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

Reserved on: 18th October, 2019

Pronounced on: 16th January, 2020

+ **O.M.P. 1118/2014**

SUKHBIR SINGH Petitioner

Through: Mr. Sanat Kumar, Senior Advocate
with Mr. Vinayak Batta, Advocates.

versus

M/S HINDUSTAN PETROLEUM
CORPORATION LTD

..... Respondent

Through: Mr. Anupam Srivastava & Ms. Divya
Joshi, Advocates.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"], the petitioner seeks setting aside of an award dated 09.09.2014, rendered by a sole arbitrator [hereinafter referred to as "the award"].

FACTS

2. The petitioner and the respondent were parties to a dealership agreement dated 27.06.1994 under which the petitioner was running a retail outlet for petrol, diesel, motor oils, greases, and other such products. The term of the agreement was fifteen years.

3. The controversy between the parties, which gave rise to arbitration proceedings, concerns a sample of motor spirit [“MS”] taken from the petitioner’s retail outlet on 22.01.2009. The inspection of MS at the retail outlet of the petitioner is stated to have failed in the mobile lab test report, although the sample of High Speed Diesel [“HSD”] was found to meet with specifications. Depot samples [“supply location sample”], alongwith a Tank Truck Retention Sample [“TT Sample”] and Retail Outlet Sample [“RO Sample”] were sent by the respondent to its laboratory, and received on 24.01.2009. The laboratory report dated 25.02.2009, in respect of the MS depot sample received, reveals that the samples taken from the supply location and the tank truck were not tested, as they were reported to be “leaky”. However, it was reported that the sample taken from the retail outlet failed to meet specifications. The respondent thereafter appears to have submitted another depot sample of MS to its laboratory on 30.01.2009. According to the petitioner, this was done unilaterally by the respondent without any information or notice to the petitioner. The report dated 28.04.2009, in respect of the MS sample received on 31.01.2009, found the sample to meet specifications.

4. The respondent issued a show cause notice dated 12.05.2009, calling upon the petitioner to show cause as to why its dealership should not be terminated. The petitioner claims that it is at this stage that the test reports came to its knowledge.

5. The petitioner replied to the show cause notice on 20.05.2009, raising various disputes regarding the validity of the procedure

adopted by the respondent, and relying upon the provisions of the respondent's Marketing Discipline Guidelines ("MDG") in this regard.

6. The petitioner challenged the show cause notice by way of a writ petition [WP(C) 13930/2009] before this Court. The writ petition was disposed of by an order dated 29.07.2010, permitting the petitioner to file a further reply to the show cause notice, and directing the respondent to pass a reasoned order. Pursuant to the liberty granted, the petitioner filed a detailed reply on 06.08.2010. By a reasoned order dated 05.10.2010, the respondent found the petitioner's reply unsatisfactory, and decided to proceed further in the matter. The dealership was then terminated on 22.12.2010. This was challenged in WP(C) 8175/2010, which was withdrawn on 23.08.2012 with liberty to pursue arbitration proceedings.

7. The petitioner invoked the arbitration clause contained in the dealership agreement, and Mr. Arun Garg, an officer of the respondent, was appointed as the sole arbitrator in accordance with the arbitration clause. Before the arbitrator, the petitioner filed a statement of claim seeking restoration of the dealership agreement and cancellation of the termination letter, as well as damages.

8. The respondent, in its reply to the petitioner's statement of claim, relied *inter alia* upon the laboratory test results mentioned above. The respondent contended that the test results demonstrated adulteration and tampering with the quality of the product by the petitioner. The petitioner filed an affidavit in evidence dated 09.09.2013, reiterating its contentions regarding non-compliance with provisions of the MDG, and drawing out various discrepancies in the

laboratory reports. On behalf of the respondent, evidence was led by way of an affidavit of Mr. Raj Jindal, Chief Regional Manager - Retail, HPCL, Meerut Retail Regional Office, dated 27.09.2013.

9. The petitioner thereafter filed an application dated 04.04.2014 before the arbitrator contending *inter alia* that there was no occasion for the respondent to have sent a second set of depot samples to the laboratory on 30.01.2009, even prior to the report dated 25.02.2009, wherein the sample submitted on 24.01.2009 was reported to be “leaky”. The specific contention of the petitioner was that the letter dated 30.01.2009 (by which the second depot sample is alleged to have been submitted to the laboratory) and the report dated 28.04.2009, by which the second depot sample was found to be within specifications, were fabricated documents. The petitioner therefore sought permission to cross-examine the respondent’s witness.

10. The arbitrator made his award on 09.09.2014. He declined the petitioner’s request for an opportunity to cross-examine the witness. On a consideration of the material before him, the arbitrator came to the conclusion that the respondent’s termination of the dealership agreement was not illegal. Consequently, he declined to award restoration of the dealership or damages in favour of the petitioner, but awarded the value of stock lying at the outlet, and also gave the petitioner permission to remove his goods and belongings from the site.

11. Being aggrieved by the said award, the petitioner has filed the present petition under Section 34 of the Act.

SUBMISSIONS

12. The only ground of challenge argued by Mr. Sanat Kumar, learned Senior Counsel for the petitioner, is that the arbitrator's failure to permit cross-examination of the respondent's witness renders the impugned award liable to be set aside for violation of the principles of natural justice.

13. Mr. Kumar drew my attention particularly to the first proviso to Section 24 of the Act, to submit that in the absence of an agreement to the contrary, an oral hearing for the presentation of evidence or for oral arguments is required to be held at the request of either party. He emphasised that the petitioner was not party to the documents in question, which were fundamental to the termination of the petitioner's dealership. In the context of the disputes raised, he submitted that the petitioner's request for cross-examination was not arbitrary or whimsical, and ought to have been allowed. In support of his argument on the requirements of the principles of natural justice, Mr. Kumar referred to the judgments of this Court in *Degremont Ltd. vs. Yamuna Gases & Chemicals Ltd. & Ors.*, (2012) 186 DLT 343, and of the Bombay High Court in *Pradyuman Kumar Sharma & Ors. vs. Jaysagar M. Sancheti & Ors.*, 2013 SCC OnLine Bom 453, (2013) 5 Mah. L.J. 86, and *Bi-Water Penstocks Ltd. vs. Municipal Corporation of Greater Bombay & Anr.*, (2011) 3 Mah. L.J. 706.

14. Mr. Kumar cited the judgments of the Supreme Court in *Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors.*, (2003) 2 SCC 107 (Paragraph 5), *Hindustan Petroleum Corporation Ltd. & Ors. vs. M/s Super Highway Services & Anr.*, (2010) 3 SCC 321

(Paragraphs 31 & 33), and *M/s Bharat Petroleum Corporation Ltd. vs. Jagannath & Co. & Ors.*, (2013) 12 SCC 278 (Paragraphs 14-16), to support the petitioner's case on merits regarding violation of the MDG guidelines.

15. Mr. Anupam Srivastava, learned counsel for the respondent, on the other hand, submitted that the challenge raised by the petitioner on these grounds does not fall within the scope of Section 34 of the Act. He relied upon the Division Bench decision of this Court in *State Trading Corporation of India Ltd. vs. Toepfer International Asia PTE Ltd.*, (2014) 3 ArbLR 105 (Delhi), 2014 (144) DRJ 220 in this connection.

16. Mr. Srivastava further submitted that the proviso to Section 24(1) of the Act ought not to be read so as to render the principal provision, granting discretion to the arbitrator, redundant. It was his submission that the proviso to Section 24(1) only permits a party to approach the arbitrator in the absence of any prior determination as to the permissibility of oral hearings, but does not cast any obligation upon the arbitrator to permit oral hearings. He referred to the judgment of the Supreme Court in *V. Tulasamma & Ors. vs. Sasha Reddy*, (1977) 3 SCC 99 (paragraphs 4 and 40) with regard to the proper construction of a proviso to a statutory provision. Mr. Srivastava commended the view taken by the Madras and Bombay High Courts in *Anand Viswanathan & Ors. vs. Kotak Mahindra Bank Ltd. & Ors.* [O.P. No. 726/2011, decided on 26.02.2019], and *Vinay Bubna vs. Yogesh Mehta & Ors.*, 1998 SCC OnLine Bom 399; 1998 (100) 3 Bom.L.R. 739 respectively. He also cited the judgment of a Division

Bench of the Bombay High Court in *Harinarayan Bajaj vs. Madhukar Sheth*, 2015 (3) Arb.L.R. 234 (Bom) in this connection.

17. Factually, Mr.Srivastava submitted that the petitioner's application before the arbitrator was made only on 04.04.2014 –more than six months after the affidavit of evidence was filed by the respondent's witness. He referred to the application to submit that the grounds taken by the petitioner were untenable and baseless, having regard to the fact that the samples received by the laboratory, as evidenced by the letter dated 30.01.2009, were in fact tested, and the report dated 28.04.2009 was filed.

18. On the question of delay, Mr. Kumar pointed out in rejoinder that the affidavit of evidence of the respondent's witness was received by the petitioner only at the hearing on 01.10.2013, following which, the next hearing was held only on 04.04.2014, when the petitioner's application was made. He submitted (and it was not disputed by Mr.Srivastava) that although several hearings were fixed in the interregnum, they were adjourned in advance, and no proceedings were actually held between 01.10.2013 and 04.04.2014.

ANALYSIS

I. Statutory provisions

19. The relevant provisions of the Act, required for adjudication of the questions raised in this petition, are reproduced below:-

“18.Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

19. Determination of rules of procedure.—(1) *The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*

(2) *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*

(3) *Failing any agreement referred to in subsection (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*

(4) *The power of the arbitral tribunal under subsection (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

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24. Hearings and written proceedings.—(1) *Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:*

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held:

¹ *[Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]*

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.”

20. Section 34 of the Act, to the extent relevant for the present purposes, contemplates setting aside of an award on the following grounds:

“34. Application for setting aside arbitral award.—

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(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so

submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

¹*[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—*

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

²*[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]*

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II. Principles of Natural Justice

21. In considering the question raised in the context of a petition under Section 34 of the Act, it must be noted at the outset that the Supreme Court has, time and again, emphasised adherence to the principles of natural justice as a part of the fundamental policy of Indian law. In *ONGC Ltd. vs. Western Geco International Ltd.*, (2014) 9 SCC 263, the Court held *inter alia* as follows: -

“38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.”

22. Referring to *Western Geco* (supra) and *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, the Court reiterated these principles in *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India*, 2019 (3) ArbLR 152 (SC): 2019 SCCOnline SC 677. In paragraph 35 of *Ssangyong* (supra), the

analysis in *Western Geco* has been reaffirmed, at least to the extent that it applies to arguments of natural justice: -

“...However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).”

23. Mr.Srivastava referred to the decision in *State Trading Corporation of India* (supra), to emphasise the limited scope of Section 34. However, even in that decision, the Division Bench observed that the legitimacy of the process is well within the scope of the Court's consideration. Reading this judgment in consonance with the decisions of the Supreme Court, I am of the view that the present challenge falls within these boundaries.

III. Delay

24. The next preliminary point which requires consideration is Mr.Srivastava's argument that the petitioner requested cross-examination belatedly.

25. It is undisputed that an affidavit of evidence was filed on behalf of the respondent on 01.10.2013 and the next hearing was only held on 04.04.2014, when the request for cross-examination was made to the arbitrator. Although some hearings had been scheduled in the interregnum, it is evident from the material on record that no hearings were in fact held. Considering that all the dates of hearing between 01.10.2013 and 04.04.2014 were cancelled in advance of hearing,

I find that the petitioner's request to the arbitrator was made at the appropriate stage.

IV. Interpretation of Section 24(1) of the Act

(a) Background:

26. In interpreting the procedural provisions of the Act, and assessing the integrity of the arbitral process in a given case, Section 18 provides the guiding principle. Equal treatment of the parties and grant of full opportunity to present their cases is central to the credibility of arbitration as a binding form of alternative dispute resolution. The procedure determined by a tribunal under Section 19, and any exercise of discretion in procedural matters, must fulfil these requirements. Section 24, which is based upon Article 24 of the UNCITRAL Model Law on Commercial Arbitration, requires interpretation in this context.

27. Whether oral hearings are to be held – either for presentation of evidence or for oral arguments – may be a matter upon which the parties have reached agreement. If so, it is clear from the opening words of Section 24(1), and consistent with the doctrine of party autonomy, that their agreement would prevail.

28. Absent such agreement however, the Arbitral Tribunal is vested with discretion to decide this question. It appears from the first proviso to Section 24(1) that the discretion of the arbitrator in this regard is subject to one of the parties requesting an oral hearing. The principle of the provision is that the requirement of due process includes a right to oral hearing at the appropriate stage, if a party so desires. The question to be decided is whether the proviso entitles a

party to oral hearing at its option, or leaves this matter to the discretion of the Arbitral Tribunal.

(b) Authorities cited:

29. In the judgment of this Court in *Degremont* (supra), relying upon Section 18 of the Act, an arbitral award was set aside on the ground of ‘procedural infirmities’. Mr.Sanat Kumar relied upon the following extracts of the said judgment:-

*“30. The reply by Respondent No. 1 to the counter claims of the Petitioner was over 300 pages. It was but necessary for the Tribunal to have permitted the Petitioner to file a rejoinder to the said reply. Moreover, considering that a large number of documents had been filed by both the parties and the claim was for a sum of over Rs. 3.5 crores involving disputed questions of fact, it was necessary for the Tribunal to have devised a procedure consistent with Section 18 of the Act to ensure that full opportunity was given to both the parties to support their respective claims and counter claims. **It was also necessary, in the facts and circumstances of the present case, to permit the parties to file affidavits by way of examination in chief and also in a time-bound manner complete the cross-examination of witnesses.** On the other hand, the Tribunal appears to have adopted summary procedure of going by the written submissions of both the parties. While a Tribunal is not bound by the strict rules of evidence and the rules of procedure that govern the proceedings before a civil court, **it must ensure that adequate opportunity is given to the parties before it to present their respective cases and establish the veracity of the documents relied upon by them.** As far as the present case is concerned, it was not correct for the Tribunal to have adopted a summary procedure of going only by the written submissions of the parties. The Tribunal also does not appear to have referred to the*

numerous documents filed by the parties in the impugned Award.

31. This Court holds that the procedure adopted by the Tribunal in the present case was far from satisfactory and was not consistent with the requirement of Section 18 of the Act. This is another ground on which the impugned Award is unsustainable in law and is hereby set aside.”

[Emphasis supplied]

30. Mr.Kumar also relied upon a judgment of the Bombay High Court in *Pradyuman Kumar Sharma* (supra) (paragraph 33), wherein on an interpretation of Section 24 of the Act, it has been held that consideration of an unproven document by an arbitrator would be in violation of the principles of natural justice. A Division Bench of Bombay High Court in *Bi-water Penstocks Ltd.* (supra) also came to the same conclusion that even though an arbitrator is not bound by technical rules of procedure, the rules of natural justice must be observed, failing which the award would be liable to be set aside.

31. Mr.Srivastava very fairly drew my attention to a decision of a Single Bench of Madras High Court in *ADV Consultant vs. Pioneer Equity Trade (India) Pvt. Ltd.*, 2009 SCC OnLine Mad 1072, (2009) 8 Mad LJ 1578, in which Section 24 was interpreted as follows:-

“2. The main ground on which the award is challenged by the petitioner who was the respondent before the Arbitral Tribunal, apart from the grounds of bias and the failure to give proper opportunity, is that the Arbitrator has not conducted the proceedings as per section 19(2) read with section 24 of the Arbitration and Conciliation Act, 1996. It is the case of the petitioner that the petitioner had demanded to have oral hearing which was

not allowed and no order was passed by the Arbitrator on the request and there is no mention about it in the award.

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*7. A combined reading of section 24(1) and section 19 of the said Act makes it clear that on the factual situation of this case, the petitioner has requested for oral hearing, which has been denied by the Arbitrator without assigning any reason. **By virtue of the proviso to section 24(1) of the Act, that is, when one of the parties requests for oral hearing, it is the duty of the Arbitral Tribunal to conduct the same unless consent of the parties have been formulated by the Arbitral Tribunal agreeing not to have oral hearing.** In the absence of any reason adduced by the learned Arbitrator, it has necessarily to be construed that the denial of oral hearing requested by the petitioner, by the Arbitrator is against the provisions of the Act. In such circumstances, the contention of the learned counsel for the petitioner in this regard has to be accepted.”*

[Emphasis supplied]

32. The aforesaid judgments lend support to an interpretation of the first proviso to Section 24(1) in mandatory terms. It may be derived therefrom that a party has a right (at least, in the absence of a prior agreement to the contrary) to cross-examine a witness produced by the other party. The importance of the right to cross-examination has been emphasised in Mustill & Boyd, *Commercial Arbitration*, Second edition, 1989, Chapter 22, Paragraph C5 (at pg 308):

“C5: Opportunity to controvert opponent’s case: Each party must have a reasonable opportunity to challenge the case put forward by his opponent. The parties must be able to find what case is to be met, and must be enabled to test the opponent’s case by cross-examining the witness and leading evidence in rebuttal, and to

controvert his opponent's arguments on facts or law by making submissions in reply."

33. Mr.Srivastava however relied upon a somewhat contrary interpretation of Section 24 of the Act by the Madras High Court in *Anand Vishvanathan(supra)*. The learned Single Judge in that judgment held as follows: -

*"26. A perusal of proviso to Section 24 A& C Act reveals that Arbitral Tribunal should hold oral hearings at an appropriate stage of the proceedings, when a request is made by a party. This is contained in the proviso to Section 24(1) of A & C Act. **To be noted, Section 24 as such gives elbowroom for the Arbitral Tribunal to decide whether oral hearings has to be held at all, but that is controlled by the proviso.** Proviso has to be construed strictly.*

*27. Be that as it may, even with regard to proviso, it is clear that **it is imperative on the part of the Arbitral Tribunal to hold oral hearing, if a request is made by a party and the only exception to this rigour is when parties have agreed that no oral hearings shall be held....***

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31. In the normal circumstances, it can be held that the matter rests here. The reason is, oral hearings as envisaged under Section 24 of A& C Act is clearly for the presentation of evidence or for oral argument. To be noted, the expression as occurring in Section 24(1) of A & C Act is 'oral hearings for the presentation of evidence or for oral argument'. This expression makes it clear that oral hearings if any can be for two purposes. One is, for presentation of evidence and the other is, for oral arguments. It can obviously be for both also in a given case. Therefore, the expression 'oral hearings' occurring in the first proviso to section 24(1) of A & C Act should necessarily be construed to mean oral hearings for the presentation of evidence or for oral argument, i.e., two

purposes set out herein. As the petitioners in the instant case have clearly sought for permission to let in oral evidence, particularly in paragraph 18 of the counter statement before Arbitral tribunal, it follows as a sequitur that if the request had been acceded to, it would have resulted in holding oral hearings. Be that as it may, **proviso makes it mandatory for Arbitral tribunal to hold oral hearings if a request in this regard is made by a party and the only exception is when parties had agreed (in the arbitration agreement) that no oral hearings shall be held.** As already alluded to supra, the parties in the instant case have not agreed that no oral hearings shall be held, but what is of importance is arbitration clause is silent on this aspect. When arbitration clause is silent on this aspect, I am of the considered view that it should at best be left to the discretion of the Arbitral tribunal to decide whether oral hearings are necessary.

32. This court reminds itself that Arbitral tribunal being a creature of contract (in contradistinction to being creature of a Statute) is clearly a private tribunal which can evolve its own procedure without being bound by 'The Code of Civil Procedure, 1908' ('CPC' for brevity) or for that matter 'The Indian Evidence Act, 1872' ('Evidence Act' for brevity). Under such circumstances, if an arbitration clause, (i.e., arbitration agreement within the meaning of Section 7 of A & C Act) in which it has not been explicitly articulated/covenanted that parties have agreed that no oral hearings shall be held, is to be construed in such a manner that oral hearings become mandatory the moment a party asks for oral evidence to be let in (as the arbitration agreement is silent) that will dilute the complete discretion vested in the Arbitral tribunal qua evolving its own procedure without being bound by CPC or Evidence Act. Therefore, in my considered opinion, the expression 'unless the parties have agreed that no oral hearing shall be held' occurring in the first proviso to section 24(1) of A & C Act will mean cases where parties have explicitly covenanted that

they agree that no oral hearings shall be held and not to cases where the arbitration agreement/clause is silent on this aspect of the matter.”

[Emphasis supplied]

34. Mr.Srivastava next relied upon the judgment in *Vinay Bubna* (supra), particularly paragraph 59 thereof, which is set out below: -

*“59. That takes us to the next challenge namely that the petitioners were denied opportunity of leading evidence. The proviso to sub-section (1) of section 24 is clear. **If the parties before the arbitral tribunal seek to lead oral evidence it must be granted as the expression is shall hold oral hearings at the request of the parties.** It may be that **even in the expression ‘shall’ in a limited number of cases wherein in fact no evidence is required to be led, the tribunal can reject such an application.** In the instant case, however the petitioner had pointed out the need to examine the witnesses. The tribunal on the express language of the proviso to section 24(1) could not have denied that opportunity. On that count also the Award is liable to be set aside.”*

[Emphasis supplied]

35. These two judgments do not, in my view, depart from the above interpretation of Section 24 in general terms. However, to the extent that they appear to vest some residuary discretion in the arbitrator, the request for oral hearings can only be declined in exceptional circumstances and for reasons to be recorded. It is not necessary to consider this issue further in the present case as, for the reasons stated below, I find that the present case was not one which falls in that exceptional category.

36. Similarly, the Division Bench judgment of Bombay High Court in *Harinarayan Bajaj* (supra) is distinguishable. Although Section 24

is not discussed in the judgment at all, the circumstances in which it was held that a refusal for permission to cross-examine the respondent did not afford a ground for setting aside was that the respondent had not been examined as a witness at all. The Division Bench judgment is therefore authority for the proposition that a person who does not give evidence cannot be compelled to offer himself for cross-examination. In the present case, in contrast, evidence was led by the witness on behalf of the respondent, who was sought to be cross-examined.

(c) *Legislative History of the UNCITRAL Model Law:*

37. Support for a reading of the proviso to Section 24(1) of the Act in mandatory terms can also be derived from the legislative history of the corresponding provision of the UNCITRAL Model Law.

38. Section 24(1) and its first proviso are based upon Article 24(1) of the Model Law, reproduced below: -

“Article 24 - Hearings and Written Proceedings

*1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. **However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.***

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be

communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.”

[Emphasis supplied]

39. The use of the word “shall” in the second part of Article 24(1) appears to be a deliberate and considered attempt to incorporate a mandate to the Tribunal to grant a request, if made by either party. This is evident from a perusal of Article 24 of the Draft Model Law considered by UNCITRAL. In the Draft Model Law, the corresponding provision, set out below, used the directory “may”, rather than the imperative “shall”:

“Article 24 - Hearings and Written Proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

*(2) Notwithstanding the provisions of paragraph (1) of this article, **if a party so requests, the arbitral tribunal may, at any appropriate stage of the proceedings, hold hearings for the presentation of evidence or for oral argument.***

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for inspection purposes.

(4) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or other document, on which the arbitral tribunal may rely in making its decision, shall be communicated to the parties.”

[Emphasis supplied]

40. In the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General (A/CN.9/264) [as published in the United Nations Commission on International Trade Law Yearbook, 1985 (Vol. XVI)], the following comments were offered with regard to Articles 19(3) and 24(1) and (2) of the Draft Model Law, which correspond to Sections 18 and 24(1) of the Act, respectively:

Regarding Article 19(3)

“Fundamental requirements of fairness, paragraph (3)

7. **Paragraph (3) adopts basic notions of fairness in requiring that the parties be treated with equality anti each party be given a full opportunity of presenting his case.** *As expressed by the words "in either case", these fundamental requirements shall be complied with not only by the arbitral tribunal when using its discretionary powers under paragraph (2) but also by the parties when using their freedom under paragraph (1) to lay down the rules of procedure. **It is submitted that these principles, in view of their fundamental nature, are to be followed in all procedural contexts, including, for example, the procedures referred to in articles 13 and 14.***

8. **The principles, which paragraph (3) states in a general manner, are implemented and put in more concrete form by provisions such as articles 24 (3), (4) and 26(2).** *Other provisions, such as articles 16(2), 23(2) and 25(c), present certain refinements or restrictions in specific procedural contexts in order to ensure efficient and expedient proceedings. These latter provisions, which like all other provisions of the model law are in harmony with the principles laid down in article 19(3), make it clear that "full opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example,*

present any objections, amendments, or evidence only on the eve of the award.

9. *Of course, the arbitral tribunal must be guided, and indeed abide, by this principle when determining the appropriate conduct of the proceedings, for example, when fixing time-limits for submission of statements or evidence or when establishing the modalities of hearings.* It must, for instance, not require more from a party than what may be reasonably expected under the circumstances. With regard to the observation of the Working Group noted in the commentary to article 12 (para. 5), it might be doubted whether a party is given a full opportunity of presenting his case where, although he is able to state in full his claim and the evidence supporting it, the conduct, of an arbitrator reveals clearly lack of competence or of another qualification required of him by agreement of the parties.”

[Emphasis supplied]

Regarding Article 24 (1) and (2)

“Proceedings with or without oral hearing, paragraphs (1) and (2)

1. Paragraphs (1) and (2) deal with the important procedural question whether there will be any oral hearing or whether, as is less common, the arbitral proceedings will be conducted exclusively on the basis of documents and other materials (i.e. as "written proceedings"). Under paragraph (1), the arbitral tribunal shall decide that question, subject to any contrary agreement by the parties and subject to paragraph (2), which should, thus, be commented upon together with paragraph (1). In order to facilitate understanding the interplay of these two paragraphs, it seems advisable to distinguish three situations.

2. The first situation is that the parties have agreed that there shall be an opportunity for oral argument or hearings for the presentation of evidence, either upon

request of a party or even without any such specific request. In such case, which is probably not very common, the arbitral tribunal would have to comply with that agreement, although a literal interpretation of the words "notwithstanding the provisions of paragraph (1)" could lead to the conclusion that even in such case the arbitral tribunal would have discretion as to whether to follow any later request of a party.

3. The second situation is that the parties have agreed on written proceedings. In such case, which is probably even less common than the first one, the arbitral tribunal would have to comply with the wish of the parties (paragraph (1)). However, if a party later requests a hearing, paragraph (2) empowers the arbitral tribunal to disregard the original agreement of the parties and, in exercising its discretion, to hold a hearing at an appropriate stage of the proceedings. The underlying philosophy is that the right of a party to request a hearing is of such importance, as emphasized by article 19(3), that the parties should not be allowed to exclude it by agreement, while, on the other hand, it is desirable to envisage a certain control by the arbitral tribunal in order to avoid its abuse for purposes of delaying or obstructing the proceedings.

4. The third situation is that the parties have not made any stipulation on the mode of the proceedings. In such case, which appears to be the most common of all three situations, the arbitral tribunal would have discretion under paragraph (1) to decide whether to hold an oral hearing. According to paragraph (2), it would retain this discretion even if a party requests an oral hearing. It is submitted that this latter rule, which appears to be the result of a legislative oversight, should be reconsidered since it may be regarded as not being consistent with article 19(3). Under the present text, a party would have the fundamental right to present his views or evidence in an oral hearing, unrestricted by any discretion of the arbitral tribunal, only if so provided in

the agreement of the parties, which, as mentioned above, is rarely the case and should not be made a necessity by the model law.

5. As regards the particulars of paragraph (2), it may be noted that the wording "hearings for the presentation of evidence or for oral argument" is intentionally adopted in such general form. The formula "presentation of evidence" is intended to cover all possible types of evidence recognized in various legal systems and potentially admitted under article 19(1) or (2), e.g. evidence by witness, expert witness, cross-examination of any such witness, testimony and cross-examination of a party. The formula "oral argument" is intended to cover arguments not only on the substance of the dispute but also on procedural issues."

[Emphasis supplied]

41. The UNCITRAL Report on Adoption of the Model Law also underscored the concern expressed in the Analytical Commentary. The relevant extracts of the report, dealing with Article 24(1) and (2) of the Draft Model Law, are reproduced below:

*"203. The Commission noted that article 24 dealt with the issue of the mode of arbitral proceedings as a matter of principle and did not deal with the procedural aspects of deciding that issue. For example, the article did not deal with the question of the point of time when the arbitral tribunal would have to decide on the mode of the arbitral proceedings. That meant that the arbitral tribunal was free to decide that question at the outset of the proceedings, or it could postpone the determination of the mode of the proceedings and make such determinations in the light of the development of the case. Before so deciding the arbitral tribunal would normally request the parties to express their view or possible agreement on the question. **The article also did not deal with, and therefore did not limit, the power of the***

arbitral tribunal to decide on the length of oral hearings, on the stage at which oral hearings could be held, or on the question whether the arbitral proceedings would be conducted partly on the basis of oral hearings and partly on the basis of documents. It was noted that such procedural decisions were governed by article 19, including its paragraph (3).

204. The Commission was agreed that an agreement by the parties that oral hearings were to be held was binding on the arbitral tribunal.

205. As to the question whether an agreement by the parties that there would be no oral hearings was also binding, different views were expressed. Under one view, the right to oral hearings was of such fundamental importance that the parties were not bound by their agreement and a party could always request oral hearings. Under another view, the agreement of the parties that no oral hearings would be held was binding on the parties but not on the arbitral tribunal so that the arbitral tribunal, if requested by a party, had the discretion to order oral hearings. However, the prevailing view was that an agreed exclusion of oral hearings was binding on the parties and the arbitral tribunal. Nevertheless, it was noted that article 19 (3), requiring that each party should be given a full opportunity to present his case, might in exceptional circumstances provide a compelling reason for holding an oral hearing. It was understood that parties who had earlier agreed that no hearings should be held were not precluded from later modifying their agreement, and thus to allow a party to request oral hearings.

206. **The Commission was agreed that where there was no agreement on the mode of the proceedings a party had a right to oral hearings if he so requested.** In that connection it was noted that the French version of paragraph (2) reflected that view while according to other versions of that paragraph the arbitral tribunal

retained the discretion whether to hold oral hearings even if requested by a party.

207. The Commission was also agreed that where there was no agreement on the mode of the proceedings, and no party had requested an oral hearing, the arbitral tribunal was free to decide whether to hold oral hearings or whether the proceedings would be conducted on the basis of documents and other materials.

208. The Commission referred the implementation of its decisions to the Drafting Group.

*209. During consideration of the second sentence of article 24 (1), as presented by the Drafting Group, which read as follows: "However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, if so requested by a party at an appropriate stage of the proceedings, hold such hearings", the question was raised whether "at an appropriate stage" should refer to the request or to the proceedings. **After discussion the Commission decided to reword the sentence as follows: "However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."***

[Emphasis supplied]

42. It appears that the Model Law was thereafter revised to reflect the above comments. In the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, Article 24 is characterised as an illustration of the general principle of equality and full opportunity. Paragraph 32 of the Explanatory Note states as follows:-

“a. Fundamental procedural rights of a party

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.”

[Emphasis supplied]

43. The aforesaid understanding of the Model Law thus supports the reading of the first proviso to Section 24(1) of the Act as a “right” of a party, and therefore as a mandate to the Tribunal.

(d) Conclusion:

44. From the aforesaid materials, and upon an interpretation of Section 24 consistent with the requirements of natural justice, I am of the view that the first proviso to Section 24(1) requires a party’s request for oral hearings at the stage of evidence or arguments to be granted. Unless the right to require oral evidence or oral arguments has been waived by a prior agreement to the contrary between the parties, the proviso to Section 24(1) expresses a legislative preference for the grant of oral hearing at the request of either party. The judgment in *V. Tulasamma* (supra), cited by Mr.Srivastava, holds that a proviso carves out an exception to the main provision, but cannot

destroy the effect of the main provision itself. In my view, this interpretation of the proviso to Section 24 does not fall foul of this principle – the proviso provides for an exception to the general provision, that the arbitrator has discretion on the question of whether or not to permit oral hearings.

45. Some guidance in this regard can also be found in the recent judgment of the Supreme Court in *Jagjeet Singh Lyallpuri (Dead) Through Lrs. & Ors. vs. Unitop Apartments & Builders Ltd.*, 2019 SCC OnLine SC 1541 [Civil Appeal No. 692/2016, decided on 03.12.2019]. The High Court, in that case, had set aside an award on the ground that parties were not given adequate opportunity to lead evidence and cross-examine witnesses. The Supreme Court set aside that decision on the finding that the parties had expressly agreed that cross-examination of witnesses was not required. The challenge was therefore repelled (in paragraph 15 of the judgment) on the grounds of estoppel, rather than on a finding that the party did not otherwise have a right to lead evidence or cross-examine witnesses.

46. Having so held, a word of caution is necessary. The right granted in Section 24 does not require an Arbitral Tribunal to countenance unending cross-examination or oral arguments. It is always open to the arbitrator to determine the length and scope of oral hearings, which would necessarily depend upon the facts and circumstances of each case. If a party seeks oral evidence, for example, the Tribunal may be able, after hearing the parties, to determine the points on which evidence is to be led. Similarly, arbitrators can set appropriate time limits for oral arguments.

The arbitrators can require an application to be filed by the concerned party, setting out the necessary material to enable the Tribunal to determine these matters. Further, the second proviso to Section 24(1) expressly provides for hearings on a day-to-day basis without unnecessary adjournments. The specific insertion of the second proviso to Section 24(1) in our law, which goes beyond the framework of the Model Law, indicates a legislative direction to litigants and arbitrators in the interests of expeditious adjudication. Paragraph 8 of the Analytical Commentary, paragraph 203 of the UNCITRAL Report on Adoption of the Model Law, and paragraph 32 of the Explanatory Note to the Model Law make the limits of Article 24 quite clear – a party’s rights do not extend to determining procedural issues, such as the length or timing of oral hearings. These matters remain squarely in the domain of the Arbitral Tribunal. In an appropriate case, a request for oral hearing may be found to have been unreasonable or unnecessary, and to have been made for collateral purposes, such as to delay the proceedings. In such a case, Section 31(8) read with Section 31A of the Act empowers the Arbitral Tribunal to make an order of costs in favour of the innocent party. Sections 31A(3)(a) and 31A(4)(e) and (f) in particular permit the Tribunal to make a specific order of costs in relation to a particular stage of proceedings, having regard *inter alia* to the conduct of the parties. Recourse to these safeguards will check strategic requests for oral hearing, intended only to delay proceedings, without denying parties the fundamental protections of natural justice.

V. **Application to the facts of the present case**

47. In the present case, I am of the view that the petitioner's request for oral evidence to be led on the veracity and contents of the letters dated 30.01.2009 and 28.04.2009 was reasonable, and could not have been rejected in the manner reflected in the award. The said documents were fundamental to the case of the respondent. The respondent's contention, as recorded in the award, were based on a comparison of the report dated 25.02.2009 (with regard to the depot samples taken) and the report dated 28.04.2009 (with regard to the supply location sample). The award records the respondent's submission *inter alia* as follows:-

“...The defence of the respondent is summarised as under:

a) That at the time of inspection, clinical tests were carried out at the retail outlet for both MS and HSD. The mobile lab report for MS dated 22/01/2009 provided that MS failed in parameter recovery at 100 degree Celsius as the observed recovery of MS sample drawn from the outlet recorded 78, which is more than the prescribed standard limit of 40-70. The mobile lab report for HSD dated 22/01/2009 provided that the HSD sample meets the specification. The said mobile lab reports for MS and HSD were signed and acknowledged by Claimant.

b) That the Delhi Metro Lab report dated 25/02/2009 for MS provided that the retail outlet nozzle sample failed at parameter recovery at 100 degree Celsius and failed to meet specifications as per IS-2796:2008. The report further provided that the TT samples were not tested by the lab as the same were found to be leaky and the supply location sample was also not tested as the same was also

returned as it was leaky. Since the sample container is sealed and kept inside another wooden sample box it is not possible to know the status of the sample (whether it is leaky or not) at the time of its collection which is done on 'as is where is basis'.

c) That the depot maintains two identical sets of sample and since one set was found to be leaky at the lab, therefore another set of same samples retained/kept at the Supply location were sent to laboratory for testing and analysis. The Delhi Metro lab, vide report dated 28/04/2009 provided that the depot sample met the specification as per IS:2796:2008. And that both, letter dated 30.01.2009 and the lab report dated 28.04.2009 are perfectly legal and valid documents. From the above facts it is to be noted that since the depot sample was found to be meeting the IS specifications, it is evident that the product supplied to the dealer was proper and conforming to the required IS specification. Further the TT retention sample could not be tested since the same was not properly maintained by the dealer and was found to be leaky at the time of testing by lab. Since the retail outlet nozzle sample failed to meet the specifications it invariably indicates that Claimant has indulged in tampering with the quality of the product supplied to the claimant in other words indulged in adulteration of product. Considering that the MS sample also failed during the clinical test by mobile lab inspection, and also in the test conducted by Delhi Metro Lab, it is evident that the adulteration has taken place at the Claimant/Dealer's end making him liable for the consequences thereof as mentioned in the Dealership Agreement."

48. The judgments cited by Mr. Sanat Kumar regarding the MDG, namely *Harbanslal Sahnia* (supra), *Hindustan Petroleum Corporation Ltd.* (supra), and *Bharat Petroleum Corporation Ltd.*

(supra), show that while undertaking the process of testing, adherence to proper procedure as laid down in the rules/guidelines framed for that purpose is basic to the process, and the arbitrator ought to have been cognizant of the fact that the disputes raised by the petitioner, with regard to the procedure adopted by the respondent, in fact go to the root of the matter.

49. The only analysis in the impugned award with regard to the veracity of the documents sought to be impeached by the petitioner is as follows:

“v. Regarding the dispute raised by the Claimant on the authenticity of the letter dated 30.01.2009 and the Lab Report dated 28.04.2009, I have to say that they are official records duly signed by responsible Officers of the respondent corporation. The claimant has not attributed any motive to the Officers concerned for indulging in highly irregular practice of fabrication of the documents except for ‘to escape embarrassment’. However, there was no case for the Lab Officers to feel embarrassed for the lapses on part of the Depot, as alleged by the claimant.”

50. In my view, this reasoning is hardly satisfactory. Merely because a document is signed by “responsible officers” to whom no motive is attributed, the request of the petitioner could not have been denied. In fact, the aforesaid reasoning betrays the arbitrator’s implicit faith in the officials of the respondent – of which he also incidentally was one. While acting as an arbitrator, it is the duty of a person to approach the dispute objectively and eschew preconceived notions about the credibility, authenticity or genuineness of either

party's case. The impugned award falls short of that minimum standard.

CONCLUSION

51. For the reasons aforesaid, I am of the view that even on the narrow grounds permissible under Section 34 of the Act, the impugned award is unsustainable. The petition is therefore allowed, and the impugned award dated 09.09.2014 is set aside.

JANUARY 16, 2020
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PRATEEK JALAN, J.



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