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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(COMM.) 241/2018**

Date of Decision : 12th December, 2018

VIMALA DHINGRA

..... Petitioner

Through Mr.M.M.Kalra and Ms.Sonali
Kumar, Advs.

versus

BHARAT PETROLEUM CORPORATION LTD....Respondent
Through None.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.7488/2018 (Delay)

This is an application seeking condonation of 11 days delay in re-filing of the petition.

For the reasons stated in the application, the delay is condoned and application stands allowed.

O.M.P. (COMM) 241/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated

16.01.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Distributorship Agreement.

2. Learned counsel for the petitioner submits that the Award is liable to be set aside as the Sole Arbitrator was an officer of the respondent itself. He however, fairly admits that no challenge was made to the Arbitrator before the Arbitrator himself, even though the proceedings had originated in October, 2011 and culminated in the Impugned Award. I may further note that prior to the amendment in the Arbitration and Conciliation Act, 1996 by way of the Arbitration and Conciliation (Amendment) Act, 2015, appointment of a serving officer of a party who had otherwise not dealt with the subject matter of the disputes, was permissible (*Aravali Power Company Pvt .Ltd. v. Era Infra Engineering Ltd.*, (2017) 15 SCC 32).

3. In view of the above, I find no merit in the objection raised by the learned counsel for the petitioner.

4. On merit, the counsel for the petitioner has raised two contentions. Firstly, he submits that the petitioner being an old lady had made a request to the respondent to induct a partner to manage the affairs of the Distributorship Business. This request has been kept pending by the respondent. Secondly, the respondent put a false case of irregularities in the distributorship business of the petitioner and took signature on purported representation of the petitioner admitting to such irregularities on the pretext of taking a lenient view in the matter. He submits that the said representation therefore, could not

have been relied upon by the Arbitrator. He further relies upon the judgment dated 29.11.2010 passed by the Supreme Court in SLP(C) No.26153/2010, titled ***M/s Shalimar Gas & Others v. M/s India Oil Corp. Ltd. & Anr.*** to contend that a lenient view is to be taken in favour of the petitioner in the present petition.

5. I am unable to agree with the submission made by the counsel for the petitioner. The Arbitrator has considered this issue and has held as under:

17.4 I have gone through all the material on record. In the reply of the Claimant dated 30.5.2008 to the Show Cause Notice, the Claimant has not denied any of the irregularities mentioned in the Show Cause Notice of the BPCL. Instead the Claimant has stated that due to ill health of their regular staff members/their family members the Claimant had appointed new staff for the delivery of godown. They further stated that they have changed the new staff and also looking personally towards the delivery of the cylinders and have taken steps to improve the delivery position and work at godown. They assured that in future there will be no irregularities. The only allegation denied by the respondent is the excess booking of 588 cylinders. From the reply of the Claimant to the Show Cause Notice it is clear that the claimant accepts the irregularities observed and highlighted in the Show Cause Notice. No evidence had been brought forth by the Claimant to prove that the reply to the Show Cause Notice was under the instruction of BPCL officials or any assurance regarding action in pursuance of Show Cause Notice was given by BPCL officials.

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17.6 The Claimant has not produced any evidence to prove their case. In the light of the reply to the Show Cause Notice it appears that the arguments of Claimant are nothing but an afterthought. The Claimant further sought to argue the issue of reconstitution of the distributorship. The same is not tenable as the subject matter of dispute here are irregularities committed by the Claimant and it was the sole responsibility of the duly appointed distributors of Bharat Gas to carry out the responsibility under the distributorship agreement. Further, it is also we go through the Show Cause Notice dated 21.5.2008 it is clear that in the past as well irregularities have been committed by the Claimant.”

6. A mere bald statement that the representation was made on the instructions of the officers of the respondent without giving any particulars in support of such vague assertion, cannot be accepted.

7. Further, though, it may be true that the petitioner had applied for induction of a partner to run the Distributorship Business, however, the dispute before the Arbitrator was not on the merit of such request, but one relating to irregularities found in running of business at the time of inspection by the respondent. Such irregularities having been accepted by the petitioner, the petitioner cannot now take a vague plea of the same having been admitted on some instructions from respondent's officials.

8. The irregularities complained of were:-

“(i) Whether the distributorship agreement executed between claimant and respondent is determinable in nature and if so, its effect thereto? OPR

(ii) Whether the Claimant had not committed breach of the terms of Distributorship Agreement? OPR

(iii) Whether the Show Cause Letter dated 21.5.2008 was illegal and arbitrary? OPC

(iv) Whether the order of termination of distributorship is illegal and contrary to principal of natural justice and liable to be set aside? OPC

(v) Whether the terminated distributorship be restored? OPC”

9. These were serious irregularities and cannot be justified on the ground that the petitioner is an old lady and had applied for induction of a partner. For the same reason judgment of Supreme Court in *M/s Shalimar Gas* (Supra) will also not be of any help to the petitioner as in that case the only allegation against the licensee was that the licensee had assigned/transferred the distributorship to respondent no. 2 therein. The Supreme Court held that as the licensee held 51% share in the partnership, it could not be said that she had lost control over the distributorship. In the present case, the allegation is of irregularities in running of the business and, therefore, question of showing leniency would not arise.

10. Learned counsel for the petitioner further submits that the Arbitrator has erred in rejecting the affidavits of 13 witnesses filed by the petitioner who would have proved that there were no irregularities in the conduct of the business as alleged by the respondent. He submits that these witnesses were present before the Arbitrator,

however, the Arbitrator refused to accept said affidavits leading to the denial of Principles of Natural Justice to the petitioner.

11. I am unable to agree with the contention raised by the learned counsel for the petitioner. The petitioner had filed an application seeking summoning of the witnesses who were alleged customers of the petitioner. The said application was allowed by the Arbitrator. The petitioner thereafter filed affidavits of 13 witnesses and produced four out of the 13 witnesses before the Arbitrator on 14.10.2016. However, as the petitioner had not served the copies of the affidavits of these witnesses on the respondent as per the direction dated 09.09.2016 given by the Arbitrator, the affidavits were withdrawn by the petitioner with liberty to file fresh affidavits. However, instead of filing fresh affidavits and producing witnesses, the petitioner filed an application praying that the affidavits already given may be taken on record and that incase the respondent wishes to dispute the said affidavits, their officers can go and verify the same from the deponents as per the guidelines and policy of the Ministry of Petroleum and the Marketing Guidelines. This application was rejected by the Arbitrator vide his order dated 27.02.2017 holding as under:

“I have considered the arguments of both the sides. The argument of the claimant that BPCL officers should verify the affidavits does not hold good as it was on the request of the claimant only that the witnesses were being summoned. Further, there is no provision under which BPCL officers are required to verify the details from the persons whose affidavit have been filed by the claimant. BPCL officers have already at the time of inspection visited the customers

and submitted report. It is also clear from the proceeding on record that the claimant had earlier file an application for producing those witnesses and had agreed during the meeting on 14.10.2016 that affidavit of those witnesses who do not turn up for cross examination/evidence on next hearing, their affidavits shall be discarded.”

12. I do not find any reason to disagree with the observation made by the Arbitrator. It was for the petitioner to have established before the Arbitrator that the allegation raised by the respondent to terminate the Distributorship Agreement was false or incorrect. The same could have been done only if the petitioner would have produced the witnesses for cross examination before the Arbitrator. The petitioner cannot shift the burden of proof on a plea that incase the respondent does not believe the witnesses, it is on the respondent to fetch for them and make its own inquiries in that regard. If the deponents are not produced before the Arbitrator, the affidavit filed before him has no value and has rightly been disregarded by the Arbitrator.

13. In view of the above, I find no merit in the petition and the same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 12, 2018/Arya