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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINALCIVIL JURISDICTION

ARBITRATION PETITION NO. 1007 OF 2009

Ms. Anila Gautam Jain
Proprietress of M/s. Badal Agency,
erstwhile H.P. Gas Distributor,
residing at 190/5, Kamal Kunj,
Station Road, Wadala (West),
Mumbai – 400 031. … Petitioner.

V/s.

Hindustan Petroleum Corporation Ltd.
Through its Chief Regional Manager,
Navi Mumbai LPG Regional Office,
1st Floor, Plot No.4/1, Near NMMT Depot,
Sector 20, Turbhe, Navi Mumbai – 400705. ... Respondent.

Mr. Gautam Ankhad a/w. Ms. Nishtha Mohanti i/b. Ashwin Ankhad and Associates for the Petitioner.
Mr. S.A. Bhalwal a/w. Ms. Usha Singh i/b. M/s. Vyas & Bhalwal for the Respondent.

CORAM : N.M. Jamdar, J.

16 January, 2017.

ORAL JUDGMENT **:-**

By this Arbitration Petition under Section 34 of the

Arbitration and Conciliation Act, 1996, the Petitioner has challenged the Award of the sole arbitrator wherein the part of the claim of the Petitioner was granted and rest rejected and the Respondent's counter-claim was accepted. The Award of the sole arbitrator is dated 11 September 2009.

2. An agreement was entered into between the Petitioner and the Respondent – Corporation for allotment of HP Gas (Liquefied Petroleum Gas) dealership at Vashi, Navi Mumbai. The agreement was for period of five years The agreement provided for various terms. The liabilities of the dealer, that is the Petitioner, were specified. Certain rights were given to the Respondent – Corporation in case of default by the Petitioner and consequent action to be taken was specified. The liabilities of the Petitioner were in respect of statement of accounts and such other relevant conditions were laid down. The agreement provided for termination of the agreement if it was found that the agreement was breached and the consequential actions on termination and the liability of the dealership were specified. Show cause notices were given to the Petitioner, which culminated into a suspension letter of 3 June 2008 and a termination letter of 13 September 2008. Arbitration clause was invoked by the Petitioner, in respect of the suspension and termination of dealership and the sole arbitrator was appointed to arbitrate upon dispute between the parties.

3. The Petitioner filed her statement of claim and sought quashing and setting aside the orders dated 3 June 2008 of suspension and 13 September 2008 of termination of the dealership agreement of 17 August 2004. In addition, the Petitioner also sought an amount of Rs.24,44,076.09 and towards the statement of dues annexed to the claim and also an amount of Rs.12,00,000/- per annum towards reimbursement of future loss. In the statement of claim it was primarily contended by the Petitioner that the Petitioner had not committed any breaches of the agreement and that the action of the Respondent – Corporation in terminating the agreement was not correct and also not fair and proper as the Respondent being an instrumentality of the State was required to act fairly. The claim statement was filed on 23 October 2008. Reply was filed by the Respondent on 15 November 2008, wherein the case of the Petitioner that the suspension and termination was not legal and proper, was contested. The Respondent placed on record the various breaches committed by the Petitioner which led to the termination of the agreement and referred to the earlier show cause notices and the levy of penalty. The Respondent made a counter-claim in respect of the amount due from the Petitioner towards reconciliation of accounts, diversion of gas cylinders and penalties. Accordingly, the Respondent sought certain amounts as specified in the counter-claim from the Petitioner in respect of the above. Rejoinder-cum-reply was filed by the Petitioner to the counter-claim

wherein it was reiterated that there was no cause for termination of the agreement and the contentions raised by the Respondents in their reply regarding alleged mal-practices of the Petitioner were denied. The claim made by the Respondent towards the amounts sought for in the counter-claim was also resisted.

4. The parties led their evidence before the learned Arbitrator. The Petitioner choose to lead oral evidence and the Respondent placed on record the documentary evidence. The learned Arbitrator, by the impugned Award dated 15 September 2009, held that the termination of dealership was legal and proper and the termination was upheld and consequently the claim of restoration of dealership was refused. The claims of Rs.7,56,000/- and Rs. 12,00,000/- made by the claimant were rejected. It was held that the claimant is entitled to Rs.4,01,244.88 alongwith simple interest and also an amount of Rs.83,474/-, rest of the claims made by the Petitioner were rejected and the claim of the Respondent – Corporation towards penalty for Rs.10,39,474.68 was granted so also the amount of Rs.9,54,700/- towards stock variation and Rs.5,35,191.69 towards debit balance in legacy account and also the amount of Rs.1,27,669.54 towards debit balance in ERP account so also an amount of Rs. 1,07,298.00 towards the non-paid showroom and godown license fee alongwith interest.

5. Aggrieved by this Award, the Petitioner has filed this Petition under Section 34 of the Arbitration and Conciliation Act. By order dated 30 August 2010, the learned Single Judge upheld the Award to the extent that it rejected the Petitioner's claim, and set aside the Award only to the extent wherein granted some of the claim of the Respondent and held that it would be open to the Respondent to adopt appropriate proceedings in respect of their claim including seeking a fresh reference and disposed of the Arbitration Petition by order dated 30 August 2010 . The Petitioner thereafter challenged this order dated 30 August 2010 by filing an Appeal No.109 of 2011 and the order dated 30 August 2010 was set aside by consent of parties and the Petition was remanded back to the Single Judge keeping contentions of the parties open. Since the order dated 30 August 2010 was set aside by consent and the matter is directed to be heard afresh, the learned Counsel for the parties have advanced their submissions in respect of their case.

6. Mr. Gautam Ankhad, learned Counsel for the Petitioner submitted that as far as the claim made by the Petitioner which have been negated by the Arbitrator, the Petitioner is restricting her challenge to contest the claim made by the Respondent which has been granted. Mr. Ankhad submitted that the learned Arbitrator has not given any reasons whatsoever in support of its findings that the Petitioner is liable to pay the amount claimed by the Respondent

– Corporation from the Petitioner under three Heads i.e. penalties, re-conciliation of accounts and debit balance and towards stock variation. Mr. Ankhad submitted that since there is absolutely no reasons given as to how the Petitioner is liable to pay these amounts, the Award is perverse and sought to place reliance on various decisions in the cases of [1]*State of Rajasthan and Anr v/s. Ferro Concrete Construction Pvt. Ltd.*, [2]*Associate Builders v/s. Delhi Development Authority*, [3]*Sahyadri Earthmovers and L & T Finance Ltd.*, [4]*Mh. L.J., Prajakta Mahesh Joshi and Anr. v/s. Rekha Uday Prabhu* and [5]*Union of India v/s. Sun Media Services, Mumbai.* Mr. Ankhad in rejoinder submitted that, even assuming the liability of the Petitioner to pay the amount under the above heads is established, there is no discussion as to the quantum of the amount which the Petitioner is liable to pay and the Respondent has not proved the quantum of these amounts, which is necessary without which the claim could not have been granted.

7. Mr. Bhalwal, the learned Counsel for the Respondent on the other hand submitted that the contention of the Petitioner that there is no discussion at all regarding counter-claim of the Respondent and the sums which have been awarded, is entirely incorrect as at various places the learned Arbitrator has discussed the

1 **(2009) 12 SCC 1**
2 **A.I.R. (2015) SCC 620**
3 **2011 (4) Mh. L.J. 200**
4 **2013 (2) Mh. L.J. 603**
5 **2011 (5) Mh. LJ. 749**

liability of the Petitioner to pay the said amount. It was contended that the quantum was never put into dispute by the Respondent. Mr. Bhalwal, submitted that the Award of the Arbitrator gives reasons and on the ground that the reasons are not sufficient, the Award cannot be set aside. Mr. Bhalwal submitted that from time to time notices were issued to the Petitioner calling upon the Petitioner to rectify the breaches and also to pay the penalties which the Respondents were fully empowered to do. He submitted, there is no error in the Award and the Petitioner is trying to escape from the consequences of serious illegalities committed by her.

8. The scope of interference under Section 34 of the Act in the Award of the Arbitrator, is well settled. The narrow jurisdiction of the Court to interfere with an arbitral award as indicated in the statutory scheme of the Section 34 of the Act, has been reiterated time and again by this Court and the Apex Court. Suffice it to say that the grounds for setting aside the arbitral award are extremely limited. One of the grounds for setting aside the Award is if the Award is based on no evidence, it may amount to legal misconduct. As laid down by the Apex Court in the case of *State of Rajasthan,* when a claim is disputed, it is not permissible for the Arbitrator to simply grant a claim made by the claimant, without anything more. Therefore, to ascertain whether the challenge to the impugned Award, falls within the parameters laid down by the Apex Court, the

facts of the present case including the notices for termination, the statement of claim, reply to the counter-claim and the rejoinder will have to be noticed to understand what was the exact nature of controversy between the parties.

9. The dispute arose from an agreement for dealership dated 17 August 2004 executed by the Petitioner with the Respondent – Corporation. The copy of the agreement is on record. Perusal of the agreement indicates that there are certain stringent conditions laid down on the dealer as to how the distribution of the LP Gas cylinders should be done. Considering the dangers of mishandling the commodity i.e. LP Gas cylinders and the short supply, such stringent conditions are required for public safety and even distribution. Therefore, the agreement also contains various clauses laying down strict conditions to be followed by the dealer in respect of distribution of the cylinders for domestic and non domestic use. The power is vested in the Respondent – Corporation under the agreement to take punitive action in case of breaches to achieve the above objects.

10. The genesis of the dispute are the notice for suspension dated 3 June 2008 and the termination notice dated 13 September 2008. In the suspension notice dated 3 June 2008, the Respondent referred to the dealership agreement dated 17 August 2004. The Respondent noticed, as a matter of grave concern, that the Petitioner

was not acting as per the agreed terms and conditions. The Respondent stated that there were repeated diversions of LP Gas cylinders refill during the period February 2005 to November 2007. During the inspection carried out on 23-26 February 2005, it was found that there was variance in respect of 806 cylinders. The customers were contacted and it transpired that around 55 gas cylinders for domestic purpose were diverted to non-domestic. Penalty was imposed, to which reply was given which was not found satisfactory and it was asserted that clauses 6, 10, 11, 12, 24(a) and 28B(a) of dealership agreement were breached. It was stated that again refill audits were conducted where it was found that there was a positive variation of 46 cylinders and negative variation of 28 cylinders. It was found that diversion were made to fictitious addresses. The Respondent put the Petitioner to notice in respect of the inspection carried out in March 2007, wherein the customers to which supply was allegedly made were not found in existence. Details were given of diversion of domestic cylinders towards unauthorized use. It was also found that there were various irregularities at site, such as non-availability of weigh scales, inadequate house keeping, lack of fire extinguishers, non-maintenance of safety standards, non-maintenance of record of customers. The letters dated 31 October 2006 and 23 November 2006 in respect of imposition of penalty, were referred to. Same was the position in respect of inspection carried out on 30 March 2007.

Again various irregularities and shortage of cylinders were noticed. Details of penalty levied were given. The pendency was calculated as per the number of cylinders and the amounts per cylinders such as Rs. 2500 and Rs. 1800. Other irregularities such as not providing rebate to the customers and the customers complaints on various occasions were given. It was pointed out that the Petitioner did not follow safety norms, restrictive trade practices were carried out and and the customers services was poor. The suspension letter referred to the earlier show cause notices and that the replies were not satisfactory. In the termination letter dated 30 September 2008, the assertions made in the suspension letter were reiterated. It was stated that reply was not found satisfactory, neither any payments were made and therefore, the Respondent had no option but to terminate the dealership.

11. It is these two orders dated 3 June 2008 and 30 September 2008 that the Petitioner contested by filing the claim. If the claim statement is perused, the entire claim proceeds on the basis that it was not the fault of the Petitioner and it was not the duty of the Petitioner to verify to whom the gas cylinders being delivered. The allegation that rebate was not passed on, was denied. It was asserted that the Petitioner did not breach the terms and conditions of the agreement neither there were any diversion of the gas cylinders. The case was sought to be made out that to harass the Petitioner arbitrarily dealership was cancelled. It was stated that the

termination was without hearing the Petitioner, it was for collateral purpose and because of the actions of the Respondent which was arbitrary, the Petitioner suffered losses for which damages were required to be paid. It was stated that therefore, the dealership needs to be restored and if it is not restored, the amounts as claimed should be paid. When the Respondents filed their reply and the counter-claim, the averments made in the notices under challenge, regarding breaches, were asserted and the earlier correspondence regarding show cause notices and calling upon the Petitioner to pay the penalty and other amounts, was pressed into service. Therefore, the dispute that arose for consultation before the learned Arbitrator was whether the letters terminating the dealership of the Petitioner and other contents was valid, and whether the Petitioner committed breaches of the agreement. The learned Arbitrator held that breaches were established and therefore, the termination of dealership was valid.

12. Mr. Ankhad in the opening made a solitary submission that there are no reasons whatsoever in the Award while granting the counter-claim made by the Respondent. It was his contention that an Award which simply accept the case of one side is perverse and therefore, cannot be sustained. After the reply, where it was shown that adequate reasons existed, by Mr. Ankhad advanced a contention in rejoinder that the Civil Procedure Code, which is held to be applicable in the decision of the learned Single Judge of this Court in the case of *Sahyadri Earthmovers v/s. L and T Finance Ltd. and Anr.*

postulates that the parties must prove its claim by stepping in the witness box. He submitted that the levy of penalty and other charges claimed by the Respondent ought to have been proved.

13. A contention can be raised by a dealer that since there are no breaches there cannot be any termination and therefore, there cannot be any question of payment of penalty or other charges levied by an order which terminates the dealership. The dealer could contend that the termination may be valid but the penalty and the other amounts specified in the termination letter are not calculated correctly and the basis for calculation is not properly taken into account. These two stands are different. Before the learned Arbitrator, it was the first stand taken by the Petitioner. Petitioner challenged the letters of termination and suspension and resisted the penalty on the ground that there were no breaches.

14. If the Award is analysed, it will be seen that the solitary argument made in the opening by Mr. Ankhad that there are no reasons, is entirely unfounded. In the Award, the learned Arbitrator noted the reply and the statement of claim, counter-claim, the gist of dispute, the prayers made by the parties and referred to the arguments made by the parties. The learned Arbitrator dealt with the *mens rea* of the dispute under the heading 'Findings'. The learned Arbitrator observed that the issues to be decided were only as to whether the order of termination and suspension are legal and

valid and whether the parties are entitled to any relief. The learned Arbitrator noted that the Petitioner herself accepted the diversion but the Petitioner blamed the commercial establishment and its own deliverymen for such diversion. The Arbitrator noted clause 18 of dealership agreement and categorically rendered a finding that it was the total responsibility of the Petitioner to arrest the diversion, especially when the Petitioner blamed her own deliverymen. The learned Arbitrator also took note of the letters annexed to the counter-claim at Exhibit R-12 wherein the Petitioner accepted that there was a sale of cylinders without refill booking. The learned Arbitrator found that the conduct of the Petitioner was contrary to provisions of clause 18 of the dealership agreement. The learned Arbitrator thereafter held that the Petitioner had violated various clauses of dealership agreement in that regard. This is a clear and unequivocal finding in respect of diversion of the cylinders wherein the Arbitrator considered the record, correspondence, relevant clauses.

15. The learned Arbitrator then dealt with the issue of shortage of cylinders. The statement of the Petitioner regarding shortage was noted by the learned Arbitrator. He noted the clause 24 of the dealership agreement and found that it was the responsibility of the Petitioner and that the Petitioner had violated the terms of the agreement. The learned Arbitrator then dealt with

various breaches which led to the termination of the agreement and found that the termination of the agreement was justified. As regard the other heads of counter-claim, the learned Arbitrator noted the contention of the Petitioner for penalties and levies and proceeded to consider the facet of reconciliation of accounts. The learned Arbitrator found that it was a duty of the Petitioner under the dealership agreement to reconcile the accounts and therefore proceeded to hold that the claims made by the Respondent towards the breaches and penalty and other monetary claims were required to be granted. The Arbitrator analysed the evidence on record, the correspondence, the terms of the agreement and categorically held that the Petitioner did not prove that there were no breaches and the notices impugned were unjustified.

16. After these detailed findings were read out, Mr. Ankhad had to accept that the learned Arbitrator had given a finding regarding breaches of the Petitioner and then sought to argue that the finding that termination may have been valid, but the quantum of the amount which is directed to be paid is not correct and there is no evidence nor there is any finding in that regard. Inspite of repeatedly calling upon Mr. Ankhad to show such categorical stand taken before the Arbitrator, it has not been shown that it was taken. Looking at the manner in which the proceedings were conducted and the pleadings

of the parties, it is not open for the Petitioner to advance such contentions for the first time in this Petition under Section 34 of the Act. The clear case of the Petitioner that the Petitioner is not liable to pay any amount at all because there have been no breaches. It is a different argument to be made than the one that the Petitioner may have to pay the amount and there were breaches but the calculations made by the Respondent are not correct.

17. The facts in the case of *State of Rajasthan and Anr. v/s. Ferro Concrete Construction Pvt. Ltd.*, heavily relied upon by Mr. Ankhad, need to be noted. In this case, a dispute arose before the arbitrator in respect of allowing and commissioning water pipeline. Tenders were floated and the work was allotted. An agreement was entered into between the employer and contractor. Dispute arose which was referred to the Arbitrator. The Arbitrator rejected some claims and awarded part of the claims. In respect of Claim Nos. 36 and 37, the contractor had given a value of plant and machinery. The Apex Court held that even assuming the figure given was correct, for the block of investment value of Rs.36,84,161/- the loss would be around 1% per month by way of interest which was at the most Rs.36,841/- per month and the Arbitrator had proceeded to grant a claim of Rs.12,072/- per day without any discussion, merely because it was so sought in the claim statement. The Apex Court thus noted that on the face of it such grant of interest was absurd and was not borne out by any evidence.

18. In the present case it is the Petitioner who has brought the dispute regarding the validity of the termination notice before the Arbitrator. The notices themselves call upon the Petitioner to pay various penalties. Calculations were also given. In the counter-claim, the amounts were reinstated, an additional amount was specified based on the termination. The Petitioner could have taken a stand that the calculations by the Respondent made are not correct and have given a correct figure, which according to the Petitioner was leviable, even if breaches were proved. Mr. Ankhad has taken me through the pleadings of the Petitioner before the Arbitrator. What was disputed was the factum of the breaches by the Petitioner. It was asserted that the Petitioner has not committed any illegality and therefore not able to pay any amount whatsoever. The Petitioner, pursued the dispute only on the premise that the Petitioner was not liable to pay the amount in principle because there were no breaches. When the Arbitrator held on facts that there were breaches and the Petitioner was liable, nothing further remained to be adjudicated as the Petitioner did not advance the alternate argument which is sought to be advanced today. It was open to the Petitioner to contend that the penalty is calculated under wrong parameters or that the calculations are not correct. It is not that the Petitioner did not have an opportunity to contest the counter-claim. The reply was filed to the counter-claim. In the reply, the only stand that is taken is that the Petitioner is not liable to pay the amount

because there are no breaches and the termination is not valid. Once a specific amount is asserted by one party as due, atleast the party disputing it must assert a counter figure. If only stand is taken that no amount is payable on an principle, the Arbitrator will be called upon to decide only this limited controversy. The arbitration proceedings are not a civil suit. The decision of the learned Single Judge in *Sahyadri Earthmovers* does not lay down such a proposition. The only answer of Mr. Ankhad is that even in these circumstances, the learned Arbitrator ought to have called upon the Respondent to lead evidence. Having over-ruled the contentions of the Petitioner regarding the liability and that the Petitioner was disputing the amounts sought for by the Respondent on the ground of liability, the Arbitrator was cannot be said to be in error in presuming that this was the only dispute that was raised by the Petitioner. In none of the cases that has been cited by Mr. Ankhad such factual position exists. Therefore, having called upon the learned Arbitrator to adjudicate in a limited area, the Petitioner cannot now advance an alternate stand to set aside of the Award, to which the law demands that deference needs to be given.

19. After application of mind by the Arbitrator to the dispute at hand, a finding of fact has been given. Merely because another view may be possible is not a ground to set aside the Award under Section 34 of the Act, unless the well established parameters

are made out. In these circumstances, I find no ground has been made out by the Petitioner to set aside the Award of the learned Arbitrator. The Arbitration Petition is dismissed. No order as to costs.

(N.M. Jamdar, J.)