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

+ **O.M.P. (COMM) 420/2016**

ATMIYA CHEMICALS

..... Petitioner

Through : Mr S. Nanda Kumar, Mr K.
Maijilsamy, Mr Anand Selvam, Mr S.
Muthi Krishnan, Mr Parivesh Singh
Mr Prateek Gupta and Mr P.
Srinivasan, Advocates.

versus

GAS AUTHORITY OF INDIA LTD.

..... Respondent

Through : Mr Kaushik Laik, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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20.09.2016

VIBHU BAKHRU, J

IA No. 11622/2016

1. Exemption is allowed, subject to all just exceptions.
2. Application stands disposed of.

O.M.P. (COMM) 420/2016

3. The petitioner (hereafter 'Atmiya') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, assailing an award dated 25.05.2016 (hereafter 'the impugned award') made by the Sole Arbitrator, Justice Mukul Mudgal

(Retd.), former Chief Justice of Punjab and Haryana High Court.

4. The impugned award was made in the context of the disputes that had arisen between the parties in respect of transmission charges for supply of Low Pressure Natural Gas (LPNG). On 13.06.2003, the respondent (hereafter 'GAIL') had issued a Notice Inviting Applications (NIA) for prospective consumers of LPNG within the isolated Motwan field in Gujarat. Atmiya applied under the said NIA and was qualified as a prospective consumer. In addition, two other applicants were also qualified as prospective consumers

5. By a letter dated 19.06.2003, Atmiya communicated its acceptance to take LPNG through the isolated pipelines in the Motwan region. On 30.06.2003, GAIL allocated 2000 SCDM of LPNG in favour of Atmiya. Thereafter on 18.07.2003, the parties entered into a Gas Supply Agreement (hereafter 'the GSA') whereby GAIL agreed to supply LPNG to Atmiya from its Motwan field for a period of two years w.e.f. 30.11.2003. There is no dispute that in terms of the GSA, Atmiya was liable to pay for the transmission of gas in addition to the price of LPNG gas.

6. It is not disputed that GAIL had to lay pipelines for supply of LPNG

from its Gas Generating Station (hereafter ‘GGS’) to the respective units of the three consumers. In terms of clause 4.03 of the Agreement, Atmiya was required to pay monthly transmission charges of ₹1,14,605/- for transmission of gas by GAIL to its unit.

7. After GSA was signed, certain disputes arose between the parties in respect of the transmission charges. Atmiya alleged that the transmission charges being levied by GAIL were excessive and discriminatory inasmuch as according to Atmiya, the other two consumers were being charged less than Atmiya. In the circumstances, Atmiya filed a writ petition being W.P.(C) 10398/2006 before this Court. The said writ petition was considered by a Single Judge of this Court and was rejected by an order dated 31.01.2011. This Court categorically held that the submission that amount of transmission charges charged by GAIL were discriminatory in comparison to other consumer(s) was rejected. The court also rejected the contention that the charges were arbitrary, excessive or violative of Article 14 of the Constitution of India. The relevant extract of the said decision is reproduced below

"18. The Petitioner's submission that the amount of transmission charges being levied on the Petitioner by GAIL is discriminatory vis-a-vis CGPL is also without merit. The additional affidavit

dated 9th November 2010 filed by GAIL demonstrates that the location of the Petitioner's unit is not at the same distance as CGPL is from the GGS Motwan. The actual distance of the Petitioner's unit from the GGS is over 800 m. The explanation given in the said additional affidavit of GAIL is as under:

“It is evident from the said diagram that two varieties of pipes of 63 mm and 125 mm have been used for providing connectivity. Further, the distance of the Petitioner’s factory from the gas field is 0.847 kms ($0.147+0.616+.084$) using both 125 mm and 63 mm pipe while that of Crystal Glazes is only 0.412 ($0.147+0.265+.16$) kms using both 125 mm and 63 mm pipe from the gas filed. Further, the distance of the factory premises of M/s Clean Glass is 2.792 kms ($0.147+2.645$), all of which has been laid using 125 mm pipe.”

19. The additional affidavit of GAIL further explains that the pipelines laying work was outsourced to M/s Desai Associates. Copies of the completion certificate issued by the said agency and the purchase orders placed for supply of MDPE fittings and MDPE pipelines have been enclosed with the additional affidavit. This gives a fair idea of the basis adopted by GAIL in computing the transmission charges.

20. In exercise of its writ jurisdiction, this Court cannot possibly determine whether the transportation/transmission cost arrived at by GAIL is excessive or not. The limited scope of judicial review under Article 226 of the Constitution does not permit this Court to enter into the nitty-gritty of the calculations justifying the transmission charges. As long as GAIL has been able to show that its decision is based on relevant materials, it is not for this Court to sit in an appeal over such decision.

21. Consequently, this Court finds no merit in the submissions of counsel for the Petitioner that the transmission charges levied are arbitrary or excessive and violative of Article 14 of the Constitution."

8. Aggrieved by the aforesaid decision, Atmiya preferred an appeal being LPA No. 198/2011. The said LPA was disposed of by a Division Bench of this Court on 04.03.2011 and the parties were referred to arbitration with their consent.

9. The Arbitrator has considered the controversy regarding discrimination and has rejected the same. Aggrieved by the same, Atmiya has filed the present petition.

10. The learned counsel appearing for Atmiya submitted that it was an admitted case that Atmiya's unit was situated at a distance of 847 meters from GAIL's facility. In addition, there were two other consumers being supplied gas from Motwan field, namely, Crystal Glazes Pvt. Ltd. (now known as Mehek Glazes) and Clean Glass Pvt. Ltd., whose sites were situated at 412 meters and 2,792 meters respectively. It is stated that whereas Atmiya was being charged a sum of ₹1,14,605/- per month as transmission charges, however, Clean Glass Pvt. Ltd. was being charged ₹1,79,000/- per month and Crystal Glazes Pvt. Ltd. was charged ₹24,317/- per month as transmission charges. He stated that discrimination with regard to levy of transmission charges was clearly evident from the aforesaid figures and the Sole Arbitrator had failed to consider the same.

11. He referred to the impugned award and drew the attention of this Court to Paragraph 18 wherein the Arbitrator had considered the charges paid by Atmiya and Clean Glass Pvt. Ltd. He contended that the Arbitrator had not adverted to the charges being paid by Crystal Glazes Pvt. Ltd. He submitted that even with regard to Clean Glass Pvt. Ltd., the transmission charges levied on Atmiya were disproportionate. He referred to the diagram of pipelines which indicated that all the three consumers in question shared a common pipeline up to a distance of 0.147 kms from GAIL's facility. Thereafter, from the said junction, the unit of Atmiya was 0.7 kms whereas the distance of Crystal Glaze was 0.265 kms and the unit of Clean Glass Pvt. Ltd. was 2.645kms. He submitted that the transmission charges amongst the three users ought to have been reasonably fixed keeping the aforesaid distances in mind.

12. The learned counsel for Atmiya further submitted that in terms of clause 17 of GSA, the GSA could be amended.

13. The learned counsel, appearing for GAIL on advance notice, countered the submissions made by the learned counsel for Atmiya and submitted that the issue regarding the levy of discriminatory charges has been considered by the Arbitrator and, therefore, the present petition is

without any merit.

14. I have heard the learned counsel for the parties.

15. At the outset, it must be borne in mind that the scope of interference in an arbitral award is very narrow and the arbitral award can only be interfered with on the basis of the grounds as specified under Section 34(2) of the Act. In the present case, there is no dispute as to the constitution of the Arbitral Tribunal or the arbitrability of the dispute. Atmiya has sought to place its case within the provision of Section 34(2)(b)(ii) of the Act, that is, the impugned award is in conflict with the public policy of India.

16. The principal dispute between the parties is with regard to levy of transmission charges. In the aforesaid context, clause 4.03 of the GSA is relevant and is set out below:-

"4.03 In addition to price of GAS as mentioned under Article 10, the BUYER shall pay to the SELLER monthly transmission charges of Rs.114605/- (One Lakh Fourteen Thousand Six Hundred Five Only) per month for the facilities provided by the SELLER for supply of GAS to the delivery point located at the BUYER's premises. Provided further, the BUYER shall pay to the SELLER additional transmission charges, if any, in case the SELLER is required to replace/revamp the existing pipeline and allied facilities wholly/partly for supply of gas to the BUYER at the point of delivery. The above monthly transmission charges shall be

increased by 3 (Three) percent on yearly rest basis with effect from 1.4.2004. The buyer shall pay the above monthly transmission charges to the SELLER in addition to the price of GAS mentioned in Article 10. During the currency of the CONTRACT irrespective of Total/Partial/Non-Supply of quantity of GAS as per Article 5.01 hereinafter to the BUYER during month(s), the BUYER agrees to pay above monthly fixed transmission charges. The BUYER shall pay the above monthly transmission charges and taxes there of to the SELLER in addition to the payment of Invoice for supply of GAS to be raised as per Articles 10 and Article 11. Provided further in case monthly transmission charges are not paid by the BUYER within 3 (Three) working days of presentation of 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."

17. In is apparent from the above that Atmiya had agreed to pay fixed charges of ₹1,14,605/- per month for transmission of LPNG. The Arbitrator had held that there was a legal and valid contract subsisting between the parties to the agreement and the parties could not claim that the terms and conditions were unacceptable unless they were totally unreasonable and arbitrary and hence, violating the party's right.

18. The Arbitrator further proceeded to examine the rationale of the charges levied by GAIL and found that the charges could not be determined with mathematical exactitude. The Arbitrator found that Atmiya's site was

situated at 847 meters and Crystal Glazes Pvt. Ltd. and Clean Glass Pvt. Ltd. sites were situated at 412 meters and 2792 meters respectively. The charges levied on Clean Glass Pvt. Ltd. were also much higher than Atmiya's. The Arbitrator also referred to the diagram submitted by GAIL which indicated that the three consumers were situated at different distances. The Arbitrator also noted that while transmission in case of Atmiya and M/s Crystal Glazes was through pipelines of 63 mm dia and 125 mm dia, M/s Clean Glass's pipeline was only of 125mm dia.

19. GAIL had further affirmed that the transmission charges were not based on distance alone but had been fixed after taking other factors such as recurring operating costs, volume of gas to be supplied, nature of industry of the consumer, etc. GAIL had further emphasised that Atmiya had accepted the charges fixed and thus, could not be permitted to resile from its agreement

20. Clearly, the Arbitrator has decided the dispute in terms of the contract entered into between the parties - that is, the GSA - and there is no material to indicate that there is anything arbitrary or unreasonable in the levy of transmission charges.

21. The learned counsel for Atmiya had also referred to clause 17 of the Agreement which indicates that the GSA could be amended. The said clause is set out below:-

"ARTICLE - 17 AMENDMENTS

17.01 Any amendment to any of the clause of the CONTRACT will be proposed and sent in writing to the other party proposing such amendment and if both the SELLER and the BUYER agree to such amendment then the same shall be incorporated in the CONTRACT and shall become binding on the parties as such from the date the agreement is reached unless otherwise agreed to."

22. A plain reading of the said clause indicates that an amendment of the GSA could be brought about only by consent of the two parties; any party could propose an amendment and if the other party has agreed, the GSA could be amended. Clearly, the said clause has no application in the present case because GAIL has not agreed to any amendment in the GSA. The amendment to the Agreement is a matter of consent between both the parties and, therefore, the contention that the Arbitrator could have referred to clause 17 of the Agreement and reasonably altered the Agreement, is wholly bereft of any merit. An arbitrator has no power to rewrite the agreement entered into between the parties.

23. In *Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd* : (2014) 9 SCC 263, the Supreme Court had held as under:

"29. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available."

24. I am unable to accept that the impugned award is perverse or unreasonable on the touchstone of the wednesbury principle or in conflict with the public policy of India.

25. Accordingly, the petition is dismissed.

VIBHU BAKHRU, J

SEPTEMBER 20, 2016
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