

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
24~09~2021	06-10~2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P. No. 646 of 2017

Karaikal Chlorates
[Unit of Mepco Industries Ltd.]
17-A, Vallabhai Road,
Chokkikulam
Madurai 625002

... Petitioners / Claimant

.Vs.

M/s. GAIL (India) Limited
16, Bhikaji Cama Place
R.K.Puram,
New Delhi 110066.

.. Respondent / Respondent

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 07.02.2017 passed by the Sole Arbitrator in Arbitration Case No.14 of 2016.

For Petitioner : Mr. AR.L. Sundaresan
Senior Counsel for
M/s.A.L.Ganthimathi

For Respondent : Mr.P.V.S. Giridhar for

M/s. Giridhar and Sai

ORDER

Challenge has been made against the Award of the sole Arbitrator rejecting the Claim of the Petitioner/Claimant, the present Original Petition has been filed.

2. The parties are arrayed as per their own rankings before the Arbitral Proceedings.

2.a. It is the case of the Claimant that they entered into an agreement with the respondent for supply of 25,000 SCM natural gas per day vide agreement dated 12.05.2003. Thereafter, another agreement was entered after lapse of the initial agreement on 28.12.2010 for a period of 5 years from 01.01.2011 to 31.12.2015. It is the case of the Claimant that in the agreement dated 28.12.2010, new clauses were introduced as clauses 5.2, 5.3 and 5.4. The same was objected by the Claimant. However, the Respondent compelled the Claimant to sign the document being the only supplier of natural gas. The Respondent contrary to the condition in Clause 5.2, 5.3 and 5.4 raised invoice dated 31.03.2015 for Rs.2,02,72,658/- on 07.08.2015.

2.b. The Respondent adjusted a sum of Rs.1,14,00,000/-against the LC opened by the Claimant and the balance amount of Rs.88,72,658/- was paid by the Claimant “under Protest” on 14.09.2015. Thereafter, the Respondent issued a Credit Note dated 8.9.2015 and refunded a sum of Rs.22,34,392/-. It is the contention that the disputed MGO invoice collected from the Claimant was Rs.1,80,38,266/-. Besides the Respondent also issued a Debit Note dated 14.03.2016 claiming interest of Rs.2,33,532/- for the belated payment of the MGO invoice dated 31.03.2015. Hence it is the contention that the issuance of invoice and collecting of the amount is against the condition under Clause 5.4 of the Agreement. As per Clause 5.4 of the Agreement, Seller shall raise the Supplementary Invoice or Debit Note to the Buyer for the amount of Annual Take or Pay Deficiency Quantity for each Financial Year, if any, at the end of the second fortnight of March of each Financial Year but not later than three days from the last day of second fortnight of March of each Financial Year. Hence it is the contention that the Claim under MGO invoice dated 31.03.2015 sent to the Claimant on 07.08.2015 is time barred. It is also submitted by the Claimant that MGO quantity imposed by ONGC on Gail for the year ended 31.03.2015 was

5,75,72,447 SCM. But for the particular year, the Respondent had purchased APM gas over and above the MGO quantity. The actual quantity purchased was 79,55,09,490 SCM. Hence, as per Clause 5.2(b), the Respondent is not bound to pay the MGO charges to ONGC. Accordingly, the question of recovery on pro-rata basis from Respondent consumers does not arise and MGO invoice dated 31.03.2015 issued to the Claimant on 07.08.2015 is unjust and against the provisions of the contract.

2.c. The Respondent has no obligation to pay ONGC till this date with regard to supply of MGO gas and hence the question of claiming money from the Claimant does not arise as such the Claim raised by the Respondent under MGO invoice dated 31.03.2015 is null and void. Hence, prayed for refund of the amount of Rs.1,92,61,520/- including 10% of interest.

3.a. The Claim was resisted by the Respondent stating that the Claimant has suppressed the email dated 15.12.2010 which clearly articulating the position of the Respondent on article 5.2 of the draft GSTA being modified and invited the Claimant to sign the GSTA before the appointed date 28.12.2010. As per GSA

with ONGC, Respondent is liable for Take or Pay obligation to off take 90% of the quantities, failing which Respondent is liable to pay Take or Pay amount for the difference quantity (Annual Quantity Deficiency) for the said Financial Year. Pursuant to gas allocation by the MoP & NG, the Respondent and M/s. Karaikal Chlorates executed Gas Sales and Transmission Agreement (GSTA) dated 28.12.2010 for supplying APM (Administered Price Mechanism) gas of 25000 Standard Cubic Meters per day on Fall back basis for use in the plant located in Narimanam Zone in Cauvery Basin.

3.b. In term of Clause 2.1 as well as 5.2(b) the Respondent under an obligation upstream agreement was getting gas from ONGC and in case any MGO (ToP) charges levied by ONGC on the Respondent, the same has to be paid by the defaulting consumers including Claimant on pro rata basis. In term of article 5 the buyer has to draw at least 90% of the Daily Nominated Quantity (Minimum Guarantees Off-take or Pay Obligation) failing which liable to pay for the differences of non-off-take quantity on annual basis (financial year). Further the Respondent shall raise MGO on customers on pro-rata basis when ONGC (Upstream Supplier) claims the same. It is also denied the contention of the

Claimant that the time is barred by limitation. Hence invoice issued by them as per the Contract and the same is valid and prayed for dismissal of the Claim.

4. The learned Arbitrator on the basis of the pleadings, documents and after hearing the parties has framed the following issues:

“(i) Whether the Claim raised by the Respondent vide MGO invoice Dt. 31/03/2015 was belated / time barred as per terms and conditions of the Agreements Dt. 28/12/2010?”

“(ii) Whether the Respondent collected the amount to ONGC, if so its affect?”

“(iii) Wheather the Collection made by the Respondent from the Claimant is unjust and against the terms of contract

iv) Relief?”

5. After perused the oral, documentary evidence and other materials the learned Arbitrator held that there is no breach of Contract by the Respondent in

presenting the MGO invoice on 07.08.2015. A substantial right cannot be defeated by a procedural limitation and even if such limitation is stated to be mandatory in the agreement, the same cannot be enforced by the claimant since the same is void as being unconceivable and unenforceable in law and rejected the contention. The learned Arbitrator also held that the amount collected from the Claimant shall be paid to the ONGC on finalisation of the dispute. Therefore the contention of the Claimant that the Respondent collected the amount varies from the Claimant is not correct, it was also negated. And It was also held that the agreement signed by the parties free of consent there was no coercion and undue influence. Challenging the same the present Original Petition is filed.

6. It is relevant to note that similar set of facts an Arbitral Award was challenged in ***O.P.No.606 of 2016 of 2018 between M/s. Diamond Silicate vs. GAIL (India) Limited.*** This Court has confirmed the Award passed by the learned Arbitrator by its Order dated 28.11.2019. The above Order is relevant to this case since the very nature of the contract entered between GAIL and the parties are similar in the above O.P.

7. Be that as it may. The Main contention of the learned Senior Counsel appearing for the Petitioner/Claimant that the Award is contrary to the contract and it is submitted that the minimum quantity of gas which has not lifted before the end of the Financial Year i.e., on 31st March, the Respondent ought to have raised MGO invoice within three days at the end of the Financial Year i.e., on 3rd of April. The Respondent can claim amount for MGO invoice only if it is responsible to pay ONGC towards minimum guarantee take-off (MGO) and MGO amount is to be collected through supplementary invoice / Debit Note. The above three conditions are agreed between the parties. Whereas contrary to the above conditions the Respondent raised Provisional Invoice dated 31.03.2015 and received by the Petitioner only on 07.08.2015 after the expiry of the time limit specified in the agreement. Hence it is the contention of the learned Senior Counsel that the learned Arbitral Tribunal cannot travel beyond the terms of the contract. In addition to the above, the learned Senior Counsel placed much reliance on the Memo filed by them as an Additional Ground to contend that the Arbitrator has already conducted 14 Arbitrations in respect of the Respondent and he has not made any disclosure as mandated in law. Therefore, when the Arbitrator has not made any disclosure under Section 12 of the Arbitration and Conciliation Act, the

Award has to be set aside since lot of bias attached in the Order. Hence it is his contention that the Additional Ground filed by way of Memo also can be raised in Section 34 of the Arbitration and Conciliation Act Petitions. The above ground alone sufficient to interfere the Award. Hence it is his contention that merely because similar set of facts Award has been confirmed by this Court in O.P.No.606 of 2018. The same will not a bar for this Court to decide the issue of bias in this case. Hence submitted that the limitation prescribed under Section 34(3) of the Arbitration and Conciliation Act is applicable only for filing of the application challenging the Award, but not refiling of the said application after curing defects. Hence, it is his contention that raising an additional ground is maintainable under law.

8. In support of his submissions the learned Senior Counsel relied upon the following judgments:

1. State of Maharashtra –Vs- Hindustan Construction Co.

Ltd [(2010) 4 SCC 518]

2. Northern Railway –Vs- Pioneer Publicity Corpn. (P) Ltd

[(2017) 11 SCC 234]

3. TRF Ltd. –vs- EnergoEngg. Projects Ltd.,[(2017) 8 SCC 377]

4. Rajasthan Small Industries Corpn. Ltd., -Vs- Ganesh Containers movers Movers Syndicate [(2019) 3 SCC 282]

5. Bharat Broadband Network Ltd. –Vs- United Telecoms Ltd. [(2019) 5 SCC 755]

9. Whereas the learned counsel for the Respondent would contend that the allegation of bias has been raised after the disposal of similar set of facts of the earlier order of this Court dated 28.11.2019. Hence it is his contention that even assuming that the Arbitrator has not made any disclosure under Section 12 (1) of the Act, when the Petition filed u/s 34 of the Act, the Petitioner was already aware of the fact by way of RTI information that the Arbitrator has already appointed in some other cases on behalf of the Respondent. Even then no ground raised in Section 34 Petition alleging the bias. Hence it is his submission that even assuming that the Arbitrator has not disclosed the same during the Arbitration, the moment the Petitioner becoming aware of any circumstances referred to in Section 12 ought to have made a challenge within 15 days after such information, which has not

been done so. Therefore, it is his contention that the provision under Section 13 of the Act, the time limit provided for challenging the appointment of Arbitrator also apply the additional grounds raised in section 34 Petition. Prior to the filing of Petition under Section 34 of the Act, RTI reply was obtained by the Applicant. However no allegation or bias has been raised. Sensing that no legal grounds available after the disposal of the earlier order of this Court dated 28.11.2019, the present allegation of bias has been raised by way of memo, same cannot be permitted which was made beyond the period of 15 days. Hence, submitted that the entire Award perused there cannot be any bias at all. Hence prayed for dismissal of application.

10. Further it is submitted by the learned counsel for the Respondent that the Arbitration commenced prior to the Amendment Act. Therefore, Class 12.5 cannot be pressed into service. Hence submitted that the Application lacks merits and *bonafide*. Hence prayed for dismissal of the Original Petition.

11. In support of his contention the learned counsel has relied upon the following judgments:

1. *Madhav Structural Engineers Ltd. –Vs- Vice Chairman and Managing Director [(2016) SCC Online Bom 5322]*
2. *HRD Corpn –Vs- GAIL (India) Ltd. [(2018) 12 SCC 471]*
3. *SaurabhKalani –Vs- Tata Finance Ltd. And Another [Appeal No. 213 of 2003 in Arbitration Petition No. 165 of 2002 Decided on 28/29-04-2003 (O.O.C.J) Bombay]*
4. *Board of Control for Cricket in India –Vs- Kochi Cricket Pvt. Ltd. And ors [(2018) 6 SCC pg 287]*

12. Now, Before dealing with the allegations of bias raised by way of Memo, this Court first deal with the the contention of the learned Counsel with regard to the merit.

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13. As rightly pointed out by the learned Counsel for the Respondent, earlier O.P. No.606 of 2018 the similar set of facts, were the subject mater of the O.P.

With regard to the Limitation aspect this Court in para 8 of the above order has held as follows:

“8. While dealing with the contention that the invoice should be raised within three days from the commencement of the next financial year, he submitted that the said stipulation is not a condition of the GSPA and certainly does not excuse non-payment. In support of this submission, he referred to Section 11 of the Sale of Goods Act, 1930, which stipulates that time of payment is not deemed to be the essence of a contract of sale. With regard to the enforceability of the TPO, he referred to and relied upon the judgment of the Hon-ble Supreme Court in BIHAR STATE ELECTRICITY BOARD, PATNA AND OTHERS vs. M/s.GREEN RUBBER INDUSTRIES AND OTHERS, 1991 SCC 731 and, in particular, paragraph 20 thereof, wherein a similar obligation in the context of supply of power was upheld by the Hon-ble Supreme Court.”

14. With regard to the contention that the gas was supplied at very low pressure, this Court has held as follows:

9. With regard to the contention that gas was supplied

at very low pressure, he submitted that there was no pleading or evidence with regard to the said contention and that, therefore, it does not merit attention. In response to the contention that TPO was claimed and awarded from 01.04.2014 instead of 30.04.2014, he submitted that the period of contract is from 30.04.2014 and, therefore, the Award may be liable to be revised to that extent. Likewise, he submitted, in conclusion, that the contention regarding calculation of interest, in the Award, on the total sum instead of the adjusted sum is a matter of computation and arithmetic and could be considered subject to the provision of a memo of calculation in that regard by the Petitioner.

15. In para 13 of the order in O.P.No.606 of 2018 of this Court it is also held as follows:

13. The next contention that should be dealt with is with regard to the time limit for issuing the invoice towards the TPO. The time limit has been specified in Clause 5.4(a) as not later than 3 days from the last day of the second fortnight of March of each financial year. As correctly contended by the learned counsel for the Respondent, this time limit cannot be construed as a condition. To put it differently, it cannot be said that the liability of the Petitioner stands extinguished or

waived if the invoice is not issued within the stipulated time limit. It is a different matter that the liability for payment of interest on the amount demanded would run only from the date when the invoice becomes payable and that the Respondent cannot derive an undue benefit after issuing the invoice belatedly and this aspect may have a bearing on the Award in so far as it deals with interest. Therefore, it may be concluded that the belated issuance of the invoice on 06.08.2015 in respect of the financial year 2014~2015 does not extinguish the liability of the Petitioner in that regard. The next contention with regard to the invoice being labelled as provisional need not detain us for long. The learned counsel for the Respondent pointed out that the invoice was described as provisional so as to enable the revision thereof, if necessary. In fact, a revision was made to the provisional invoice whereby the amount was reduced upon verification. Once again, the labelling of the invoice as provisional would not extinguish the liability of the Petitioner.

And rejected the Claim which is similar to the claim raised in the present O.P.

16. The Arbitral Tribunal taken note of Section 28 of the Contract Act and

held that the contention of the Claimant to contend that the period of limitation only 3(three) days is not correct. Learned Arbitral Tribunal held that specific clauses exceeding time for 3 days as against the right to recover money within three years cannot be enforced in pursuant to Section 28 of the Act. With regard to the other contention that the Respondent cannot collect the money without paying the same to the ONGC. The learned Arbitrator in Issue No.II has elaborately discussed and found that the amount so collected from the Claimant towards the MGO was not required to be paid to ONGC at the time of recovery of the same from the claimant on pro-rata basis subject to maximum of MGO (ToP) liability under the Contract. The learned Arbitrator has also taken note of the sufficient explanation by the claimant for nonpayment of the amount under dispute, which shall be paid to the ONGC on finalisation of the dispute. Further contention of the Applicant that they were forced to sign a contract, there was no free consent to the Claimant in signing the agreement, the learned Arbitrator has gone to the question of undue influence and factually recorded that the agreement was executed between the parties and rejected the contention of the Claimant. Therefore, the factual aspect recorded on the basis of the evidence cannot be interfered by this Court. Further, an earlier occasion this Court already confirmed the nature of the

contract between the parties.

17. Now with regard to the main contention raised by the Claimant that the Arbitrator has conducted Arbitration in 14 matters in respect of the GAIL upto 2017. To substantiate the same, by way of the Additional Type Set information sought by the Claimant and the reply given under the RTI Act placed on record. The query were raised to the Respondent as to the total number of disputes referred to Shri D.C.Anand for arbitration since his name included in panel of Arbitrators. The reply was given that in total 14 arbitration matters were referred to Shri D.C.Anand in terms of duly executed arbitration clause in respective contracts. The number of Arbitration conducted by the Arbitrator is of 14 and all the 14 arbitrations went in favour of GAIL. This information has been placed on record. Much has been emphasized to contend that the Award is biased since the Arbitrator has already conducted 14 arbitrations. It is to be noted that the query raised was not as to whether how many arbitrations were conducted prior to the present Arbitration. Whereas the query was in general.

18. Be that as it may. The fact remains that the Arbtrator has conducted 14

arbitrations with regard to the Respondent. It is the contention of the learned Senior Counsel that the Arbitrator has not made disclosure in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. It is admitted by both sides that the present Arbitration was commenced prior to the Amended Act, i.e., prior to 23.10.2015. It is the contention of the learned Senior Counsel for the Petitioner that even then Section 12.1 unamended portion makes it very clear that the Arbitrator shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence and impartiality, which has not been done so. Only when such disclosure is made, the Arbitrator could be challenged as per Section 13 of the Act. But through out the Arbitration Proceedings no such disclosure was made. Therefore, his contention is that only after information provided under the Right to Information Act they came to know about the 14 Arbitrations conducted by Arbitrator. Therefore, his submission is that the entire proceedings is the result of bias hence the same is liable to be interfered.

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19. Mr.P.V.S. Giridhar learned counsel for the Respondent submitted that whether disclosure made in writing or not has not proved since the entire records

were not produced before this court. Even assuming that no such disclosure was made by the Arbitrator, appointment shall be challenged within 15 days after becoming aware of such circumstances. Otherwise his contention is that the when the challenge procedure provides 15 days limitation to make such challenge, the same also apply to Section 34 of the Act also. It is not in dispute that in Section 34 of the Arbitration and Conciliation Act Petition was filed on 28.4.2017 before this Court. In the grounds raised under Section 34 Petition no ground is made with regard to bias of the Arbitrator. The Award was challenged only on some other grounds.

20. It is also relevant to note that the Award in the given case passed on 17.02.2017. On 20.02.2017 the Petitioner sought information from the Respondent under RTI Act about the number of Arbitration done by the Arbitrator. Such information was provided on 10.03.2017. But Original Petition under Section 34 of the Arbitration and Conciliation Act was filed on 28.04.2017. Even after the Petitioner was aware of the Information through RTI Act, he has not raised any objection or made any ground of attack in Section 34 Petition. Therefore, the time limit provided under Section 13 of the Act to challenge the Arbitrator can be

equally applicable to make such ground to challenge the Arbitrator while filing petition under Section 34 of the Act. Despite the fact that the Petitioner was aware of the information, they have not raised any ground under Section 34 Petition. Only after the dismissal of the earlier Petition in O.P.No.606 of 2018 the above ground of bias sought to be argued before this Court. Therefore, when the time limit is granted for challenging the the Arbitrator even during the Arbitral proceedings, such time limit is also equally applicable to raise the ground of bias challenging appointment of Arbitrator under Section 34 of the Act, the same has not been done so. Therefore, the submissions of the learned counsel for the Petitioner that the learned Arbitrator has biased cannot be entertained at this stage. They have not only waived their right and also estopped from raising such a ground. Despite the fact that they have got information on 10.03.2017 itself, they have not challenged or made any ground in this regard under Section 34 of the Arbitration and Conciliation Act. Therefore, the main ground challenging the Arbitrator on the plea of bias cannot be entertained beyond the period of limitation.

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21. In *State of Maharashtra –Vs- Hindustan Construction Co. Ltd* *[(2010) 4 SCC 518]* the Honourable Supreme Court has held that the application

for such amendment for incorporation of additional grounds in application under Section 34 filed after expiry of limitation the bar under Section 34(3) of the Act not invariably applicable to such application, though same may be a factor for consideration in exercise of court's discretion.

22. Though the judgment relied upon by the learned Senior Counsel for the Petitioner to contend that limitation for filing the Original Petition under Section 34 of the Act cannot be applied to the re-filing of O.P. under Section 34. In ***Northern Railway –Vs- Pioneer Publicity Corpn. (P) Ltd [(2017) 11 SCC 234]*** the Honourable Apex Court has held that Section 34 Petition has filed in time. However due to certain defects the matter has been returned for rectification. Taking note of the Rules governing for curing defects the Apex Court has held that the limitation prescribed under Section 34(3) is not applicable to re-filing. The above judgment is not applicable to the present case. Here the very challenge of Arbitrator sought to be made on new grounds, which has not been made within the period of limitation. Besides, it was also not made within 15 days after aware of the information under the Right To Information Act. If really the Petitioner intend to challenge the award the Award on the ground of bias from the very inception

their conduct would have been otherwise. Immediately after receipt of the information, the Petitioner ought to have raised such ground under Section 34 of the Act within a period of 15 days or even at the time of filing Petition under Section 34 of the Act, which has not been done so. Further, on perusal of the entire Award, this Court found that the learned Arbitrator interpreted the contract in its plain meaning, applied law and decided the matter. Therefore, it cannot be said that the learned Arbitrator has taken a biased decision.

23. Therefore, this Court is of the view that the Memo for Additional Ground filed only after the earlier application has been dismissed on merits. In such a view of the matter this Original Application is liable to be dismissed.

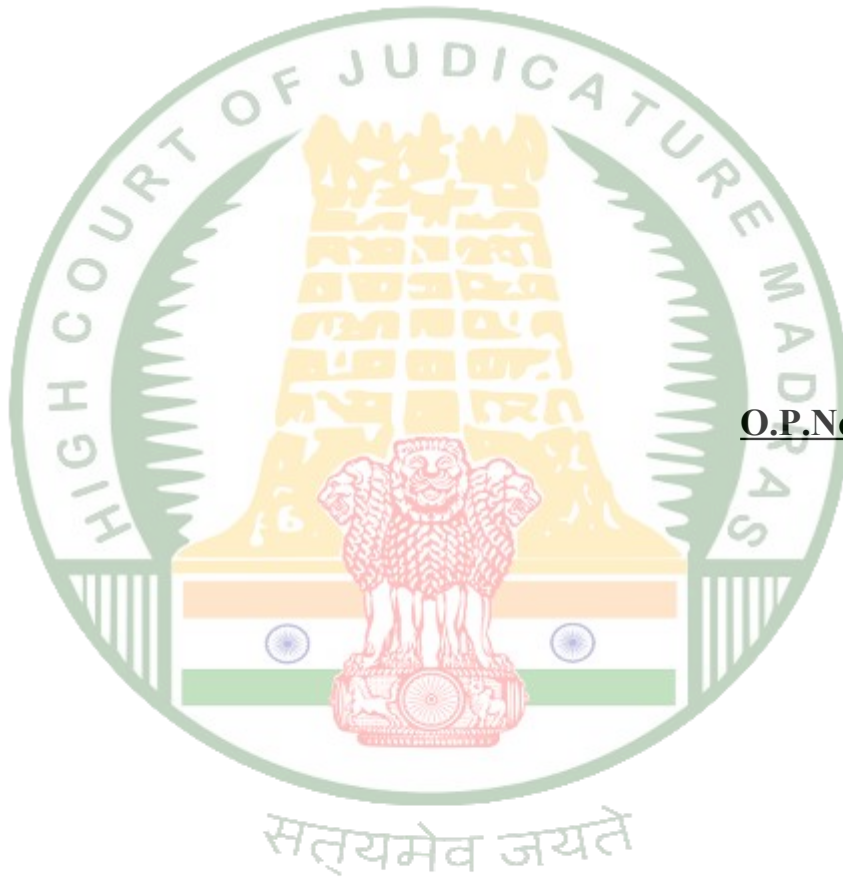
24. Accordingly, the Original Petition is dismissed.

06.10.2021

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N. SATHISH KUMAR, J.
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Order in:
O.P.No.646 of 2017

06.10.2021

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