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

+			**<u>O.M.P.No. 365/2007</u>**
%				**13th August, 2015**

GAIL (INDIA) LTD.				..... Petitioner

Through: Mr. Dinesh Agnani, Sr. Adv. with Ms. Leena Tuteja, Adv.

versus

HINDUSTAN SANITARYWARE & INDUSTRIES LTD.
..... Respondent

Through: Mr.Jayant Tripathi and Mr. Dinesh Dahiya, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

**<u>VALMIKI J. MEHTA, J (ORAL)</u>**

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 impugns the Award dated 8.3.2007 by the Arbitration Tribunal comprising of Justice S.C. Sen, Justice P.P. Gupta and Justice R.S. Pathak. Award was passed by dismissing the claim of the petitioner of Rs.28,38,165/- for excessive unmetered gas stated to be consumed by the respondent during the period from September, 1992 to December, 1996.

Respondent has denied the claim of drawl of excessive unmetered gas and has contended that the gas drawn was billed and duly paid for.

2. Though, the Award discusses facts as to whether there is an excessive drawl of gas by the respondent, this Court need not go into that aspect inasmuch as, the Arbitration Tribunal has dismissed the claim petition on the ground of limitation. Counsels for the parties agree that this Court has therefore only to examine the issue of limitation.

3. The facts of the case are that the petitioner in terms of the Agreement dated 24.12.1990 with the respondent agreed to supply natural gas to the respondent. The supply for payment was to be calculated in standard cubic meters and the entitlement of the respondent was to draw a maximum of 20,000 standard cubic meters per day. Petitioner had installed its gas metering equipment to record the amount of gas being supplied to the respondent. Petitioner had installed a meter to record a maximum drawl of 25,000 standard cubic meters par day considering that respondent was entitled to draw a maximum of 20,000 standard cubic meters per day. Disputes arose when in December, 1996, petitioner claimed that respondent had drawn unmetered gas beyond 25,000 standard cubic meters per day from September, 1992 to December, 1996 and consequently correspondences

were exchanged between the parties on this aspect. Since no conclusion was reached in terms of the correspondences, arbitration proceedings were invoked in December, 2001.

4. Arbitration Tribunal has decided the issue of limitation, and which was issue no.1, in paras 8.1 to 8.1.11 of the Award and these paras read under:-

> **"8.1. Limitation:**
>
> 8.1.1. The claim relates to the period September 1992 to December 1996.
>
> 8.1.2. Any claim made for the period before December 1996, would be barred by limitation. Therefore, it has to be determined whether the period of limitation has been extended by any acknowledgment of liability or otherwise within the provisions of the Limitation Act, 1963.
>
> 8.1.3 The Claimant strongly relied upon several letters exchanged between the parties in support of its contention that there was clear acknowledgment of the liability by the Respondent. We have examined the letters carefully. Although in some of them the fact that night drawl of gas was more than that the drawl of gas during day time was admitted, the Respondent has consistently denied the charge of consumption of unmetered gas. There is no where any acknowledgement in any of the letters that the Respondent has been drawing unmetered gas at any point of time between September 1992 to December 1996. The letter written by Dua on 19 December 1996 which has been set out hereinabove does not really acknowledge that there has been excessive drawl of gas. The letter does not say that unmetered gas being consumed nor does it say that the gas consumed was higher than the contracted quantity of 25000

SM2/day over a period of four years for the last four years and four months.

8.1.4. Even otherwise, this letter was written on 19 December 1996. It will not extend the limitation upto 23 July 2002, when the claim was lodged. No other letter has been shown to us where the Respondent has clearly or impliedly acknowledged drawl of unmetered gas. Therefore, the contention based on an alleged acknowledgement of liability fails.

8.1.5 There is also another aspect of the matter. The letter relied upon by the Claimant discusses problems in praesanti. The letters nowhere refer to consumption of unmetered gas for the period September 1992 to December 1996.

8.1.6. The Claimant has drawn our attention to Art.55 of the Schedule to the Limitation Act which is as under:-

| **Description of Suit** | **Period of Limitation** | **Time from which period begins to run** |
|---|---|---|
| 5.5 For compensation for the breach of any contract, express or implied not specially provided for | Three years | When the contract is broken or (Where there are successive breaches) when the breach in respect of which the suit is instituted occur or (where the breach is continuing when it ceases. |

It has been contended on behalf of the Respondent that the contract has not been broken. The only allegation of breach of contract is a non-uniform rate of drawl of gas for which the contract has not provided any penal consequence. It is pointed out that the Statement of Claim does not mention any case of breach of contract.

8.1.7. We are unable to uphold this contention. There has clearly been a breach of contract when the Respondent drew gas in excess of the contractual amount of 25000 SM3/day. The drawl of gas at non-uniform rate was also in breach of contract. It may be that the contract does not provide for any specific remedy or action in a situation like this. But a breach of contract does not arise when the contract provides a remedy for the breach.

8.1.8. It may be noted that even if the breach is assumed to be continuous, limitation will have to be counted from 31 December 1996, the last day of the period in dispute, and limitation will have expired when this Claim was filed.

8.1.9. Another point raised related to fraud or mistake, and the argument was that limitation would commence to run from the date of recovery of the fraud of mistake. The Statement of Claim does not contain any pleading of fraud or mistake. Moreover, the Respondent was making two hourly entries in the log book continuously. The entries from the Field Computers including DPT were manually recorded two hourly. Bills were prepared and sent bi-monthly on the basis of the Log Book from which Srivastava discovered that there were drawls of unmetered gas by the Respondent. Therefore, even if any fraud was committed by the Respondent, it was found out by Srivastava in February 1996. Therefore, the period of limitation cannot be extended beyond December 1999 and the ground of discovery of fraud or mistake fails.

8.1.10. Article 55 deals with "compensation for the breach of any contract-express or implied and not specifically provided for". The period of limitation is 3 years. Time begins to run

> when the contract is broken or where there are successive breaches when the breaches in respect of which the suit is instituted occur or where the breach is continuing when it ceases.
>
> 8.1.11. In view of the aforesaid, we are of the view that this claim made by GAIL is clearly barred by limitation."

5. A reading of the aforesaid paras shows that the Arbitration Tribunal has found the claim to be barred by limitation by reference to lodging of the claim on 23.7.2002, however, it is noted that admittedly this date is a mistake because limitation will stop running from December, 2001, when the arbitration proceedings were invoked. However, even if we take the date of December, 2001, the Arbitration Tribunal was justified in arriving at its conclusion that the claim of alleged excessive unmetered gas drawn by the respondent from September, 1992 to December, 1996 was barred by limitation, and for which purpose, the limitation is taken to have stopped in December, 2001 and which is because limitation will expire within a period of three years from December, 1999 viz three years from December, 1996 and since arbitration proceedings were first invoked much later in December, 2001, the claim petition filed by the petitioner was hence clearly barred by limitation.

6. Arbitration Tribunal in the aforesaid paras of the Award has rightly concluded that there is no issue of fraud or mistake deferring the

period of limitation, inasmuch as, the statement of claim does not contain any pleading of fraud or mistake. Even assuming issue of fraud or mistake for expanding limitation period comes in, by virtue of provision of Section 17 of the Limitation Act, 1963, fraud or mistake can only help the petitioner if the same has resulted in concealment of facts from the petitioner entitling deferment of the period of limitation, however, in the facts of the present case there does not arise any issue of concealment of facts by the respondent because the claim of the petitioner is based upon the recording of excessive unmetered gas beyond the permissible limit on its own meters and recording by its own staff every two hours every day. Not only that, as per the recordings contained in the meter, fortnightly bills were being issued by the petitioner to the respondent. The Arbitration Tribunal in the Award noted that the limit of 25,000 standard cubic meters per day had been breached not a few times but on as many as 614 times in a span of four years and four months from September, 1992 to December, 1996 ie once roughly every 55 hours and therefore it does not lie in the mouth of the petitioner to seek deferment of limitation on the ground of fraud or mistake under Section 17 of the Limitation Act.

7. The only real issue with respect to limitation was whether the respondent had acknowledged its liability towards the petitioner, and such acknowledgment of liability helps in accordance with Section 18 of the Limitation Act for petitioner's invocation of arbitration in December, 2001 to be within limitation. In this regard, I may note that the Arbitration Tribunal records in para 8.1.3 of the Award that it has carefully examined the letters filed by the petitioner and none of the letters show any acknowledgment of liability of the respondent towards the petitioner. Though the Arbitration Tribunal has not referred to any specific letter, I have with the assistance of the learned senior counsel for the petitioner gone through the various letters, and only one such letter is relevant, being the letter dated 2.1.1998 of the respondent to the petitioner, and this letter reads as under:

> "Ref: BO;PHS;98;87 2-Jan-98
>
> M/s. Gas Authority of India Ltd.,
> DESU Terminal,
> IP Estate,
> Ring Road,
> New Delhi-110 002
>
> Attn. Mr. M.K. Sogani
>
> This has reference to your fax no.GAIL/DESU/TERM/CSTMR/(I) 97 dt. 29th Dec.97 regarding over drawl of gas. We wish to write to you that because of the highly unpredictable and bad weather, our

heating requirement in the process has gone up and that is the reason that we have been consuming more gas than the contracted quantity.

However, please note that the drawl of gas in the night in any case goes up, historically you can see our figures in this respect. The reason for this is that many heating equipments do not run in the day time and these are operated only in the night.

However, we are taking necessary care to reduce the gas consumption and already converted one of our Boiler to oil firing from gas firing. We request you to please accommodate us for little higher drawl of gas for the month of Jan. due to winter weather.

Our Engg. Dept. feels that your meter is not showing correct reading and therefore, we request you to please get the meter caliberated also.

Thanking you,

Yours faithfully,
for Hindustan Sanitaryware & Inds. Ltd.,

Sd/-

R.B. KABRA
SR. VICE-PRESIDENT
(COMML. & PROJECTS)
Cc Mr. B.E. Dua"

8. As per Section 18 Explanation (a) of the Limitation Act, once there is an acknowledgment of a right even without specifying the exact nature of the right, there is acknowledgment of liability and even if we take the letter dated 2.1.1998 as an acknowledgment of liability under Section 18 of the Limitation Act, yet, limitation adversely affects the petitioner on two

counts. Firstly, the letter dated 2.1.1998 will only save the claims of the petitioner post January, 1995 and not before that, and secondly, claims post January, 1995 till December, 1996 would have been saved by limitation only if the arbitration proceedings were invoked on or before 2.1.2001 i.e three years from 2.1.1998, however the arbitration proceedings were invoked only in December, 2001. Clearly therefore, arbitration proceedings having been invoked beyond 2.1.2001 i.e only in December, 2001, the Arbitration Tribunal was hence justified in dismissing the claim petition as being barred by limitation.

9. In view of the above, I do not find that the Award is against the law or the contract between the parties is in any manner perverse for this Court to interfere with the same in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

10. In view of the above, the petition is dismissed, leaving the parties to bear their own costs.

**AUGUST 13, 2015** **VALMIKI J. MEHTA, J.**

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