(2021) 06 DEL CK 0019

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM.) No. 99 Of 2021, Miscellaneous Application No. 3614 Of 2021

Indraprastha Gas Limited (IGL) APPELLANT

Vs

M/S Pawan Casting RESPONDENT

Date of Decision : 01-06-2021

Acts Referred:

Evidence Act, 1872 — Section 65B
Indian Penal Code, 1860 — Section 336, 379
Arbitration And Conciliation Act, 1996 — Section 9, 11, 13, 34, 34(2), 34(2A)

Citation : (2021) 06 DEL CK 0019

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Saurav Agarwal, Shantanu Agarwal, Sharad Kumar, Harshit Malik, Akansha Dixit, Ananvay Anandvardhan, Devpriya Singh, Sai Abhishek, Anshuman Chowdhury

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. Indraprastha Gas Limited (hereinafter â??IGLâ?) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996

(hereinafter the â??A&C Actâ?) impugning an arbitral award dated 10.12.2019 (hereinafter â??the impugned awardâ?) delivered by the Arbitral

Tribunal constituted of Justice (Retd.) Dilip Raoshaeb Deshmukh, former Judge of the Chhattisgarh High Court, as the Sole Arbitrator.

2. Pawan Castings (hereinafter â??the respondent') is a proprietorship concern of Mr. Deepak Dhuper. He is engaged in the business of

manufacturing of Aluminium Pressure Dye Castings under the said name. IGL is a company incorporated under the Companies Act, 1956 and is the only supplier of natural gas in Delhi. IGL was the claimant before the Arbitral Tribunal. The impugned award was rendered in the context of disputes

that have arisen between the parties in relation to a Gas Sales Agreements (GSAs) dated 10.11.2009 and 1.11.2014.

Factual context

3. On 10.11.2009, the parties (IGL and the respondent, Pawan Castings) entered into a Gas Sales Agreement (GSA) under the category of Large

Industrial Customer for the supply of Piped Natural Gas (hereafter PNG). IGL agreed to supply 1,56,000 SCM of PNG annually and 500 SCM daily

under the aforesaid GSA.

4. Thereafter, on 01.11.2014, the respondent requested IGL to change his category to Small Industrial Customer and executed a fresh GSA (2014

GSA). In terms of the said 2014 GSA, the daily contract quantity of PNG was reduced to 250 SCM per day.

5. On 04.12.2014, officials of IGL, conducted an inspection at the premises of the respondent. IGL alleges that they found unauthorised tapping of

PNG and claims that the said officials took photographs and also a video recording of the unauthorised tapping. Thereafter, on 05.12.2014, IGL filed a

complaint and pursuant thereto an FIR bearing no. 1425 of 2014 under Sections 336/379 of the Indian Penal Code, 1860 was registered against the

respondent. The said FIR recorded that an unauthorised CS/MS pipeline had been laid with the covering of PVC pipe in the factory of the respondent.

The said pipeline was connected to the first floor of the factory premises and an unauthorised regulator was installed inside a shelf of a desk. Further,

the same pipeline was connected to a downstream pipeline bypassing the meter of IGL. Thus, the respondent had sourced PNG from an unauthorised

tapping point.

6. By a notice dated 11.12.2014, IGL terminated the 2014 GSA in terms of Article 25(ii) of the said GSA. It alleged that during the inspection

conducted on 04.12.2014, an unauthorised connection in IGLâ?s 32mm MDPE pipeline with continuous high pressure natural gas of 4 bar was found.

According to IGL, this amounted to theft of IGLâ??s gas.

7. On 20.12.2014, the respondent responded to the aforesaid letter and denied the allegation that he had tapped IGLâ?s gas pipeline. He stated that

PNG was consumed in terms of the GSA and he had not defaulted in making payment of bills. The respondent further requested IGL to resume the

supply of PNG with immediate effect as the production was suffering for want of gas supply. He further put IGL to notice that he would claim

compensation for any loss caused due to suspension of the supply of gas.

8. On 05.02.2015, IGL sent a notice informing the respondent that the total unauthorised overdrawal quantity of natural gas for the period of April,

2010 till November, 2014 was 347 SQM and raised a provisional demand of Rs. 1,52,51,669. The said amount was to be paid within three working

days with effect from 09.02.2016.

9. Thereafter, on 14.02.2015, in view of non-payment of the aforesaid amount, IGL invoked the Bank Guarantee of Rs. 6,04,050 issued by Canara

Bank. On 20.02.2015, the Canara Bank made the payment against the said Bank Guarantee.

10. In view of the disputes between the parties, by a letter dated 12.03.2015, IGL invoked the Arbitration Clauses (Article 15.3 of the GSA dated

10.11.2009 and Article 23(iii) of the GSA dated 01.11.2014) and nominated Mr. P.K. Pandey, Vice President (CNG O&M) of IGL as the Sole

Arbitrator.

11. On 15.04.2015, the respondent filed an application under Section 13 of the A&C Act challenging the appointment of the Sole Arbitrator. The

learned Arbitrator dismissed the aforesaid application on 11.08.2015.

12. On 11.05.2015, IGL filed a petition under Section 9 of the A&C Act (being O.M.P. (I) 217 of 2015), inter alia, praying for the appointment of a

Court Commissioner to visit the factory premises to collect the relevant information. This Court allowed the aforesaid prayer and by an order dated

15.05.2015, appointed Mr. S.K. Sharma, a former Registrar of this Court, as the Court Commissioner to visit the factory premises of the respondent

and collect the relevant information. The operative part of the said order indicating the scope of the work to be performed by the Commissioner is set

out below :

â??9. In light of the above submissions, the Court considers it appropriate to issue the following directions:

(i) The Court appoints Mr. S.K. Shatma, a former Registrar of this Court, residing at WZ-321, Sri Nagar, Shakur Basti, Delhi-110034 (Mob.No.

9818103888) as Court Commissioner. The CC will inform the parties at least one day in advance of his proposed visit to the sites.

ii) The CC will inspect the factory premises of the four Respondents to ascertain the gas pipes running from the point where the meter of the

Petitioner was installed; take photographs of the pipeline and the equipments to which the pipelines may have been or are now connected

(iii) Prepare an inventory of all the equipments installed in the premises including the furnace and take photographs thereof. The details of the

equipments including dimensions, capacity etc. and any relevant documents in relation to such equipments will be furnished to the CC by the

concerned Respondent.

(iv) Each of the Respondents will make available to the CC documents pertaining to production of the final product, payment of excise duty, vouchers

reflecting sales of the final product and registers showing the stocks on hand. The above figures shall be produced for the billing period as may be

specified by the representatives of the Petitioner who will be present at the site. It is clarified that whatever records are unable to be produced by the

concerned Respondent, the CC will make note to that effect. The CC in his report shall make note of whatever is pointed out by the Respondents at

the site.

(v) The memo of the proceedings drawn up by the CC shall be got signed by the representatives of the Petitioner and the Respondents

(vi) One copy of the CC's report of his visit enclosing the proceedings, documents, photographs etc., shall be filed in the Court in these proceedings

within two weeks of the completion of the visits and another copy thereof shall be filed by the Petitioner before the learned Arbitrator. Copies of the

CC's report be made available to all the parties.

(vii) The fee of CC is fixed at Rs.2 lakhs which should be paid by the Petitioner to him in two instalments. 50% of fee be paid within one week from

today and the balance within a week of the submission of the report. This is apart from all incidental expenses towards travel, secretarial assistance,

photography, etc. which shall be paid by the Petitioner as per acutals.

(vii) The CC should complete the above exercise preferably on or before 10th June 2015.

13. On 30.05.2015, the Court Commissioner inspected the factory premises of

the respondent. During the course of the inspection, he recorded the

contentions advanced by Mr. Deepak Dhuper (sole proprietor of the respondent). The respondent stated that one furnace and two dye casting

machines were shifted to Bawana in first week of May, 2015. He claimed that after disconnection of the gas supply from IGL, he was using

Diesel/Low Density Oil for melting aluminium in the existing furnace. Mr. Dhuper could not produce any documents regarding capacity of the

equipment or the excise records. He stated that the records were not available as the unit (Pawan Castings) was not registered with the Excise

Authorities because its sales were exempted. A list of documents required to be submitted by Mr. Deepak Dhuper was handed over to him and the

proceedings were adjourned to 03.06.2015.

14. On 03.06.2015, Mr. Deepak Dhuper handed over a note regarding the process of aluminium pressure die casting and the invoices of Kamal Gas

Service and Bharat Gas Service to the Court Commissioner along with his covering letter. The said covering letter recorded that â??As the (LPG

Commercia) Gas was the fuel we were using just prior to PNG (IGL). At the time in December '14 the pipeline of this medium were installed in the

premises which may have been confused as that of PNG kindly noteâ?. The Court Commissioner also recorded the statement of the counsel for IGL

to the effect that no such pipeline as mentioned in the aforesaid letter existed at the time of installation of the PNG connection on 04.12.2014. Mr.

Deepak Dhuper had provided copies of the documents as per the list and the Court Commissioner also noted the same.

15. The aforesaid report by the Court Commissioner was filed before this Court on 29.06.2015.

16. On 05.09.2015, IGL filed its Statement of Claims and the respondent filed its Statement of Defence and Counter Claims on 04.11.2015. In view of

the rival stands, the Arbitral Tribunal revised the issues framed on 23.02.2016 and framed the following issues, on 08.04.2016:-

â??1. Whether the invocation of the present Arbitration by the Claimant is valid as per the provisions of the Arbitration and Conciliation Act, 1996?

2. Whether the Claimant is entitled to claim any amount in respect to the Gas Supply Agreement dated 10.11.2009 in these proceedings in view of the

objection taken by the Respondent in the Preliminary Objection-III of its

Statement of Defence?

3. Whether there was any unauthorized and illegal consumption of gas by the Respondent as on 04.12.2014 as contended by the Claimant?

4. Whether the Claimant is entitled to recover a sum of Rs.1,46,47 ,619 I - from the Respondent towards unauthorized and illegal consumption of gas

as claimed in the Statement of Claim?

5. Whether either of the Party is entitled to interest @ 18% on the amount claimed?

6. Whether the Claimant was justified in enchasing the Bank Guarantee of the Respondent worth Rs.6,04,050

7. Whether Respondent is entitled to recover the amount from the Claimant as claimed in his Counter Claim?â??

17. Thereafter, the learned Arbitrator resigned and on 19.12.2016, IGL appointed Justice (Retd.) Dilip Raosaheb Deshmuk, former judge of

Chhattisgarh High Court as the Sole Arbitrator to adjudicate the disputes.

18. On 20.12.2016, the respondent filed a petition under Section 11 of the A&C Act (ARB. P. 815/2016) seeking appointment of an Arbitrator to

adjudicate the disputes as the arbitrator appointed earlier, Mr. PK Pandey, had resigned. This Court by an order dated 22.12.2016 confirmed the

appointment of Justice (Retd.) Dilip Raosaheb Deshmukh, as the Sole Arbitrator to adjudicate the disputes and further directed that the arbitration be

conducted under the aegis of the Delhi International Arbitration Centre (DIAC).

19. On 10.12.2019, the Arbitral Tribunal made the impugned award rejecting IGLâ?s claims. It found that IGL had failed to prove tampering of the

pipeline or the unauthorised consumption of PNG, inside the respondentâ?s factory. The Arbitral Tribunal also held that the encashment of the Bank

Guarantee submitted by the respondent, was illegal. The Tribunal did not accept his prayer for refund of the amount received by IGL on invocation of

the Bank Guarantee because he had not paid any fee for the said claim. However, the Arbitral Tribunal held that IGL was liable to bear the entire

cost of the arbitration.

20. Aggrieved by the impugned award, IGL has filed the present petition.

Submissions

21. Mr. Saurav Agarwal, learned counsel appearing for IGL, submitted that the

finding of the Arbitral Tribunal that IGL had failed to establish that

there was any tampering of IGLâ?s facilities in the premises of the respondent is patently erroneous. He submitted that the said finding is perverse

and based on assumptions, which are contrary to record. He drew the attention of this Court to the finding of the Arbitral Tribunal that â??there is no

photograph or video on record to show that an illegal tapping point existed before the MRSâ? and contended that the said finding is patently erroneous

as the photographs placed on record clearly show an illegal tapping point. He referred to the photograph exhibited as CW-1/17 and submitted that the

said photograph clearly evidenced that IGLâ??s pipeline for supply of gas had been tapped before the Metering and Regulation Station (MRS).

22. Next, he submitted that the entire approach of the Arbitral Tribunal in rejecting the evidence led by IGL is perverse and indicated a pre-existent

disposition to reject the evidence. He further pointed out that the Arbitral Tribunal had rejected the electronic evidence on the ground that an affidavit

under Section 65B of the Indian Evidence Act, 1872 had not been filed. He stated that no such objection had been taken at the material time.

Reasons and conclusion

23. I have heard Mr. Agarwal, learned counsel appearing for IGL at some length.

24. IGLâ?s claim for a sum of Rs. 1,46,47,619/- is premised on the assumption that the respondent had consumed 3,17,822.09 SCM of PNG without

the said supply being recorded by the Metering and Regulation Station (MRS). The said consumption was calculated on the basis of the respondentâ?s

maximum monthly consumption during the period of supply. In August 2010, the respondent had consumed 16,686 SCM of PNG, which the maximum

consumption in any moth and IGL quantified its claim on the assumption that the respondent was consuming at least the said quantum of PNG every

month. According to IGL, the difference between the said consumption and that recorded by the MRS and invoiced by IGL, would be the bare

minimum consumption that had escaped being metered. And, the respondent was liable to pay for the same. The said claim was premised on the basis

that IGLâ?s facilities (supply pipelines) before MRS had been tapped by the respondent and bulk of the PNG for its consumption had been drawn

from the illegal tapping point. IGL claimed that only a small fraction of PNG supply was drawn from beyond the metering system and therefore, only that part of the consumption was recorded and invoiced by IGL to the respondent.

25. As is apparent from the above, IGL was required to, essentially, prove that the respondent had in fact tapped IGLâ?s pipeline before the MRS and

had drawn the gas from the said pipeline for his consumption.

26. The respondent had contested the aforesaid claim on two fronts. First of all, it disputed that the inspection carried out at the factory premises had

resulted in discovery of any illegal or unauthorized tapping point. The respondent claimed that PNG supplied by IGL had not been consumed

unauthorizedly or without the same being recorded at the MRS. The respondent also contested IGLâ?s assumption that the reduction in the metered

PNG consumption was a result of the respondent tapping the said supply before the metering point. The respondent claimed that he was also using oil

for its production and relied upon the Court Commissionerâ?s report, which confirmed the existence of overhead oil tanks for storing oil for use as fuel

to carry on the manufacturing process. It was also submitted that in terms of the GSAs, the respondent had agreed to not depend on a single fuel. The

respondent had also produced certain bills showing purchases of oil.

27. The Arbitral Tribunal considered the rival contentions and had held that the onus of proving the following facts rested on IGL:

(i) that an inspection at the factory premises of the respondent was conducted by an authorized officer of IGL;

(ii) that the respondent had laid an unauthorized CS/MS pipeline with a covering of PVC pipe in its factory and had sourced PNG from the

unauthorized tapping point before the MRS; and

(iii) that an unauthorized regulator had been installed inside a shelf of the desk located at the first floor of the factory premises, to regulate the flow of

PNG.

28. The Arbitral Tribunal examined the evidence and concluded that IGL had failed to prove the above. The reasons for the same as articulated by the

Arbitral Tribunal in the impugned award are set out below:

â??(iv) The inspection report dated 06.07.2015 by Mr. S.K. Sharma Local Commissioner appointed by the High Court and the photographs taken are

of no avail to the Claimant and prove nothing as none of the incriminating material alleged to have been found at the Respondentâ?s premises is seen in the photographs. Such incriminating material was not even found by the police on 05.12.2014 as admitted by Mr. Dileep Kumar (CW-1).

(v) The Claimant has led the evidence of Mr. Dileep Kumar (CW- 1) and Mr. Narendra Nath Pandey (CW-2) officials of the Claimant to prove the

above allegations and has also filed the photographs and video stated to have been taken inside the factory of the Respondent. There were two

affidavits in evidence of the witness Mr. Dileep Kumar (CW-1). The first one was dated 13.04.2016 while the second was dated 24.05.2016. While

the first affidavit does not even whisper that Mr. Dileep Kumar (CW-1) an official of the Claimant had inspected the premises of the Respondent on

04.12.2014 the second affidavit is also totally silent about the name of any other official of the Claimant who was present in the factory premises of

the Respondent during such inspection. It was for the first time in the Rejoinder by the Claimant that it was stated that one Mr. Dilip and Mr. Pranav

Uppal officials of the Claimant had inspected the factory premises of the Respondent on 04.12.2014. Mr. Pranav Uppal was not examined by the

Claimant. Presence of Mr. Narendra Nath Pandey at the inspection is not mentioned therein. During cross-examination Mr. Narendra Nath Pandey

(CW-2) in answer to Q.No.30 stated that besides Mr. Dileep Kumar Mr. Shashank had carried the initial inspection on 04.12.2014 in the premises of

the Respondent. He further stated that Mr. Somil Garg, Mr. Rakesh Agarwal and Mr. Sushil Kumar also joined the inspection on being informed by

Mr. Dileep Kumar. Thus firstly, none of the witnesses corroborate the presence of Mr. Pranav Uppal during the inspection. The names of Mr.

Shashank, Mr. Somil Garg, Mr. Rakesh Agarwal and Mr. Sushil Kumar are also absent in the Rejoinder by the Claimant. None of these witnesses

have been examined by the Claimant. So far as Para 10 of the affidavit in evidence of Mr. Narendra Nath Pandey is concerned, it does not even

whisper about his presence at the factory premises of the Respondent during such inspection on 04.12.2014. Even during cross-examination he

admitted that he did not accompany Mr. Dileep Kumar to the Respondentâ?s factory premises but reached there only after Mr. Dileep Kumar called

him. At what stage of the inspection was he called is not known. His testimony being evasive to material questions does not in any manner prove

either his presence during inspection or any of the essential elements of alleged tampering by the Respondent.

(vi) Mr. Dileep Kumar (CW-1) has testified about some of the photographs C 1/8, 10, 12, 13 and 17 as proof of tampering done by the Respondent in

its premises to facilitate flow of PNG from the illegal tapping point done by the Respondent before the metering unit provided by the Claimant in the

factory premises. However, there is no photograph or video on record to show that an illegal tapping point existed before the MRS. There is no

photograph which shows the location or the existence of the MRS.

(vii) As regards the photographs and videos on record while the first affidavit of Mr. Dileep Kumar is silent, the second affidavit states as under in

Para 23:

â??23. All the videos had been prepared and photographs using the mobile phone of different employees of IGL who were present at the

site at the time when the above stated incident was taking place. These videos and photos were then copied and stored on their computers by

the respective employees, which computer was working properly and was used regularly to store or process information for the purposes of

activities regularly carried on by the concerned employee and the photographs and the videos stored in the CD are reproduced from what

was stored in the said computers.â??

(viii) No such inference can be drawn from the above evidence that any photographs or videos were taken by Mr. Dileep Kumar (CW-1). In answer

to Q.No.80 he admits his inability to identify which of the photographs on record were taken by which of the officials. One CD on record was

displayed before the tribunal. The witness stated that he was seen taking videos in the CD. It naturally follows from it that the CD on record was not

made by Mr. Dileep Kumar but by some unidentified person. The evidence of Mr. Dileep Kumar is completely discredited by his admission in answer

to Q.No.81 that his statement regarding taking photographs and videos during inspection at the Respondentâ?s factory is incorrect while what was

stated in Para 23 of his additional affidavit (quoted above) is correct. This leads to the inescapable conclusion that the photographs and videos on

record cannot be read in evidence for three reasons, firstly because their author has not been examined, their source is not known and lastly because

of total non-compliance of Section 65-B of the Evidence Act. In Anvar P. V. vs. P.K. Basheer and Ors. (2014) 10 SCC 473 it was held that an electronic record by way of photograph, CD etc. shall not be admitted in evidence unless the requirements under section 65-B of the Evidence Act

are satisfied. In the absence of a certificate in terms of Sec. 65-B of the Evidence Act by the author of such electronic record such secondary

evidence of photographs and CDs is wholly inadmissible.

(ix) What shocks the conscience is that Mr. Dileep Kumar (CW-1) admits that no panchnama or inspection report was prepared during or after the

inspection at the factory of the Respondent. He mentions the presence of some labourers of the Respondent during the inspection and asserts that if

called they may confirm the facts. However, no such labourer has been examined. He admits that on 04.12.2014 he had first inspected a factory

â??Mangla Handlesâ? adjacent to the Respondentâ?s factory but stated that he does not remember if he had prepared any inspection report there or

not. On being directed the witness was unable to produce such inspection report. The testimony of Mr. Dileep Kumar in cross-examination is so

evasive that it fails to inspire confidence. In answer to Q.No.18 he stated that he did not prepare any inspection report on 04.12.2014 but had informed

his boss Mr. Somil Garg, the then Chief Manager and requested him to come to the premises. Mr. Somil Garg has not been examined. He volunteered

that he had only given an oral information to his high officials and did not remember if any inspection report was made. According to him (Q.No.25)

Mr. Pawan Dhuper, brother of Mr. Deepak Dhuper was present during inspection. It was therefore incumbent that an inspection report or panchnama

was prepared at the factory premises of the respondent and got duly signed by Mr. Pawan Dhuper or any of the labourers present. His testimony is

replete with evasive replies.

(x) Mr. Dileep Kumar had lodged FIR on 05.12.2014 at PS Samaypur Badli regarding the incident. The said FIR shows that four number of

photographs during the cause of action, copy of disconnection notice dated 05.12.2014 and CD containing the video of excavation of unauthorized

tapping with softcopy of photographs were also handed over. None of the above material and primary evidence has been requisition before this

tribunal.

(xi) Mr. Dileep Kumar admits in answer to a tribunal question that he visited the police station in the night of 04.12.2014 at around 01.00 a.m. i.e. on

05.12.2014. In Rejoinder it is admitted by the Claimant that the possession of the Respondentâ??s factory was with the police from 05.12.2014 onwards

till 07.12.2014. Therefore, if the police officials had visited the factory premises on 05.12.2014 after the FIR being lodged and had taken possession

thereof, such police officials were material witnesses who ought to have been examined. What is equally shocking is that no incriminating article

evidencing any tampering by the Respondent with the sellerâ?s facilities was found in the factory premises when Mr. Dileep Kumar returned to the

factory with the police after lodging FIR. In answer to Q.No.31, the witness stated that â??When we visited the premises with the police after

lodging the FIR in the next morning i.e. 05.12.2014 such regulator was not found at the premises as it was removed by the customer.â? This in my

opinion is completely fallacious. One photograph CWl/17 shows a yellow pipeline with a â??Tâ? junction which according to the witness is the

unauthorized tapping point. However, in answer to Q.No.46 & 48 he admitted that no such unauthorized point was removed during or after the

inspection. If the officials of the Claimant were working at the factory premises of the Respondent late beyond midnight on 04.12.2014, had lodged a

prompt FIR on the morning of 05.12.2014 and the police had sealed the premises on the same day (Q.No.50) it is impossible that incriminating material

like â??Tâ? junction, tapping point, regulator etc. would not be found when the police reached the spot with Mr. Dileep Kumar. In answer to Q.No.62

the witness stated that he had not removed any such incriminating material from the Respondentâ?s premises before reporting to the police on

05.12.2014 and in answer to Q.No.64 he stated that the â??Tâ? junction and some pipeline as well as the regulator was also missing from the site at

the time of the visit by the Police. No panchnama or inspection report was prepared during inspection. An oral report only was made to the high

officials in Dec. 2014. No record was maintained regarding the inspection. No acknowledgement was obtained from the representative of the

Respondent or labourers alleged to be present during inspection. In reply to Q.No.69 the witness admits that no independent witness was either

present or called during his inspection. His first affidavit dated 13.04.2016 is wholly silent if Mr. Dileep Kumar conducted the inspection. Therefore, it

is difficult to fathom that the additional affidavit dated 24.05.2016 was prepared by Mr. Dileep Kumar from his memory or by simply seeing the photographs or video. Even the map Ex.CW-1/7 is totally unsupported by any evidence. There is nothing in the photographs on record to rule out that

these were not taken during inspection of other factory premises as none of the photos show the name of Pawan Casting or the presence of Mr.

Deepak Dhuper who was absent during such inspection. Several premises were inspected and several photos and videos were taken by different

officials whose identity is not known. This completely demolishes the testimony of Mr. Dileep Kumar (CW-1).

(xii) An application dated 24.04.2018 was filed by the Respondent stating that the averments made by Mr. Dileep Kumar in the affidavit dated

23.05.2016 were beyond the pleadings and therefore paragraphs 6 to 19 of the said affidavit should not be read in evidence. Mr. Dileep Kumar was

specifically asked in cross examination why he did not mention the facts contained in his additional affidavit in his first affidavit to which he replied that

â??Since I did not think that the above mentioned facts, photographs and videos could be material they did not form part of my first affidavit.â? In

view of the most evasive manner in which the witness testified before this tribunal, the fact that no incriminating article evidencing tampering of gas

supply by the Respondent were found in the premises on the early morning of 05.12.2014 and for the reasons aforesaid no reliance can be placed on

what is stated in para 6 to 19 of the additional affidavit of Mr. Dileep Kumar as he has not only been completely discredited in cross-examination but

also his testimony has elements of admitted falsehood.â??

29. It is evident from the above that the finding of the Arbitral Tribunal that IGL had failed to prove that there was any unauthorized tapping from the

PNG pipeline before the MRS and, that PNG had been sourced from the said tapping point, is based on evaluation of evidence that was led before the

Arbitral Tribunal. The fact that IGL had not filed any affidavit in terms of Section 65B of the Indian Evidence Act, 1872 is not the only ground on

which the evidence (photographs and video) produced by IGLâ?s witness, CW-1, was rejected. It was also noticed that the person who had made the

video recording had not been examined. CW-1 could not have been the person who had recorded the video as apparently, he is visible in that video

recording. The Arbitral Tribunal thus, found that the source of the video recording and the photographs produced was not known because the person who had made the video recording or captured the photograph had not been examined.

30. The contention that the finding of the Arbitral Tribunal that the photographs and the video on record do not show that there was any illegal tapping

point before the MRS must be read in its context. CW 1/17 is a photograph that shows a dug-out pit with an exposed pipeline below the surface. It

also shows that another pipe has been joined to that pipe. However, that photograph does not show any metering system. Mr. Agarwal submitted that

photograph CW-1/8 shows the metering system (MRS). That may be correct but it is apparent that there is no photograph that shows both the tapping

point and the MRS, which would clearly show that the tapping point was before the MRS. It was possible for the Arbitral Tribunal to examine both the

photographs (CW 1/17 and CW 1/8) and other photographs to evaluate whether the alleged tapping point shown in the photograph (CW 1/17) was

before the MRS. However, as a matter of fact, there is no photograph, which shows the illegal tapping point before the MRS since there is no single

photograph that shows both, the tapping point as well as the MRS. In order to make the photographs meaningful, IGL would have to establish the

location of the alleged tapping point and the MRS. The matter clearly is one of appreciation of evidence. It cannot be stated that the statement that

there is no such photograph, which shows tapping before the MRS, is incorrect.

31. It is also evident from the above that the entire controversy sought to be raised before this Court revolves on the question whether the Arbitral

Tribunal had correctly appreciated the evidence. Essentially, IGL seeks that this Court once again re-evaluate the evidence and examine the merits of

the dispute. Clearly, this is beyond the scope of examination under Section 34 of the A&C Act. Perhaps, on evaluation and reappreciation of evidence,

this Court may have not concurred with the decision of the Arbitral Tribunal. However, it is well settled and, has been reiterated by the Supreme

Court in several decisions that the examination under Section 34 of the A&C Act does not entail re-evaluation of the evidence as a first appellate

court and this Court cannot supplant its opinion in place of that of the Arbitral Tribunal. (See P.R. Shah, Share & Stock Brokers (P) Ltd. v. B.H.H.

Securities (P) Ltd: (2012) 1 SCC 594).

32. In Associated Builders v. Delhi Development Authority: (2015) 3 SCC 49, the

Supreme court had observed that â??Once it is found that the

arbitrators approach is not arbitrary or capricious, then he is the last word on factsâ??

33. In the present case, none of the grounds as set out in Section 34(2) or 34(2A) of the A&C Act are established and therefore, the impugned

awards cannot be set aside.

34. The petition is accordingly, dismissed. The pending application is also disposed of.

