
(2011) 01 DEL CK 0315

In the Delhi High Court

Case No : Writ Petition (C) 10398 of 2006 and CM No's. 7804 of 2006 and 8466 of 2006

Atmiya Chemcials

APPELLANT

Vs

Gas Authority of India Ltd.

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Citation : (2011) 2 AD 317 : (2011) 178 DLT 761

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Shailesh Kapoor and Afsar, for the Appellant; Ajit Pudussery and Dinesh Khurana, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The question raised in this writ petition under Article 226 of the Constitution concerns the reasonableness of the charges demanded by the Respondent GAIL (India) Ltd. ("GAIL") from the Petitioner for transportation/transmission of gas to the Petitioner's unit in Bharuch District Gujarat from GAIL's Gas Generating Station (GGS) at Motwan, Gujarat.

2. The Petitioner firm entered into an agreement dated 18th July 2003 with the GAIL whereby GAIL agreed to supply to the Petitioner gas from GGS Motwan with effect from 30th November 2003 up to 29th November 2005 on the terms and conditions set out in the agreement. In terms of Clause 4.01, gas was to be delivered to the Petitioner at the Gas Metering Station ("GMS") located at GAIL's premises in Motwan. The gas was to be transported from the downstream flange of the pipeline at the outlet of the GMS located by means of a pipeline to be provided and maintained by the Petitioner. Clause 4.03 of the agreement stated that in addition to the price of gas the Petitioner was to pay monthly transmission charges of Rs. 1,14,605 for the facilities provided by GAIL for supply of gas to the delivery point located in the Petitioner's premises. Clause 4.05 stated that for effecting deliveries GAIL "shall install and maintain at its own

risk and cost the piping control and regulation and metering equipment in the aforesaid GMS and all other accessories." The equipment installed by GAIL was to remain its property and it had the right to remove such equipment at any time within twelve months after the expiry of the contract.

3. On 29th September 2003, the Petitioner wrote to GAIL stating that it had purchased the land for its project which was at a distance of approximately 360 m. On 8th March 2004, the Petitioner informed GAIL that it had completed the erection of its Sodium Silicate plant and for the pre-commissioning activities of drying of furnace it required gas. It noted that GAIL had laid a pipeline and since its total length was 400 m, GAIL should work out the revised transportation charges on that basis. A further reminder was sent on 11th April 2004. The Petitioner wrote to GAIL on 7th November 2004 pointing out that GAIL had worked out the transmission charges on the basis of a distance of 1.5 km @ Rs. 1,14,605 whereas if it was worked out on the basis of 400 m the amount would be Rs. 30,565. The Petitioner pointed out that despite its request GAIL had been charging @ Rs. 1,14,605 per month as transmission charges for the months April to October 2004. Accordingly, the Petitioner sought refund of the excess amount.

4. On 13th December 2004, GAIL wrote to the Petitioner saying that it was not agreeable to the Petitioner's request for review of the transmission charges. GAIL further stated that in case a decision was taken by the corporate office to review the transmission charges, the Petitioner would be informed.

5. By its letter dated 2nd December 2005 to GAIL, the Petitioner drew attention to the fact that the transmission charges collected by GAIL from the neighbouring industry Crystal Glazes Pvt. Ltd. ("CGPL") which was at the same distance from the GGS Motwan was Rs. 24,317 exclusive of local sales tax whereas the Petitioner was being charged Rs. 1,18,043. The Petitioner enclosed charts demonstrating the difference in the transmission charges collected from the Petitioner and CGPL.

6. By its letter dated 7th December 2005 addressed to the Petitioner, GAIL again turned down the request and asked the Petitioner to make payment of outstanding dues without delay. On 12th January 2006, the Petitioner again wrote to GAIL pointing out that CGPL was being charged far less transmission charges. In response, on 2nd February 2006, GAIL wrote to the Petitioner stating that it was not agreeable to review the transmission charges and that as on 27th January 2006 the Petitioner owed GAIL Rs. 46 lakhs as outstanding transmission charges. The Petitioner was asked to clear the said dues without delay. By its letter dated 21st March 2006, GAIL informed the Petitioner that it was agreeable to extend the validity of the agreement dated 18th July 2003 up to 30th June 2006 on the same terms and conditions.

7. On 29th March 2006, the Petitioner again raised the issue of transmission charges which had been fixed as Rs. 1,14,605 in the draft renewal agreement. According to the Petitioner this was five times higher than what was being

charged from CGPL. The Petitioner insisted on the transmission charges being revised. Meanwhile, on 4th April 2006, the Petitioner sent GAIL four demand drafts for an aggregate sum of Rs. 7,40,000. The Petitioner further informed GAIL that its bankers had been asked to clear two L Cs for a total sum of Rs. 5,20,000.

8. On 11th April 2006, GAIL again declined to review the transmission charges and informed the Petitioner that if it was not willing to sign the extension side letter, it would be presumed that the Petitioner was not interested availing of gas supply from GAIL. GAIL informed the Petitioner that as on 31st March 2006 the total outstanding dues were of Rs. 52.24 lakhs which should be cleared within seven days. The Petitioner made a further payment of Rs. 2 lakhs on 24th May 2006 and protested about the transmission charges. GAIL once again on 5th June 2006 declined to review the transmission charges and asked the Petitioner to clear the outstanding dues.

9. The present petition was filed by the Petitioner on 15th June 2006. At the hearing on 26th June 2006, this Court noticed that in a connected matter i.e. W.P. (C) No. 8131 of 2006 filed by Clean Glass Pvt. Ltd. a status quo order had been passed by this Court on 18th May 2005. Consequently, a status quo order was passed in the present petition as well.

10. On 12th July 2006, GAIL filed an application being CM No. 8466/2006 u/s 8(1) of the Arbitration and Conciliation Act, 1996. GAIL referred to Article 30 of the agreement dated 18th July 2003 under which the disputes arising out of the contract, which were not settled by mutual consultation, were to be referred to a sole Arbitrator selected by the Petitioner from the panel of three Arbitrators proposed by GAIL. Notice was issued in the said application on 14th July 2006. At the hearing on 15th January 2008, learned Counsel for the Petitioner relied upon the judgment of this Court in *Ramjee Power Construction Ltd. v. Union of India* 2006 1 AD (Delhi) 109 to urge that the present petition is maintainable notwithstanding the Arbitration clause. It may be mentioned that Writ Petition (Civil) No. 8131 of 2006 filed by Clean Glass Pvt. Ltd. was subsequently dismissed as withdrawn as the transmission charges in that case was re-worked to the mutual satisfaction of the parties.

11. Mr. Shailesh Kapoor, learned Counsel for the Petitioner submitted that GAIL had acted arbitrarily in fixing the transmission charges @ Rs. 1,14,605/- when in respect of CGPL which was at the same distance as the Petitioner from the GGS, Motwan, GAIL was charging only Rs. 24,317/- per month as transmission charges. He submits that there was no legal or factual basis for this discrimination. Referring to the policy of GAIL as displayed on its website, GAIL was looking for a return of 12% post tax on equity. If the actual cost of laying the HDPE pipelines was computed then it would be apparent that the transportation charges demanded from the Petitioner by GAIL were excessive. It is submitted that the gas supplied from GGS, Motwan was a low pressure natural gas. GAIL was merely redirecting the gas from oil fields through 2 inch HDPE

pipelines. No pressurization or technological aids were installed by GAIL. It was submitted that the transportation charges had to be recovered on actual cost basis and there ought to be no profiteering by GAIL in the garb of recovering transportation charges. Referring to the details provided by the learned Counsel for GAIL, learned Counsel for the Petitioner points out that the charging of Rs. 7,41,887 towards "metering skid" from the Petitioner was contrary to Clause 4.05 of the agreement in terms of which this cost was to be borne by GAIL. He submits that metering skids had nothing to do with the transportation. Referring to the additional affidavit dated 9th November 2010 filed by GAIL enclosing a diagram which shows the relative distances of the industrial units from the GGS Motwan, it is submitted that there had to be an equal distribution of the cost of laying the common pipeline among the three buyers who were located adjacent to each other. Counsel for the Petitioner has submitted detailed notes of calculations to show that without adding the cost of the metering skids, transportation cost worked out to only Rs. 7,325/- per month for the Petitioner and Rs. 4,824 per month for CGPL. If the cost of the metering skid was to be included, and recovering the entire investment in two years with a post-tax return computed at 16% per annum, the transportation charges for the Petitioner would work out to Rs. 51,471/- and for CGPL Rs. 48,973/-. In any event, therefore, there was no logic in charging Rs. 24,317/- from CGPL and Rs. 1,14,615/- from the Petitioner. Justifying the interference by this Court under Article 226 of the Constitution in matters like the present one, learned Counsel for the Petitioner referred to a number of decisions including *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, *R.K. Gupta Vs. Delhi Administration*, etc., *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, *Ramjee Power Construction Ltd. v. Union of India 2006 I AD (Delhi) 109*, *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, *E. Venkatakrishna Vs. Indian Oil Corporation and Another*, *M.P. State Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan*, *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, *Binny Ltd. and Another Vs. V. Sadasivan and Others*, and *Punjab State Electricity Board Ltd. Vs. Zora Singh and Others*, .

12. Appearing for GAIL, Mr. Ajit Pudussery, learned Counsel submits that the matter was purely within the realm of contract and in terms thereof the dispute was required to be referred for Arbitration. Further the Petitioner was inviting this Court to adjudicate on the reasonableness of the terms and conditions of the contract which had been entered into by the parties of their own free will. Reference is made to the decisions of the Supreme Court in *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, and *S.K. Jain Vs. State of Haryana and Another*, . It was submitted by Mr. Pudussery that the basis on which the transmission charges had been computed was set out in the additional affidavit dated 9th November 2010 filed by GAIL. He denied that the

transmission charges were arbitrary, excessive and discriminatory vis-a-vis CGPL. He denied that the Petitioner was located at the same distance as CGPS was from the GGS, Motwan. It was submitted that the contract dated 18th July 2003 had already come to an end and the Petitioner could not seek extension of the contract through interim orders of this Court.

13. The above submissions have been considered by this Court. Undoubtedly, the present dispute arises out of a contract dated 18th July 2003 entered into between the parties for the supply of gas. Although in terms of Article 30 of the agreement the dispute concerning the fixation of transportation charges ought to be referred to arbitration, considering that this petition has been pending in this Court for over four years, this Court is not inclined to adopt that course. For the reasons hereinafter discussed, this Court finds no merit in the principal issue raised by the Petitioner as to the reasonableness of the transmission charges demanded by GAIL. Therefore, the preliminary objection is not decided in this petition and is left open for a decision in some other appropriate case.

14. The scope of interference by this Court exercising its jurisdiction under Article 226 of the Constitution in the context of the reasonableness of a clause in a contract is extremely limited. In *Assistant Excise Commissioner v. Issac Peter*, the licencees of liquor vends sought directions to the Excise Department of Kerala not to enforce the minimum monthly payments due in terms of the contract entered into with the Department but collect only such amount as was payable on the basis of the arrack actually supplied. The writ petition filed by one of the licencees was allowed by the Division Bench of the Kerala High Court. In certain other matters of other licencees which reached the High Court by way of revision petitions, another Division Bench of the High Court took a contrary view. Appeals were then filed by both parties in the Supreme Court. While allowing the appeals preferred by the State and dismissing the appeals preferred by the licencees, the Supreme Court observed that the doctrine of fairness and reasonableness cannot read into contracts to which the State was a party. The Supreme Court observed as under (SCC, p.124):

Doctrine of fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant

supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate.

15. The Supreme Court in *Issac Peter* further observed as under (SCC, p.125):

We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a businesses for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits.

16. In *S.K. Jain v. State of Haryana*, the above legal position was reiterated and the Court declined to accept the submission that the parties were in an unequal bargaining power when the contract was entered into and, therefore, the Court should examine the reasonableness of the conditions and also whether the clauses of the contract were contrary to Sections 23 and 28 of the Contract Act, 1872.

17. Following the ratio of aforesaid two decisions, this Court holds that it is really not possible to examine the reasonableness of Clause 4.03 of the agreement dated 18th July 2003 which fixes the transmission charges @ Rs. 1,14,605/- per month.

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.

22. There is no merit in this writ petition and is dismissed as such. The interim order stands vacated. The pending applications are dismissed.