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

+ **O.M.P. (COMM) 439/2016**

M/S. SRI GANGA ICE FACTORY

..... Petitioner

Through: Mr Gurpreet Singh and Mr Nimesh
Chib, Advocates.

versus

M/S GAIL (INDIA) LIMITED

..... Respondent

Through: Mr Dharmendra Tyagi, Advocate for
Mr Sanjeev Sagar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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06.10.2016

IA No.12513/2016

1. For the reasons stated in the application, the delay in re-filing the appeal is condoned.
2. The application stands disposed of.

IA No.12512/2016

3. Allowed, subject to all just exceptions.
4. The application stands disposed of.

O.M.P. (COMM) 439/2016

5. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the Arbitral Award dated 10.02.2016 (hereafter 'the impugned award') whereby the petitioner's claims have been rejected.
6. Briefly stated, the disputes between the parties had arisen in the following context :-
7. The respondent (hereafter 'GAIL') had issued an advertisement dated

06.12.2003 inviting offers from consumers interested in availing of low pressure gas from an isolated installation of ONGC at Upplaguptam (Gopavaram) for a period of 3 years and 9 months. The petitioner responded to the said advertisement and, thereafter, the parties entered into a Gas Supply Contract (hereafter 'the GSC') dated 15.03.2003, which was valid upto 31.12.2007. In terms of GSC, GAIL was to supply 1500 SCMD of gas on 'Fallback Basis Allocation' from Gopavaram Gas field in Upplaguptam Mandal East Godavari District, Andhra Pradesh to the petitioner. Admittedly, the said agreement was extended on quarterly basis up to 30.06.2010.

8. It is the petitioner's case that the supply pressure of gas during the last few months had dropped to the extent that the petitioner could no longer use the gas. The respondent supplied gas upto 06.05.2010. The reason given by GAIL for stopping of the gas was its non-availability from ONGC. The petitioner alleges that the gas in question was available to GAIL but it had diverted the same to other commercial users and thereby had breached the GSC. The petitioner claims that it has also obtained information from ONGC under the Right to Information Act, 2005 regarding the availability of gas from Gopavaram Gas field. It is further alleged by the petitioner that GAIL was supplying gas to the petitioner from another field which was not permissible under the terms of the GSC.

9. In view of the aforesaid, the petitioner raised the following claims:-

“(1) Rs.65,74,460/- towards loss of income, due to non supply of gas;

- (2) Rs.12 lakh towards the expenses which the claimant had to incur on plant, operation of stock, despite non supply of gas;
- (3) Rs.7,500/- towards the rental charged from the claimant for about 15 days despite non supply of gas;
- (4) Rs.20 lakh towards loss of goodwill
- (5) Rs.2,50,000/- towards legal expenses;
- (6) Interest @ 18% p.a. on the above claims, till realization.”

10. The Arbitrator considered the disputes and came to the conclusion that the gas was to be supplied on ‘Fallback Basis Allocation’ which was expressly defined under the GSC as ‘as and when available basis’. The Arbitrator further found that GAIL was unable to supply the gas due to non-supply from ONGC. GAIL’s contention that it could supply the gas at the requisite pressure only if it received gas from ONGC at sufficient pressure, was accepted by the Arbitrator.

11. Insofar as the petitioner’s claims for damages is concerned, the same were rejected principally on the ground that in terms of the GSC, the petitioner was to arrange for dual fuel/feed. In other words, the petitioner could not rely on the supply of gas by GAIL as its only source of fuel.

12. The learned counsel appearing for the petitioner submits that petitioner would have no claim if an advance notice of stoppage of gas was issued to the petitioner. However, as the supply of gas was stopped abruptly, the petitioner suffered losses as it did not make alternative arrangements. I am unable to find any merit in the aforesaid contention for several reasons.

First of all, that was not the main thrust of the petitioner's contention before the Arbitrator. Secondly, GAIL had asserted that it had duly informed the petitioner as to the availability of gas. And, thirdly it is not disputed that the GSC itself envisaged that the petitioner would make arrangement for a dual fuel source.

13. The scope of interference in an Arbitral Award is highly restricted and the same can be assailed only on the grounds specified under Section 34(2) of the Act. The petitioner seeks to place his case within the scope of Section 34(2)(b)(ii) of the Act, that is, that the impugned award is in conflict with the public policy of India. There is no material to indicate that the impugned award is opposed to the public policy of India. It is neither perverse nor patently illegal. Further, I am also unable to accept that the impugned award is contrary to any statute.

14. The Arbitrator has interpreted the GSC, which is well within his jurisdiction. It is well settled that the question as to interpretation of an Agreement between the parties is clearly within the jurisdiction of the Arbitrator. In ***Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.*** (2006) 11 SCC 181, the Supreme Court held as under:-

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that

correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India* : (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

15. In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.***: (2009) 10 SCC 63, the Supreme Court had expressly stated as under:-

“....an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award”.

The Court further held that “*If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award*”.

16. In ***Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India***: (2010) 11 SCC 296, the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award

in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

17. Although, the aforesaid judgment was in context of the Arbitration Act, 1940, the above view expressed by the Supreme Court is still good law since the scope of interference in an arbitral award has been further restricted under the Act. In **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**: (2012) 5 SCC 306, the Supreme Court referred to the above quoted passage from the decision in *Sumitomo Heavy Industries Limited* (*supra*) as instructive.

18. Thus, the view of the Arbitrator on the interpretation of the GSC is final and binding. Even if it is assumed that the said interpretation is erroneous, that cannot be a ground for assailing the impugned award.

19. In view of the above, I find no merit in the present petition and the same is, accordingly, dismissed.

VIBHU BAKHRU, J

OCTOBER 06, 2016
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