IN THE HIGH COURT OF JUDICATURE AT MADRAS

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| Judgment reserved on | 18.11.2019 |
| Judgment pronounced on | 28.11.2019 |

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THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

**O.P. No.606 of 2018**
**and**
**A.No.5172 of 2018**

M/s.Diamond Silicate
Rep. by its Partner
3-163/1, Vellakudi,
Thiruvarur – 613 704. ... Petitioner

Vs.

GAIL (India) Limited
GAIL Bhavan,
No.16, Bhikaji Cama Place,
New Delhi – 110 066.
Also at
5th Floor, KUPPU ARCADE"
No.4, Venkatanarayana Road,
T.Nagar, Chennai – 600 017. ... Respondent



**Prayer:-** Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to call for the Arbitral records pertaining to the case of M/s.GAIL India Limited vs. M/s.Diamond Silicate, being case Ref. No.DAC/1292/09-16 in DELHI INTERNATIONAL ARBITRATION CENTRE

(DAC), and set aside the Award dated 01.02.2018 passed by Hon'ble Sole Arbitrator Mr.D.C.Anand.

For Petitioner : Mr.Om Prakash, Senior Counsel for Mr.R.Swarnavel

For Respondents : Mr.P.V.S.Giridhar for M/s.Giridhar and Sai

**ORDER**

The respondent in the Arbitration Proceeding is the Petitioner before this Court. The dispute arises out of a Gas Sale and Purchase Agreement dated 30.04.2014 (the GSPA) between the Petitioner and the Respondent for the supply of gas on fall-back basis allocation. The said GSPA did not provide for an assured daily contracted quantity but provided for a fall-back allocation of gas of 4000 standard cubic metres per day on as and when available basis with the further clarification that the fall-back allocation was subject to modification by way of the daily nominated quantity (DNQ), which could be notified by the Respondent/Seller, latest by 22.00 hours on the previous day. The said GSPA also provided for a take or pay obligation (TPO), which is also referred to as a minimum guaranteed obligation (MGO), whereby, once the Seller notifies the fall-back allocation, including the DNQ, the Buyer has to pay for the TPO, whether or not the Petitioner/Buyer actually purchases and consumes the said quantity of gas. During the contractual period of April 2014 to July 2014, the Petitioner procured quantities of gas, which were lower than the DNQ. In the contractual period beginning from August 2014 and ending in March 2015, the Petitioner's plant was shutdown and, therefore, the Petitioner did not procure gas from the Respondent. As regards this entire period ranging from April 2014 to March 2015, the Respondent calculated the MGO/TPO and issued provisional MGO invoices dated 31.03.2015 and 06.08.2015 for an aggregate sum of Rs.73,20,100/-. The Petitioner disputed its liability and in respect of the ensuing dispute, the Respondent initiated Arbitration Proceedings and, by statement of claim dated 14.10.2016, the Respondent claimed the following: (i) a sum of Rs.73,20,100/- towards the TPO; (ii) a sum of Rs.12,89,381/- towards interest as on 30.09.2016 at the rate of 15.55% per annum; (iii) future interest on the sum of Rs.73,20,100/-; and (iv) general and special damages of Rs.10,00,000/-. By written statement dated 15.12.2016, the Petitioner requested for the following relief: (i) that the provisional invoices for Rs.73,20,100/- should be declared as void; (ii) that the claim for interest by way of debit note dated 14.03.2016 should be declared as void; and (iii) that the Respondent should refund the sum of Rs.41,42,021/- debited towards provisional MGO invoice dated 06.08.2015 with interest at 15.55% per annum from the date of debit of the Petitioner's account till the date of

Award. Upon completion of pleadings, the Arbitral Tribunal framed seven issues. Both parties adduced documentary evidence. Upon consideration of the pleadings, documentary evidence and the oral arguments, the Arbitral Tribunal pronounced the Arbitral Award dated 01.02.2018(the Award) whereby it was held that the Respondent is entitled to a net sum of Rs.35,39,263/- towards TPO, after setting off the available credit balance against TPO dues along with interest at Rs.12,39,381/- as on 30.09.2016 at 15.55% per annum and future interest as per Clause 5 of the GSPA. The claim for damages was rejected and all the counter claims of the Petitioner were rejected. The Award is impugned in this Petition.

2. I heard Mr.Om Prakash, the learned senior counsel for the Petitioner and Mr.P.V.S.Giridhar, the learned counsel for the Respondent.

3. The first submission of the learned senior counsel for the Petitioner was that the GSPA is dated 30.04.2014, whereas the TPO was calculated by the Respondent from 01.04.2014 and the said claim was awarded by the Arbitral Tribunal, as claimed by the Respondent. He submitted that this is a patent error, which is evident on the face of the Award and that the Award is liable to be set aside in this respect. He, next, provided an over view of the nature of the GSPA. In specific, he emphasized that it is not an agreement for supply of gas on firm

allocation basis and that the allocation was on fall-back basis. He also submitted that the parties had entered into a contract earlier on 16.10.2001 for supply on fall-back basis and that the said contract did not contain a take or pay obligation. However, he submitted that this stipulation was introduced in the GSPA. In view of the fact that the GSPA is on fall-back basis allocation, he pointed out that the daily contracted quantity is nil. In other words, he submitted that the Respondent is not obligated to make any supply to the Petitioner under the GSPA. According to the learned senior counsel, the TPO should be viewed in this contractual context.

4. He further pointed out that as to how even the fall-back allocation quantity of 4000 standard cubic metres per day as specified in Clause 5.1(b) is not a committed quantity as evidenced by the fact that it is to be supplied "on as and when available basis". He further submitted that Clause 5.1(c) stipulates that the Respondent/Seller has the right to nominate the DNQ of gas to be supplied on day-to-day basis, which shall be a final quantity for that day. By referring to the said clause, he emphasized that even the specified quantity of 4000 standard cubic metres per day, on as and when available basis, is liable to be modified by notifying the DNQ. This obligation to nominate the DNQ quantity is an on-going day-to-day obligation according to the learned senior counsel for

the Petitioner. Consequently, if the Respondent does not exercise its right to specify the DNQ, the Petitioner cannot proceed on the assumption that any gas would be supplied and, on the contrary, is required to keep alternative sources of supply ready and available for the purpose of operating its plant. He also pointed out that Clause 5.4 provides for the enforcement of the annual payment obligation, including the manner in which the Respondent would enforce the said obligation by issuing an invoice. In particular, he pointed out that Clause 5.4 envisages that the Respondent shall calculate the take or pay deficiency quantity for each financial year and raise a supplementary invoice/debit note on the Petitioner/Buyer at the end of the second fortnight of March of each financial year but not later than three days from the last day of the second fortnight of March of each financial year. As a result of the stipulation, he submitted that the Respondent should issue the invoice so as to enforce the TPO latest by the 3rd April of the following financial year. If this is not done, according to the learned senior counsel, the Respondent waives or relinquishes its right to enforce the TPO. In this case, he submitted that the admitted position is that the invoice was issued on 06.08.2015 in respect of the financial year 2014-2015, which ended on 05:59 hours on 1st April 2015. In specific, he submitted that the said invoice should have been raised on or before 03.04.2015, whereas it was raised on 06.08.2015.

5. The next submission of the learned senior counsel was that this invoice was not a supplementary or final invoice. Instead, it was admittedly described as a provisional MGO invoice. The GSPA does not envisage the issuance of a provisional MGO invoice and, therefore, he submitted that the said invoice is not valid or enforceable. He also pointed out that the Respondent was required to notify the DNQ on day-to-day basis, whereas such notification was not done after 26.07.2014. In this connection, he referred to the email of 26.07.2014 and pointed out that this was the last notification of the DNQ for the purpose of Clause 5.1(c) of the contract. By this communication, he pointed out that the Respondent had notified a quantity of 120% of the contracted fall-back quantity of 4000 standard cubic metres per day. According to the learned senior counsel, subsequent notifications should have been issued on day-to-day basis as per Clause 5.1(c) of the GSPA. In the absence of such continual notifications of the DNQ, he submitted that the Petitioner cannot be mulcted with the TPO. He also pointed out that the Petitioner had a credit balance of Rs.41,42,000/- and that this credit balance was not taken into consideration by the Arbitral Tribunal in the Award. Hence, the submission of the learned senior counsel was that the Respondent mechanically applied the fall-back allocations of 4000 standard cubic metres per day for the entire period from August 2014 to March 2015 without taking into account the actual availability of gas for supply to the

Petitioner. In this regard, by referring to the annexure to the Provisional MGO invoice, he pointed out that the cumulative DNQ, as specified therein, for each of the months commencing from August 2014 and ending in March 2015 has been arrived at by mechanically multiplying 4000 standard cubic metres per day as regards the respective months. For example, he pointed out that there are 31 days in August and that the cumulative DNQ of 124,000 standard cubic metres has been arrived at by the Respondent by multiplying 4000 standard cubic metres per day by 31 days. As regards September 2014, he submitted that the cumulative DNQ is reflected as 120,000 standard cubic metres because there are 30 days in September. In effect, he submitted that the quantification is completely at variance with the fact situation as regards the available quantity of gas.

6. In order to substantiate this submission, he referred, to the chain of emails at Pages 223 to 226 of the main typed set of papers so as to establish that the Respondent was actually supplying very low quantity of gas, whereas it had notified the availability of 120% of the daily contracted quantity. He next referred to the Award at Pages 5 and 6 thereof and pointed out that the interest of Rs.12,89,381/- was calculated on the total TPO of Rs.73,20,100/- and not on the adjusted liability of Rs.35,39,000/- after taking into consideration the credit balance of about Rs.41 lakhs which was available. Once again, he pointed out that this was

a patent error on the face of the Award. As regards the contention that the invoice should have been issued at the latest within 3 days from the commencement of the next financial year, he submitted that the Arbitral Tribunal erroneously relied upon the amended Section 28 of the Contract Act,1872 so as to hold that the invoice could be issued even thereafter. He further submitted that the Arbitral Tribunal relied upon a letter dated 15.12.2015 so as to conclude that Article 5.2 of the GSPA was modified by the said letter. In that connection, he submitted that irrelevant evidence was relied upon by the Arbitral Tribunal. He also referred to Article 12 of the GSPA which deals with billing and payment and pointed out that the invoice is supposed to contain all the particulars that are set out in Article 12.2 whereas the provisional invoice does not contain such details and is, therefore, not valid. The learned senior counsel concluded his submissions by pointing out that the supply of gas continued as per the consent order and, that, therefore, the current position is that the Petitioner is continuing to procure gas from the Respondent and is making payments in respect thereof and that the relationship between the parties is on going.



7. In reply and to the contrary, Mr.P.V.S.Giridhar, the learned counsel appearing on behalf of the Respondent, submitted that the GSPA clearly provides for the TPO. He further submitted that the fall-back

allocation quantity of 4000 standard cubic metres per day is liable to be modified by the DNQ. He referred to the communications dated 17.05.2014, 08.07.2014 and 26.07.2014 with regard to the DNQ and pointed out that the last of the said communications, namely, the communication dated 27.06.2014 specified the available quantity of gas at 120% of 4000 standard cubic metres per day and informed the Petitioner that the said quantity would be the DNQ until further intimation. In light of the admitted position that no subsequent communication was issued to the Petitioner, he submitted that it is evident that the availability of gas for supply to the Petitioner continued to be 120% of 4000 standard cubic metres per day. Therefore, he submitted that the contention that the said quantity of gas was not available is incorrect and liable to be rejected. As regards the contention that it is a provisional invoice, he submitted that the said invoice was described or labelled as provisional so as to enable revision thereto, if necessary. However, he pointed out that the Petitioner cannot evade liability merely because the invoice is described as provisional.



8. While dealing with the contention that the invoice should be raised within three days from the commencement of the next financial year, he submitted that the said stipulation is not a condition of the GSPA and certainly does not excuse non-payment. In support of this

submission, he referred to Section 11 of the Sale of Goods Act, 1930, which stipulates that time of payment is not deemed to be the essence of a contract of sale. With regard to the enforceability of the TPO, he referred to and relied upon the judgment of the Hon'ble Supreme Court in **BIHAR STATE ELECTRICITY BOARD, PATNA AND OTHERS vs. M/s.GREEN RUBBER INDUSTRIES AND OTHERS, 1991 SCC 731** and, in particular, paragraph 20 thereof, wherein a similar obligation in the context of supply of power was upheld by the Hon'ble Supreme Court.

9. With regard to the contention that gas was supplied at very low pressure, he submitted that there was no pleading or evidence with regard to the said contention and that, therefore, it does not merit attention. In response to the contention that TPO was claimed and awarded from 01.04.2014 instead of 30.04.2014, he submitted that the period of contract is from 30.04.2014 and, therefore, the Award may be liable to be revised to that extent. Likewise, he submitted, in conclusion, that the contention regarding calculation of interest, in the Award, on the total sum instead of the adjusted sum is a matter of computation and arithmetic and could be considered subject to the provision of a memo of calculation in that regard by the Petitioner.

10. By way of rejoinder submissions, the learned counsel for the Petitioner reiterated the contention that the Agreement is from 30.04.2014, whereas the Arbitral Tribunal awarded the claim from 01.04.2014. In this regard, he also pointed out that the Section 11 order specified the terms of reference of the Arbitral Tribunal and that, therefore, the Arbitral Tribunal dealt with a dispute, which is beyond the scope of reference. He also relied upon the chain of emails at Pages 223 to 226 so as to establish that the full quantity of gas was actually not supplied by the Respondent to any of the entities in the relevant zone during the period extending from August 2014 to March 2015. With regard to the communication dated 26.07.2014, as regards the DNQ, he pointed out that the said communication cannot be valid until March 2015. He further submitted that the TPO/MGO cannot be extended to the full contracted fall-back quantity and that such an interpretation does violence to the word "minimum" by reading it as "maximum".



11. The records were examined and the oral submissions of both sides were considered carefully. The main question that arises for consideration in this case is whether the TPO in the GSPA is enforceable and, if so, from which period. On perusal of the GSPA, it is evident that it is effective from the date of execution, namely, 30.04.2014. Therefore, the claim should have been restricted to the period commencing from

30.04.2014. To that extent, as correctly contended by the learned senior counsel for the Petitioner, there is an error apparent on the face of the Award which is liable to be set aside to that extent. The next contention that should be dealt with is with regard to the notification of the DNQ.

12. On examining Clause 5.1(b) of the GSPA, it is clear that the fall-back allocation of gas is 4000 standard cubic metres per day on as and when available basis. Because the allocation is on as and when available basis, the Respondent is given a right to nominate and notify the DNQ. In exercise of this right, the Respondent notified the DNQ on various dates such as 17.05.2014, 08.07.2014 and 26.07.2014. The last such notification is, on the face it, until further intimation and there is nothing in Clauses 5.1(b) and 5.1(c) that precludes the Respondent from notifying such availability until further intimation/ notification. As stated earlier, Clause 5.1(c) is an enabling provision that confers the right on the Respondent to notify DNQ on a day-to-day basis provided such notification is done latest by 22.00 hours on the previous night. Therefore, the only limitation on the exercise of the right is that it cannot be exercised later than 22.00 hours on the previous night in respect of supplies for the following day. From the above, it is clear that such notification can be done in advance of the said time limit or on "until further intimation or until further notification" basis. Consequently, the contention of the

learned senior counsel for the Petitioner that such notification should have been done on a day-to-day basis or on a periodic basis is rejected.

13. The next contention that should be dealt with is with regard to the time limit for issuing the invoice towards the TPO. The time limit has been specified in Clause 5.4(a) as not later than 3 days from the last day of the second fortnight of March of each financial year. As correctly contended by the learned counsel for the Respondent, this time limit cannot be construed as a condition. To put it differently, it cannot be said that the liability of the Petitioner stands extinguished or waived if the invoice is not issued within the stipulated time limit. It is a different matter that the liability for payment of interest on the amount demanded would run only from the date when the invoice becomes payable and that the Respondent cannot derive an undue benefit after issuing the invoice belatedly and this aspect may have a bearing on the Award in so far as it deals with interest. Therefore, it may be concluded that the belated issuance of the invoice on 06.08.2015 in respect of the financial year 2014-2015 does not extinguish the liability of the Petitioner in that regard. The next contention with regard to the invoice being labelled as provisional need not detain us for long. The learned counsel for the Respondent pointed out that the invoice was described as provisional so as to enable the revision thereof, if necessary. In fact, a revision was

made to the provisional invoice whereby the amount was reduced upon verification. Once again, the labelling of the invoice as provisional would not extinguish the liability of the Petitioner.

14. A contention was raised that the Respondent was not in a position to supply the notified quantity of gas and the chain of emails at pages 223 to 226 was relied upon in that regard. On perusal thereof, it is clear that these emails were not sent by the Petitioner. Therefore, these emails cannot be relied upon as evidence that the Respondent was unable to supply the notified quantity of gas to the Petitioner. Instead, it is the admitted position that the Petitioner's plant was shut down between August 2014 and March 2015 and, therefore, the Petitioner failed to procure gas from the Respondent. In such circumstances, in view of the contractually stipulated TPO, the Petitioner is bound to make the payment for the entire period of contract from 30.04.2014 to 31.03.2015. The ancillary contention, in this regard, is that the TPO/MGO cannot be for the entire quantity of gas and that such an interpretation does violence to the word "minimum" in MGO, which should not be read as maximum. However, on examining Clause 5.2 (a) of the GSPA, which deals with TPO/MGO, and the Provisional MGO invoice, it is clear that this contention is untenable. Clause 5.2(a) provides that the TPO would extend to 90% of the annual DNQ per financial year. Although the first Respondent had

notified 120% of the contracted fall-back allocation quantity of 4000 SCM as the DNQ by its last communication dated 26.07.2014, 4000 SCM and not 120% thereof was taken as the basis to calculate the annual DNQ from August 2014 to March 2015. By this process, the annual DNQ was computed as 1367968 SCMD and 90% thereof was reckoned as the annual TPO/MGO as per Clause 5.2(a). This method cannot be said to be in violation of the GSPA.

15. The final contention of the learned senior counsel for the Petitioner that interest should have been calculated after giving credit to the credit balance of Rs.41 lakhs is well founded. In addition, such interest is payable only from the due date of the invoice, which is 3 days from the date of receipt thereof, as per Clause 5.4(b) of the GSPA. Thus, the Award in respect of interest is liable to be partly set aside and interest should be re-worked on the net outstanding, i.e. after giving credit to the amount in credit balance, at the contractual rate of SBI standard PLR plus 2% from 09.08.2005, i.e. date of issuance of invoice plus 3 days for making payment. Given the fact that this is a reasonable benchmark for a business to business commercial transaction, this rate of interest may be applied in the post-Award period also until realisation.

16. The Award is clearly severable both with regard to the award of TPO for the pre-GSPA period, i.e. from 01.04.2014 to 29.04.2014, and in respect of interest and such severance is just and necessary in the facts and circumstances of this case.

17. Therefore, the Award is partly set aside with regard to the award of TPO for the period: 01.04.2014 to 29.04.2014. Consequently, the annual contracted quantity and the TPO should be re-computed on this basis. As stated above, the Award is also partly set aside as regards the award of interest of Rs. 12,89,381/-, which was calculated on the unadjusted outstanding. Instead, interest would apply at the rate of SBI Standard PLR plus 2%, as per Clause 5.4 (b) of the GSPA, from 09.08.2015, i.e. the date when the invoice became payable as per Clause 5.4(b) of the GSPA, till the date of payment thereof. Such interest shall be applied to the revised net outstanding amount, which should be arrived at by deducting the TPO for the period extending from 01.04.2014 to 29.04.2014 and by giving credit to the credit balance of Rs.41,42,021/- Except to the extent indicated above, interference with the Award is not warranted. Consequently, the connected Application is closed.



**28.11.2019**

Speaking/none Speaking order
Index: Yes/No
Internet: Yes/No

**SENTHILKUMAR RAMAMOORTHY, J.**
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**Pre Delivery order**
**in**
**O.P.No.606 of 2018**

**28.11.2019**