

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.06.2021

+ **O.M.P. (COMM.) 99/2021 & IA No. 3614/2021**

INDRAPRASTHA GAS LIMITED (IGL) Petitioner

versus

M/S PAWAN CASTING Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Saurav Agarwal, Mr Shantanu Agarwal, Mr Sharad Kumar, Mr Harshit Malik, Ms Akansha Dixit, Mr Ananvay Anandvardhan, Ms Devpriya Singh, Mr Sai Abhishek, Mr Anshuman Chowdhury, Advocates.

For the Respondent :

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Indraprastha Gas Limited (hereinafter 'IGL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 10.12.2019 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal constituted of Justice (Retd.) Dilip Raoshaeb Deshmukh, former Judge of the Chhattisgarh High Court, as the Sole Arbitrator.

2. Pawan Castings (hereinafter 'the respondent') is a proprietorship concern of Mr. Deepak Dhuper. He is engaged in the business of manufacturing of Aluminium Pressure Dye Castings under the said name. IGL is a company incorporated under the Companies Act, 1956 and is the only supplier of natural gas in Delhi. IGL was the claimant before the Arbitral Tribunal. The impugned award was rendered in the context of disputes that have arisen between the parties in relation to a Gas Sales Agreements (GSAs) dated 10.11.2009 and 1.11.2014.

Factual context

3. On 10.11.2009, the parties (IGL and the respondent, Pawan Castings) entered into a Gas Sales Agreement (GSA) under the category of Large Industrial Customer for the supply of Piped Natural Gas (hereafter PNG). IGL agreed to supply 1,56,000 SCM of PNG annually and 500 SCM daily under the aforesaid GSA.

4. Thereafter, on 01.11.2014, the respondent requested IGL to change his category to Small Industrial Customer and executed a fresh GSA (2014 GSA). In terms of the said 2014 GSA, the daily contract quantity of PNG was reduced to 250 SCM per day.

5. On 04.12.2014, officials of IGL, conducted an inspection at the premises of the respondent. IGL alleges that they found unauthorised tapping of PNG and claims that the said officials took photographs and also a video recording of the unauthorised tapping. Thereafter, on 05.12.2014, IGL filed a complaint and pursuant thereto an FIR bearing no. 1425 of 2014 under Sections 336/379 of the Indian Penal Code,

1860 was registered against the respondent. The said FIR recorded that an unauthorised CS/MS pipeline had been laid with the covering of PVC pipe in the factory of the respondent. The said pipeline was connected to the first floor of the factory premises and an unauthorised regulator was installed inside a shelf of a desk. Further, the same pipeline was connected to a downstream pipeline bypassing the meter of IGL. Thus, the respondent had sourced PNG from an unauthorised tapping point.

6. By a notice dated 11.12.2014, IGL terminated the 2014 GSA in terms of Article 25(ii) of the said GSA. It alleged that during the inspection conducted on 04.12.2014, an unauthorised connection in IGL's 32mm MDPE pipeline with continuous high pressure natural gas of 4 bar was found. According to IGL, this amounted to theft of IGL's gas.

7. On 20.12.2014, the respondent responded to the aforesaid letter and denied the allegation that he had tapped IGL's gas pipeline. He stated that PNG was consumed in terms of the GSA and he had not defaulted in making payment of bills. The respondent further requested IGL to resume the supply of PNG with immediate effect as the production was suffering for want of gas supply. He further put IGL to notice that he would claim compensation for any loss caused due to suspension of the supply of gas.

8. On 05.02.2015, IGL sent a notice informing the respondent that the total unauthorised overdrawal quantity of natural gas for the period

of April, 2010 till November, 2014 was 347 SQM and raised a provisional demand of ₹1,52,51,669. The said amount was to be paid within three working days with effect from 09.02.2016.

9. Thereafter, on 14.02.2015, in view of non-payment of the aforesaid amount, IGL invoked the Bank Guarantee of ₹6,04,050 issued by Canara Bank. On 20.02.2015, the Canara Bank made the payment against the said Bank Guarantee.

10. In view of the disputes between the parties, by a letter dated 12.03.2015, IGL invoked the Arbitration Clauses (Article 15.3 of the GSA dated 10.11.2009 and Article 23(iii) of the GSA dated 01.11.2014) and nominated Mr. P.K. Pandey, Vice President (CNG O&M) of IGL as the Sole Arbitrator.

11. On 15.04.2015, the respondent filed an application under Section 13 of the A&C Act challenging the appointment of the Sole Arbitrator. The learned Arbitrator dismissed the aforesaid application on 11.08.2015.

12. On 11.05.2015, IGL filed a petition under Section 9 of the A&C Act (being O.M.P. (I) 217 of 2015), *inter alia*, praying for the appointment of a Court Commissioner to visit the factory premises to collect the relevant information. This Court allowed the aforesaid prayer and by an order dated 15.05.2015, appointed Mr. S.K. Sharma, a former Registrar of this Court, as the Court Commissioner to visit the factory premises of the respondent and collect the relevant

information. The operative part of the said order indicating the scope of the work to be performed by the Commissioner is set out below :

“9. In light of the above submissions, the Court considers it appropriate to issue the following directions:

(i) The Court appoints Mr. S.K. Shatma, a former Registrar of this Court, residing at WZ-321, Sri Nagar, Shakur Basti, Delhi-110034 (Mob.No. 9818103888) as Court Commissioner. The CC will inform the parties at least one day in advance of his proposed visit to the sites.

ii) The CC will inspect the factory premises of the four Respondents to ascertain the gas pipes running from the point where the meter of the Petitioner was installed; take photographs of the pipeline and the equipments to which the pipelines may have been or are now connected

(iii) Prepare an inventory of all the equipments installed in the premises including the furnace and take photographs thereof. The details of the equipments including dimensions, capacity etc. and any relevant documents in relation to such equipments will be furnished to the CC by the concerned Respondent.

(iv) Each of the Respondents will make available to the CC documents pertaining to production of the final product, payment of excise duty, vouchers reflecting sales of the final product and registers showing the stocks on hand. The above figures shall be produced for the billing period as may be specified by the representatives of the Petitioner who will be present at the site. It is clarified that whatever records are unable to be produced by the concerned Respondent, the CC will make note to that effect. The CC in his report shall make note of whatever is pointed out by the Respondents at the site.

(v) The memo of the proceedings drawn up by the CC shall be got signed by the representatives of the Petitioner and the Respondents

(vi) One copy of the CC's report of his visit enclosing the proceedings, documents, photographs etc., shall be filed in the Court in these proceedings within two weeks of the completion of the visits and another copy thereof shall be filed by the Petitioner before the learned Arbitrator. Copies of the CC's report be made available to all the parties.

(vii) The fee of CC is fixed at Rs.2 lakhs which should be paid by the Petitioner to him in two instalments. 50% of fee be paid within one week from today and the balance within a week of the submission of the report. This is apart from all incidental expenses towards travel, secretarial assistance, photography, etc. which shall be paid by the Petitioner as per actuals.

(vii) The CC should complete the above exercise preferably on or before 10th June 2015.

13. On 30.05.2015, the Court Commissioner inspected the factory premises of the respondent. During the course of the inspection, he recorded the contentions advanced by Mr. Deepak Dhuper (sole proprietor of the respondent). The respondent stated that one furnace and two dye casting machines were shifted to Bawana in first week of May, 2015. He claimed that after disconnection of the gas supply from IGL, he was using Diesel/Low Density Oil for melting aluminium in the existing furnace. Mr. Dhuper could not produce any documents regarding capacity of the equipment or the excise records. He stated that the records were not available as the unit (Pawan Castings) was not registered with the Excise Authorities because its sales were

exempted. A list of documents required to be submitted by Mr. Deepak Dhuper was handed over to him and the proceedings were adjourned to 03.06.2015.

14. On 03.06.2015, Mr. Deepak Dhuper handed over a note regarding the process of aluminium pressure die casting and the invoices of Kamal Gas Service and Bharat Gas Service to the Court Commissioner along with his covering letter. The said covering letter recorded that *“As the (LPG Commercial) Gas was the fuel we were using just prior to PNG (IGL). At the time in December '14 the pipeline of this medium were installed in the premises which may have been confused as that of PNG kindly note”*. The Court Commissioner also recorded the statement of the counsel for IGL to the effect that no such pipeline as mentioned in the aforesaid letter existed at the time of installation of the PNG connection on 04.12.2014. Mr. Deepak Dhuper had provided copies of the documents as per the list and the Court Commissioner also noted the same.

15. The aforesaid report by the Court Commissioner was filed before this Court on 29.06.2015.

16. On 05.09.2015, IGL filed its Statement of Claims and the respondent filed its Statement of Defence and Counter Claims on 04.11.2015. In view of the rival stands, the Arbitral Tribunal revised the issues framed on 23.02.2016 and framed the following issues, on 08.04.2016:-

“1. Whether the invocation of the present Arbitration by the Claimant is valid as per the provisions of the Arbitration and Conciliation Act, 1996?

2. Whether the Claimant is entitled to claim any amount in respect to the Gas Supply Agreement dated 10.11.2009 in these proceedings in view of the objection taken by the Respondent in the Preliminary Objection-III of its Statement of Defence?

3. Whether there was any unauthorized and illegal consumption of gas by the Respondent as on 04.12.2014 as contended by the Claimant?

4. Whether the Claimant is entitled to recover a sum of Rs.1,46,47 ,619 I - from the Respondent towards unauthorized and illegal consumption of gas as claimed in the Statement of Claim?

5. Whether either of the Party is entitled to interest @ 18% on the amount claimed?

6. Whether the Claimant was justified in enashing the Bank Guarantee of the Respondent worth Rs.6,04,050

7. Whether Respondent is entitled to recover the amount from the Claimant as claimed in his Counter Claim?”

17. Thereafter, the learned Arbitrator resigned and on 19.12.2016, IGL appointed Justice (Retd.) Dilip Raosaheb Deshmuk, former judge of Chhattisgarh High Court as the Sole Arbitrator to adjudicate the disputes.

18. On 20.12.2016, the respondent filed a petition under Section 11 of the A&C Act (ARB. P. 815/2016) seeking appointment of an Arbitrator to adjudicate the disputes as the arbitrator appointed earlier, Mr. PK Pandey, had resigned. This Court by an order dated 22.12.2016 confirmed the appointment of Justice (Retd.) Dilip Raosaheb Deshmukh, as the Sole Arbitrator to adjudicate the disputes and further directed that the arbitration be conducted under the aegis of the Delhi International Arbitration Centre (DIAC).

19. On 10.12.2019, the Arbitral Tribunal made the impugned award rejecting IGL's claims. It found that IGL had failed to prove tampering of the pipeline or the unauthorised consumption of PNG, inside the respondent's factory. The Arbitral Tribunal also held that the encashment of the Bank Guarantee submitted by the respondent, was illegal. The Tribunal did not accept his prayer for refund of the amount received by IGL on invocation of the Bank Guarantee because he had not paid any fee for the said claim. However, the Arbitral Tribunal held that IGL was liable to bear the entire cost of the arbitration.

20. Aggrieved by the impugned award, IGL has filed the present petition.

Submissions

21. Mr. Saurav Agarwal, learned counsel appearing for IGL, submitted that the finding of the Arbitral Tribunal that IGL had failed to establish that there was any tampering of IGL's facilities in the

premises of the respondent is patently erroneous. He submitted that the said finding is perverse and based on assumptions, which are contrary to record. He drew the attention of this Court to the finding of the Arbitral Tribunal that “*there is no photograph or video on record to show that an illegal tapping point existed before the MRS*” and contended that the said finding is patently erroneous as the photographs placed on record clearly show an illegal tapping point. He referred to the photograph exhibited as CW-1/17 and submitted that the said photograph clearly evidenced that IGL’s pipeline for supply of gas had been tapped before the Metering and Regulation Station (MRS).

22. Next, he submitted that the entire approach of the Arbitral Tribunal in rejecting the evidence led by IGL is perverse and indicated a pre-existent disposition to reject the evidence. He further pointed out that the Arbitral Tribunal had rejected the electronic evidence on the ground that an affidavit under Section 65B of the Indian Evidence Act, 1872 had not been filed. He stated that no such objection had been taken at the material time.

Reasons and conclusion

23. I have heard Mr. Agarwal, learned counsel appearing for IGL at some length.

24. IGL’s claim for a sum of ₹1,46,47,619/- is premised on the assumption that the respondent had consumed 3,17,822.09 SCM of PNG without the said supply being recorded by the Metering and

Regulation Station (MRS). The said consumption was calculated on the basis of the respondent's maximum monthly consumption during the period of supply. In August 2010, the respondent had consumed 16,686 SCM of PNG, which the maximum consumption in any month and IGL quantified its claim on the assumption that the respondent was consuming at least the said quantum of PNG every month. According to IGL, the difference between the said consumption and that recorded by the MRS and invoiced by IGL, would be the bare minimum consumption that had escaped being metered. And, the respondent was liable to pay for the same. The said claim was premised on the basis that IGL's facilities (supply pipelines) before MRS had been tapped by the respondent and bulk of the PNG for its consumption had been drawn from the illegal tapping point. IGL claimed that only a small fraction of PNG supply was drawn from beyond the metering system and therefore, only that part of the consumption was recorded and invoiced by IGL to the respondent.

25. As is apparent from the above, IGL was required to, essentially, prove that the respondent had in fact tapped IGL's pipeline before the MRS and had drawn the gas from the said pipeline for his consumption.

26. The respondent had contested the aforesaid claim on two fronts. First of all, it disputed that the inspection carried out at the factory premises had resulted in discovery of any illegal or unauthorized tapping point. The respondent claimed that PNG supplied by IGL had not been consumed unauthorizedly or without the same being recorded

at the MRS. The respondent also contested IGL's assumption that the reduction in the metered PNG consumption was a result of the respondent tapping the said supply before the metering point. The respondent claimed that he was also using oil for its production and relied upon the Court Commissioner's report, which confirmed the existence of overhead oil tanks for storing oil for use as fuel to carry on the manufacturing process. It was also submitted that in terms of the GSAs, the respondent had agreed to not depend on a single fuel. The respondent had also produced certain bills showing purchases of oil.

27. The Arbitral Tribunal considered the rival contentions and had held that the onus of proving the following facts rested on IGL:

- (i) that an inspection at the factory premises of the respondent was conducted by an authorized officer of IGL;
- (ii) that the respondent had laid an unauthorized CS/MS pipeline with a covering of PVC pipe in its factory and had sourced PNG from the unauthorized tapping point before the MRS; and
- (iii) that an unauthorized regulator had been installed inside a shelf of the desk located at the first floor of the factory premises, to regulate the flow of PNG.

28. The Arbitral Tribunal examined the evidence and concluded that IGL had failed to prove the above. The reasons for the same as

articulated by the Arbitral Tribunal in the impugned award are set out below:

“(iv) The inspection report dated 06.07.2015 by Mr. S.K. Sharma Local Commissioner appointed by the High Court and the photographs taken are of no avail to the Claimant and prove nothing as none of the incriminating material alleged to have been found at the Respondent’s premises is seen in the photographs. Such incriminating material was not even found by the police on 05.12.2014 as admitted by Mr. Dileep Kumar (CW-1).

(v) The Claimant has led the evidence of Mr. Dileep Kumar (CW- 1) and Mr. Narendra Nath Pandey (CW-2) officials of the Claimant to prove the above allegations and has also filed the photographs and video stated to have been taken inside the factory of the Respondent. There were two affidavits in evidence of the witness Mr. Dileep Kumar (CW-1). The first one was dated 13.04.2016 while the second was dated 24.05.2016. While the first affidavit does not even whisper that Mr. Dileep Kumar (CW-1) an official of the Claimant had inspected the premises of the Respondent on 04.12.2014 the second affidavit is also totally silent about the name of any other official of the Claimant who was present in the factory premises of the Respondent during such inspection. It was for the first time in the Rejoinder by the Claimant that it was stated that one Mr. Dilip and Mr. Pranav Uppal officials of the Claimant had inspected the factory premises of the Respondent on 04.12.2014. Mr. Pranav Uppal was not examined by the Claimant. Presence of Mr. Narendra Nath Pandey at the inspection is not mentioned therein. During cross-examination Mr. Narendra Nath Pandey (CW-2) in answer to Q.No.30 stated that besides Mr. Dileep Kumar Mr. Shashank had carried the initial inspection on 04.12.2014 in the premises of the Respondent. He

further stated that Mr. Somil Garg, Mr. Rakesh Agarwal and Mr. Sushil Kumar also joined the inspection on being informed by Mr. Dileep Kumar. Thus firstly, none of the witnesses corroborate the presence of Mr. Pranav Uppal during the inspection. The names of Mr. Shashank, Mr. Somil Garg, Mr. Rakesh Agarwal and Mr. Sushil Kumar are also absent in the Rejoinder by the Claimant. None of these witnesses have been examined by the Claimant. So far as Para 10 of the affidavit in evidence of Mr. Narendra Nath Pandey is concerned, it does not even whisper about his presence at the factory premises of the Respondent during such inspection on 04.12.2014. Even during cross-examination he admitted that he did not accompany Mr. Dileep Kumar to the Respondent's factory premises but reached there only after Mr. Dileep Kumar called him. At what stage of the inspection was he called is not known. His testimony being evasive to material questions does not in any manner prove either his presence during inspection or any of the essential elements of alleged tampering by the Respondent.

(vi) Mr. Dileep Kumar (CW-1) has testified about some of the photographs C 1/8, 10, 12, 13 and 17 as proof of tampering done by the Respondent in its premises to facilitate flow of PNG from the illegal tapping point done by the Respondent before the metering unit provided by the Claimant in the factory premises. However, there is no photograph or video on record to show that an illegal tapping point existed before the MRS. There is no photograph which shows the location or the existence of the MRS.

(vii) As regards the photographs and videos on record while the first affidavit of Mr. Dileep Kumar is silent, the second affidavit states as under in Para 23:

“23. All the videos had been prepared and photographs using the mobile phone of

different employees of IGL who were present at the site at the time when the above stated incident was taking place. These videos and photos were then copied and stored on their computers by the respective employees, which computer was working properly and was used regularly to store or process information for the purposes of activities regularly carried on by the concerned employee and the photographs and the videos stored in the CD are reproduced from what was stored in the said computers.”

(viii) No such inference can be drawn from the above evidence that any photographs or videos were taken by Mr. Dileep Kumar (CW-1). In answer to Q.No.80 he admits his inability to identify which of the photographs on record were taken by which of the officials. One CD on record was displayed before the tribunal. The witness stated that he was seen taking videos in the CD. It naturally follows from it that the CD on record was not made by Mr. Dileep Kumar but by some unidentified person. The evidence of Mr. Dileep Kumar is completely discredited by his admission in answer to Q.No.81 that his statement regarding taking photographs and videos during inspection at the Respondent's factory is incorrect while what was stated in Para 23 of his additional affidavit (quoted above) is correct. This leads to the inescapable conclusion that the photographs and videos on record cannot be read in evidence for three reasons, firstly because their author has not been examined, their source is not known and lastly because of total non-compliance of Section 65-B of the Evidence Act. In *Anvar P. V. vs. P.K. Basheer and Ors.* (2014) 10 SCC 473 it was held that an electronic record by way of photograph, CD etc. shall not be admitted in evidence unless the requirements under section 65-B of the Evidence Act are satisfied. In the

absence of a certificate in terms of Sec. 65-B of the Evidence Act by the author of such electronic record such secondary evidence of photographs and CDs is wholly inadmissible.

(ix) What shocks the conscience is that Mr. Dileep Kumar (CW-1) admits that no *panchnama* or inspection report was prepared during or after the inspection at the factory of the Respondent. He mentions the presence of some labourers of the Respondent during the inspection and asserts that if called they may confirm the facts. However, no such labourer has been examined. He admits that on 04.12.2014 he had first inspected a factory 'Mangla Handles' adjacent to the Respondent's factory but stated that he does not remember if he had prepared any inspection report there or not. On being directed the witness was unable to produce such inspection report. The testimony of Mr. Dileep Kumar in cross-examination is so evasive that it fails to inspire confidence. In answer to Q.No.18 he stated that he did not prepare any inspection report on 04.12.2014 but had informed his boss Mr. Somil Garg, the then Chief Manager and requested him to come to the premises. Mr. Somil Garg has not been examined. He volunteered that he had only given an oral information to his high officials and did not remember if any inspection report was made. According to him (Q.No.25) Mr. Pawan Dhuper, brother of Mr. Deepak Dhuper was present during inspection. It was therefore incumbent that an inspection report or *panchnama* was prepared at the factory premises of the respondent and got duly signed by Mr. Pawan Dhuper or any of the labourers present. His testimony is replete with evasive replies.

(x) Mr. Dileep Kumar had lodged FIR on 05.12.2014 at PS Samaypur Badli regarding the incident. The said FIR shows that four number of photographs during the cause of action, copy of disconnection notice dated 05.12.2014 and CD containing the video of

excavation of unauthorized tapping with softcopy of photographs were also handed over. None of the above material and primary evidence has been requisition before this tribunal.

(xi) Mr. Dileep Kumar admits in answer to a tribunal question that he visited the police station in the night of 04.12.2014 at around 01.00 a.m. i.e. on 05.12.2014. In Rejoinder it is admitted by the Claimant that the possession of the Respondent's factory was with the police from 05.12.2014 onwards till 07.12.2014. Therefore, if the police officials had visited the factory premises on 05.12.2014 after the FIR being lodged and had taken possession thereof, such police officials were material witnesses who ought to have been examined. What is equally shocking is that no incriminating article evidencing any tampering by the Respondent with the seller's facilities was found in the factory premises when Mr. Dileep Kumar returned to the factory with the police after lodging FIR. In answer to Q.No.31, the witness stated that "When we visited the premises with the police after lodging the FIR in the next morning i.e. 05.12.2014 such regulator was not found at the premises as it was removed by the customer." This in my opinion is completely fallacious. One photograph CWI/17 shows a yellow pipeline with a 'T' junction which according to the witness is the unauthorized tapping point. However, in answer to Q.No.46 & 48 he admitted that no such unauthorized point was removed during or after the inspection. If the officials of the Claimant were working at the factory premises of the Respondent late beyond midnight on 04.12.2014, had lodged a prompt FIR on the morning of 05.12.2014 and the police had sealed the premises on the same day (Q.No.50) it is impossible that incriminating material like 'T' junction, tapping point, regulator etc. would not be found when the police reached the spot with Mr. Dileep Kumar. In answer to Q.No.62 the witness stated that he had not removed any such incriminating material from the Respondent's

premises before reporting to the police on 05.12.2014 and in answer to Q.No.64 he stated that the 'T' junction and some pipeline as well as the regulator was also missing from the site at the time of the visit by the Police. No *panchnama* or inspection report was prepared during inspection. An oral report only was made to the high officials in Dec. 2014. No record was maintained regarding the inspection. No acknowledgement was obtained from the representative of the Respondent or labourers alleged to be present during inspection. In reply to Q.No.69 the witness admits that no independent witness was either present or called during his inspection. His first affidavit dated 13.04.2016 is wholly silent if Mr. Dileep Kumar conducted the inspection. Therefore, it is difficult to fathom that the additional affidavit dated 24.05.2016 was prepared by Mr. Dileep Kumar from his memory or by simply seeing the photographs or video. Even the map Ex.CW-1/7 is totally unsupported by any evidence. There is nothing in the photographs on record to rule out that these were not taken during inspection of other factory premises as none of the photos show the name of Pawan Casting or the presence of Mr. Deepak Dhuper who was absent during such inspection. Several premises were inspected and several photos and videos were taken by different officials whose identity is not known. This completely demolishes the testimony of Mr. Dileep Kumar (CW-1).

(xii) An application dated 24.04.2018 was filed by the Respondent stating that the averments made by Mr. Dileep Kumar in the affidavit dated 23.05.2016 were beyond the pleadings and therefore paragraphs 6 to 19 of the said affidavit should not be read in evidence. Mr. Dileep Kumar was specifically asked in cross examination why he did not mention the facts contained in his additional affidavit in his first affidavit to which he replied that *"Since I did not think that the above mentioned facts, photographs and videos could be material they did not form part of my first affidavit."* In

view of the most evasive manner in which the witness testified before this tribunal, the fact that no incriminating article evidencing tampering of gas supply by the Respondent were found in the premises on the early morning of 05.12.2014 and for the reasons aforesaid no reliance can be placed on what is stated in para 6 to 19 of the additional affidavit of Mr. Dileep Kumar as he has not only been completely discredited in cross-examination but also his testimony has elements of admitted falsehood.”

29. It is evident from the above that the finding of the Arbitral Tribunal that IGL had failed to prove that there was any unauthorized tapping from the PNG pipeline before the MRS and, that PNG had been sourced from the said tapping point, is based on evaluation of evidence that was led before the Arbitral Tribunal. The fact that IGL had not filed any affidavit in terms of Section 65B of the Indian Evidence Act, 1872 is not the only ground on which the evidence (photographs and video) produced by IGL’s witness, CW-1, was rejected. It was also noticed that the person who had made the video recording had not been examined. CW-1 could not have been the person who had recorded the video as apparently, he is visible in that video recording. The Arbitral Tribunal thus, found that the source of the video recording and the photographs produced was not known because the person who had made the video recording or captured the photograph had not been examined.

30. The contention that the finding of the Arbitral Tribunal that the photographs and the video on record do not show that there was any illegal tapping point before the MRS must be read in its context. CW

1/17 is a photograph that shows a dug-out pit with an exposed pipeline below the surface. It also shows that another pipe has been joined to that pipe. However, that photograph does not show any metering system. Mr. Agarwal submitted that photograph CW-1/8 shows the metering system (MRS). That may be correct but it is apparent that there is no photograph that shows both the tapping point and the MRS, which would clearly show that the tapping point was before the MRS. It was possible for the Arbitral Tribunal to examine both the photographs (CW 1/17 and CW 1/8) and other photographs to evaluate whether the alleged tapping point shown in the photograph (CW 1/17) was before the MRS. However, as a matter of fact, there is no photograph, which shows the illegal tapping point before the MRS since there is no single photograph that shows both, the tapping point as well as the MRS. In order to make the photographs meaningful, IGL would have to establish the location of the alleged tapping point and the MRS. The matter clearly is one of appreciation of evidence. It cannot be stated that the statement that there is no such photograph, which shows tapping before the MRS, is incorrect.

31. It is also evident from the above that the entire controversy sought to be raised before this Court revolves on the question whether the Arbitral Tribunal had correctly appreciated the evidence. Essentially, IGL seeks that this Court once again re-evaluate the evidence and examine the merits of the dispute. Clearly, this is beyond the scope of examination under Section 34 of the A&C Act. Perhaps, on evaluation and reappreciation of evidence, this Court may

have not concurred with the decision of the Arbitral Tribunal. However, it is well settled and, has been reiterated by the Supreme Court in several decisions that the examination under Section 34 of the A&C Act does not entail re-evaluation of the evidence as a first appellate court and this Court cannot supplant its opinion in place of that of the Arbitral Tribunal. (See ***P.R. Shah, Share & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd: (2012) 1 SCC 594***).

32. In ***Associated Builders v. Delhi Development Authority: (2015) 3 SCC 49***, the Supreme court had observed that “*Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts*”

33. In the present case, none of the grounds as set out in Section 34(2) or 34(2A) of the A&C Act are established and therefore, the impugned awards cannot be set aside.

34. The petition is accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

JUNE 1, 2021
RK