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

Date of Decision : 03.12.2020

+ **W.P.(C) 3457/2020 & CMs 12263/2020, 13610/2020**

SMARTCHEM TECHNOLOGIES LTD. Petitioner
Through Mr. Neeraj Kishan Kaul, Sr.
Adv. with Mr. Rishi Agrawala,
Mr. Karan Luthra, Mr. Ankit
Banati, Ms. Chanan Parwani,
Ms. Namisha Chadha, Advs

versus

UNION OF INDIA Respondent
Through Mr. Kirtiman Singh CGSC with
Mr. Waize Ali Noor, Mr. Rohan
Anand, Mr. Taha Yasin, Advs

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This hearing has been held by video conferencing.
2. This petition has been filed by the petitioner praying for the following reliefs:

“(a) Issue a Writ of Certiorari, or any other Writ, Order or direction of like nature setting aside the letters having Nos.2.12/CW/2017018 dated 16.03.2020 and F.No. 23011/5/201-MPR(Vol.III)(Pt.) dated 05.06.2020 issued by the Respondent seeking extension

of the Bank Guarantee having No. 0896617BG000201 dated 16.12.2017 issued by State Bank of India, Pune Branch for a sum of Rs. 310.52 crores;

(b) Issue a Writ of Mandamus or any other Writ, Order or direction of like nature restraining the Respondent from invoking and/or encashing the Bank Guarantee having No. 0896617BG000201 dated 16.12.2017 issued by State Bank of India, Pune Branch for a sum of Rs. 310.52 crores;

(c) Issue a Writ of Mandamus or any other Writ, Order or direction of like nature directing the Respondent to conclude the determination of the alleged undue benefit accrued to the

Petitioner in terms of the formula finalized by the Respondent, in a time bound manner, preferably within a period of 4 weeks, failing which the Respondent deserves to be directed to return the Bank Guarantee having No. 0896617BG000201 dated 16.12.2017 issued by State Bank of India, Pune Branch for a sum of Rs. 310.52 crores.”

3. Before adverting to the submissions made, it would be relevant to note that this Court by its order dated 30.06.2020, restrained the respondent from insisting upon the petitioner to renew the Bank Guarantee in question. The issue which is now to be adjudicated is whether the petitioner is entitled to the release of the Bank Guarantee held by the respondent.

4. The Bank Guarantee in question was given by the petitioner to the respondent pursuant to the Office Memorandum dated 14.06.2017, which reads as under:

“Sub: Release of withheld subsidy amounting to Rs. 310.52 Crores to M/s Deepak Fertilisers & Petro Chemicals Ltd (DFPCL).

The undersigned is directed to say that this Department has withheld an amount of Rs. 310.52 Crores from the subsidy claims of M/s Deepak Fertilisers & Petro-Chemicals Limited on provisional basis pending the finalization of recovery formula to be finalized for recovery of undue benefits accrued to the company on account of use of Cheap APM gas for production of P&K fertilizers w.e.f. 01.04.2010. A request of M/s Deepak Fertilisers & Petro Chemicals Ltd, for release of withheld subsidy amounting to Rs. 310.52 Crores on submission of bank guarantee for the entire amount of Rs. 310.52 crores, has been examined in the Department in consultation with IFD. Based on the examination, the Competent Authority has decided to release the withheld subsidy claims of Rs. 310.52 Crores to M/ s Deepak Fertilisers & Petro Chemicals Limited on the submission of a Bank Guarantee from a Nationalized Bank by M/ s DFPCL covering the entire amount of Rs. 310.52 Crores.

2. The Bank Guarantee shall be a valid and continuing bank guarantee till the finalization of recovery formula by the Department of Fertilizers. M/ s Deepak Fertilisers will continue to extend the validity of the said bank guarantee on financial year-wise till the finalization of the recovery formula and further recovery, if any. The Bank Guarantee, so issued, should not impose any restriction on the rights of the Department of Fertilizers to invoke the bank guarantee.

3. Accordingly, FA wing is requested to process immediately the withheld subsidy claims of DFPCL on the submission of a Bank Guarantee from a Nationalized Bank by M/ s DFPCL covering the entire amount of Rs. 310.52 Crores.

4. This has the approval of Hon'ble Minister (C&F). ”

5. The respondent vide Office Memorandum dated 06.01.2014 had decided to recover undue benefits to the P & K Fertilizer Company, including the petitioner herein, on account of use of cheap domestic gas in the production of P&K fertilizers. The said Office Memorandum reads as under:

“Subject: Recovery of undue benefits to fertilizer companies producing P&K fertilizers on account of usage of cheaper domestic gas as feedstock-reg.

The undersigned is directed to state that three P&K fertilizers manufacturing companies namely Deepak Fertilizers and Chemical Ltd., Rashtriya Fertilizer & Chemicals Ltd. (RCF) and Gujarat State Fertilizer & Chemicals Ltd. (GSFC) have been allocated cheap domestic gas of around 1.137 mmscmd for production of ammonia used in their NPK fertilizers. The Ministry of Petroleum and Natural Gas has agreed to continue availability of cheap gas to these NPK manufacturers on the assurance of this Department to EGOM that any undue gain by these NPK manufacturers will be moped up.

2. The EGOM has asked this Department for framing the guidelines for effective recovery of undue benefits accrued to these fertilizer companies in the meeting held on 24.2.2012. The guidelines are under finalisation.

3. Pending finalisation of the guidelines on recovery, it has been decided to recover undue benefits to these P&K fertilizer companies on account of use of cheap domestic gas in the production of P & K fertilizers from the date of issue of this O.M., considering differential prices of fertilizers based on cost of imported ammonia and the APM gas, subject to reconciliation after final decision by

EGOM.”

6. In continuation of the above Office Memorandum, by a subsequent Office Memorandum dated 03.06.2016, the liability of the petitioner was provisionally assessed as Rs.310.52 crores and it was decided to withhold an equivalent amount of the subsidy claimed by the petitioner. It was on the petitioner's request thereafter that the Office Memorandum dated 14.06.2017 reproduced hereinabove, had decided to release the subsidy claim subject to the petitioner furnishing the Bank Guarantee of an equivalent amount.

7. The present petition was filed by the petitioner claiming that the respondent had since formalized the recovery formula and no amount was recoverable from the petitioner under the same.

8. The learned senior counsel appearing for the petitioner has now placed reliance on the Office Memorandum dated 14.05.2019 of the Ministry of Finance which *inter-alia* records as under:

“Subject: Undue profit to fertilizers companies producing P&K fertilizers on account of use of cheap domestic gas as feed stock.

Reference is invited to the OM No. 23011/5/2012-MPR(Pt.) dated 21.12.2018 of Department of Fertilizers (DoF) and the subsequent OM of even number dated 01st March, 2019 of the DoF in response to the DoE OM of even number dated 08.01.2019 wherein certain details have been provided on the above mentioned subject requesting DoE to provide their concurrence to the revised proposal of DoF mentioned in para 3 of the above mentioned OM.

2. The request of DoF is considered. In this regard, I am directed to convey the following views of the Department of Expenditure with regard to the recovery methodology vis-a-vis the undue profit to fertilizer companies' viz. GSFC, RCF and DFPCL producing P & K fertilizers on account of use of cheap domestic gas as feed-stock in reference to the recommendations of the Group of Officers meeting held on 12.11.2018:

xxx

III. The DoF in compliance of the recommendation of the Group of Officers proposed through it's O.M. dated 21.12.2018, two approaches as options for recovery from the three P&K fertilizers manufacturing companies i.e. RCF, GSFC and DFPCL as under:

(i) M/s GAIL which supplied the gas as per the purchase agreement entered with the fertilizer companies may recover the amount due from these three companies based on MoP&NG letter of 16.05.2015 (inadvertently the date has been mentioned as 16.5.2015 whereas it should have been 16.12.2015).

OR

(ii) The recovery of unreasonable profit beyond 12% profit on cost of quantity sold may be made from these companies on the basis of verification of reasonableness of MRP from the audited cost data.

IV. We have considered these two different methodologies proposed by DoF. In our view these options are not alternatives but methodologies for taking action to comply with two different objectives at hand as explained below:

V. The issue for consideration before the Group of Officers was undue benefits to the three fertilizer companies on account of supply of cheap domestic gas

which was used as a feed stock to produce non-urea products. The undue benefit is on account of availability of differential input price of gas to these three companies. The issue is specific to these three companies only.

VI. Vide OM in File No.23011/5/2013-MPR dated 3rd May, 2013 wherein the subsidy rates for NBS were notified for 2013-14, at para 13 of the said OM, it was stated that the benefits to the manufacturers of P&K fertilizers on account of use of cheaper domestic gas shall be mopped up for which separate guidelines shall be issued. However, till date, no such separate guidelines have been issued by DoF.

*VII. For the issue before the Group of Officers as stated at para (V) above, under the facts and circumstances of the case since no separate guidelines have yet been issued by DoF, it is felt that it would be appropriate that M/s GAIL recovers the differential input price for gas which has been used to produce products other than urea. viz, NPK, chemical products, etc. from these three P&K companies i.e. M/s RCF, M/s GSFC and M/s DFPCL as per their methodology already conveyed to GAG outlined in MoPNG letter No.13013/3/2012-GP-I(FTS:23311) dated 16.12.2015. This will take care of the core issue of supply of cheap input i.e. gas at cheaper prices to these companies **which is a matter to be resolved between these fertilizer companies and GAIL.** To this effect, DoE endorses the view of DoF stated at OM dated 01.03.2019.*

VIII. The issue of unreasonable profits earned by NPK fertilizer companies pertains to all NPK fertilizer companies. DoF is supposed to compute this unreasonable profits on a year on year basis adopting a methodology of assessing the same on all NPK fertilizer companies. This flows from a Cabinet decision of 1st May, 2013. Notification to this effect was issued by DoF vide their OM File No.23011/5 (NBS-Policy)/2013-MPR dated 3rd May, 2013 wherein NBS Policy, 2010 was amended to this effect of including unreasonable profits. However, no

detailed guidelines till date have been issued by DoF for the procedure to be adopted for computing the unreasonable profit.

IX. In this regard, its advised that DoF may expeditiously without any loss of time issue the detailed instructions / guidelines with regard to the procedure/methodology to be adopted for computing the unreasonable profits earned by the NPK fertilizer companies.

X. However, DoF in its various correspondences including OM dated 21.12.2018 and 01.03.2019 has advocated that profits earned above 12% of cost of production is being treated by them as unreasonable profits earned by NPK fertilizer companies and accordingly, the same should be recovered from these three fertilizer companies also. DoF has also proposed in its OM dated 01.03.2019 to give effect to the GAIL recovery while computing the unreasonable profits.

XI. As per standard accounting principles, DoF is supposed to recover the unreasonable profits as determined by the detailed guidelines to be issued by DoF in this regard taking into account the actual cost of production (incurred in the year of production). Therefore, DoE does not agree with the proposal of DoF given in its OM dated 01.03.2019 to give effect to the GAIL recovery while computing the unreasonable profits on account of the following reasons:

XII. This exercise of mopping up of unreasonable profits vis-a-vis these three fertilizer companies as indicated at para (XI) above may be done without factoring in the 'proposed recovery by GAIL as stated at (VII) above as (VII) above is a separate proceeding to recover cheap input price of gas.

XIII. Currently the proceedings of GAIL recovery are at different stages of arbitration and hence sub-judice.

These fertilizer companies have also not paid any amounts on the same as they have preferred arbitration. As such, these recoverable amounts as per GAIL's methodology are contingent liabilities which have not yet been crystallized. As and when these contingent liabilities become final/crystallized/ or actually paid, DoF may give effect to them in computation of unreasonable profit following the generally followed principles of accountancy.

(Emphasis Supplied)

9. He has further placed reliance on the Office Memorandum dated 15.05.2020 issued by the respondent which records as under:

“Sub:- Continued supply of APM gas to P&K fertilizer manufacturers and recovery of undue benefits-reg.

The undersigned is directed to refer to MoP&NG's OM No.L-12023/4/2012-GP-II (pt.) dated 15.12.2019 on subject mentioned above and to state that the DoE vide OM dated 14.05.2019 has furnished the following recommendations:

(a) It would be appropriate that M/s GAIL recovers the differential input price for gas which has been used to produce products other than Urea viz. NPK, Chemical products, etc from three P&K companies i.e. M/s RCF, M/s GSFC and M/s DFPCL as per their methodology already conveyed to CAG.

(b) DOF is supposed to compute unreasonable profits on a year on year basis adopting a methodology of assessing the same on all NPK fertilizer companies.

2. In regard to point (a) above, recommendation of DoE have been referred to the MoP&NG. In view of this, the issue of undue profit to P&K fertilizer companies has been settled finally in DOF with the approval of Hon'ble Minister (C&F) wherein action of MoP&NG has been

considered final with no further role on part of DOF in this regard. Now, it is for M/s GAIL to recover the differential input price for gas from these three companies as per their agreement as per MoP&NG's letter dated 16.12.2015.

3. This issues with the approval of Competent Authority."

(Emphasis supplied)

10. Based on these two Office Memorandums, the learned senior counsel for the petitioner submits that as far as the respondent is concerned, no liability was cast on the petitioner based on the Office Memorandum dated 06.01.2014 and/or Office Memorandum dated 14.06.2017. It has been decided that it would be M/s GAIL which would recover the differential input price of gas. As far as M/s GAIL is concerned, it had sought to recover such differential price in arbitration proceedings which has resulted in the order dated 20.12.2018 of this Court passed in Arb.A.(COMM.) 3/2018 and O.M.P.(COMM.) 31/2018 whereby this Court upheld the order of the Arbitrator rejecting the claim of M/s GAIL as not maintainable under the Gas Sales and Transportation Contract dated 10.05.2006 and the Gas Sales and Transmission Agreement dated 31.12.2010. He submits that though M/s GAIL has challenged the said order before the Division Bench of this Court in form of an Appeal, being FAO(COMM.) 40/2019, and a Special Leave Petition, being SLP(C) No.7194/2020, no interim orders have been passed in its favour. He submits that in view thereof, the Bank Guarantee in question deserves to be released in favour of the petitioner.

11. On the other hand, the learned counsel for the respondent submits that the Bank Guarantee in question has been given by the petitioner as a security for recovery of claim of undue benefit that the petitioner obtained due to usage of cheaper domestic gas as feed-stock. Such undue benefit is also in form of the differential price of gas which now has been decided to be recovered by M/s GAIL. He submits that therefore, until such recovery is made, the Bank Guarantee cannot be released to the petitioner. Placing reliance on the judgment of the Supreme Court in ***Joshi Technologies International Inc. v. Union of India & Ors.***, (2015) 7 SCC 728, he submits that this being a contractual dispute and a claim for recovery of money is being made, in any case, a Writ Petition would not lie. He also places reliance on the judgments of the Supreme Court in ***Gujarat Maritime Board v L&T Infrastructure Development Projects Ltd and Anr.***, (2016) 10 SCC 46; ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. And Another***, 1996 (5) SCC 450; and ***Andhra Pradesh Pollution Control Board v.CCL Products (India) Limited***, 2019 SCC OnLine SC 985, to submit that Bank Guarantee being an independent Contract other than the underlying Contract for which it has been given and obtained, this Court cannot interdict the invocation/retention thereof by the respondent on the basis of adjudication of the underlying dispute between the parties.

12. I have considered the submissions made by the learned counsels for the parties. As is evident from the Office Memorandum dated 06.01.2014, the respondent was to finalize the guidelines on the

manner of recovering the alleged undue benefits to the fertilizer companies on account of use of cheap domestic gas in the production of the P&K fertilizers. By the Office Memorandum dated 03.06.2016, the respondent provisionally assessed such undue benefit at Rs.310.52 crores against the petitioner and decided to withhold the subsidy claim of the petitioner to the said amount. The Office Memorandum dated 14.06.2017 decided to release the subsidy claim of the petitioner, subject to the petitioner furnishing the Bank Guarantee in question. By the Office Memorandum dated 14.05.2019 it was decided that M/s GAIL will recover the differential price of gas while the respondent shall recover the “unreasonable profits”. By the subsequent Office Memorandum dated 15.05.2020, the respondent has decided that while M/s GAIL shall recover the differential price of gas as per its agreement with the petitioner and the letter dated 16.12.2015 of the MoP&NG, as far as the respondent is concerned, no further recovery is to be made from the petitioner.

13. As noted hereinabove, M/s GAIL has already tried to recover the differential input price of gas from the petitioner, however, has remained unsuccessful. Proceedings in this regard are pending before the Division Bench of this Court as also the Supreme Court. M/s GAIL by its letter dated 26.06.2020 addressed to the petitioner has, making reference to the Office Memorandum dated 15.05.2020, advised the petitioner as under:-

“In view of the above, subject to final outcome of legal proceedings before Hon’ble High Court of Delhi and Hon’ble Supreme Court of India (cited above at reference 8 & 9 respectively), M/s DFPCL will be liable to make

payment of Rs 360.18 Crores against the claim letter mentioned above. It may be further noted that in the event M/s DFPCL becomes liable to make payment of amount mentioned in the claim letters, interest as applicable on the outstanding dues till the date of actual payment will be charged in accordance with respective agreement(s) executed between GAIL and DFPCL.”

14. Therefore, it is now for M/s GAIL to make the recovery of the differential gas price depending upon the outcome of the two litigations that are pending between it and the petitioner, however, as far as the respondent is concerned, it is its own stand, as recorded in the Office Memorandum dated 15.05.2020, that it has no claim against the petitioner.

15. In view of the above, the retention of the Bank Guarantee by the respondent cannot be sustained.

16. Though it is correct that normally this Court does not entertain disputed questions of fact or disputes relating to contractual matters, however, in the present case, in view of the admitted stand of the respondent as recorded in its Office Memorandum dated 15.05.2020, there is no disputed question of fact to be determined by this Court. The retention of the Bank Guarantee by the respondent would clearly be arbitrary and unreasonable and therefore, cannot be sustained. Equally, the law relating to invocation of Bank Guarantee would be of no relevance in the present case as the question before this Court is of the power of the respondent to retain such Bank Guarantee in the absence of any claim remaining.

17. In view of the above, the petition succeeds. The respondent

shall release the Bank Guarantee held by it to the petitioner within a period of four weeks from today.

18. The cost imposed on the respondent vide order dated 28.08.2020 is revoked keeping in view the special request made by the learned counsel for the respondent.

19. There shall be no order as to cost.

NAVIN CHAWLA, J

DECEMBER 3, 2020/Arya

