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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 16.02.2022*

+ **ARB.P. 597/2021 & IA 8049/2021, IA 14329/2021**

GAIL (INDIA) LIMITED Petitioner
Through Mr Junior Luwang, Advocate.

versus

M/S RATHI STEEL AND POWER LTD. Respondent
Through Mr Sanjoy Ghose, Senior Advocate
with Mr anand Shankar Jha, Mr Arpit Gupta, Mr
Rhishabh Jetley, Mr Girish Bhardwaj, Ms
Meenakshi Devgan, Mr Shubham Tripathi,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') praying that an Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in connection with the Gas Supply Contract dated 26.12.2008 (hereafter 'the GSA') and the Supplementary Agreement dated 21.05.2009. The GSA includes an Arbitration Clause that reads as under:-

“15.6 Arbitration

Any Dispute arising in connection with this Agreement which is not resolved by the Parties pursuant to Article 15.1 within sixty (60) Days of the notice of the Dispute or Article 15.3(c) and Article 15.3(d), shall:

** ** ** **

Alternative 2- where one Party to the Agreement is not a Government Company

(a) be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and rules made there under, from time to time. The procedure for appointment of arbitrators shall be as follows:

- (i) After the sixty 60 Days period described in Article 15.1, either Party may submit the Dispute to a single arbitrator (the “**Sole Arbitrator**”).
- (ii) The Buyer shall select the Sole Arbitrator within thirty [30] Days of the expiration of such sixty 60 Days period from a panel of three (3) distinguished persons nominated by the Seller.
- (iii) The decision(s) of the Sole Arbitrator, supported by reasons for such decision, shall be final and binding on the Parties.
- (iv) The venue of the arbitration shall be New Delhi.

This Article 15.6 shall survive the termination or expiry of this Agreement.”

2. It is the petitioner’s case that the respondent had not lifted the minimum quantity of Regasified LNG (hereafter ‘Gas’) as agreed; nonetheless, it was liable to pay the amount for the said quantity under Clause 14.1 of the GSA, which provides for ‘Pay For If Not Taken’ obligations.

3. The petitioner had issued a letter dated 28.02.2015 raising a demand of ₹10.33 crores for the dues payable under the said clause for the year 2014. The petitioner claims that similar demands were made for the subsequent years as well. The respondent had not paid the said invoices, as according to the respondent, it was not liable to do so. It had not received the supply of Gas for which the invoices were raised. In view of the above, the petitioner had also suspended the supply of gas from the year 2015 onwards.

4. Notwithstanding that the supplies had been suspended, the petitioner states that it continued to raise the invoices under the ‘Pay For If Not Taken’ quantity for the year 2015 as well as the years subsequent thereto.

5. Since the respondent had failed to pay the amounts as claimed by the petitioner, the petitioner issued a notice dated 27.11.2019 invoking the Arbitration Agreement, in terms of Clause 15.6 of the GSA claiming certain amounts, which according to the petitioner, were due under Clause 14.1 of the GSA (‘Pay For If Not Taken’ obligations).

6. Paragraphs 10 and 11 of the said notice issued under Section 21 of the A&C Act are relevant and are set out below:-

“x. That since your concern was not lifting “Pay For If Not Taken” quantity, my Client vide its letter of February 28, 2015 raised a demand of INR.10.33 Cr towards the same for the year 2014. So did my Client raised a demand of INR 35.04 Crores vide its letter of February 29, 2016, INR 20.48 vide letter of February 28, 2017, INR 23.87 Crores vide its letter of February 26, 2018, INR 31.46 Crores vide letter dated February 26, 2019 towards your concern’s “Pay For If Not Taken” contractual liability. Similarly, my Client also raised various demands for different amounts towards your “LC Encashment postage and Advice Charges”, Interest payment on delayed payment etc. for the period of 2014 to 2019 i.e. till date. As you must be aware, the total amount of Rs. 122.19 crores, detailed calculation was enclosed with my Client’s letter of July 30, 2019.

xi. That it was on your concern’s failure to clear my Client’s invoices that my Client on April 28, 2015 had no option but to suspend gas supply. The same position continues till today for reasons solely attributable to you, more specifically your concern’s failure to clear our Client’s dues, maintain letter of credit of the required amount etc. ”

7. Mr Ghose, learned senior counsel appearing for the respondent, does not dispute that the parties had entered into the GSA. He also does not dispute that an agreement exists between the parties for reference of the disputes to arbitration. He, however, states that the claims made by the petitioner are *ex-facie* barred by limitation. He referred to the decision of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation: (2021) 2 SCC 1*** and ***Bharat Sanchar Nigam Ltd. And Anr. v. M/s Nortel Networks India Private Limited: (2021) 5 SCC 738***, in support of his contention that the Court would not relegate the parties to arbitration in respect of the disputes that are *ex-facie* barred by limitation.

8. Mr Luwang, learned counsel appearing for the petitioner, countered the aforesaid submissions. He submits that the liability of the respondent to pay under Clause 14.1 of the GSA ('Pay For If Not Taken' obligations) continued even after the supply of Gas was suspended. He states that notwithstanding that the invoices raised in respect of the period three years prior to 27.11.2019 (the date of notice of invocation of arbitration) are considered as barred by limitation; the petitioner is, nonetheless, entitled to recover the amounts due under Clause 14.1 of the GSA for the period of three years prior to the notice invoking arbitration.

9. Mr Luwang also referred to the letter dated 08.06.2021, whereby the respondent had evinced its interest to settle the disputes by payment of a one-time settlement amount of ₹1.61 crores. He contended that the said letter constitutes an acknowledgement of liability as the respondent had sought waiver of liabilities in respect of the dues demanded for the

years 2015 to 2020. He also referred to an email dated 28.04.2015 and submitted that the said email sent by the respondent in respect of the notice for disconnection of Gas supply also indicates that the respondent had acknowledged its liability.

10. Undoubtedly, the contention that the claims raised by the respondents are barred by limitation is a substantial one. In the notice invoking arbitration, the petitioner had expressly stated that it had terminated the gas supply on 20.04.2015 and “*the same position continues till today*”. This, according to the petitioner, was on account of the respondent’s failure to clear the dues. The failure to pay the amount claimed does not extend the period of limitation.

11. The email dated 28.04.2015 also does not appear to be an acknowledgement of the liability against the ‘Pay For If Not Taken’ obligations under the GSA. Further, the letter dated 08.06.2021, which is relied upon by the petitioner, is a letter evincing interest for a one-time settlement, which was issued by the respondent without prejudice to all rights and contentions. It is difficult to accept that this letter constitutes an acknowledgement of liability for two reasons. First, that the letter was written “*without prejudice*” and does not unequivocally acknowledge any liability. Second, that it was not sent within the period of limitation of three years.

12. Having stated the above, there is a contentious issue, whether the amounts claimed by the petitioner, for the period three years prior to the issuance of notice, are barred by limitation. According to the petitioner, the liability to pay under Clause 14.1 of the GSA continues, notwithstanding, the discontinuation/suspension of the supply of Gas.

The respondent claims that the entire claim is barred by limitation as it had declined to pay the amount under Clause 14.1 of the GSA and had not done so since 2015. Thus, it had repudiated any alleged liability/obligation for making any payment for Gas not received by it and more particularly after it was suspended.

13. The respondent also claims that the petitioner has not claimed such amounts against the 'Pay For If Not Taken' obligations under the GSA from certain other establishments and had entered into a one-time settlement with them.

14. Although, this Court is inclined to accept the contention as advanced by the respondent. However, it is apparent that the controversy as noted above falls outside the standard of examination under Section 11 of the A&C Act. The Supreme Court in ***BSNL v. Nortel Networks Private Limited*** (*supra*) had after referring to the observations made by the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation*** (*supra*) explained that it is only in cases where there is no vestige of doubt that the claims are barred by limitation that the Court would decline the request for appointment of an Arbitrator. It is now well settled that unless the Court finds that *ex-facie* the dispute is barred by limitation and there is no issue to be adjudicated, the Courts would relegate the parties to the remedy of their choice – arbitration.

15. In view of the above, this Court considers it apposite to allow the present petition. Accordingly, Justice (Retired) Badar Durrez Ahmed, a former Chief Justice of Jammu and Kashmir High Court (Mobile No. 7042205786) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the learned Arbitrator

making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

16. The learned counsel for the parties further request that the arbitration be conducted under the aegis of the Delhi International Arbitration Centre (DIAC) and in accordance with its Rules. Thus, with the consent of the parties, it is directed that the arbitration would be conducted under the aegis of DIAC and in accordance with its Rules.

17. The parties are at liberty to approach the Coordinator, DIAC for further proceedings.

18. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

FEBRUARY 16, 2022

pkv

VIBHU BAKHRU, J

[Click here to check corrigendum, if any](#)