

**Court cannot interfere with an award in a Section 34 petition if the view taken by the
arbitral tribunal is a plausible one (Bombay High Court)**

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Published on 22 June 2020

Niko Resources Ltd. v. Gujarat State Petroleum Corporation Ltd.

Case Number: Commercial Arbitration Petition 484 of 2017 | **Citation:** Currently not available |
Judge: AK Menon J | **Court:** Bombay High Court | **Date:** 09 June 2020 | **Available at:**
<https://indiankanoon.org/doc/142413589/>

On 9 June 2020, the Bombay High Court dismissed a petition for setting aside of an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 (“ACA”). The Court found that the arbitral tribunal’s interpretation of the underlying contract was a plausible one, thus there was no need to interfere with the award. Further, the grounds of challenge in the petition related to the merits of the tribunal’s decision and required a re-appreciation of evidence, which is not permissible in a Section 34 proceeding.

A. Background facts- the joint venture and the balancing gas agreement

Niko Resources and Gujarat State Petroleum Corporation Limited (“GSPC”) were joint-venture partners carrying out the business of exploration, development, and marketing of gas from what is known as Hazira Field.

They entered into Gas Sales Agreements (“GSAs”) with various customers, who had agreed to purchase diverse quantities of gas from them. The GSAs provided for a minimum guaranteed off-take of gas, which Niko and GSPC were obliged to supply to the customers. If the joint-venture failed to supply the minimum guaranteed gas, the customers could claim liquidated damages.

The production of gas from the Hazira field commenced sometime in 1995. In 2006, the production of gas from the Hazira Field started to decline. Consequently, the obligations under the GSAs fell overdue. To avoid claims for liquidated damages from the customers, GSPC took the initiative to supply gas which fell short from its portfolio, apparently at prices that were higher than that contemplated under the GSAs.

GSPC and Niko arrived at an understanding that, GSPC having supplied the shortfall gas would receive contributions from Niko by way of three alternatives recorded in what was described as a Balancing Gas Agreement (BGA). The alternatives were as follows:-

- (a) First, Niko would supply to GSPC gas from a field known as D6 Field where it had an ongoing arrangement with Reliance Industries Limited (RIL).
- (b) Second, if Niko was unable to supply shortfall gas from D6 Field, it would be obliged to provide to GSPC five times the gas from any other source [Clause 6.1 of the BGA].¹

¹ The exact language of the BGA clauses is not provided in the judgment.

- (c) Third, if Niko was not successful in procuring gas from any other source, it was obliged to make a one-time payment to GSPC. The formula for determining the one-time payment was provided in the BGA [Clause 6.2 of the BGA].

B. The dispute and the arbitral award

Niko was unable to procure gas from the D6 field in view of revised guidelines regarding the sale of natural gas known as the New Exploration Licensing Policy issued by the Government of India.

GSPC invoked clause 6.1 of the BGA, which required Niko to supply the gas from “any other source” i.e., other than the D6 gas.

Niko contended that the BGA was subject to several conditions precedent which hadn’t been fulfilled. Thus, the BGA had not become operational and its invocation by GSPC was premature.

Consequently, GSPC invoked arbitration claiming payment of the one-time payment contemplated under the BGA. The arbitral tribunal allowed GSPC’s claim and awarded it a sum of USD 17,798,643 million as a one-time payment.

C. Niko’s Section 34 challenge to the award

The main thrust of Niko’s Section 34 petition was that the award was against the specific terms of the contract and the law of damages. Accordingly, it was patently illegal and against the public policy of India. Principally, the challenge was based on two arguments.

First, the BGA was had not become operational because it was subject to certain conditions precedent which were not fulfilled.

Second, the provision for one-time payment under the BGA was in effect a provision for payment of liquidated damages. Under Section 74 of the Indian Contract Act, 1872 (“ICA”) payment of liquidated damage is subject to proof of actual loss. GSPC made no attempt to establish the loss. Thus, the tribunal couldn’t have allowed GPSC’s claim for the one-time payment.

D. The court’s decision

AK Menon J dismissed Niko’s petition. The reasons were as follows:-

- (a) The Court noted that the grounds of challenge in the petition were akin to grounds of appeal. They related to the arbitral tribunal’s decision on the merits of the case and invited for a re-appreciation of evidence, which is impermissible in a Section 34 petition.
- (b) Citing the Supreme Court’s decision in *SsangYong Engineering*,² the Court observed that as long as the view taken by the arbitral tribunal is a possible one, a court cannot interfere with the award in a Section 34 challenge.
- (c) The tribunal had held that compensation payable by way of one-time payment under the BGA was a contractual payment and not a payment for damages for breach of contract. The Court

² (2019) SCC OnLine SC 677.

found that this view taken by the tribunal was a plausible one. That being so, the court had no reason to interfere with the award and substitute it with its view.

- (d) In fact, the Court agreed with the tribunal's view that the one-time payment was not pecuniary recompense for an actionable wrong done to GSPC by Niko. Instead, it was payment due under an express provision of the contract.
- (e) In view of the tribunal's opinion that a claim does not arise from a breach of contract, the principles of Section 74 ICA would not apply. Thus, there was no need to prove loss.
- (f) Relying on the Supreme Court's decision in *Associate Builder's*,³ the Court rejected Niko's contention that the arbitral award was patently illegal. It held that:-
 - (i) The arbitral tribunal had given clear, lucid reasons for the conclusions that it had reached, and hence, the award, did not fall foul of Section 31(3) ACA. Thus, the ground of patent illegality on that basis was certainly not established.
 - (ii) The construction of the terms of a contract is for the arbitral tribunal to decide. The present case was not one where the arbitral tribunal had committed any error of jurisdiction, as contemplated by Section 34(2A).
 - (iii) The arbitral tribunal's findings were not without any basis in evidence, nor did the tribunal ignore or fail to consider material evidence. In other words, there was no perversity that the award displayed in order to invite the ground of patent illegality.
- (g) The arbitral tribunal had held that BGA had come into force. The Court observed that this finding of the tribunal was based on a detailed analysis of communications between the parties, statutory filings, and admission of witnesses. Thus, there was no need to interfere with it.
- (h) The Court also rejected Niko's objections regarding the quantification of the award. It held that the BGA provided for a formula for determining the one-time payment. The arbitral tribunal had applied that formula. The tribunal's application of the formula could not be interfered with.

³ *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.