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

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Date of Decision: 26.04.2024+ **FAO(OS) (COMM) 84/2024, CM Nos.24519-21/2024**

GAIL GAS LIMITED

..... Appellant

Through: Mr.Sandeep Kumar Mahapatra &
Mr.Tribhuvan, Adv.

versus

M/S OKAY GLASS INDUSTRIES PRIVATE LTD Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (Oral)**

1. The appellant (hereafter *GGL*) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 19.09.2023 (hereafter *the impugned order*) passed by the learned Single Judge in OMP(COMM) 380/2023 captioned *Gail Gas Limited v. M/s OKAY Glass Industries*.

2. GGL had filed the aforesaid petition under Section 34 of the A&C Act impugning an Arbitral Award dated 06.06.2023 (hereafter *the impugned award*) passed by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*).



3. GGL has challenged the impugned order to the limited extent that the learned Single Judge has rejected GGL's challenge to the impugned award to the extent that it rejects GGL's counter claim. The learned Single Judge has directed issuance of notice in the said petition confined to the respondent's claims awarded by the Arbitral Tribunal.

4. The learned Single Judge had relied upon its earlier decision in ***GAIL Gas Limited v M/s Shyam Glass Works: Neutral Citation No.: 2023: DHC: 5190*** whereby, GGL's challenge to an arbitral award rendered in somewhat similar terms, was rejected.

5. Mr. Sandeep Mahapatra, learned counsel appearing on behalf of GGL did not dispute that the controversy involved in ***GAIL Gas Limited v M/s Shyam Glass Works*** (supra) is similar to that involved in present petition under Section 34 of A&C Act [OMP (COMM) No.380/2023] in so far GGL's counter claims are concerned. However, he submits that GGL intends to appeal the decision in ***GAIL Gas Limited v M/s Shyam Glass Works*** (supra).

6. In view of the above, we considered it apposite to hear Mr. Mahapatra in respect of GGL's challenge to rejection of its counter claim notwithstanding that the same is covered by the decision in ***GAIL Gas Limited v M/s Shyam Glass Works*** (supra) and the time for moving an appeal against the said decision has expired.

7. GGL is a Government of India undertaking and a wholly owned subsidiary of GAIL (India) Limited (hereafter *GAIL*). GGL is, *inter alia*, engaged in the business of distribution of the gas. The impugned award was



rendered in the context of disputes between GAIL and Onkar Nath Bansal, who was at the material time carrying on the business of manufacturing of glass tumblers and other glassware as a sole proprietor of a concern named M/s OKAY Glass Industries. However, it is material to note that in the petition filed under Section 34 of the A&C Act before the learned Single Judge being OMP (COMM) No.380/2023, the respondent is reflected as a firm arrayed through its partner (Manish Bansal). In the present appeal, the respondent is reflected as private limited company (M/s OKAY Glass Industries Private Limited) albeit arrayed as through its partner Manish Bansal.

8. The controversy arose between the parties in respect of the Gas Supply Agreement dated 31.01.2001 (hereafter *the GSA*) entered into between GAIL and the respondent. In terms of the GSA, GAIL agreed to supply natural gas and the respondent had agreed to purchase the natural gas for the use at the respondent's unit at Firozabad, Uttar Pradesh.

9. On 16.11.2011, in terms of the Business Transfer Agreement, GGL assumed the obligations of GAIL under the GSA entered with the respondent.

10. In terms of the GSA, natural gas was required to be supplied at the respondent's premises through a metering skid comprising of Turbine Flow Meter (hereafter *the TFM*) for the measurement of the gas. GAIL was required to raise fortnightly invoices on the basis of the reading reflected in the TFM.

11. The disputes arose in respect of the allegations of tampering of the



TFM. It is GGL's case that the TFM installed at the premises of the respondent was found to be tampered with resulting in reduced measurement of gas supplied to the respondent.

12. GGL claimed that it is entitled to the payment for the natural gas. In terms of the GSA, GAIL has raised the demand of ₹4,18,00,803/-, but subsequently revised the same to ₹2,67,37,456/-.

13. According to GGL, there were three episodes of tampering. The first was discovered on 05.08.2004 when the TFM installed at the premises of the respondent was replaced by GAIL's Station-in-charge on the ground that the seal of the TFM had been tampered. It is the case of GGL that the TFM was removed from the premises of the respondent and was sent for testing to M/s Rockwin Flow Meter (India) Private Limited (hereafter *the Test Laboratory*) for calibration and inspection. GAIL claimed that the Test Laboratory confirmed that the counter seal was refixed and the electric connector seal was found to be broken.

14. The TFM installed on 05.08.2004 was removed on 23.09.2004 and replaced. This was the second occasion when the TFM was removed on the allegations that the seal appeared to be tampered with. The removed TFM was again sent to the Test Laboratory and GGL claims that the seal of the TFM was found to be tampered. It is stated that on 18.02.2005 the officials of GAIL visited the premises of the respondent and once again found that the TFM seal had been tampered with.

15. Thereafter, on 14.03.2005, GAIL issued a Show Cause Notice (hereafter *the SCN*) calling upon the respondent to show cause as to why the



supply of gas should not be discontinued. The respondent disputed the allegations made in the SCN and referred to its earlier letter reporting that the TFM installed at the premises was not functioning properly.

16. In view of above, the respondent invoked the arbitration clause by the notice dated 26.05.2005. The respondent also filed an application under Section 9 of the A&C Act before the learned District Court at Agra being Arbitration Case No. 309 of 2005, *inter alia*, seeking an order restraining GAIL from terminating the GSA or the supply of gas. The said application was not allowed and on 28.05.2005, GAIL discontinued the gas supply to the respondent. The respondent filed an application in Arbitration Case 309/2005 for resumption of gas supply, however, the same was rejected by an order dated 31.05.2005. Thereafter, on 08.06.2005, GAIL raised a demand of ₹4,18,00,803/- on provisional basis on account of tampering with the TFM.

17. In the meanwhile, the respondent appealed the order dated 31.05.2005 rejecting the respondent's application for resumption of gas supply before the Hon'ble Allahabad High Court (FAFO No. 621/2005). The Allahabad High Court passed an order dated 08.07.2005 directing the respondent to deposit a sum of ₹50,00,000/-, by way of installments and security amount of ₹3,75,00,000/-, for restoration of the gas connection. On 11.07.2005, the respondent deposited a sum of ₹20,00,000/-, as a first installment and sought clarification of the order dated 08.07.2005. By an order dated 30.08.2005 the Hon'ble Allahabad High Court modified its earlier order and in compliance of the order dated 30.08.2005 GAIL reinstated the gas supply to the premises of the respondent.



18. GAIL issued a debit note dated 06.01.2006 to the respondent for a shortfall in gas consumption for the period from April 2005 to September 2005 for a sum of ₹45,10,011/- towards Minimum Guaranteed Offtake (MGO), claiming that on the failure of such payment, the gas supply would be discontinued. The respondent disputed the said demand and claimed that the shortfall was on account of GAIL's arbitrary action and not on account of its default.

19. The disputes between the parties were referred to the Arbitral Tribunal.

20. The respondent filed its claim before the Arbitral Tribunal claiming a sum ₹1,06,11,626/-, as damages for losses incurred by it on account of GAIL. It also sought further damages to the extent of ₹50,00,000/-. GAIL filed the counter claim claiming tampering charges for a sum of ₹3,02,35,033 and an additional amount of ₹45,10,011/- along with the interest towards MGO charges.

21. GAIL's counter claim before the Arbitral Tribunal was essentially premised on the allegation that the respondent had tampered with the TFM. This allegation was stoutly disputed by the respondent. The respondent claims that some of the officials were inimical to the respondent and had orchestrated the said allegation in addition to the other defences.

22. Both parties led extensive evidence in respect of the said controversy. The Arbitral Tribunal examined all the materials and evidence led and concluded that GGL (which succeeded to GAIL's business of distribution of gas) had failed to establish that the respondent had tampered with the TFM



and therefore, the counterclaim for penalty (tampering charges) in terms of Clause 11.06 of the GSA was rejected.

23. The Arbitral Tribunal referred to the evidence led and examined in detail; the steps taken for securing the TFM. The Arbitral Tribunal noted the security measures taken for frustrating any attempts to tamper the meters and, in effect, found that the allegations of the tampering were inconsistent with the security measures. The tampering of the TFM seal would be impossible without tampering the outer seals.

24. The relevant extract of the impugned award noting the safety measure put in place reads as under:

“.....in October, 2004 the bottom of the metering skid was sealed with concrete wall and the seals too were replaced with new improved tamper proof seals. The metering skid was fenced also and the three doors were locked from inside by tamper proof locks. In addition even surprise checking at consumer's premises was introduced. As if all this was not enough the Respondent had also taken some more preventive steps. Those additional preventive steps, according to the aforesaid witness, were:

- (a) Firstly, the originally installed locks on the metering skids which, earlier, could be easily opened with duplicate keys, were replaced by high security locks and those locks were put on the panel doors of the skids.
- (b) Secondly, earlier the doors of the skids were pasted with paper seals. However, since those paper seals so pasted could be easily removed and repasted, the Respondent started putting Holographic seals on the doors as well as on the turbine meters.

As per the aforesaid witness the Respondent made further



improvements. Earlier there were no steel plates with the result that there used to be sufficient gaps through which anyone could easily gain access to the supply system and the flow meter. Those gaps were closed with the help of plates and by placing those skids on concrete foundations. Besides that, the earlier cover sheet on top portion of the skid was fixed with nuts and bolts which could be easily removed and replaced for gaining access to the supply system inside the skid. To prevent any mischief the cover sheets were sealed in such a manner that they could not be easily removed for gaining access inside the skid. In short thus, as per the witness, on account of those improvements made, the only way any threat/theft and pilferage of gas could be established was by:

- (a) Examining the metering skid
- (b) The seals on the skid door and the meter
- (c) Through examination of the internal condition of the flow meter coupled with the consumption chart pattern of the consumer concerned.”

25. The Arbitral Tribunal also noted that the manner in which meters were removed and taken was a subject matter of serious challenge. On the basis of the evidence led of GGL’s witness (Praveen Kumar), the Arbitral Tribunal noted that the TFM seal and the TFM side door could not be tampered with unless the skid door seal was tampered. However, the evidence did not indicate that the other seals were tampered. In addition, the Arbitral Tribunal found that the documents (Ex.RW6/1 and Ex.RW6/A), which were relied upon to establish that the seals were found tampered were authored by one Mr. Rajiv Chak, who was not examined. The respondent had made allegations against him. The Arbitral Tribunal also noted that the respondent was not present when the meter was removed. The Arbitral Tribunal’s observations in this regard are set out below:

“I have already referred to above, the evidence itself showing what



precautions had been taken by the Respondent, to frustrate any attempt or chance of tampering of the meter, and so also the metering skid. Coming to Praveen Kumar's cross-examination, he has stated in clear and unambiguous terms that the turbine flow meter seal and turbine flow meter side door seal cannot be tampered with unless the skid door seal is tampered with. Ofcourse, RW6/1 does speak of "meter seal found disturbed" but then, neither that document nor any oral evidence clarifies what is signified by "meter seal". RW6/A does not clarify it at all. There is no evidence as to which "meter seal" RW 6/1 is referring to and what does it mean by the word "disturbed". If it means the seal inside the skid doors then there has to be evidence of seals of skid doors having been tampered with but there is no mention of it. Admittedly the box of the metering skid has four doors and one lock is applied from outside and three from inside. There is no reference to any of those locks having been tampered with. Admittedly, again, the skid box has opening from the bottom and so also from the top. While the access from the top can be had by removing the bolts fixed at the top cover and from the sides by removing similar bolt, there is no mention of any such removal either in Exhibits RW 6/1 and RW 6/A. Admittedly, again, the outside boxes are locked by putting a padlock, however, there is no evidence of its breaking open by force or otherwise (see cross-examination of Praveen Kumar). To add to it the author of Exhibits RW 6/1 or RW 6/A namely Shri Rajeev Chak has not been examined. He was the most material witness. It is he who, we are made to believe, was not only present but supervised the entire exercise and prepared those documents. As if all this was not enough, though the most material documents namely Ex.RW 6/1 and RW 6/2 bear his name as the main architect of the entire proceedings, the documents do not even bear his signatures. And, add to it the fact that there is no explanation why he did not sign them and why someone else his signed "for" him? We all know the effect of not examining the most material witness and the lack of any explanation as to why the author of a document did not himself sign it and why somebody else signed "for him". Ofcourse his one affidavit, which he filed before the learned District Judge, Agra (Exhibit CW-9, pages-182) is on the record. Significantly, it makes no reference to the steps taken by him in removal of the turbine meter nor to which lock or seal was in what condition. However, what is of significance is that in para-5 of his affidavit he states in clear and unambiguous terms that the meter so



removed on August 5, 2004 was sent to Rockwin “in the sealed condition” and proceeds to explain that “the seals of the wooden box as well as of the meter were not tampered in the office of the Respondent”. I am mentioning this at this stage itself because this part of his affidavit would assume significance at a later part of this discussion.”

26. After evaluation of the material placed on record, the Arbitral Tribunal observed that Ex.RW6/1 and Ex.RW6/A was prepared by Mr. Rajeev Chak but he was not examined and in fact the same were signed by Mr. Praveen Kumar.

27. The Arbitral Tribunal also found that there were gaps in the evidence as to who had delivered the wooden box at GAIL’s office; who had received the same; and, in what condition the same was delivered. Similarly, there was lack of evidence as to who had received the same at the Test Laboratory and when it was returned by him.

28. The Arbitral Tribunal examined the evidence in detail in arriving at its conclusion.

29. It is not necessary for this Court to list out the evidence and material referred to by the Arbitral Tribunal to arrive at its conclusion. Suffice it to note that the Arbitral Tribunal has founded its conclusion on the basis of appreciation and evaluation of evidence.

30. It is impermissible for a court to reappreciate or re-evaluate the evidence and material and, supplant its decision in place of that of the Arbitrator.



31. The contentions advanced on behalf of GGL essentially invite this Court to undertake a merits review on re-evaluation of the materials and evidence placed on record. This is impermissible in a proceeding under Section 34 of the A&C Act.

32. The question, as to whether GGL had established that the relevant meter was tampered by the respondent is essentially a question of fact. The impugned award indicates that the findings of the Arbitral Tribunal in regard to the said question were arrived at after elaborately examining the evidence led by the parties. We are unable to accept that no reasonable person could possibly accept the view of the Arbitral Tribunal. This is also not a case where the findings are based on no evidence at all but where the Arbitral Tribunal has based its conclusion on evaluation of evidence and material placed on record.

33. In *Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*, the Supreme Court had observed that “*once it is found that the arbitrator’s approach is not arbitrary or capricious then he is the last word on facts.*” The Supreme Court also explained that “when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of quantity and quality of evidence to be relied upon when he delivers his arbitral award”.

34. Given the limited scope of Section 34 of the A&C Act, we are unable to accept that the impugned award warrants any interference insofar as it



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rejects GGL's counterclaim for tampering charges.

35. In view of the above, the appeal is unmerited and, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

APRIL 26, 2024

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Signature Not Verified

Digitally Signed
By: DUSHYANT
RAWAL
Signing Date: 06.05.2024

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