

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

OMP NO. 299/2007

Dated: March 07, 2008.

M/s J.S. Continental Ltd.

..... Plaintiff

Through :Mr. Rajiv Shakdhar, Sr.Adv. with Mr.Rajiv
Kapoor, Advocate.

versus

M/s Indian Oil Corporation Ltd. & ors.

..... Defendants

Through:Mr. D. Moitra, Advocate for R-1.

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be
allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

Mr. Justice S. Ravindra Bhat, (OPEN COURT)

1. This petition under Section 34 of the Arbitration and Conciliation Act 1966,
seeks orders for setting aside an Award of the Arbitrator dated 30.1.2007.
2. The facts necessary for deciding the controversy in the present case are that
the Plaintiff, which engages itself in the business of transportation of bulk
Liquefied Petroleum Gas (LPG) using trucks for such purpose answered a
tender enquiry issued by the Respondent on 14.5.1999. The respondent

sought for tenders in a two bid system i.e credential and price bid for award of transportation contract for two years with an option for extending it by one year. The petitioner had agreed to the tender conditions. Clause 4 of the Standard Terms and Conditions, contained an escalation clause which stipulated that revisions in the contracted freight rate would be applicable subsequent to the issue of the offer letter against the tender.

3. It is not in dispute that the Petitioner was declared successful and its offer of Rs.1.32 per k.m. M.T., was accepted by the Respondent. The Respondent was unable to finalise the rates and, therefore, not in a position to enter into final and formal contract within the stipulated 240 days. It, therefore, sought extension of validity of the offer through letters dated 5.11.1999, 24.1.2000, 29.4.2000 and 31.5.2000, from the Petitioner, which granted it.
4. When the Respondent was considering the offers and before issuance of formal contract documents of 5.10.1999 there was an increase in the cost of High Speed Diesel Oil (HSD).The Respondent later issued a Letter of Intent to the Petitioner on 5.7.2000.
5. The contract between the parties subsisted for the period 1.11.1999 to 31.10.2002, in terms of the Letter of Intent dated 5.7.2000. The Petitioner

claimed benefit of Clause 4(b) of the tender conditions and consequent increase of the rates, on application of the escalation clause. The Respondent did not accede to it. It, therefore, sought a reference of the controversies and disputes between the parties for decision to a Sole Arbitrator. The Sole Arbitrator, after considering the pleadings and materials on record and contentions of the parties, framed the impugned award rejecting the Petitioner's claims. The findings have been now challenged in the present proceedings.

6. The Petitioner avers, and its senior counsel Sh. Rajeev Shakdhar contends that the award cannot be sustained as the Arbitrator has not rendered any findings on the main issue even after acknowledging that it was bound to be decided. Counsel relied upon the said issue formulated in Paragraph 1 of the Award i.e whether the claimant was entitled to revision in transportation rates in terms of Clause 4(a) and 4(b) of the standard terms and conditions of the agreement on account of hike in the price of high speed diesel on 5.10.1999. It was contended that having formulated the question correctly, the arbitrator fell into grave error in not deciding the issue. Learned counsel relied upon on the stipulation to contend that the rates in this case were recommended on

5.10.1999 and thus after the offer was submitted by the Petitioner (on 8.5.1999, which was opened on 14.5.1999) though benefit of the rates were to be given with effect from 1.1.1999 i.e. when the contract became effective. The Petitioner therefore could not be deprived of this revision in view of the express terms in Clause 4(a) and 4(b). Learned counsel submitted in this regard that the un-articulated premise of the award, while rejecting this claim was that the offer was in fact made on 5.7.2000, the date when the LOI was issued, which is clearly a wrong assumption. A plain reading of clause 4(a) and 4(b) of the terms can leave no room for doubt that the offer letter intended to be taken into consideration is the one given by the contractor, in response to the tender and not the Letter of Intent, issued by the Respondent after receiving the response to the tender. If the latter's contentions were to be accepted, the contractor/transporter would be bound by unrealistic rates and left at the mercy of the Respondent which could accept the offer even a year later, ignoring previous revisions that would undermine the Sub-stratum of the offer itself.

7. Learned counsel next contended that the Arbitrator ignored a letter dated 19.11.1999 written by the Petitioner to the Respondent requesting the latter to

revise the transportation rates, this letter could not have been overlooked as it contained a seal of the receipt of the Respondent. The latter did not produce any evidence to rebut this fact. The Arbitrator therefore should have accepted on the probability of evidence and held that the rates were revised on 5.10.1999 and effective from 1.11.1999 and therefore bound the parties.

8. Learned counsel next contended that the findings recorded in Para 5 of the Award that the escalation in rates was below 0.13 P, were unsustainable; the arbitrator overlooked the revision in rates made on 5.10.1999 which should have been taken into account. It was not open to the Respondents to contend that the later increase in HSD by Rs.2.51P had absorbed the intervening increase on that account. Learned counsel also adverted to subsequent letters after 19.11.1999 written by the Petitioner to the Respondent and submitted that they supported the former's case about its claiming escalation at all relevant times.

9. Learned counsel lastly contended that the Arbitrator fell into error and thus mis-conducted himself in distinguishing the award in the case of M/s Aggarwal Automobiles where the respondent's nominee arbitrator found that an identical claim was admissible. Learned counsel contended that the

findings of the arbitrator in this case about the facts and circumstances in that award being peculiar and atypical were not based on records and hence unfounded.

10. Learned counsel submitted that this Court should exercise its jurisdiction under Section 34 and set aside the award, in terms of the judgments of the Supreme Court reported as *Oil and Natural Gas Commission Vs. Saw Pipes*, 2003(5) SCC 705, *Mecdermott International Inc. Vs. Burn Standard Co. Ltd. and Ors.*, 2006 (11) SCC 181. Learned counsel relied upon the decision of the Supreme Court in *Bank of India Vs. O.P. Swarnakar* 2003 4 SCC 721, in support of the submission that the offer made on 8.5.1999 was binding upon the Respondent, under Clauses 4(a) and clause 4(b).
11. Mr. Devashish Moira, learned counsel for the Respondent contended that the Award does not disclose any error to enable this Court to interfere with it award or set aside any of findings recorded as the Petitioner is unable to demonstrate that any of the factors which vitiate an award in terms of Section 34 and the law declared in that regard attach to it. It was contended that the objection about the arbitrator not rendering any finding on the issue of the relevant date of offer, is without substance. Learned counsel pointed that the

issue as framed was not so much as the date of submission of the tender or offer as much as the entitlement of the Petitioner to the amounts claimed by it. He relied upon the findings to the effect that the Petitioner never, during the subsistence of the agreement between 1.11.1999 and 31.10.2002 sought for any increase in the price of high speed diesel. It was submitted that the arbitrator noticed that in none of the tenders or documents submitted did the Petitioner ever seek recourse to clause 4(a) or 4(b) or claim that the price fixation made on 5.10.1999 should be applicable. The arbitration in this case was invoked on 20.5.2004 much after the validity period of the contract.

12. Counsel contended that even if the Court were not to agree with the interpretation placed by the arbitrator or find that some materials were ignored by him, unless the award disclosed any of the elements spelt out in the *Saw Pipes* decision, i.e it was opposed to public policy in India, or was opposed to national interest or was contrary to the express provisions of the Arbitration Act, and/or patently illegal, the Court would desist from interfering with the findings.

13. Clause 4 of the Tender Conditions upon which the Petitioner has placed considerable reliance reads as follows :-

“ESCALATION/ DE-ESCALATION OF RATES

- a) Upward/ downward revision in the contracted freight rates shall be allowed by the contracting Corporation/s, in case of revision/s in the prices of High Speed Diesel, automotive Diesel Lubricants, and Tyres, as per the contracting Corporation’s norms as applicable norms as applicable from time to time.*
- b) These revisions in the contracted freight rate will be applicable only for case/s of revision/s in the prices of High Speed Diesel, Automotive Diesel Lubricants, and Tyres, notified by the Government/ contracting Oil co./Tyre Manufacturers subsequent to the issue of the offer letters against these tender/s.*
- c) These revisions in the contracting freight rates will be applicable uniformly irrespective of the make, model and loading capacity of the Tank – Trucks.*
- d) Frequently for permitting escalation, de-escalation of the rates will be as under :*

For HSD & Lube consumed: As and when the increased/decrease in rates works out as 1.0 paisa or more PKM/ PMT on account of increase/ decrease in the price of diesel/ lubes.

Increase/ decrease in the price of HSD will be based on RSP of one litre of HSD sold ex-regional/ Zonal Head Quarters)Mumbai, Delhi, Calcutta and Madras).

Increase/ decrease in the price of the lubes will be based on RSP of one litre of lube grade 30/40/50 (sold in loose) at the regional Head Quarters (Mumbai, Delhi, Madras and Calcutta) ”.

14. In this case undeniably the Petitioner gave its offer pursuant to the tender enquiry on 8.5.1999. The offer was to be valid for 240 days. The Respondent was unable to finalize its decision and consequently it is an admitted fact that the Petitioner extended the period of validity of the offer on two occasions, the last one being upto 31.5.2000. The Letter of Intent was granted on 5.7.2000. No doubt the Petitioner has placed reliance on two letters dated 19.11.1999 – one stating that the Respondent should consider allowing justifiable escalation in the rate quoted in the tender, yet what cannot be ignored is that the receipt of this letter was disputed. The arbitrator, however, did not accept the claimants contentions in this regard and proceeded to hold that the offer as made on 8.5.1999 was accepted. This in turn led him to find that the Petitioner was not entitled to the revision effected on 5.10.1999 in the HSD rates. Though there can be two views on this issue – since there is no explanation about the seal of the Respondent on that letter, nevertheless the question is one of appreciation of facts. The Arbitrator was not convinced that the letter was received by the Respondent, at any rate. He distinguished this from the other case i.e. Aggarwal Automobiles where another letter phrased somewhat differently making acceptance without prejudice to right to claim

rates, was given. If the Court's jurisdiction were an appellate one, the Court should have perhaps considered and appreciated the evidence. However, judicial scrutiny cannot be expanded to substitution of such findings. In the absence of any infirmity or unreasonableness in appreciation of facts the Court should desist from interfering with the Award, on this ground.

15. The Arbitrator in Paras 4,5 & 6 of the Award noticed that the claims for increase of price in HSD due to revision dated 5.10.199 had never been stressed upon at any time during finalisation of tender nor during the contractual period, except for the letter dated 19.11.199 set up by the Petitioner. He further held that during the contractual period, escalation took place on two occasions i.e 16.1.200 and 30.9.2000. The first escalation was to the extent of 0.13P. The interpretation given by him on this was that clause 4(d) entitled the contractor to increase rates only if the escalation was more than one paise. He concluded that since the increase at that stage did not correspond to the parameters, it was later absorbed in the subsequent increase on 30.9.2000. This cumulative increase to the extent of 5.03 was duly granted to all transporters including the present Petitioner. He, therefore, held as follows :

“ In view of this the Claimants stand is unwarranted and unsustainable as the escalation which took place during the period from 01.11.99 to 05.07.2000 was only to the extent of Rs.0.13 paisa, which the Claimant was not entitled to as per terms of the contract. However, subsequently the cumulative increase in rates due to prices of HSD not only between 01.11.1999 to 05.07.2000 but also during the entire contractual period were duly awarded to the Claimant by the Respondent. It is noted that claimant has admittedly confirmed the aforesaid during his cross examination on 22nd April, 2006.”

During Arbitration proceedings the letter 19.11.1999 which the claimant say was issued by them has been strongly contested by the Respondent. During the proceedings the Claimants could not prove that this letter was served on the Respondent. Further there is no mention of this letter in their various extension letters of 19.11.1999, 27.01.2000 and 31.05.2000 issued to the Respondent from time to time. The Claimant should have endeavoured to get their letter accepted and acknowledged by Respondent as was clearly done for their other correspondence exchanged with the Respondent. I cannot but come to the conclusion that the letter is an after thought. Thus letter of 19.11.1999 which the claimant submits was issued regarding revision of rates cannot be considered to be a part of the finalized contract. Further except in the letter dated 19.11.1999 wherein revision of rates was allegedly sought by the claimant there is no correspondence in any manner whatsoever from the Claimant with the Respondent on this subject till as late as year 2003. It is also relevant to note that the all payments under the contract were duly and unconditionally accepted by the Claimant and without any protest whatsoever. Under these circumstances their claim to revision in rate is evidently unjustified.”

16. The reliance placed by the Petitioner on the award in M/s Aggarwal Automobiles case was held not to be tenable on the ground that the contractor there had categorically stated that signing of its contract was without prejudice to its rights and contentions and that the was only for Kandla and LPG. These two factors were deemed sufficient to distinguish the facts of this case.
17. This Court has examined that Award which is a part of the record having been produced and relied upon by the Petitioner in the arbitral proceedings. The objection to the approach of the arbitrator in the present case, in not following the other award, in the opinion of the Court is without foundation. Firstly, it could not be shown as to how the award drawn pursuant to the claims of another contractor, for transactions unrelated to the present Petitioner were revision in these arbitration proceedings. Even if for some reason such award were to be examined, it was well within the arbitrators domain to distinguish the reasoning in that case from the present one. Another aspect which cannot be lost-sight of (as observed by the Arbitrator) is that the claimant did not demand the escalation, declared on 5.10.1999 during the substance of the contract. It admittedly sought reference on 24.5.2003. The award in M/s Aggarwal Automobiles was made on 1.3.2003. These facts though not

noticed show that it appears that the present Petitioner was inspired by the award in M/s Aggarwal Automobiles to make a claim – the only difference being that in this case the claim was made more than a year after the contract itself ended.

18. Having considered the entire conspectus of the case the Court is unpersuaded by the grounds urged in support of these petitions. They do not constitute reasons for setting aside the award under Section 34, as interpreted in the *Saw Pipes* decision (*supra*). The award does not disclose any infirmity it can be characterized as findings that are opposed to public policy, national interest, patent legality or contrary to express provisions of the Act.
19. As a result of the above discussion, the Petition has to fail. It is accordingly dismissed without any order as to costs.

March 7, 2008
mlb

(S. RAVINDRA BHAT)
JUDGE