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

\+ **O.M.P.(I) (COMM.) 274/2016**

BHUSHAN STEEL LIMITED ..... Petitioner

Through Mr Salman Khurshid & Mr Anil Airi, Sr Advocates with Ms Azra Rehman, Ms Alisha Panda, Mr Ravi chandana, Ms Sakshi Kotiyal & Mr Aman Madan, Advs.

versus

M/S GAIL (INDIA) LTD. & ANR. ..... Respondents

Through Mr Sachin Puri, Sr Adv with Ms Purnima Maheshwari, Ms Hrshika Pandit and Mr D K Singh, Advs for R1.
Mr Kailash Sharma, Adv for R-2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 11.07.2016

IA 7719/2016

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P.(I) (COMM.) 274/2016

1. The Petitioner (hereafter ‘BSL’) has filed this petition under Section 9

of the Arbitration and Conciliation Act, 1996, *inter alia,* praying as under:-

> "a. Restraining the Respondent No. 1 from invoking the Letter of Credit [LC] bearing no.0630950001710 dt. 19.04.2010 till the adjudication of the dispute by the Sole Arbitrator by furnishing any fresh set of documents or otherwise;
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> b. Restraining the Respondent No. 2 Bank from releasing any amount under the invocation of the Letter of Credit [LC] bearing no.0630950001710 dt. 19.04.2010;
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> c. The Respondent No. 1 be directed to refund a sum of Rs.14,57,55,396/-(Fourteen Crores fifty seven lakhs fifty five lakhs three hundred ninety six only) to the petitioner which has been illegally realized by the Respondent No.1 and in the alternative the Respondent No.1 be directed to deposit the said amount with this Hon'ble Court.
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> d. The operation of the letter dated 16.05.2016 and debit notes bearing documents No 1600001889 and 1600001888 both dated 01.06.2016 be stayed."

2. BSL claims that GAIL(India) Ltd (the respondent herein and hereafter “GAIL”) has invoked the bank guarantee furnished at the instance of BSL and for recovering charges on account of levy of Value Added Tax (VAT) on Compressed Natural Gas (CNG) supplied by GAIL. It is BSL's case that VAT is chargeable at the rate of 12.5% - and not 21% - on sale of CNG and therefore, GAIL is completely unjustified in demanding the amounts in question. BSL is engaged in the business of manufacturing of C.R.

Coils/Strips, G.P. Coils/Strips, G.C. Sheets from its facility located at plot No. 23, Site No. IV, Industrial Area, Sahibabad, Ghaziabad, Uttar Pradesh. BSL entered into an agreement dated 20.02.2013 with GAIL for purchase of gas for carrying on its manufacturing activity. BSL asserts that the gas supplied by GAIL is imported as Liquid Natural Gas (LNG). GAIL thereafter regasifies LNG and supplies the Regasified Liquefied Natural Gas (RLNG) through a pipeline in a compressed form. According to the BSL, RLNG so supplied is Compressed Natural Gas (CNG) as the regasified gas is pressurized to reduce its volume and increase the density for its transportation through pipes.

3. Apparently, certain disputes have been raised by BSL with regard to VAT payable on the gas supplied by the GAIL. According to BSL, GAIL has supplied CNG which does not fall under any of the entries under Schedule IV under UP Value Added Tax Act, 2008 (hereafter ‘UP VAT Act’) and therefore, falls under the residuary entry, that is, under Schedule V of the UP VAT Act.

4. It is stated that in the past, BSL had been purchasing gas from GAIL against form-D issued by the UP Trade Tax Authorities. This enabled GAIL to charge a lower VAT on the gas supplied. However, the UP Trade Tax

Authorities had subsequently taken a stand that BSL was not entitled to input tax credit on such goods. Accordingly, the Assessing Authority had raised demands on BSL. It is stated that BSL had challenged such demands before the Additional Commissioner (Appeals), the First Appellate Authority and the said Authority had, by its order dated 21.03.2015, stayed 40% of the amounts demanded pursuant to the order of the Assessing Authority. BSL had appealed against the aforesaid order dated 21.03.2015 before the Commercial Tax Tribunal, Ghaziabad. The said Tribunal had by its order dated 04.04.2015 stayed 80% of the demand raised by the Assessing Authority and it is futher stated that BSL had deposited the balance 20% of the demand raised.

5. BSL states that the dispute regarding levy of VAT is pending before the Commercial Tax Tribunal and GAIL is a party to the said appeal preferred by BSL. In the present petition, BSL has alleged that although GAIL is aware that proceedings are pending before the Ghaziabad Commercial Tax Tribunal, it has "*in order to overreach the proceedings pending before the Tribunal, issued a letter dated 16.05.2016 on the ground that the petitioner has not submitted the Form - D against purchase of Gas since January 2015 onwards and also issued two debit notes both dated*

01.06.2016 demanding the differential tax due to non submission of Form D."

6. It is further asserted that GAIL had invoked the Letter of Credit in the sum of Rs.14,57,55,396/- (Fourteen crores fifty seven lakhs fifty five thousand three hundred ninety six only), which had since been released by respondent no.2 to GAIL.

7. The debit notes dated 01.06.2016 raised by GAIL are for an aggregate sum of Rs.34,25,78,035/- (thirty four crores twenty five lakhs seventy eight thousand thirty five only) out of which a sum of Rs.14,57,55,396/- (Fourteen crores fifty seven lakhs fifty five thousand three hundred ninety six only), has already been released to GAIL by respondent no. 2 bank pursuant to encashment of the LC for the aforesaid sum.

8. It is in the aforesaid context that BSL has filed the present petition.

9. Mr Salman Khurshid, learned Senior Advocate appearing for BSL submitted that the gas supplied by GAIL to BSL is CNG and not natural gas. He submitted that accordingly, the same was not classifiable under entries 8(a), 8(b) and 8(c) of Schedule IV of the UP VAT Act which read as under:-

1	2	3	4
8(a)	Natural gas other than Compressed Natural Gas (CNG) when sold to an industrial unit* of a registered dealer for use in the process of manufacture of taxable goods other than non vat goods against certificate prescribed by the Commissioner.	M or I	5%
8(b)	Natural gas other than Compressed Natural Gas (CNG) when sold to registered dealer for use in the process of manufacture by an industrial unit* situated in Taj Trapezium Area against Certificate prescribed by the Commissioner.	M or I	5%
8(c)	Natural gas other than Compressed Natural Gas (CNG) in cases other than those described in Serial No. 8(a) and 8(b)	M or I	21%

10. He contended that in the circumstances, CNG was liable to fall under Schedule V of the UP VAT Act, which listed the goods that were chargeable to UP VAT Act at the rate of 12.5%. The relevant entry under Schedule V of the UP VAT Act reads as under:-

List of goods taxed at 12.5%

S. No.	**Name and description of goods**

1	2
1	All goods except goods mentioned or described in Schedule-I, Schedule-II, Schedule-III and Schedule-IV of this Act.

11. He submitted that the central dispute between the parties was whether VAT was chargeable at the rate of 21% or 12.5% under the UP VAT Act.

12. Mr Khurshid next referred to paragraph 3 of the Agreement between the parties which provided for payment of tax and duties and submitted that under clause (b) of paragraph 3, the Petitioner was only obliged to reimburse taxes that had been paid by the seller (i.e. GAIL). He submitted that in the present case, GAIL had not paid the taxes sought to be recovered from BSL and, therefore, the invocation of the letter of credit/bank guarantee furnished at the instance of the Petitioner was wholly unjustified.

13. Mr Sachin Puri, learned Senior Advocate appearing for GAIL submitted that the stay granted by the Commercial Tax Tribunal was for the period prior to 2014 and did not cover the period in respect of which demands had been raised by GAIL. He submitted that GAIL was liable to pay VAT on the natural gas supplied and, therefore, was fully justified in demanding the said sum from the Petitioner. He further submitted that

GAIL had raised invoices by giving the benefit of form-D to the Petitioner as in the past, such forms had been furnished by BSL. However, since the BSL had failed to provide form-D, GAIL had no other option but to recover the VAT chargeable on the gas supplied. In addition, he submitted that the BSL was paying VAT on the current supplies being made by GAIL.

14. I have heard the learned counsel for the parties.

15. Before proceeding further, it would be relevant to refer to paragraph 3 of the agreement between the parties which reads as under:-

> "3) Taxes and Duties: The following provisions would be applicable to clause 1.1. and 1.2 above:
>
> (a) The Buyer shall be liable to pay all taxes, duties, imposts, charges, VAT, cess or levies by whatever name called and levied by Governments Agency from time to time, with respect to the sale, supply transfer, transport, storage, treatment, handling or importation, as the case may be, of the RLNG/Gas.
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> (b) Any taxes/duties/statutory levies for which the Buyer is liable under this clause or the Agreement but which may have been paid by the Seller shall be reimbursed by the Buyer together with applicable interest as provided in the Agreement for the Payment Default Period, if any, within 15 days after written request by the Seller.
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> (c) Service Tax: At Present, Service Tax at the rate of 12.36% is applicable on regasification services and transmission services. Such Service Tax shall be charged to the Buyer as applicable from time to time.

> (d) 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, transfer, importation, treatment of R-LNG or handling of Gas sold as per the terms of this Agreement or this Price Side Letter."

16. It is not in dispute that the Petitioner is liable to pay the VAT chargeable on the gas supplied by the Petitioner. It is also clear that any amount collected as VAT by GAIL would have to be remitted by GAIL to the concerned authority and it would not be open for GAIL to retain any amount collected as VAT from BSL. Thus, the central dispute that is sought to be agitated by the Petitioner essentially relates to classification of the product supplied by GAIL and the said dispute is to be resolved with the relevant authorities.

17. The law relating to grant of injunctions against enforcement of a bank guarantee/irrevocable letter of credit is now well settled. In ***Svenska Handelsbanken v. Indian Charge Chrome***: **(1994) 1 SCC 502**, the Supreme Court had clearly held that a bank guarantee/ irrevocable letter of credit cannot be interfered with unless fraud is established and irretrievable injustice is involved in the case. The Court further proceeded to hold that

mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of a bank guarantee. The aforesaid decision has been consistently followed by the Courts thereafter. In ***Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others***: **(1995) 6 SCC 68**, the Supreme Court referred to the earlier decision in ***Svenska Handelsbanken*** (*supra*) and held as under:-

> “. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in United Commercial Bank v Bank of India [1981] 3SCR 300, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd. [1988] 1 SCR 1124, General Electric Technical Services Co. Inc v Punj Sons (P) Ltd. [1991] 3SCR 412 and the decision of the Court of Appeal in England in Elian and Rabbath v Matsas and Matsas [1966] 2 Lloyd’s Report 495 and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome AIR 1994 SC 626, laid down the law thus: (SCC pp. 523-27, paras 60-72)
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> ‘.in case of confirmed bank guarantee/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...
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> ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.’

18. In ***U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.***: **(1988) 1 SCC 174**, the Supreme Court had further clarified that:

> “The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.”

19. In view of the above principles, I am unable to accept that any of the grounds for restraining encashment of the bank guarantee/letter of credit has been made out.

20. In the circumstances, the petition is dismissed.

21. It is, however, clarified that any observation made herein would not preclude BSL from pursuing any remedy as may be advised or from claiming refund of the amounts collected by GAIL, if otherwise entitled in law.

VIBHU BAKHRU, J

JULY 11, 2016
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