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

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Date of decision: 26.09.2019

+ ARB.P. 499/2019

M/S GAIL (INDIA) LTD

..... Petitioner

Through: Ms. Sangeeta Bharti, Mr. Krishanu
Adhikary, Mr. Ashish Kumar, Advocates
versus

M/S. RATHI BARS LIMITED & ORS.

..... Respondents

Through: Mr. Anand Shankar Jha, Advocate

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('Act') for appointment of a Sole Arbitrator to adjudicate the disputes and differences between the parties pertaining to a long term Gas Sale Agreement ('GSA') dated 24.10.2009.
2. It is the contention of the learned counsel for the petitioner that though the GSA is valid till 30.04.2028, the respondent has unilaterally stopped off-taking Gas from 01.01.2014 which is illegal. She submits that as per clause 14.1 of the GSA, in respect of each contract year the respondent is liable to pay to the petitioner for the quantity of Gas equal to the difference of the 90% of the AACQ. For the contract year 2014, the total Annual Take or the Pay Deficiency against the respondent worked out to 202300 MMBTU and the Pay For If Not Taken liability amounted to Rs. 7.1 Crores (Approximately). The

respondent having failed to pay pursuant to a legal notice dated 24.06.2016, the petitioner vide letter dated 22.08.2016 invoked the Arbitration Clause 15.6 suggesting names of three retired Judges of this Court for appointment as Sole Arbitrator.

3. Pursuant to the said notice, the respondent vide its letter dated 16.11.2016, denied its liability and sought to discuss the matter amicably.
4. The petitioner agreed to the proposed meeting to resolve the dispute and kept the notice invoking arbitration in abeyance. Several meetings ensued thereafter between the parties but the matter could not be resolved despite the petitioner having constituted a Committee to oversee the settlement procedure.
5. Learned counsel for the petitioner thus submits that all the necessary steps, including, resort to Dispute Resolution Mechanism, as provided in the GSA have been exhausted and the petitioner, only thereafter invoked Arbitration vide notice dated 09.05.2019, raising disputes for the year 2014 and subsequent years. It is thus prayed that the Sole Arbitrator be appointed by this Court as the respondents have forfeited their right under the Arbitration Agreement in not having appointed the Arbitrator, pursuant to the notice dated 09.05.2019.
6. *Per contra* learned counsel for the respondent submits that the Arbitration Clause between the parties clearly mandates that before the parties resort to Arbitration, they must take steps towards an internal mechanism for dispute resolution and only once the same has failed, resort can be taken to Arbitration. He submits that the petitioner did not follow the said procedure laid down in the Arbitration Clause

and straightaway sent a notice invoking arbitration, and thus, the petition cannot be allowed.

7. I have carefully perused the petition as well as the notice invoking arbitration. It is clear from a bare reading of paras 14 to 22 of the petition as well as several emails, filed on record, that the petitioner and the respondent were having repeated meetings to resolve the dispute internally. In fact, a Committee was also set up by the petitioner to oversee the settlement by the petitioner. The notice invoking arbitration also contains details of the various efforts made by the petitioner to resolve the matter amicably with the respondent. Thus, the contention of the learned counsel for the respondent that the internal Dispute Resolution Mechanism was not exhaustive has no merit.
8. The Arbitration Clause between the parties is as under:

“15.6 Arbitration

Any Dispute arising in connection with this Agreement which is not resolved by the parties pursuant to Article 15.1 within sixty (60) Days of the notice of the Dispute of Article 15(3) and Article 15.3(d), shall:

xxx

xxx

xxx

Alternative 2- where one Party to the Agreement is not a Government Company.

(a) Be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and rules made there under, from time to time. The procedure for appointment of arbitrators shall be as follows:

(i) After the sixty 60 Days period described in Article 15.1, either Party may submit the Dispute to a single arbitrator (the “Sole Arbitrator”). The Buyer shall select the Sole Arbitrator within third

[30] Days of the expiration of such sixty 60 Days period from a panel of three (3) distinguished persons nominated by the Seller.

(ii) The decisions(s) of the Sole Arbitrator, supposed by reasons for such decision, shall be final and binding on the parties.

(iii) The venue of arbitration shall be New Delhi.

This Article 15.6 shall survive the termination or expiry of this Agreement.”

9. Respondent does not dispute the existence of the Arbitration Agreement. As per the recent judgment of the Apex Court in the case of M/s. Mayavati Trading Pvt. Ltd vs Pradyut Deb Burman, (Civil Appeal No. 7023/2019 decided on 05.09.2019), this Court while deciding a petition under Section 11(6) of the Act has to concern itself with the existence of the Arbitration Agreement only. Relevant para of the said judgment is extracted hereunder:

“10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (Supra) – See paras 48 & 59.

11) We, therefore, overrule the judgment in United India Insurance Company Limited (Supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.”

10. In view of the above, I appoint Hon'ble Mr. Justice A.P. Shah, former Chief Justice of Delhi High Court, as the Sole Arbitrator to adjudicate the disputes between the parties. The address of the learned Arbitrator is as under:

Hon'ble Mr. Justice A.P. Shah,
Former Chief Justice of Delhi High
Court.
F-15, Hauz Khas Enclave, New
Delhi- 110016.
Mob. No. 9910160007.

11. The Arbitrator will give a disclosure under Section 12 of the Arbitration & Conciliation Act, 1996 before entering upon the reference.
12. The fee of the Arbitrator shall be as per the Fourth Schedule of the Act.
13. Copy of this order be sent to the learned Arbitrator.
14. The petition is allowed in the aforesaid terms.

JYOTI SINGH, J

SEPTEMBER 26, 2019

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