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

Date of decision: 17.08.2018

\+ **FAO(OS) (COMM) 182/2018**

GAIL (INDIA) LTD ..... Appellant

Through: Mr. Sachin Puri, Sr. Adv. with Mr. Yoginder Handoo, Mr. Kamil Khan and Mr. Dhananjay Grover, Advocates.

versus

M/S LANCO TANJORE POWER CO LTD ..... Respondent

Through: Mr. Manu Seshadri and Ms. Tanvi Rana, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)
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CM APPL. 32866/2018 *(for exemption)*

Allowed, subject to all just exceptions.

CM APPL. 32867/2018 *(for condonation of delay)*

For the reasons mentioned in the application, the delay of 6 days in filing the instant appeal is hereby condoned.

CM stands disposed of.

FAO(OS) (COMM) 182/2018

At the outset, it was urged on behalf of Gas Authority of India Ltd. (hereinafter 'GAIL') that the identical questions were considered and pending consideration by the Supreme Court in transfer proceedings [Transfer Petition(s) (Civil) No(s). 1351-1366/2012] and that, in terms of order of 04.08.2014, all the transfer petitions would be taken up after files in the transferred cases were taken up. Counsel for the respondent on his part submits that the present case was separated and de-tagged by order dated 04.08.2014 [which stated that transfer petition (civil) No.1366/2012 and transfer petition (civil) No.127 and 128 of 2013 are dismissed]. The Supreme Court had noticed that the subject matter of the dispute in those transfer petitions were pending consideration before Arbitral Tribunals. As a result, there is no merit in GAIL's request that the matter be not proceeded with. The Tribunal's award was rendered on 23.12.2017 in this case.

2. GAIL appeals the decision of the learned Single Judge rejecting its petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an award made by the Arbitral Tribunal on 23.12.2017.

3. Briefly, the subject matter of the disputes were related to a contract for supply of gas to respondent/claimant for the period 01.07.2005 to 31.03.2010. The contractual conditions, especially Article 10, have stipulated that the price of the supplies would be based upon the administered gas price orders issued by the Central Government. The prevailing gas policy was of 1997; it was subsequently revised on 20.06.2005, which led to consequential amendment of the agreement.

4. The amended condition reads as follows:-

"ARTICLE-10 PRICE OF GAS

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………………"

5. The disputes in this case pertained to GAIL's claim for ₹2,43,74,932/- along with interest on account of the differential price between Administrative Price Mechanism (APM gas) and non-APM gas for the additional supplies made to the claimant. In terms of the agreement the claimant was entitled to draw and be supplied certain quantities of gas. On account of various exigencies, for the relevant period i.e. 01.07.2005 to September, 2009, gas was supplied to the claimant in excess over the APM allocation.

6. Respondent-M/s Lanco Tanjore Power Co. Ltd. (hereinafter 'Lanco') in its defence submitted that the letters of 18.01.2006 and other communications established that the additional supplies were made on the understanding that the APM price would be recovered. It also referred to a letter dated 06.02.2006 to say that the excess gas produced, if not supplied, would have had to be flared (in other words it would have been totally unremunerative and of no consequence). After an overall analysis of the materials on record and considering the submissions of the parties the Tribunal concluded that GAIL's

claim had to fail on all counts. The GAIL therefore approached the learned Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996 which after a comprehensive reading of the relevant letters and communications, including the letters dated 18.01.2006 and 06.02.2006 – both of which were part of the record, held that no patent illegality or infirmity calling for interdiction under Section 34 of the Act was substantiated.

7. GAIL's senior counsel Mr. Sachin Puri invites the attention of this Court to the APM gas fixation policy and submits that the letter dated 09.02.2010 compelled it in public interest to demand the differential amounts between the APM gas price and the market price for the period of supplies (during February, 2005 to September, 2009). It was further urged that the recovery was also on account of the pricing policy announced on 09.02.2010 which was clarified subsequently by another letter of 04.04.2012 which is to recover differential amounts for the period 01.07.2005 to 31.03.2010.

8. This Court is unpersuaded by the GAIL's submissions. What emerges from the award – as well as from a plain reading of the letters dated 18.01.2006 and more importantly dated 09.02.2010, is that excess gas was available (over and above the APM administered cost) with the GAIL; be it not supplied, gas would have been flared, leading to loss. Even the extraction cost would not have been recovered; at this stage it offered these quantities to its customers, including Lanco. Obviously, this was in excess of the quantity agreed to be supplied under the contract. Lanco agreed, stating on 18.01.2006 that the price chargeable would be at the same rate i.e. APM rate than the prevailing

(i.e. w.e.f. 01.07.2005). GAIL made supplies of such gas in excess of non-APM allocation for more than four years. Thereafter, based upon the Government's clarification and the subsequent policy of 09.02.2010 (i.e. issued five years after entering into the contract after the old policy) GAIL sought to charge, what it claimed to be a differential amount. This was contrary to any principle of contract because having supplied the product at a price (although not of the agreed quantities but given that the excess amounts were made available by GAIL by invitation and accepted by Lanco on the condition that the APM price would be recovered), it could then not have sought to retrospectively recover the so called differential amounts. Unsupported by Statute or any binding rule or regulation, the clarification sought to be pressed into service clearly could not be the basis of what was otherwise an untenable recovery effort. The Tribunal, in our opinion, and the learned Single Judge did not commit any error in refusing the GAIL's claim.

The appeal is bereft of merit and is consequently dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 17, 2018
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