IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE **RAJIV SHAKDHER**

O.P.No.321 of 2012

M/s.Dhandapani Enterprises,
Rep. By its Proprietor, A.Thanigaivelu,
No.48, Bazulla Road,
T.Nagar, Chennai – 600 017.
... Petitioner

Vs.

1. The Chief Regional Manager,
M/s.Hindustan Petroleum Corporation Ltd.,
Chennai Retail Regional Office,
Thalamuthu Natarajan Building,
No.8, Gandhi Irwin Road, Egmore,
Chennai – 600 008.

2. K.Murali,
Director – Refineries,
M/s.Hindustan Petroleum Corporation Ltd.,
No.17, Jamshedji Tata Road,
Bombay – 400 020.
... Respondents

Petition under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the Award dated 13.09.2011 passed by the second respondent herein.

* * *

For Petitioner : Mr.AR.L.Sundaresan, Senior Counsel, for M/s.AL.Ganthimathi

For Respondent : Mr.O.R.Santhanakrishnan Standing Counsel

O R D E R

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996, to assail the award dated 13.09.2011, passed by the learned Arbitrator.

2. The challenge to the award is laid in the background of the following facts :

2.1. The petitioner was awarded a dealership by the respondent Corporation on 18.10.1982. Evidently, the retail outlet of the petitioner was inspected on 27.02.2006 by the officers of the respondent Corporation, when, it was found that there was a stock variation to the extent of 3.34% in [Power branded] Motor Spirit (MS) beyond the permissible limits.

2.2. Accordingly, samples were drawn and sent to a laboratory for testing. The report, dated 28.02.2006, generated in that behalf, revealed, that both the nozzle and the Tank Truck (shortly 'TT') samples drawn in respect of Motor Spirit, had failed in Research Octane Number (in short 'RON') test.

2.3. Consequent thereto, the sales and supplies of the products were suspended by the respondent Corporation, vide its letter dated 04.04.2006.

2.4. Resultantly, the petitioner preferred a writ petition (bearing W.P.No.10844 of 2006) along with an interlocutory application (bearing No.WPMP No.12281 of 2006) to assail the action of the respondent Corporation. This Court, vide order dated 19.04.2006, granted interim relief, which, in effect, resulted in restoration of sales and supplies to the petitioner outlet, with effect from 21.04.2006.

2.5. On 18.05.2006, the respondent Corporation carried out yet another inspection qua the petitioner's outlet. Inspection revealed that there was a stock variation in Euro III Motor Spirit (Power) and Turbojet (branded diesel) beyond permissible limits and, furthermore, Euro III MS had also failed the distillation test, i.e., in achieving recovery at 100 Deg. Centigrade, in the test conducted at the Mobile laboratory.

2.6. As a necessary concomitant, once again, sales and supplies to the petitioner's outlet were suspended. Furthermore, samples were collected from the nozzles of the dispensing unit of the petitioner's outlet and forwarded to the concerned laboratory for testing.

2.7. Importantly, TT samples were not collected by the officers of the respondent Corporation, as samples tags were not available with the petitioner.

2.8. Nozzle samples, upon being tested, failed to meet the specification provided for vis-a-vis in Sulphur content percentage and RON. This fact was recorded in the inspection report dated 20.05.2006.

2.9. Accordingly, the respondent Corporation issued a show-cause notice dated 14.06.2006, to which, a reply, dated 19.06.2006, was sent by the petitioner.

3. The respondent Corporation, not being satisfied with the petitioner's reply, terminated the dealership, vide communication dated 14.07.2006.

3.1. Aggrieved by the termination order, the petitioner instituted yet another writ petition in this Court, which was numbered as : W.P.No.24867 of 2006.

3.2. This writ petition, however, came to be dismissed , by this Court, vide order dated 02.09.2010, on the ground that an effective alternative remedy by way of arbitration was available to the petitioner. Accordingly, the petitioner was given liberty to approach the respondent Corporation, within a period of four (4) weeks, for appointment of an Arbitrator. The Court also observed that if such an application was filed, the respondent Corporation would refer the dispute to an

Arbitrator, within a period two (2) months of receipt of such an application.

3.3. Directions were also issued to the Arbitrator to dispose of the dispute on merits within a period of six (6) months from the date of appointment.

3.4. It is, in this background, that the petitioner made a request to the Chairperson of the respondent Corporation, vide letter dated 09.11.2010, for appointment of an Arbitrator.

3.5. Based on the request of the petitioner, on 21.12.2010, the Arbitrator was appointed in the matter.

3.6. In the course of proceedings, the learned Arbitrator framed the following two issues in the matter :

> "I. Whether the termination of the Dealership Agreement is justified, valid and legal ?
> II. Whether the Claimant is entitled for the restoration of the Dealership Agreement ?"

3.7. The Arbitrator found both issues against the petitioner and, accordingly, passed the impugned award, on 13.09.2011.

Submissions of counsels :

4. Mr.AR.L.Sundaresan, learned Senior Counsel, who appears for petitioner, assails the award on the ground that the Arbitrator had committed error, in as much as, he had imputed adulteration to the petitioner without recording a finding as to whether adulteration had, in fact, been carried out by him.

4.1. Learned Senior Counsel further submits that adulteration of samples could have, possibly, taken place at two junctures in the supply line established by the respondent Corporation, (i) during transportation of the product; or (ii) at the time of disbursement of the product at the petitioner's outlet.

4.2. The learned Senior Counsel submits that, if, the adulteration was brought about during transportation, then, surely, the petitioner could not be held responsible.

4.3. The learned Senior Counsel further submits that because sample tags were not available with the petitioner, the Arbitrator, could not have reached a conclusion that the adulteration was brought about by the petitioner.

4.4. Furthermore, learned Senior Counsel contended that the petitioner had been a dealer of the respondent Corporation since, 1982, and hence, the termination, which was brought about in 2006, on a ground which was not backed by requisite proof was both unfair and illegal.

4.5. Learned Senior Counsel submits that when, the samples were sent to the Laboratory, no prior information was given to the petitioner and, therefore, there was a breach of principles of natural justice.

5. On the other hand, learned counsel for the respondent Corporation submitted that the petitioner was accorded complete opportunity.

5.1. It is contended that the Arbitrator had clearly recorded a finding that the petitioner did not seek a review of the results reflected in the test report.

5.2. The learned counsel avers that the relief sought, was a relief of restoration of dealership agreement, which, the Arbitrator had rightly declined to grant, in view of the fact that the dealership accorded was, one, which was known in law as dealership at Will.

Reasons :

6. I have heard the arguments of the learned Senior Counsel for the petitioner and the learned Standing Counsel for the respondent Corporation and perused the record.

6.1. According to me, what has emerged, is that, the officials of the respondent Corporation, upon inspection carried out, on 18.05.2006, drew samples from the nozzles of the disbursing unit set up at the petitioner's outlet, the examination of which, at the Mobile Laboratory, failed the distillation test. This apart, the inspection, also revealed, variation in stock vis-a-vis Euro III Motor Spirit (Power) and Turbojet (branded diesel). The mobile laboratory test report is dated 18.05.2006.

6.2. Samples drawn were also sent to the respondent Corporation's Terminal Laboratory at Chennai on 20.05.2006. The report generated by the Terminal Laboratory at Chennai revealed that the samples were adulterated. This fact is recorded in paragraphs 13 to 15 of the award. For the sake of convenience, the findings recorded, are extracted hereunder :

> "13. The Test Report No.ML/MS/2006-07/31, dated 18/05/2006 of Mobile Lab. under remarks contains the following:
>
> "Remarks :

a) EIII-MS sample failed in distillation i.e. recovery at 100 deg C.
b) Suspended the sales from all the nozzles of all the products
c) Totaliser readings and dips are recorded by Sr. Sales Officer in his inspection report."

14. Laboratory Inspection Report Sl.No.MDG-07 dated 20/05/2006 of HPCL's Chennai Terminal under remarks column says "the product is off spec".

15. The Test Report of Motor Spirit dated 20.05.2006 of Tondiarpet Laboratory of Bharat Petroleum Corporation, Chennai contains the following remarks :

"Based on the test result, the product as represented by the above sample, FAILS to meet the BIS : 2796 : 2000 (Amendment No.5) requirements of MS w.r.t. RON tested." ."

6.3. The argument of Mr.Sundaresan that the respondent Corporation could have given the petitioner an opportunity to participate in the testing process, by issuing him a notice in that behalf and thus, complied with the principles of natural justice is flawed for several reasons : First, the entire exercise of inspection required an element of surprise. What was important in the exercise conducted, was to ensure, sanitisation of the samples drawn and not participation in the testing process; there is no allegation that samples were not properly sanitised. Second, it is not as if the inspectors or those who tested the samples had any bias against the petitioners, none is as a matter of fact alleged. Lastly, even after results of the test report were conveyed, the petitioner did not seek a re-test of the samples.

6.4. The other argument of the learned Senior Counsel for the petitioner that the learned Arbitrator had failed to return a finding of fact as to the point at which, the adulteration took place and thereby, ignored the possibility of adulteration having taken up during transportation is also a submission, which, I am not willing to accept, as the samples were drawn from the product which was in the custody of the petitioner. Since, the test report shows that the product was adulterated, it was for the petitioner to demonstrate that adulteration took place during transportation. As per the laid down practice, in respect of which, there is no dispute, once the product reaches the retail outlet via Tank Trucks (TTs) samples are drawn. The petitioner, admittedly, failed to get the samples tagged. Had the samples been tagged, it would have shed light as to whether or not adulteration had taken place during transportation of the product. The initial burden to prove that adulteration had taken place during transportation was on the petitioner. Had the TT samples been preserved the burden of proof would have shifted on to the respondent Corporation.

6.5. Therefore, the submissions advanced in this behalf by Mr.Sundaresan cannot be accepted and hence, are, rejected.

6.6. As correctly argued by the counsel for the respondent Corporation, the action instituted was unsustainable, as the final relief sought in the Statement of Claim, is for restoration of the dealership. As rightly concluded by the learned Arbitrator, the contract was terminable at Will, as per Clause 55 of the Contract. The said clause set out various eventualities, in which, the contract could be terminated, one of which pertains to the tampering of the product. Therefore, the Arbitrator, in any event, could not have restored the dealership, even if issue No.1 had been found in favour of the petitioner.

6.7. The above position is clearly articulated in the decision of the Supreme Court in the case of **Indian Oil Corporation Limited V. Amristar Gas Services and Others, 1991 (1) SCC 553.** The relevant observations read as follows :

> *"....11. The arbitrator recorded finding on issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under Clause 27. Thereafter, he proceeded to record the finding on issue No. 2 relating to grant of relief and held that the plaintiff-respondent No. 1 was*

entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the Agreement and, therefore, the plaintiff-respondent No. 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April,1976, if and when an occasion arises.

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the Agreement dated 1.4.1976, which contains the aforesaid Clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with Clauses 27 and 28 of the Agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with Clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be *specifically enforced, one of which is 'a contract which is in its nature determinate'. In the present case, it is not necessary to refer to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained....."*

7. For the reasons given above, I find no merit in the petition.

8. Accordingly, the petition is dismissed leaving the parties to bear their own costs.

Sd/-R.S.A.J
28.06.2016

//Certified to be a true copy//

Dated this the day of 2016.

S.s/22.07.2016

COURT OFFICER

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