

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 9747 of 2014

IN

MA No. 715 of 2013

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Mrs. Mithilesh Singh, Proprietor of Maa Devi H.P. Gas Agency Ismela,
P.S.Dighwara, Dist. Saran.

.... Petitioner

Versus

1. The Hindustan Petroleum Corporation Ltd through its Chairman, 17 Jamshedji Tata Road, Mumbai 400 020.
2. Chairman & Managing Director I/C Hindustan Petroleum Corporation Limited, 17, Jamshedji Tata Road, Mumbai 400 020.
3. Deputy General Manager, Retail (East Zone) of Hindustan Petroleum Corporation Limited, Purbanchal Bhawan, 771, Anandpur, Off EM Bye Pass Road, Kolkata.
4. Shri R. Lakshminarayanan, Sole Arbitrator appointed by Respondent No. 2, Chairman & Managing Director I/C. Hindustan Petroleum Corporation Limited, 17, Jamshedji Tata Road, Mumbai 400 020.
5. Senior Regional Manager, Patna LPG Regional Office, LPG Division, Hindustan Petroleum Corporation Limited, 6th Floor, Lok Nayak Jai Prakash Bhawan, Dak Bungalow Road, P.S. Kotwali, Dist. Patna.

.... Respondents

with

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Request Case No. 14 of 2015

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Mrs. Mithilesh Singh, Proprietor of Maa Devi H.P. Gas Agency Ismela,
P.S.Dighwara, Dist. Saran.

.... Petitioner

Versus

1. The Hindustan Petroleum Corporation Ltd through its Chairman, 17 Jamshedji Tata Road, Mumbai 400 020.
2. Chairman & Managing Director I/C Hindustan Petroleum Corporation Limited, 17, Jamshedji Tata Road, Mumbai 400 020.
3. Deputy General Manager, Retail (East Zone) of Hindustan Petroleum Corporation Limited, Purbanchal Bhawan, 771, Anandpur, Off EM Bye Pass Road, Kolkata.
4. Deputy General Manager, Retail Upgradation, Hindustan Petroleum Corporation Ltd., Purvanchal Bhawan, Office of the General Manager, East Zone, 17, Anandpur Off GM Bye Pass Road, Kolkata 700 107.
5. Senior Regional Manager, Patna LPG Regional Office, LPG Division, Hindustan Petroleum Corporation Limited, 6th Floor, Lok Nayak Jai

Prakash Bhawan, Dak Bungalow Road, P.S. Kotwali, Dist. Patna.

6. Shri R. Lakshminarayanan, Sole Arbitrator appointed by Respondent No. 2, Chairman & Managing Director I/C., Hindustan Petroleum Corporation Ltd. who is presently posted as Deputy General Manager, Retail Upgradation, Hindustan Petroleum Corporation Ltd., Purvanchal Bhawan, Office of the General Manager, East Zone, 17, Anandpur Off GM Bye Pass Road, Kolkata 700 107.

.... Respondents

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Appearance :

(In CWJC No.9747 of 2014)

For the Petitioner/s : Mr. Md.Imteyaz Ahmad

For the Respondent/s : Mr. Rabindra Nath Kanth

(In REQ. CASE No.14 of 2015)

For the Petitioner/s : Mr. Nilesh Kumar

For the Respondent/s : Mr. Sanjay Kumar Mishra

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 05-05-2016

Heard learned counsel for the petitioner and learned counsel for the respondent Corporation.

2. The present writ petition has been filed against the order contained in letter No. CMD/100 dated 11.10.2013 passed by the Chairman and Managing Director I/c, Hindustan Petroleum Corporation Limited (hereinafter 'the Corporation') by which he did not approve the name of the sole Arbitrator as proposed by the petitioner, and instead appointed Shri R. Lakshminarayanan, Deputy General Manager (Retail), East Zone, Hindustan Petroleum Corporation Limited, as the sole Arbitrator to adjudicate upon the disputes and differences between the parties.

3. The petitioner subsequently also filed the present Request

Case No. 14 of 2015 on 07.05.2015 under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act" hereinafter) for appointment of an Arbitrator on the ground that the Arbitrator appointed by the respondents was contrary to the terms of the agreement entered into between the parties.

4. The brief facts of the case are that the parties entered into a memorandum of agreement dated 30.11.2004, clause 38 whereof, *inter alia*, provided for the resolution of disputes through arbitration, as follows :-

"38. Any dispute or difference of any nature whatsoever or regarding any rights, liability, act, omission or account, of any of the parties hereto arising out or in relation to this agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who may be nominated by the Managing Director. The Dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is and the office of the Corporation or that he has to deal with the matter to which the contract relates or in the course of the duties as an officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of the Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reasons, the Managing Director as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as Arbitrator in accordance with the terms of the agreement. Such persons shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of the Contract that no person other than the Managing Director or a person nominated by such Managing Director of the Corporation as aforesaid shall act as Arbitrator hereunder"

5. On 07.01.2008, the respondent Corporation communicated to the petitioner its decision to amend the arbitration clause in the



aforesaid distributorship agreement by providing for certain other persons also to be appointed as arbitrators, and thus it was proposed “to enable the appointing authority to appoint a retired officer of the Corporation or other oil PSUs or retired senior Central Government officials also as sole Arbitrator”. The petitioner was required to convey her consent by signing the enclosed addendum to incorporate the change to that effect. The addendum was accordingly signed and despatched by registered post on 15.01.2008. Though the aforesaid letter of the Corporation dated 07.01.2008 was despatched by Registered post on 12.02.2008, the petitioner states that she had responded to the said letter on 05.01.2008 on the basis of an advance copy which had been hand delivered to her. After a lapse of over five years, the respondent Corporation by its letter dated 21.08.2013 once again wrote to the petitioner seeking her consent “to appoint a retired officer of the Corporation as the sole Arbitrator instead of a serving officer” and accordingly sought the petitioner’s written consent to the appointment of a retired officer of the Corporation. In response, the petitioner by her letter dated 30.09.2013 suggested the name of Hon’ble Mr. Justice U.P. Singh, retired Chief Justice of Kerala High Court, and alternatively Mr. Mukund Deo Mishra, retired I.A.S., for appointment as sole Arbitrator. It transpires that soon thereafter on 11.10.2013, the Managing Director of the respondent Corporation appointed Sri R. Lakshminarayanan, Deputy General Manager-Retail,



East Zone, as the sole Arbitrator to adjudicate upon the disputes between the parties. The said Arbitrator so appointed entered upon the reference and directed the parties to submit their pleadings by way of statement of claim, reply thereto and rejoinder. It appears that by letter dated 05.01.2015 the respondent Corporation filed an application before the appointed Arbitrator for termination of the arbitration proceedings for default on the part of the petitioner who had not filed her statement of claim despite sufficient opportunity having been given.

7. Learned counsel for the petitioner submits that the respondents have acted arbitrarily and illegally in appointing Sri R. Lakshminaryanan, a serving officer subordinate to the Managing Director, as the sole Arbitrator, despite the petitioner having suggested the names of Hon'ble Mr. Justice U.P. Singh, retired Chief Justice of Kerala High Court and Mr. Mukund Deo Mishra, retired I.A.S. It is submitted that the petitioner having earlier consented to the respondent Corporation's decision as provided in its letter dated 07.01.2008 to appoint a retired officer of the Corporation or other PSUs or retired senior Central Government officials as sole Arbitrator, there was no warrant to appoint a serving officer of the Corporation as Arbitrator.

8. Learned counsel for the respondent Corporation on the other hand, submits that no fault can be found with the respondent



Corporation in appointing a serving Officer, Sri R. Lakshminarayanan, as the sole Arbitrator. It is pointed out that the Corporation's letter dated 07.01.2008 contemplated the appointment of retired officers in addition to serving officers as sole Arbitrator.

9. It is further submitted by the respondents that, the appointment of Arbitrator calls for no interference also on the ground that such Arbitrator had already entered upon the reference as evident from the Corporation's letter dated 05.01.2015 by which request was made for terminating the arbitration proceedings on the ground of default by the petitioner. Steps had been taken by the appointed Arbitrator requiring the parties to submit their pleadings, and extension of time for the same had also been granted by him to the petitioner. It is submitted that once an Arbitrator has been appointed and has entered upon the reference, the only remedy available with the petitioner is to move a petition under Section 13 of the Act, and thereafter upon an award being made, under Section 34 of the Act for setting aside of the same.

10. Having heard the parties and on consideration of the materials on record, this Court is in agreement with the submissions made on behalf of the respondent Corporation. The letter dated 07.01.2008 contemplated appointment of certain retired officers in addition to, and not instead of, serving officers as contemplated in the agreement dated 30.11.2004. This is evident from the use of the words



'also as Sole Arbitrator' in the said letter dated 07.01.2008. This letter was accepted by the petitioner by her letter dated 15.01.2008 enclosing the signed addendum as required, whereby the arbitration clause in the agreement dated 30.11.2004 stood replaced. The proposed amendment in the arbitration clause as stated in the accompanying addendum also provided that the disputes were referable to "the sole arbitration of the Chairman and Managing Director of the Corporation when some officer or retired officer of the Corporation or retired officers of other PSUs or retired senior Central Government officers who may be nominated by the Chairman and Managing Director". Clearly therefore, serving officers of the Corporation were not excluded under the replaced arbitration Clause and the retired officers were merely included therein in addition to serving officers. Such addendum had been accepted by the petitioner. The Corporation's action in appointing a serving officer as sole Arbitrator thus did not militate against the amended arbitration clause, which did not oust a serving officer from being so appointed. The subsequent letter dated 21.08.2013 seeking the petitioner's consent for appointment of a retired officer of the respondent Corporation was not consented to by the petitioner, and she did not communicate her acceptance in her letter dated 30.09.2013, and instead she suggested the names of two other persons for appointment.

11. This Court is therefore, of the view that the appointment of

the retired officer of the corporation not having been consented to by the petitioner, the Corporation was under no obligation to accept the names suggested by the petitioner and as such, the Corporation cannot be faulted in subsequently appointing a serving officer.

12. This Court is also in agreement with the submission of behalf of the Corporation that the sole Arbitrator having been validly appointed on 11.10.2013, and such Arbitrator having duly entered upon the reference by taking steps, there is no occasion for this Court to consider the appointment of another Arbitrator. It has been held by the Supreme Court in *Antrix Corporation Limited versus Devas Multimedia Private Limited* [(2014) 11 SCC 560] as follows :-

“33. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

*34. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an Arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In *Som Datt Builders Pvt. Ltd. Vs. State of Punjab* [2006 (3) RAJ 144 (P&H)], the Division Bench of the Punjab & Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the*

parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.”

13. It may not be out of place to observe that Section 12(5) read with the Seventh Schedule to the Act as newly inserted by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 01.01.2016 would also not be attracted in the instant case to render the appointed Arbitrator, being a serving officer of the Corporation, as ineligible, inasmuch as such appointment had already been made much prior to the date when the amended provisions came into force.

14. In the above view of the matter, this Court is not inclined to interfere in the matter. The writ petition as well as the Request Case stand dismissed. The Interlocutory Applications filed in both the cases also stand disposed of.

(Vikash Jain, J)

Chandran

AFR/ NAFR	AFR
CAV DATE	
Uploading Date	06.05.2016
Transmission Date	