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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **<u>O.M.P. (COMM) 584/2016</u>**

SH. D.V. ANAND ..... Petitioner

Through: Mr. Raman Kapur, Senior Advocate with Mr.Varun Kapur, Advocate

versus

HINDUSTAN PETROLEUM CORPORATION LIMITED .....Respondent

Through: Mr Naveen Kumar Raheja, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **30.05.2018**

<u>VIBHU BAKHRU, J</u>

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 14.12.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by the sole arbitrator, namely, Sh Sanjay Kumar (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in relation to 'HP Gas (Liquefied Petroleum Gas) Dealership (Domestic & Commercial) Agreement' dated 31.10.2013 (hereafter 'the Agreement').

2. The principal dispute between the parties relates to the penalty

imposed by the respondent in terms of the Marketing Disciplinary Guidelines, 2014 on account of fake connections. The respondent had received a complaint regarding eight hundred and twenty six number of fake connections. After conducting inquiries, the complaint was found substantiated and, accordingly, the respondent has imposed penalty in terms of the Marketing Disciplinary Guidelines-2014. The Arbitral Tribunal has rejected the petitioner's challenge to the said levy.

3. Mr Raman Kapur, learned Senior Counsel appearing for the petitioner contended that the Arbitral Tribunal had grossly erred in rejecting the petitioner's claim and upholding the penalty as the allegation that there were fake connections was not substantiated. He submitted that the respondent had failed to lead any evidence to establish that there were eight hundred and twenty six fake connections and, therefore, the impugned award was based on no evidence at all.

4. The petitioner has been carrying on the business of distribution of LPG Gas, under the name and style of its proprietorship concern – Anand Stores, since 01.12.1981. The petitioner had entered into a dealership agreement dated 31.10.2013 (the Agreement) with the respondent, which was valid for a period of five years. The petitioner has been carrying on the business from two counters(outlets) – one located at Karawal Nagar, New Delhi and the other located at Netaji Nagar, New Delhi. It is stated that the petitioner's primary business was at Netaji Nagar, however, in the year 1988 the petitioner was also

granted an extension counter at Karawal Nagar. The respondent claims that this was at the request of the petitioner and on account of piped gas being supplied to customers at Netaji Nagar. The respondent states that the petitioner has approximately twenty-six thousand five hundred (26500) customers out of which about nineteen thousand (19000) are at Karawal Nagar and about seven thousand (7500) are at Netaji Nagar.

5. The respondent claims that it has been receiving frequent complaints from customers regarding deficiency in services provided by the petitioner including poor refill delivery services, worst customers support at the agency, and underweight refill deliveries. It is stated that these complaints were forwarded to the petitioner from time to time and the petitioner was also counseled to improve his services.

6. The respondent had also issued show cause notices on 22.02.2012 and 19.07.2012 alleging diversion of domestic cylinders and, thereafter, action was also taken against the petitioner for recovery of Rs.1,00,584.50. On 31.01.2013, another show cause notice was issued to the petitioner alleging diversion of domestic cylinders (pursuant to refill audit for the period 30.10.2012 to 23.10.2013) and a further recovery of ₹5,39,520/- was made from the petitioner. On 16.09.2013, yet another show cause notice was issued on account of non-placement of sufficient indents and timely supply to customers and a sum of Rs.5000/- was recovered from the petitioner.

7. The present petition relates to disputes arising from an

allegation of high number of fake LPG connections.

8. On 17.01.2014, the respondent received a complaint from one Shree Gurmeet Singh wherein, it was alleged that there were eight hundred and twenty six (826) numbers of fake connections in the petitioner's dealership. The complainant also provided particulars of the fake connections. In order to verify the allegation made in the aforesaid complaint, the respondent sent letters to three hundred and eighty-seven (387) number of customers at the addresses as provided. However, all the letters were returned back by the postal department. To further investigate the complaint, a joint team of officers carried out physical verification at some of the addresses mentioned in the complaint. The said team attempted to locate the customers at five different locations, namely, Moonga Nagar, Roshan Vihar, Kamal Vihar, Shiv Vihar and New Sabhapur. However, the team found that the addresses of the customers in question at the said locations were not traceable.

9. In view of the above, the respondent issued a show cause notice dated 11.03.2014 to the petitioner. In its show cause notice, the respondent provided the details of customers whose addresses were found to be not traceable by the team of officers who had visited the areas as stated above. The show cause notice also indicated that the team of officers had met the residents of the area and had found that the customers and the addresses mentioned in the show cause notice did not exist. Inquiries were also made from the ration card office and other local shops in the areas.

10. The petitioner responded to the aforesaid show cause notice by a letter dated 14.04.2014. It is relevant to state that the petitioner did not dispute any of the allegations made in the show cause notice; he, however, claimed that the data manipulation was done by his ex-employees. He expressly acknowledged that on receiving the show cause notice he had conducted an investigation and discovered that "the said data manipulation in the computer system was performed by his ex-employees".

11. The respondent did not find any merit in the petitioner's response and proceeded to levy a penalty under the MDG-2014. The petitioner made a representation to the DGM-LPG against the imposition of the penalty but was advised to follow the appellate proceedings after depositing the penalty. In the aforesaid context the petitioner invoked the arbitration clause by his letter dated 20.08.2014. Thereafter, the Chairman and Managing Director of the respondent appointed the sole arbitrator by a letter dated 16.09.2014.

12. Before the Arbitral Tribunal, the petitioner filed a statement of claims, *inter alia*, making the following claims:-

Claim No. 1 Towards withdrawal of peantly Imposed by respondent by vide letter dated	Rs.2,24,89,020/-
Claim No. 2 Towards Loss of business due to illegal suspension of Supply of LPG	Rs.25,35,060/-

Claim No. 3 Towards Loss of customer Due to illegal suspension (commercial/domestic)	Rs.5,00,000/-
Claim NO. 4 Towards Loss of Reputation In business	Rs. 2,00,00,000/-
Claim No. 5 Towards Cost of Arbitration	Rs. 10,00,000/-

The petitioner also prayed for award of interest at the rate of 18% per annum.

13. The respondent filed his statement of defence and counter claim claiming a sum of ₹2,24,89,020/-. The arbitral proceedings culminated in the arbitral tribunal passing the impugned award whereby the claims made by the petitioner were rejected and the arbitral tribunal has awarded a sum of ₹2,03,12,102/- in favour of the respondent. The Arbitral Tribunal has also awarded pre-award interest at the rate of 18% per annum from 29.05.2014 till the date of the award, which is computed at ₹41,44,782/-. Further, the Arbitral Tribunal also awarded future interest at the rate of 8% per annum.

14. The principal controversy to be addressed is whether the impugned award falls foul of Section 34(2)(b)(ii) of the Act. According to the petitioner, the said award is contrary to the public policy of India as it is based on no evidence at all.

15. As noticed above, the respondent had received a complaint from

Shree Gurmeet Singh alleging that there were 826 fake customers. Undisputedly, this complaint was investigated by the respondent by initially sending letters to 387 customers out of the 826 listed in the complaint. All of the letters sent were returned back. Thereafter, the respondent had deputed a team of officers, which visited five separate areas and made efforts to locate some of the customers that were alleged to be fake. The report furnished by the team of officers also established the allegations made in the complaint inasmuch as the team could not locate the addresses of the customers in question. Further, inquiries were also made from third parties such as ration card office, cable operators in the area as well as local shopkeepers. Such inquiries also established that the customers did not exist at the given addresses.

16. The Area Sales Manager of the respondent also alleged that customer numbers starting below digit seven (i.e. 4,5 & 6), which were issued to the customers of the petitioner located in the South Delhi trading area, were now reflected against the addresses in North East Delhi. This was done after the said customers had been blocked on account of supply of piped gas. In other words, it was alleged that the addresses of customers that were no longer availing LPG supply from the petitioner were altered to reflect addresses in the North East Delhi and that is how fake connections had been created.

17. None of the aforesaid allegations were refuted or denied by the petitioner at the material time. In its response, the petitioner stated that he had conducted an investigation and discovered that the data

manipulation was done by his ex-employees. He, thus, expressly accepted that the data had been manipulated and the addresses of the customers of Netaji Nagar had been changed to Moonga Nagar, Roshan Nagar, Karawal Nagar, Shiv Vihar, New Sabhapur, etc. The relevant extract of his response sent by the petitioner is set out below:-

> "The undersigned after going through the contents of the said notice was **Shocked & Surprised** and immediately tried to investigate the contents of the said notice, the undersigned upon investigation discovered the said data manipulation in the computer systems was performed by his ex employees.
>
> It is important to state that the computers present at the distributorship that were used for all daily activities including printing cash memos, punching cash in memos and updating consumer information were operated by his ex employees namely Mr. Pankaj Bandolia, Mr. Ranul Sharma, and Mr. Jitendra Kumar and the employees had full access to the system for the entire working hours of the office. Additionally, it is necessary to state that all the said employees had been working for M/S Anand Store since a significant period of time.
>
> It is important to state the all the three employees without assigning any reason whatsoever or providing any prior notice left the agency on 13/02/2014 and were unavailable for any contact subsequently.
>
> The undersigned further learned that the said consumer numbers are genuine in nature having addresses pertaining to Netaji Nagar Area and have been issued to consumers since a very long time.
>
> The ex employees namely Mr. Pankaj, Mr. Rahul and Mr Jitendra manipulated the data and changed the addresses

of the said consumers to Moonga Nagar, Roshan Nagar, Karawal Nagar, Shiv Vihar, New Sabhapur etc.

Having said that, the undersigned post the incident, has taken preemptive measures so that such events are not repeated in the future and has strictly instructed all the employees to only make modifications after seeking proper approval from him.

The undersigned humbly states that he had no information pertaining the data manipulations done by the ex employees until the date of receiving the notice by the corporation.

The undersigned has been operating the distribution-ship for a period of over 51 years and never in this span of 51 years has the undersigned performed any manipulation of data whatsoever and has not been a defaulter in any manner.

The undersigned also states that the manipulation done was neither intentional nor deliberate and that he stands innocent having no role in manipulating any data whatsoever. Rather, the undersigned after the said incident underwent a great deal of shock arid mental distress.

It is therefore requested, considering the past records of the operation of the distributor-ship wherein no such incident has ever taken place in its 51 year of operation and in view of the above-mentioned facts and circumstances, that the show cause notice dated 11/03/2014 be withdrawn."

18. It is apparent from the above that the petitioner had accepted the allegations that were leveled in the show cause notice. In the given circumstances, the contention that the allegations against the petitioner

were not established is not persuasive.

19. There is some controversy as to whether the details of the eight hundred and twenty six alleged fake connections had been provided to the petitioner. Whereas, the respondent claims that the said details were provided, the petitioner disputes the same. However, it cannot be disputed that the petitioner was provided the names of three hundred and eighty-seven persons out of the eight hundred and twenty six customers that were alleged to be fake connections. Further the petitioner was also provided the gist of the report furnished by the joint team of officers which included the names and details of the persons whose addresses were found to be untraceable. The petitioner has not produced any material to refute the said allegations. On the contrary, in his reply to the show cause notice, the petitioner accepted the allegations regarding the fake connections.

20. The Arbitral Tribunal considered the aforesaid facts and held as under:-

> "5.3 The main issue in controversy in the matter is as whether or not fake customers existed at the Claimant's distributorship as the entire case of the Claimant is that no fake customers exist and the penalty imposed by the Corporation considering 826 fake customers is bad. In order to adjudicate this issue it is necessary to refer to complaint dated 17.01.2014 received from Sh. Gurmeet Singh which was a trigger point for investigation by the Respondent Corporation. The claimant has challenged the findings of investigation on the ground that the answering respondent sent letters to

only 387 customers and not to all 826 fake customers and, thus, investigation remain inconclusive which does not establish presence of 826 fake customers. The said point was replied by the Respondent within an argument that letters were issued to 387 customers only on sample basis to ascertain the genuineness of the complaints and it is for the claimant dealer to prove that all said connections are genuine as the claimant is responsible for issuance of LPG connections as well as maintaining customer data, refill data etc.

The perusal of LPG distributorship agreement clearly show that it is for the claimant distributor to ensure that customer data is maintained properly in accordance with the guidelines and, admittedly, there is no doubt that refills are to be issued to only genuine customers which can be ensured by the distributor as it is the distributor who conduct preliminary enquiry about the genuineness of customers and their addresses and is responsible for supplying refills to genuine customers.

I find merit in the contention of the respondent that issuance of letters of 387 customers out of 826 customers was only an effort made by the Corporation to ascertain the genuineness in the allegations made by the complainant in his complaint that 826 fake customers exist at the Claimant's distributorship and once all the 387 letters returned “UNDELIEVERED” with remarks that addressee did not exist the burden is on the Claimant distributor to show that all said 826 customers exist as it is the Claimant who has created those customers and supplying LPG cylinders to them on regular basis. However, the Claimant restrict himself only finding fault in the investigation than producing documents to suggest that all said

826 customers are genuine customers who are his customers and, thus, he could have easily produced document to prove that all said customers are genuine.

The contention of the claimant that name of residents were not mentioned in SCN or testimony of witnesses not provided etc. does not have any merit as the purpose of said investigation to ascertain whether or not said customers exist at addresses entered in the system by the Claimant. The said investigation does not stop the claimant to produce documents to suggest that those customers exist at those addresses and the addresses are correct. On the other hand, the Claimant in his reply dated 14.04.2014 to SCN dated 11.03.2014 admitted that customer data was manipulated by his ex-employees. The claimant also admitted in his reply that he had no information pertaining the data manipulations done by ex-employee until the date of receiving the notice by the Corporation.

The claimant in his said reply dated 14.04.2014 though stated that said consumer numbers are genuine in nature having addresses pertaining to Netaji Nagar but failed to explain as how the refills were being delivered to said customers when their addresses were changed in the system. In other words, the claimant is not disputing the release of refills (i.e. 25181 from Sept, 2009 till April, 2014 w.r.t 826 customers) issued to said customers which are also considered by the answering Corporation for imposing penalty and the only question is whether those refills were issued to genuine customers or not?

The Claimant failed to explain that if, according to him, these customer are genuine and only addresses were manipulated and changed to Moonga Nagar, Roshan Nagar, Karawal Nagar, Shiv Vihar etc. then where the refills were delivered in the past as admittedly refills cannot be delivered to those customers because addresses mentioned in the system were incorrect.

Even otherwise, the Claimant has not produced any documents to suggest that said 826 customers are genuine though it is the case of the Claimant that refills were supplied to them. The failure on the part of claimant to address this issue proves the case of the respondent corporation of diversion of refills on the part of Claimant.

5.4 The claimant has also challenged the findings of investigation on the ground that the answering respondent has not provided list of all 826 customers to the Claimant despite various requests made by him to the Respondent. In this regard, I find merit in the contention of the Respondent that identity of 826 customers was never in dispute till the passing of impugned order dated 29.05.2014 and, in fact, the Claimant throughout maintained that all said 826 customers were genuine customers and only addresses got changed by his ex-employees. The SCN dated 11.03.2014 refers to all 826 customers and the mere perusal of reply dated 14.04.2014 suggest that the Claimant has admitted the existence of all said customers and did not dispute the existence of said customers. Not only that, even in representation-cum-appeal dated 19.06.2014 the claimant did not raise the issue of not supplying details of 826 customers. On the other hand, the Claimant has stated in said appeal that ".... ***It is obvious that when the database of customers is tampered fraudulently by errant employees, there would be a mismatch of customer ID and his real address leading to doctored findings*** ....."

> Thus, the above referred documents suggest that 826 customers were never disputed by the Claimant except to claim that addresses of said customers were changed by his officials."

21. This Court finds it difficult to accept that the aforesaid reasoning or conclusion falls foul of the fundamental policy of Indian law. The provisions of Indian Evidence Act, 1872 do not apply to arbitral proceedings and the Arbitral Tribunal is required to render a decision based on material placed on record. In the present case, the Arbitral Tribunal has appreciated the evidence and material placed before it in making the impugned award. The scope of judicial review under Section 34 of the Act does not entail re-appreciation or reappraisal of material considered by the Arbitral Tribunal. In the circumstances, this Court is not persuaded to accept that any interference by this Court is warranted in the impugned award.

22. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MAY 30, 2018
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