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Arb.O.P.(Com.Div.)No.77 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	13.10.2023
Pronounced on	28.03.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.77 of 2023

Mr.L.Dhanasekar,
S/o.Loganathan,
Proprietor, Sri Rajiv Gandhi Gas Agency,
No.7, 1st Cross, Nehru Nagar, Thangaithittu,
Puducherry – 605 004.

... Petitioner

Vs.

The Chief Area Manager,
Indian Oil Corporation Ltd,
Trichy Area Office,
Imankulathur,
Trichy – 620 017.

... Respondent

Prayer: Original Petition is filed under Section 34(2)(b)(ii) and (2A) of the Arbitration and Conciliation Act, 1996, praying to set aside the Arbitral Award dated 31.12.2021 bearing O.P.No.1 of 2021 passed by Mr.Nainar Mohamed, Sole Arbitrator in its entirety and to direct the respondent to pay the costs.



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For Petitioner : Mr.R.Ravi
for Mr.P.Kannan

For Respondent : Mr.Mohammed Fayaz Ali

ORDER

This petition has been filed under Section 34(2)(b)(ii) and (2A) of the Arbitration and Conciliation Act, 1996 to set aside the Award passed by the learned Arbitrator dated 31.12.2021 in O.P.No.1 of 2021.

2. The petitioner, an unsuccessful claimant before the Arbitral Tribunal is now before this Court, aggrieved by the impugned Award dated 31.12.2021 passed by the learned Arbitrator.

3. By the impugned Award dated 31.12.2021 the learned Arbitrator has dismissed the claim petition filed by the petitioner during July 2021 and has upheld the decision of the respondent terminating the distributorship with the respondent vide order dated 04.12.2021.



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4. Relevant portion of the impugned Award dated 31.12.2021 reads as under:

“14. It is admitted by both the parties that as per Ex.C1(Ex.R16) dated 07.01.2019, show cause notice for first instance was issued for the quarter from October 2018 to December 2018, the TDT rating of the claimant's distributorship is "Poor", for which, the claimant replied as per Ex.R17 dated 06.02.2019 stating that in the future, this type of activities will not happen and sorry for inconvenience. The respondent by Ex.C2(R18), the letter dated 18.02.2019, imposed penalty of Rs.25,595/- on the claimant. The claimant paid the same under Ex.C3(R19) dated 21.03.2019.

15.The respondent under Ex.C4(Ex.R21) dated 24.07.2019, issued show cause notice for second instance for the quarter from April 2019 to June 2019, the TDT rating of the claimant's distributorship is "Poor", for which, the claimant replied as per Ex.C5(Ex.R22) stating that he was affected by chest pain and took treatment in the hospital and requested to pardon him. The respondent by Ex.C6(R26), the letter dated 11.10.2019, imposed penalty of Rs.55,143/- on the claimant.

16.The respondent under Ex.C7(Ex.R27) dated 28.10.2019, issued show cause notice for third instance of the quarter from July 2019 to September 2019, the TDT rating of the claimant's distributorship is "Poor", for which, the claimant has not replied. Therefore, the respondent by



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*Ex.C8(R30), the letter dated **08.01.2020**, imposed penalty of Rs.59,943/- on the claimant.*

- 17.The respondent under Ex.C9(R31) dated **16.01.2020**, issued show cause notice for fourth instance for the quarter from October 2019 to December 2019, the TDT rating of the claimant's distributorship is "Poor", for which, the claimant has replied under Ex.C10(R32) dated 09.03.2020 stating that due to health condition and family problem, he could not concentrate the delivery activities and assured that he would show the performance in future.*
- 18. After receiving the reply from the claimant, the respondent issued show cause notice for termination under Ex.C11(R33) dated **09.06.2020**. The claimant sent a reply under Ex.C12(R34) dated 19.06.2020 wherein, he reiterated that he would maintain best performance and requested to give a chance to maintain the life and his family.*
- 19.Therefore, it is evident that the show cause notices were issued promptly by the respondent, that on receipt of reply from the claimant, the reply being not satisfactory, the respondent imposed penalty and the same was paid. Thus, principles of natural justice and 'audi alterum partem' were followed by the respondent in this case.*
- 20.At this juncture, it is to be pointed out that the LPG distributor is expected to maintain a minimum standard of service to his customers and comply with guidelines and rules issued by the Corporation from time to time. Though several opportunities were given to the claimant for improving the standards of service offered to the customers, there was no improvement in the functioning of the*



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claimant's distributorship.

21. *It is also reiterated that the claimant cannot go into the validity of the earlier show cause notices and orders imposing penalty after having admitted to the poor performance and after having paid the penalty. Further, the claimant having admitted that the respondent has established violation of TDT norms on three occasions, now cannot approbate and reprobate the same. **The timelines as contemplated by MDG 2018 for initiating action has been duly complied with.***

22. *In the light of violation of Clause Nos.11, 23(a) and 27(a) of the Distributorship Agreement dated 09.05.1996 read with Clause 4.2(v)(d) of MDG 2018, the distributorship agreement entered with the claimant was terminated by the impugned order dated 04.02.2021 and the same is valid in law. The point Nos.1 to 6 are answered accordingly.*

23. *Point No.7: In view of the discussion made above, the claimant is not entitled for restoration of LPG Distributorship Agency. Hence, this point is answered against the claimant.*

24. *In the result, the claim petition is dismissed with costs.”*

5. The Challenge to the impugned Award passed by the learned Arbitrator is primarily on the ground that the petitioner was issued notices in accordance with the provisions of the Marketing Discipline Guidelines, 2018 (hereinafter



referred to as MDG, 2018) for LPG Distributorship which came into effect from 01.11.2018. It is submitted that the petitioner was issued with notices purportedly in the exercise of power conferred under Clause 4.2(v) of the MDG, 2018.

6. It is further submitted that the said guideline could apply only for violations made under the aforesaid guidelines. Specifically, a reference was made to Clause 4.2(V)(a) of the Distributorship Agreement dated 09.05.1996 which reads as under:-

“4.2.(v) Action against Distributors performing at "Poor" rating:-

(a) In case it is established that the distributorship is at 'Poor' rating in 1st or 2nd quarter during the period of first six months from the implementation of MDG, a Warning-cum guidance letter shall be issued to the distributor.”

7. It is therefore submitted that the alleged violations under the old guidelines cannot be the basis for terminating the contract in terms of Clause 4.2(V)(d) of the Distributorship Agreement dated 09.05.1996 which reads as under:-

“4.2 (V)(d) In case it is established that the distributorship performance is rated as "Poor" in any four completed



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quarters during the preceding 2 years (i.e. 8 quarters), it would lead to Termination of the LPG distributorship.”

8. The learned counsel for the petitioner admits that the petitioner was issued with the following notices to which the petitioner has replied and was imposed with penalties:-

Sl.No.	Date of Show Cause Notice	Date of Penalty	Penalty	Period	Rating
1.	09.10.2017			1 st and 2 nd quarter of 2017	
2.	05.04.2018			3 rd and 4 th quarter of 2017	
3.	05.10.2018			1 st and 2 nd quarter of 2017	Poor
4.	07.01.2019	18.02.2019	Rs.25,595/-	3 rd quarter of 2018	Poor
5.	24.07.2019	11.10.2019	Rs.55,143/-	1 st quarter of 2019	
6.	28.10.2019	08.01.2020	Rs.59,943/-	2 nd quarter of 2019	
7.	16.01.2020			3 rd quarter of 2019	Poor

9. It is submitted that the petitioner has also paid the penalty imposed under the respective orders of the respondent. It is further submitted that termination of the distributorship pursuant to notice dated 09.06.2020 by invoking Clause 4.2(v)(d) and Clause 11 and 23(a) of the Distributorship Agreement dated 09.05.1996 was not available to the respondent for previous



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defaults committed by the petitioner under Old MDG.

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10. It is submitted that the first notice issued to the petitioner on 05.04.2018 pertains for the period from April 2018 to September 2018 where only a warning notice was issued under the AEGIS of the earlier guidelines. It is submitted that the new guidelines were later issued with effect from 01.11.2018.

11. It is submitted that the next notice dated 07.01.2019 was issued for imposing a penalty of Rs.25,595/-. It is submitted that it relates to part of the period prior to the implementation of the MDG, 2018 for LPG Distributorship.

12. The learned counsel for the petitioner has also drawn attention to a new Guideline issued with effect from 01.05.2022, *post facto* namely the Marketing Discipline Guidelines, 2022, (hereinafter referred to as MDG 2022) for LPG Distributorship. It is submitted that under the new Guidelines, there is no scope for terminating the Distributorship of a dealer for failure to achieve the star rating under the Targeted Delivery Time Norms (hereinafter referred to



as TDT Norms) by a Distributor.

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13. It is submitted that as a public authority, the respondent was not entitled to terminate the Distributorship Agreement dated 09.05.1996 and therefore, the Award passed by the learned Arbitrator is to be declared as patently illegal on the face of it.

14. That apart, it is submitted that the Award passed by the learned Arbitrator is also in conflict with the morality and justice. It is therefore submitted that the Impugned Award passed by the learned Arbitrator is therefore, liable to be set aside, as termination of the Distributorship of the petitioner by the respondent vide order dated 04.02.2022 is liable to be interfered by restoring the Distributorship of the petitioner.

15. Defending the impugned Award passed by the learned Arbitrator, the learned counsel for the respondent would submit that the petitioner is essentially seeking for a relief which is contrary to Section 14(d) of the Specific Relief Act, 1963 [formerly 14(1)(c) of the said Act].



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16. It is submitted that the relief sought for by the petitioner cannot be countenanced in view of Clause 27 and 28 of the Distributorship Agreement dated 09.05.1996.

17. It is submitted that Clause 27 deals with specifically empowers the respondent corporation to terminate the Agreement Distributorship dated 09.05.1996. It is submitted that under Clause 27, the respondent Corporation can terminate the agreement by giving 30 days notice to the period without assigning any reasons for such termination. A reference was made by the learned counsel for the respondent to the decision of the Hon'ble Supreme Court in **Indian Oil Corporation Limited Vs. Amritsar Gas Service and others** [(1991) 1 SCC 533].

18. A specific reference is made to paragraph 4 of the said decision and wherein under a similar circumstances, applying the ratio of the Hon'ble Supreme Court in **Indian Oil Corporation Limited Vs. Amritsar Gas Service**



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and others [(1991) 1 SCC 533]. The order of the learned Single Judge of this Court was interfered with.

19. It is submitted that under a similar circumstances, an Award of the learned Arbitrator there restoring the Distributorship Agreement was held to be bad in law by a Division Bench of this Court in the case of **Indian Oil Corporation Limited and another Vs. Bhagawan Balasai Enterprises and Another** [(2018) 1 LW 610].

20. That apart, it is submitted that admittedly there have been breaches by the petitioner in meeting the targets and there was a failure on the part of the petitioner to maintain the TDT as per the norms prescribed under the MDG, 2018 for LPG Distributorship with effect from 01.11.2018.

21. It is further submitted that the said guidelines was effective from 01.11.2018. It is therefore submitted that since the petitioner did not meet TDT norms, termination of Distributorship of the petitioner was warranted under the circumstances. In case, of new distributors commissioned, the TDT norms will become effective from the quarter following the quarter in which new



distributorship is commissioned.

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22. It is submitted that the petitioner was issued with notice to which the petitioner has also replied and admitted to the short comings and was warned and later was imposed with penalty. It is submitted that despite the same, the petitioner continued to fail to meet the requirements of TDT and therefore, the impugned Award was passed by relying on Clause 4.2.(v)(d) of MDG, 2022 which was perfectly in order and does not call for interference with.

23. Therefore, on this count also specific performance of the contract cannot be interfered in favour of the petitioner.

24. That apart, it is submitted that MDG, 2018 has been an existence right from 1982. It is submitted that it was amended from time to time and that the petitioner was aware of the conditions of the MDG issued and amended from time to time and therefore on this count also the impugned Award does not call for any interference.



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25. Finally, the learned counsel for the respondent has also drawn attention to Section 16 of the Specific Relief Act, 1963. Specifically, a reference is made to Section 16 (b) of the Act. It is submitted that since the petitioner rendered himself incapable of performing the obligations taken under the Distributorship Agreement dated 09.05.1996 regarding TDT which was an essential terms of the contract under the Distributorship Agreement dated 09.05.1996, the Dealership Agreement with the petitioner was terminated vide order dated 04.12.2021 of the respondent.

26. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

27. There are no dispute on facts. The Distributorship agreement dated 09.05.1996 contemplates a mechanism for resolution of a dispute through Arbitration. Clause 37(a) of the aforesaid Agreement reads as under:-



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“37(a). Any dispute or difference of any nature whatsoever any claim, cross-claim, counter-claim or set off of the Corporation against the Distributor or regarding any right liability, act, omission or 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). The Distributor will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an Officer of the Corporation or that he has dealt with the matters to which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director (Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act may in the discretion of the Director (Marketing) designate another person to act as arbitrator in accordance with the terms of the agreement to the end and intent that the original Arbitrator shall be entitled to continue the arbitration proceeding notwithstanding his transfer or vacation of office as an officer of the Corporation if the Director (Marketing) does not designate another person to act as arbitrator on such transfer, vacation of office or inability of original arbitrator. Such persons 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 contract 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 Act, 1940 or any statutory modification or reenactment thereof and the rules made there under for the time being in force shall apply to the arbitration proceedings under this clause.”



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28. The parties have accepted the above clause to resolve the dispute through Arbitration. The Distributorship Arrangement was terminated vide Order dated 04.02.2021 passed by the respondent. Aggrieved by the same, the petitioner had invoked Arbitration Original Petition before the learned Arbitrator.

29. There is no dispute that the petitioner has also been issued with notice and imposed with penalty as is contemplated under the MDG, 2018 with effect from 01.11.2018.

30. The scope for enquiry under section 34 of the Arbitration and Conciliation Act, 1996 is limited to the grounds specified therein. Although not argued by the petitioner as to how the impugned Award was liable to be set aside on the grounds stipulated in Section 34, except for the perceived wrong done to the petitioner by the respondent.



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31. In Indian Oil Corporation Limited vs. Amristar Gas Service and

Others, (1991) 1 SCC 533, the Court observed as under:-

“12.....

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held that the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-Section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the



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distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.

32. In **Hindustan Petroleum Corporation Limited and Others vs. Super Highways Services and Another**, (2010) 3 Supreme Court Cases 231, it was held as under:-

“In the present case, there is no admissible evidence to prove service of notice on the respondent or refusal of notice by the respondent. Further, the notice dated 28.05.2008 which was allegedly refused by the respondent, did not give him adequate time to arrange for the presence of himself or his representative during the test to the conducted at 3.00 p.m. on 29.05.2008. It is also to be noted that the endorsement regarding the alleged refusal is dated 29.05.2008 itself. Thus, the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice.”

33. This view was also followed by this Court under a some what similar circumstances in **Bharat Petroleum Corporation Limited, Chennai vs. Rajarajeswari Agency, Chennai**, dealing with Section 14(1)(C) of the Specific Relief Act as it stood then and Clause 28 of the Agreement between the



parties therein. The Court held as under:-

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“22. Clause 28 permit either party without prejudice to the foregoing provision or anything to the contrary contained in the Agreement, to terminate the Agreement by giving 30 days notice to the other party, without assigning any reason for such termination.

23. Section 14(1)(c) of the Specific Relief Act provides inter alia that the Contract, which is in its nature determinable cannot be specifically enforced when there is a specific Clause authorising and enabling either parties to terminate the agreement in the event of happening of the events specified therein. In the present case, Clause 28 permitted either party “without prejudice to Clause 27 or anything to the contrary” contained in the agreement to terminate the agreement by thirty days notice to the other party without assigning any reason for such termination. We find that the Agreement being of a determinable nature is not specifically enforceable in view of Section 14(1)(c) of Specific Relief Act, which was not taken note of by the learned Single Judge, while ordering restoration and Distributorship Agreement.”

34. Ultimately the Court concluded as under:-

“The facts of the present case are identical to the facts of the aforementioned decision of the Supreme Court inasmuch as the Distributorship Agreement in the instance case is also terminable by the Appellant-Corporation on the happening of certain events. In the present case also, the Agreement was terminable on the happening of certain events. There is no manner of doubt that the Contract by its nature, especially in view of Clause 28 is determinable in nature. The terms of Agreement being revocable at the instance of either parties, in our view, the learned Single Judge was not right in ordering restoration of



Distributorship.”

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35. A similar view was taken by a subsequent Division Bench of this Court in **Indian Oil Corporation Ltd. and Another vs. Bhagawan Balasai Enterprises and Another**, 2017 SCC OnLine Mad 37266, the order passed by a learned Single Judge which is impugned before the Hon'ble Division Bench was set aside following the views of the Hon'ble Supreme Court in the case of **Indian Oil Corporation Limited Vs. Amritsar Gas Service and others** [(1991) 1 SCC 533].

36. In **Bharat Petroleum Corporation vs. Jagannath and Company and Others**, (2013) 12 SCC 278, it was held as under:-

“19. Though the appellant BPCL protested the said application contending that the said provision in the Petroleum Act, 1934 is not applicable and the very same objection was raised by the learned Senior Counsel for the appellant before us, it is relevant to quote Clause 10(k) of the dealership agreement with which the parties are bound is as under:

“10(k) To abide by the Petroleum Act, 1934 and the Rules framed hereunder for the time being in force as also in other laws, rules or regulations either of the Government or any local body as may be in force.”

In view of the dealership agreement, particularly, Clause 10(k) referred above, the contention of the learned Senior Counsel for BPCL is liable to be rejected.



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20. *In terms of Section 20 of the Petroleum Act, 1934 the contesting respondents had a right to have fresh samples drawn and get the same retested within seven days of intimation of the test results. It is the assertion of the contesting respondents that the test reports were intimated to them only upon filing of a suit before the trial court. After getting the above reports, on 02.09.2005, the contesting respondents moved an application before the trial court in the said suit for fresh sampling/retest of the products. Though an objection was raised for filing counter-statement in the said application, it is brought to our notice that in spite of several opportunities given by the Court, no such objection was ever filed. It was further pointed out by the learned counsel for the contesting respondents that they timely exercised their right available in law. In view of the application filed by the contesting respondents on 02.09.2005 and in the light of Section 20 of the Petroleum Act, 1934 as well as the terms of the dealership agreement, the objection raised by the learned Senior Counsel for BPCL is liable to be rejected.”*

37. In Allied Motors Limited vs. Bharat Petroleum Corporation

Limited, (2012) 2 SCC 1, it was held as under:-

“7. The appellant urged that the samples taken in this raid were in complete violation of the mandatory procedural provisions of law as provided under the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1998 (hereinafter referred to as “the Order”). The appellant while reproducing the relevant provisions of law has submitted as under:

(a) Clause 4 of the said Order provides for power of search and seizure. Sub-clause (A) of the clause authorises any police officer not below the rank of the Deputy Superintendent of Police (for short “DSP”) the rank of the Sales Officer to take samples of the products and/or seize



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any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of the said Order.

8. In the present case, however, the samples were collected in complete violation of the aforesaid provisions. The police official who had conducted the raid and collected the samples was admittedly below the rank of DSP. This is also recorded in the Metropolitan Magistrate's order dated 27.05.2002 passed in FIR.No.193 of 2000 wherein it is stated as under:

“In the present case the search and seizure was conducted by an unauthorised police officer of the rank of Inspector which is totally contrary to the mandatory provisions of the said Clause 4.”

(b) Sub-clause (B) of Clause 4 of the said Order provides that:

“4.(B) While exercising the power of seizure under Clause 4(A)(iv) the authorised officer shall record in writing the reasons for doing so, a copy of which shall be given to the dealer...”

38. The above three decisions cited by the learned counsel for the petitioner are not relevant to the facts of the case.

39. The only issue to be decided is whether the award passed by the learned Arbitrator is liable to be set aside or any of the ground stipulated in Section 34 of the Arbitration and Conciliation Act, 1996.



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40. From the submission made by the learned counsel for the petitioner, it appears that the petitioner wants the Court to come to a conclusion that the impugned Award was in conflict with the public policy as is contemplated under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 read with Sub clause (ii) & (iii) to Explanation 1 and that the impugned Award passed by the learned arbitrator is vitiated by patently illegally under Section 34(2-A) of the Arbitration and Conciliation Act, 1996.

41. The Distributorship Agreement dated 09.05.1996 signed with the petitioner is determinable. Therefore, the relief which the petitioner had sought for before the Arbitral Tribunal for restoring the Distributorship Agreement which stood terminated by order dated 04.12.2021 of the respondent was rightfully rejected.

42. It can neither be said that the impugned Award passed by the Arbitral Tribunal was either in conflict with the public policy as is contemplated under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 nor the impugned Award was vitiated by patently illegally under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996.



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43. The law under subject had been clarified by the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India**, (2019) 15 SCC 131.

44. The impugned Award dated 31.12.2021 of the learned Arbitrator therefore does not call for any interference. Hence, the Arbitration Original Petition is liable to be dismissed with liberty to the petitioner to workout his remedy by drawing attention to MDG 2018, for LPG Distributorship in terms of which the power for determining/terminating the Distribution Agreement has been taken away. Consequently, time spent before the Arbitral Tribunal and before this Court is to be excluded for the purpose of determining the limitation under Section 43 of the Arbitration and Conciliation Act, 1996 for the petitioner to workout the remedy in the manner known to law. No cost.

28.03.2024

Index : Yes/No
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C.SARAVANAN, J.

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Pre-deliver order in
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