Price Side Letter have been negotiated and agreed between the Parties taking into consideration the elements/constituents of the price agreed between PLL and the Seller, and the Laws and policies of any Government Agency applicable/prevaling on the date of this Agreement.

Accordingly, the Buyer agrees that if at any time, any element/constituent of the Price as set forth in the Price Side Letter requires any variance/change including because or on account of, any change in Law (including any change in judicial/quasi-judicial interpretation or application of any Law), any directive from any Government Agency, changes in the policy of any Government Agency, pooling of LNG prices, decision of any court, and the same shall result in a corresponding change in the Price; and, the Seller shall by written notice inform the Buyer of such change and the Price shall accordingly stand revised to the extent, and with effect from such date as, stated in the Seller's notice, and shall be payable by the Buyer. The change in Price and the necessary adjustment shall be reflected in the subsequent Invoice.”

10. The respondent sent reply e-mail on the same day, i.e., 2.12.2008, the relevant portions whereof are extracted below:

“We refer to your email dated December 2, 2008 on the subject matter and noted the contents thereof. We have also gone through the changes suggested in the draft GSA attached along with the email.

In this context, we would like to state that the existing GSA is valid till 0600 hours of 1.1.2019. The provision of the existing GSA does not contemplate change in the terms of the same except the Price of Gas with effect from January 1, 2009. According to Article 11.3 of the GSA, the Contract Price agreed

between the Parties is valid up to December 31, 2008 and it can be reviewed only to the extent to which Ras Gas (Supplier of LNG) agrees for a different price. Apart from such change, which Ras Gas has agreed thereto, no price revision is allowed under the GSA.

In view of the above, GSPC is not in a position to agree to the changes suggested in the draft of the existing GSA except the price of Gas which shall be in accordance with Article 11.3 of the GSA.”

11. On 23.12.2008, the appellant sent proposed Price Side Letter to the respondent mentioning that the contract would be effective from 1.1.2009 to 1.1.2019. The respondent did not agree to the terms of the draft agreement as also the Draft Price Side Letter and returned the corrected draft agreement indicating that during the period from 1.1.2009 to 30.9.2009 the foreign currency component shall be the Weighted Average Price of the specified quantities of LNG and matter regarding the implementation of pooled price would depend on the final adjudication by the Supreme Court and that the pooled price mechanism provided under Clause 11.4 shall not be applicable and the foreign currency component of contract price shall be equal to the ex-ship LNG price including customs duty under the SPA. It was also mentioned that if the Supreme Court quashes the pooled price mechanism, then the appellant will have to refund/reimburse the differential amount.

12. In the backdrop of disagreement between them on the terms of draft contract, the appellant and the respondent agreed to sign fresh Price Side Letter which became part of the GSA. Paragraphs 11.2, 11.3, 11.4(1)A(g), 11.6 and 11.7 of Price Side Letter dated 31.12.2008 read as under:

“11.2 The Price for Gas

- a) The Price, which Buyer shall pay for quantities of Gas to be sold and purchased in a Contract Year, shall be as set out in Article 11.4 of this Price Side Letter, which shall form an integral part of the Agreement.
- b) The above Price includes only those Taxes and Duties expressly set out in this Price Side Letter.
- c) The Buyer shall, in addition to the Taxes and Duties expressly set out in this Price Side Letter, reimburse any other Taxes and Duties, which may have been paid by the Seller. For avoidance of doubt, the Buyer shall indemnify the Seller against any other such Taxes and Duties which the Seller as a result of any Law or change in Law; is or becomes obliged to pay directly or indirectly on sale or importation of LNG, RLNG or Gas sold as per the terms of this Agreement.
- d) The Buyer shall also be responsible for, and shall be liable to pay the Seller for any Overdrawn Quantity, as may be applicable and determined from time to time in accordance with Appendix B.

11.3 Change in Law & Other Price Variations

- a) The Buyer acknowledges and agrees that the elements/constituents of the Price set forth in the Price Side Letter have been mutually agreed between the Parties taking into consideration the price agreed between PLL and the Seller, the Laws and policies of any Government Agency applicable/prevaling on the date of this Agreement.

Accordingly, the Buyer agrees that if at any time, any element/constituent of the Price as set forth in this Price Side Letter requires any variance/change including because of or on account of, any change in Law (including any change in judicial/quasi-judicial interpretation or application of any Law, any directive from any Government Agency, changes in the policy of any Government Agency, pooling of LNG prices, decision of any court or change in Law), shall result in a corresponding change in the Price; and, the Seller shall by written notice inform the Buyer of such change and the Price shall accordingly stand revised to the extent, and with effect from such date as, stated in the Seller's notice.

- b) The Price shall stand revised from the date such change in Law is made effective or implemented by the relevant

Government Agency. Further, the change in Price and the assessment adjustment shall be reflected in the subsequent Invoice.

11.4 Components of Price

The Price payable by the Buyer to the Seller for supply of RLNG shall consist of (1) Contract Price; (2) Connectivity Charges and (2) Taxes and Duties Charges as detailed below:

(1) Contract Price

The Contract Price payable by the Buyer to the Seller under the Agreement shall consist of the following elements/components:

- A. Foreign Currency Component; and
- B. INR Component.

Each of these elements/components is as follows:

A. Foreign Currency Component:

(g) The indicative Pooled Price for the period January to September 2009:

PLL has indicated the Ex-terminal "Pooled price" for the period / January to September 2009 in the range of USD 6.3 to USD 6.8 per MMBTU at a crude price of \$70. Even though the above "Pooled Price" is Ex-Terminal price but as per the procedure adopted by PLL, an indicative "Pooled Price" equivalent to Foreign Currency /Component (FE) will be declared around 15th of the month for the next month and the "Pooled Price" will be indicated by PLL on first of every month starting from January 2009. The pooled price bands at various levels of crude are expected to be as under as provided by PLL:

| Month | 50 | 60 | 70 | 80 |
|--------------|-----------|-----------|-----------|-----------|
| Jan-09 | 6.26 | 6.26 | 6.26 | 6.26 |
| Feb-09 | 6.34 | 6.34 | 6.34 | 6.34 |
| Mar-09 | 6.43 | 6.43 | 6.43 | 6.43 |
| Apr-09 | 5.60 | 5.93 | 6.26 | 6.58 |
| May-09 | 5.69 | 6.02 | 6.35 | 6.67 |
| Jun-09 | 5.78 | 6.11 | 6.44 | 6.77 |
| Jul-09 | 5.87 | 6.20 | 6.53 | 6.86 |
| Aug-09 | 5.97 | 6.30 | 6.62 | 6.95 |
| Sep-09 | 6.06 | 6.39 | 6.72 | 7.05 |

11.6 The Parties agree that the provisions of this Article 11 shall be valid till 31.12.2013 and that supply of Gas from 01.01.2014 onwards shall be subject to parties reaching a fresh agreement on the provisions for Price of Gas to be applicable with effect from 01.01.2014. The parties further agree that the provisions of this Article 11 to be applicable with effect from 01.01.2014 shall be mutually discussed and finalized afresh no later than 31.12.2011, failing which, the Agreement shall stand terminated with effect from 01.01.2014 and the Parties hereto shall stand relieved of their respective obligations to supply or receive Gas.

11.7 General

(a) The Parties further agree to additional amendments to the Agreement as specified at Appendix B.

(b) This Price Side Letter forms an integral part of the Agreement and together with the Agreement represents the entire agreement between the Buyer and the Seller.

(c) In the event of any conflict between the provisions of this Price Side Letter and the provisions stipulated in the Agreement, the provisions of this Price Side Letter shall prevail.

(d) Capitalized terms used, but not defined, in this Price Side Letter, shall have the same meaning as given to them in the Agreement.”

(emphasis supplied)

13. After signing the Price Side Letter, the parties exchanged letters dated 1.10.2011, 21.12.2011, 26.12.2011, 28.12.2011 and 6.1.2012. For the sake of reference, these letters are reproduced below:

“GSPC

GUJARAT STATE PETROLEUM
CORPORATION LTD.

(A Govt. of Gujarat Undertaking)

Regd- Office : GSPC Bhavan,
Behind Udyog Bhavan, Sector-11,
Gandhinagar-382 010, INDIA.

Phone: +91-79-66701001

Fax :+91-79-23236375

E-mail : gspc@gspc.in

GSPCL/COMM/2011/1021

1st October 2011

Shri A.K. Saksena
Zonal General Manager
GAIL (India) Limited
809, Sakar-II, Opp. Town Hall,
Near Ellisbridge
Ahmedabad - 380006

Sub: Gas Price with effect from 01.01.2014

Ref: Gas Sales Agreement dated February 7, 2004 between GAIL and GSPCL ('GSA') read with the Price Side Letter dated 31.12.2008 ("Price Side Letter")

Dear Sir,

This is with reference to Article 11.6 of the above-referred GSA.

As per the terms of the referred Article, the provisions of Article 11 as incorporated into the GSA by the Price Side Letter would remain valid till 31.12.2013. Further, the Article also stipulates that GSPCL and GAIL shall mutually discuss and finalize, no later than December 31, 2011, a fresh agreement on the provisions for Price of Gas to be applicable with effect from 01.01.2014.

In this regard, GSPCL would like to propose that the current arrangements with regards to Price of Gas, as has already been mutually agreed vide price Side Letter to the GSA, be extended and continued till the expiry of the GSA.

You are requested to let us know if the above is acceptable. In case of any clarifications, GSPCL is willing to meet and discuss the same with GAIL officials at a mutually convenient date and time.

The same is without prejudice to our rights under the GSA.

Yours sincerely,

Sd/-
Ravindra Agarwal
GM (Commercial)

GAIL (India) Limited
(A Government of India Undertaking)
Ahmedabad Zonal Office

Dated: 21st December, 2011

Ref: GAIL/AZO/MKTG/RLNG/2011/GSPCL

To
Sh. Ravindra Agarwal
GM (Commercial)
Gujarat State Petroleum Corporation Ltd. (GSPCL)
GSPC Bhavan, Behind Udyog Bhavan,
Sector 11, Gandhinagar- 382010 (Gujarat)

Subject: Gas Price with effect from 01.01.2014.

Dear Sir,

This has reference to the Gas Sale Agreement (GSA] dated 07.02.2004 and Price Side Letter dated 31.12.2008 executed between GAIL and GSPCL for supply R-LNG.

Further, this has reference to your letter No.GSPCL/COMM/2011/1021 dated 1st October 2011 and our subsequent meeting held on 14.12.2011 at Ahmedabad, wherein we conveyed to you that the price offered by GSPCL to continue with the current arrangements is not acceptable to GAIL for R-LNG supplies beyond 31.12.2013.

Therefore, it is requested to let us know GSPCL's revised offer on or before 26th December 2011 to enable us to take an appropriate view considering the urgency of the matter. If you wish to discuss the issue further, we propose to discuss the matter in our Delhi Office at your earliest convenience, preferably on 23rd December 2011 to take a final view.

Yours sincerely,

Sd/-
(A.K. Saxena)
Zonal General Manager

GSPC

GUJARAT STATE PETROLEUM

CORPORATION LTD.
(A Govt. of Gujarat Undertaking)
Regd- Office : GSPC Bhavan,
Behind Udyog Bhavan, Sector-11,
Gandhinagar-382 010, INDIA.
Phone: +91-79-66701001
Fax :+91-79-23236375
E-mail : gspc@gspc.in

GSPCL/COMM/2011

December 26, 2011

Shri A.K. Saksena
Zonal General Manager
GAIL (India) Limited
809, Sakar-II, Opp. Town Hall,
Near Ellisbridge
Ahmedabad - 380006

Sub: Gas Price with effect from 01.01.2014

Ref:

- i. Gas Sales Agreement dated February 7, 2004 between GAIL and GSPCL ('GSA') read with the Price Side Letter dated 31.12.2008 ("Price Side Letter")
- ii. Letter from GSPC dated October 1, 2011

Dear Sir,

Please refer to our earlier communication and your most recent letter dated 21st December, 2011 on the subject matter.

In connection to the same and subsequent to our meetings at GAIL Ahmedabad Zonal Office and New Delhi office on December 14, 2011 and December 23, 2011 respectively, GSPC would like to resubmit and reiterate that with regards to Price of Gas under the GSA, the current arrangements which have been mutually agreed vide Price Side Letter, be extended and continued with effect from January 1, 2014 till the expiry of the GSA.

The same is without prejudice to our rights under the GSA.

Yours sincerely,

Sd/-
Ravindra Agrawal
GM (Commercial)

GAIL (India) Limited
(A Government of India Undertaking)
Ahmedabad Zonal Office

Dated: 28.12.2011

Ref: GAIL/AZO/MKTG/RLNG/2011/GSPCL

To
Sh. Ravindra Agarwal
General Manager (Commercial)
Gujarat State Petroleum Corporation Ltd. (GSPCL)
GSPC Bhavan, B/h Udyog Bhavan,
Sector -11, Gandhinagar- 382010
Gujarat

Subject: Gas Price with effect from 01.01.2014.

Dear Sir,

This has reference to our meeting on 23.12.2011 on the Price of Gas to be applicable from 01.01.2014 under the R-LNG GSA.

During the discussion held on 23.12.2011, GAIL sought GSPCL's proposal on the price to be applicable w.e.f. 01.01.2014. However, no specific proposal for revising the price was made by GSPCL. In this context, GAIL suggested that it would be fair to align future price of R-LNG with the market conditions prevalent. We further suggested that GSPCL may propose certain principles based on which the price to be applicable in future can be further discussed, especially since GSPCL is also sourcing LNG cargoes internationally.

The current pricing arrangement is valid till 31.12.2013 and supply of Gas from 01.01.2014 onwards shall be subject to GAIL and GSPCL reaching a fresh agreement regarding the price to be applicable with effect from 01.01.2014. Further, the price applicable with effect from 01.01.2014 is required to be finalized afresh no later than 31.12.2011. It may be recalled that such clause for price review was included at the request of

GSPCL.

It is therefore requested to revert on above at the earliest for finalizing the price that would be applicable for the supply from 01.01.2014 onwards.

Yours sincerely,

Sd/-
(A.K. Saksena)
Zonal General Manager

“GSPC

GUJARAT STATE PETROLEUM
CORPORATION LTD.
(A Govt. of Gujarat Undertaking)
Regd- Office : GSPC Bhavan,
Behind Udyog Bhavan, Sector-11,
Gandhinagar-382 010, INDIA.
Phone: +91-79-66701001
Fax :+91-79-23236375
E-mail : gspc@gspc.in

GSPCL/COMM/2012/21

January 6, 2012

Shri A.K. Saksena
Zonal General Manager
GAIL (India) Limited
809, Sakar-II, Opp. Town Hall,
Near Ellisbridge
Ahmedabad - 380006

Sub: Gas Price with effect from 01.01.2014

Ref:

- i. Gas Sales Agreement dated February 7, 2004 between GAIL and GSPCL ('GSA') read with the Price Side Letter dated 31.12.2008 ("Price Side Letter")
- ii. Letter from GSPC dated October 1, 2011
- iii. GAIL letter dated December 21, 2011

- iv. Letter from GSPC dated December 26, 2011
- v. GAIL letter dated December 28, 2011

Dear Sir,

In relation to your above referred letter dated December 28, 2011, it should be noted that it is incorrect to state that GAIL has not received any specific proposal for revising the price from GSPCL. In fact GSPCL vide its letter dated 1.10.2011 had proposed the continuation of the existing framework stated in the Price Side Letter for the remainder of the Term of the GSPCL-GAIL GSA dated 7.2.2004 ("GSPCL-GAIL GSA"), which has been reiterated by GSPCL in the meeting held on 23.12.2011 as well as vide its letter dated 26.12.2011.

Please note that the GSPCL-GAIL GSA is specifically for the delivery of RLNG sourced from the regasification of the LNG sourced from the identified LNG Supplier i.e. Ras Laffan LNG Limited and regasified at an identified LNG Terminal i.e. the Petronet LNG Limited Dahej Terminal. This is clear from the provisions of Recital A (which identifies Ras Laffan LNG Limited to be the LNG supplier), read with Clause 6.7 (which also identifies the LNG supplier to be Ras Gas) and Clause 19.1 (which provides for the termination of the GSPCL-GAIL GSA in the event the GSPA between PLL and GAIL is terminated).

We have already indicated that we are agreeable to the continuation of the existing gas price framework as provided in the present Price Side Letter. The existing Price Side Letter is already meeting GAIL's requirement of aligning the price of RLNG with the price of LNG being sourced.

We would like to point out that in seeking to renegotiate the Price of gas under the GSPCL-GAIL GSA, other agreed provisions of the GSA such as sourcing of LNG, regasification from PLL's Dahej LNG Terminal cannot be sought to be changed.

It should be noted that proposals for revision of Gas price have to be within the overall framework of the GSPCL-GAIL GSA and cannot seek to change the basic framework of the GSPCL-GAIL GSA itself.

We reiterate that the existing framework under the Price Side Letter is already covering point sought to be raised by GAIL vide its letter dated 28.12.2011 of having the price of RLNG reflect market conditions of LNG being sourced for the GSPCL-GAIL GSA and we have already submitted our proposal to continue with the existing arrangement for the entire Term of the GSPCL-GAIL GSA.

The same is without prejudice to our rights under the GSA.

Yours sincerely,
Sd/-

Ravindra Agrawal
GM (Commercial)”

(emphasis supplied)

14. By letter dated 27.1.2012, the respondent acknowledged the receipt of various communications exchanged between the parties and noted that the appellant’s proposal for aligning the price of RLNG with the prevalent market conditions was analogous to its own proposal.

15. Thereafter, the appellant sent communication dated 4.5.2012 to the respondent mentioning therein Article 11.6 of Price Side Letter dated 31.12.2008 and pointed out that if the parties are not able to agree on the issue of price of gas applicable from 31.12.2011, the agreement shall stand terminated with effect from 1.1.2014. The relevant portions of that letter are reproduced below:

“Further, as per the Article 11.6 in the above referred Price Side Letter dated 31.12.2008, the current pricing arrangement is valid till 31.12.2013; and supply of gas from 01.01.2014 onwards was subject to GAIL and GSPCL reaching a fresh agreement regarding the price to be applicable with effect from 01.01.2014. Further, the price applicable with effect from 01.01.2014 was required to be finalized afresh no later than 31.12.2011. It may

be recalled, that such clause for price review was included at the request of GSPCL. In the event, the market conditions would have been adverse, such clause provided GSPCL with an option to exit from the GSA.

Further, with reference to your letters dated 06.01.2012 and 27.01.2012, GAIL reiterates that the offer and understanding of the basis on which future supply could have been envisaged was that the price should be a discoverable market price having regard to international prices of LNG. In fact the attempts to prescribe a method to achieve the same failed.

In view of the fact that no agreement could be reached between GAIL and GSPCL by 31.12.2011 regarding the price of gas to be applicable with effect from 01.01.2014, the agreement shall stand terminated w.e.f. 01.01.2014 and the parties hereto shall stand relieved of their obligation under the Agreement.”

(emphasis supplied)

16. In its reply dated 3.7.2012, the respondent rejected the offer of the appellant for maintaining future supply at the market price and also accused it of acting in a *mala fide* manner. Paragraphs 4 and 5 of that letter read as under:

“4. You may recall the background in which the GSA dated 07.02.2004 has been executed. The GSA was executed between GAIL and GSPC pursuant to a long term gas supply contract entered into between Petronet LNG Limited (PLL) and Ras Gas. The GSA has been executed by GAIL as Gas marketer of PLL. You may please note that the provisions of the GSA dated 07.02.2004 and the provisions of the subsequent Side Letter dated 31.12.2008 provide for price of RLNG which is split into two components. One is the Foreign Currency Component and the second is the Indian Rupee Component. Article 11.4 of the Side Letter dated 31.12.2008 provides that the Foreign Currency Component shall be the weighted average price of all RLNG quantities procured by PLL under various long term contracts, as required by the letter dated 06.03.2007 of the Ministry of Petroleum and Natural Gas. Article 11.4(l)A(b) further provides that during the Term of the GSA, the Foreign Currency Component shall be the weighted average price of the specified quantities sourced by PLL. It is to be noted that the term of the

GSA is till 0600 hours of 01.01.2019. The Foreign Currency Component is a pass through. The Indian Rupee Component inter alia contains the marketing margin of GAIL. Please also refer to the supplemental agreement as recorded in the letter of GAIL dated 07.02.2004 wherein clause 7 stipulates that at any time during the Contract Period, in the event that Seller offers to charge a Price for Gas to any other gas buyer that is lower than price for such quantity of gas, Seller shall offer the same to the Buyer also.

In the aforesaid background it is stated that it was for GAIL to act in a fair and reasonable manner and make genuine efforts to agree on the price of RLNG payable from 01.01.2014. The date 31.12.2011 stipulated in the Article 11.6 of the Side Letter dated 31.12.2008 is with intent to facilitate an early agreement on price mechanism between the parties and a mandatory inflexible adherence thereto is not intended by the parties. .

5. Under the present price arrangement between the parties, gas is required to be sold to GSPC by GAIL at the price under the Price Side Letter, or, if GAIL is selling gas of comparable quality and volume to any other buyer at a lower price (as compared to the price under the Price Side Letter) then the sale to GSPC shall also be at lowest price (such lowest other price being the 'Price Cap'). In view of GAIL never having offered to GSPC a price lower than the price as determined under the Price Side Letter, it is GSPC's bona fide belief that the price offered to GSPC under the Price Side Letter is equal to or lower than the Price Cap. Therefore, we state that even if GSPC and GAIL were unable to arrive at a new price side letter, albeit on account of the failure and the unreasonable conduct of GAIL, GSPC and GAIL still have a continuing agreement as to Price Cap, and therefore the sale of RLNG could nevertheless be continued at such Price Cap.”

17. The appellant responded to that communication by sending letter dated 24.1.2013 and refuted the allegations of *malafides*. The appellant also pointed out that the respondent had not accepted its proposal to sign a GSA based on uniform pooled price in terms of letter dated 6.3.2007 of the Government of India and agreed only to sign a Price Side Letter. The relevant portions of that

letter are as under:

“GAIL had signed fresh long term GSAs in December 2008 with all its downstream customers, except GSPCL, which are governed by the uniform pooled price in terms of the MOPNG directive dated 06.03.2007, and all such GSAs are valid till April 2028. There is no provision in any of these GSAs for reopening the price before the term ends in April 2028 unless there is a change in law or policy. It may be recalled that at the time of review for the gas price to be valid w.e.f. 01.01.2009, GAIL had offered to sign a GSA with GSPCL to be valid till April 2028 based on the uniform pooled price in terms of MoP&NG directive dated 06.03.2007 as had been done by GAIL with all its other downstream customers. However, GSPCL did not accept the GSA proposed by GAIL and agreed only to sign a new Price Side Letter, and also insisted on a provision for price review for the period 01.01.2014 to 31.12.2018 in such Price Side Letter. Hence, the allegation of GSPCL that GAIL has conducted itself in an unfair and arbitrary manner is not correct.

It was on the insistence of GSPCL that Article 11.6 was incorporated in Price Side Letter dated 31.12.2008 which expressly provided that ".....supply of Gas from 01.01.2014 onwards shall be subject to Parties reaching a fresh agreement on the provisions of Price of Gas to be applicable from 01.01.2014.....". Therefore, the term of the contract is determined by Article 11.6 of the Price Side Letter dated 31.12.2008. By virtue of the said provision for price review that was included at its sole insistence, GSPCL kept for itself the option to exit from the GSA after 31.12.2011, had the price for the period 01.01.2014 onwards not been acceptable to GSPCL.

The consequence of failure to arrive at a mutually agreed price has been expressly provided in Art.11.6 itself, and is not something which has been left to the discretion of either party. Having insisted on incorporating such a condition in the Price Side Letter dated 31.12.2008, thereby making it an obligatory condition on both parties, GSPCL has to abide by the said condition.

The undisputed position is that representatives of GAIL and GSPCL met on 14.12.2011 and 23.12.2011 and also exchanged correspondence to arrive at the mutually agreed gas price for the period 01.01.2014 to 31.12.2018 as contemplated under Art.11.6. It is also an undisputed position that GSPCL was insisting on continuation of the existing pricing mechanism

under the Price Side Letter dated 31.12.2008 and was not open to any other pricing mechanism. GAIL was not for continuation of the existing pricing mechanism and had suggested a mechanism based on prevalent market conditions. As such, there was no meeting of minds as on 31.12.2011 on the price of gas to be applicable with effect from 01.01.2014. It is a matter of record that GAIL, by its letter dated 28.12.2012 had reminded GSPCL that the price was required to be finalized "no later than 31.12.2011"; however, GSPCL did not choose to act with diligence. Hence, the allegations of GSPCL in the letter dated 03.07.2012 that GAIL had not acted in a fair and reasonable manner and had abused its so called dominant market position are incorrect.”

(emphasis supplied)

18. The respondent challenged communications dated 4.5.2012 and 24.1.2013 in Special Civil Application No. 2362/2013 filed before the Gujarat High Court and prayed that a direction be issued to the appellant to engage itself in a bona fide manner to arrive at the price of gas to be effective from 1.1.2014. In the affidavit filed on behalf of the respondent, it was averred that even though Article 15.5 of the GSA contains arbitration clause, the same was not being resorted to because its complaint did not relate to any breach of the agreement but was against the arbitrary action of the appellant in fixing the price of gas. The respondent referred to letter dated 6.3.2007 of the Government of India, the Second Price Side Letter, the correspondence exchanged between the parties in 2011, 2012 and January, 2013 and pleaded that the action of the appellant seeking to terminate the GSA is violative of Articles 14, 19(1)(g) and 301-A of the Constitution. The respondent further pleaded that the price of gas should be based on the pooled price mechanism prescribed by the Ministry of Petroleum and Natural Gas.

19. In the counter affidavit filed on behalf of the appellant, several objections were taken to the maintainability of the Special Civil Application including the following:

- a) The subject matter of the Special Civil Application is in the realm of a private contract and is not amenable to judicial review under Article 226 of the Constitution.
- b) The GSA signed by the parties is purely a commercial contract and the dispute emanating from the GSA can be decided only by way of arbitration.

20. On merits, it was pleaded that the appellant had offered to sign fresh long term Gas Sale Agreement with all existing customers including the respondent for supplying RLNG up to April, 2028 at uniform pooled price in terms of the policy decision of the Government of India, but the respondent did not accept the offer and insisted on signing only the Price Side Letter effective from 1.1.2009. According to the appellant, the respondent also insisted that the Price Side Letter should provide for review of RLNG price before the expiry of the 5 years' term on 31.12.2013 and the price applicable from 1.1.2014 to 1.1.2019 should be mutually agreed by the parties. Along with the counter affidavit, the appellant enclosed draft Price Side Letter forwarded by the respondent vide e-mail dated 26.12.2008.

21. The Division Bench of the High Court extensively noted the arguments of the learned counsel for the parties (pages 27-59 of the impugned order), referred

to the precedents cited by them and held that though the High Court will not entertain a matter where the petitioner is seeking damages for breach of contract or specific performance of contract by invoking Article 226 of the Constitution, the power of judicial review can be exercised when the contractual dispute involves a public law element. The Division Bench then proceeded to observe:

“This Court, as stated hereinabove, is of the opinion that on perusal of the relief sought for, the petitioner is approaching this Court, not for any damages for breach of contract nor for any specific performance of contract, but it is seeking a direction directing the respondent to engage itself in a bona fide manner with the petitioner to arrive at the price of gas to be effective from 01.01.2014. From the facts above, learned senior advocate appearing for the petitioner could convince this Court that the conduct of the respondent was not found to be befitting to 'State' or 'an instrumentality of State'. Otherwise there was no reason for the respondent not to respond to letter dated 01.10.2011 till 21.12.2011. Not only that, there was no reason for the respondent to all of a sudden change the criteria for fixing the price of gas from 'pooling price' to 'aligning future price of RLNG with market conditions prevalent'. This gives reason to draw a conclusion that the respondent was not acting in a manner which can be said to be free from arbitrariness and, therefore, the matter requires to be allowed.”

22. On the aforesaid premise, the Division Bench finally quashed communications dated 4.5.2012 and 14.1.2013 and directed the appellant to engage itself with the respondent to arrive at the price of gas to be effective from 1.1.2014.

23. Shri R.F. Nariman, learned senior counsel for the appellant referred to the pleadings of the parties and the documents produced by them including letter

dated 6.3.2007 sent by the Ministry of Petroleum and Natural Gas, Government of India and e-mails dated 2.12.2008 and argued that the High Court committed serious error by entertaining the Special Civil Application ignoring that the parties had unequivocally agreed to resolve the disputes arising in connection with the GSA by arbitration. Shri Nariman emphasized that the Price Side Letters executed by the parties were integral part of the GSA and every dispute relating to the price of gas has to be resolved by arbitration in terms of Para 15.5 of the GSA and the remedy of arbitration is an effective remedy. In support of this argument, Shri Nariman relied upon the judgments in Life Insurance Corporation of India v. Escorts Ltd. (1986) 1 SCC 264, Bareilly Development Authority v. Ajai Pal Singh (1989) 2 SCC 116 and Kerala State Electricity Board v. Kurien E. Kalathil (2000) 6 SCC 293. Learned senior counsel further argued that the appellant had not discriminated the respondent in the matter of fixation of the price of gas. He pointed out that the appellant had made identical offer to all the buyers including the respondent for supply of gas at the pooled price determined by the Central Government but, the respondent declined to accept the offer and insisted on fresh agreement being signed on mutually agreed price and argued that the High Court committed serious error by directing the appellant to negotiate the price with the respondent. Shri Nariman then argued that having challenged the policy decision of the Central Government before the High Court and this Court, it was not open to the respondent to seek a direction for implementation of that decision.

24. Shri Andhyarujina, learned senior counsel for the respondent supported

the order under challenge and argued that the High Court did not commit any error by entertaining and allowing the Special Civil Application because the parties are State agencies and refusal of the appellant to supply gas at pooled price was totally arbitrary and unjustified. Learned senior counsel submitted that though the respondent had challenged the pooled price mechanism enshrined in letter dated 6.3.2007, the appellant cannot discriminate the respondent and charge more than the pooled price. Learned senior counsel submitted that the decision of the appellant to insist for determination of price through market mechanism was totally uncalled for, arbitrary and unjustified and the Division Bench of the High Court did not commit any error by directing it to enter into a fair negotiation with the respondent. Shri Andhyarujina relied upon the judgments in *Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay* (1989) 3 SCC 293, *Mahabir Auto Stores and others v. Indian Oil Corporation and others* (1990) 3 SCC 752, *Kumari Shrilekha Vidyarthi and others v. State of U. P. and others* (1991) 1 SCC 212, *ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others* (2004) 3 SCC 553 and *Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others* (2003) 2 SCC 107 and argued that the arbitration clause contained in the GSA cannot operate as a bar to the entertaining of petition under Article 226 of the Constitution.

25. We have considered the respective arguments. At the outset, we may mention that vide e-mail dated 2.12.2008, the appellant had offered to sign fresh long term sale agreement with all the existing customers including the

respondent for supply of RLNG upto April, 2028 at a uniform pooled price in terms of the policy decision of the Government of India. This is evident from the averments contained in paragraphs 4.9 and 4.10 of the counter affidavit filed on behalf of the appellant before the High Court, which remained uncontroverted. A reading of the draft RLNG contract and Price Side Letter sent by the appellant to the respondent also shows that the appellant had offered to supply gas to the respondent at the pooled price but the latter did not agree and insisted on negotiation for the contract price of RLNG to be effective from 1.10.2009.

26. As many as 150 existing buyers had signed long term agreements with the appellant without any provision for review of price during the currency of contract. However, the respondent did not accept the offer and did not sign long term sale agreement. Instead, it agreed to sign the second Price Side Letter which contained a provision for review of the price before expiry of 5 years term on 31.12.2013. The respondent also insisted that RLNG price for the period from 1.4.2014 to 1.1.2019 should be mutually agreed between the parties. These terms were incorporated in the Price Side Letter sent by the respondent to the appellant vide e-mail dated 26.12.2008. The Price Side Letter which was finally signed by the parties indicate that the price of gas had been mutually agreed between the parties. This was also mentioned in letters dated 1.10.2011 and 26.12.2011 sent by the respondent to the appellant. Therefore, the premise on which the High Court recorded the conclusion that the appellant had acted arbitrarily was non-existent and on this ground alone the order under challenge

is liable to be set aside.

27. We also agree with Shri Nariman that the remedy of arbitration available to the respondent under paragraph 15.5 of the GSA was an effective alternative remedy and the High Court should not have entertained the petition filed under Article 226 of the Constitution of India. The contents of the GSA, the Price Side Letters and the correspondence exchanged between the appellant and the respondent give a clue of the complex nature of the price fixation mechanism. Therefore, the High Court should have relegated the respondent to the remedy of arbitration and the Arbitral Tribunal could have decided complicated dispute between the parties by availing the services of experts. Unfortunately, the High Court presumed that the negotiations held between the appellant and the respondent were not fair and that the respondent was entitled to the benefit of the policy decision taken by the Government of India despite the fact that it had not only challenged that decision but had also shown disinclination to accept the offer made by the appellant to supply gas at the pooled price and had insisted on mutually agreed price.

28. In *Arun Kumar Agrawal v. Union of India and others* (2013) 7 SCC 1, this Court was called upon to consider the scope of judicial review of complex economic decision taken by the State or its instrumentalities. The Government of India, ONGC and Shell entered into a production sharing contract with a private enterprise for exploration and exploitation of crude oil and natural gas in respect of the Rajasthan Block. After due deliberation, the Government of India

endorsed the decision taken by ONGC. While refusing to interfere with the decision of the Government, this Court observed:

“We notice that ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives.”

29. In view of the aforesaid conclusions, we do not consider it necessary to deal with the judgments relied upon by learned counsel for the parties. Suffice it to say that each case was decided in the backdrop of the peculiar facts and the Court did not lay down a proposition which could be universally applied to all the cases.

30. In the result, the appeal is allowed, the impugned order is set aside and the Special Civil Application filed by the respondent is dismissed.

.....J.
(G.S.SINGHVI)

.....J.
(V. GOPALA GOWDA)

NEW DELHI;
SEPTEMBER 17, 2013.



JUDGMENT