

(2017) 01 DEL CK 0030
In the Delhi High Court
Case No : OMP No. 1610 of 2014

Gail Gas Ltd.

APPELLANT

Vs

Bapu Industries

RESPONDENT

Date of Decision : 10-01-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, Section 42

Citation : (2017) 4 ADDelhi 93 : (2017) 1 ArbiLR 474 : (2017) 238 DLT 1 : (2017) 161 DRJ 282

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Pankaj Kumar Singh, Advocate, for the Respondent; Mr. Rajiv Tyagi with Mr. Divakar Kumar, Advocates, for the Petitioner

Final Decision : Dismissed

Judgement

S. Muralidhar, J. - This is an application by the Respondent praying that the main petition be dismissed as not maintainable and for a declaration that the District Court at Firozabad, Uttar Pradesh alone has jurisdiction to entertain the petition.

2. The background to this application is that the main petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") has been filed by Gail Gas Limited ("GAIL") challenging the impugned Award dated 20th August, 2014 passed by the sole Arbitrator in the disputes between GAIL and the Respondent, Bapu Industries, arising out of a Gas Supply Contract ("GSC") dated 22nd September, 2000 for the supply of gas from 30th September, 2001 till 31st March, 2006.

3. The Respondent is the manufacturer of fancy glass, bangles and block glasses at Firozabad (Uttar Pradesh). The above GSC was for supply of natural gas for use as a fuel for its furnace used in manufacturing of fancy glass items etc. Under Article 4.01 of the GCC, GAIL provided the piping, control, regulator and metering equipment for the Gas Metering Station. The Gas Metering Equipment

was installed in the factory premises of the Respondent. However, in terms of the GCC, the said equipment remained the property of GAIL. It is further pointed out that while GAIL, under Clause 11.06 of the GCC, had an "unrestricted right to take action including stoppage of gas supply, imposition of penalty and termination of the Gas Supply Contract" in the event of tampering of the "Gas Metering Skid" or its "associated piping/accessories", the safety and security of the metering skid/equipment along with the piping and accessories for gas supply was the exclusive responsibility of the Respondent.

4. GAIL inspected the metering skid of the Respondent on 19th July, 2004 as the meter skid seals had been reported deformed and the consumption was found to drop drastically after 3 pm. In the meanwhile, on 24th September 2004, the Respondent requested GAIL to remove the governor and also expressed its readiness to pay the Re-gasified Liquefied Natural Gas ("RLNG") price for the gas consumed over and above the allocated gas. On the request of the Respondent, GAIL confirmed by its letter dated 7th October, 2004 the change in the supply pressure of gas from 2.50 Kg/Cms to 2.0 kg/Cms.

5. According to GAIL, between 27th October, 2004 and 12th April, 2005, the Respondent was found to have indulged in several incidents of gas meter tampering. During the surprise inspection on 13th November, 2004 the Petitioner found that the gas metering skid was tampered. The Turbine Flow Meter ("TFM") was replaced. The gas meter was removed and sent for third party inspection to M/s. Rockwin Flowmeters Private Limited ("Rockwin"). The tampering of the gas meter was confirmed by Rockwin. A show cause notice ("SCN") dated 14th March, 2005 was issued to the Respondent as regards the tampering detected on 13th November, 2004.

6. During another inspection conducted on 11th May, 2005, GAIL found the TFM replaced on 13th November, 2004 disturbed. Consequently, the TFM was removed on 13th May, 2005 in the presence of the Respondent and was kept in a seal box, and a 4-stage Checklist for Joint Skid Inspection was prepared by the Petitioner on the same date. The Gas Metering Skid of the Respondent was found tampered and the yellow seal had either been re-pasted or half-cut.

7. A demand notice was thereafter sent by GAIL to the Respondent on 8th June, 2005 imposing a tampering penalty of Rs. 1,96,47,131 computed on an RLNG basis for meter tampering. The Respondent addressed a communication dated 15th July, 2005 to GAIL and thus failed to provide any evidence in reply to the SCN dated 14th March, 2005. It is stated that the GSC expired on 31st March, 2006 and the Respondent owed GAIL a sum of Rs. 2,33,41,498. It is claimed that the Respondent did not allow GAIL to disconnect the gas supply which was ultimately done on 29th April, 2006 with police assistance. By letter dated 5th May, 2006, GAIL informed the Respondent that the penalty imposed earlier had been re-worked and the Respondent was liable to pay an amount of Rs. 52,78,682.

8. The Respondent challenged the disconnection of the gas supply by filing Writ Petition No. 48286 of 2006 in the Allahabad High Court on 29th June, 2006. That writ petition was disposed of by the Allahabad High Court on 4th September, 2006 directing GAIL to restore the gas supply upon the Respondent depositing 50% of the disputed amount of penalty. The High Court also directed the parties to refer their disputes to arbitration. The Respondent deposited 50% of the dues in terms of the above order of the High Court of Allahabad and, thereafter, GAIL restored the gas supply to the Respondent.

9. On 10th December, 2007, GAIL formalized the demand notices and issued two invoices of Rs. 23,47,566 and Rs. 78,19,084.

10. On 24th April, 2008 the learned sole Arbitrator entered upon the reference. The Respondent filed its statement of claims on 29th July, 2008 and GAIL filed its written statement and counter-claims subsequently. The amended statement of claims and the counter-claims were filed by the Respondent and GAIL on 13th November, 2009 and 5th February, 2010, respectively. There were nine counter-claims submitted by GAIL. By the impugned Award dated 20th August, 2014 the learned sole Arbitrator rejected the claims of the Respondent in entirety and also the counter-claims of GAIL on the ground of limitation.

11. At the hearing of the present petition on 9th January, 2015, learned counsel for the Respondent informed the Court that the petition filed by the Respondent under Section 34 of the Act "challenging the same impugned Award was pending before the Civil Court either in Agra or Kundla." The Respondent was then permitted to file an affidavit bringing those facts on record.

12. On 18th March, 2015 the following order was passed by this Court:

"1. An affidavit has been filed by the Respondent. A copy of the said affidavit has been handed over to the learned counsel for the Petitioner today in the Court.

2. Learned counsel for the Respondent points out that an appeal was filed by the Akash Wali Glass Works against the order dated 10th May 2006 of the District Judge, Firozabad whereby it rejected a petition under Section 9 of the Arbitration and Conciliation Act, 1996 holding that the Civil Court at Firozabad would not have jurisdiction. The High Court of Allahabad by an order dated 3rd August 2006 allowed the appeal and set aside the said order holding that the Courts at Firozabad would have jurisdiction to entertain the petition. She further states that on the strength of the above order, the Respondent has filed a petition under Section 34 of the Act challenging the same impugned award in the Court of the District Judge, Firozabad.

3. Learned counsel for the Petitioner states that he needs some time to take instructions.

4. List on 23rd April 2015."

13. At the subsequent hearing on 23rd April, 2015, learned counsel for the

Petitioner produced a copy of the order passed by the District Judge, Firozabad dismissing Arbitration Petition No. 7 of 2014 (Bapu Industries v. GAIL (India) Limited) in default. However, the Respondent persisted with its preliminary objection regarding jurisdiction of this Court to entertain the present petition. Thereafter, on 19th February, 2016 the Court passed the following order:

"The Petitioner filed the above mentioned petition under Section 34 of the Arbitration and Conciliation Act, 1996 against the arbitral award dated 20th August 2014. The Petitioner was the counter-claimant before the Arbitrator.

Learned counsel for the Petitioner has confirmed that all the claims raised in the counter-claim were rejected, except Claim No. 1. The Petitioner has challenged the arbitral award in respect of the other claims raised in the counter-claim. It is a matter of fact that the Respondent (claimant before the Arbitrator) has also filed the objections to the said award before the District Judge, Firozabad. Counsel for the Petitioner states that even Firozabad Court has no jurisdiction; only the Courts either in Agra or in Delhi could have the jurisdiction to entertain the objections under Section 34 of the Act. Learned counsel for the parties have informed that the agreement was executed in Agra, however, the arbitration proceedings were conducted in Delhi. Learned counsel for the Petitioner has no objection if in case the objections filed by the Respondent be considered along with the present objections filed by the Petitioner with regard to rejection of the claims raised in the counter-claim. Counsel for the Respondent submits that his client would take the necessary steps in this regard. At joint request, renotify on 29th April, 2016."

14. In respect of the preliminary objection, Mr. Pankaj Kumar Singh, learned counsel for the Respondent submits that the only case of the Respondent is that the stand has been taken by GAIL that the Court at Firozabad does not have jurisdiction is misplaced. Prior to this proceeding, the Respondent had filed a petition under Section 9 of the Act in the Court of the learned District Judge, Firozabad where a preliminary objection was taken by GAIL that the said Court did not have jurisdiction to entertain the petition. It is pointed out that under Clause 13.02, "all disputes or differences whatsoever, arising out of this Contract which are not settled by mutual consultation, shall be settled by Arbitration" under the Act and the venue of arbitration would be New Delhi.

15. By an order dated 10th May, 2006 the District Judge, Firozabad accepted the preliminary objection of GAIL after finding that the contract between the parties was signed at Agra but the parties had recorded that the venue of arbitration shall be New Delhi. The District Judge, Firozabad had no jurisdiction to entertain the petition under Section 9 of the Act and that either the Principal Civil Court at District Agra or in New Delhi would have jurisdiction to entertain the petition. It was observed that the fact that gas supply was disconnected or that GAIL maintained a branch office or because of threat to disconnect or actual disconnection etc. or incidental matters could not have conferred jurisdiction on the Principal Civil Court at Firozabad.

16. At more or less the same time by a separate order dated 10th May, 2006, the District Judge, Firozabad also dismissed another application filed by M/s. Akash Wani Glass Works under Section 9 of the Act on the very same ground.

17. As already noted, as far as the Respondent herein was concerned, it had filed a writ petition in which an interim order was passed by the Allahabad High Court pursuant to which the Respondent deposited 50% arrears and the gas supply was resumed. There was no occasion for the Respondent to further carry the matter in appeal. However, M/s. Akash Wani Glass Works carried the matter in appeal by FAO No. 1949 of 2006 to the High Court of Allahabad. In its order dated 30th August, 2006 the Allahabad High Court interpreted Clause 13.02 and held that "two things are clear from the aforesaid clause. It talks about the venue of arbitration and does not talk about the jurisdiction of a Court to entertain a suit or proceeding. Coming to the facts of the case the gas was supplied at Firozabad for its consumption there as a fuel and the payment was to be made for that supply of the gas at Firozabad. The agreement was executed at Agra. Thus, obviously no part of cause of action arose at New Delhi. On an interpretation of the aforesaid clause, it is clear that it does not oust the jurisdiction of the Courts at Firozabad." Consequently, the order of the District Judge, Firozabad was set aside and the appeal was allowed.

18. It is not in dispute that the Respondent's petition under Section 34 of the Act was filed challenging the same impugned Award in the Court of the District Judge, Firozabad, it was dismissed for non-prosecution on 19th March, 2015.

19. Mr. Pankaj Kumar Singh, learned counsel for the Respondent relied upon the decision in *Nand Kishore v. State of Punjab* (1995) 6 SCC 614 and stated that GAIL was now precluded from questioning the jurisdiction of the District Judge, Firozabad on the principle of *res judicata* since in the case of an identically placed party, M/s. Akash Wani Glass Works had accepted the jurisdiction of that Court in an almost identical contract. Reliance is also placed on the decision in *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy* 1970 (1) SCC 613 to urge that a pure question of law unrelated to the right in question cannot be deemed to be a "matter of issue" and that when the law has since the earlier decision been altered, the earlier decision will not operate as *res judicata* between the same parties. Reliance is placed on the decision in *Sonepat Cooperative Sugar Mills Limited v. Ajit Singh* (2005) 3 SCC 232 in which it was held that the principle of *res judicata* will not apply in the case of decisions relating to jurisdictional facts. Lastly, reliance was placed on the decision in *Himalayan Coop. Group Housing Society v. Balwan Singh* (2015) 7 SCC 373 in which it was held that the client is not bound by the lawyer's statements or admissions as to matters of law or legal conclusions.

20. Countering the above submissions, Mr. Rajiv Tyagi, learned counsel for the Petitioner, GAIL, submits that once the Respondent did not prefer any appeal against the order dated 10th May, 2006 of the District Judge, Firozabad holding that it has no jurisdiction to entertain the petition under Section 9 of the Act to

be become final, then clearly, the Respondent accepted that the Court at Firozabad did not have jurisdiction. It is submitted that even on assuming that both the Court at Delhi as well as Court at Firozabad have jurisdiction, even then the superior most Court exercising jurisdiction should be taken to have been chosen by the parties for adjudication of the disputes arising out of the arbitration Award. Reliance is placed on the decision in *State of West Bengal v. Associated Contractors* 2015 (1) SCC 32 and *State of Maharashtra through Executive Engineer, Road Development v. Atlanta Limited* 2014 (11) SCC 619.

21. It is further submitted by Mr. Tyagi that even for the purpose of Section 42 of the Act in view of the order dated 10th May, 2006 of the District Judge, Firozabad, it should be construed that no proper petition is being presented before that Court. Secondly, on the strength of the decision in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* 2012 (9) SCC 552, it is submitted that Courts where arbitration takes place would be required to exercise supervisory control over the arbitral process and challenge to the Award can be appealed against only before the Courts having supervisory jurisdiction over the arbitration proceedings and the Tribunal irrespective of the place where the contractual applications were to be performed.

22. Relying on the decision in *Bhandari Udyog Limited v. Industrial Facilitation Council* AIR 2015 SC 1320, Mr. Tyagi urged that the arbitral Award has to be challenged before the Court within whose jurisdiction the arbitration proceedings had been conducted. Lastly, it is pointed out that the learned counsel for the Respondent had made a statement before this Court on 19th February, 2016 that the Respondent would take necessary steps to have the objections filed in the Court at Firozabad transferring to this Court and therefore, should not be permitted to renege from the statement at that stage.

23. The Court has considered the above submissions. The short question that arises is whether this Court has jurisdiction to entertain the present petition filed by the Petitioner, GAIL, under Section 34 of the Act. It is not in dispute that although the Respondent did file the petition under Section 9 of the Act in the Court of District Judge, Firozabad, an order was passed on 10th May, 2006 by that Court holding that it had no jurisdiction to entertain that petition. Hence, that order attained finality. Subsequently, in Writ Petition No. 48286 of 2006, an order dated 4th September, 2006 was passed by the Division Bench of the Allahabad High Court directing that in the event the Respondent deposited 50% of the amount so claimed by GAIL and furnished collateral security in respect of the balance 50%, GAIL would, within two weeks thereafter, enter into a fresh contract with the Respondent and further that the amount deposited and the security furnished pursuant to the order would be subject to the final decision of the Arbitrator, if any. There was no occasion for the High Court to examine whether the Court at Firozabad did or did not have the jurisdiction as the decision dated 10th May, 2006 of the District Judge, Firozabad was not carried in appeal to the High Court.

24. The issue is not so much as one of *res judicata* as it is sought to be urged by learned counsel for the Respondent. The decision dated 30th August, 2006 in the case of *M/s. Akash Wani Glass Works*, although accepted by GAIL, cannot be said to be a subsequent decision by a superior court in the disputes between the same parties i.e., GAIL and the Respondent herein. Therefore, the Court does not consider the decisions in *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy* (supra) or *Nand Kishore v. State of Punjab* (supra) or *Sonepat Cooperative Sugar Mills Limited v. Ajit Singh* (supra) to be relevant to the facts of the present case.

25. The Court, at the same time, does not consider the submissions made by learned counsel for the Respondent before this Court on 19th February, 2016 as precluding the Respondent from urging a preliminary objection to the present petition on the ground of jurisdiction. Indeed, there could not be any such finding of admission or statement by the counsel as to the matters of law.

26. Turning to the central issue, in *State of West Bengal v. Associated Contractors* (supra), it was explained that for the purpose of Section 42 the first application should have been filed before a Court of original jurisdiction as defined under Section 2 (1) (e) of the Act. The conclusions (a) to (g) in para 25 are relevant, which read as under:

"(a) Section 2 (1) (e) contains an exhaustive definition making out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2 (1) (e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have

come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42."

27. In the present case, with the Court at Firozabad having held that it has no jurisdiction to entertain the petition under Section 9 of the Act and that order not being challenged further by the Respondent, it cannot be said that in terms of Section 42 of the Act, further objections had to be filed only in that Court and in no other Court. As far as the present case is concerned, both parties i.e., GAIL and the Respondent are bound by the finality of that order of the District Judge, Firozabad and cannot now consider the said proceeding under Section 9 of the Act to be a previous proceeding for the purposes of Section 42 of the Act.

28. As far as State of Maharashtra through Executive Engineer, Road Development v. Atlanta Limited (supra) is concerned, the question in that case was whether there could be concurrent jurisdiction of both the High Court (under its Ordinary Original Civil Jurisdiction) as well as the District Court (being the Principal Civil Court of Original Jurisdiction). It was held that if an option is to be exercised between the High Court and the District Court, the application lies to High Court only, since it is superior-most court exercising ordinary original civil jurisdiction. In the present case, the GSC was executed at Agra and gas was supplied to the Respondent from Agra. All the invoices for sale and supply of gas were raised at Agra (UP). The payments of all the invoices had to be made at Agra. Therefore, there was a cause of action for the Courts at Agra. It can also possibly be argued that since gas was supplied at Firozabad, some part of the cause of action did arise within the jurisdiction of the Court of the District Judge at Firozabad, and that with the arbitration having taken place in Delhi in terms of Clause 13.02 of the GSC, this Court would also have jurisdiction.

29. However, one of the three possibilities no longer not exist since the decision of the District Judge, Firozabad holding that it had no jurisdiction to entertain the petition under Section 9 of the Act has attained finality. For the purpose of the present petition, the question is really not whether notwithstanding the said decision of the District Judge, Firozabad, that Court would continue to exercise jurisdiction. That question may be relevant as far as the petition filed by the Respondent under Section 34 of the Act before that Court is concerned. It will not have any relevance as far as the jurisdiction of the present Court to entertain the present petition is concerned, particularly since there is nothing in the GSC conferring jurisdiction upon one Court to the exclusion of any other Court.

30. Secondly, there is no intention of the parties to exclude the jurisdiction of this Court. On the other hand, the order dated 4th September, 2006 passed by the Allahabad High Court in W.P. (C) No. 48286/2006 made it explicit that the

parties would refer the disputes to arbitration. Therefore, we have a situation where two Courts can be said to have jurisdiction, one being the District Court at Agra where some part of cause of action has arisen and the other being this Court within whose jurisdiction the arbitration took place. As explained by the Constitution Bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* (supra), both the Courts can exercise jurisdiction. Inasmuch as no intention of the parties to exclude the jurisdiction of this Court, it can entertain this petition notwithstanding the contractual obligations may have been performed elsewhere.

31. In *Bhandari Udyog Limited v. Industry Facilitation Council* (supra), it was explained that where the arbitration proceeding was conducted within the jurisdiction of the Court superior to the Court where an application under Section 11 of the Act was made, then the Award could not be challenged before a court subordinate to another High Court. In the present case, with the arbitration having taken place in New Delhi, this Court should certainly have jurisdiction to entertain the present petition.

32. Consequently, the preliminary objection of the Respondent as to the maintainability of the present petition is hereby overruled. The application is, accordingly, dismissed. OMP No. 1610 of 2014

33. The petition is set down for hearing on merits on 12th April 2017.