IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE M. SATHYANARAYANAN
and
THE HONOURABLE MR.JUSTICE N. SESHASAYEE

O.S.A.No.250 of 2016
and
C.M.P.No.19843 of 2016

M/s Dhandapani Enterprises
Rep.by its Proprietor
Mr.A.Thanigaivelu
No.48, Bazulla Road,
T.Nagar, Chennai-600 017. .. Appellant

-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

Prayer: Memorandum of Grounds of Original Side Appeals filed under Order 41 Rule 1 of CPC Rules read with Clause 15 of the Letters Patent against the fair and decretal order passed by this Court in O.P.No.321 of 2012 dated 28.06.2016.

For Appellant : Mr.G.Jeremiah

For Respondents : Mr.O.R.Santhanakrishanan

JUDGMENT

(Judgment of the Court was delivered by **M. SATHYANARAYANAN.,J**)

The present appeal arising out of the Arbitration proceedings under the Arbitration and Conciliation Act, 1996 (in short "Arbitration Act, 1996). The claimant in the arbitration proceedings and the petitioner in O.P.No.321 of 2012, is the appellant herein.

2. There was a Memorandum of Agreement dated 18.10.1982 between the appellant and the 1st respondent, for carrying on business in the form of running a retail outlet, under the Scheduled Category for dispensing petroleum products at Door No.48, Bazlullah road, Thiyagarayanagar, Chennai-600 017. It is the case of the 1st respondent that on 27.02.2006, the retail outlet run by the appellant was inspected by their Manager-Vigilance along with Senior Sales Officer and the inspections reveal that there was a stock variation of 3.34 % in Power [branded Motor Spirit (MS) on petrol], which was beyond the permissible limits. The said officials having noted the same, drawn samples and sent to laboratory for testing and submitted their report dated 28.02.2006 and the result of the same revealed that both nozzle and TT sample of MS

failed in Research Octane Number (RON), subsequent sales and supplies of all the products were suspended. Therefore, the said retail outlet were suspended, vide letter dated 04.04.2006. The appellant, challenging the said action, filed W.P.No.10844 of 2006 and also filed W.P.M.P.No.12281 of 2006, praying for interim order and obtained an interim order and in compliance of the same, sales and supplies were resumed to the said outlet with effect from 21.04.2006.

3. The retail outlet of the claimants was also inspected on 18.05.2006 by the Senior Sales Officer and Mobile Lab/Quality Control Officer of the 1st respondent Corporation and during the said inspection, it was found that the stock variation of Euro III MS (Power) & Turbojet (branded diesel) was beyond permissible limits and Euro III MS also failed in distillation i.e., recovery at 100 Degree Centigrade in the test conducted at the Mobile Lab and therefore, sales and supplies were suspended. Samples through the nozzles of dispensing unit were collected from the outlet and forwarded to the laboratory for testing. However, Tank truck samples retained at the outlet were not collected, since the same were not having sample tags. Samples forwarded to the laboratory were tested on 20.05.2006 and as per the test results, Euro III MS Samples failed to meet the specification in Sulphur content and in RON. Therefore, the 1st respondent Corporation had issued a show

cause notice dated 14.06.2006 to the appellant / retail outlet dealer and in response to the same, the appellant submitted his reply dated 21.06.2006.

4. The 1st respondent Corporation not satisfied with the reply to the show cause notice, terminated the Dealership Agreement dated 18.10.1982, vide their letter dated 14.07.2006. The appellant aggrieved by the letter of termination dated 14.07.2006, filed WP.No.24876 of 2006, before this Court and it was dismissed by this Court, vide order dated 02.09.2010 and an opportunity was also granted to refer the dispute for arbitration. Accordingly, the appellant, vide communication dated 09.11.2010, requested the Chairman and Managing Director of the 1st respondent Corporation for appointment of an Arbitrator to adjudicate the disputes and differences between the parties and accordingly, the 2nd respondent was appointed as the sole Arbitrator to adjudicate the disputes and difference between the parties. The 2nd respondent has accepted the same and entered appearance and issued notice dated 18.01.2011 to the appellant as well as the 1st respondent to file their statement of claim and counter claim etc., Accordingly, the statement of claim was filed, for which, counter claim / statement of the 1st respondent Corporation was also filed and thereafter, rejoinder, reply and sur-rejoinder were also filed and so also documents on behalf of

both the parties.

5. The learned Arbitrator based upon the said materials framed the following issues:

I.Whether the termination of the Dealership Agreement is justified, valid and legal?

II.Whether the Claimant is entitled for restoration of the Dealership Agreement?

During the course of arbitration proceedings, no oral evidence was let in and therefore, documents submitted by both the parties were marked.

6. The learned Arbitrator, on consideration of the claim, counter statement, reply/sur-rejoinder as well as the documents marked during the course of arbitration proceedings and taking into consideration Clause Nos.26, 42, 55 of the Dealership Agreement as well as the Test Reports dated 18.05.2006 and 20.05.2006, found that Euro III MS Sample failed in lab test and that Clause 55(I) of the Dealership Agreement was also in violation of the provisions of Marketing Discipline Guidelines.

7. The 2nd respondent - Arbitrator also noted that in terms of the above said Clause, the 1st respondent Corporation have right to

terminate the Dealership, in case of contamination of product found in the retail outlet. The 2nd respondent - Arbitrator in Paragraph No.21 has also noted the fact that on an earlier occasion, the inspection was caused by the Anti-adulteration cell at the Outlet on 06.04.2004 and found that HSD variation beyond permissible limit and short delivery of ULPDU-III and a fine of Rs.5,000/- was levied along with suspension of sales for 15 days and from inspection report dated 08.05.2005, it was found that the appellant had failed to maintain Club HP Certification. During the inspection on 27.02.2006, the Manager-Vigilance and Senior Sales Officer also found variation of 3.34% in Power (branded petrol).

8. The learned Arbitrator, on consideration and appreciation of entire materials as well as the decisions cited, found that the termination of the retail outlet Dealership Agreement of the appellant / claimant by the 1st respondent Corporation is correct, valid and justifiable and accordingly, passed the following Award on 13.09.2011:

- *The termination of the Dealership Agreement of the claimant vide letter dated 14.07.2006 is justified, valid, proper and legal.*
- *The claims of the Claimant to set aside the termination of the Dealership Agreement and restoration of the Dealership are rejected.*
- *Both the parties to bear their own expenses and costs.*

9. The appellant / claimant, aggrieved by the same, filed O.P.No.321 of 2012 under Section 34 of the Arbitration Act and the said Original Petition was entertained and notices were ordered. The 1st respondent has filed a counter statement.

10. The learned Single Judge, taking into consideration the petition, counter statement and other materials as well as the arguments advanced on behalf of both the parties, has repelled the contention put forth on behalf of the appellant that they were denied an opportunity to participate in the testing process, by recording a finding that the entire exercise of inspection require an element of surprise and the importance of such an inspection was to ensure, sanitisation of the samples drawn and not participation in the testing process and also noted the fact that there was no allegation that the samples were not properly sanitised. The learned Single Judge has also taken into consideration the statement made on behalf of the appellant that adulteration might have been taken place during the course of transportation and found that it was for the petitioner to demonstrate that the adulteration took place during transportation and also noted the presumption and recorded the finding that initial burden to prove that the adulteration had taken place during the course of transportation was on the petitioner and he has

failed to discharge the same. The learned Single Judge has also taken note of Clause No.55 of the Dealership Agreement and the decision rendered by the Hon'ble Apex Court in the decision reported in ***1991 (1) SCC 553 (Indian Oil Corporation Limited Vs. Amristar Gas Services and Others)*** and found that there is no merit in the Original Petition to set aside the Arbitration award and vide, impugned order dated 28.06.2016, has dismissed the petition, leaving the parties to bear their own costs.

11. The appellant herein, aggrieved by the dismissal of the Original Petition, has filed the present appeal under Section 37 of the Arbitration Act.

12. Mr.Mr.G.Jeremiah, learned counsel appearing for the appellant / claimant made the following submissions.

As per Marketing Discipline Guidelines of the 1st respondent dated 01.08.2005, in supply locations, samples are collected and even for the sake of arguments that the samples drawn by the dealer at the time of discharge of the transported materials in the retail outlet was demonstrated and sales are not properly maintained, still, it is obligatory on the part of the 1st respondent Corporation to test the samples, if the samples are collected at supply locations and they have failed to do so and thereby, exercised lack of evidence. The 2nd respondent- Arbitrator as well as the learned Judge had failed to appreciate the relevant materials in proper prescriptive and since there is an error apparent on the record and the findings are also perverse, the same requires interference at the hands of this Court, in exercise of it's jurisdiction under Section 37 of the Arbitration Act.

13. *Per contra,* Mr.O.R.Santhanakrishanan, learned Standing Counsel appearing for the 1st respondent, has invited the attention of this Court to the typed set of papers and would submit that the samples collected by the Dealer at the retail outlet could not be relied upon for the reason that there was no proper tagging and would further add that with regard to the testing of the sample collected at the supply point, the petitioner did not raise the said issue, even at the time of reply to the show cause notice as well as in the claim statement and therefore, he is precluded from raising the said issue for the first time before this Court. It is the further submission of the learned counsel appearing for the 1st respondent that the terms of Clause 55 of the Dealership Agreement has been effected properly and since, there is no specific allegation of bias or *mala fide* on the part of the appellant against the 1st respondent Corporation, such a kind of act cannot be easily or normally interfered.

14. Lastly, it is submitted by the learned counsel appearing for the respondent that since the 2nd respondent Arbitrator as well as the learned Single Judge, had recorded findings touching upon the merits of the claim, this Court in exercise of it's jurisdiction under Section 37 of the Arbitration Act, cannot normally interfere with the same and prays for dismissal of the Original Petition with exemplary costs.

15. This Court paid it's best attention to the rival submissions and also perused the materials placed as well as the decision relied upon by the learned counsel for the appellant reported in ***CDJ 2010 SC 190 (M/s.Hindustan Petroleum Corporation Ltd. & others Vs. M/s. Super Highway Services & Another).***

16. The factual aspects revealed by the Arbitrator as well as the learned Single Judge, are not in dispute. The fact remains that the sample was drawn on 18.05.2006 and, without any loss of time in the presence of Dealer, immediately, it was sent to the Lab and as per the Laboratory Report dated 20.05.2006, Euro III MS samples failed to meet the specification in sulphur content in RON. Immediately, a show cause notice dated 14.06.2006 was issued to the claimant, for which, he submitted his response dated 21.06.2006.

17. Admittedly, submission made by the learned counsel appearing for the appellant is that samples were collected at supply point and the 1st respondent Corporation could not test the collected samples, when the samples were collected at the supply point. In the considered opinion of this Court, the said submission lacks merit and substance, for the reason that the petitioner did not raise the said issue or point even in the reply to show cause notice and it was also not specifically pleaded in the claim statement. It also appears that during the submission of arguments such an issue appears to have been raised before the learned Arbitrator.

18. It is pertinent to point out at this juncture that as per Chapter 2.3 of the Marketing Discipline Guidelines of the respondent dated 01.09.2005, on receipt of tank lorry, dealer/his representative should follow the following steps:

> ***2.3 DRAWAL OF SAMPLES BY DEALER / HIS REPRESENTATIVE:***
>
> *On receipt of tank lorry, dealer/his representative should follow the steps.*
>
> *a) Check seal nos/security lock.nos on the tank lory against those mentioned in the invoice.*
>
> *B)Release master valve levers to ensure that the product fills the pipes.*

c)Ensure that a minimum of 20 liters of product is removed before drawing the samples.

d)Check the density at 15 deg C of individual compartments separately by drawing the bottom sample.

e)If the variation in the density is measured in Kg/cu mt) when compared with Invoice density, dealer should not decant the product. He should immediately report to Sales Officer / Supply location.

If density check is found to be within permissible limits as mentioned in para 1.2, the dealer is required to follow the procedure for drawal of sample as given below:

Dealer / his representative should draw 4 x 1 litres of MS and / or 1 liters of HSD bottom samples (Composite samples proportionate to the quantity of the product received in each compartment after removing a minimum of 20 liters. Before drawing the samples the empty Aluminum containers should be rinsed with the same product from the tank lorry, seal and label the same as per details given in ***Annexure S-2****, before unloading the tank lorry. The sample label should be jointly signed by dealer / his representative and tank lorry driver. The dealer should retain the (2 x 1 liters MS and / or 1 x 1 liter HSD- sample with him. The dealer should hand over, against payment 2 x 1 liters MS and / or 1 x 1 liter HSD- to the tank lorry driver / representative of the transporter for retention by the transporter. In addition, the transporter/ his driver will have to pay a deposit of Rs. 300/- per sample container to the dealer. The transporter with written mutual consent may leave his sample in safe custody with the dealer. These samples will be called "Retained Tank Lorry Samples" by dealer/retained by transporter.*

The dealer shall retain the tank lorry sample of the last two receips for each tank of MS and HSD.

Where there is more than one tank for a product, the tank number in which the product was decanted should be indicated/ identified on the tank lorry sample container.

Note:In case the TT Driver refuses to sign, the TT should bot be decnted. Dealer to contact Sales Officer / Supply Location.

Notes: (i) In case the Tank Lorry driver refuses to sign, the Tank Lorry should not be decanted. Dealer to contact supply location.

19. Clause No.2.8 of the said guidelines says that the *sample tags, as per specimen in Annexure S-2 are to be printed and supplied to the retail outlets in sufficient numbers by respective oil companies free of cost* and the Arbitrator has recorded the fact that S2 **seal** has not been maintained properly and therefore, the comparison of the said sample taken by the Dealer has not been done. The learned Single Judge has also dealt with the aspect and found that the entire exercise of inspection require an element of surprise in order to ensure sanitisation to the samples drawn and therefore, rejected the contentions put forth by the appellant. In this regard, the learned Judge further found that participation time of testing is also not a requirement and when the petitioner did not attribute any bias or *mala fide* at the time of drawing samples or at the time of testing, it is precluded to make any compliant in this regard, at this distance point of time.

20. The learned counsel placed more reliance upon ***CDJ 2010 SC 190*** (above cited) which arouse out of the proceedings in the form of writ petition under Article 226 of the Constitution of India. The facts of the case would disclose that a test could not be conducted, since the retail outlet was dry in respect of both MS and HSD, which made it impossible for samples to be drawn from the nozzles of the dispensing units of the said products. The Hon'ble Supreme Court of India also recorded the factual finding that the Laboratory test to be conducted at the Barauni Terminal had not been served on the respondents, which cause severe prejudice to the respondents. However, it is to be pointed out that the appellant / claimant did not raise any prejudice as to non-following of the alleged procedures either in the show cause notice or in his claim petition and first time during the course of arguments, raised such an issue.

21. The Hon'ble Supreme Court of India in the decision reported in ***2015 (3) SCC 49 (Associate Builders Vs. Delhi Development Authority)*** has considered the scope of Section 34 of the Arbitration Act and held that only when the award is in conflict with the public policy of India, it warrants interference and also noted the heads of public policy of India which reads as Under:

1.fundamental policy of Indian law

2.the interest of India;

3.justice or morality;

4.if it is patently illegal.

22. ***In 2015 (5) SCC 739 (Swan Gold Mining Limited Vs. Hindustan Copper Limited)*** the Hon'ble Supreme Court has dealt with the scope of interference under Section 34 and it is relevant to extract paragraph Nos.11 and 12 of the said judgment:

"11. Learned senior counsel drawn our attention to various documents including NIT, initial bid proceedings of the meeting, revised bid, offer and counter offers, on the basis of which the letter of intent was issued. Finally, the Work Order was issued and a contract was signed by both the parties. These documents would show that the appellant was made liable for payment of duty and taxes, which were inclusive of the bid price arrived at between the parties.

12.Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled *proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal."*

23. ***In 2015 (14) SCC 21 (National Highways Authority of India Vs. M/s.ITD Cementation India Limited)*** *the Hon'ble Supreme Court* once again considered the scope of interference under Section 34 of the Arbitration Act, 1996 and held that "the construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one. If construction of terms of contract was done in a reasonable manner, award cannot be set aside".

24. In the considered opinion of this Court, the 2nd respondent Arbitrator has considered the relevant clauses in the Dealership Agreement and factually found that the samples were drawn in accordance with the Marketing Displine Guidelines of the respondents and also factually found that the samples collected were sent to the laboratory without any loss of time and the test results shown the following:

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.

25. As already pointed out, the appellant / claimant did not specifically raise any objection, or specific plea that adulteration would have taken place between the supply point and delivery at retail outlet and he has failed to raise objection in that regard at the earliest point of time. This Court had also gone through all the materials placed before it afresh and finds that there is no error apparent or perversity attached to the finding recorded by the learned Arbitrator, as confirmed by the learned Judge and the award is also not against the Public policy and finds no merit in this appeal.

26. In the result, the Original Side Appeal is dismissed, confirming the order in O.P.No.321 of 2012 dated 28.06.2016. However, there shall be no order as to costs. Consequently connected miscellaneous petition is closed.

(M.S.N.,J) (N.S.S.,J)
26.10.2018

Index: No

Internet:Yes

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M.SATHYANARAYANAN.,J.
and
N.SESHASAYEE,J.,

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O.S.A.No.250 of 2016

26.10.2018