

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11th July, 2008

+ **O.M.P. 454/2006**

OSWAL SERVICE STATION Petitioner
Through Mr.R.S.Sharma, Advocate.

versus

HINDUSTAN PETROLEUM CORP.LTD. Respondent
Through Mr.K.C.Kaushik with Mr.Rahul
Kaushik and Ms.Shilpi Kaushik, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 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 |

% 11.07.2008

Mr. Justice S. Ravindra Bhat (Open Court)

1. The petitioner in this case under Section 34 of the Arbitration and Conciliation Act, 1996, questions the award of a sole Arbitrator dated 26.5.2006 whereby his claims were rejected.

2. The facts necessary for deciding the case are that the respondent - Hindustan Petroleum Corporation Limited (hereafter

referred to as "the Corporation") awarded a dealership of petroleum products to the petitioner, sometime in 1997. The terms and conditions were outlined in an Agreement dated 25.9.1997. Some of the conditions agreed upon were inter alia that the dealer/petitioner would sell products of the prescribed purity and standards and would not indulge any objectionable behaviour in that regard; by clause 58, the Corporation was empowered to terminate the dealership. Clause 68 obliged the parties to refer their disputes and differences to arbitration.

3. On 16.2.2003, the Area Sales Officer of the Corporation inspected the petitioner's retail outlet. He then drew three samples, in accordance with the prescribed procedures. In the sample drawn by him, it was observed that the specifications were within the viable or permissible limits of 0.2%. He recorded a negative variation of the stocks. In regard to the product specifications, however, he expressed satisfaction. Apparently in accordance with internal guidelines, the samples were forwarded to the authorized laboratory at Shakur Basti. The Corporation alleged that upon testing, these samples failed. A show cause notice was, therefore, issued to the petitioner on 8.3.2003 alleging that the ULP samples drawn on 16.2.2003 did not meet the specifications as prescribed by the appropriate BIS standard. The petitioner was called upon to show

cause within seven days (of the notice) why action should not be taken. The petitioner replied to this letter on 11.3.2003 protesting allegations of irregularity. He also alleged that copy of the test report had not been supplied till date.

4. On 14.3.2003, the petitioner's outlet was again inspected, this time by a mobile lab test unit. Here again, three samples were drawn ML-423, ML-424 and ML-425. The respondents alleged that the concerned samples did not meet the necessary standards, particularly, ML-423. It was alleged, inter alia, that the variation between the dealer's standard, after last receipt and the density observed by the Mobile Lab was beyond permissible limits. The permissible limits were (+)(-)0.0030 whereas the samples in question revealed a variation of 0.0032. Other specifications too were not fulfilled and the samples were declared to have failed. On the strength of this report, the Corporation issued another show cause notice on 17.3.2003, this time calling upon the petitioner to answer why the dealership should not be terminated. The petitioner responded on 25.3.2003. In this reply, it was inter alia explained that the three storage tanks for high speed diesel were very old and there were possibility of certain sediments having crept into the samples. It was also stated that there was inter-connectivity between tanks III to IV which led to possibility of contaminated products. Another detailed

reply was sent on 28.3.2003, by the petitioner.

5. On 19.12.2003, the respondent - Corporation by invoking its powers under clauses, 27, 28 and 58 of the Dealership Agreement, terminated it. The petitioner sought reference to arbitration which was granted. The sole Arbitrator, a technical person, was appointed on 28.12.2004. After considering the submissions and the claims as well as the evidence led before him, the Arbitrator held that the action terminating the Dealership Agreement dated 25.9.1997 could not be declared illegal. The Arbitrator also took note of the two decisions of the Supreme Court which ruled that in such cases, the contract being one for service could not be specifically enforced and, therefore, the relief in that regard was unavailable. He also declined the alternative relief of damages.

6. The petitioner alleges and his counsel contends that the award is illegal and contrary to public policy as it has violated several provisions of the Petroleum Act. The petitioner has relied upon the provisions of Section 2, 15,16,18 and 19 in that regard. The petitioner contends that the methodology adopted by the Corporation in drawing samples and testing are not in accordance with law and by taking the refuge of internal guidelines which do not conform to provisions of the Act, the respondent cannot rid itself of the primary liability to comply with mandatory provisions.

7. Mr.Sharma, learned counsel for the plaintiff, contended that under provisions of the Act, there is an obligation after having drawn samples, to indicate the grade or category of such products at the time of testing in the report. Furthermore, counsel contended that the Corporation violated the letter of the law in refusing to grant the request for re-testing. It was lastly contended that the Laboratory which is alleged to have tested samples was not authorized to do so nor were shown to be so authorized, through evidence before the Arbitrator. Learned counsel submitted that even the Arbitrator was satisfied about the irregularity of the samples and the manner of testing as is evident from the first paragraph of the final order. Yet the Arbitrator, it was submitted, choose not to grant any relief and rejected the petitioner's claim. This, it was submitted, constituted an unreasonable finding which amounts to patent illegality and, therefore, has to be set aside.

8. Mr.K.C.Kaushik, learned counsel for the respondent, relied upon averments in the counter affidavit and pointed out that the materials on record established beyond any doubt that (1)both kinds of samples, i.e. MS & HSD samples drawn from the detailed outlet on the two occasions failed, (2) the petitioner had indulged in serious irregularities entitling the Corporation to invoke its powers under clauses 27, 28 and 58 of the Dealership Agreement which it did

and was justified in doing so. There was no room contended counsel for discretion since the failure of the sample of 14.3.2003 amounted to a second violation which entailed termination of the dealership. Learned counsel also submitted that the Corporation followed the MDG Guidelines for drawing and testing samples, which are known to all dealers, and are binding on the Corporation.

9. Learned counsel submitted that the arguments about violation of provisions of the Petroleum Act are unsustainable and that similarly the petitioner's complaint about being not furnished with the copies of the test report cannot be given credence at this stage. He relied upon the Statement of Claim submitted by the petitioner and stated that the pleadings in arbitration never raised this aspect. Learned counsel relied upon the copies of the report dated 16.2.2003 and the copies of the three test reports. It was submitted that these documents were signed by the petitioner and were furnished to him. Learned counsel also relied upon the Statement of Claim which has quoted the test report when the first sample was drawn and submitted that this establishes that there was no failure of principles of natural justice.

10. Learned counsel relied upon the judgment of the Supreme Court reported as ***Indian Oil Corporation Ltd. vs. Amritsar Gas Service***, 1991 (1) SCC 533 and submitted that in such cases, on an

appropriate application on Section 14(1)(c) read with Section 41(1)(h) of the Specific Relief Act, 1963, the relief of restoration of dealership or an injunction in that regard, was inadmissible.

11. From the above narrative, what this Court has to consider is the legality and correctness of the award, whereby the petitioner's claim was turned down. The copy of the Area Sales Report of 16.2.2003 and copies of the three test reports prepared by the Mobile Laboratory are on the record. Although at the first blush, the report of the Area Sales Officer appears to be in petitioner's favour, the fact remains that the other two samples drawn on that date, i.e. 16.2.2003 apparently were submitted to the designated laboratory. The Laboratory furnished its opinion that the sample was not in accordance with the required standards. The petitioner's initial objection about not being furnished with the copy of this report, in the opinion of this Court, is unfounded. Although in the reply to the show-cause notice of 8.3.2003, such a contention has been in fact raised, the subsequent events and the petitioners' conduct, reveal a different picture. The petitioner has, in fact, in the Statement of Claim filed before the Arbitrator quoted extensively from the report, in relation to the samples drawn on 16.2.2003. Therefore, I am satisfied that the objection about not being furnished to the report and, therefore, being handicapped to make submissions or proper representation are

without foundation. They are accordingly rejected.

12. As far as the objection with regard to the legality of the testing done by the Mobile Laboratory is concerned, the test reports indicate that the Mobile Unit was registered. Such registrations are clearly indicated, on the reports. The signatures of the petitioner's representatives along with the seals of the outlet are clearly visible on these test reports. The provisions of the Petroleum Act upon which the petitioner led stress, in the opinion of the Court, no doubt classify petroleum product into different categories. However, one cannot be of unmindful of the fact that the prescription of the standards in the Act is essentially in the context of criminal liability sought to be fastened on the dealers and traders of the petroleum and the question of testing/re-testing would be relevant in that context. In this case, besides, the petitioner never alleged that the provisions of the Petroleum Act were applicable at the stage of testing nor that the Laboratory itself was unauthorized or did not have the requisite registration. In the absence of such a plea, this Court cannot now hold that the Arbitrator fell into an error in not considering this aspect.

13. An examination of the award would show that the Arbitrator in order to allay any apprehensions had deputed a technical team including the Corporation's and claimant's representative to the

site. The joint team apparently stated that at the time of inspection suction from tank No.II which is 4 cm deep was not possible. The Arbitrator, therefore, found some merit in the claimant's argument that the bottom sediments/slug with 4 cm deep may have crept into the samples of other tanks as both the tanks were inter-connected. However, he did not find any merit in ignoring the result of the MS samples, the result of which also failed.

14. After so concluding and after considering the matter, the Arbitrator passed his operative order in the following terms:-

"ORDER

In view of the above, I conclude that on both occasions viz. on inspection dated 16/02/03 and 14/03/03 the samples have failed. However with regard to sampling of HSD on 14/03/03 I find substantial operational inconsistencies in drawl of samples and accordingly set aside the results of HSD samples drawn on 14/03/03.

Disregarding the results of HSD sample in inspection dated 14.03.03, and holding the results of MS sample failing by itself a irregularity, I hold the claimants in breach and liable for two successive irregularities vis on 16.02.03 & 14.03.03.

I agree with the respondents that the dealership agreement is determinable in nature and as such cannot be specifically enforced. In this regard reference submitted by the respondents i.e. (1991) 1 SCC 533 IOC Indian Oil Corporation Ltd. vs. Amritsar Gas Agency and in Appeal No. 4353-54 of 1999 E. Venkatkrishna Vs. IOC also endorses the

above position. Accordingly, the prayers of the claimants are disposed as follows:-

The claimants have committed two irregularities and the respondents are within their rights to terminate the Dealership agreement dtd. 25/09/97. Accordingly the prayer of the claimants is rejected. Moreover, in view of the nature of contract being determinable the prayer of the claimants is contrary to the settled legal provisions in this regard.

The claimants have also claimed a monetary loss of Rs. 39 lakhs from the respondents which is disallowed as the cause of action for loss, if any rests with the claimants in as much as their samples failed on two occasions.

I also disallow the counter claim for the respondents in respect of loss of goodwill and reputation, as the same could not be substantiated by the respondents.

The parties to bear their own cost.

SANJEEV MALHOTRA
SOLE ARBITRATOR"

15. In proceedings under Section 34 of the Act, the Court does not sit as an Appellate Authority; its jurisdiction is supervisory and limited in extent. After the decision of the Supreme Court in ***Oil and Natural Gas Commission vs. Saw Pipe Lines***, 2003 5 SCC 705, the Court has to broadly enquire and be satisfied that the award one or more of the four elements which would vitiate its findings; are not absent such as its being opposed to fundamental policy of Indian Law;

being opposed to interest of India; being contrary to justice or morality and patent illegality.

16. The new standard prescribed in ***Saw Pipe's case*** (supra), has been reaffirmed and applied in subsequent judgments such as ***Hindustan Zinc Ltd. vs. Friends Coal Carbonisation***, 2006 (4) SCC 445 and *Mc.Dermott vs. Burnco*, (2006) 11 SCC 181. The threshold of challenge is not the same as it was when the 1940 Act was in force. Parliamentary intervention and judicial interpretation has limited the role of the Court to the four named factors while considering public policy perspectives as to the legality of any arbitration award. As regards the objection based on non-compliance with the Petroleum Act is concerned, this was an aspect never raised in the Arbitration proceeding or even to the reply to the Show Cause Notice issued by the respondent – if they were in some manner, reflected the petitioner has not, in any way, satisfactorily shown as to how these considerations vitiate the findings of the Arbitrator. The petitioner has not come forward with his own version or produced any objective evidence to show that the samples or the product drawn were in conformity with prescribed standards. In the circumstances, the findings of the Arbitrator cannot be lightly interfered with. So far as the complaint of violation of principles of natural justice are concerned, as noticed in the preceding part of this judgment, the

allegations are unfounded. The petitioner was give notice at two stages, namely on 8.3.2003 and later on 17.3.2003. After considering his objections and the representations and on the basis of the test report, particularly the second series of test reports, the Corporation deemed it appropriate to terminate the dealership. On this aspect, the Court cannot discern any illegality.

18. There is, however, one serious anomaly or infirmity which cannot be overlooked. The Arbitrator even while upholding the respondent's action, recorded a finding that there were substantial operational inconsistencies in drawl of samples and, thereafter, set aside the results of the HSD samples drawn on 14.3.2003. This would mean that the Arbitrator was persuaded that the test reports dated 14.3.2003 could not be relied upon. However, he nevertheless, went on to hold the claimant's to be breach for the second instance, or liable to two successive irregularities, i.e. 15.2.2003 and 16.3.2003. This is patently and facially contrary to the findings, apparent from the face of the award. If the Arbitrator had found that both the samples had failed and that the procedure adopted in respect of both were correct undoubtedly, the second paragraph of the operative order would have been sustainable. However, having found inconsistencies in drawls of the samples and set aside the result of the samples, i.e. report dated 14.3.2003, the Arbitrator could not

legitimately have concluded that the claimant had acted in breach and was liable to two successive irregularities. The Arbitrator thereafter proceeded to hold that, in the circumstances, the relief of restoration cannot be granted in view of the declaration of law by the Supreme Court.

19. Now, as far as the relief of declaration for restoration is concerned, undoubtedly, the findings of the Arbitrator are correct. ***Amritsar Gas Service's case*** (supra) and the subsequent judgments are authorities that in such cases, directions cannot be given by the Civil Court to restore any dealership. The only legal and permissible relief can be damages. In this case, having held that the drawal of samples was irregular and having set aside the report, the Arbitrator could not have rejected the claim of the petitioner in totality as he has done in this case. In the circumstances, the Court is of the opinion that the Arbitrator should have examined the claim of the petitioner for monetary loss, for which the claim made was Rs.39 lakhs. The petitioner should, therefore, have been allowed to lead evidence in support of its claim, in the light of the findings and established the extent of damages which could have been legally recovered.

20. Mr.Kaushik, learned counsel for the defendant, submitted that the Corporation followed its MDG Guidelines, 2000 which are binding on all its officers and technical staffs as well as dealers who

have made award of it, in regard to withdrawal and testing of samples.

21. In view of the above findings, the petition deserves to be partly allowed. It is open to the petitioner to seek fresh arbitration under clause 68 and seek such damages as are admissible in law.

The petition is allowed but in the above terms.

S. RAVINDRA BHAT,J

JULY 11, 2008
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