

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.06.2022

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

ARB.OP.(COM.DIV) No.270 of 2021

and

WP (MD) No.1183 of 2022

&

WMP (MD) Nos.1035 & 1037 of 2022

ARB.OP (COM.DIV).No.270 of 2021

M/s.Amutha & Co.,
A partnership firm,
Represented by its partners
Mr.A.L.Ramanathan,
249/1, Trichy-Chennai Bye Pass Road,
Thiruvanaikoil, Tiruchirapalli-625 005.

... Petitioner

-Vs-

1. Executive Director (RS-S&W) HO
Indian Oil Corporation Ltd.,
G9, Ali Yavar Jund Marg,
Bandra (East),
Mumbai-400 051.
2. The Executive Director,
(Incharge Tamilnadu and Pondicherry),
Indian Oil Corporation Ltd.,
Marketing Division, Southern Region,
139 Mahatma Gandhi Road,
Chennai-600 034.
3. Indian Oil Corporation Ltd.,
(Marketing Division),
Trichy Divisional Office,
"Triveni" 3rd Floor,
B 35, Shastri Road,
Thillainagar, Trichy-620 018.

... Respondents

WP (MD) No.1183 of 2022

M/s.Amutha & Co.,
A partnership firm,
Represented by its partners

Mr.A.L.Ramanathan,
249/1, Trichy-Chennai Bye Pass Road,
Thiruvanaikoil,
Tiruchirapalli-625 005.

... Petitioner

-Vs-

1. Indian Oil Corporation Ltd.,
(Marketing Division),
Trichy Divisional Office,
"Triveni" 3rd Floor,
B 35, Shastri Road,
Thillainagar, Trichy-620 018.
2. The Executive Director,
(Incharge Tamilnadu and Pondicherry),
Indian Oil Corporation Ltd.,
Marketing Division,
Southern Region, Indian Oil Bhavan,
139 Mahatma Gandhi Road,
(Nungambakkam High Road),
Chennai-600 034.
3. Executive Director (Retail Sales-S & W)
Indian Oil Corporation Ltd., Indian Oil Bhavan
G9 Ali Yuvar Jang Marg,
Bandra (East), Mumbai-400 051.

... Respondents

Prayer in Arb.OP(Com.Div) No.270/2021: Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a new sole Arbitrator to resolve the disputes between the parties may be resolved.

Prayer in WP (MD) No.1183 of 2022: Writ petition filed under Article 226 of The Constitution of India, 1950, praying to issue a writ of Certiorarified Mandamus calling for records with respect to impugned order passed by the 3rd respondent dated 17.09.2021 confirming the order of the 2nd respondent dated 24.10.2013 in TCHDO:R:TRY-2, terminating the Dealership of the Petitioner and quash the same and consequently directing the respondents to permit the petitioner to conduct the business in their outlet.

For Petitioner
in both Arb.OP & WP : Mr.B.Kumar, SC
for Mr.N.Balaji
For Respondents
in both Arb.OP & WP : Mr.Mohammed Fayaz Ali

COMMON ORDER

This common order will govern the captioned Arb.OP, writ petition and the two WMPs in the writ petition.

2. This order has to be read in conjunction with and in continuation of proceedings made by this Court on 01.03.2022 when captioned Arb.OP was listed. This 01.03.2022 proceedings reads as follows:

'Captioned 'Arbitration Original Petition' ('Arb.OP' for the sake of brevity) has been presented in this Court on 29.11.2021 under Section 11(6) 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 with a prayer for appointment of a sole Arbitrator to resolve the disputes between the petitioner and respondents.

2. In these proceedings, for the sake of convenience and clarity the sole petitioner in captioned Arb.OP shall be referred to as 'dealer' and all the three respondents in the captioned Arb.OP shall be collectively referred to as 'Oil Company'.

3. The captioned Arb.OP is predicated on an arbitration agreement which is in the form of a clause i.e., Clause 67 in an agreement captioned 'PETROL / HSD PUMP DEALER AGREEMENT FOR CORPORATION OWNED/LEASED SITES' (hereinafter 'Dealership Agreement' for the sake of convenience and clarity). To be noted, the Dealership Agreement is dated 30.03.2001 and this will be referred to as 'primary agreement' for the sake of convenience and Clause 67 of the primary agreement reads as follows:

'67. Any disputes and/or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some Officer of the Corporation who may be nominated by the Director (Marketing). It is know to the parties to the Agreement that the arbitration so nominated is an employee of the Corporation and may be shareholder of the Corporation. In the event of

the arbitrator to whom the matter is originally referred being transferred or vacating his office of being unable to act for any reason, the Director (Marketing) as aforesaid at the time of such transfer or officer of the Corporation to act as arbitrator in accordance with the terms of the Agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this agreement that no person other than the Director (Marketing) or a person nominated by such Director (Marketing) of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.'

4. Aforementioned Clause 67 serves as an arbitration agreement between the dealer and Oil Company i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

5. The primary agreement pertains to a retail outlet at Trichy-Chennai bypass at Thiruchirapalli. On 04.06.2013, a surprise inspection was conducted by the Oil Company in the aforementioned outlet, the surprise inspection was by the Anti Adulteration Cell, which found certain alleged irregularities resulting in 'show-cause notice' ('SCN' for the sake of brevity) dated 15.07.2013 being issued. The dealer replied to the SCN vide 24.07.2013 reply. This was followed by a personal hearing by the Oil Company on 25.09.2013. Thereafter, the dealership was terminated by the Oil Company in and by a termination order dated 24.10.2013.

6. Petitioner assailed this 24.10.2013 termination order by way of a writ petition in the Madurai Bench of this Court vide W.P (MD) No.654 of 2014 and after full contest, the same came to be disposed of by a Hon'ble single Judge in and by order dated 13.07.2021 inter alia holding that the dealer has to agitate its right only in the manner provided

under the primary agreement. This meant that the dealer had to file an appeal before the Executive Director (Retail Sale), the same was done and Appellate Authority has made an order dated 17.09.2021.

7. Before advertng to the order of the Appellate Authority, it is to be noted that in aforementioned W.P (MD) No.654 of 2014, the aforementioned SCN dated 15.07.2013 and the order of termination dated 24.10.2013 were assailed. Notwithstanding this, another writ petition in the Principal Bench, namely W.P.No. 22052 of 2021 was filed by the dealer assailing the order of termination alone i.e., order of termination dated 24.10.2013. This writ petition also came to be disposed of by another Hon'ble single Judge in and by order dated 25.10.2021 as the counsel for petitioner/dealer sought liberty to invoke the legal course available to the petitioner. This necessarily means that the petitioner wanted to invoke the arbitration clause.

8. Notwithstanding the aforementioned judicial order, this Court is now informed that the petitioner has chosen to file a third writ petition now in the Madurai Bench of this Court i.e., W.P (MD) No.1183 of 2022. This Court is informed that this third writ petition has been filed on 20.01.2022. This Court is also informed that this third writ petition has been filed assailing the aforementioned 17.09.2021 order of the Appellate Authority. This Court is further informed that this third writ petition is now on Board before a Hon'ble single Judge in the Madurai Bench today (01.03.2022) In the interregnum, captioned Arb.OP has been presented in this Court.

9. Mr.N.Balaji, learned counsel for dealer (lone petitioner in captioned Arb.OP) and Mr.Mohammed Fayaz, learned Standing Counsel for Oil Company are before this Court today.

10. The learned Standing Counsel for Oil Company on instructions submits that he is not opposing the prayer in the captioned Arb.OP for appointment of a sole Arbitrator. Learned Standing Counsel also fairly submits that a former Hon'ble Judge of this Court can be appointed as a sole Arbitrator at the choice and discretion of this Court. It is further submitted on instructions that all the disputes that have erupted between the parties vide primary

agreement dated 30.03.2001 can be adjudicated upon and decided by the sole Arbitrator.

11. Notwithstanding the aforementioned fair stand of the learned Standing counsel for Oil Company, learned counsel for petitioner seeks an adjournment citing pendency of aforementioned third writ petition in Madurai Bench. Learned counsel for petitioner submits that the challenge to the order of the arbitration agreement and resuscitation of dealership cannot be ordered by the Arbitral Tribunal. In support of this contention, learned counsel has placed before this Court a case law i.e., E.Venkatakrisnan case [K.Venkatakrisna Vs. Indian Oil Corporation and Another] reported in (2000) 7 SCC 764. As I propose to direct the Registry to place this matter before Hon'ble Chief Justice for tagging captioned Arb.OP with the aforementioned third writ petition, I reserve my opinion on this argument for the present.

12. Be that as it may, learned counsel also attempted to place reliance on Section 43J of A and C Act. Part IA of A and C Act was to be brought into the statute book in and by Section 10 of the Arbitration and Conciliation (Amendment) Act, 2019 i.e., Act No.33 of 2019. Act 33 of 2019 is dated 09.08.2019 and it contains 16 provisions which are to come into force on and from the date they are notified by the Central Government in the Official Gazette. This is clearly ingrained in sub-section (3) of Section 1 of amending Act. Only 10 out of the 16 provisions were notified by the Central Government in and by S.O 3154 (E) and those 10 provisions are Sections 1, 4 to 9, 11 to 13 and 15. This means Section 10 of amending Act 2019 has not been notified and this has not come into force. Therefore, learned counsel relying on Section 43J which has not even come into force is of no consequence.

13. Registry to place this matter before Hon'ble Chief Justice seeking a decision regarding the tagging of captioned Arb.OP with W.P (MD) No.1183 of 2022 so that there is no anomaly. Let the Registry do the needful.'

3. Pursuant to aforementioned proceedings, a note was placed before Hon'ble Chief Justice and Hon'ble Chief Justice by an order dated 21.03.2022 on the administrative side had tagged the captioned Arb OP with writ petition and had directed the

entire case file of captioned writ petition to be called for from Madurai Bench. Thereafter, Registry had placed one more note before Hon'ble Chief Justice regarding listing of tagged matters. Hon'ble Chief Justice by an order dated 04.04.2022 on the administrative side had directed tagged Arb.OP and writ petition to be listed before this Bench which has been given the arbitration (Commercial) cases portfolio/determination.

4. To be noted, short forms, abbreviations and short references used in the earlier proceedings dated 01.03.2022 will continue to be used in the instant order also for the sake of convenience and clarity.

5. In the hearing today Mr.Mohammed Fayaz Ali, learned counsel for Oil Company submits, on instructions, that he is not resisting the captioned Arb.OP. This means that there is no impediment in appointing a sole Arbitrator afresh for entering upon reference and adjudicating the lis between the parties arising out of the Dealership Agreement. This takes us to the captioned writ petition. In the captioned writ petition, orders dated 17.09.2021 and 24.10.2013 made by the Original Authority and Appellate Authority qua termination of dealership have been assailed.

6. In response to the aforementioned challenge, learned counsel for Oil Company very fairly submits that petitioner-dealer has not been blacklisted and therefore, petitioner-dealer can certainly participate in future when Oil Company embarks upon the exercise of calling for applications for appointment of dealers.

7. Likewise Mr.N.Balaji, learned counsel for dealer advertng to paragraph 11 of aforementioned 01.03.2022 proceedings in the captioned Arb.OP very fairly submits that it is nobody's case that challenge to termination is not arbitrable. The point is, if the dealer succeeds in its challenge, what kind of relief can be given by the Arbitral Tribunal. Whether it can be resuscitation of dealership or damages only. The question of whether a dealership can be resuscitated came up for consideration in Bhagawan Balasai case before a Division Bench of this Court constituted by Hon'ble Mr.Justice M.M.Sundaresh [when His Lordship was a Judge of this Court] and myself. I had penned the judgment for Hon'ble Division Bench. In this Bhagawan Balasai principle [Indian Oil Corporation Ltd., Vs. Bhagawan Balasai Enterprises and Another reported in 2017 SCC Online Mad 37266], judgments of Hon'ble Supreme Court in (i) Indian Oil Corporation Ltd., Vs. Amritsar Gas Service reported in (1991) 1 SCC 533 and (ii) E.Venkatakrishna Vs. Indian Oil Corporation reported in 2000 (3) Raj 63 (SC) were followed and it was held that restoration of

dealership agreement is contrary to law as it turns on Section 14(1)(d) of The Specific Relief Act, 1963 (Act 47 of 1963). To be noted, Amritsar Gas principle is holding the field.

8. Therefore, as all disputes that have arisen between the dealer and Oil Company qua Dealership Agreement i.e., Agreement dated 30.03.2001 captioned 'PETROL / HSD PUMP DEALER AGREEMENT FOR CORPORATION OWNED/LEASED SITES' are arbitrable, relief that can be granted will be governed by Amritsar Gas principle. This Court proceeds to appoint sole Arbitrator. To be noted, this Court is informed that the Dealership Agreement dated 30.03.2001 has since elapsed [expired as the term is fifteen years]. In other words Dealership Agreement elapsed/expired in 2016.

9. Before doing that, this Court reminds itself that the scope of a legal drill under Section 11 of A and C Act should perambulate within the statutory perimeter sketched by sub-section (6A) thereat, which reads as follows:

'(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.'

10. Aforementioned sub-section (6A) of Section 11 of A and C Act came up for consideration before Hon'ble Supreme Court in Mayavati Trading Pvt. Ltd vs Pradyut Deb Burman reported in (2019) 8 SCC 714. Relevant paragraph is paragraph 10 and the same reads as follows:

'10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.'

(underlining made by this Court to supply emphasis and highlight)

11. Aforementioned paragraph 10 takes us to M/s.Duro Felguera S.A. Vs M/s. Gangavaram Port Limited reported in 2017 (9) SCC 729. Relevant paragraphs are paragraphs Nos.47, 59,

which read as follows

'47. What is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the 2015 Amendment") with particular reference to Section 11 (6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.

.....

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Courts intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.'

12. Aforementioned obtaining position of law qua a legal drill under Section 11 of A and C Act has been set out to say that this Court has embarked upon the exercise of writing about resuscitation/restoration of Dealership Agreement because this is not a stand alone order under Section 11 of A and C Act and it is a common order in a Section 11 Arb.OP and a writ petition. Both sides on instructions consent for appointment of a sole Arbitrator and make a request that all questions including challenge to termination may please be left open to be adjudicated upon and decided by Arbitrator to be appointed. As already alluded to supra, learned counsel for Oil Company is not resisting the Section 11 Arb.OP. This means that it is open to the dealer to assail the termination before Arbitral Tribunal but if Arbitral Tribunal in its discretion and wisdom is inclined to grant relief that will be governed by Amritsar Gas principle being law laid down by Hon'ble Supreme Court. In other words, relief can only be by way means other than restoration if at all and if that be so. In any event there is some solace for the dealer as learned counsel for Oil Company has very fairly submitted that they have not blacklisted the dealer and the dealer can participate (in future) if the Oil Company calls for applications for appointment of dealer/distributor etc. This Court deems it appropriate to not to dilate any further on these aspects of the matter.

13. Hon'ble Mr.Justice N.Kirubakaran (Retd), a former Hon'ble Judge of this Court, with address for service at No.36,

2nd Cross Street, Rayala Nagar, Ramapuram, Chennai-600 089, Mobile: 94450 25454 (email: justice.n.kirubakaran@gmail.com) is appointed as sole Arbitrator. Hon'ble Sole Arbitrator is requested to enter upon reference, adjudicate the arbitrable disputes that have arisen between the parties qua Dealership Agreement dated 30.03.2001 captioned 'PETROL / HSD PUMP DEALER AGREEMENT FOR CORPORATION OWNED/LEASED SITES' and render an award by holding sittings in 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC) in accordance with Madras High Court Arbitration Proceedings Rules 2017 and fee of the Hon'ble Arbitrator shall be in accordance with the Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.

Captioned Arb.OP and Writ Petition are disposed of in aforesaid manner. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

kmi

1. Hon'ble Mr.Justice N.Kirubakaran(Retd.),
Former Hon'ble Judge of this Court,
No.36, 2nd Cross Street, Rayala Nagar,
Ramapuram, Chennai-600 089.
Mobile: 94450 25454 (email: justice.n.kirubakaran@gmail.com)
2. The Director,
Tamil Nadu Mediation and Conciliation Centre -cum-
Ex-Officio Member,
Madras High Court Arbitration Centre,
Madras High Court, Chennai 600 104.
- 3.Executive Director (RS-S&W) HO
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RR(CO)
SB(13/07/2022)