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

+ **O.M.P. (COMM) 204/2018 & IA No. 6475/2018**

GAIL GAS LIMITED

..... Petitioner

Through: Mr Sacchin Puri, Sr. Advocate
with Ms Sanam Tripathi, Mr
Keshav Sehgal and Mr Kamil
Khan, Advocates.

versus

M/S BALKISHAN AGARWAL GLASS
INDUSTRIES LIMITED

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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14.05.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'GGL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 08.01.2018 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator. The impugned award was rendered in the context of the disputes that had arisen between the parties in respect of the 'Gas Supply Contract' dated 21.07.2012 (hereafter 'the GSC') entered into between the parties.

2. The disputes between the parties relate to two invoices raised by GGL: (i) Invoice No. 10000006750 dated 09.12.2015 for the sum of

₹31,72,548.82/-; and (ii) Invoice No. 10000006753 dated 09.12.2015 for a sum of ₹1,29,85,131,93/-. The said invoices were raised for the Minimum Guaranteed Offtake (MGO) for the period April to June, 2013 & July to September, 2013 respectively, which GGL claims was the respondent's obligation in terms of the GSC. The respondent disputes the same. By the impugned award, the Arbitral Tribunal accepted the respondent's claim that GGL was not justified in raising the said invoices and has accordingly quashed the same.

Factual background

3. The respondent is a company incorporated under the Companies Act, 1956. The respondent is, *inter alia*, engaged in manufacturing and sale of glassware and glass bottles and has a manufacturing unit located at Dholapura, Agra Road, Firozabad. The said unit is located within the Taj Trapezium Zone.

4. In the case of *M.C. Mehta v. Union of India: (1997) 2 SCC 353*, the Supreme Court had issued directions for regulating industries falling within the Taj Trapezium Zone to prevent and curtail pollution. Pursuant thereto, the Director of Industries and U.P. Pollution Control Board issued a notice to the respondent requiring the respondent to switch to gas as a fuel to run turbines and furnace instead of coal and oil.

5. GGL is wholly-owned subsidiary of Gas Authority of India Limited (hereafter 'GAIL'). GGL has been authorized by Petroleum and Natural Gas Regulatory Board for supply of gas in the Taj

Trapezium Zone in the state of U.P.

6. GAIL entered into a contract with the respondent in the year 1997. In the year 2005, GAIL alleged that the respondent had tampered with the metering equipment. It claimed that there were four instances of such tampering and on 28.02.2005, GAIL terminated the contract for supply of gas. This led to disputes between GAIL and the respondent. These disputes were referred to arbitration before an arbitral tribunal constituted by a sole arbitrator, Justice (Retd.) S.K. Dubey (hereafter ‘the First Arbitral Tribunal’).

7. On 09.09.2008, the First Arbitral Tribunal (Justice S.K. Dubey) directed the parties before it – that is, GAIL and the respondent – to enter into a fresh Gas Sale Agreement. Accordingly, GAIL and the respondent entered into the Gas Sale Agreement dated 07.07.2009, which was valid till 31.08.2012. GGL claims that the said agreement was entered on the basis of an undertaking furnished by the respondent acknowledging that the gas supply would be stopped if another instance of tampering was found.

8. Thereafter, in October 2011, GAIL claimed that it discovered yet another instance of tampering of metering equipment by the respondent (referred to as ‘the fifth instance’). On 16.11.2011, GAIL and GGL entered into a Business Transfer Agreement and in terms of the said agreement, GAIL’s business for supplying gas to units located in the area was transferred to GGL. GGL having stepped into the shoes of GAIL, issued a show cause notice dated 11.04.2012 in

respect of allegations pertaining to the fifth instance of tampering and theft of natural gas. The respondent replied to the said show cause notice. However, GGL did not find the same to be satisfactory and accordingly, issued a demand notice dated 22.07.2013 calling upon the respondent to pay a sum of ₹91,26,320/- as tampering and shortfall charges. Since the respondent had failed to pay the same, GGL, by a letter dated 20.09.2013, informed the respondent that gas supply stood stopped.

9. In the meanwhile, on 28.12.2013, the First Arbitral Tribunal delivered an arbitral award finding in favour of GGL and against the respondent regarding one instance of tampering, but clearing the respondent in other three cases. GGL has challenged the said award before the District Court at Firozabad.

10. Whilst, the proceedings were pending before the First Arbitral Tribunal and the show cause notice issued in respect of the fifth instance was outstanding, the parties entered into the GSC on 21.07.2012. The gas supply under the GSC commenced from 01.09.2013; that is, immediately after the expiry of the term of the Gas Sale Agreement dated 07.07.2009.

11. On 19.04.2013, the respondent issued a letter informing GGL that there was sudden defect in the furnace at its unit and, therefore, respondent would not be able to utilise the gas and consequently, requested for a shut down in accordance with Article 9.2 of the GSC. The said letter is set out below:-

“Dated 19.04.2013

To,

Gail Gas Limited
City Gate Station
Raja Ka Taal
Firozabad

Sir,

This is to inform you that due to sudden defect in the furnace at our unit, we are unable to fully utilize the gas so we are compelled to seek shutdown in accordance with Article 9.2, and the production work in the unit has been stopped.

We are trying to remove the defect of the furnace installed at our unit as soon as possible and will inform you once the defect is cured.

Thanking you,

For Shri Balkishan Agarwal Glass Industries Limited

Sd/-

Authorised Signatory

20 April 2013

12:25”

12. The letter dated 19.04.2013 was followed by another letter dated 06.09.2013 requesting for grant of isolation of gas in accordance

with Article 7.1.7 of the GSC. The said letter is set out below:-

“Dated 06.09.2013

To,

Gail Gas Limited
City Gate Station
Raja Ka Taal
Firozabad

Sir

As you are aware that due to sudden defect in the furnace at our unit on 19.04.2013 (copy of letter dated 19.04.2013 is enclosed), due to which we were compelled to seek take shutdown in accordance with Article 9.2 and since then the production work at our unit has been stopped but due to non availability of the necessary equipment and refractory etc., it shall take some more time to remove the defects.

Therefore, it is requested to grant us isolation of gas in accordance with Article 7.1.7 (The buyer shall inform the seller in writing, at least two days in advance of the time period, for which isolation of gas is required by the buyer. This shall be implemented based on daily reading of the GPRMS/EBC downloaded data.)

You are therefore requested in this regard to take necessary action under the GSC.

Thanking you,

For Shri Balkishan Agarwal Glass Industries Limited

Authorized Signatory

06 Sep 2013

CC: DGM Agra”

13. Thereafter, GGL stopped the supply of gas on 07.09.2013. On the same date – that is, on 07.09.2013 – the respondent also submitted the gas supply closing form in the prescribed format.

14. As noted above, on 22.07.2013, GGL had called upon the respondent to pay a sum of ₹91,26,320/- as tampering and shortfall charges within a period of fifteen days of the receipt of the said letter. Since the respondent did not pay the said amount, GGL sent a letter dated 20.09.2013, *inter alia*, stating that as the respondent had failed to deposit the said amount, gas supplied to the respondent’s unit “stands stopped”.

15. The disputes relating to GGL’s demand of ₹91,26,320/- as tampering and shortfall charges pertaining to the fifth instance of tampering was also referred to arbitration before an arbitral tribunal constituted by a sole arbitrator, namely, Justice S.K. Aggarwal (Retired) (hereafter ‘the Second Arbitral Tribunal’).

Submissions

16. Mr Sacchin Puri, learned Senior Counsel appearing on behalf of GGL has assailed the impugned award on three grounds. First, he submitted that the Arbitral Tribunal had failed to appreciate that the respondent had issued a letter dated 06.09.2013 to pre-empt GGL’s action to stop supply of gas on the ground of the fifth instance of tampering. The respondent was aware that GGL was in the process of

initiating action for terminating the gas supply as the respondent had failed to pay the tampering and shortfall charges of ₹91,26,320/-, which was demanded by the letter dated 22.07.2013 and GGL would proceed to stop the supply of gas. He submitted that this was a subterfuge on the part of the respondent to avoid paying the MGO charges. He submitted that in its cross-examination, the respondent's witness had stated that the defects in the unit could not be repaired for want of supply of gas. He submitted that this was incorrect as, admittedly, gas was supplied to the respondent's unit between 19.04.2013 and 06.09.2013 and this indicated that the respondent's claim that it was unable to utilize the gas due to defect in the furnace, was untrue.

17. Second, he submitted that the Arbitral Tribunal had erred in interpreting Clause 9.2 of the GSC, as Clause 9.2 of the GSC did not absolve the respondent from its MGO obligations beyond a period of thirty days. He submitted that at best, the respondent could be granted exemption from the payment of MGO charges for a period of thirty days but the respondent would be obliged to pay MGO charges.

18. Lastly, he submitted that the Arbitral Tribunal had grossly erred in holding that the invoices in question were barred by limitation.

Reasons and Conclusion

19. Before the Arbitral Tribunal, the case set up by GGL was that the respondent was found to have tampered with the metering equipment on four occasions and this was in breach of the agreement

entered into between GAIL and the respondent. Accordingly, on 28.02.2005, GAIL had terminated the contract. This led to disputes between GAIL and the respondent which were referred to arbitration (the First Arbitration). It is stated that during the course of the arbitral proceedings, the respondent agreed to give an undertaking that in case the respondent was found tampering the gas supply with the metering equipment, GAIL could discontinue the supply. On 09.09.2008, the First Arbitral Tribunal (Justice S.K. Dubey) directed the parties before it – that is, GAIL and the respondent – to enter into a fresh gas sale agreement. Accordingly, GAIL and the respondent entered into the Gas Sale Agreement dated 07.07.2009.

20. Thereafter, the Arbitral Tribunal (Justice S.K. Dubey) delivered an arbitral award finding the petitioner guilty of tampering the meter in one instance, but, rejecting GAIL's claim of tampering in respect of the other three instances. GGL claims that while the aforementioned arbitral proceedings were pending, GAIL discovered the fifth instance of tampering and theft of natural gas in October 2011. In the meanwhile, in terms of the Business Transfer Agreement signed between GAIL and the GGL, GAIL's business for supplying gas to units located in the area were transferred to GGL. Thereafter, GGL had issued a show cause notice dated 11.04.2012 in respect of allegations of tampering and theft of natural gas. The respondent had replied to the said show cause notice. However, GGL did not find the same to be satisfactory and accordingly, issued a demand notice dated 22.07.2013 calling upon the respondent to pay a sum of ₹91,26,320/-

as tampering and shortfall charges. Since the respondent had failed to pay the same, GGL, by a letter dated 20.09.2013, informed respondent that it had stopped the supply of gas.

21. In the aforesaid context, GGL contended that the respondent had sent the letters dated 19.04.2013 and 06.09.2013 for stoppage of gas to avoid the consequences of having been found to have tampered with the metering equipment.

22. It is relevant to note that the said disputes regarding tampering do not arise in relation to the GSC. The said disputes relate to the gas supply contract dated 07.07.2009, which was not the subject matter of the dispute before the First Arbitral Tribunal. The disputes relating to tampering arising out of that agreement (the Gas Sale Agreement dated 07.07.2009) were referred by GGL to the Second Arbitral Tribunal (constituted by Justice S.K. Aggarwal) and at the material time, when the impugned award was delivered, the said disputes were still pending before the Second Arbitral Tribunal.

23. The Arbitral Tribunal had considered the aforesaid facts and had rejected GGL's contention that the letter dated 19.04.2013 requesting GGL to partially stop supply of gas under Clause 9.2 of the GSC was to overreach and subvert of any action of termination of the GSC. The Arbitral Tribunal found that the allegations of the fifth instance of tampering were raised in October 2011, which is prior to the parties entering into the GSC. Admittedly, a show cause notice had been issued to the respondent regarding the fifth instance of

tampering. Despite the same, the parties had entered into the GSC on 21.07.2012.

24. The Arbitral Tribunal also found that GGL had shut down the gas on 07.09.2013 not on account of any allegations of tampering but pursuant to the respondent's request for isolation of gas under provisions of Article 7.1.7 of the GSC.

25. This was clear from the GGL's endorsement dated 07.09.2013 on the gas closing form which reads as: "*gas closing as per consumer request, letter dated 06.09.2013*"

26. This Court finds no infirmity with the aforesaid findings. Indisputably, GGL had stopped the gas on 07.09.2013 pursuant to the respondent's request for isolation of gas under Article 7.1.7 of the GSC. The Arbitral Tribunal also observed that in the notice dated 22.03.2016, GGL had admitted that the gas supply was closed by GGL on 07.09.2013 pursuant to the respondent's request dated 06.09.2013.

27. The Arbitral Tribunal did not accept the contention that there was any subterfuge on the part of the respondent in requesting isolation of gas. The Arbitral Tribunal also noted that the letter dated 19.04.2013 was sent by the respondent much prior to the GGL precipitating any action in respect of fifth instance of tampering. This Court finds no reason to interfere with the said conclusion; particularly as the disputes regarding fifth instance of tampering were pending since October, 2011 and were being contested by the respondent independent of the GSC.

28. It is also relevant to state that the scope of judicial review under Section 34 of the Act is limited and this Court is not called upon to re-examine or re-assess the evidence led before the Arbitral Tribunal. This Court does not find that the conclusion arrived at by the Arbitral Tribunal to be perverse or patently illegal warranting any interference by this Court in these proceedings. The cross-examination of the respondent's witness is to be read in conjunction with the documentary evidence placed before the Arbitral Tribunal. Considering the same, the Arbitral Tribunal's view is, surely, a plausible view.

29. The next question to be examined is whether the impugned award is contrary to Article 9 of the GSC. At this stage, it would be relevant to refer to Article 9 of the GSC, which is set out below:-

“ARTICLE 9: SHUTDOWN AND STOPPAGE OF GAS SUPPLY”

- 9.1 The scheduled annual shutdown of Gas supply, each at the Seller's end or at the Buyer's end, shall be limited to 30 (Thirty) days in a Year, and either party shall give notice in writing to the other party 2 (Two) days prior to the proposed date of shutdown of Gas supply. As for as possible, the Buyer and the Seller shall try to synchronize their shutdown periods of Gas supply. During such shutdown period, the provision of the Article 7.2 shall not be applicable for the duration of stoppage of supply of Gas during this period.
- 9.2 The Buyer shall inform the Seller immediately about any accident and/or defects in

installations of the Buyer, for the purpose of complete or partial stoppage of supply of Gas. Provided that, in all such cases, the Buyer shall undertake immediate steps to rectify the defects for commencing normal intake of Gas. Provided further that in all such cases, the provisions relating to payment of the MGO by the Buyer under Article 7.2 shall not be applicable for the duration of stoppage of supply of Gas during this period.

- 9.3 The Seller shall, likewise, inform the buyer immediately about any accident and/or defects in installations of the Seller, for the purpose of complete or partial stoppage of supply of Gas. Provided that in all such cases, the Seller shall undertake immediate steps to rectify the defects for commencing normal supply of Gas. Provided further that in all such cases, the provision relating to payment of MGO by the Buyer, under Article 7.2 shall not be applicable for the duration of stoppage of supply of Gas during this period.”

30. Article 9.1 of the GSC contemplates a *scheduled annual shutdown* of gas supply and provides that the same would be limited to thirty days in a year. It is apparent from the plain language that the scheduled annual shut down referred to in Article 9.1 of the GSC is the normal shut down, which may be required either at GGL’s end or at the end or at the instance of the purchaser. The words “*scheduled annual shut down*” indicates that shut down contemplated is one that would be required for regular maintenance purposes. In this case, neither purchaser nor GGL are required to provide any reason for the same. It is further provided that both the buyer and the seller would

try and synchronize their shut down periods of gas supply. This also indicates that the shut down contemplated, is a voluntary shut down, which is in the control of the parties. Article 9.2 of the GSC refers to a completely different situation which arises from “*any accident and/or defects in installations of the buyer*”. Similarly Article 9.3 of the GSC refers to a stoppage of gas supply for the aforesaid reason at GGL’s end. The period of thirty days is only referred in Article 9.1 and not in Article 9.2 or 9.3 of the GSC.

31. The Arbitral Tribunal had not accepted GGL’s contention that the maximum period of shut down either under Article 9.2 or Article 9.3 of the GSC would be limited to thirty days in a year. The aforesaid view – if not the only correct view – is indisputably a plausible one. As held by the Supreme Court in ***Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.: (2006) 11 SCC 181***, the question as to the interpretation of the contract would fall squarely within the jurisdiction of the arbitrator and would warrant no interference by the court unless it is found to be perverse or patently illegal.

32. Thus, no interference with the impugned award is called for with regard to the Arbitral Tribunal’s interpretation of Article 9 of the GSC.

33. The contention that the Arbitral Tribunal has held that the invoices are barred by limitation is erroneous. The Arbitral Tribunal has only noted that GGL had raised the invoices at a much belated stage and beyond the time specified under the contract. The Arbitral

Tribunal had noted that the delay in raising the invoices was not a delay of days or weeks, but the delay of two years or more. The above observations were made in the context of considering the genuineness of GGL's case and cannot be construed to mean that the Arbitral Tribunal had held the invoices to be barred under the Limitation Act, 1963.

34. In view of the above, the petition is unmerited and is, accordingly, dismissed. The pending application is also disposed of.

MAY 14, 2018
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VIBHU BAKHRU, J



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