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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Decided on: 17th October, 2022***

\+ **ARB.P. 583/2021 & I.A. 12850/2021**

GAIL (INDIA) LIMITED
GAIL Bhawan, 16, Bhikaji Cama Place,
New Delhi-110066. .....Petitioner

Represented by: Mr. Jayant Bhatt & Mr. Satyam Sharma, Advocates.

versus

FILATEX INDIA PRIVATE LIMITED

Survey No. 274, Demni Road, Dadra-396191,
Union Territory of Dadra & Nagar Haveli. ...... Respondent

Represented by: Mr. Anirudh Bakhru, Mr. Ayush Puri, Ms. Tejaswani Chander Sekhar, Mr. Umang Tyagi & Mr. Jasal, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

NEENA BANSAL KRISHNA, J. (ORAL)

I.A. 7902/2021 *(Exemption)*

1. Allowed, subject to all just exceptions.

2. Application is disposed of.

ARB.P. 583/2021

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as* "A&C Act, 1996"*)* on behalf of the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The facts in brief are that the petitioner which is a Government of

India Undertaking and is a largest state-owned Natural Gas processing and distribution Company in India.

3. The petitioner entered into a Gas Sale Agreement dated 23rd August, 2010 *(hereinafter referred to as* "GSA"*)* with the respondent. The petitioner received a Confirmation Letter *vide* E-mail dated 24th November, 2011 from the respondent for providing natural gas. Subsequently, on 28th November, 2011, the petitioner received a reply from the respondent attaching the original copies of the Negotiable and Non-negotiable Letter of Credit bearing No. 49780ILCR000111. In December, 2011, the petitioner commenced providing Natural Gas to the respondent in terms of the GSA dated 23rd August, 2010.

4. On 29th November, 2012, the petitioner complained to the respondent about the continuous reduction in drawl of natural gas significantly below the contracted quantum as per the GSA dated 23rd August, 2010. Pursuant to this letter, the petitioner received the Letter dated 31st December, 2012 from the respondent asserting the *force majeure* condition due to a major fire in its Plant on 27th November, 2012. Additionally, the respondent sought termination of the GSA dated 23rd August, 2010.

5. On 12th February, 2013, the petitioner rejected the purported *force majeure* situation for termination of GSA. The respondent, however, reiterated its contention invoking *force majeure* clause *vide* its Letter dated 31st December, 2012.

6. The petitioner has claimed that it has diligently provided the best possible services to the respondent and has continued to do so in terms of the GSA dated 23rd August, 2010. The petitioner has raised various bills for the supply of Gas to the respondent, but the respondent has been irregular in

making the payments against the bills and has been making false assurances of remitting the amounts which have not been cleared till date, despite reminders and follow-up letters. It is the respondent which is claimed to have defaulted to the tune of Rs. 73.12 crores, excluding the interest till December, 2018, which is in violation of Article 14.1 of the GSA dated 23rd August, 2010.

7. Article 15.65 of the GSA dated 23rd August, 2010 provides for the resolution of disputes through Arbitration.

8. Two Notices, of invocation of Arbitration Clause, dated 05th December, 2017 and 30th July, 2019 respectively have been served upon the respondent on account of non-payment of the due amounts, but the respondent has failed to reply to the Notices. Hence, the present petition for the appointment of a Sole Arbitrator, has been filed.

9. **The respondent in its Counter-affidavit** has taken the preliminary objection that the present petition is *ex facie* barred by limitation and is liable to be dismissed *in limine.*

10. It is further submitted that Article 15 of the GSA dated 23rd August, 2010 pertains to Dispute Resolution. Article 15.8 clearly provides for Negotiation between the parties, but for the reasons best known, the petitioner has not filed the copy of the GSA 23rd August, 2010 containing Article 15.

11. **On merits,** it is admitted that the respondent entered into GSA with the petitioner on 23rd August, 2010. However, because of the *force majeure* situation in Dadra Plant, the respondent suffered major losses. The respondent lodged an FIR with the police and also lodged initial claim of Rs. 35,70,56,033/- with the Insurance Company which finally assessed material

damage of Rs. 18,31,63,974/-.

12. The respondent *vide* Letter dated 31st December, 2012 apprised the petitioner about the frustration of the Contract due to *force majeure* and stated that on this account, the Contract be terminated. However, the petitioner disputed the termination of the Contract on account of *force majeure vide* its Letter dated 12th February, 2013.

13. It is stated that several personal Meetings were held between the senior officers of the petitioner and the respondent in Mumbai and various representations were made by the respondent to the Mumbai Zonal Office of the petitioner which accepted the claim of *force majeure* and frustration as sought by the respondent *vide* its Letter dated 26th September, 2014 and also notified removal of the metering skid and other Equipment from the Dadra Plant of the respondent. The respondent also consented to such removal.

14. It is asserted that clearly the termination of GSA was acknowledged and accepted by the petitioner. However, to the utter shock of the respondent, despite due termination of the GSA, the petitioner has raised several issues and has served Notice of Invocation dated 05th December, 2017 invoking Arbitration in terms of Article of GSA.

15. It is claimed that after passing of more than three years of the Letter dated 26th September, 2014 relating to removal of metering skid, the Notice of Invocation has been sent only to revive deadwood claim which is not admissible under law.

16. It is further asserted that the petitioner has failed to explain how the Claim of the petitioner is not barred by limitation. It is, therefore, submitted that the petition is liable to be dismissed.

17. **Submissions heard.**

18. The objections taken on behalf of the respondent are two-fold; (i) there was a provision for Negotiation and Conciliation before litigating, but the petitioner has failed to initiate any negotiation before issuing the Notice of Invocation of Arbitration. (ii) the claim of the petitioner is *ex facie barred* by limitation.

A. Prior Negotiation and Conciliation.

19. A plea has been taken on behalf of the respondent that the Article 15 provides for Dispute Resolution wherein it is clearly provided that the parties would first make an effort for Conciliation and thereafter, go for arbitration. It has been explained on behalf of the petitioner that various rounds of conciliation and meetings had taken place with the respondent. The respondent though has now claimed that due procedure as provided under the GSA for Resolution of Dispute has not been followed, but the respondent in its own counter-affidavit, had claimed that several rounds of Conciliation and meetings had taken place over a period of time between the parties.

20. It is also submitted by both the parties that a Senior-Member Conciliation Committee is in the process of being constituted for resolution of the disputes between the parties. It is quite evident that due process of resolution of dispute has been followed by the parties and the objection taken in this regard is not tenable.

B. Ex facie barred by limitation:

21. The main argument on behalf of the respondent is that the claim is *ex facie* barred by limitation. It is not in dispute that the major fire broke in Dadra Plant of the respondent leading to the closer of the factory. It is also not disputed that the respondent *vide* Letter dated 31st December, 2012

conveyed to the petitioner that the Contract has to be necessarily terminated on account of *force majeure.* The petitioner admittedly *vide* its Reply dated 12th February, 2013 rejected the termination.

22. It is the claim that as per Article 1 of GSA, the tenure of GSA was 18 years and it was a Contract for supply of the Natural Gas regularly. There was no question of unilateral termination of the Contract by the Respondent which was under the terms of the Contract, liable to pay the minimum charges in terms of GSA.

23. It is argued on behalf of the petitioner that this Contract was not terminable by the respondent as it had a term of 18 years under the Agreement.

24. Article 18 of GSA provides for *force majeure,* and deals with various calamities as *force majeure*.

25. Article 18.2 reads as under:

> ***"Article 18.2 Non-performance not excused for either party –***
>
> *Notwithstanding the provisions of this Article 18, neither Party shall be entitled to claim relief by reason of Force Majeure for:*
> *(a) Obligation of such Party that is required to be completely performed prior to the occurrence of the event of Force Majeure.*
>
> *(b) the failure of such Party to maintain its facilities or equipment in accordance with the standards of a Reasonable and Prudent Operator, or*
>
> *(c) late performance caused by the failure of such Party or its contractors or subcontractors engage qualified contractors and suppliers or to hire an adequate number of persons except where such failure is due to Force Majeure."*

26. Article 18.4 further provides for situation where *force majeure* exceeds 30 days which reads as under:

> *“**Article 18.4 Force Majeure Event Exceeds 30 days –***
>
> *Notwithstanding anything contained herein above, if an event of Force Majeure occurs and is likely to continue for a period of Thirty (30) Days from the date of occurrence of such Force Majeure, the **Parties shall meet to discuss the consequences of the Force Majeure** and the course of action, including termination to mitigate the effects thereof to be adopted to the circumstances.”*

27. The reading of Articles 18.2 and 18.4 provides that neither party shall be discharged of its obligation on account of *force majeure*. Moreover, whatever the functional difficulties which may arise, the same shall be discussed by the parties to ascertain the consequences of *force majeure* and the cause of action including the termination to mitigate the effect thereof to be adopted in the circumstances.

28. **Article 19** provides for Suspension and Termination. Article 19.1 deals with obligation of seller, if he fails to deliver the gas. Article 19.2 of GSA provides that the obligation of the buyers and provides for consequences in case, the buyer fails to make payment. Article 19.3 of GSA deals with the buyer’s failure to take gas. Article 19.3 reads as under:

> *“**Article 19.3 Buyer’s failure to take gas –***
>
> *If the Buyer fails (other than as a consequence of shall have been paid to the Seller or the Seller's default) to take 50 %o or more of the cumulative PNDCQ during a period of one hundred eighty (180) consecutive Days then without prejudice to any other rights or remedies that the Seller may have under this Agreement or Law, the seller may, at its sole option, terminate this Agreement upon not less than thirty (30) Days prior written notice to the Buyer.”*

29. Articles 19.4 to 19.6 provide for various grounds of termination available to the Seller.

30. Article 19.7 of GSA provides for other grounds for termination. It essentially deals with winding up of the Company.

31. A conjoint reading of various articles as narrated above, *prima facie* it is only the Seller who has a right of termination of GSA in various contingencies as provided under Article 19 of GSA. The buyer has barely any right to terminate the Contract. The only provision which may be invoked by the buyer is Article 18 of GSA that deals with *force majeure* but there too, it is provided that efforts would be made for Conciliation and to work out mechanism for mitigation of the losses on account of *force majeure*.

32. In the present case, serious disputes have been raised about the petitioner in regard to the alleged termination of the Contract by the respondent *vide* Letter dated 31st December, 2012. Whether the GSA was validly terminated is a mixed fact of law which cannot be determined at this stage in the present petition.

33. The other aspect which has been raised is in regard to the limitation.

34. The respondent has asserted that once the Contract stood terminated on 31st December, 2012, any claim for dues arising out of GSA could have been filed only within three years from the date of termination. The first Letter of Invocation has been given in 2017 and second was given in 2019 which is clearly beyond the period of three years and *ex facie* barred by limitation.

35. For this, learned counsel on behalf of the respondent has placed reliance on the decision of the Hon'ble Supreme Court in *Bharat Sanchar Nigam Limited vs. M/s Nortel Network India Pvt. Ltd.* (2021) 5 SCC 738 to argue that since no specific Article of the Limitation Act, 1963 is applicable

to the arbitration, the residual Article would be applicable and the period of limitation for filing the petition under Section 11 is three years from the date of refusal to appoint the arbitrator. It was further observed in *Bharat Sanchar Nigam Limited* (supra) that the petition under Section 11 of the Act should contain some averment to explain how the claim is within the limitation. In the said case, there was not even an averment either in the Notice of Arbitration or in the pleadings about how the matter was within the limitation and it was found to be time barred by over five and a half years and, therefore, the petition under Section 11 of A&C Act, 1996 was dismissed.

36. Similarly, reliance has been placed by the respondent on the decision of the Hon'ble Supreme Court in *Emaar India Ltd. vs. Tarun Aggarwal Projects LLP and Anr.* 2022 SCC OnLine SC 1328, wherein similar issue in regard to the limitation was raised in a petition under Section 11 of A&C Act, 1996. The Apex Court reaffirmed that while making any reference to under Section 11(5) and (6), the court needs to consider if arbitrable disputes have been raised and whether the same are *ex facie* not barred by limitation. In *Emaar India Ltd.* (supra), a reference was made to the decision in *Vidya Drolia vs. Durga Trading Corporation* (2021) 2 SCC 1, wherein it was held that it is the duty of the court to look into the aspects i.e., arbitrability and the limitation. In the said case, the court found that the disputes raised were not arbitrable and the petition under Section 11(6) of the Act was dismissed.

37. Learned counsel on behalf of the respondent has also placed reliance on the decision of the Co-ordinate Bench of this Court in *M/s KSR Brothers through Its Partner Jaswinder Singh vs. IGNOU through Its Vice Chancellor* in ARB.P. 619/2021 decided on 16th November, 2021, wherein it

was held that on the facts of the case, it was found that the amount was time barred since January, 2013, while the petitioner had invoked the Arbitration Clause *vide* Notice dated 15th March, 2019. It was found that the claim was *ex facie* barred by limitation and the petition under Section 11(6) was dismissed.

38. The reliance has also been placed by the respondent on the decision of the Co-ordinate Bench of this Court in *GAIL(India) Limited vs. Kesar Alloys & Metals Private Limited* in ARB.P. 325/2021 decided on 25th March, 2022m wherein similar facts came under consideration. It was held that the letter terminating the Contract and Notice of Arbitration was served on 25th July, 2013 and the first letter under Article 15.1 of GSA was given by the petitioner on 22nd August, 2016 whereafter Notice invoking Arbitration under Article 15.6 was issued on 10th October, 2022. It was found that the claim of GAIL was *ex facie* barred by limitation and the petitioner under Section 11(6) of A&C Act, 1996 was dismissed.

39. In the present case, the first aspect which has already been discussed is that there is a dispute if the respondent was unilaterally entitled to terminate the Contract on account of *force majeure* thereby bringing in imposed liability under GSA, this is an arbitrable dispute which can be considered only during the arbitration. Once only if it is concluded in the given facts that there was a valid termination of GSA, the other liabilities accruing under GSA or the claim being time barred, *ex facie* barred by limitation can be determined. Though at the first instance, it may seem that the Claims that had arisen way back in December, 2013 for which the Letter of Invocation of Arbitration Clause has been sent only in 2017 and 2019 is *ex facie* time barred, but admittedly, the parties have been in regular talks for

Conciliation so much so, that a Senior-Member Conciliation Committee is in the process of being constituted. Also, whether there is valid termination of GSA, is a moot fact which can be determined only by adjudication.

40. In the given facts of this case, it cannot be said that the claims as raised by the petitioner are *ex facie* barred by limitation. In the case of *Vidya Drolia* (supra), it was observed that when there is a doubt about the authenticity of the claim, the thumb rule is that *"when in doubt, do refer"*, otherwise, it would encroach upon what is essentially a matter to be determined by the Arbitral Tribunal.

41. In the present case, it has been shown that the arbitrable disputes have arisen between the parties and *ex facie* they do not seem to be barred by limitation. However, the parties are at liberty to raise the issues of arbitrability/limitation of before the learned Arbitrator without prejudice to the rights and contentions to raise their pleas.

42. In view of the submissions made, the petition is allowed and Mr. Justice Pradeep Nandrajog, Former Chief Justice, High Court of Bombay, Mobile No. 9818000130, is hereby appointed as the Arbitrator to adjudicate the disputes between the parties.

44. The parties are at liberty to raise their respective objections before the Arbitrator.

45. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as may be otherwise agreed between the Arbitrator and the parties.

46. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

47. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry of this Court.

48. Both the parties have submitted that there is possibility of a settlement between the parties. The Order of Appointment of the Arbitrator be kept in abeyance for a period of two months. In the meantime, if the parties resolve their disputes, an intimation to that effect shall be sent to the learned Arbitrator, failing which the arbitration proceedings shall commence.

49. The petition along with pending application is accordingly disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 17, 2022
S.Sharma