IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:02.09.2020

CORAM:

THE HONOURABLE Mr. JUSTICE M.SUNDAR

O.P.No.47 of 2016

1. The Chairman and Managing Director
   Hindustan Petroleum Corporation Limited
   No.17, Jamshedji Tata Road
   Church Gate
   Mumbai – 20

2. The Senior Regional Manager
   Hindustran Petroleum Corporation Limited
   Chennai LPG Regional Office
   Petro Bhavan
   III Floor
   New No.82, Old No.47
   T.T.K.Road
   Alwarpet
   Chennai – 600 018
3. The Deputy Manager Finance
   H.P.Corporation Ltd.,
   Alwarpet
   Chennai – 600 018 ... Petitioners

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Vs.

1.M/s.Nandhini Gas Agencies
Rep. By its Proprietrix
S.Jayalakshmi
No.41, Marudeswarar Shopping Complex
East Coast Road
Tiruvanmiyur
Chennai – 600 041

2. Mr.Justice M.Thanikachalam (Retd.,)
Residing at Plot No.27
M.G.R.Salai
Niyayalayam (Near Vishranthi)
Palavakkam, Chennai – 600 041 ... Respondents

(**Second respondent deleted in and by this order**)

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 31.08.2015 passed by the 2nd Respondent herein and received by the Office of the Petitioner on 05.09.2015.

For Petitioners : Mr.O.R.Santhana Krishnan

For respondents : Mr.S.Vijayakumar

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' and this Act shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience.

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2. Captioned OP has been filed assailing an 'arbitral award dated 31.08.2015' (hereinafter 'impugned award' for the sake of clarity) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator, who is a former Hon'ble Judge of this Court. The sole

Arbitrator, who constituted the AT, has been arrayed as Respondent No.2 in captioned OP.

3. Mr.O.R.Santhanakrishnan, learned counsel on record for petitioners ('petitioners' shall hereinafter collectively be referred to as 'HPCL' denoting 'Hindustan Petroleum Corporation Limited', for the sake of convenience and clarity) and Mr.S.Vijayakumar, learned counsel for contesting first respondent (first respondent hereinafter be referred to as 'dealer' for the sake of convenience) who are before me in this web-hearing on a video-conferencing platform consented for captioned OP being taken up for final disposal. As the submissions unfurled in the course of captioned OP being heard out and from the case file placed before me, I am of the considered view that Hon'ble sole Arbitrator, who constituted AT and made the impugned award, need not be there in the array of parties in captioned OP. 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) 13 SCC 680***], I direct that the second respondent be deleted from the array of parties in captioned OP. In other words, the second respondent will now stand deleted in and by this order.

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This means that the contesting first respondent i.e., dealer shall now become sole respondent.

4. To be noted, as already mentioned supra, captioned OP is an application under Section 34 of A and C Act, which is neither an appeal nor a revision, but a mere challenge to an arbitral award within the limited statutory contours and confines of Section 34 of A and C Act. Therefore short facts shorn of details/facts/particulars not imperative for appreciating this order will suffice. Factual matrix in a nutshell is that the dealer was appointed as a dealer for HPCL for Liquefied Petroleum Gas cylinders (LPG cylinders); that the First Dealership Agreement is dated 18.12.2009; that the renewal of dealership was vide an agreement dated 08.06.2012; that the renewal was for a period of five years i.e., up to 25.03.2017; that HPCL issued notice dated 21.09.2009 demanding differential amount between 14.2 kgs cylinders and 19 kg cylinders; that HPCL sent a reminder dated 09.12.2010; that dealer challenged the notice dated 21.09.2009 by way of a writ petition being W.P.No.30065 of 2010; that the writ petition came to be disposed of by this Court by order dated 04.04.2014 setting aside 21.09.2009 notice and the reminder, albeit giving opportunity to HPCL to issue a fresh show-cause notice, to

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consider the reply of the dealer and pass appropriate orders within a time frame of three months; to be noted the order in the writ petition came to be passed on the ground that the reply of the dealer had not been considered and therefore liberty to issue fresh show cause notice and carrying the same to its logical end was given; that pursuant to orders of this Court, fresh show-cause notice dated 09.07.2014 was issued; that the dealer sent a reply dated 15.07.2004; that there was some correspondence between HPCL and dealer thereafter; that final orders pursuant to the fresh show-cause notice came to be passed by HPCL on 04.08.2014, vide which HPCL levied a penalty of Rs.9,78,372.09 computed at the rate of Rs.628.37 per refill being the differential cost of domestic and non-domestic cylinders; that the dealer contested this order dated 04.08.2014 stating that there is an arbitration clause in the aforementioned dealership agreement; that the dealer took recourse to section 11 of A and C Act by filing O.P.No.677 of 2014 and vide order dated 19.12.2014 made by then Hon'ble Chief Justice of this Court, sole Arbitrator was appointed for going into the contest of the dealer qua the 04.08.2014 order; that the AT entered upon reference and after full contest which included oral and documentary evidence, made the impugned award setting aside 04.08.2014 order of HPCL; to be noted, before AT, the dealer had made

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a counter claim in a sum of Rs.35,65,256/- (Rupees Thirty five lakhs sixty five thousand two hundred fifty six only) constituted inter-alia by damages, bulk transfer loss, deprivation of business activity qua refill sales etc., and this counter claim came to be dismissed by AT; there is no disputation or disagreement before me that the dealer has not assailed the impugned award though the counter claim of the dealer has been dismissed in its entirety; that the AT had also directed HPCL to pay the costs of arbitration to the AT.

5. This Court having set out the factual matrix in a nutshell, now proceeds to capture the nature of challenge to the arbitral award.

6. Notwithstanding very many pleas in the OP/petition, learned counsel for HPCL/petitioner conscious of the limited legal landscape or in other words limited statutory contours of Section 34 focused his submissions on two main points which are as follows:

> (a)Clauses of the contract i.e. Dealership Agreement have been given a go-by. To state with specificity, according to learned counsel for HPCL, clause 15(c)(i), 15(c)(ii) and 36(a) of the Distributor Agreement have been given a go-by and the impugned award is therefore contrary to the terms of the

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contract;

(b) AT having noticed that the dealer may have not followed the seniority list strictly qua 568 refills on one day, ought not to have set aside the 04.08.2014 order of HPCL.

7. To be noted, other submissions are in the nature of regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) and therefore this Court deems it appropriate to not to burden this order with those submissions owing to limited legal landscape or Section 34 of A and C Act.

8.Responding to the aforementioned focused challenge to the impugned award, learned counsel for dealer, invited the attention of this Court to the issues framed by AT which have been adumbrated in paragraph 17 of the impugned award. Learned counsel for contesting respondent submitted that AT has framed as many as eight issues including an issue touching upon the counter claim of the dealer and a perusal of the award, according to the learned counsel, reveals that every issue has been discussed and answered in the light of the oral / documentary evidence placed before AT. Saying so, learned counsel submitted that the impugned award does not suffer from breach of/ vice

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of any of the slots adumbrated in Section 34 and therefore is not liable to be set aside.

9. In the light of the narrative thus far, this Court now embarks upon the exercise of discussing the challenge to the impugned award and giving its dispositive reasoning for the purpose of arriving at a conclusion in the captioned OP.

10.With regard to the argument that AT had not taken into account terms of the contract, the same is traceable to sub-section (3) of Section 28 of A and C Act. From the case file placed before this Court, it comes to light that instant OP has been presented in this Court on 07.12.2015, which means it is governed by the post 23.10.2015 regime. Post 23.10.2015 regime in other words means, the amended A and C Act, post amendment vide Act 3 of 2016 being the amending Act, which kicked in with retrospective effect on and from 23.10.2015. Therefore this Court takes into account the amended language of sub-section (3) of Section 28 i.e., post amendment on 23.10.2015. For the purpose of appreciating this submission, it is necessary to extract and reproduce three clauses which according to learned counsel for petitioners have not been taken into account and those three clauses are 15(c)(i) and 15(c)(ii), 11(a) and 36(a)

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(as set out supra) and the same read as follows:

'15(c)(i) The Dealer shall be bound to register prospective customers in a waiting list and maintain the same in accordance with the procedures laid down by the Corporation from time to time and to enroll customers i.e., release LPG connection to waitlisted customers in the order in which they are registered in the waiting list and/or as directed by the Corporation in writing from time to time.

15(c)(ii) The Dealer agrees and undertakes to make supplies of LPG to only such of the customers as have been enrolled as authorised by the Corporation. The Dealer shall not release supplies to any other customer(s) who have not been so enrolled as authorised by the Corporation.

'11(a) The Dealer shall at all times faithfully, promptly and diligently observe and perform and carry out at all times, all directions, orders, rules, terms and conditions as may be issued by the Corporation or its representatives from time to time on safe practices, and marketing discipline and for the proper carrying on of the Dealership or the Corporation including those contained in the Corporation's "LPG Manual" and may amendments or modifications as may be made by the Corporation thereto from time to time. The Dealer hereby confirms that he has received a copy of the LPG Manual and the General Directions as circulated by the Corporation up to the date this Agreements and agrees to abide by and perform the same.'

36(a) The Dealer undertakes faithfully and promptly to carry out, observe and perform all direction and orders or rules made

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from time to time by the corporation or its representatives for the proper carrying on of the Dealership of the Corporation.'

11. This Court has carefully considered the aforementioned contractual clauses. At the out set, it is to be noticed that the aforementioned clauses are in the nature of broad guidelines to a dealer given by HPCL. Be that as it may, a careful perusal of the impugned award reveals that there are as many as 37 documents (Exs. C1 to C37) on behalf of the dealer before AT and there are as many as 12 exhibits (Exs.R1 to R12) on behalf of HPCL before AT. This Court was informed that no oral evidence was let in before AT. In this backdrop, with regard to the nature of the evidence before AT, particularly evidence to support the basis on which the claim/ levy was made vide 04.08.2014 notice, it is clear that HPCL had not produced evidence to support the contents of 04.08.2014 notice, though the inspection notice was marked as Ex.C3. Likewise, the dealer had not annexed several documents referred to in its reply dated 28.07.2014. This aspect of the matter is articulated by AT in paragraph 25 of the impugned award and relevant portion of paragraph 25 reads as follows:

'25. .... The parties have not produced any cash memo/receipts to prove or disprove that they contained no signature

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and they are non genuine identical signatures as seen from the records the complainant himself have issued notice for production of receipts which were seized by the inspecting authorities admittedly, as evidenced by the inspection report also.'

12. A careful perusal of 12 issues and discussion on each these issues vide the impugned award leaves this Court with the considered view that AT has returned findings on each of the issues based on documentary evidence available before it and there is nothing before this Court to demonstrate that the impugned award has not taken into account the terms of the contract, particularly the four clauses extracted and produced supra. On the contrary, the terms of the contract have been looked into. The second point of attack is that AT, having gravitated towards believing breach of seniority list, ought to have set aside 04.08.2014 levy/penalty. To be noted, this is articulated in Paragraph 26 of the impugned award, which reads as follows:

'26. 568 refills appeared to have been delivered on the same day of booking and there is nothing wrong when such a quick transaction had taken place even assuming that the complainant failed to follow the seniority strictly. Therefore, concerning the backlog alone it is impossible to conclude that there were 568 refill diversion thus totalling 1,557 when the second respondent who had imposed fine or claimed amount for diversion has failed to prove

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the above facts by letting in documents or filing affidavits of the consumers though in the proceedings we have permitted the parties to file affidavit to prove or disprove as the case may be. Hence on the score of diversion the second respondent is not entitled to the penalty of Rs.9,78,372.09.'

13. Therefore, it is clear that the clauses of contract particularly clauses pertaining to seniority list, namely clauses 15(c)(i) and 15(c)(ii) have been taken into account by AT and AT has decided on the same on the basis of evidence before it.

14. This takes us to evidence before AT and this is governed by what has now come to stay as ***Hodgkinson*** principle. ***Hodgkinson*** principle was first laid down by an English Court in ***Hodgkinson Vs. Fernie,*** decided way back in 1857 to be precise and this ***Hodgkinson*** principle was reported in ***140 ER 712.*** To be noted, 'ER' stands for 'English Reports'. However, what is of significance is, this ***Hodgkinson*** principle has been reiterated by our Courts and more particularly, by Hon'ble Supreme Court in the celebrated ***Associate Builders*** case ***[Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49]. Associate Builders*** principle was further

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explained in the light of 23.10.2015 amendments to A and C Act by Hon'ble Supreme Court in ***Ssangyong*** Case [**Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (2019) 15 SCC 131**]. On a careful perusal of ***Ssangyong*** principle it is clear that the upholding of ***Hodgkinson*** principle by Hon'ble Supreme Court in ***Associate Builders*** case, continues to obtain and govern the field in the post 23.10.2015 regime also. Hodgkinson principle, stated in very simple terms means that AT is the best judge of both quality and quantity of evidence before it. ***Hodgkinson*** principle is not without a caveat and the caveat inter-alia is, it depends on factual matrix of each case. To put it differently it is not an absolute rule, which does not admit of any exception or require qualification as vital evidence being ignored, extraneous evidence being taken into account and evidence taken behind the back of a party being looked into, certainly qualify as exceptions to ***Hodgkinson*** principle, but there is no such demonstrable departure in the instant case. In the absence of demonstrable departure in the instant case, this Court has no difficulty in coming to the conclusion that AT has evaluated the documentary evidence available before it and has come to the conclusion

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that 04.08.2014 notice cannot be sustained. To be noted, as already alluded to supra, AT has dismissed the counter claim of the dealer in entirety, but this Court is informed that the same has not been challenged by the dealer. It is also to be noted that this has already been delineated supra.

15. The other grounds raised are in the nature of an appeal assailing the impugned award and therefore, this Court has not burdened this order with those grounds and this has already been alluded to supra.

16. As the grounds, which are permissible within the statutory contours and confines or in other words legal landscape of Section 34 of A and C Act which have been considered fail, captioned OP also fails and the same is dismissed. There shall be no order as to costs.

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Speaking order: Yes/No
Index: Yes/No
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