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**(2013) 01 GAU CK 0008**

**In the Gauhati High Court**

**Case No :** Arbitration Application No's. 20, 22 and 23 of 2012

Assam Gas Company Ltd.

APPELLANT

Vs

Sankar Tea Company Pvt. Ltd. and Others

RESPONDENT

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**Date of Decision :** 04-01-2013

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 21, 37(1)(a), 9

**Citation :** (2013) 3 ARBLR 378 : (2013) 2 GLD 535 : (2013) 1 GLT 961

**Hon'ble Judges :** B.D. Agarwal, J

**Bench :** Single Bench

**Advocate :** S.N. Sarma and Mr. A.N. Choudhury, for the Appellant; B.C. Das, Mr. D.N. Bhattacharyya, S.S. Dey and Mr. S. Banik, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

B.D. Agarwal, J.—Since a common question of law is involved in all these three arbitration appeals I propose to dispose of all these appeals by this common judgment. The appeals have been filed u/s 37 (1) (a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act") against the judgments dated 22.8.2012, 31.8.2012, and 7.9.12 passed by the learned District Judge, Tinsukia, Assam putting the seal of the court on the interim orders passed in Misc. Arbitration Case Nos. 17 of 2010, 1 of 2011 and 2 of 2011. By these impugned judgments, the court has directed the appellant to maintain the "status quo" of supply of gas to the factories of the respondents. The impugned orders have been passed by the learned District Judge on the basis of an applications filed by the respondents u/s 9 of the Arbitration Act

2. Heard Sri. S.N. Sarma, learned Sr. counsel for the appellant and Shri BC Das, learned Sr. Advocate and Sri SS Dey, learned counsel for the respondents. Also gone through the pleadings of both the parties; impugned orders and documents annexed with the pleadings.

3. The moot question that arises for consideration before this court is as to

whether a prohibitory and protection order can be passed by the Court u/s 9 of the Arbitration Act after the expiry of the period of contract

4. Shorn of the details, the appellant and the respondents had entered into agreements whereby M/s. Assam Gas Company Ltd., a Government of Assam undertaking, agreed to supply gas to the factories of the respondents for a certain period at a fixed price as per the terms and conditions stipulated in the agreements. It may be mentioned herein that the stipulations in all the agreements are identical.

5. In the case of M/s. Sankar Tea Company Pvt. Ltd., the agreement was executed on 23.8.2003 for a period of five years. The agreement of M/s. J.M. Agro Industries was also for a period of 5 years with effect from 25.9.2003. However, the agreement of M/s. Evergreen Tea Pvt Ltd. was for a period of 10 years. In this way, the contract agreements expired long back in the year 2008 so far as two respondents are concerned and so far as M/s. Evergreen Tea Private Ltd. is concerned, though the agreement is dated 18.11.1999 the same expired on 15.6.2010 due to some delay in the commencement of the agreement. After the expiry of the period of contract, the appellant wrote to the tea companies to renew their agreements. In the proposal of renewal of the agreements, the appellant proposed a new rate of transmission charges of the gas and also stipulated that the tea companies shall have to pay the cost of the gas as per price fixed by the Ministry of Petroleum and Natural Gas.

6. There were exchanges of letters from both sides. The respondents wanted certain clarifications regarding fixation of the quantity and price of gas to be supplied to them, whereas, the appellant was insisting for execution of new agreements on their own terms with a veil threat of discontinuation of supply of gas in the absence of any agreement. Hence, the respondent companies filed separate applications u/s 9 of the Arbitration Act seeking a direction to Assam Gas Company to continue to supply gas to the petitioners' factories and also to restrain Assam Gas Company from withholding supply of gas. Pursuant to these applications, interim orders were passed directing the appellant company to continue to supply gas, subject to the condition that the companies shall make payment of the bills raised by Assam Gas Company. The interim orders were subsequently made absolute, which are under challenge in these appeals.

7. The controversy in the appellants revolves around Clauses 10, 17 and 19. Clause 10 relates to fixation of gas price; Clause 17 relates to arbitration of the dispute and Clause 19 is regarding tenure of the agreement. For better appreciation of the contentious arguments of the learned counsel for the parties it would be just and proper to reproduce the relevant portions of the aforesaid Clauses:

#### 10.00 Gas Price

10.01. The Consumer shall pay to the Company the price of gas Rs. 1700.00 (Rupees One Thousand Seven Hundred) only per 1000 SCUM of gas delivered

plus Royalty, taxes and other levies, etc., as applicable from time to time: Price discount if any agreed to by Govt. of India for this case specifically will also be applicable.

10.01.01. The price of gas as above shall be subject to any revision effected by Ministry of Petroleum and Natural Gas, Govt. of India/Oil India Limited, from time to time.

10.01.02 \*\*\*

10.01.03 \*\*\*

## 17.00 Arbitration

17.01. Any dispute or difference arising out of or in connection with this Agreement including any dispute or difference" regarding its interpretation or any Clause thereof, shall be referred to the Board of Directors of Assam Gas Company Limited. The Consumer will nominate a representative(s) and at the discretion of the Consumer a Lawyer, who will discuss about the disputed matters with the Board of Directors in a meeting. The decision arrived at by the Board shall be final and binding on the Company as well as on the Consumer.

17.02. Not with standing dispute or difference which might have been referred to the arbitration as mentioned in Clause 17.01, all obligations under these agreement shall continue to be fulfil by both Company and Consume unless otherwise directed by the Company in writing, except as provided expressly in the Agreement itself.

## 19.00 Terms

19.00. This Agreement shall be valid in force and binding on the Company as well as the Consumer for a period of 5 (Five) years from the date of commencement of supply of gas by the Company to the Consumer. On the expiry of this period of 5 (Five) years both the Company and the Consumer may enter into a fresh Agreement for the transportation of gas, and the transmission cost will be revised inter-alia keeping in view the depreciated cost of the pipeline by then and escalated cost of operation, maintenance, overheads, etc.

8. Sri Sarma, learned Sr. counsel for the appellant submitted that contract for supply of gas was for a definite period of 5/10 years and, as such, Section 9 of the Arbitration Act cannot be invoked in relation to proposed terms and conditions of the new agreement, The learned counsel further contended that the arbitration clause, inserted in the previous agreement, has to be confined to any dispute or difference arising out of that agreement and cannot be extended to the proposed agreement

9. In support of the submission, the learned Sr. counsel referred to the judgments of the Hon''ble Supreme Court rendered in the case of Gaya Electric Supply Co. Ltd. Vs. The State of Bihar, : The Oil and Natural Gas Commission and another Vs. The Association of Natural Gas Consuming Industries of Gujarat and

others, etc. etc., and M/s. Rickmers Verwaltung GMB H Vs. The Indian Oil Corporation Ltd., .

10. Sri Sarma, learned Sr. counsel for the appellant also submitted that under the policy of the Central Govt. a consumer is entitled to certain quantity of natural gas at a subsidised rate, known as Administered Price Mechanism ("APM.") and if tire consumer exceeds Consumption of committed quantity of gas he is liable to pay "Non A.P.M." rates. According to the learned counsel if the impugned orders are sustained it would amount to supply of gas to the respondents irrespective of the quantity of gas as consumed by them. The learned counsel for the appellant has also submitted that the appellant is drawing/purchasing gas from Oil India Ltd. and it is merely a transmission agency and has little role in fixation of the price of the gas. According to the learned counsel, since the respondents are drawing excess quantity of gas they are liable to pay "non A.R.M." rates but the impugned order is silent in this regard. The learned counsel for the appellant drew my attention to the Debit Notes dated 2.4.2008 and 10.4.2008 issued by Oil India Ltd. for excess drawal of natural gas making Assam Gas Company liable for payment of gas price at "non-A P.M." rates.

11. Per contra, the learned counsels for the respondents strongly urged that the terms and conditions of the proposed agreements cannot be read in isolation sans the terms and conditions of the previous agreements. To put it differently, the learned counsels for the respondents submitted that since there is specific mention of renewal of the agreement in clause 19 any dispute arising out of fixation of price of gas or transmission charges, even for new agreement, the same would come within the ambit of a dispute arising out of the existing agreement Sri Dey, learned counsel appearing for the respondents in Arbitration Appeal Nos. 20 and 23 submitted that the respondent companies are being supplied natural gas from Doomdooma Gas Grid and the said Grid has neither purchased excess quantity of gas from Oil India Ltd. nor excess quantity of gas has been consumed in their factories. In support of this submission, the learned counsel referred to a reply by OIL on 1.11.2012. Since this aspect was not raised in the trial court and since I have decided to confine only on the legal issue about the maintainability of the applications u/s 9 of the Arbitration, I am not examining the question as to whether the respondents are liable to pay APM or "non-APM" rates.

12. On the other hand, Sri Das, learned Sr. counsel appearing in Arbitration Appeal No. 22 of 2012 submitted that M/s. Evergreen Tea Pvt. Ltd. did not raise any objection with regard to the fixation of price of gas or transmission cost but merely requested the appellant to consider their capital contribution in laying of the pipe line during the previous term. However, the appellant has not considered the representation and, instead, is contemplating to discontinue gas supply.

13. In support of their submissions, regarding jurisdiction of the court to entertain their applications U/s. 9 of the Act, the learned counsels for the

respondents cited the judgments of the Hon"ble Supreme Court rendered in the case of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, , Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, and a judgment of Gauhati High Court rendered in the case of Union of India (UOI) Vs. B.K. Construction, .

14. As could be gathered from the interim orders as well as final judgments passed by the learned District Judge, the prohibitory and protection orders have been passed holding that the balance of convenience lies in favour of the petitioners in view of the previous agreements and that the petitioners would suffer irreparable loss if supply of gas is discontinued by the appellant company till the dispute is resolved by way of arbitration.

15. The learned District Judges has rejected the objection of Assam Gas Company regarding non-maintainability of applications u/s 9 of the Arbitration Act on the basis of the judgment of the Hon"ble Supreme Court in the Case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., which are reproduced below:

17, There are two other factors which are weighing heavily with us and which we proceed to record: As per the law laid down by this Court in Sundaram Finance Ltd. an application u/s 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In Sundaram Finance Ltd. itself the Court has said:

It is true that when an application u/s 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings.

Section 9 permits application being filed in the court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word "before" means, inter alia, "ahead of; in presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term "before" must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or "within-sight" certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended (as Sundaram Finance Ltd. puts it) and are "positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection", the order passed by the court should fall within the meaning of the expression

"an interim measure of protection" as distinguished from an all-time or permanent protection.

16. Essentially, in the case of Sundaram Finance Ltd the issue before the Apex Court was that of jurisdiction of the court to pass an interim order even before commencement of an arbitral proceeding and not the issue of passing of interim orders after the determination and expiry of the contract agreement. In the aforesaid case, the dispute between the parties related to non-payment of hire purchase installments as per the agreement. Besides this, the Arbitration Clause was clothed with the following words.

All disputes, differences and/or claims, arising out of this hire-purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Managing Director of the owner. The award given by such an arbitrator shall be final and binding on all the parties to this agreement....

17. Referring to Section 21 of the Act, their Lordships, in the case of Sundaram Finance Ltd. (supra), have held that an arbitral proceeding commences on the date on which a request for referring the dispute to an arbitrator is made. The Apex Court also recognised and took into consideration Article 9 of the UNCITRAL Model Law which also provided that there: should be a Clause in the arbitration agreement that a party can request a court for an interim order before or during arbitral proceedings. In the light of the facts and circumstances of the case, the court held that the trial court had jurisdiction to entertain an application u/s 9. The authority is distinguishable on the sole ground that in the case at hand the dispute is not related to any subsisting or alive agreement, The dispute is out and out for settlement of terms and conditions of the proposed agreement.

18. The case of Olympus Superstructures (Supra) is also based on different footing. In that case also, the arbitral Clause permitted the disputes to be referred for arbitration during the continuance of the agreement or even after its determination. The dispute was related to non-payment of installments of apartment flats. The said case is arising out of an award and not against any interim order. The award was subsequently challenged in the court raising a question of jurisdiction of the arbitrator to pronounce award against certain claims in view of two arbitration Clauses in the same agreement and their relativity to refer the dispute for arbitration. In that context, the Hon''ble Supreme Court was examining the arbitrator's jurisdiction. In other words, this judgment is not an authority u/s 9 of the Arbitration Act.

19. The judgment of Tarapore and Company (Supra); relied upon by the respondents, also cannot be said to be a judgment to decide the issue for passing an interim order u/s 9 of the Act with respect to terms and conditions of a proposed agreement. In the cited authority, the contractor company was

allowed to import equipments and know-how from abroad at his own cost up to Rs. 2 crores (Rupees two crores) only in foreign exchange. During the continuance of the agreement the prices of equipments gone up due to variation in the rate of foreign exchange and a claim for reimbursement of the increase of the cost of equipments was laid. This claim was resisted by the respondents on the ground that it was out of purview of Clause 40, which provided reference of disputes to the sole arbitrator arising out of execution of the contract and not for importing machines from abroad. After referring to Clauses 31 and 40 of the agreement, the Hon''ble Supreme Court held that the claim of the contractor on the basis of price escalation of the equipment had arisen out of the contract or it was otherwise in execution of the contract. Their Lordships further held that the claim was allowed on the basis of arbitration clause which was "widely worded". In this way, the dispute was intrinsically arising out of a subsisting contract and not applicable in the case before me. Similar is the situation with regard to the judgment of this court rendered in the case of BK Construction (Supra). This is also a judgment arising out of various claims under a contract agreement and not an authority u/s 9 of the Arbitration Act.

20. On the other hand, in the case of Gaya Electric Supply Co. (supra), the Apex Court has observed that no dispute can be referred for arbitration de-hors to-the contract clause. Similarly, in the case of O.N.G.C. (supra), the Hon''ble Supreme Court has held that there cannot be any order of supply of gas at a price demanded by a party without any contract. In the case before me the contract agreement is yet to be executed between the parties. Be that as it may, in this set of appeals, I am not examining the issue with regard to the rate of gas or transportation cost that can be charged by the appellant. The question of fact is yet to be decided by an appropriate authority.

21. In the case of M/s. Rickmers (supra), the Hon''ble Supreme Court was examining as to whether correspondences exchanged between the parties can form a contract. In this cited authority, their Lordships have held that it is beyond the purview of the court to create a contract. The relevant observations of the Apex Court are re-produced below:

In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is

to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

22. The aforesaid authority was cited by the learned counsel for the appellant to buttress his submission that so far there is no conclusive commitment by either party, far less executing a formal agreement and, as such, there cannot be any direction from the court to supply gas at the previous rates.

23. In view of the aforesaid discussions, it appears to me that there cannot be any legal embargo for the court to entertain an application u/s 9 of the Arbitration Act and pass interim order (s) even before a formal arbitration proceeding is drawn up, provided the appellant convinces the court that it has the intention to refer the dispute for arbitration. No doubt, in the case before me, the parties have already written letters to the appellant seeking certain clarifications to formulate the terms and conditions of the new agreements. However, the fact is that there does not appear to be any dispute arising out of the previous agreements nor is there any indication of referring the disputes for arbitration by the appellant. In this way the facts are against the theory of any contemplated arbitration proceeding. I have already mentioned earlier that the appellant's case is that neither is there any dispute arising out of any contract for referring the same to the arbitrator nor is there any scope of passing interim or final orders by the court u/s 9 of the Act.

24. The arbitration Clause of the agreement between the parties clearly spells out as to what dispute and differences can be referred to the Board of Directors to resolve the same. Clause 17.01 unambiguously speaks that any dispute or difference arising out of or in connection with this agreement (emphasis supplied) can be referred for settlement by way of arbitration. It is difficult to comprehend that just because Clause 19 provides for a fresh agreement for supply of gas it can be construed that until a new agreement is executed the previous agreement shall remain in force. If presumption can be drawn by the court it would amount to rewriting the terms of the previous agreement, where there was no such stipulation. Besides this, Clause 10 provides revision of price of gas at any time during the subsistence of the agreement. Even otherwise, in Clause 19 also it has been provided that the transmission cost may be revised in the new agreement. In this way, I hold that though the terms and conditions of the expired agreement may have relevance in formulating the new agreement, but it does not mean that the new agreement should be on the same terms and conditions. Besides this, I hold that till new agreements are executed between the parties there is no scope of referring the proposed terms and conditions of the new agreement for arbitration and on the same principle there is no scope for invoking section 9 of the Arbitration Act. In my view, the remedy for the petitioners/respondents lies in a different forum and in different form other than

an application u/s 9 of the Arbitration Act

25. For the reasons assigned hereinabove I hold that the impugned judgments have been passed by the learned District Judge without any jurisdiction. Consequently, the impugned judgments and interim orders are hereby set aside. In the result all the three arbitration appeals stand allowed.