

\$~8

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

%

Date of Judgment: 16th February, 2021

+ **O.M.P. (COMM.) 464/2020 & I.A. NOS. 7785/2020 & 7786/2020**

HINDUSTAN PETROLEUM
CORPORATION LTD.

..... Petitioner

Through: Mr Naveen Raheja and Ms
Aditi Shastri, Advocate.

versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: Mr Santosh Kr. Tripathi,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner, Hindustan Petroleum Corporation Ltd. (hereafter 'HPCL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 28.11.2019 (hereafter the 'impugned award') rendered by the Arbitral Tribunal comprising of a Sole Arbitrator. The impugned award was rendered in the context of disputes that had arisen between HPCL and the respondent (DTC) in

respect of a contract for supply of lubricants.

2. DTC is a corporation engaged in providing public transport services. HPCL is one of the public sector oil marketing company. DTC had issued a limited inquiry inviting tenders from four public sector oil marketing companies, including HPCL, for supply of lubricants (in all thirteen items). Pursuant to the said invitation to tender, HPCL submitted its bid dated 23.10.2007 quoting firm rates for supply of certain lubricants on the given terms and conditions. HPCL's bid was declared the lowest and was accepted. Consequently, separate purchase orders dated 08.11.2007, 10.01.2008, 18.01.2008, 25.01.2008, 28.01.2008 and 26.03.2008 were placed by DTC on HPCL. HPCL was required to supply the lubricants in terms of delivery schedule on a staggered basis during the year 2008-09.

3. On 19.06.2008, HPCL sent a letter to DTC, *inter alia*, stating that oil prices in the international market had risen and it may not be able to hold the current prices for future supplies. HPCL requested that the prices of the lubricants be increased by ₹20.50 per litre. HPCL stated that after 15.07.2008, it would not be in a position to execute the indents at the existing rates. DTC did not agree to increase the prices and sent a letter dated 16.07.2008 contending that the prices tendered by HPCL were to remain firm till completion of the contract. The said letter is not placed on record. However, the learned counsel for HPCL does not dispute that, DTC had, in fact, sent a letter dated 16.07.2008 declining HPCL's request for any increase in the agreed prices. DTC sent another letter dated 28.07.2008 once again reiterating

that HPCL's demand for increasing the prices was in contravention with the contract. DTC also informed HPCL that its inventory was depleted and was making it difficult to meet the demands of running of the fleet of buses. DTC called upon HPCL to resume the supply. However, HPCL did not comply. HPCL has also not placed the said letter on record.

4. Since HPCL had declined to supply the lubricants at the price agreed by it, DTC floated another tender inquiry in August, 2008 and procured lubricants at the lowest prices, as offered by the tenderers. The learned counsel appearing for HPCL states that HPCL also participated in the fresh tender and supplied lubricants at the tendered prices, which were significantly higher than as earlier agreed by HPCL.

5. DTC claims that it had to incur extra cost of ₹1,09,22,527.42/- for procuring lube oil at prices higher than those, as agreed with HPCL.

6. Accordingly, DTC issued a notice dated 13.05.2010, *inter alia*, stating that because of non-supply of oil, DTC was compelled to call fresh limited tenders for the balance quantity in August, 2008. The rates offered pursuant to the said tender were approximately 57% to 84% higher than the agreed rates. It further alleged that despite being called upon to do so, HPCL had failed to resolve the disputes amicably or refer the matter to the Secretaries appointed by the Central Government for resolution of the disputes relating to public

sector undertakings or refer the matter to the Arbitrator appointed by the Central Government. By the said notice, DTC called upon HPCL to settle the disputes and agree to refer the matter to the Permanent Machinery of Arbitration.

7. HPCL responded to the said notice by its letter dated 19.07.2010, *inter alia*, stating that HPCL had not breached the contract with DTC since its inability to supply oil was to “*due to unprecedented price increased in the base oil stock*”. It also stated that it had no objection for reference of the dispute to arbitration.

8. It is not disputed that an Arbitration Agreement exists between the parties in view of the Arbitration Clause, as included in the tender conditions. In terms of the Arbitration Clause (Clause 24), the parties had agreed that all questions and disputes arising out of the contract would be referred to Sole Arbitration of the Chairman cum Managing Director, DTC and if he is unable or unwilling to act as a Sole Arbitrator, to some other person appointed by him.

9. In terms of the said Arbitration Clause, Justice (Retd.) Rekha Sharma, a former Judge of this Court, was appointed by DTC to act as the Sole Arbitrator. DTC filed its Statement of Claims before the Arbitral Tribunal in March 2012. HPCL contested the claims made by DTC.

10. The impugned award was rendered on 28.11.2019 and the learned Arbitrator forwarded a copy of the impugned award by an email to the learned counsel for HPCL on the said date.

11. HPCL claims that, since, it had not received a signed copy of the impugned award, it sent a letter dated 07.02.2020 to the learned Arbitrator enquiring about the delivery of the signed award. According to HPCL, the learned Arbitrator responded by a letter dated 10.02.2020 informing HPCL that the signed award had been couriered to HPCL's office earlier. HPCL did not take any immediate steps thereafter. HPCL claims that since it did not receive a signed award, it sent an office boy to the office of the learned Arbitrator on 14.07.2020 and received the signed award. The present petition assailing the impugned award was filed on 20.08.2020.

12. Mr Raheja, the learned counsel appearing for HPCL submits that the present petition under Section 34 of the A&C Act has been filed is within the period as stipulated under Section 34(3) of the A&C Act. He submits that there is no delay in filing the above-captioned petition because the signed impugned award was received by HPCL on 14.07.2020 and the petition was filed within the period of three months as stipulated under Section 34(3) of the A&C Act.

13. Insofar as the merits of the present petition are concerned, Mr Raheja contends that DTC's claims before the Arbitral Tribunal were barred by limitation and therefore, the impugned award is patently illegal. He submitted that HPCL had refused to supply lubricants at the offered price and had communicated the same to DTC by its letter dated 19.06.2008. Therefore, the cause of action had arisen in June, 2008 but DTC had referred the disputes to arbitration in March, 2012, which was beyond the period of three years.

Reasons and Conclusion

14. This Court is of the view that the present petition has been filed beyond the period of limitation as prescribed under Section 34(3) of the A&C Act. Admittedly, the impugned award was received by HPCL's counsel on 28.11.2019 and, thus, HPCL was fully aware of the award against it. However, it took no steps to challenge the same. Although it is asserted that HPCL had not received a signed award, HPCL took no steps to collect the same. As noticed above, HPCL claims that it had sent a letter dated 07.02.2020 to the learned Arbitrator regarding the same and the arbitrator had responded by informing HPCL that the signed award had been sent to HPCL's office. It is relevant to note that the said communication has not been placed on record. Further, HPCL has also not placed on record, copies of the *Dak* inward register, to establish that it had not received any communication/courier from the learned Arbitrator.

15. Even after being informed by the learned Arbitrator that a signed award has been dispatched to HPCL, it took no steps to obtain a copy of the same or to challenge the impugned award. HPCL claims that it finally sent an office boy to the office of the learned Arbitrator on 06.06.2020 and received the signed award on 14.07.2020. It is material to note that HPCL has not filed any evidence of receiving the signed award on 14.07.2020, as claimed by it.

16. HPCL has filed an application (being IA No. 7786/2020) seeking condonation of delay of twenty-one days in filing the above-

captioned petition. It is relevant to note that HPCL has calculated the period of limitation from the date of the award as it had received the award electronically on that date.

17. According to HPCL, the three months period as stipulated under Section 34(3) of the A&C Act expired on 02.03.2020. The nationwide lockdown was declared on 23.03.2020 due to outbreak of Covid-19. According to HPCL, the period of limitation stopped running from that date and therefore, there is a delay of only twenty-one days in filing the petition.

18. The said contention is, plainly, unpersuasive. The Supreme Court had by an order dated 23.03.2020 passed in ***Re Cognizance for Extension of Limitation: Suo Moto Writ petition (Civil) No. 3/2020*** extended the period of limitation in all matters till further orders. However, by an order dated 06.05.2020, the Supreme Court clarified that in case the period of limitation had expired after 15.03.2020, the same would be suspended till fifteen days after the lockdown is lifted. The lockdown was lifted with effect from 01.06.2020 and therefore, the period of limitation would expire on 15.06.2020. It is also doubtful whether the said orders would inure were to the benefit of HPCL, since the same were only applicable to cases where the period of limitation was expiring after 15.03.2020. In the present case, the time period for filing the petition had expired on 02.03.2020.

19. Although there is merit in the contention that period of limitation would commence when an award in terms of Section 31(5)

of the A&C Act is received by the concerned party. However, in this case, HPCL has not provided any material to establish the communications received from the Arbitral Tribunal. A copy of the email sent by the learned Arbitrator enclosing the impugned award as well as further communications received from the learned Arbitrator have not been produced. None of the communications exchanged with the learned Arbitrator after rendering of the award have been filed before this Court.

20. There is no ground for condoning any delay as concededly, HPCL had a copy of the impugned award on the date it was made. In view of the above, the application filed by HPCL seeking condonation of delay in filing the above-captioned petition is dismissed. Consequently, the above-captioned petition is also liable to be dismissed.

21. Having stated the above, for the sake of completeness, this Court also considers it apposite to consider HPCL's contention on merits.

22. The Arbitral Tribunal had found that HPCL had committed a breach of the Contract by not supplying lubes at the prices as agreed.

23. It is HPCL's case that it had not done so because the international price of the base stocks had risen substantially, thus, making it unviable to make supplies at the agreed prices. Before the Arbitral Tribunal, HPCL claimed that the contract entered into between the parties was frustrated on account of increase in the

international prices of oil. The Arbitral Tribunal rejected the said contention. The Arbitral Tribunal held that the events as cited by HPCL did not make out a case of frustration of the contract and HPCL had attempted to wriggle out of its contractual obligations by citing unprecedented increase in oil prices. A contract is not frustrated because it has become commercially unviable. Further, the Arbitral Tribunal had also noted that it was common knowledge that oil prices do not remain stable. Notwithstanding the above, HPCL had agreed to provide the lubricants at firm prices and thus could not avoid its obligations.

24. This Court finds no infirmity with the aforesaid view. It is trite law that merely because a contract has become financially unviable, it would not absolve the contracting parties to perform the same. It is important to note that HPCL does not dispute that the prices quoted by it were to remain firm for the duration of the contract.

25. The Arbitral Tribunal also rejected the contention that the claims were barred by limitation. The Arbitral Tribunal noted that although HPCL had declined to supply lubes at the rates as agreed with effect from 15.07.2008, DTC had not accepted the same. DTC had by its letters dated 16.07.2008 and 28.07.2008 emphasized that the Contract between the parties had provided for a fixed rate and therefore, any demand for increase in prices would be in contravention of the Contract. Since HPCL had declined to supply the lubricants at the agreed price, DTC had procured the remaining quantity by inviting fresh tenders. It had, thereafter, issued a notice dated 13.05.2010

calling upon HPCL to settle the disputes and agree to refer the matter to the Permanent Machinery of Arbitration.

26. It is relevant to note that HPCL had, by its letter dated 13.05.2010, expressed that it had no objection for “arbitration reference”. Thereafter, the learned Arbitrator was appointed and DTC had filed its Statement of Claim before the learned Arbitrator in March, 2012. The period of limitation would end with DTC suggesting that the disputes be referred to Permanent Machinery of Arbitration and evincing its intention to refer the disputes to arbitration. It would also end with HPCL agreeing to refer the disputes to arbitration.

27. It is not HPCL’s case that the learned Arbitrator was appointed beyond the period of three years of it agreeing to refer the disputes to arbitration. It is also not HPCL’s case that the Arbitral Tribunal was constituted beyond the period of limitation.

28. In view of the above, this Court finds no reason to interfere with the impugned award.

29. Before concluding, this Court considers it necessary to observe that, the present petition is accompanied by an Affidavit of Truth, whereby the deponent (Deputy General Manager) has affirmed that he has disclosed all relevant documents. However, as noticed hereinbefore, the same have not been filed with the present petition. The petitioner has been highly economical in placing the relevant material on record. Most of the communications as mentioned in the

impugned award have not been produced. This Court is of the view that filing petitions in such a manner must be discouraged.

30. In view of the above, this Court also considers it apposite to impose cost of ₹25,000/- on HPCL. The costs shall be deposited with Delhi High Court Legal Services Committee (Delhi High Court Legal Service Committee, UCO Bank, Delhi High Court, Shershah Road, New Delhi, Account No. 15530110008386, IFS Code UCBA0001553) within a period of two weeks from today.

31. The petition is dismissed with costs as aforesaid. All pending applications are also disposed of.

FEBRUARY 16, 2021
RK

VIBHU BAKHRU, J

