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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 179/2018 & IA No. 5673/2018 & CAV**
366/2018

GAIL(INDIA) LTD. Petitioner
Through: Mr Yoginder Handoo,
Advocate.

versus

M/S. LANCO TANJORE POWER CO. LTD Respondent
Through: Mr Manu Seshadri and
Mr Ishan Bisht, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
% **26.04.2018**

VIBHU BAKHRU, J

1. GAIL (India) Ltd. (hereafter 'GAIL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 23.12.2017 (hereafter 'the impugned award') passed by the arbitral tribunal constituted by the sole arbitrator, Justice (Retired) Parthasakha Datta, (hereafter 'the Arbitral Tribunal').

2. By the impugned award, the Arbitral Tribunal has rejected GAIL's claim for a sum of ₹2,43,74,932/- along with interest at the rate of 18% per annum on account of price differential between Administered Price Mechanism (APM) Gas and non-APM Gas in respect of additional Natural Gas supplied to the respondent (hereafter

‘Lanco’) during the period commencing from 01.07.2005 to 31.03.2010. The Arbitral Tribunal found that GAIL had raised invoices for the Natural Gas supplied during the aforesaid period, which was duly paid by the respondent. The amounts so paid were also accepted without any protest or demur. The Arbitral Tribunal rejected GAIL’s claim principally on the ground that there was no stipulation in the contract between the parties for charging any additional amount.

3. GAIL contends that the impugned award is patently illegal as Lanco was bound to pay for the Natural Gas at the price fixed by the Government of India and the Arbitral Tribunal’s interpretation of the contract between the parties is unsustainable.

Factual Context

4. Lanco operates a power plant located at Karuppur Village, Tanjor District in the State of Tamil Nadu. Pursuant to an application made by Lanco (then known as M/s Aban Power Company Ltd.), the Ministry of Petroleum and Natural Gas (hereafter ‘MoPNG’) had issued an Allocation Order allocating certain quantity of Natural Gas for Lanco’s power plant. Thereafter, on 28.03.2002, the parties entered into a Gas Supply Contract (hereafter ‘GSC’), whereby GAIL agreed to supply Natural Gas on the terms and conditions as stated in the GSC.

5. In terms of Article 10 of GSC, Natural Gas was to be provided as per the Government Price Order dated 18.09.1997. It was also

provided that after 31.03.2000, GAIL would have the right to fix the price of Gas as per directive, instruction, order. etc. of Government of India.

6. On 20.06.2005, the Government of India issued a letter (Pricing Order), whereby the applicable price for Natural Gas supplied was revised to ₹3200/- per One Thousand Standard Cubic Meter (SCM) exclusive of royalty, taxes/duties, statutory levies, service/transmission charges, marketing costs, duties, etc. By a letter dated 28.06.2005, GAIL informed Lanco of the revision in the prices of Gas and, accordingly, Article 10 of GSC was amended. Lanco accepted the same.

7. Certain quantity of additional Gas was available with GAIL on account of lower or non-consumption by certain consumers in Kuttalam Zone. In this regard, GAIL sent a letter dated 18.01.2006 informing Lanco that the said unutilized Gas may be made available for distribution to other consumers on a temporary basis, however, Lanco would have to pay an additional transmission charges for supply of additional quantity of Gas at a unit rate of ₹243.70/- per thousand SCM. Lanco was called upon to communicate its willingness to accept such additional Gas on a temporary basis. Admittedly, Lanco accepted the said terms.

8. During the period in question – that is, from 01.07.2005 to 31.03.2010 – GAIL supplied additional Gas over and above the allocated quantity to Lanco and raised invoices for the same

periodically. There is no dispute that Lanco paid the amounts due against the said invoices.

9. On 09.02.2010, The MoPNG sent a letter, *inter alia*, stating that in terms of the Pricing Order dated 28.06.2005, APM Gas was to be supplied against existing allocations; therefore, supply of Gas at APM rates would be limited to the extent of APM allocation and any supply beyond the APM allocation would have to be made at non-APM Rates. GAIL was called upon to immediately switch to charging non-APM prices for supplies made over and above the APM allocations.

10. By an e-mail dated 18.06.2010, GAIL informed Lanco that non-APM rates would be charged for supply of Gas beyond Lanco's allocation. Thereafter, GAIL raised invoices for additional Natural Gas after 31.03.2010, at non-APM rate and Lanco paid the same.

11. On 19.11.2010, GAIL sent a letter to MoPNG providing details of region wise financial implications for Gas supplied to consumers at APM rates above their allocation.

12. On 04.04.2012, MoPNG sent a letter to GAIL, *inter alia*, stating that GAIL should have implemented the Ministry's order dated 09.02.2010 to recover market rates for APM Gas supplied by GAIL during the period 01.07.2005 to 31.03.2010.

13. Thereafter, on 01.08.2012, GAIL sent a Debit Note to Lanco communicating that it had debited Lanco's account by a sum of ₹2,43,74,932/- (Rupees Two Crore Forty Three Lakhs Seventy Four

Thousand Nine Hundred Thirty Two). Lanco failed and neglected to pay the aforesaid amount and this led GAIL to invoke the arbitration clause.

14. After the Arbitral Tribunal was constituted, GAIL filed a statement of claims, *inter alia*, praying for the aforesaid sum of ₹2,43,74,932/- along with interest at the rate 18% per annum from the date of the amount became due till its realization. The arbitral proceedings culminated in the Arbitral Tribunal passing the impugned award.

Submissions

15. The learned counsel appearing for the petitioner submitted that the Arbitral Tribunal had grossly erred in rejecting GAIL's claim for the differential price. He submitted that the differential price was demanded on account of the directions issued by MoPNG and Lanco was, thus, obliged to pay the same. Next, he submitted that even if the part of the demand raised by GAIL was considered as barred by limitation, GAIL could nonetheless seek recovery of the amounts due after September 2009, as the demand had formally been raised on 02.08.2012, and the Arbitral Tribunal had erred in not allowing GAIL's claim to the extent of supplies made after September, 2009.

Reasons and Conclusion

16. India has two pricing regimes for Natural Gas: APM (Administrative Price Mechanism) and non-APM (free market price).

The APM Gas price is declared by a competent body constituted by the Government of India. As is apparent from the above, the principal dispute between the parties relates to the question whether Lanco is obliged to pay non -APM price for part of the Natural Gas supplied by GAIL.

17. Lanco (then known as M/s Aban Power Company Limited) was allocated 5,00,000 SCM of Natural Gas per day by MoPNG. Thereafter, the parties had entered into the GSC on 28.03.2002, which was valid till 31.12.2010. During the subsistence of the GSC, MoPNG issued a letter dated 20.06.2005 (Pricing Order). The relevant extract of the said Pricing Order is set out below:-

“..In supersession of the earlier orders on the subject following has been decided:-

- (i) ONGC will not subsidize the prices of gas produced by joint venture and other private operators, which would be sold at market price in terms of the respective Production Sharing Contract.
- (ii) As far as the gas produced by ONGC and OIL is concerned, the determination of producer prices for this gas will be referred to the Tariff Commission and the Commission will be asked to submit its report within a period of six months. At present, ONGC and OIL produce about 55 MMSCMD gas (hereinafter referred to as APM gas). Till the Tariff Commission submits its recommendations and a decision is taken thereon, the consumer price of APM gas will be increased from the existing price of Rs.2850/MCM to a fixed price of Rs.3250/MCM on adhoc basis.

- (iii) Power and fertilizer sectors are critical to the economic development of the country and the output price of these sectors is either controlled or regulated by the Central and State Governments, who have to bear subsidy to a large extent for any increase in the output price. The specific end users committed under Court Orders/small scale consumers having allocations upto 0.05 MMSCMD also deserve priority in gas supply. Accordingly, it has been decided in the public interest that all available APM gas would be supplied to only the power and fertilizer sector consumers against their existing allocations along with the specific and users committed under Court orders/small scale consumers having allocations upto 0.05 MMSCMD at the revised price of Rs.3200/MCM. This price would be linked to a calorific value of Rs.10,000 K.cal/cubic metre. However, the gas price for transport sector (CNG), Agra-Ferozabad small industries and other small scale consumers having allocations upto 0.05 MMSCMD would be progressively increased over the next 3 to 5 years to reflect the market price.

2. The above Order will come into operation with effect from 1.7.2005. GAIL/ONGC/OIL will suitably inform the above Orders to their respective consumers.

3. For any clarification, reference may be made to this Ministry.”

18. It is apparent from the above that MoPNG had decided that APM Gas (which was referred to as the Gas being produced by ONGC and OIL) would be supplied only to Power and Fertilizer Sector consumers against their existing allocation. The price for the Gas would be linked calorific value of 10,000 K.cal/cubic metre.

19. Pursuant to the aforesaid Pricing Order, GAIL sent a letter dated 28.06.2005 seeking to amend Article 10 of the GSC. This letter was accepted by Lanco. Article 10 of the GSC as amended reads as under:-

“10.01(a) Government of India vide its Order No. L-12015/5/04-GP dated 20.06.2005 notified that Power and Fertilizer sectors, the specific end users committed under Court order/small scale customers having allocation upto 50000 (Fifty Thousand) Standard Cubic Meters Per Day are to be priority sector and all available APM gas would be supplied to such above mentioned customers against their allocation at the revised APM price @ Rs.3200 per thousand standard cubic meters. This price would be linked to a calorific value of 10000 K.Cal/cubic metre.

The natural gas price for APM gas for transport sector (CNG), Agra-Firozabad small industries and other small scale customers having allocation upto 50000 (Fifty Thousand) standard cubic meters per day would be progressively increased over the next 3 to 5 years to reflect the market price. Customers other than Fertilizer, Power and specific end users committed under Court Orders/Small Scale customers having allocations upto 50000 (Fifty Thousand) standard cubic meters per day would be supplied natural gas at market related price depending on the price being paid to joint venture(Panna-Mukta/Tapti/Ravva) and private operators at landfall point subject to ceiling of ex-Dahej R-LNG (Regasified LNG) price of US\$ 3.86 per net MMBTU for the current year i.e. 2005-06.

10.01(b) In consideration of 10.01(a) herein above the Price of 1000 (one thousand)standard Cubic meters of GAS w.e.f. 01.07.2005 applicable to the BUYER as per aforesaid Government Pricing Order shall be Rs.3200/MCM for period upto 31.03.2006. After 31.03.2006 the SELLER shall have right to fix the price

of Gas which may be as per directive, instruction, order, etc of Government of India etc. which is likely to be market related in accordance with current policy of liberalization of the government of India and the BUYER pay to the SELLER such price of gas. Provided further, the price of gas so Fixed is exclusive of Royalty, Taxes, Duties, Service / Transpiration (Transmission) charges, marketing cost (as may be applicable) and all other statutory levies as applicable at present or to be levied in future by central or state Government or Municipality or any other Local body or bodies payable on purchase of GAS from ONGCL/Other Producers (s) by the SELLER or on sale from SELLER to the BUYER and these shall be borne by the BUYER and these shall be borne by the BUYER over and above the aforesaid price.

10.02 For the Price applicable on United State of America Dollar (US \$ basis), provisional invoice will be raised considering the fortnightly quantity as per the SELLER's certification multiplied by US\$ converted at SBI Card Rate - Bills Selling (the card rate of latest data available). The Final adjustment would be based upon the actual PRICE paid for the bill for Tapti Panna-Mukta and Ravva joint venture fields for the current/subject month is paid subsequently. For example gas supplied during April is paid in 1st week of June and accordingly adjustment on account of above supplies for April and May shall be done in June & July 1st fortnight invoice(s) and so on.

20. It is clear from the above that GAIL had agreed that the price of Natural Gas would be ₹3,200/- per MCM for a period up to 31.03.2006. There is no dispute that GAIL continued to supply Gas at the price, which is referred to as the price for APM Gas.

21. It is also apparent from the plain reading of the Pricing Order that it did not contemplate supply of any Gas to Power and Fertilizer Sector consumers other than against their existing allocations. The Pricing Order did not provide for prices to be charged for Gas supplied over and above the allocation made to such consumers. The Arbitral Tribunal considered the above and concluded that at the relevant time, it was not under contemplation that any surplus Gas would be available for supply on a temporary basis to Power and Fertilizer Sector consumers and, therefore, it is difficult to accept that the Pricing Order provided that non-APM Gas prices would be charged for such supplies. This Court finds no infirmity with the aforesaid view.

22. Although, MoPNG has subsequently interpreted the Pricing Order to conclude that the Gas supplied over and above the allocation would be charged at Non-APM prices, no such interpretation is borne out by the terms of the Pricing Order.

23. More importantly, MoPNG has sought to interpret the same at a much belated stage after the term of the GSC had expired and after GAIL had raised the invoices for the Gas supplied and had duly received the payment against the same. The Arbitral Tribunal had held – in my view rightly so – that the price to be paid by Lanco was a matter of contract between GAIL and Lanco.

24. In above context, it would also be relevant to refer to the circumstances, which led to surplus Gas being available with GAIL. GAIL found that certain consumers in Kuttalam Zone were either

irregularly drawing or were drawing lower than their allocation or were not drawing at all and this had resulted in unutilized Gas being available with GAIL on a temporary basis. It is in the background that GAIL decided to offer the available Gas to other willing consumers. Accordingly, on 18.01.2006, GAIL sent a letter to Lanco (then known as Aban Power Company Limited). The said letter reads as under:-

“No.GAIL/CZO/NG/DM/06

January 18, 2006

M/s Aban Power Company Ltd.
25, G N Chetty Road
T. Nagar
CHENNAI – 600017

Kind Attn.: Shri P. Panduranga Rao, CEO

Dear Sir,

Sub: Supply of gas purely on temporary basis under day-to-day demand management

This has reference to the Gas Supply Contract entered into between GAIL AND M/s Aban Power Co. Ltd., on 28.03.2002 and subsequent Amendments and Side Letters to the aforesaid contract for supply of gas to your power plant at Kuttalam.

In this regard, this is to inform that due to irregular/less/non-drawl of gas by some of the consumer(s) in Kuttalam zone, the unutilized gas may be made available for distribution on pro-rata basis to the interested consumers purely on temporary basis under day-to-day operational need, after considering the supply-demand management.

For this, you shall be required to pay additional transmission charges for supply of additional quantity of gas on day-to-day basis, over and above the Maximum

Contracted Quantity on unit rate basis (@ Rs.243.75 per 1000 SCM) over and above the applicable transmission charges, gas price, taxes, levies etc. as per provision of the existing Gas Supply Contract. Further, the BUYER shall not have any prescriptive right towards that gas.

In case, you are interested, it is requested to confirm your willingness to utilize such gas purely on temporary basis, immediately but not later than 25.01.2006 to enable us to review the same along with other customers.

Thanking you,

Yours faithfully,

Sd/-

(U M Rao)

Zonal General Manager”

25. Lanco communicated its willingness to accept the supply of additional Gas as offered by GAIL and the parties entered into an agreement on 06.02.2006, which was embodied in a letter of the said date. The said letter reads as under:-

“No.GAIL/CZO/NG/ABAN/11102/06 February 06, 2006

M/s Aban Power Company Ltd.

25, G. N. Chetty Road

T-Nagar,

Chennai – 600 017

Kind Attn.: Shri P. Panduranga Rao, CEO

Dear Sir,

Sub: Supply of gas purely on temporary basis under day-to-day demand management scheme.

Ref: 1) Our letter No.GAIL/CZO/NG/DM/06/2469 dated 18.01.2006

2) Your letter No.APCL/GAIL/2006/044 dated 24.01.2006 and APCL/GAIL/2006/048 dated 30.01.2006

Please refer to our Gas Sales Agreement dated 28.03.2002 as amended till date for supply of natural gas to your existing power plant at Karuppur Village, Thiruvvidaimaruthur Taluk, Tanjore District, Kuttalam in Tamil Nadu.

2. Although long term availability of gas in the area is lesser than overall allocation, there may be occasions when additional gas become available on temporary/short term basis due to less drawal/no drawal, due to shut down by some consumers. During such period if it become possible, GAIL may consider within the permissible limit, to supply additional quantity of gas for shorter duration on days when such additional gas is available over and above the existing maximum contracted quantify of 0.5 MMSCMD as mentioned in Article 5.01 of the contract dated 28.03.2002. Amendments dated 28.11.2002 & 10.09.2004 and Side Letters dated 02.05.2005 & 28.06.2005.
3. It may please be noted that such additional supply of gas to your plant under above circumstances would be purely “TEMPORARY” arrangement. Thus would not in any way regarded as giving any preferential rights to you/your Company towards any allocation or even as assurance for such supply or a continuing supply for such additional gas or for

the purpose of any fresh allocation of supply of gas in future. GAIL reserves the right to discontinue the supply of such additional quantity and to allot the same in favour of any other party at its sole discretion.

4. It should further be noted that GAIL will have unrestricted right to discontinue the above "TEMPORARY" arrangements of supply without notice.
5. The BUYER specifically agrees that additional temporary supply of gas is only under the SELLER's Demand Management and such additional supply of gas to the BUYER doesn't create any preferential right on the BUYER towards any future allocation for distribution of gas against the SELLER. The above arrangements would not give the BUYER any prescriptive rights for future allocation of gas.
6. It is clearly understood and agreed by the BUYER that the additional temporary supply of gas is on a purely "TEMPORARY" basis and is without prejudice to the right of the SELLER to terminate such supply without notice and SELLER/Govt. of India reserve the right to allocate additional quantities of gas to any of its customers/new parties to the execution of the BUYER and the terms and conditions of the GAS Supply Contract dated 28.03.2002, Amendments dated 28.11.2002 & 10.09.2004 and Side Letters dated 02.05.2005 & 28.06.2005 shall remain unchanged.

7. It may also be noted, during the period of temporary arrangement for supply of natural gas, supply shall be governed by following terms:

- i) In addition to the monthly transportation charge as per Article 4.03 of the above referred contract & amendments as applicable, M/s Aban Power Company Ltd shall pay additional transportation charges @ Rs.243.70/1000 SCM (Rupees Two Hundred Forty Three and paisa Seventy Only) for supply of additional quantity of gas over and above maximum contracted quantity as mentioned in the Article 5.01 of the above referred contract.

All other terms and conditions of the Gas Supply Contract dated 28.03.2002, Amendments dated 28.11.2002 & 10.09.2004 and Side Letters dated 02.05.2005 & 28.06.2005 shall remain unchanged and this temporary arrangement for the supply of additional gas under above terms shall however be subjected to the terms & conditions of this letter and without prejudice to all rights and obligation of the SELLER and BUYER under the contract dated 28.03.2002, Amendments dated 28.11.2002 & 10.09.2004 and Side Letters dated 02.05.2005 & 28.06.2005.”

26. The Arbitral Tribunal considered the letter dated 18.01.2006 as well as the Agreement dated 06.02.2006 and concluded that GAIL had agreed to provide additional Gas, on the same terms and conditions, as the APM Gas being supplied to Lanco except that Lanco was required to pay additional transmission charges for supply of the additional quantity of Gas at the rate of ₹243.70/- per thousand SCM. Neither

the letter dated 18.01.2006 nor the agreement (letter) dated 06.02.2006, as quoted above, referred to charging any other market price for additional supplies of Gas.

27. The Arbitral Tribunal concluded that it was the understanding of the parties that additional Gas would also be supplied on temporary basis at the APM rate. The aforesaid conclusion cannot be faulted.

28. Clearly, if GAIL had supplied Gas as per the aforesaid understanding and Lanco had accepted the same, there would be no question now demanding any further payment from Lanco.

29. The Arbitral Tribunal had also noted that Lanco was a power generation company and had utilized the Natural Gas for producing power, which was then supplied to Tamil Nadu Electricity Board (TNEB). Thus, there was no scope for a retrospective demand.

30. The Arbitral Tribunal concluded that GAIL had approached Lanco to accept the supplies on payment of additional transportation charges and, therefore, could not now demand a price higher than what had been paid by Lanco and accepted by GAIL at the material time in terms of their understanding.

31. This Court finds no infirmity with the above conclusion of the Arbitral Tribunal. Having stated the same, it is necessary to observe that the scope of judicial review under Section 34 of the Act is limited and an arbitral award cannot be interfered with except on the ground set out therein. Plainly, none of the grounds as set out in Section 34 of

the Act are established and, thus, no interference with the impugned award is warranted or permissible.

32. The petition is, accordingly, dismissed. The pending application is also disposed of. The caveat stands discharged. The parties are left to bear their own costs.

APRIL 26, 2018

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VIBHU BAKHRU, J

