

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

F-125

O.M.P. No.75 of 2007

GAS AUTHORITY OF INDIA LIMITED

..... Petitioner

Through: Mr. Sanjay Jain, Senior Advocate with
Mr. Buddy A. Ranganadhan, Mr. T.V.
Ratnam, Ms. Namisha Gupta & Ms.
Sonam Singh, Advocates

versus

BOSS PROFILES LIMITED

..... Respondent

Through: Mr. N. Ganpathy & Mr. Atul N.,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
16.11.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) is to an Award dated 1st November, 2006 passed by the sole Arbitrator in the disputes between the Petitioner, Gas Authority of India Limited (GAIL) and the Respondent, Boss Profiles Limited (BPL) arising out of a Gas Supply Contract (GSC) dated 11th March, 1996 ('Contract 1') and a subsequent contract dated 5th September, 2001 ('Contract 2') entered into between the parties.

2. The background facts are that under Contract 1 GAIL was to supply BPL natural gas from Cauvery Basin for BPL's project for manufacture of ceramic profiles in Karaikal in the Union Territory of Pondicherry. Pursuant to application made by BPL, its request for supply of gas was considered by the Gas Linkage Committee and an allocation of 7000 cubic meters of gas

per day was made for its plant on fall back basis. This was communicated to BPL by GAIL by letter dated 14th December, 1995. Thereafter, the Contract 1 was entered into on 11th March, 1996 in terms of which BPL was bound to pay GAIL Minimum Guaranteed Offtake (MGO) charges in the manner specified in Article 5.02. This was an addition to BPL keeping a security deposit of Rs.1,78,500/- with GAIL and a bank guarantee in the sum of Rs.5,35,500/- under Clause 2.02(i) of Contract 1. The supply of gas under Contract 1 was to commence on 1st May, 1997 for a period of over three years ending on 31st December, 2000. In the event that drawal of gas by BPL was not started within three months of the date of commencement indicated in Article 2.01 of Contract 1, the security deposit and bank guarantee would stand forfeited and GAIL “shall have unrestricted right to terminate the contract.” Under Clause 2.02(iv) the security deposit and bank guarantee were to be refunded/discharged by GAIL on commencement of supply of gas subject, however, to the drawal commencing within three months of the date of commencement and opening of irrevocable letter of credit (LC) in terms of Article 11.01 of Contract 1. In addition to the above, BPL was to pay GAIL monthly transportation charges of Rs.1,28,783/- per month, which was to be increased at 3% on yearly rest basis with effect from 1st April, 1998.

3. Admittedly, BPL was unable to commence drawing of gas within three months as stipulated in Contract 1. On 4th October, 1996 BPL wrote to GAIL stating that it would be in a position to draw gas from May, 1997, which was the contractual date of drawal. On 5th February, 1997 GAIL confirmed to BPL that it would be in a position to commence gas supply from 1st May, 1997 as indicated in Contract 1 and requested BPL to plan to draw gas accordingly.

4. BPL wrote to GAIL in March, 1997 stating that it was having difficulties in commencing the project and requested GAIL to amend the earlier date of gas drawal from 1st May, 1997 to 1st November, 1997. In the said letter BPL admitted that it was bound to pay the MGO charges, but pleaded inability to do so citing difficulties. With GAIL not accepting the above request, BPL offered by its letter dated 2nd September, 1997 to pay the MGO and transportation charges along with interest, if any, for the period from May, 1997 till April, 1998 in 12 instalments beginning from April, 1998. This offer was accepted by GAIL and an undertaking dated 16th December, 1997 was executed by BPL, agreeing to pay the outstanding amounts and gas supply bills regularly from 1st April, 1998. BPL furnished 12 post dated cheques (PDCs) for a total sum of Rs.67,25,042 payable by 1st of each calendar month beginning 1st April, 1998.

5. However, BPL failed to draw gas as agreed. As a result on 21st March 2000 GAIL recommended to the Ministry of Petroleum and Natural Gas (MoPNG), Government of India, that the gas allocation in favour of BPL be cancelled. On 21st March, 2000 MoPNG informed BPL that the allocation of 7000 SCMD of natural gas in its favour stood cancelled with immediate effect. A corresponding letter was written on 12th June, 2000 by GAIL to BPL in which it pointed out that as on 3rd June, 2000 a sum of Rs.1,70,56,638/- and interest @ 24% per annum till the realization was outstanding. Further, in view of the decision of MoPNG communicated on 21st March, 2000, GAIL stated that it was constrained to predetermine Contract 1 with effect from 21st March, 2000.

6. A detailed representation was made by BPL on 13th June, 2000 wherein it

admitted its liability to pay MGO and transportation charges, but pleaded its inability to do so on account of financial difficulties. It requested GAIL for waiver of MGO and transportation charges for the unused period of gas. Further representations were made by BPL on 17th August and 7th November, 2000. On 16th August, 2001 the MoPNG approved reallocation of 7000 SCMD of natural gas to BPL subject to the conditions that (a) BPL would sign the necessary GSC with GAIL; (b) BPL would pay requisite transportation charges for gas supply; and (c) BPL would liquidate all outstanding dues of GAIL.

7. On 5th September 2001, pursuant to the above approval of MoPNG, BPL and GAIL entered into a fresh GSC (Contract 2), which set out clearly in its recitals that BPL had defaulted in payment of MGO and transportation charges under Contract 1 and further that BPL had agreed to clear the outstanding under Contract 1 as a condition of being reallocated gas supply under Contract 2. It was agreed that BPL would pay Rs.40 lakhs as advance amount for liquidating part of the outstanding under Contract 1 and the balance would be payable in 34 equal monthly instalments (EMIs).

8. Admittedly, after making the down payment of Rs.40 lakhs and a few instalments, BPL defaulted in making payments. On 12th September, 2001 Oil and Natural Gas Corporation Ltd. (ONGC) wrote to GAIL requesting for remittances of the MGO charges. It may be mentioned here that GAIL is itself not a producer of gas. It was ONGC that was producing the gas which was then being supplied by GAIL to BPL. Consequently the MGO and transportation charges collected from BPL had to be remitted by GAIL to ONGC. On 13th May, 2002 BPL wrote to GAIL admitting its liability to pay

MGO and transportation charges and admitting to making default in payments due to financial difficulties. It again requested for waiver of the said charges under Contract 1. This was reiterated on 29th January, 2003 and 23rd May, 2003. On 19th April, 2004 GAIL wrote to BPL asking it to clear the outstanding dues within 7 days, failing which GAIL would be constrained to suspend/ terminate the gas supply to BPL.

9. On 30th July, 2004, BPL filed O.M.P. No.247 of 2004 in this Court under Section 9 of the Act. On 9th August, 2004 an order was passed restraining GAIL from discontinuing gas supply to BPL, subject to BPL making payment of all outstanding dues. Further, it was directed that BPL would make an offer in writing within ten days for liquidating dues of approximately Rs.2 Crores as per Contract 2.

10. On 17th August, 2004 BPL filed W.P. (C) No.13907 of 2004 in this Court challenging certain provisions of Contract 1 as being opposed to public policy. On 20th August, 2004 a learned Single Judge of this Court dismissed the said writ petition as misconceived and also imposed costs on BPL. It was also noticed that BPL had also invoked the jurisdiction of the Court by way of a petition under Section 9 of the Act.

11. At the hearing of O.M.P. No.247 of 2004 on 31st August, 2004 it was brought to the notice of the Court that no offer in writing had been made by BPL to GAIL as required by the order dated 9th August, 2004. Accordingly, the Court vacated the said interim order. Thereafter, BPL filed I.A. No.6626 of 2004 in O.M.P. No.247 of 2004 seeking permission to withdraw the O.M.P. with liberty to file a fresh petition. In the said application, BPL filed

an affidavit on 22nd September, 2004 admitting on oath its inability to pay the MGO and transportation charges. The said affidavit read as under:

“I, Susheel Pandita, son of Shri Shamboo Nath, aged 39 years, res. 85/10 Nanak Nagar, Jammu, Presently at 515/B2 Vashumdhra in Delhi – 110096.

I, the deponent above named do hereby solemnly affirmed and state as:-

1. That I am the Area Sales Manager of the Petitioner Company am fully conversant with the facts and circumstances of the authorized to depose the same on behalf of the Petitioner.

2. I say that an Application bearing No.1.A. No.6266/2004 withdrawal of the above mentioned petition came up for hear on 21st September, 2004. The Hon’ble Court was pleased to grant the Respondents to file the reply for the same.

3. I say that due to the inability to meet the arrears of MGO an transportation charges in terms of the contract dated 5.9.2001. A gas supply to the Petitioner’s plant at Karaikal was disconnected.

4. I say that due to difficulties and urgent need to avoid the consequences out of the in operation of the plant, at representation dated 10.9.2004 was made the Hon’ble Minister of Petroleum Natural Gas, Government of India requesting for waiver of the demanded from the Petitioner by way of MGO charges together interest.

5. I say that the Petitioner agrees to withdraw the above Writ Petition and shall not raise the dispute on the issue of Guaranteed Offtake (MGO) charges.

6. I say that the Petitioner undertake to abide by the decision Ministry on the representation and in the event the decision is beyond three months, from the date of the aforesaid representation the Petitioner shall commence paying such dues remained outstanding in monthly installments as may be prescribed by GAIL.”

12. On the basis of the aforementioned affidavit GAIL restored the gas supply to BPL on 2nd October, 2004. However, BPL continued to default in settling the outstanding amounts. Notices were sent by GAIL to BPL on 16th November and 21st December, 2004. On 29th December 2004, BPL forwarded a cheque in the sum of Rs.10 lakhs as interim payment and requested for extension of time by one month i.e. till 31st January, 2005. This was acceded to by GAIL by its letter dated 10th January, 2005. Again on 19th January, 2005 BPL sought waiver of the MGO. GAIL declined the request and by letter dated 10th February, 2005 required BPL to honour its obligations. On 24th February 2005, the MoPNG wrote to GAIL stating that the settlement of dues by BPL ought to be in terms of the GSC. This was communicated by GAIL to BPL on 4th March, 2005. On 24th March, 2005 BPL tendered a cheque of Rs.5 lakhs as *ad-hoc* payment and admitted that it was bound by its commitment to begin clearing the outstanding demand of GAIL at Rs.1 lakh per month with effect from May 2005.

13. On 26th March, 2005 BPL invoked the arbitration clause, but now sought to contend that the undertaking given by it to the Court was “pending consideration and, therefore, the dispute concerning the MGO charges still subsists.” BPL filed an application under Section 9 of the Act in the High Court at Madras on 27th March, 2005. On 1st April, 2005 an order was passed by the High Court of Madras restraining GAIL from disconnecting the gas as long as BPL paid the current charges.

14. Meanwhile, the learned Arbitrator entered upon reference. BPL filed its statement of claims in which it sought to following reliefs:

“(a) an award for refund of Rs. 1,17,83,000/- paid by BPL towards the demand of GAIL;

(b) interest on the above @ 12% p.a.; and

(c) a declaration that GAIL’s demand aggregating to approx 2.98 crores was illegal and not payable by BPL.”

15. GAIL did not file any counter claims. However, in its written statement of defence it averred BPL owed GAIL over Rs. 186 lakhs. The parties agreed not to lead any evidence and argue the matter on the basis of the affidavits filed. The learned Arbitrator framed the following issues for determination:

- “1. When does the MGO and Transportation charges became payable? Whether on the date set down in the Contract or on the actual drawal of gas?
2. Whether the Claimants are entitled to refund of Rs.1,17,83,000/- being the amount paid towards MGO and Transportation Charges under the Contract dated 11 March 1996 with interest?
3. Whether the undertaking given by the Claimants on 16 December 1997 and the Contract dated 5 September 2001, particularly in relation to payment of MGO and also Transportation Charges, are vitiated being unjust, unreasonable and arbitrary and also opposed to public policy due to unequal bargaining power between the Parties thereto?
4. Whether there is an arbitrable dispute between the Parties in view of the mutually agreed terms of the Contract dated 5 September 2001 between the Claimants and Respondents and as well as the undertaking/affidavit given by Claimants in the Delhi High Court in OMP No.247/2004?
5. Whether the Claimants are estopped from claiming the reliefs in the Claim Petition in view of:

- a) The acceptance of MoP & NG letter dated 16 August 2001 for re-allocation of gas by the Claimants on the condition that all outstanding dues will be cleared by Claimants.
 - b) And having consequently acted thereupon by entering into a gas supply contract with Respondents on 5 September 2001.
 - c) Claimants' undertaking given in OMP No.247/2004 in the Delhi High Court that they shall not raise any dispute on MGO charges and would abide by the decision of Ministry on the representations made by Claimants.
6. Whether in view of the dismissal of W.P. No.13907/2004 (filed by the Claimants) on 20 August 2004 by the Delhi High Court wherein the issue of unequal bargaining power was raised, Claimants can once again raise the same issue in the present arbitration?
7. Whether the Claimants are liable to pay interest? If so, at what rate and from what date?
8. What Award?
9. Whether the Parties are entitled to costs?"

16. The conclusions of the learned Arbitrator in the impugned Award were as under:

- (i) On Issue No.4 the learned Arbitrator concluded that there was an arbitral dispute between the parties in view of the stand of BPL that there was no outstanding amount due and payable under Contract 1 and that a statement to that effect was wrongly incorporated in Contract 2.

(ii) As regards BPL's affidavit of undertaking before the Delhi High Court, the learned Arbitrator observed that: "it is not for me to consider whether Claimants are bound by that undertaking, whether they have committed any breach thereof and what would be the consequences of any such breach. With respect, it seems to me that it is a matter which falls within the exclusive jurisdiction of the Delhi High Court."

(iii) The opening of an LC was necessary for GAIL to draw the amount if BPL did not pay cash when invoices were presented. Article 11.02 came into operation after LC was opened in terms of Article 11.01.

(iv) The letter dated 12th September, 2001 written by ONGC to GAIL requesting for remittance of MGO charges by itself did not establish the obligation of GAIL to recover the said charges from BPL.

(v) There was substance in the contention of BPL that GAIL had no right to demand MGO and transportation charges since drawal of gas did not commence. If an LC was not opened, the second stage of the contract including Article 11 could not be worked out. Therefore, GAIL could not have raised invoices for MGO and transportation charges for the period from the specified date till termination of the contract. The delayed termination of the contract did not enable GAIL to recover MGO and transportation charges if drawal of gas had not commenced.

(vi) The expression 'outstanding dues' in the Contract 2 meant dues that were legitimately due and payable under Contract 1. The undertaking given by BPL and the issuance of PDCs did not constitute estoppels against BPL.

(vii) BPL was entitled to refund Rs.1,17,83,000/- paid towards MGO and transportation charges.

(viii) On Issue No.3 it was held that the terms of Contract 1 did not create any liability on BPL to pay the amount as per the undertaking dated 16th December, 1997. As regards Issue No.6 it was held that BPL was not bound to pay MGO and transportation charges even if they arose under Contract 1.

(ix) On Issue No.5, it was held that since there were no outstanding dues under Contract 1 the acceptance of the letter of the MoPNG dated 16th August, 2001 by BPL on condition of paying all outstanding dues did not have any meaning.

(x) Under Issue No.7, it was held that BPL was entitled to uniform rate of interest @ 12% per annum from 26th March, 2005 till the date of payment.

17. This Court has heard the submissions of Mr. Sanjay Jain, learned Senior counsel appearing for the Petitioner and Mr. N. Ganpathy, learned counsel for the Respondent.

18. The central issue to be decided by the learned Arbitrator was whether there was an arbitral dispute between the parties in view of the mutually agreed terms of the contract dated 5th September, 2001 and the affidavit of undertaking given by the BPL in this Court in O.M.P. No.247 of 2004.

19. The narration of facts shows that BPL had, prior to the executing of Contract 2 on 5th September 2001, repeatedly acknowledged its liability to pay the MGO and transportation charges. The necessity for entering into

Contract 2 arose on account of BPL requesting time and again either for waiver of the MGO and transportation charges or for its deferment in payment of instalments. GAIL had declined the request. Faced with the cancellation of the allocation of gas supply, BPL agreed to the terms and conditions incorporated in Contract 2 executed on 5th September, 2001. The recitals in Contract 2 make it clear that the parties acknowledged the amounts due to be paid by BPL under Contract 1. The recitals clearly state that BPL “failed to draw gas in terms of the aforesaid predetermined contract (i.e. Contract 1) and defaulted in payment of necessary MGO and transportation charges under Article 5.02 and monthly transportation charges under Article 4.03 of the aforesaid predetermined contract”. It also clearly states that MoPNG decided to cancel the gas allocation whereupon BPL approached GAIL “and agreed to liquidate all the outstanding dues towards MGO and monthly transmission (*sic.* transportation) charges along with interests dues in a manner provided in this contract hereinafter”.

20. There can be no manner of doubt that the consideration for Contract 2 was BPL agreeing to pay all outstanding dues under Contract 1. It was on that express understanding that MoPNG decided to reallocate gas supply to BPL. In other words the very basis of Contract 2 was that BPL was to liquidate all the outstanding dues under Contract 1, which included MGO and transportation charges. At no point of time did BPL question its liability to pay MGO and transportation charges under Contract 1 even though it had not commenced drawing the gas thereunder. It was because BPL was desperate to revive the allocation of gas that it bound itself to liquidating the outstanding amounts under Contract 1.

21. Apart from the fact that it was not open to BPL to question its liability to pay MGO and transportation charges under Contract 1, the affidavit filed by it in this Court in O.M.P. No.247 of 2004 also makes it absolutely clear that BPL had agreed “not to raise the dispute on issue of minimum guaranteed Offtake (MGO) charges” and it was on that undertaking it was permitted to withdraw the said petition. In the circumstances, this Court is unable to appreciate how the learned Arbitrator could hold that the question of the liability of BPL to pay MGO and transportation charges under Contract 1 was an arbitrable dispute. Clearly in view of the undertaking given by BPL, which was binding not only on it, but on the learned Arbitrator as well, BPL was precluded to raise any dispute relating to its liability to pay MGO and transportation charges.

22. Accordingly, this Court has no hesitation in holding that the learned Arbitrator committed a patent illegality in holding that the question of non-compliance by BPL with the solemn undertaking given by it to the Court was a matter for the High Court to consider. As long as the said undertaking remained, BPL was obliged to honour the said undertaking. It is another matter that for breach of the said undertaking BPL was also liable for contempt of the High Court. That, however, does not mean that the learned Arbitrator was not obliged to bind BPL to its undertaking. There was no question of the learned Arbitrator entertaining any submission of the BPL regarding its liability to pay MGO and transportation charges under Contract 1. It may be recalled that even in respect of Contract 1, when BPL sought to question the terms of the said contract in a writ petition, this Court negatived it by dismissing its writ petition with costs. The terms of Contract 1 required BPL to pay the MGO and transportation charges even when the actual

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drawing of gas did not commence. The liability would arise even where BPL failed to commence drawing supplies of gas within the period stipulated in Contract 1. It was not open to the learned Arbitrator to re-examine the question which stood conclusively decided by the dismissal of the writ petition by this Court. This Court holds that the learned arbitrator overlooked the express terms of the contract, and decided Issue No.4 contrary thereto and in violation of Section 28(3) of the Act.

23. Once it is clear that the learned Arbitrator could not entertain any dispute raised by BPL in regard to its liability to pay MGO and transportation charges under Contract 1, the very basis of the impugned Award cannot be sustained. The entire discussion in impugned Award proceeds on the erroneous footing that the recitals in Contract 2 and the undertaking given by BPL to this Court on affidavit do not preclude it from challenging its liability to bear MGO and transportation charges.

24. For the aforementioned reasons, this Court holds that the impugned Award suffers from patent illegality and accordingly sets it aside with no orders as to costs. The petition is disposed of accordingly.



S. MURALIDHAR, J.

NOVEMBER 16, 2012
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