REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 3504-3505 OF 2010

M/S. GAIL (INDIA) LIMITED …APPELLANT

Versus

M/S. INDIAN PETROCHEMICALS CORP. LTD. & ORS. …RESPONDENTS

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. M/s Gas Authority of India Limited (for short 'GAIL'), the appellant herein, is a Government of India undertaking, incorporated on 16.08.1984, engaged primarily in the activity of providing services for the utilisation of natural or associated gas. Indian Petrochemicals Corporation Ltd. (for short 'IPCL'), respondent no.1 herein, formerly a public sector undertaking, is engaged in the manufacture of petrochemicals. It ceased to be a public undertaking w.e.f. June 2002, when 26% of its shares were sold to Reliance Petroinvestments Ltd. in line with the Government's disinvestment policy.

Respondent no. 2 is a shareholder of IPCL and respondent no. 3 is the Union of India.

Background

2. On 01.01.1999, the Ministry of Petroleum and Natural Gas, Government of India (hereinafter referred to as '*MoPNG*'), the allocating and price-fixing authority for natural gas, issued a letter for allocation of natural gas to IPCL. IPCL was allotted 0.85 MMSCMD of semi-rich gas on firm basis from Hazira to IPCL's Gandhar Unit (at Dahej) for extraction of C-2 and C-3 fractions. The same was made subject to the following conditions:

"(i) Signing of gas supply contract with GAIL.

(ii) The pipelines require to transport semi-rich gas from Hazira to IPCL Unit at Gandhar and to transport the lean gas back to Hazira shall be laid by M/s IPCL.

2. You are requested to enter into necessary gas supply contract with GAIL within 60 days of issue of this letter failing which above allocation will be liable for allocation."

Looking to the significance of the time period in the letter, the parties began negotiating the terms of the gas supply contract. IPCL thus entered into a contract with GAIL on 09.11.2001 for supply of natural gas. IPCL had set

up and installed a plant at Gandhar by investing approximately Rs. 4500 crores. Further, in order to meet the stipulation of the allocation letter, it laid down pipelines between Hazira and Gandhar at a cost of approximately Rs. 354 crores.

3. As per the contract, the methodology of supply of gas was that GAIL received natural gas from the producer, i.e. ONGC, which procured the same at Hazira from the Bombay High project. Thereafter, the gas was transported from Hazira to IPCL's Gandhar plant through pipelines laid down by IPCL. The unutilised gas was then sent back to Hazira, also using IPCL's pipelines.

4. We may flag at this stage itself the significance of the manner in which the gas is carried, as the dispute before us revolves around this particular aspect. On one hand, as per the allocation terms, IPCL had to lay down its own pipelines (which were so laid), and those pipelines alone were utilised for carrying gas. On the other hand, the charge is levied by GAIL for 'loss of transportation charges' in terms of the contract. It is this aspect of the contract between the parties which has been the subject matter of adjudication in writ proceedings filed by IPCL under Article 226 of the

Constitution of India. IPCL succeeded before the learned Single Judge in terms of the orders dated 19.09.2006 and 11.04.2007, and before the Division Bench in the Letters Patent Appeals vide order dated 17.06.2008.

5. We may note that though the contract *inter se* the parties was signed on 09.11.2001, the challenge was laid to Clauses 10.01 and 4.04 of the contract only on 09.03.2006, i.e. after five years. In this interregnum, IPCL ceased to be a public sector undertaking.

6. The other development is the decision of GAIL to stop levying loss of transportation charges in May 2016. Thus, the total amount collected under the aforesaid clauses is stated to be Rs. 134 crores before it was quashed by the Single Judge and sustained by the Division Bench.

7. In order to understand the contractual context, the relevant two clauses are extracted below:

> "4.04 The BUYER, in addition to price of GAS mentioned in Article 10, shall pay to the SELLER Rs. 4,16,700/- (Rupees Four Lakh Sixteen Thousand and Seven Hundred) towards fortnightly service charges on account of deployment of manpower by the SELLER for terminal operation and routine maintenance along with applicable taxes / levies thereon, connected with delivery of Gas at the Point of Onward Delivery and receipt of Gas returned by the BUYER at the Point of Return Delivery. The above

service charges is exclusive of any material requirements like tools, tackles etc. and also the spares / items / equipments to maintain the terminal in operable condition. Any interruptions in supply of gas to any consumers on account of such material requirement shall be at the risk and cost of the BUYER. The above Service charges shall be increased by 3 (Three) percent per annum on yearly rest basis with effect from 1st April following the scheduled date of commencement of gas supply mentioned under article 2.01 hereinabove. In addition to the above, the BUYER shall also pay to the SELLER transportation charges, as applicable from time to time along the HBJ pipeline system for the quantity of GAS utilized / shrinkage as per formula provided under Article 5.02 or for the difference in quantity of gas measured at the Point of Onward Delivery at Metering Station No. – I (after adjusting the quantity of Gas Bye Passed as mentioned under Article 4.03 hereinabove) and Point of Return Delivery at Metering Station No. – II, whichever is higher. The BUYER shall pay above charges to the SELLER in addition to invoice for supply of gas to be raised as per Article 11 hereinafter along with all applicable taxes / levies thereon. Provided that in case above charges are not paid by the BUYER within 3 (Three) working days of presentation of the invoice, the SELLER will present the invoice for the same to the Bank against Letter of Credit and draw the amount. The BUYER will make arrangements with the Bank in a manner that in such an eventuality the full L/C amount gets automatically reinstated.

…. …. …. …. ….

ARTICLE 10-PRICE OF GAS

10.01 Present price of 1000 (One Thousand) Standard Cubic meters of GAS w.e.f. 1.10.1997 is applicable as per Government Pricing Order No. L-12015/3/94-GP dated 18.9.1997 (Annexure-IV) after which the SELLER shall have right to fix the price of GAS which may be as per directive, instruction, order, etc. of the Government of India which is likely to be market related in accordance with current policy of

liberalisation of the Government of India and the BUYER shall pay to the SELLER such price of GAS. In addition to the above, the BUYER shall also pay to the SELLER transportation charges, as applicable from time to time along the HBJ pipeline system, for the quantity of GAS utilised/ shrinkage. Provided further, the price of GAS so fixed is exclusive of Royalty, Taxes, Duties, Service/Transportation charges and all other statutory levies as applicable at present or to be levied in future. By the Central or State Government of Municipality or any other local body or bodies payable on purchase of Gas from ONGCL/Other Producer(s) by the SELLER or on sale from SELLER to the BUYER or on return of the balance quantity of GAS after processing by the BUYER to the SELLER and these shall be borne by the BUYER over and above the aforesaid price."

(Emphasis supplied)

8. IPCL challenged the aforesaid clauses primarily on the ground that they were contrary to the Government pricing orders dated 30.01.1987, 31.12.1991, 18.09.1997, 30.09.1997 and 20.06.2005, whereby the price of natural gas was fixed. Further, the allocation letter by the MoPNG mandated that transportation of gas to IPCL's plant had to be through IPCL's own pipelines from the ONGC Metering Station. Thus, it was contended that recovery of 'loss of transportation charges' by GAIL was arbitrary and unfair. IPCL did not have the option to transport gas through GAIL's pipelines due to the mandate of the contract and the allocation letter. IPCL also challenged the aforesaid clauses on the ground of unequal bargaining

power. It was contended that GAIL occupied a monopolistic position in respect of supply of gas at the time of entering into the contract. Additionally, IPCL had a limited time frame to enter into the contract, particularly as a hefty investment had been made in setting up the gas cracker plant. As a consequence, IPCL claimed refund of the 'loss of transportation charges' paid by them. The Single Judge quashed these clauses vide order dated 19.09.2006 as being contrary to the pricing orders, and thus unfair and unconscionable.

9. GAIL, being aggrieved by the said judgment, preferred a Letters Patent Appeal. In the meantime, IPCL also preferred an application for clarification/modification, seeking directions to GAIL to refund loss of transportation charges, as apparently no such specific direction had been passed by the learned Single Judge. IPCL's application was allowed by an order dated 11.04.2007, predicated on the reasoning that while upholding the claim of IPCL, inadvertently the direction of refund had not been specifically passed. This latter order also came to be assailed before the Division Bench by GAIL.

10. The Division Bench affirmed the Single Judge's observations vide order dated 17.06.2008, thereby leading to the present appeal by GAIL.

GAIL's Plea:

11. At the outset, Mr. Tushar Mehta, learned Solicitor General, appearing for GAIL, contested the very maintainability of the writ petition filed by IPCL. He contended that the parties had provided for arbitration before the Permanent Machinery of Arbitrators in the Bureau of Public Enterprises under Clause 13.1 of the contract. Further, the matter was stated to be purely contractual in nature, involving the enforceability and validity of the terms of the contract, and no case was made out for violation of Fundamental Rights. The presence of a public law element was a *sine qua non* for the exercise of writ jurisdiction, as elucidated in ***Joshi Technologies International Inc. v. Union of India & Ors.***[1]. The endeavour of IPCL, by invoking such writ jurisdiction, was alleged to be an attempt to bypass the law of limitation, as the contract had been signed way back in 09.11.2001. In any case, the writ petition was also barred by limitation, having been filed on 09.03.2006, i.e. after a period of five years. Reliance was placed on ***Lipton India Ltd. & Ors. v. Union of India & Ors***[2] to contend that

1(2015) 7 SCC 728.
2(1994) 6 SCC 524.

communications between the parties about levy of transportation charges following the signing of the contract could not extend the period of limitation.

12. He stated that even if the petition was maintainable, the clauses could not have been invalidated by the High Court. It was pointed out that there were no differences in the bargaining positions of the two organisations where one could be said to be more powerful. Both organisations were public sector enterprises at the relevant time. The contract was stated to be carefully negotiated and reflected the mutual consensus between the parties, as was evident from the *inter se* communications at the pre-contractual stages. Thus, the clauses could not thus be treated as arbitrary or unfair. IPCL's and the High Court's reliance on ***Central Inland Water Transport Corporation Limited v. Brojonath Ganguly***[3] was misplaced as a principle applied to a service contract between the employer and the employee could not be imported to a commercial contract, and that too between two public sector enterprises. The alternative plea was that even were the impugned judgments to be sustained, the amount of refund could not be granted beyond the period of limitation, i.e. three years after the signing of the contract.

3(1986) 3 SCC 156.

13. The basic defence and justification for levy of loss of transportation charges was that GAIL had made a huge investment in constructing its own infrastructure, i.e. the HBJ pipeline (Hazira - Bijaipur - Jagdishpur). GAIL had a limited number of opportunities to supply gas to consumers and, thus, an equally limited number of opportunities to levy transportation charges to recover its legitimate maintenance costs. The allotment had pre-supposed the imposition of such transportation costs.

14. Finally, it was emphasized that the learned Single Judge had become *functus officio* having pronounced the judgment dated 19.09.2006. Thus, there was no question of directing a refund through a clarification/modification application. Such a refund raised questions of unjust enrichment, as IPCL would have passed on the 'loss of transportation charges' paid by them to their own customers. As to what constituted unjust enrichment, the Solicitor General sought to refer to ***Rameshwar & Ors. v. State of Haryana and Ors***[4].

IPCL's Defence:

15. Dr. A.M. Singhvi, learned Senior Counsel, sought to defend the impugned order and the maintainability of writ proceedings with respect to a

4(2018) 6 SCC 215.

private contract. The transportation charges were alleged to have a discriminatory effect as IPCL was being treated on par with consumers who were using the HBJ pipeline, whereas IPCL was transporting the gas through its own pipelines. That being the plea, it was urged that the writ jurisdiction was the appropriate remedy as there were questions of arbitrary state action violating the mandate of Article 14. This was notwithstanding the fact that the issue arose from a contract between the parties, as was also the case in ***ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India & Ors.***[5] It is in these circumstances that the High Court exercised its writ jurisdiction notwithstanding the availability of an alternative remedy, i.e. the arbitration clause or through the civil suit. ***ABL International***[6] was also relied on to show that consequent monetary relief could be granted where such a writ petition was successful.

16. With respect to striking down a contractual clause, Dr. Singhvi was at pains to point out that the ambit of ***Brojonath Ganguly's***[7] case had been expanded and was not only restricted to service disputes. In ***Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.***[8], this Court

5 (2004) 3 SCC 553.
6 (supra).
7 (supra).
8 (2021) 10 SCC 401.

considered the bargaining capacity of contracting parties in a commercial dispute as there was a seemingly unfair or unreasonable clause in the contract.

Discussion:

17. We have considered the arguments and counter arguments of the counsel for the parties, and also examined whether the present case is a fit one for this Court to exercise jurisdiction under Article 136 of the Constitution of India, albeit leave having been granted.

18. In our view, the dispute is within the following parameters. First, whether the writ petition filed by IPCL challenging Clauses 4.04 and 10.01 of the contract was maintainable. Second, assuming such a petition was maintainable, whether the High Court could have invalidated the aforementioned clauses on the ground of unequal bargaining power and arbitrariness / unfairness. Third, whether monetary relief in the form of refund could have been granted after the order dated 19.09.2006 was passed.

19. Although the dispute arises from a commercial contract, we find that the writ petition challenging the clauses was maintainable. It is not disputed that GAIL is a Public Sector Undertaking and thus qualifies under the

definition of 'State' as per Article 12 of the Constitution. At the time of entering into contract, GAIL was enjoying a monopolistic position with respect to the supply of natural gas in the country. IPCL, having incurred a significant expense in setting up the appropriate infrastructure, had no choice but to enter into agreement with GAIL. Thus, there was a clear public element involved in the dealings between the parties. Further, writ jurisdiction can be exercised when the State, even in its contractual dealings, fails to exercise a degree of fairness or practices any discrimination. We are fortified in our view by this Court's decision in ***ABL Enterprises***[9] and ***Joshi Technologies***[10]. In the present case, GAIL's action in levying 'loss of transportation charges' was *ex facie* discriminatory, insofar as IPCL was mandated to build its own pipeline in terms of the allocation letter and was not using GAIL's HBJ pipeline at all. Thus, it cannot be said that merely because an alternative remedy was available, the Court should opt out of exercising jurisdiction under Article 226 of the Constitution and relegate the parties to a civil remedy.

20. Now, we come to the validity of the clauses under which 'loss of transportation charges' were levied. In our view, it would be extremely

9 (supra).
10 (supra).

unfair and unjust, apart from being an arbitrary action in violation of Article 14 of the Constitution of India that IPCL is charged for loss of transportation charges when it is mandated to lay down its own pipelines and not to transport the gas through the HBJ pipeline. This action also violates the principle of non-discrimination enshrined in Article 14. IPCL, which is using its own pipelines, is being treated at par with other commercial entities who are carrying gas through the HBJ pipeline laid down by GAIL. This is more so when the pricing orders by the concerned authority, i.e. MoPNG stipulate a fixed price for natural gas.

21. On a basic principle, it cannot be doubted that once GAIL has laid down the pipeline, it is entitled to structure in its cost in the contract. However, the issue is not simply that. We are faced with a scenario where two public sector enterprises entered into a contract in pursuance of the allocation made by the MoPNG. There was also a time constraint for IPCL. After incurring a heavy expenditure in the construction of the Gandhar Plant, IPCL had very little choice but to enter into the contract. What is of most significance is that IPCL was bound to follow the allocation terms provided by the principal authority, i.e., MoPNG. Thus, as pleaded by IPCL, they were faced with a "Hobson's choice", where they had to either give up

the contract or accept the clauses levying transportation charges. On a conspectus of the above factors, it can be said that GAIL exercised an unequal bargaining power at the time of signing the contract.

22. In fact, the contractual exercise of providing such a clause runs contrary to every commercial and common sense and is manifestly arbitrary, as IPCL is not being charged under any general terms but for a specific purpose. This purpose cannot exist in the contract in view of the master authority, i.e., the Union of India, providing to the contrary.

23. GAIL may have made a huge investment in constructing the HBJ pipeline, but at the same time IPCL had also made a huge investment in constructing its own pipelines. This was not an option but a mandate of the allocation letter issued by the MoPNG. Thus, it is difficult for us to accept that on the one hand IPCL must lay down its own pipelines, and simultaneously pay for loss of transportation through the HBJ pipeline even without using it. We do not accept GAIL's contention that the charges could be levied merely because GAIL had laid the HBJ pipeline for users generally.

24. Further, we may note that the direction for refund vide order dated 11.04.2007 arose as a consequence of quashing of the clauses. It was in the nature of a sequitur and, thus, we do not find any reason to interfere with the same.

25. We, however, now turn to whether the whole amount is to be refunded. The alternative argument of the learned Solicitor General was that the period of limitation, in any case, could not have been expanded in granting the refund. No doubt the issue of loss of transportation charges was flagged by IPCL in various communications exchanged *inter se* the parties subsequent to the signing of the contract. That, however, cannot grant a license to IPCL to approach the court as and when it considers proper. Thus, while upholding the quashing of the clauses, we are of the view that the refund should be restricted to a period of three years prior to the date of the filing of the writ petition on account of IPCL's delay in approaching the court. Here we draw strength from judgement in ***Lipton India Limited & Ors.***[11] case referred to aforesaid, which observed that the writ petition was entertained because of the plea of discrimination but then the relief was restricted to what would have been claimed in the suit.

Conclusion:

11 (supra).

26. We thus dismiss the appeal(s) qua the aspect of maintainability of the writ petition and the quashing of the clauses dealing with loss of transportation charges in the case of IPCL. However, we deem it fit to restrict the relief to period of three years insofar as refund is concerned from the date of filing of the writ petition, i.e., 09.03.2006.

27. We are also of the view that this refund should be made within a period of two months from today, failing which it will carry interest at 8 per cent per annum from the date it became due. If the refund is made within the stipulated time, we are not inclined to levy interest on the amount due.

28. The appeals are allowed in the aforesaid terms leaving the parties to bear their own costs.

.....J.
[Sanjay Kishan Kaul]

.....J.
[Abhay S. Oka]

New Delhi.
February 08, 2023.