

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 03RD DAY OF OCTOBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

A. No.5961 of 2018

In the matter of Arbitration
and Conciliation Act, 1996

And

In the matter of Franchise
Agreement dated 09.03.2016
for selling MS/HSD

Between:

Mrs.R.Sujatha,
Sole Proprietrix,
Shri Rangaa Agencies,
55 Sothupakkam Road,
T.K.Pattu Village, Madhavaram Taluk,
Thiruvallur District, Tamil Nadu. Applicant

-Versus-

Essar Oil Ltd. Also known as
Nayara Energy Limited
5th Floor, Chennai House,
7, Esplanade, Chennai 600 018.Respondent

Application praying that this Hon'ble Court be
pleased to pass an order directing the respondent, its men,
agents, servants to resume/restore supplies of MS and HSD
in terms of the Franchise Agreement dated 09.03.2016 to my
retail Outlet at S.No.55, Sothupakkam Road, T.K.Pattu
Village, Madhavaram Taluk, Thiruvallur District, Tamil
Nadu, pending disposal of arbitration proceedings.

This Application coming on this day before this court for hearing the court made the following order:

The application has been filed to direct the respondent, its men, agents, servants to resume/restore supplies of MS and HSD in terms of the Franchise Agreement dated 09.03.2016 to her Retail Outlet at S.No.55, Sothupakkam Road, T.K.Paatu Village, Madhavaram Taluk, Thiruvallur District, Tamilnadu, pending disposal of arbitration proceedings.

2. The applicant was appointed as a franchisee, by the respondent for selling Motor Spirit/High Speed Diesel/lubes etc. vide Letter of Appointment dated 25.06.2015.

3. Pursuant to the aforesaid letter of appointment a Franchise Agreement dated 9.3.2016 was signed between the applicant and the respondent.

4. At the time of appointment as a franchisee, the applicant was required to furnish security deposit of Rs.3 lakhs.

5. As a franchise, the applicant is to be paid on the principle of Return on Investment (ROI) limited to the Normative Cost or Actual Cost, whichever is lower based on the specifications provided by the respondent on the agreed civil construction and cost of equipment as per the policy of the respondent company subject to the applicant achieving the agreed sales volume.

6. In the event of any shortfall in achieving the target's, the ROI payment would be proportionately reduced.

7. The respondent has a complete right to withhold/stop the payment's of ROI in case of any further standardisation if required at the retail outlet as per the policy or in the opinion of the respondent. The Letter of Appointment sets the target and other details as to how the business has to be carried on.

8. In case of any dispute between the parties, all disputes are to be resolved by a sole arbitrator to be appointed by the respondent and that the proceedings are to be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof's, from time to time in force.

9. The **venue** of the arbitration is **Mumbai** and the language of the proceeding shall be English. The letter of appointment also stipulates that only the **Courts** in the city of **Mumbai alone shall have jurisdiction** to entertain any application or other proceedings in respect of any issue arising out of the said Letter of Appointment. These are specified in clause 3.29 and 3.30 of the said Letter of Appointment's and in clause 21 and 22 of Franchise

Agreement dated 09.03.2016. They read as under:-

"21. Dispute Resolution : All disputes and differences of any nature whatsoever or any claim, cross claim , counter or any dispute arising under or out of this Agreement or any breach of alleged breach of any of the covenants thereof as to the interpretation of any clause/provision of this Agreement shall be resolved through mutual discussion between the parties hereto, failing which the same shall be referred to and finally resolved by arbitration to be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996, as amended. The arbitration panel shall consist of a sole arbitrator to be appointed by the Company. The arbitration proceedings shall be held in Mumbai and shall be conducted in the English language. The award rendered by the arbitration panel shall be final, conclusive and binding on all parties to this agreement and shall be subject to enforcement in any court of competent jurisdiction. Each party shall bear the cost of preparing and presenting its case and the cost of arbitration, including fees and expenses of the arbitrator, shall be shared equally by the disputing parties, unless the award otherwise provides.

22. Governing Laws and Jurisdiction: This Agreement will be governed by and construed in accordance with the laws of Indian and shall be subject to the exclusive jurisdiction of the Courts at Mumbai only."

10. For the purpose of running a retail outlet as a franchise of the respondent, the applicant has entered into

registered lease deed for a period of 20 years. The applicant has also invested a sum of Rs. 55 lakhs for putting up the retail outlet.

11. Certain allegations regarding sale of adulterated HSD were levelled against the applicant pursuant to an inspection carried on 26.3.2018 when samples of motor spirit and high-speed diesel were drawn. Almost after a lapse of two months a show cause notice dated 16.5.2018 was issued and without the lab report was given to the applicant.

12. It is the case of the respondent that in case the sample fails to meet the test as per the relevant clause in Marketing Discipline Procedure, an explanation shall be called for in writing within seven days giving the details.

13. However, no explanation was called for within seven days of the sample. The report was also not enclosed. Elaborate submission have been made by the applicant regarding the failure of the respondent in following the procedure for conducting the test and in giving the samples to the applicant.

14. It is further submitted that without terminating the agreement, the respondent has stopped supplying HSD/MS and other products for being sold in the retail outlet

which has been exclusively lease out for the purpose of the franchise agreement.

15. Learned counsel for the applicant drew my attention to clause 5.6.2 of the Marketing Discipline Procedure and also clause 5.5.5 of the Marketing Discipline Procedure to make a case that the respondent has acted in contravention of the guidelines and therefore the applicant is entitled for the relief as prayed for.

16. Per Contra, learned counsel for the respondent drew my attention to clause 5.3.2 of the franchise agreement which reads as under:-

" 5.3.2 The Franchisee for the Covenants that he is aware that the company is under no obligation to supply the products as invented by the franchisee and the supply of product is solely at the discretion of the company. The franchisee hereby agrees not to dispute a challenge any such decision of the company."

17. Learned counsel for the respondent submitted that the applicant has not denied adulteration of the HSD even in their affidavit filed in support of the application and have merely disputed the method carried out for testing. In any event according to them it is subject matter of

evidence before the arbitrator and cannot be discussed at length in the proceeding under section 9 Of the Arbitration and Conciliation Act, 1996.

18. Learned counsel for the applicant has relied on the following decisions in support of their plea for the interim relief.

- i) **Sundaram Finance Ltd., vs. NEPC India Ltd.**, (1999) 2 SCC 479
- ii) **Babu Filling Station, rep. By N.Babu 1268, Cuddalore road, Vridhachalam, Cuddalore vs. The Divisional Retail Sales Manager, Indian Oil Corp.Ltd., Trichy**, 2010 3 CTC 591
- iii) **Mahabir Auto Stores and Others vs. Indian Oil Corporation and Others**, (1990) 3 SCC 752
- iv) **Dorab Cawasji Warden vs. Coomi Sorab Warden and Others**, (1990) 2 SCC 117
- v) **Adhunik Steels Ltd., vs. Orissa Manganese and Minerals (P) Ltd.**, (2007) 7 SCC 125
- vi) **Industan Petroleum Corporation Ltd., rep.y its Managing Director, No.17, Jamshedji Tata Road, Mumbai and another vs. Geetha Kasturirangan and Others**,

W.A.Nos.1250 & 1251 of 2008

vii) **Kishore Kumar Khaitan and another
vs. Praveen Kumar Singh**, 2006 3 CTC 185

19. Learned counsel for the respondent has relied on the decision of this court in **Bharat Petroleum Corporation Ltd vs Raja Rajeshwari Agency** 2007 (6) MLJ 525 wherein it was held that when the parties are governed by the terms of the agreement, the learned single judge was not right in referring to MDG. Learned counsel for the respondent relied on certain other decisions touching upon the principles governing grant of interim relief.

20. Without delving into the merits of the case filed by the applicant and the defence taken up by the respondent in the present case, it would be relevant to decide first the preliminary issue relating to territorial jurisdiction of this Court to take up the case though same was not canvassed by either of the parties.

21. In **Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd.**, (2006) 11 SCC 521, the Hon'ble Court observed as follows:-

"On a plain reading of the definition of

"court" under Section 2(1)(e) of the 1996 Act, it is evident that the arbitration petition can be filed before:

(i) A Principal Civil Court of original jurisdiction in district.

(ii) A High Court in exercise of its original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit."

22. Ordinarily this Court would have had territorial jurisdiction to entertain the application since the respondent is located in Chennai and the Franchise Agreement dated 9th March, 2016 is signed at Chennai as it is evident from the recital in the agreement even though both the applicant and the applicant's retail outlet are located outside the jurisdiction of this Court in Thiruvallur District. Though amendment to Section 2(e) of the Act was proposed, it was not passed. Section 2(e) reads as under:

"Court"- means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil

Court, or any Court of Small Causes;"

23. Section 20 of the Act, deals with the "Place of arbitration". It has undergone minor change. Section 20 reads as under:-

" (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

24. In **Bharat Aluminium case [BALCO v. Kaiser**

Aluminium Technical Services Inc., (2012) 9 SCC 552 the Hon'ble Supreme Court while dealing with the issue relating to pre-amendment in the context of above provision in an international arbitration observed that "A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the

parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai, etc. In the absence of the parties' agreement thereto, Section 20(2) authorises the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

25. Text of other paragraphs from the same judgment are also reproduced below:-

99. The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20 has to be read in the context of Section 2(2) which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.

100. True, that in an international

commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, *The Law and Practice of International Commercial Arbitration* (1986) at p. 69 in the following passage under the heading "The Place of Arbitration":

'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual

for an Arbitral Tribunal to hold meetings—or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country—for instance, for the purpose of taking evidence.... In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.'

This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" [Sections 20(1) and 20(2)] and "venue" [Section 20(3)]. We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) the designated foreign "seat" would be read as in fact only providing for a "venue"/"place" where the hearings would be held, in view of the choice of the Arbitration Act, 1996 as being the curial law, OR

(ii) the specific designation of a foreign seat, necessarily carrying with it the choice of that country's arbitration/curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996."

26. The Hon'ble Supreme Court in **Indus Mobile Distribution (P) Ltd. V Datawind Innovations (P) Ltd.**, (2017) 7 SCC 678 while dealing with the same provision after the amendment, has observed as under:-

19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the

Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. **In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.**

27. Recently, the Hon'ble Supreme Court in **Union of India Vs Hardy Exploration and Production (India) INC** 2018 SCC OnLine SC 1640, in para 39 observed as under:-

"39..... When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to

'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place."

28. In **Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.**, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157, the concurring view of the court reads as under " Is it really necessary for this Court to repeatedly affirm the legal position ad nauseam? I believe the law on the subject is well settled and it is to nobody's advantage as not maintainable before this court if the same law is affirmed many times over."

29. In para 37 it was further observed as follows:-

37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction

clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject-matter of the proceedings vested, by agreement, only in the courts in Kolkata.

30. Not only the arbitration clause in the Franchise Agreement between the parties herein but also the Letter of Appointment dated 25.06.2016 issued to the applicant have specifically conferred jurisdiction to the courts in Mumbai alone. The agreement also specifically states that the Arbitration shall be held only in Mumbai. Thus, the seat of the Arbitration is at Mumbai.

31. In view, of the above facts of the case and the decision of the Hon'ble Supreme Court, I find that this Court has no jurisdiction to entertain the present application. Therefore, I am constrained to dismiss the present application as not maintainable before this court.

32. Applicant is therefore, given a liberty to approach the jurisdictional court in Mumbai to enforce her rights under the Franchise Agreement and the Letter of Understanding. Registry is directed to return the original copy of the Franchise Agreement dated 09.03.2016 to the applicant, in case it has been filed to facilitate

the applicant to approach the jurisdictional Court in
Mumbai.

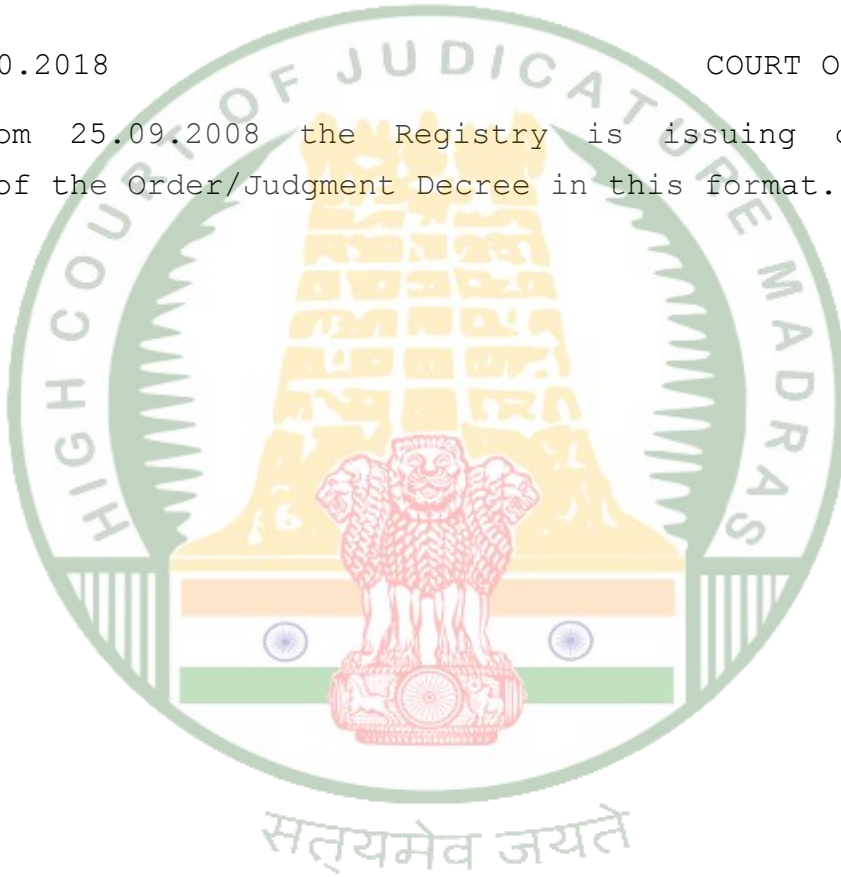
Sd/- C.S.N.J
03.10.2018

//Certified to be a true copy//
Dated this the day of 2018.

DL:11.10.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified
copies of the Order/Judgment Decree in this format.



WEB COPY