

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

% **Order reserved on: December 01, 2022**
Order pronounced on: December 06, 2022

+ ARB.P. 746/2022

SPECTRUM POWER GENERATION LIMITED Petitioner

Through: Mr. Raghvendra Singh, Mr.
Abhishek Gupta and Mr. Mohit
Mishra, Advs.

versus

GAIL (INDIA) LIMITED Respondent

Through: Mr. Anish Chawla, Mr. Neeraj
Kumar and Mr. Utkarsh
Mishra, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

1. The petitioner seeks to invoke the jurisdiction of the Court conferred by Section 11(6) of the **Arbitration and Conciliation Act, 1996**¹ for appointment of a Sole Arbitrator in light of the disputes which have arisen between the parties and in terms of the provisions made in the **Gas Sale Agreement**² which came to be executed between the parties on 18 December 2015.

2. The petitioner asserts that from the time of commencement of the contract for supply of natural gas, the respondent raised invoices

¹ the Act

² GSA

billing it under the heads of (i) gas price, (ii) marketing margin, (iii) transmission charges, (iv) **Goods and Service Tax**³ costs @ 18% on the aforesaid and (v) **Value Added Tax**⁴ on the sum total of gas price. The aforesaid invoices were acknowledged and payments made by the petitioner accordingly.

3. It is however contended that subsequently the petitioner came to realize that it had been incorrectly foisted with liability towards GST and in contravention of the provisions of the GSA itself. In view of the aforesaid, a notice for conciliation in terms of Article 15 of the GSA came to be issued on 06 October 2021. However, and since the disputes could not be amicably resolved, the petitioner invoked the arbitration clause by issuance of a notice dated 06 December 2021. The notice alleged that a sum of Rs.22,40,50,273/- had been wrongfully and illegally invoiced, collected and received by **Gas Authority of India Limited**⁵ under the GSA.

4. On receipt of the aforesaid notice, GAIL in terms of its reply of 30 December 2021 took the position that the service of transmission of natural gas intra unit is subjected to GST. It further asserted that GAIL is paying and bearing the burden of GST on its inter-unit billing connected with the supply of gas. In view thereof, it was averred that since GAIL is not entitled to claim Input Tax Credit, it would be entitled to to recover the GST cost from the petitioner. In view of the aforesaid, it stated that no refunds are due or payable to the petitioner here and that consequently no occasion arises for invocation of

³ GST

⁴ VAT

⁵ GAIL

arbitration. Since the respondent, according to the petitioner, failed to take further steps in terms of the appointment procedure as set forth in Clause 15 of the GSA, it was constrained to file the instant petition.

5. Upon notices being issued, GAIL has filed a reply in these proceedings. The principal objection which is taken by it before this Court is that the dispute which is raised relates to issues of taxation and is “*non arbitrable*”. Reliance in this respect is placed on the following observations as appearing in the decision of the Supreme Court rendered in **Vidya Drolia versus Durga Trading Corporation**⁶:

“50. Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject-matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as distinguished from commercial activities, economic adventures and welfare activities. Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.”

6. Before proceeding further, it must be noted that the existence of the arbitration clause is not disputed. The solitary objection which is taken for the constitution of the Arbitral Tribunal is that since the

⁶ (2021) 2 SCC 1

dispute itself relates to reimbursements which were claimed by GAIL towards payment of GST, the dispute clearly relates to the subject of taxation and is non-arbitrable.

7. The arbitration and conciliation procedure stands encapsulated in Clause 15 of the GSA and is reproduced below: -

15.1 GAIL (India) Limited has framed GAIL (India) Ltd Conciliation Rules 2010 in conformity with supplementary to Part - III of the Indian Arbitration and Conciliation Act 1996 for speedier, cost effective and amicable settlement of disputes through conciliation. A copy of the said rules is made available on GAIL's web site *www.gailonline.com* for reference. Unless specified otherwise in the Agreement all disputes shall be settled in accordance with the said GAIL (India) Ltd Conciliation Rules 2010.

15.2 Any dispute(s)/difference(s)/issue(s) of any kind whatsoever between/ amongst the Parties arising under/out of/in connection with this Agreement shall be settled in accordance with the provisions of this Article.

15.3 In case of any dispute(s)/ difference(s)/issue(s), a Party shall notify the other Party(ies) in writing about such dispute(s)/ difference(s)/issue(s) between / amongst the Parties and that such a party wishes to refer the dispute(s)/ difference(s)/issue(s) to Conciliation. Such Invitation for Conciliation shall contain sufficient information as to the dispute(s) / difference(s)/issue(s) to enable the other Party(ies) to be fully informed as to the nature of the dispute(s)/ difference(s)/issue(s), the amount of monetary claim, if any, and apparent cause(s) of action.

15.4 Conciliation proceedings commence when the other Party(ies) accept(s) the invitation to conciliate and confirmed in writing. If the other Party(ies) reject(s) the invitation, there will be no conciliation proceedings.

15.5 If the Party initiating conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such other period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to conciliate. If it so elects, it shall inform the other Party(ies) accordingly.

15.6 Where Invitation for Conciliation has been furnished, the Parties shall attempt to settle such dispute(s) amicably under Part-III of the Indian Arbitration and Conciliation Act, 1996 and GAIL (India) Limited Conciliation Rules, 2010. It would be only after exhausting the option of Conciliation as an Alternate Dispute Resolution Mechanism that the Parties hereto shall go for Arbitration. For the purpose of this Article, the option of 'Conciliation' shall be deemed to have been exhausted, even in case of rejection of 'Conciliation' by any of the Parties.

15.7 The cost of Conciliation proceedings including but not limited to fees for Conciliator(s), Airfare, Local Transport, Accommodation, cost towards conference facility etc. shall be borne by the Parties equally.

15.8 The Party raising the dispute shall freeze claim(s) of interest, if any, and shall not claim the same during the pendency of Conciliation proceedings. The Settlement Agreement, as and when reached/agreed upon, shall be signed between the Parties and Conciliation proceedings shall stand terminated on the date of the Settlement Agreement.

15.9 Arbitration

Any Dispute arising in connection with the Existing Contract which is not resolved by the Parties through amicable settlement shall be settled through Arbitration asunder:

Where the BUYER is a Government Company or a Central Government Undertaking / Department:

(a) in the event of any dispute or difference relating to the interpretation and application of the provisions of this Agreement, such dispute or difference shall be referred by either party for arbitration to the sole arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this Article. The award of the arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India at New Delhi. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary authorized by the Law Secretary, whose decision shall bind the

Parties finally and conclusively. The Parties to the dispute will share equally the cost of arbitration as intimated by the arbitrator.

(b) in the event either Party ceases to be a Government Company, due to privatization or disinvestment or otherwise, the dispute or differences relating to the interpretation and application of the provisions of this Agreement between the Parties shall still be referred to the arbitration proceedings provided above in Article 15.9(a), as per office memorandum No. DPE/4(10)/2001-PI\IA G 21, dated 22 January, 2004 of the Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises, Government of India;

Where the BUYER is other than a Government Company/Central Government Undertaking/Department

(c) The disputes shall be settled by Arbitration by a Sole Arbitrator and procedure for appointment of Sole Arbitrators shall be as follows:

On invocation of the Arbitration clause by a Party, GAIL may suggest a panel of three independent and distinguished persons to the other party to select anyone among them to act as the sole arbitrator.

In the event of failure of the other party to select the sole arbitrator within 30 days from the receipt of the communication suggesting the panel of arbitrators, the right of selection of sole arbitrator by the other party shall stand forfeited and GAIL shall have discretion to proceed with the appointment of the sole arbitrator. The decision of GAIL on the appointment of Sole Arbitrator shall be final and binding on the parties.

The Award of the Sole Arbitrator shall be final and binding on the parties and unless directed/awarded otherwise by the Sole Arbitrator, the cost of arbitration proceedings shall be shared equally by both the parties. The arbitration proceeding shall be in English language and the venue shall be at New Delhi, India.

Except to the extent as mentioned in Article 15.9, the provisions of Arbitration & Conciliation Act 1996 and the rules framed there under shall be applicable.

This Article 15.9 shall survive the termination or expiry of this Agreement.

The Government Company shall have the same meaning as ascribed in the Company's Act, 1956.

Notwithstanding the above, where Buyer indulges in corrupt/fraudulent/Collusive/Coercive practices and the same is under investigation by CBI or Vigilance or any other investigating agency or government etc., the same shall not be the subject matter of the arbitration or conciliation mechanism.

15.10 Continue performance

While any Dispute under this Agreement is pending, for settlement before the Arbitration, the Parties shall continue to perform all of their respective obligations under this Agreement without prejudice to the final determination in accordance with the provisions under this Article 15.

15.11 No payments due to the SELLER shall be withheld on account of such legal proceedings.”

8. Learned counsel appearing for the petitioner has while taking the Court through the various terms and conditions contained in the GSA, has submitted that Article 10 which dealt with the issue of pricing clearly provided that gas price payable by the petitioner to GAIL would be in accordance with the directives, guidelines and orders issued by the Government of India and the Ministry of Petroleum and Natural Gas. It was pointed out that in terms of Article 10.6 the price which the petitioner was liable to pay was understood to be inclusive of royalty and exclusive of taxes, duties, cess, VAT, Service Cess, Education Cess as well as other statutory levies payable on purchase of gas from the Oil and Natural Gas Corporation or any other source by GAIL or those leviable at the point of sale by GAIL to the petitioner. It was contended that any other liability towards GST or VAT and which was unconnected with the levy of tax on the purchase transaction undertaken by GAIL or on the sale transaction

with the petitioner was clearly not a liability which was liable to be borne by the petitioner. It was in the aforesaid light that learned counsel for the petitioner submitted that if GAIL had incurred any tax liability in the course of transmission of natural gas between its various units, that would clearly fall outside the ambit of Clause 10.6. It is in that backdrop that learned counsel contended that the dispute clearly fell within the ambit of Clause 10.6 and it would be wholly incorrect for the same being viewed as a non-arbitrable issue.

9. The relevant clauses of the GSA dealing with the issue of pricing are extracted hereinbelow: -

10.1 Commencing from the Agreement date and during the Agreement Period, BUYER shall pay the Price which shall be arrived in the following manner:-

10.2 Gas Price

(a) The Gas Price payable by the BUYER to the SELLER shall be in accordance with the directives/ guidelines/ orders etc. of the GoI/MoPNG from time to time. The present gas price is as per the New Domestic Natural Gas Pricing Guidelines, 2014 dated 25th October 2014 notified by the Government (placed at Annexure 3). In accordance with para 8 of the said guidelines, Director General of Petroleum Planning and Analysis Cell (DG-PPAC) under the Ministry of Petroleum and Natural Gas shall notify the periodic revision of prices.

The above price shall be converted to Rs. /MMBTU at RBI reference exchange rate of the month previous to the month during which supply of APM gas is made. The RBI exchange rate of the month would be calculated by taking the average of the RBI reference exchange rates for all days in the relevant month for which the rate is available on the RBI website.

(b) Notwithstanding Article 10.2(a), any directive, instruction, order, clarifications etc. of the MoP&NG/Government of India issued from time to time in respect of gas price shall be applicable and such gas price shall be payable by the BUYER for gas supplies under this Agreement. Any revision in gas price resulting from such directive,

instruction, order, clarifications etc. shall be applicable from the date as specified therein, whether retrospective or prospective.

(c) BUYER further agrees that for gas supplies beyond APM allocation, the gas price may be different as per directives/orders of the Government and the BUYER shall undertake to pay the same.

10.3 In addition to Gas Price as mentioned under Article 10.2 above, the BUYER shall pay to the SELLER the following charges (as applicable):

(a) The transmission charges shall be the Provisional Initial Unit Natural Gas Pipeline Tariff for KG Basin Natural Gas Pipeline Network as notified by PNGRB/MoP&NG/Government Agency i.e. Rs.5.56/MMBTU (Rupees Five and Five Six paise per MMBTU) (on Gross Heating Value basis).

Provided further that the above transmission charges are subject to revision variation by the Seller which may be in line with the time to time directives, instructions, orders, etc. of MoP&NG/PNGRB/Government Agency / change in law and accordingly shall be governed by the provisions of such directives, instructions, orders / change in law etc.

(b) The fixed monthly transmission charges of Rs.Nil(Rupees Nil only) per month plus additional transmission charges at the unit rate of Rs. Nil/ per thousand standard cubic meters (MSCM)/MMBTU.

The above fixed monthly transmission charges/additional monthly transmission charges as mentioned at 10.3.b shall be escalated by Nil percent on yearly rest basis with effect from NA.

Provided further that the above transmission charges are subject to revision/ variation by the Seller which may be in line with the directives, instructions, orders, etc. of MoP&NG/PNGRB/Government Agency / change in law and accordingly shall be governed by the provisions of such directives, instructions, orders / change in law etc.

(c) The Interconnectivity charges of Rs. Nil.

(d) Marketing Margin as applicable from time to time which is presently applicable @ Rs.200 per thousand SCM (linked to calorific value of 10000 Kcal. SCM on Net Calorific Value (NCV) basis for APM Gas supplies.

(e) Upstream suppliers (ONGC/OIL) charges towards other costs/tariff.

10.4 To maintain safe, uninterrupted/ continuous Gas supply to the BUYER, the SELLER shall be required to install and operate all such apparatus/equipment including, but not limited to Telemetry and Telecom system. For such facilities created or to be created, the BUYER shall be required to pay all such charges to be calculated as provided under this Article.

10.5 In case the BUYER agrees to take Gas under Article 5.5 (Substitute Gas), the BUYER shall pay to the SELLER for the Gas delivered as mentioned in the terms and conditions of the offer of the SELLER including additional transmission charges for such additional pipeline and allied facilities as may be required to provide such Substitute Gas.

10.6 The above Price is inclusive of Royalty, and exclusive of Taxes, Duties, cess, VAT, service tax, education cess and all other statutory levies as applicable at present or to be levied in future by the Government or State Government or Municipality or any other local body or bodies payable on purchase of Gas from ONGCL/Other sources (s) by the SELLER or on sale from SELLER to the BUYER and these shall be borne by the BUYER over and above the aforesaid Price.

10.7 The applicability of above Price/ Gas price /Transmission charges /Marketing Margin etc., under Article 10 is subject to any law or promulgation or directives, regulation or ordinance or executive order of MoP&NG/Government Agency, if any, from time to time.

10. Learned counsel appearing for GAIL, on the other hand, had urged that the dispute essentially relates to whether the burden of GST/VAT which may have been borne by GAIL and of which reimbursement was claimed from the petitioner is liable to be refunded. Viewed in that light learned counsel for GAIL would contend that the dispute is clearly one relating to taxation and thus non-arbitrable in light of the principles enunciated in **Vidya Drolia**.

11. Having considered and noticed the rival submissions which have been advanced, the Court firstly notes that undisputedly the existence of an arbitration agreement is not questioned by the respondent. That then leads the Court to deal with the question of non-arbitrability of the dispute as was urged on behalf of GAIL.

12. Vijay Drolia undoubtedly constitutes the locus classicus on the twin issues of non-arbitrability and the scope and extent of the power under Section 11 of the Act. While answering the question “*Who Decides Arbitrability?*” it enunciated the legal position as follows: -

138. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]* The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely,

if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable. [Ozlem Susler, “The English Approach to Competence-Competence” Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

154.1. Ratio of the decision in *Patel Engg. Ltd.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

13. While explaining the extent of the jurisdiction that the Court may exercise at the Section 11 stage of the Act, the Supreme Court had while expanding upon the questions which would merit consideration by the referral court had explicitly referred to matters relating to the inalienable sovereign and public interest functions of the State which would be inherently non-arbitrable as well as those which would fall outside the ambit of a private resolution process by virtue of a mandatory statutory command. As would be evident from paragraph 138 of the report extracted above, **Vijay Drolia** clearly holds that the aforesaid questions would merit consideration at the initial stage. The note of caution which was however struck was with respect to the Court for legitimate reasons while conducting an intense yet summary prima facie review, being cognizant of not usurping the jurisdiction of the Arbitral Tribunal itself. It went on to further hold that the referral court would proceed to refer disputes to arbitration where it is satisfied that the nature of the objection which is raised merits consideration by the Arbitral Tribunal in the first instance. Dealing with this aspect it was significantly observed that in situations where “*debatable and disputed facts*” arise or in respect of “*good reasonable arguable cases*”, the Court should force parties to raise the same before the Arbitral Tribunal which has the primary jurisdiction to decide all disputes including jurisdictional challenges which may be raised including with respect to non-arbitrability.

14. From the enunciation of the legal principles which would govern, the principal issue which arises is whether the objection taken by the respondent merits the reference being denied or in the

alternative the matter being referred to the Arbitral Tribunal and the question being kept open for its consideration.

15. It would be pertinent to recall that **Vidya Drolia** while expounding upon what questions would fall in the category of *non-arbitrable* disputes had included those which related to the sovereign functions of the State. It was explained that sovereign functions would extend to the exercise of an executive power in different fields including that of commerce, economic, legislation in all forms, taxation, eminent domain and police powers. **Vidya Drolia** thus is an authority for the proposition that the powers and decisions that the State may take in exercise of its sovereign functions, and which would necessarily include its taxing power, cannot form subject matter of an arbitration.

16. However, it is relevant to bear in mind that the petitioner here does not assail, question or dispute a tax that may have been imposed upon it by the State in exercise of its sovereign or statutory powers. The issue which is essentially raised is whether the GST/VAT liability which came to be placed upon GAIL could be passed onto the petitioner or it be held liable to reimburse GAIL to the aforesaid extent under the agreement. The challenge is raised solely on the anvil of Article 10.6. The petitioner asserts that it was only liable to bear such taxes as may have been shouldered by GAIL while purchasing gas from any supplier or any tax that may have been levied or stood attracted at the time when natural gas was sold to the petitioner. Viewed in the aforesaid light, it is manifest that the issue

does not relate to the taxing power of the State or any action taken or an order made in exercise thereof.

17. The contention that the dispute raised is non-arbitrable on the aforesaid ground is thus negated. The Court arrives at this conclusion and has chosen to return the findings aforementioned since the challenge which was raised neither gave rise to a disputed or a debatable issue. It would also not fall foul in the category of a good or a reasonably arguable case. The contention urged is wholly specious and would thus not merit the referral being either stalled or deferred.

18. Accordingly, the instant petition is allowed. The Court consequently appoints Ms. Nidhi Raman, Advocate [Official Address: Chamber No. 120, Block I, Delhi High Court] [Mobile No.9891088658] [email: niddhiraman@gmail.com] as the Sole Arbitrator.

19. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

20. The fees of the Arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

DECEMBER 06, 2022

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