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

% *Date of Judgment: 12th March, 2019*

+ **FAO(OS) (COMM) 291/2018**

GAIL GAS LIMITED

..... Appellant

Through Mr. Sudhir K. Makkar, Senior Advocate with Mr. Anurag Kishore, Mr. Abhishek Chaudhary, Ms. Saumya Gupta and Mr. S.P. Krishna Prasad, Advocates

versus

M/S BALKISHAN AGARWAL GLASS INDUSTRIES LIMITED

..... Respondent

Through Mr. J.P. Sengh, Senior Advocate with Mr. Samrat K. Nigam, Mr. Shaurya Kuthiala, Ms. Manisha Mehta, Ms. Mrigna Shekhar, Mr. R.L. Sinha, Mr. Shashi Pratap Singh and Mr. Zubin Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

CMs. APPL 51490/2018(delay) & 51491/2018(delay in re-filing)

1. By these applications, the applicant/appellant seeks condonation of 21 days delay in filing and 95 days delay in re-filing the present appeal.
2. For the reasons stated in applications, delay in filing and re-filing the appeal is condoned.
3. The applications stand disposed of.

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4. This is an appeal under section 13(1) of the Commercial Courts Act 2015 read with Section 10 of Delhi High Court Rules against an order dated 14.05.2018, whereby a learned Single Judge of this Court

dismissed the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to 'Act').

5. The necessary facts required to be noticed for the disposal of this appeal are that:
6. The appellant is a wholly-owned subsidiary of GAIL India and has been authorized by Petroleum and Natural Gas Regulatory Board (PNGRB) for supplying of gas in inter alia the Taj Trapezium Zone, whereas the respondent is engaged in the manufacturing and sale of glassware and glass bottles. The respondent is situated in the Taj Trapezium Zone where the appellant is one of the suppliers of natural gas.
7. The parties entered into a gas supply contract dated 21.07.2012 to govern the purchase of gas by the respondent from the appellant for a minimum contractual quantity also referred as "Daily Contracted Quantity" (DCQ) under the terms of Article 7.1 of the contract. The contract was scheduled to expire on 31.12.2015, in terms of the Article 3.1 of the contract. As per the Article 7.2 of the contract, the respondent was under an obligation to purchase a minimum of 80% of the DCQ for a calendar quarter, i.e. the Minimum Guaranteed Offtake (MGO). The respondent undertook to pay for the MGO or the actual quantity of gas supplied or whichever is higher, during each period of contract period except in case the respondent discloses any accidents and/or defects in installations immediately to the appellant, provided further that the respondent in all such cases would undertake immediate step to rectify the defects for commencing normal intake of gas as mentioned under Article 9.2 and 9.3.

8. A notice was issued by the respondent to the appellant on 19.04.2013 informing the appellant that due to sudden defects in the furnace at their unit, the respondent would not be able to fully utilize the gas. The appellant was also informed by the respondent that they would be compelled to seek shutdown in accordance with Article 9.2 of the Agreement. The said communication further stated that the respondent was taking immediate steps to remove the said defect. Another communication was issued to the appellant for isolation of the unit on 06.09.2013. The respondent admittedly failed to comply with its MGO obligation in the quarter of April to June, 2013 and July to September, 2013. The appellant accordingly levied MGO charges on the respondent vide two invoices, dated 09.12.2015 in the sum of Rs.31,72,548.82 and another invoice dated 09.12.2015 in the sum of Rs.1,29,85,131.93 respectively. Since the respondent disputed the invoices, the matter was referred to arbitration. An Award dated 08.01.2018 was rendered by the learned Tribunal. Aggrieved by the Award so passed led to the filing of the objections under Section 34 of the Arbitration and Conciliation Act, which was dismissed by a learned Single Judge of this Court by an order dated 14.05.2018, which has led to the filing of the present appeal under Section 37 of the Arbitration and Conciliation Act.
9. Mr. Makkar, learned Senior Counsel appearing for the appellant, while relying on Article 7.2 of the Gas Supply Contract, submits that the respondent was required to pay a minimum guarantee, which aspect has been ignored by the learned Arbitrator and also the learned Single

Judge of this Court. For the sake of convenience, Article 7.2 has been reproduced below:

“7.2 Minimum Guaranteed Offtake (MGO):

7.2.1 During the period of contract, the Buyer shall pay to the Seller for the actual quantity of gas supplied by the Seller to the Buyer subject to minimum of 80% of the aggregate contracted quantity for the calendar quarter, referred as Minimum Guaranteed Offtake (MGO). Upon the Buyer failing to lift MGO quantities of Gas during any quarter, the Buyer undertakes to pay for the price of Gas for such quarter as per Annexure II, or as per revision of DCQ mentioned under Article 7.1 of the Contract. In case, Seller is unable to supply 80% of the contracted quantity on any day(s) during the quarter, the MGO for such calendar quarter shall be worked out by adding the actual quantity of Gas supplied on such day(s) and the quantity obtained by multiplying 80% of the contracted quantity with the remaining number of day(s) in the quarter. The Buyer undertakes to pay for such MGO or for actual quantity of Gas supplied during such quarter, whichever is higher. In case of non-payment of the MGO charges by the Buyer within the stipulated period, the Seller shall have the unrestricted right to stop supply of Gas, apart from any other action as may be required to realize the MGO charges.”

10. Mr. Makkar, learned Senior Counsel has laboured hard to submit that the learned Arbitrator and the learned Single Judge have completely lost track of the fact that the pipelines were laid to the unit of the respondent and the minimum guarantee has been fixed in this backdrop for purposes of maintenance and allied public purposes. Mr. Makkar has also contended that the learned Single Judge has failed to take into account that the interpretation of the terms of the Contract

are required to be interfered with, as the view of the learned Arbitrator is not only incorrect but not plausible. Counsel submits that Article 7.2 is to be read along with Article 7.1 and 9.1. He submits that Article 9.1 prescribes the maximum period of shut down for 30 days and thus, it cannot be accepted that the stoppage of gas while relying on Article 9.2 can be for an unlimited period, which would make provisions of Article 7.2 redundant.

11. Mr. J.P. Singh, learned Senior Counsel appearing for the respondent submits that there is no infirmity or illegality in the Award and in the order passed by the learned Single Judge. He submits that the respondent had informed the appellant by a communication dated 19.04.2013 that on account of compelling reasons, they would not be able to utilize the gas. Specific reliance was made on Article 9.2. He further submits that subsequently vide a communication dated 06.09.2013, isolation of gas was sought in consonance with Article 7.1.7. Counsel further contends that the request was acceded to and supply of gas was discontinued. He further submits that the view of the learned Arbitrator is the only possible view and the same has been upheld by the learned Single Judge. While relying on *McDermott International Inc. v. Burn Standard Co. Ltd and Others*, reported at (2006) 11 SCC 181, Mr. J.P. Singh, learned Senior Counsel contends that the question as to the interpretation of the Contract will fall clearly within the jurisdiction of the Arbitrator, more so there is no perversity or patent illegality in the view so expressed.
12. We have heard the learned Senior Counsels for the parties and considered their rival submissions. Since the submissions of learned

Senior Counsels for the parties revolve around three clauses of Gas Supply Contract, we deem it appropriate to reproduce Articles 7.2, 9.1 and 9.2.

“7.2 Minimum Guaranteed Offtake (MGO):

7.2.1 During the period of contract, the Buyer shall pay to the Seller for the actual quantity of gas supplied by the Seller to the Buyer subject to minimum of 80% of the aggregate contracted quantity for the calender quarter, referred as Minimum Guaranteed Offtake (MGO). Upon the Buyer failing to lift MGO quantities of Gas during any quarter, the Buyer undertakes to pay for the price of Gas for such quarter as per Annexure II, or as per revision of DCQ mentioned under Article 7.1 of the Contract. In case, Seller is unable to supply 80% of the contracted quantity on any day(s) during the quarter, the MGO for such calender quarter shall be worked out by adding the actual quantity of Gas supplied on such day(s) and the quantity obtained by multiplying 80% of the contracted quantity with the remaining number of day(s) in the quarter. The Buyer undertakes to pay for such MGO or for actual quantity of Gas supplied during such quarter, whichever is higher. In case of non-payment of the MGO charges by the Buyer within the stipulated period, the Seller shall have the unrestricted right to stop supply of Gas, apart from any other action as may be required to realize the MGO charges.

.....

9.1 The scheduled annual shutdown of Gas supply, each at the Seller's end or at the Buyer's end, shall be limited to 30 (Thirty) days in a Year, and either party shall give notice in writing to the other party 2 (Two) days prior to the proposed date of shutdown of Gas supply. As far as possible, the Buyer and the Seller shall try to synchronize their shutdown periods of Gas supply. During such shutdown period, the provision of the

Article 7.2 shall not be applicable for the duration of stoppage of supply of Gas during this period.

9.2 The Buyer shall inform the Seller immediately about any accident and/or defects in installations of the Buyer, for the purpose of complete or partial stoppage of supply of Gas. Provided that, in all such cases, the Buyer shall undertake immediate steps to rectify the defects for commencing normal intake of Gas. Provided further that in all such cases, the provisions relating to payment of the MGO by the Buyer under Article 7.2 shall not be applicable for the duration of stoppage of supply of Gas during this period.”

13. We also deem it appropriate to reproduce copy of the letter dated 19.04.2013 issued by the respondent to the appellant:

“Dated 19.04.2013

To,

Gail Gas Limited
City Gate Station
Raja Ka Taal
Firozabad

Sir,

This is to inform you that due to sudden defect in the furnace at our unit, we are unable to fully utilize the gas so we are compelled to seek shutdown in accordance with Article 9.2, and the production work in the unit has been stopped.

We are trying to remove the defect of the furnace installed at our unit as soon as possible and will inform you once the defect is cured.

Thanking you,

For Shri Balkishan Agarwal Glass Industries Limited

Sd/-
Authorised Signatory

20 April 2013
12:25”

14. A reading of the communication would show that the respondent had relied upon Article 9.2 of the Gas Supply Agreement. Reading of 9.2 Article makes it crystal clear that during the period of examination or any defect in escalation, Article 7.2 could not be applicable. While Mr. Makkar, learned Senior Counsel for the appellant has labored hard to convince this Court that the period of 30 days as per Article 9.1 would also apply to Article 9.2, we are unable to accept this contention simply for the reason that in case the parties desired to include the 30 days period in Article 9.2, they would surely have included the same and it is not for the Court to add terms which are not explicit in the agreement between the parties.
15. The learned Single Judge has examined the submissions which are sought to be urged before us even today. Both Articles 9.1 and 9.2 make it abundantly clear that in case the above Articles are invoked, Article 7.2, which led to minimum guarantee would not apply. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Arbitration and Conciliation Act is even more restricted, while deciding a petition under Section 34 of the Arbitration and Conciliation Act. The Hon'ble Supreme Court in the case of **McDermott International Inc.**(*supra*) held as under:

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to

*ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.** So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

16. In case of *Navodaya Mass Entertainment Ltd. V/s J.M. Combines*, reported at (2015) 5 SCC 698 in paragraph 8 held that once the arbitrator has applied his mind to the matter before him, the court cannot re-appraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. Further, where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and only then it would be justified in interfering with the award published by the arbitrator. The aforesaid paragraph has been reiterated as under:

*"8. In our opinion, the scope of interference of the court is very limited. The court would not be justified in reappraising the material on record and substituting its own view in place of the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. [See *Bharat Coking Coal Ltd. v. L.K. Ahuja* [(2004) 5 SCC 109], *Ravindra & Associates v. Union of India* [(2010) 1 SCC 80: (2010) 1 SCC (Civ) 20], *Madnani**

Construction Corpn. (P) Ltd. v. Union of India [(2010) 1 SCC 549: (2010) 1 SCC (Civ) 168], Associated Construction v. Pawanhans Helicopters Ltd. [(2008) 16 SCC 128] and Satna Stone & Lime Co. Ltd. v. Union of India [(2008) 14 SCC 785] .]”

17. Similarly, this court in ***ADTV Communication (P) Ltd. V/s Vibha Goel & Ors***, reported at 2018 (3) Arb. LR 499 (Delhi) (DB) and ***M/S L.G. Electronics India (P) Ltd vs Dinesh Kalra***, reported at 2018 SCC OnLine Del 8367 held that The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Arbitration and Conciliation Act, 1996 is even more restricted while deciding a petition under Section 34 of the Act, while entertaining appeals under Section 37 of the Arbitration and Conciliation Act, 1996 the court is not actually sitting as a court of appeal over the award of the arbitral tribunal and therefore the court would not re-appreciate or re-assess the evidence.
18. For the reasons stated above, we find no infirmity or illegality in the Award or in the order passed by the learned Single Judge of this Court.
19. We find no merits in the appeal, the same is accordingly dismissed.

G.S. SISTANI, J.

JYOTI SINGH, J.

MARCH 12, 2019

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