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

+ ARB.P. 171/2017& IA No. 2933/2017

NAGARJUNA FERTILIZERS AND CHEMICALS
LIMITED

..... Petitioner

Through Mr. Sanjeev Kapoor, Mr. S. Narang,
Ms. Sneha and Mr. Rajat Jariwal,
Advocates

versus

GAIL (INDIA) LIMITED

..... Respondent

Through Mr. Sachin Puri, Sr. Counsel with
Mr. Sanjeev Sagar and Ms. Mehak
Tanwar, Advocates

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **26.04.2017**

1. The petitioner (hereafter 'NFCL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed on behalf of the respondent (hereafter 'GAIL'). Mr Kapoor, learned counsel appearing for NFCL states that as per the terms of the arbitration clause, the petitioner has already nominated Justice Raveendran (Retd.) as its arbitrator, however, GAIL has failed to nominate its arbitrator.

2. NFCL claims that the disputes have arisen in relation to a Gas Transmission Agreement ('the Agreement') dated 02.04.2009 which includes an arbitration clause that reads as under:-

“16.2 Referral for Settlement:

- (i) In the event of failure of a settlement under Clause 16.1 of any such Dispute, the Dispute shall be

referred to and finally resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 (Act 1996) in force at the time such arbitration is commenced.

- (ii) If a Dispute is to be settled by arbitration pursuant to Clause 16.2 i., then an arbitral tribunal (the "Tribunal") shall be established in accordance with the provisions of this Clause 16.2 ii. The number of arbitrators shall be 3 (three). Each Party shall nominate an arbitrator within 30(thirty) Days of the date of a request for arbitration, and the two nominated arbitrators shall within 30(thirty) Days of the date of the nomination of the second arbitrator jointly nominate a third arbitrator to act as Chairman of the Tribunal."

3. Mr Kapoor, has also drawn attention of this Court to a notice dated 16.01.2016, whereby GAIL was called upon to commence conciliation proceedings. However, GAIL declined the said request by its letter dated 23.06.2016 principally for the reason that, according to GAIL, there were no disputes between the parties. In the circumstances, NFCL invoked the arbitration clause vide letter dated 09.12.2016.

4. Mr. Puri, learned senior counsel appearing for GAIL earnestly contended that there was no cause of action for NFCL to invoke the arbitration clause. He further contended that the Agreement dated 02.04.2009 was extinguished by a later agreement dated 29.02.2016. He also referred to decision of the Supreme Court in **Young Achievers v. IMS Learning Resources Pvt. Ltd:** (2013) 10 SCC 535 in support of his contentions.

5. Mr Kapoor, stoutly disputes the same. He points out that the Agreement was for transmission of gas for a particular period, which was

extended from time to time and the agreement dated 29.02.2016 was entered into subsequently for transmission of gas for a period, which was not covered under the agreement dated 02.04.2009. He submits that in the circumstances, there was no question of the arbitration clause being extinguished.

6. This Court is unable to accept that the arbitration agreement (arbitration clause), as contained in the Agreement dated 02.04.2009 stands novated or extinguished. First of all, no such agreement has been produced before this Court which would indicate that the arbitration clause was novated by the parties. Secondly, there is also nothing to substantiate the contention that the subject matter of the Agreement dated 02.04.2009 - transmission of gas for a particular period - was also covered in the subsequent agreement dated 29.02.2016. Thus, the second agreement dated 29.02.2016 would be a separate agreement and would not novate the Agreement. Although the term of the Agreement may have ended but that would not terminate the arbitration clause. In this view, the decision of the Supreme Court in **Young Achievers** (*supra*) has no application whatsoever to the facts of the present case.

7. In the circumstances, an arbitrator is required to be appointed/nominated.

8. Accordingly, Justice S. B. Sinha (Retd.) is appointed as an arbitrator on behalf of GAIL. This is subject to the arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. The arbitrators shall fix their fees in consultation with the parties. The two arbitrators shall appoint the third arbitrator as

Chairman/ Presiding Arbitrator, as expeditiously as possible. The parties are at liberty to approach the arbitrators for further proceedings.

9. The petition along with the pending application is disposed of.

VIBHU BAKHRU, J

APRIL 26, 2017

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