(2009) 07 DEL CK 0473

In the Delhi High Court

Case No : OMP No. 254 of 2009

Gail (India) Ltd. APPELLANT

Vs

Advance Glass Works RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 17, 9

Citation : (2009) 07 DEL CK 0473

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Parag P. Tripathi, ASG, Navin Kumar and Monisha Honda, for the Appellant; Arjun Chawla, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—This appeal has been preferred against an order of learned Arbitrator made u/s 17 of the Arbitration and Conciliation Act, 1996.

2. The brief facts relevant for purpose of deciding this appeal are that the appellants were supplying natural gas to the respondent under a contract of supply of gas. The quantity of gas being supplied was measured by a meter installed at the premises of the customer. The meter was installed in a skid. The door of the skid used to be locked and at the time of meter reading the skid used to be opened and the meter reading used to take place in presence of the customer. The meter skid used to be sealed under various seals. Supply of the gas prior to 1st April was being made by the petitioner at specified rate upto 31st March, 2006. With effect from 31st March, 2004 supply of quantity of gas over and above the contracted quantity was allowed and the petitioner was given liberty to charge at higher rate of RNLG (Re-liquified Natural Gas) for extra gas. Petitioner''s case is that soon after rise in prices, loss of gas was noticed indicating that the respondent was using unrecorded gas. The petitioner suspected pilferage, ostensibly due to insecure locks, insecure paper seals on doors, and gaps at bottom of skid and top of skid. A joint inspection of the

turbine meter at the factory of the respondent was conducted on 26th October, 2004 and a joint inspection report was prepared and signed by both the parties. The inspection report showed that all seals, locks, etc. were intact except the turbine manufactures seal which was shown as ''not OK'' by GAIL but the representative of the respondent disagreed with it. The petitioner, suspecting that the meter had been tampered with, on the same very day, after inspection, took out the meter and sealed the same with signatures of both the parties at 20.50 hours on 26.10.2004 in a container, so that the meter could be got checked from Rockwin Flow Meter India Pvt. Ltd. at Ghaziabad. After removal of the meter and sealing it in a sealed container having signatures of both the parties, petitioner gave a notice to the respondent that the meter would be inspected/checked at Rockwin Flow Meter India Pvt. Ltd, Ghaziabad on 27th October, 2004 and respondent should send his representative to Rockwin on 27th October, 2004 at 10.00 am. It was also made clear to the respondent that in case respondent failed to depute representative to Rockwin Flow Meter at Ghaziabad for joint inspection and calibration at the laboratory, then the inspection and calibration would be conducted in the absence of the respondent. Petitioner also wrote that if any irregularity was found with the meter during inspection and calibration by Rockwin Flow Meter, action would be taken by the petitioner as per contract. The respondent replied to this letter of 26th October, 2004 that he was not in a position to come to Ghaziabad on 27th October, 2004, therefore, inspection be postponed to some other date and date be informed. However, the inspection at Rockwin Flow Meter India Pvt. Ltd. was carried on 27th October, 2004 as scheduled and since respondent had not sent its representative it was carried in the absence of the respondent. The observations of Rockwin Flow Meter Pvt. Ltd. in respect of the meter were as under:

REPORT OF TURBINE METER INSPECTION

TURBINE METER DETAILS

Make : RMG, Germany

Model : DN 80 G 160

Sr. No. : 27931, 25373, 28980 & 7930------

Date of Inspection: 27.10.2004

The above meters were calibrated in as brought condition. The results are enclosed.

OBSERVATIONS

27931 Paper Meter Seal found torn,

Counter head found loose,

Counter Gears found replaced with

unknown gears.

Adjustment screw missing.

3. Rockwin Flow Meter Pvt. Ltd. gave a report that meter was tampered and was recording supply of gas as 44% less than of actual quantity. Thereafter, the petitioner served a demand notice on the respondent on 18th January, 2007 on account of pilferage of gas and demanded a sum of Rs. 86,54,350/-. This demand was revised to Rs. 97,33,411/-. The respondent on receiving this demand filed an application u/s 9 of the Arbitration and Conciliation Act before the District Judge, Ghaziabad seeking an order that this amount be not recovered as respondent intended to invoke the arbitration clause. District Judge, Ghaziabad issued an injunction against recovery of this amount till appointment of an arbitrator in accordance with the contract. After appointment of Arbitrator, when Arbitrator was seized with the matter, this application u/s 17 of the Arbitration and Conciliation Act was filed by the respondent that the amount be not recovered. The application was opposed by the petitioner who wanted that the respondent be, at least, asked to pay 50% of the demand and furnish security of balance 50% of the demand.

4. The learned Arbitrator after noting the facts observed that the credibility of meter test conducted at Rockwin Flow Meter Pvt. Ltd. was low because it was conducted in absence of the respondent. The hurry shown by the petitioner was unwarranted. More so, the report of Rockwin Flow Pvt. Ltd. was sent to the petitioner only after 15 months. Regarding 44% low recording of the gas, the Arbitrator observed that during the period from 15th August, 2004 to 25th October, 2004, the factory of respondent worked only for 21 days. The joint inspection tickets also showed that unit was not functioning between 15th August, 2004 and 23rd September, 2004 and from 17th August, 2004 to 26th October, 2004 the furnace was not working. Thus, the consumption recorded during this period was lower than the average consumption and the argument that the meter reading was low due to manipulation could not be a valid argument. The Arbitrator also found that the data of the gas consumption does not support the petitioner and petitioner thus do not have a strong prima facie case for injunction against recovery of penal dues and the balance of convenience also lays in favour of the respondent since the amount of Rs. 1 crore was a large sum in the light of the total turnover of the business of the respondent. No irreparable loss was going to be suffered by the petitioner, but in case this amount was recovered the respondent whose total turnover was 4.75 crores for years 2005-06 may face loss.

5. The gas, electricity, water which are supplied to the consumers through pipes are normally measured through meters and installed at the premises of the consumers. In case of industrial organizations, electricity and the gas, in many industries are used like raw materials. The possibility of their pilferage cannot be ruled out and that is why the suppliers take extraordinary precautions about the sealing of the meters and strict provisions are made in the contract in respect of pilferage and tampering of the meters. The Arbitrator''s contention that the

report of Rockwin Flow Meter Pvt. Ltd. was not reliable is without any basis. The meter was removed and sealed in the presence of the respondent. The respondent was given an opportunity to be present at the time of calibration and inspection of the meter. If the respondent had chosen not to be present on flimsy grounds, the report cannot be disbelieved or rejected outrightly. The report shows that counter gears of the meter were found replaced with unknown gears and adjustment screws were missing. The counter gears were loose. The counter gears play important role in measurement of the gas and if they are found replaced by different gears, the only inference that can be drawn is that they were replaced to tamper the meter so as that the gas was measured lower than actual quantity. There can be no other reason of replacement of the counter gears and making the adjustment screws missing. This report could not have been rejected so lightly as has been done by the Arbitrator. Even if the Arbitrator had found that the factory was lying closed for some period and the total turnover of the respondent was such that Rs. 1 crore demand would be heavy burden, some measures were required to ensure the securing of a part of the demand if not entire demand raised by the petitioner so that ultimately when the award is passed it does not turn out to be a paper award specially when the respondent was a small unit. I consider that it would be appropriate that the respondent furnishes a bank guarantee of 25% of the demand before the learned Arbitrator valid for a period of 6 months, to secure a part of the amount as demanded by the petitioner. The appeal is allowed to the extent that the respondent shall furnish a security of 25% of the demand raised by the petitioner before the learned Arbitrator within 10 days from today.