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

\+ O.M.P.(I) (COMM.) 389/2016

HRD CORPORATION (MARCUS OIL AND CHEMICAL DIVISION) ..... Petitioner

Through: Mr Arvind Nigam, Senior Advocate with Ms Aparajita Swarup, Advocate.

Versus

GAIL (INDIA) LIMITED, (FORMERLY GAS AUTHORITY OF INDIA LTD.) ..... Respondent

Through: Mr Ciccu Mukhopadhaya, Senior Advocate with Mr Tejas Karia, Mr Surjendu Sankar Das, Ms Rashmi and Ms Avlokita Rajvi, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **03.10.2016**

<u>VIBHU BAKHRU, J</u>

<u>IA No.12250/2016</u>

Allowed, subject to all just exceptions.

<u>O.M.P.(I) (COMM.) 389/2016</u>

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia,* praying as under:-

> "(i) Restrain the Respondent from selling, transferring, assigning, pledging, mortgaging, alienating or otherwise

disposing of any part of the Wax produced by the Respondent at its Plant at Pata Complex, U.P. to any third parties or creating any third party rights therein till the final disposal of the Arbitration proceedings except to the Petitioner;

(ii) Direct the Respondent to effect the supply of entire quantity of Wax produced at its Pata Plant to the Petitioner at the price determined in accordance with the pricing formula in terms of the Agreement and the Award dated 08.04.2006 till the disposal of the arbitration proceedings;

(iii) Restrain the Respondent and their directors, partners, servants, agents, representatives or assigns from directly or indirectly entering into any agreement for sale or provision of the quantity of Wax allocated to the Petitioner under the Agreement dated 01.04.1999 with any other person or requiring the Petitioner to pay market price for the Wax supplies under the Agreement;

(iv) Appoint a local commissioner to check the quantity of the stock of Wax produced by the Respondent and lying in storage at its Plant at Pata Complex, U.P. as also the conditions of storage thereof and to report on the same to the Hon'ble Court and/or Arbitral Tribunal."

2. The parties had entered into a contract dated 01.04.1999, whereby the respondent agreed to supply the entire quantity of Wax produced by the respondent at its Plant at Petro Chemical Complex at Pata in the State of Uttar Pradesh.

3. The principal dispute between the parties appears to be regarding the pricing of the by-product Wax, which was agreed to be supplied by the respondent to the petitioner. In addition, there is also some controversy

regarding whether the respondent is obliged to supply the entire production from all its Plants. The petitioner claims that it is also entitled to production from Train-2, which the petitioner claims is an expansion of the existing plant. The respondent disputes this as according to the respondent, what the petitioner mentions as Train-2 is in fact, a new plant.

4. Insofar as the dispute regarding pricing of Wax is concerned, the petitioner claims that the same has to be in accordance with the Agreement, which specifically links the price of the product to Ethylene.

5. The disputes between the parties have already been subject matter of adjudication by two Arbitral Tribunals. The first Award was rendered on 08.04.2006 and the Tribunal had awarded as under:-

> "**<u>Final Award</u>**
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> 191. GAIL will supply flaked wax at Rs.24,860/- per metric ton to HRD Corporation, claimant, according to the terms of the contract dated 1.4.1999. This price of Rs.24,860/- per metric ton will continue from 12.7.2004 till 12.7.2007 when the parties can seek revision of the price in accordance with the agreement dated 1.4.1999."

6. The said Award covered the supplies for the period till 12.07.2007.

7. The second Award was rendered on 22.07.2015 for the period from 13.07.2013 to 12.07.2016. As per this Award, the price for the Wax was fixed at ₹47,500/- per metric ton.

8. In between the aforesaid two Awards, there was yet another determination rendered by the Arbitral Award which rendered the first Award whereby the price was determined at ₹32,950/- for the period 13.07.2010 to 12.07.2013.

9. Mr Mukhopadhaya, learned senior counsel appearing for the respondent on advance notice states that the price of the product has now increased to ₹83,000/- per metric ton. This is disputed by Mr Nigam, learned senior counsel appearing for the petitioner; he states that the prices of the Wax has now dropped to ₹35,000/-.

10. After some arguments, Mr Mukhopadhaya states on instructions that his clients would be willing to supply the Wax @ ₹60,000/- per metric ton as an interim measure till the disputes between the parties are settled.

11. As far as the dispute regarding the production of Wax from Train-II is concerned, it is seen that the said issue was settled in favour of the respondent under the Award dated 22.07.2015 as the Arbitral Tribunal had concluded as under:-

> "It is thus concluded:
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> (i) The Agreement dated 1st April, 1999 uses the words "The Plaint".
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> (ii) These words excludes the possibility of including any other plaint in their sweep.
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> (iii) The Plant which was made operational in December, 2007 operational speaks of:
>
> (a) New Plant;

(b) The Agreement dated 24th June, 2004 speaks of existing and New Plant.

(c) The heading of the Agreement dated 24th June, 2004 reads "Additional Plant License Agreement".

(iv) The Agreement dated 1st April, 1999 uses the word "The Plant" as such the words Train-I or Train-II cannot be imported in to Agreement dated 1st April, 1999. The same would be the position regarding the use of the word Unit. The words Train and Unit are aliento Agreement dated 1st April, 1999.

(v) The claimant is entitled to only Wax produced at plaint governed by Agreement dated 1st April, 1999.

(vi) The press release, clearance given by Environmental Department or the document of Excise Department cannot be used to interpret Agreement dated 1st April, 1999 because these cannot shed any light on the situation which was prevalent on 1st April, 1999.

(vii) The principles of interpretation cannot be applied when meaning of the term is clear. The term Plaint would mean "The Plant" referred to in an Agreement dated 1st April, 1999 and not New Plant."

12. The petitioner is aggrieved by the aforesaid conclusion and has preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996. However, no decision on the objections of the petitioner has been delivered as yet.

13. Since in the present case, the question is only limited to determine an interim arrangement, it would not be appropriate to upset the finding of the Arbitral Tribunal in these proceedings.

14. Whether the agreement in question is specifically enforceable is also a contentious issue. If the agreement is not specifically enforceable, the petitioner would not be entitled to any interim relief however, this question has been decided in favour of the petitioner in the Award dated 08.04.2006. And, the said Award has apparently been accepted. Considering that the said Award had been accepted by the respondent, I am refraining from expressing any *prima facie* view on the said question.

15. However, since an offer has been made by the respondent to supply the Wax @ ₹60,000/- per metric ton, subject to further determination, an interim workable arrangement can be made.

16. It is, accordingly, directed that the respondent shall offer all its production pertaining to the Plant as specified under the Award dated 22.07.2015 to the petitioner at the price of ₹60,000/- per metric ton. This price shall be subject to any further order(s) or Award that may be passed by the Arbitral Tribunal as and when constituted.

17. The parties shall nominate their respective Arbitrators within a period of two weeks from today and the third Arbitrator shall be appointed in accordance with the arbitration clause as expeditiously as possible. The interim order passed is subject to any order that Arbitral Tribunal may pass. It is further clarified that nothing stated in this order shall be read as an expression of opinion as to the merits of the disputes and all contentions of the parties are open.

18. The petition is disposed of.

19. Order *dasti* under the signatures of the Court Master.

VIBHU BAKHRU, J

OCTOBER 03, 2016
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