

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2020

Delivered on: 26.02.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.Nos.287, 330 and 793 of 2014

Keerthy Travels,
Hotel Hilux Buildings,
No.15/722, Keerthy Kunnathur Medu,
Palakkad- 678 013,
Kerala State.

...Petitioner in all petitions

Vs

1. Bharat Petroleum Corporation Ltd.,
No.1, Ranganathan Gardens,
Off 11th Main Road,
Anna Nagar West,
Chennai - 600 040.

...1st Respondent in all petitions

2. The Managing Director,
Bharat Petroleum Corporation Ltd.,
Bharat Bhavan, Ballard Estate,
Mumbai - 400 001.

...2nd Respondent in O.P.No.287 of 2014

3. The Director (Marketing)
Bharat Petroleum Corporation Ltd.,
Bharat Bhavan, Ballard Estate,
Mumbai- 400 001.

..3rd Respondent in OP.No.287 of 2014

4. Mr. N. Govindarajan,
Hon'ble Sole Arbitrator,
(In the matter of Arbitration between
M/s. Keerthy Travels and BPCL)
Bharat Petroleum Corporation Ltd.,
No.1, Ranganathan Gardens,
Off- 11th Main Road,
Anna Nagar, Chennai - 600 040.

...4th respondent in OP.No.287 of 2014
and 2nd respondent in OP.Nos.330
and 793 of 2014

PRAYER in OP.No.287 of 2014: Original Petitioner under section 14 (2) of the Arbitration and Conciliation Act, 1996 to remove the 4th respondent as the sole Arbitrator in DGM (R) S.Arb.2.con and appoint any one from the panel of Retired District Judges as the sole arbitrator to conduct the arbitration proceedings in accordance with law.

PRAYER in OP.No.330 of 2014: Original Petitioner under section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 to set aside the interim order dated 31.12.2013 passed in DGMR (R) S.ARB.2.CON on the file of the 2nd respondent and direct the 1st respondent to furnish (a) Stock register maintained both at Walayar and Kasargode Godowns for the period from February 2003 to November 2004 and (b) Minutes of the Transporters Meet held on 15.02.2002, 28.12.2002 and 17.09.2003.

PRAYER in OP.No.793 of 2014: Original Petitioner under section 34 of the Arbitration and Conciliation Act, 1996 (i) to set aside the award passed on 25.08.2014 by the second respondent in DGM (R) S.ARB.2.CON direct the first respondent to pay the claim amount of Rs.1,36,99,390.29 to the petitioner along with interest @24 % from the date of claim petition and (ii) direct the first respondent to pay the costs.

For Petitioner : Mr. G. Suryanarayan

For Respondents : Mr. O.R. Santhanakrishnan

COMMON ORDER

The claimant who is the petitioner in all the Original Petitions has come forward with the following petitions:

"OP.No.287 of 2014 is filed by the petitioner under section 14 (2) of the Arbitration and Conciliation Act seeking to terminate the mandate of the 4th respondent/the sole Arbitrator and in his place to appoint a retired District Judge.

OP.No.330 of 2014 is filed under Section 37(2) (b) to set aside the interim orders dated 31.12.2013 passed by the second respondent dismissing the application moved by the petitioner seeking a direction to the first respondent to furnish certain registers.

OP.No.793 of 2014 is filed under Section 34 of the Arbitration and Conciliation Act setting aside the award passed by the 4th respondent dated

25.08.2014 directing dismissing the claim of the petitioner.

2. The facts giving rise to the filing of the Petitions, which are common to all the petitions are narrated hereinbelow. The parties are referred to in the array provided in OP.No.793 of 2014.

a) The petitioner was the Transport contractor engaged by the first respondent to transport Liquefied Petroleum Gas (LPG) from the first respondent's plants at Coimbatore and Mangalore and transport the same to the godown of the first respondent at Walayar and Kasargode and from there to the distributors at Kerala. An agreement was initially entered into between the petitioner and the first respondent for a period of three years 2001 to 2003, which was being periodically extended.

b) The rates were as per the Schedule of rates attached to the agreement.

c) The Contract proceeded very smoothly till 30.11.2004. All of a sudden, the respondent had recovered a sum of Rs.33,58,663.86/- stating that the same was towards excess payment made to the petitioner. The petitioner had immediately raised a protest asking for details to which, there was no response. On the contrary, the 1st respondent continued with the recovery and till 18.05.2006, a sum of Rs.51,99,390.29/- was recovered. It is only on 26.05.2006, after they had received the legal notice of the petitioner dated 03.05.2006 that the 1st respondent had conceded to the recovery and they would contend that the same was towards the excess amounts paid to the petitioner. However, no details as to how much was due and payable to the petitioner and what was the amount over and above this which had been paid was provided. Meanwhile, the area of operation of the petitioner was also allotted

to 3rd party contractors by transferring the area to the Cochin LPG Plant. This had also caused a loss to the petitioner in the form of operational loss.

d) The petitioner would further contend that they had to continue to maintain the vehicles that they had purchased in anticipation of their business with the first respondent. Ultimately, the petitioner had made a claim for a total sum of Rs.1,36,99,390.20/- together with interest at 24 per cent per annum from the date of claim till date of payment under the following heads:

(i) Recoveries made from the bills of the petitioner for September 2004, to 15.05.2006- Rs. 51,99,390.29/-

(ii) Loss due to awarding the contract works to third party contractors from Trichur and Malappuram Districts from

Nov.2003 to June 2004 - Rs. 40,00,000.00/-

(iii) Loss due to awarding the contract

works to third party contractors from

Koxhilkkode and Waynad Districts from July

2003 to Nov. 2004 - Rs. 45,00,000.00/-

e) In view of the above, the petitioner had invoked the arbitration clause contained in the agreement and thereafter one Mr.Kurian P Chandy was appointed by the 3rd respondent in OP.No.287 of 2015 as Arbitrator in the year 2007. The petitioner had filed a claim statement, in which, he had claimed a total sum of Rs.1,36,99,390.20/- together with interest at 24 per cent per annum from the date of claim till date of payment.

f) When the proceedings were at a part heard stage, the first respondent had suo moto removed the said Mr.Kurian P Chandy without any prior intimation to the petitioner herein. Thereafter, the

second respondent herein was appointed as the Arbitrator.

g) The change according to the first respondent was on account of the fact that the earlier arbitrator had resigned and requested the Director (Marketing) to appoint a new arbitrator. After the second respondent was appointed as Arbitrator evidence was commenced. During cross examination of the official of the first respondent company certain statements were made by the witness relating to the reasons for the recovery. Thereafter, the petitioner came forward with two applications: one to direct the first respondent to produce certain documents and the other for a direction to the two officers of the first respondent Corporation to produce documents and adduce oral evidence. These applications were filed on 16.12.2008 and 18.07.2011 respectively. On 2.12.2011, the first respondent had submitted their counter. However, no orders were pronounced on the said applications despite arguments having been concluded in the same. The

petitioner in fact had to request the learned Arbitrator, the 2nd respondent on 15.02.2013 to pass orders in the interim petitions. Ultimately, orders came to be passed on 31.12.2013. Under this order, both the applications were dismissed.

h) In the meantime, there appears to be a series of communications between the petitioner's counsel and the 2nd respondent, in and by which, the counsel had requested the 2nd respondent to fix the next date of hearing. By letter dated 04.08.2012, the petitioner's counsel addressed a letter to the 2nd respondent requesting him to intimate the next date of hearing and also bringing to the notice of the 2nd respondent the fact that his address for communication had changed. The counsel had also brought to the notice of the second respondent that the last sitting of the Tribunal had been held way back on 18.07.2011. The second respondent did not deem it fit to respond to this letter. The petitioner's counsel therefore addressed another letter dated

27.09.2013 once again requesting the 2nd respondent to fix an earlier date for the hearing. The counsel had also requested the 2nd respondent to note that he would not be available between 26.11.2013 and 02.12.2013. The counsel therefore requested the second respondent to fix the next hearing date and once again requested the 2nd respondent to make a note of his changed address. To this, the 2nd respondent had sent a cryptic reply dated 23.10.2013 acknowledging receipt of the letter dated 27.09.2013 as well as noting the absence. This letter appeared to be the trigger for the dispute.

i) On 25.01.2014, the petitioner had sent a letter to the Managing Director of the first respondent Corporation, the 2nd respondent herein requesting him to change the 2nd respondent as his conduct was manifestly biased. Meanwhile, the second respondent had fixed the next date of hearing as 31.01.2014. On 31.01.2014, the counsel for the petitioner had appeared before the

2nd respondent and sought for an adjournment since their request for seeking a termination of the mandate of the Managing Director of the 1st respondent was pending. However, this request was turned down and the matter was reserved for orders. Ultimately, the impugned Award dated 25.08.2014 came to be passed. Therefore the petitioner has come forward with these three Petitions.

j) After the petitioner's application for receiving the additional documents had been rejected, they had come forward to file OP.No.330 of 2014. The petition for terminating the mandate was filed in OP.No.287 of 2014. Since there was no stay of further proceedings, the 2nd respondent has gone ahead and passed the Award on 25.08.2014, which is challenged in OP.No.793 of 2014.

3. Case of the respondents:

(i) O.P.No.287 of 2014:

a) The first respondent has filed their counter statement

separately in each of these Original Petitions. In the Counter statement in OP.No.287 of 2014, at the outset, the 1st respondent would seek to have the Petition dismissed, since the Award had come to be passed and the same had been challenged in O.P.No.793 of 2014 before this Court. Therefore, they would contend that this petition has become infructuous. However, without prejudice to these contentions, the first respondent had contested the claim of the petitioner by *inter alia* contending that the 2nd respondent had conducted the entire proceedings in a very unbiased manner and the allegations made against him was without any basis.

b) The first respondent had further submitted that the proceedings had been conducted diligently for a period of five years with both parties filing their claim, counter claim, rejoinder, etc. Proof affidavit had been submitted and the witnesses had also been cross-examined. The written arguments had been submitted and the Arbitration proceedings had concluded. At this stage, the petitioner

has come forward with these frivolous Petitions. The 1st respondent had further contended that there is no reason for the petitioner to be apprehensive about the judicious temperament of the Arbitrator.

(ii) Counter in OP.No.330 of 2014:

(a) The 1st respondent would contend that the petitioner had requested the 1st respondent to produce five documents, out of these documents, Document Nos. (a) to (d) had been given to the petitioner and it was only the Minutes of the Meetings between the first respondent and the Transporters Association that was held on 15.02.2002, 28.02.2002 and 17.09.2003 which was not given. The 1st respondent would contend that these minutes are not available with them and that these documents are total irrelevant. The first respondent would further submit that while dismissing the said application, the 2nd respondent had given valid reasons for rejecting the same.

(b) The first respondent would further question the jurisdiction of the Court since the petition in order to attract the provisions of Section 37 (2) (b) of the Act, should be a petition filed under Section 17 for interim measures. According to the first respondent, the petitioner has not taken out any application under Section 17 of the Act. The first respondent would further contend that the petitioner has wrongly invoked Sections 23 and 24 of the Arbitration and Conciliation Act along with Section 18. Therefore, they sought for dismissing of this petition as well.

(iii) Counter in OP.No.793 of 2014:

(a) The respondents have reiterated the contentions made by them in their counter to the claim statement and would state that the Arbitrator has considered the issue in detail and passed the Award and therefore no exception can be taken to the same. The recovery of excess payment was only in keeping with Clause 24 (a) (b) (c) of the Agreement and regarding allotment of the areas to 3rd party

contractors the same was done only as per the provisions of the Sub Clause 11 and 48 of the Transport Agreement which has been accepted and signed by the petitioner. Having accepted the same, the petitioner cannot now turn around and question the action of the first respondent.

I shall proceed to deal with the submissions made in each of the petitions and pronounce my findings on them separately.

4. Submission:

(a) With reference to arguments pertaining to termination of mandate, Mr. G. Suryanarayanan, learned counsel appearing on behalf of the petitioner would submit that the very appointment of the second respondent was without notice to the petitioners. The Original Arbitrator Mr. Kurian P Chandy had received the pleadings in the above matter and thereafter he was all of a sudden removed and the 2nd respondent appointed. No doubt, the petitioner had gone ahead with conducting the proceeding before the second respondent. However, the conduct of the 2nd respondent gave rise

to a serious doubt in the mind of the petitioner with regard to his impartiality.

b) The learned Counsel would also contend that as per the terms of the Agreement, the Arbitral proceedings was found in *Clause No.63 of the LPG Cylinder Transport Contract Agreement. Clause 63 (b) provides that the Award has to be made within two years, upon the Arbitrator entering reference or within such extended time, not exceeding a further period of 12 months.* In the instant case, the Arbitrator was appointed originally in the year 2007 and therefore the award had to be pronounced by 2009. Even assuming that the time would start ticking from the date of the appointment of the second respondent, the Arbitral award has been passed much beyond the period provided under the agreement since the mandate of the Arbitral Tribunal had come to an end in the month of August 2009 and the award that has been passed as late as in the year 2014. Therefore the said award is non-est and without

authority.

c) He would further submit that a memo had been filed by the petitioner on 31.01.2014 requesting the 2nd respondent to adjourn the hearing since the petitioner had already addressed a letter to the Managing Director of the first respondent Corporation seeking termination of mandate of the second respondent and appointing a retired District Judge as Arbitrator to resolve the dispute between the parties. Despite such a memo being filed, the 2nd respondent refused to adjourn the matter and he had proceeded to reserve orders for the same. The above would clearly show that the second respondent had acted in a rather biased manner particularly when one takes note of the long gap between the earlier hearings.

d) He would further argue that this Petition had been filed even before the award had been passed and despite being served with a notice in the said petition, the 2nd respondent has proceeded

post haste to pass an Award. Therefore the passing of the Award after the filing of this petition clearly shows malafides.

e) Per contra, Mr. O.R. Santhanakrishnan, learned counsel would contend that terminating the mandate at this stage does not arise, since the award had already been passed in the matter. He would further argue that the petitioner having challenged the award passed by the 4th respondent is also estopped from questioning the mandate of the learned Arbitrator.

He would rely upon the following Judgements:

(i) "1987 (4) SCC 217 - *Prasun Roy vs Calcutta Metropolitan Development Authority & another*"

(ii) "1999 (4) SCC page 327- *ONGC vs M/s. M.C. Clelland Engineers S.A.*"

(iii) "2010 (2) SCC 385 - *N.B.C.C. Ltd. vs J.G. Engineering Pvt. Ltd.*"

5. Discussion:

a) The failure or impossibility to act as a Arbitrator and the termination of the mandate and substitution of the Arbitrator are dealt with in Sections 14 and 15 of the Act. The same is herein extracted:

"14. Failure or impossibility to act.—

(1) 3 [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]— (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the

parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.—(1) *In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate— (a) where he withdraws from office for any reason; or*

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal. "

b) The petitioner has filed the petition for terminating the mandate on the following grounds:

(i) Petitioner not informed about the change of Arbitrator

A) Clause 63(a) of the Agreement entered between the parties provides for the Director (Marketing) to substitute an Arbitrator in the event the Arbitrator to whom the matter was originally referred is transferred or vacates his office or is unable to act for any reason. The Agreement further provides that the new Arbitrator will continue the Arbitration Proceedings from the point at which it was left by his predecessor. This power could be exercised only by the Director (Marketing) of the respondent Corporation. Though no details with reference to the reasons as to why the earlier Arbitrator had been substituted by the respondent finds place in the counter, however, a letter has been filed on the side of the 1st respondent dated 13.08.2007. This letter which has been addressed by the

Director (Marketing), both to the petitioner as well as the 1st respondent, informs them that the earlier Arbitrator Mr.Kurian P Chandy by letter dated 01.08.2007 had intimated that he has resigned from the office of Arbitrator and requested the Director (Marketing) to nominate an officer in his place. The letter would also state that the erstwhile Arbitrator has informed both parties about his stepping down as an Arbitrator.

B) In view of the resignation, the second respondent has been nominated to act as sole Arbitrator in the place of Mr.Kurian P Chandy. Therefore, taking into consideration the provisions of Clause 63 (a) of the Agreement and the fact that these Arbitral proceedings are prior to the amending Act 3 of 2016 the appointment of the second respondent by the Director (Marketing) of the 1st respondent corporation cannot be found fault with. Further, the records would show that after the second respondent has been nominated as Arbitrator, the petitioner has participated in the

proceedings without demur till 25.01.2014.

(ii) Bias on the part of the Arbitrator:

A) The petitioner has requested a change of the Arbitrator not only on account of there being an infirmity in the appointment of the 2nd respondent but also on account of the manner in which he has conducted the proceedings. The petitioner has referred to the exchange of correspondence between their counsel and the 2nd respondent to demonstrate the bias of the 2nd respondent. It is seen that though the counsel for the petitioner has addressed letters to the 2nd respondent asking him for the next date of hearing there has been no reply and the only response was a cryptic reply to a letter of the counsel informing the 2nd respondent that the counsel would not be able to attend the hearings on 2 given dates. There is no necessity for the 2nd respondent to be tight-lipped about informing the next-date of hearing which the petitioner is as a matter of right entitled to. Section 24 (2) of the Act enjoins the Arbitrator to give sufficient

advance notice of any hearing. This, therefore gives rise to an apprehension regarding the impartiality of the 2nd respondent. That apart, this Court has noticed that when a memo had been filed on 31.01.2014 by the petitioner requesting the 2nd respondent to adjourn the hearing, since a request had been made to the Managing Director of the 1st respondent company to change the 2nd respondent, the 2nd respondent has proceeded to record minutes which clearly reflect the mind of the 2nd respondent. The Minutes which was prepared on 31.01.2014, would read as follows:

"The Arbitrator has taken exception to the communication addressed to the Managing Director of the BPCL as well as the memo filed today, where a statement has been made by the claimant that "the Arbitrator has acted in a biased manner towards the claimant"

B) Such a reaction on the part of the 2nd respondent is totally uncalled for. As an Arbitrator, he is supposed to be impartial and unaffected by the arguments or petitions that are filed by the parties. The petitioner has only exercised the rights available to them, both under the contract as well as the Act and the second respondent cannot take exception to this. That apart, the proceedings would clearly show that both parties have not submitted their arguments, which is evident from the very same Minutes wherein it is stated as follows:

*"more than 10 sitting are already over.
evidence are closed, all the documents are
exchanged between the parties and marked.
The allegation of bias and change of
arbitrator at this stage is totally uncalled for
and such allegations has been made without
any basis."*

"The claimant raised objection against the recording and refused to sign the Minutes of today's proceedings. The Arbitrator concluded the session and reserved the matter for passing of Award".

C) The counsel for the 1st respondent would rely upon the judgment reported in **"1987(4) SCC 217 - Prasun Roy vs Calcutta Metropolitan Development Authority and another"** in support of his argument that a plea of bias cannot be taken after the party had participated in the proceedings for a long time. In the aforesaid judgment the Hon'ble Supreme Court has held that a long participation and acquiescence in the proceedings precludes a party from contending that the proceedings is without jurisdiction.

D) The facts of that case and the ratio laid therein does not apply to the instant case for the following reasons. The 2nd respondent Arbitrator has held his sittings few and far apart and further the allegations of bias starts with the letters requesting the 2nd respondent to inform the date of the next hearing to which there was no response and ultimately a cryptic reply dated 23.10.2013 simply acknowledges the petitioner's counsel letter dated 27.09.2013 without giving the next date of hearing. This is clearly violative of the provisions of Sec 24 (2) of the Act. The request for a change was addressed to the appointing authority on 25.01.2014. Thereafter in the hearing date 31.01.2014 the petitioner's request was not only turned down but exception is taken to it

E) The minutes dated 31.01.2014 clearly demonstrate the fact that the 2nd respondent has taken exception to the petitioner's request for a change of Arbitrator. This coupled with his subsequent action of not providing an opportunity to the petitioner to make their

submission is a clear manifestation of his bias thereby rendering him de jure unable to perform his duties as Arbitrator. It is also ironic that the 2nd respondent who turned down a request for an adjournment had taken 7 months to pass the award. There cannot be a more manifest case of bias.

(iii) Arbitrator not adhering to the time schedule:

A) The 2nd respondent has clearly violated the time schedule which has been fixed under Clause 63 (b) of the Arbitration Agreement between the parties. When perusing the records, it is seen that the Original Arbitrator was appointed in the year 2007 and in terms of the said Clause, the Arbitral proceedings ought to have been concluded by 2009. Even assuming that the time would start ticking from the date on which the second respondent/Arbitrator had entered reference, the Arbitral proceedings ought to have been concluded by 12.08.2009 and adding a further 12 months as provided under this Clause, the Award ought to have been passed by

12.08.2010. However, the records would clearly indicate that the award has been passed four years later which is in violation of the terms of the agreement.

B) The counsel for the respondent has sought to buttress his arguments that even if a time schedule is fixed for the Arbitral proceedings the same can be waived by parties by producing the following judgment

"(2010) 2 SCC 385 - NBCC Ltd vs J.G. Engineering Pvt Ltd."

C) However a reading of the same would indicate that the Hon'ble Supreme Court had rejected the argument of the appellant therein that since the arbitral proceedings has reached the stage of award pronouncement the mandate of the Arbitrator need not be terminated. The Hon'ble Supreme Court has held as follows:

" 27. With reference to the contention made by the appellant that the arbitrator having concluded the proceedings could not be said to have failed to act so as to attract the provisions of Section 14 of the Act, which will call for termination of the arbitration proceeding. It is pertinent to mention here that the arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so. The mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within time did not warrant to be continued as an arbitrator in the absence of the consent of both the parties. It is clear from a bare reading of sub-section (1) (a) of Section 14 of the Act, the

mandate of an arbitrator shall terminate if he fails to act without undue delay. "

D) The time taken by the 2nd respondent in the instant case is extraordinarily long. Therefore the 2nd respondent had become de jure unable to continue. Therefore the mandate of the Learned Arbitrator has to be terminated on account of the bias and on account of not adhering to the time schedule provided in the agreement between the parties.

E) Though I have terminated the mandate, however since the Award has been passed during the pendency of the petition under Section 14 of the Act before this Court, I would also proceed to discuss the grounds raised for setting aside the Award in O.P.No.793 of 2014. The agreement between the parties has clearly provided a time frame within which the arbitral award had to be pronounced. The Award in the instant case has been passed seven years after he

had entered reference in the matter. Therefore, the procedure was clearly contrary to the agreement of the parties and the petitioner has not been consulted nor his consent obtained by the 2nd respondent to continue beyond the mandated period. The Arbitral Tribunal is a creation of the agreement between parties and therefore the terms of the agreement is sacrosanct and there cannot be a deviation from this.

F) A mere perusal of the time taken by the second respondent after he had assumed office clearly shows that between one hearing to the other, the 2nd respondent was adjourning the matter over 4 to 5 months and in one case nearly by 10 months. Therefore, the Award passed is contrary to the agreement between the parties and in violation of Section 28(3) of the Act. Therefore the award is liable to be set aside under Section 34 (2)(a) (v) of the Act.

G) Further a reading of the Minutes dated 31.01.2014 would clearly show that the 2nd respondent has not permitted the parties to put forth their arguments which is clearly a ground for setting aside the Award under Section 34(2)(a)(iii) of the Act. Section 18 of the Act provides for each party being given full opportunity to present his case. It is only if there is an agreement between the parties to dispense with oral arguments or if one party has failed to appear at a hearing and produce documentary evidence that an ex parte award could be made. In the case on hand such a situation has not arisen. In the judgment in ***Suresh Chandra Nanhorya vs Rajendra Rajak (2006 (7) SCC 800)***, the Apex Court has held that *"Natural justice is the essence of fair adjudication deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice"* The Learned Judges have drawn a biblical parallel to state that the principles of natural justice is as old as Adam. They had quoted from the celebrated judgement in ***"Cooper vs Wandsworth Board of Works (1863) 143 ER 414"*** were Byles J had stated *" the laws of God and man both give the party an*

opportunity to make his defense, if he has any. I remember to have heard it observed by a very Learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam (says God), 'where are thou? Hast thou not eaten of the tree whereof I commanded thee thou shouldest not eat? And the same question was put to Eve also". It is this principle that is encapsulated in Section 18 of the Act.

H) That apart even when the award is analysed with regard to the application of mind by the 2nd respondent to the issue on hand in terms of the agreement the same appears wanting.

I) The 2nd respondent had framed over 23 issues. With reference to two issues namely issues Nos. XVII and XXIII, the 2nd respondent has directed the parties to mutually arrive at a negotiated settlement. Therefore no finding on the dispute referred has been rendered. The 2nd respondent has relegated them to negotiations.

J) Issue Nos. XVII and XXIII would read as follows:

" XVII- Whether the claimant was asked to ply the laden lorries from the LPG plant directly to the distributor during the relevant period without break?

XXIII: Whether claimant has incurred any additional expenditure in going through the godown at Walayar?

K) With reference to Issue Nos. 1 to 5, 7 to 11, 13 to 16 and 18 to 20, the 2nd respondent would hold as follows:

" It is prudent to conclude that the petitioner was getting excess amount than agreed rate as per the agreement between the parties during the disputed period. However in the absence of any specific evidence on

record it is not possible to calculate the quantum of excess amount paid by the respondent to the petitioner"

L) Therefore, the conclusion arrived at is not on the basis of agreement between the parties or evidence but by applying prudence. Section 31 (3) of the Act provides that an arbitral award shall state the reasons upon which it is based. Such reason should be cogent and a speaking one and cannot be on surmises.

M) The lack of reasoning assumes significance since the interlocutory application taken out by the petitioner calling for documents had been dismissed by the Arbitrator. In this application, one of the documents which was called for and which would throw light as to whether the recovery was justified or not is the Minutes of the Transporters meetings which was held on 15.02.2002, 28.02.2002 and 17.09.2003. It is the specific case of the petitioner that during the meetings the respondent had agreed to a new billing procedure

where two invoices were to be raised one from the plant to the godown and the other from the godown to the billing point at Kerala. It was based on these instructions that the petitioner had raised the invoices. That apart, it is the respondent who had deducted from the future bills of the petitioner. The onus therefore was upon the respondent to produce the proof to show the basis on which the deduction had been made which they had failed to do so. The Award suffers from a patent illegality in as much as the Award dismissing the claim has been passed without affording an opportunity to the petitioners to submit their case. Reliance in this regard is made to the judgment of the Hon'ble Supreme Court in its decision in "*Associate Builders vs Delhi Development Authority* reported in AIR 2015 SC 620 = (2015) 3 SCC page 49". The learned Judges had placed reliance on Paragraph 38 of the earlier judgment in "*ONGC Ltd. vs Western GECO International Ltd* reported in 2014(9) SCC page 263" which is extracted hereinbelow:

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 requirements 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."

N) Further the Award has been passed beyond the period contemplated under the Agreement between the parties. The Award therefore deserves to be set aside.

O) Since I am setting aside the Award, no orders are required to be passed in O.P.No.330 of 2014.

P) In fine, O.P.No.287 of 2014 and O.P.No.793 of 2014 is partly allowed. O.P.No.330 of 2014 is closed in view of O.P.No.793 of 2014 being allowed. There shall be no order as to costs.

WEB COPY 26.02.2021

mrn/mps

Index : Yes/No

Speaking order/non-speaking order

To

1. Keerthy Travels,
Hotel Hilux Buildings,
No.15/722, Keerthy Kunnathur Medu,
Palakkad- 678 013,
Kerala State.

2. Bharat Petroleum Corporation Ltd.,
No.1, Ranganathan Gardens,
Off 11th Main Road,
Anna Nagar West,
Chennai - 600 040.

3. The Managing Director,
Bharat Petroleum Corporation Ltd.,
Bharat Bhavan, Ballard Estate,
Mumbai - 400 001.

4. The Director (Marketing)
Bharat Petroleum Corporation Ltd.,
Bharat Bhavan, Ballard Estate,
Mumbai- 400 001.

5. Mr. N. Govindarajan,
Hon'ble Sole Arbitrator,
(In the matter of Arbitration between
M/s. Keerthy Travels and BPCL)
Bharat Petroleum Corporation Ltd.,
No.1, Ranganathan Gardens,
Off- 11th Main Road,
Anna Nagar, Chennai 0 600 040.

P.T.ASHA, J.,

mrn/mps



**Pre-Delivery orders in
OP.Nos.287, 330 and 793 of 2014**

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