IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.12.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.743 of 2013

Mrs.Kalavalli
Prop. M/s.Kala Agencies
No.2, Maran Nagar Extension
Poonamallee
Chennai-600 056. ... Petitioner

vs.

1. The Executive Director
   I.O.C. Ltd., Indian Oil Bhavan
   No.139, Nungambakkam High Road,
   Chennai-600 034.

2. The Deputy General Manager (L.P.G.)
   I.O.C. Ltd., Indian Oil Bhavan
   No.139, Nungambakkam High Road,
   Chennai-600 034.

3. The Chief Area Manager
   I.O.C. Ltd., Indian Oil Bhavan
   No.139, Nungambakkam High Road,
   Chennai-600 034.

4. Shri S.Gunasekaran
   The Sole Arbitrator
   I.O.C. Ltd., Indian Oil Bhavan, Level-III
   No.139, Nungambakkam High Road,
   Chennai-600 034. ... Respondents

(4th respondent is deleted in and by this order)

WEB COPY
http://www.judis.nic.in

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to

(a) Set aside the award dated 23.07.2013 passed by the 4th respondent in ARB/KA/2011 in the matter of dispute and differences between the petitioner and the respondents 1-3;

(b) Allow the arbitration claim petition in ARB/KA/11 on the file of the sole arbitrator Shri.S.Gunasekaran; and

(c) Direct the respondents to pay the cost of the proceedings.

(d) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For petitioner : Mr.P.Amarnath
For Respondents : Mr.V.Anantha Natarajan
for R1 to R3

O R D E R

Captioned 'original petition' ['OP' for the sake of brevity, convenience and clarity] has been presented in this Court on 11.10.2013 *inter-alia* assailing an 'arbitral award dated 23.07.2013 bearing reference No.ARB/KA/2011' [hereinafter 'impugned award' for the sake of brevity, convenience and clarity] made by a 'Arbitral Tribunal' ['AT' for the sake of brevity, convenience and clarity] constituted by a sole arbitrator.

WEB COPY

http://www.judis.nic.in

2. In the captioned OP, Mr.P.Amarnath, learned counsel on record for sole petitioner and Mr.V.Anantha Natarajan, learned counsel for 'Indian Oil Corporation Limited' ['IOC' for the sake of brevity] on behalf of contesting respondents 1 to 3 are before me in this web hearing on a video conferencing platform i.e., virtual hearing. This Court with the consent of both learned counsel took up the captioned OP for final disposal and heard out the same.

3. Before plunging into the core matter there are two peripheral aspects which need to be looked into. One peripheral aspect is prayer in captioned OP. Prayer in captioned OP reads as follows:

> *'It is therefore humbly prayed that this Hon'ble Court may be graciously pleased to:*
>
> *(a) Set aside the award dated 23.07.2013 passed by the 4th respondent in ARB/KA/2011 in the matter of dispute and differences between the petitioner and the respondents 1-3;*
>
> *(b) Allow the arbitration claim petition in ARB/KA/11 on the file of the sole arbitrator Shri.S.Gunasekaran; and*
>
> *(c) Direct the respondents to pay the cost of the proceedings and*
>
> *(d) pass such further or other orders as this Hon'ble*

WEB COPY
http://www.judis.nic.in

Court may deem fit and proper in the circumstances of the case and thus render justice.'

4. A perusal of prayer makes it clear that while prayer limbs (a), (c) and (d) can be entertained, prayer limb (b) cannot be entertained as this Court in a Section 34 legal drill cannot allow a claim petition before AT. Therefore, prayer limb (b) is straight away negatived as it is incorrect and outside the statutory perimeter of Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, convenience and clarity. In effect captioned OP is being heard out on prayer limbs (a), (c) and (d).

5. The second peripheral aspect is, the sole arbitrator who constituted the AT has been arrayed as respondent No.4 in captioned OP. From the submissions made and on a perusal of petition in captioned OP, it becomes clear that sole arbitrator need not be in the array of parties. Therefore, following the procedure adopted by Hon'ble Supreme Court in ***Vinay Heavy Equipments*** case **[*Zonal General Manager, Ircon Internatinal Limited Vs. Vinay Heavy Equipments*** reported in ***(2015)***

http://www.judis.nic.in

***13 SCC 680*],** (to be noted, deletion procedure is captured in order reported in **2007 SCC OnLine SC 4**) this Court deletes respondent No.4 from the array of parties. This means that now there are three respondents in captioned OP and the three respondents will be collectively referred to as respondents or IOC. The petitioner will be referred to as dealer also.

6. This Court having set out/dealt with the two peripheral aspects now plunges into the core matter.

7. Petitioner was appointed as a dealer of IOC for LPG Distributorship at Poonamallee vide an 'agreement dated 30.03.1996' [hereinafter 'said contract' for the sake of brevity]. This Court is informed that 'LPG' stands for 'Liquefied Petroleum Gas'.

WEB COPY

8. In the course of said contract operating, IOC issued notice to dealer pointing out certain lapses. In this regard, this Court is informed that there is a MDG issued by IOC and 'MDG' stands for 'Marketing Discipline Guidelines'. It is not necessary to dilate much on notices

http://www.judis.nic.in

issued by IOC regarding lapses as the same were challenged by way of writ petitions, carried in appeal by way of an intra court appeal to Hon'ble Division Bench of this Court and ultimately, to Hon'ble Supreme Court where it culminated in an order dated 05.02.2010 made by Hon'ble Supreme Court in Civil Appeal No.1434 of 2010. Suffice to say that Hon'ble Supreme Court held that IOC can proceed against dealer in accordance with law and initiate such steps as may be available to it.

9. Thereafter, IOC issued a show cause notice dated 23.03.2010, which culminated in termination order dated 04.06.2010 bearing reference No.TNL/S/332.

10. There is no disputation that there is an arbitration clause in the said contract, the same was triggered by the petitioner dealer, AT entered upon reference and made the impugned award. Claim of petitioner before AT runs as follows:

WEB COPY

'*The claimant filed her claim statement for the following relief:*

A. to set aside and cancel the termination order of dealership of the claimant and to restore the dealership to the

http://www.judis.nic.in

claimant.

B. to cancel the order of recovery of Rs.34,03,429.20/- from the claimant.

C. to pay the costs of this proceeding in full and

D. to pass such further or other orders as the Hon'ble Arbitrator may deem fit and proper in the circumstances of the case and thus render justice.'

11. IOC filed detailed counter pleadings. AT has recorded that the claimant (petitioner before me) had not appeared in spite of several opportunities being given. This is captured in paragraph No.5 of the impugned award which reads as follows:

'5. The Arbitral Tribunal conducted arbitral proceedings on following dates and the hearing dates are given below:

21.11.11, 19.01.12, 27.01.12, 03.02.12, 15.02.12, 22.02.12, 29.02.12, 08.03.12, 14.03.12, 05.04.12, 19.04.12, 30.04.12, 08.05.12, 11.06.12, 14.06.12, 22.06.12, 25.06.12, 02.07.12, 14.07.12, 02.08.12, 21.08.12, 30.08.12, 28.09.12, 26.10.12, 07.01.13, 22.01.13, 30.01.13, 15.02.13, 06.03.13, 13.03.13, 20.03.13, 05.04.13, 16.04.13, 02.05.13, 29.05.13, 14.06.13.

On number of occasions the claimant (or her representative) not present or sought adjournments. The details are given below:- 19.01.12, 03.02.12, 15.02.12, 22.02.12, 05.04.12, 08.05.12, 11.06.12, 22.06.12, 14.07.12, 02.08.12,

WEB COPY

http://www.judis.nic.in

30.08.12, 28.09.12, 26.10.12, 07.01.13, 22.01.13, 15.02.13, 20.03.13, 16.04.13, 02.05.2013, 14.06.13.

The arbitral tribunal has made clear to the parties (communication dated 06.05.13) that no further adjournments shall be granted and No more extension of time will be granted in this matter failing which order will be passed based on the available materials with the arbitrator without any further extension of time.'

12. Therefore, the submission that adequate opportunity was not given to petitioner claimant does not hold water, but the problem arises in another manner for IOC. The impugned award runs to 17 pages and consists of 13 paragraphs. A perusal of impugned award brings to light that paragraph Nos.1 to 12 contain narrative of facts, procedural history and extract of rival pleadings. This is followed by paragraph No.13, which includes the operative portion of impugned award and paragraph No.13 of the impugned award reads as follows:

'13.The main issue for consideration of the Arbitral Tribunal, whether the order of the termination passed by the respondent against the claimant is valid or not. I have carefully considered the documents and the statement filed by the parties before the Arbitral Tribunal.

The claimant's agency was suspended by the respondent vide letter dated 20.11.2007. The claimant submitted reply to the

http://www.judis.nic.in

show cause notice and after considering the reply submitted by the claimant, the respondent passed the order of termination by proceedings dated 04.06.2010.

The claimant challenges the order of termination and imposing of MDG. The respondent submitted the reply and also filed certain documents. It is evident from the record that the claimant failed to conduct the agency as per the rules and regulations formulated by the ministry as well as the circular issued by the respondent.

The claimant committed various acts of commissions and omissions in conducting the day today affairs of the agency. The respondent in the counter pointed out by the action. I have carefully perused the order of termination, I am fully satisfied that the claimant failed to adhered to the rules and regulations as well as the circulars issued by the respondent, the claimant committed breach of the contract and violated the clauses of the agreement.

AWARD

In view of the above, I hereby hold that order of termination as well as imposing of MDG is valid and consequently dismiss the claim statement filed by the claimant.

I hereby publish and pass my AWARD as follows in accordance with Section 31 read with Sec.32(2)(c) of the Arbitration and Conciliation Act, 1996 as the claimant as well as his counsel was neither present for the hearings nor has shown interest to pursue the claim.

In view of the above findings, I hereby hold and award

WEB COPY

http://www.judis.nic.in

that the claim of the Claimant is not sustainable and accordingly the claim petition is dismissed.'

13. Besides paragraph No.13, there is no other discussion much less dispositive reasoning in the impugned award. Therefore, this Court has no hesitation in coming to the conclusion that there is an infarct of Sub-Section 3 of Section 31 of A and C Act, as the impugned award has not set out/stated the reasons upon which it is based. To be noted, it is nobody's case that the parties have agreed that no reasons are to be given and it is also nobody's case that impugned award came to be passed on agreed terms under Section 30 of A and C Act. To be noted, parties agreeing that no reasons are to be given and/or the impugned award being passed on agreed terms under Section 30 of A and C Act are two exceptions to Sub-Section (3) of Section 31 of A and C Act. Absent, these two exceptions, there is a clear infarct of sub-section (3) of Section 31, qua impugned award in the case on hand.

WEB COPY

14. In the absence of discussion, much less dispositive reasoning, this is clearly a case where the impugned award has not given/stated reasons upon which it is based. The aforementioned termination notice

http://www.judis.nic.in

which is based on breach as well as recovery sought to be made based on differential price (differential price between cylinders for non-domestic use and cylinders for domestic use on the basis of alleged diversion) have been sustained without setting out the basis and without discussing the material before AT.

15. This Court has noticed at the outset that captioned OP has been presented in this Court on 23.10.2013. In the light of ***Ssangyong*** principle being dicta laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** *reported in* ***(2019) SCC Online SCC 677 equivalent to (2019) 15 SCC 131,*** captioned OP is governed by pre 23.10.2015 regime of A and C Act. To put it differently, captioned OP will be governed by A and C Act as it stood prior to amendment by Act No.3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. This means that the oft-quoted ***Associate Builders*** judgement of Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49,*** can be applied to the instant case. In any event with regard to infarct of Section 31(3) of A

WEB COPY

http://www.judis.nic.in

and C Act, the principle laid down in ***Associate Builders case law*** has not been varied vide ***Ssangyong*** supra, wherein Hon'ble Supreme Court explained the impact of 23.10.2015 amendment on certain principles laid down in ***Associate Builders case law.*** Therefore, this is a case where the principle that infarct of provision of A and C Act, particularly, Section 31(3) of A and C Act, i.e., not giving/stating the basis on which the award has been made sounds the death knell of an arbitral award can be safely applied though that was an instance of Section 28(1)(a) violation. Relevant paragraph in ***Associate Builders case law*** is as follows:

> *'**42.1.** (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.....'*

16. In the light of narrative discussion and dispositive reasoning set out supra, captioned OP is allowed in terms of prayer limb (a). In other words, the impugned award is set aside. This means (c) is negatived and no orders are required under residuary limb (d). Prayer limb (b) has already been held to be outside the realm of Section 34 of A and C Act. Captioned OP is allowed in terms of prayer limb (a) setting

http://www.judis.nic.in

aside the impugned award dated 23.07.2013 bearing Reference No.ARB/KA/2011. There shall be no order as to costs.

09.12.2020

Speaking/Non-speaking order
Index : Yes / No
Internet : Yes / No
mk

WEB COPY

http://www.judis.nic.in

M.SUNDAR.J.,

mk

O.P.No.743 of 2013

WEB COPY

09.12.2020

http://www.judis.nic.in