(2023) 07 DEL CK 0269

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 263 Of 2023, I.A. No. 13483 Of 2023-Ex., I.A. No. 13481, 13482 Of 2023

Gail Gas Limited APPELLANT

Vs

M/S Shyam Glass Works RESPONDENT

Date of Decision : 25-07-2023

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2023) 07 DEL CK 0269

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Sandeep Kumar Mahapatra, Sugum Jha, Kritika Sharma

Final Decision : Dismissed

Judgement

Rekha Palli, J

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeks to assail the arbitral award dated 28.10.2022 passed by the learned Arbitrator as rectified on 09.02.2023.

2. Vide the impugned award, the learned Arbitral Tribunal has after coming to the conclusion that respondent could not be held liable for tampering of the meter or seals or any internal part of the metering skid installed in the respondent’s premises rejected the petitioner’s claim against the respondent for damages of Rs. 1.62 Crores.

3. Before dealing with submissions of the learned counsel for the petitioner, the brief factual matrix as is necessary for adjudication of the present petition may be noted.

4. The petitioner, a Central public sector undertaking under the Ministry of Petroleum and Natural Gas is inter alia engaged in the business of providing natural gas through its country vide pipeline projects. On the other hand, the

respondent is a firm engaged in the business of manufacturing of glass and glass items using a gas based furnace and is running a factory in District Firozabad, Uttar Pradesh.

5. On 09.10.1996, the petitioner entered into an agreement with the respondent for supply of gas to the respondent and accordingly a metering skid was installed at the premises of the respondent, for billing purpose. The agreement was extended from time to time and consequently the petitioner continued to supply gas to the respondent.

6. It is the common case of the parties that on 11.11.2004, the turbine meter in the metering skid installed at the respondent's premises was replaced by the petitioner's officials. The original turbine meter was sent to a company known M/s Rockwin Flow Meter Pvt Ltd. for inspection and calibration. A similar exercise was again carried out on 28.01.2005 when the turbine meter was again changed and sent for inspection to the aforesaid company. Based on the reports received from the said company that the turbine meter had been tampered, the petitioner after issuing a show cause notice, discontinued the supply of gas to the respondent, and also demanded a sum of Rs.1.62 Crores from the respondent on account of the tampering of the meter.

7. Being aggrieved by the disconnection of its gas connection, the respondent approached the Allahabad High Court by way of a writ petition which was disposed with a direction to the petitioner to decide the respondent's pending application for restoration of his gas connection. Upon its application being rejected, the respondent invoked arbitration raising eight claims. During arguments before the learned Arbitrator, the respondent however pressed only claim no.1 wherein it had sought a declaration that there was no tampering of the meters at its end. In response whereof, the petitioner also raised two counter claims before the learned Arbitrator seeking a direction against the respondent to pay a sum of Rs. 1.62 Crores. The learned Arbitrator vide the impugned award has allowed claim no.1 raised by the respondent by holding that the respondent could not be held guilty of any tampering of the turbine meters and has consequently, rejected the petitioner's counter claim.

8. In support of the petition, learned counsel for the petitioner seeks to contend that the impugned award is perverse and against public policy as the learned Arbitrator had wrongly placed the onus of proving that the meter had been tempered by the respondent on the petitioner. He submits that once it was evident from the report of M/s Rockwin Flow Meter Pvt Ltd. that the turbine meter had been repeatedly tampered, the respondent ought to have been directed to prove that the meter was not tampered by it. He further submits that the learned Arbitrator has also ignored the terms of the agreement between the parties by rejecting the inspection reports from Rockwin Flow Meter Pvt Ltd. which clearly showed that the meters had been tampered. He, therefore, contends that the impugned award being against public policy is liable to be set aside.

9. Since it is the plea of the petitioner that the award is liable to be set aside as the onus of the meters being tampered had been wrongly placed on the petitioner instead of the respondent, it would be apposite to refer to the observations of the learned Arbitrator wherein he has noted that the gas metering equipment in the metering station at the premises of the respondent was to remain under the custody and ownership of the seller/the petitioner and was to be operated and maintained by the petitioner only. It needs to be noted that the learned Arbitrator also observed that after March 2004, the respondent had started putting ultra-unpickable locks with special computerised keys inside the panels. Furthermore, the entire metering skid was placed in an enclosure which was also put under lock and key of the petitioner. The relevant extracts of the award read as under:-

"The basic question which needs to be answered is as to whether the Claimant was responsible or blame worthy for tampering of the meter. In this respect what first needs to be noticed is the original contract entered into between the parties. It is Annexure-A. A bare perusal of the contract would go to show that though the pipeline was to be provided and maintained by the Claimant, the metering equipment in the metering stations and all other accessories upto the gas metering station were to be installed by the Respondent and were to remain its property. What is further significant to note is that the gas metering station was to remain "under the custody and ownership of the seller (Respondent)"and was to be "operated and maintained" by the Respondent.

Before we proceed to deal with the alleged tampering, let us first have a look at the statement of Mr. Ayush Gupta of GAIL. He says that though in the beginning the metering skids in the metallic panel had no locks, from the year 2000-2001, ordinary locks were put on all the four doors from outside but sometime after March 2004, in order to stop tampering, the Respondent started putting three locks inside the panel. Ofcourse, the the panel was locked from outside too. Not only this, the ordinary locks were replaced with ultra unpickable locks with special computerized key from Godrej Company. Besides all this the Respondent also replaced paper seals with such seals which could indicate tampering etc. This practice started sometime in August, September 2004. What more needs to be noticed is that, as per this witness, the entire metering skid was placed in an enclosure, which was put under lock and key of the Respondent "in order to prevent any access to the Metering Skid by unauthorized persons, including the Claimant". But, then, as per this witness on inspection of the Metering Skid on October 20, 2004 "the Claimant Meter Seal was found to be abnormal", and therefore, was removed, not on October 20, 2004 itself but on November 11, 2004 and sent for inspection to Mis Rockwin Flow-meter India Pvt. Ltd. for calibration. The document showing removal of the metering skid is Annexure-6. It appears that at that time of removal of the Meter a four stage checklist was also prepared. It is also in evidence that on removal, the meter so removed was put in a box and duly sealed and sent to Mis Rockwin Flow-meter India for calibration.

It appears that the meter so sent to Rockwin on the 11th of November, was inspected on the 19th and the Report was then prepared. It is Exhibit PWl/2 and is under the signatures of Mr. Manoj Kumar Manager-Mech. The Report runs as under:

Exhibit- PWl/2

"REPORT OF TURBINE METER INSPECTION

Date of Inspection 19.11.2004

66731 No meter seal was found. Counter not moving steadily. All internal fittings found in loose condition. Counter head rotating freely. Allen screws found missing. Meter needs repair

FOR ROCKWIN FLOWMETER INDIA PVT. LTD.

MANOJKUMAR

MANAGER - MECH."

10. Having noted the undisputed position emerging from the evidence, which showed that the metering skid remained under the lock and key of the petitioner, the learned Arbitrator proceeded to examine the reports submitted by M/s Rockwin Flow Meter Pvt Ltd., on which reports the entire case of the petitioner rested. At this stage, the learned Arbitrator went on to note that not only had locks been put on the meter which could be opened only by the petitioner but even a security guard had been engaged by the petitioner to keep an eye on the safety of the meter and the skid. The learned Arbitrator further found that the evidence led by the petitioner to prove the report in respect of the meter which was removed on 11.11.2004 was not sufficient to show that there was any tampering on the part of the respondent.

11. The relevant findings of the learned Arbitrator in this regard read as under:-

“As, with respect to the aforesaid meter, the entire case of the Respondent rests on the aforesaid Report marked Exhibit PWl/2, let me first deal with it before referring to the other meter and the report with regard to it.

Should the aforesaid Report Exhibit PWl/2 be accepted?

The answer, to my mind and considered opinion is a big No. Besides the fact that the Respondent had admittedly kept a guard to keep an eye on the safety of the Meter and the skid, such locks had been put which could not be opened except by the Respondent. Add to it the fact that there is no evidence that the lock so put was tampered with. What is of equal significance is the fact that allegedly on October 20, 2004, the lock was found "abnormal", Whatever it means, it does not mean it had been successfully tampered with. Let us assume it showed tampering. Why, after having noticed that tampering on October 20, 2004, the Respondent kept comfortably sleeping over it till November 11, 2004? Add to it the Report Exhibit PWl/1 prepared on November 11, 2004 itself by the officials of the Respondent. It shows the officials "found certain anomalies with the seal of the turbine flow meter installed in your skid". What does all this show? It shows that though the seal of the turbine flow meter was there, it merely showed certain anomalies. Now look at 4-stage Check List also which too was prepared on that very day, that is, November 11, 2004. It found the skid door seals and skid door locks "OK". What does it show? Two things. One, the seal of the turbine flow meter was very much there though it had certain unspecified "anomalies" and that skid door seals and locks were intact. If that be so, and it being so, and the locks being such which could not be opened by anyone accept the Respondent, what do we make out of it? To my mind it means, the skid area was clean, locks were intact. In short not opened. Not, at least, by the Claimant. Now, before I proceed to deal with the Report of Rockwin of November 11, 2004, let me straight away mention that I find no reason, I mean no reason at all, to rely on the Report marked Exhibit PWl/2. General reasons are as follows:

(i) The Report is by one Manoj Kumar who describes himself as Manager-Mech. He has NOT been examined.

(ii) We do not know whether or not he was qualified to inspect and report.

(iii) The Report does not show that the inspection was done by him personally.

(iv) No methodology of inspection is mentioned.

(v) The Report is got proved from a person who does not claim to have witnessed or supervised the inspection.

Not all this. He says: ''No meter seal was found". This is not only too vague, it leads the Respondent no where. Which "seal" is he referring to? Skid door seal or any other seal? There are so many other seals too. There is Turbine Meter Manufacturer seal, turbine Meter Holographic seal.

But, then, all this is not enough. It is in evidence that the turbine meter was removed on account of "certain anomalies with the seal of turbine flow meter" [Exhibit PWl/1]. Now, if I am not wrong, and I feel I am not, "certain anomalies" indicate- (i) Turbine meter was there and (ii) It had only certain "anomalies". But the expression "anomalies" would not mean the seal was missing.

But, I am still not finished with the Report Exhibit PWl/2. Ofcourse, it speaks of missing seal, of counter not moving steadily, internal fittings being in, "loose condition" and "counter head rotating freely". But, where does it say that all this was the result of tampering with the meter?

I am still not finished. Two points more before rejecting the report totally. It is in evidence that after removal of the meter it had been put in a box and sealed and that it was sent to the aforesaid Laboratory on the 11th of November itself. The Inspection was done on the 19th• There is no evidence that during all these days the meter was not tampered with. I feel this assurance ought to have come from not only the Respondent but from Rockwin too. Yes, a witness from Rockwin has been examined. He neither conducted the test, nor supervised it nor has come with assurance of non-tampering. And pray! what prevented the Respondent from examining Manoj Kumar? We all know the effect of keeping away a material witness and not examining him despite being available at one's elbow. This is still not the end of the matter. Yet another meter was removed on January 28, 2005. That the meter was removed is not in dispute. Admittedly none of the officials of the Respondent had found personally the Claimant tampering with the meter. Admittedly again, the Respondent had engaged security guard to daily check the entire stretch of the pipeline in the entire area. Besides he used to record meter reading too. There is also no evidence of unpickable lock from Godrej having been tampered with. Even the holographic paper seal, admittedly put on the door-openings by the side of the meters so as to detect any opening of the door, is not shown having been tampered with. The FIR lodged against the Claimant alleging tampering was dismissed and so also the Revision Petition against the said order of dismissal. If shri Kishan Kumar Bansal is to believed, and I see no reason why not, even a sparrow could not enter the shield box type skid. He has also deposed that the meter in question was taken away by Gail Officials in a box and that the said box had been sealed."

12. I may also note that the learned Arbitrator after considering the evidence led by the parties came to a similar conclusion regarding the meter removed on 28.01.2005. The relevant findings of the learned Arbitrator in this regard read as under:-

"As far as the Checklist with regard to inspection done on January 28, 2005 is concerned, it shows that skid door seals, skid door locks were "OK" and that on opening the Meter Skid, though Turbine Meter Calibration Slip, spare fittings and set pressure were "OK", the Turbine Meter Manufacture Seal was found deformed while Turbine Meter Holographic seal was found damaged. Ofcourse, the Representative of the Respondent had not accepted the correctness of that part of the Inspection. The Report was prepared by a GAIL official Prasun Ray who has not been examined and thus a material witness has been kept back. What further needs to be noticed is that the outer enclosure of the meter skid, that is, seal and lock were found "OK". This would show that the Respondent could not and did not have any access to the turbine meter placed inside the meter skid. In this respect reference may be made to the 4- stage Checklist relating to January 28, 2005. Even otherwise, the Report of Rockwin cannot be accepted as the person who carried the inspection has not been examined, nor do we know the process and procedure followed by him and above-all whether he was sufficiently qualified to conduct the test. Ofcourse, there is also no assurance that during the period the meter remained in the custody and possession of the company, it was not tampered with. In any case, there is no cogent evidence to prove that the alleged tampering, even if it be accepted, was of such a nature that it prevented the Respondent from accurate metering / measurement of the gas supplied. Mere allegation to that effect would not be sufficient. Ofcourse, paragraphs 4, 5 of the Statement of Defence and what appears at pages 7 and 8 were referred to by the learned Counsel for the Respondent but mere assertion is not sufficient more so when it is denied. The entries in the Daily Meter Reading reports show that the meters in question were functional and recording the supply. All these facts, taken together militate against the stand taken by the Respondent. Add to it the fact that in the Allahabad High Court the method alleged for tampering was not the one taken before me.

In short I agree with the Claimant that tampering of the meters by it is not proved. This being the position, the Claimant cannot be fastened with any liability, much less with the claims, set up by the Respondent. The Counter Claims are disallowed.

It may be stated that the Claimant has set up other claims too but they were given up during arguments.

For the reasons recorded above I hold that the Claimant is not proved to have tampered with the meters in question and a declaration to that effect is granted."

13. In the light of these detailed findings of the learned Arbitrator after appreciation of evidence led before him, wherein he has clearly found that the petitioner had failed to prove that there was any tampering of the meter by the respondent, it cannot be said that there is any patent illegality or perversity in the impugned award. In my considered view, the conclusions arrived at by the learned Arbitrator are purely factual based on the evidence of both sides. The position is well settled that the Court, while exercising the limited jurisdiction under Section 34 of the Act, does not sit in appeal over an arbitral award. Therefore, this Court while exercising this narrow jurisdiction under Section 34 of the Act, cannot reappreciate the evidence led before the learned Arbitrator. Even otherwise, having noted the findings of the learned Arbitrator in detail, I do not find any perversity or patent illegality with those findings so as to warrant interference under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act).

14. The petition being meritless is, accordingly, dismissed.

