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

+ FAO (OS) (COMM) 44/2021, CM APPLs. 9555-58/2021

HINDUSTAN PETROLEUM CORPORATION LTD....Appellant

Through: Mr.Parijat Sinha with Ms.Pallak
Bhagat and Mr.Devesh Mishra,
Advocates.

Versus

DELHI TRANSPORT CORPORATIONRespondent

Through: Mr.Santosh Kumar Tripathi,
standing counsel for DTC.

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Date of Decision: 10th March, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. Present appeal has been heard by way of video conferencing.
2. Present appeal has been filed challenging the order dated 16th February 2021 passed by the learned Single Judge whereby the petition preferred by the Appellant against the arbitral award was dismissed by the Single Judge.
3. Learned counsel for the Appellant submits that the learned Single Judge erred in holding that the petition challenging the award was barred by limitation. He states that the learned Single Judge did not appreciate that due to the nationwide COVID 19 lockdown and subsequent delay by

the office of the Sole Arbitrator, the signed copy of the Arbitral Award was received only on 14th July 2020 by the Appellant and the Petition challenging the award was filed on 19th August 2020. Consequently, according to him, the petition filed by the appellant was within the limitation prescribed under Section 34(3) of the Arbitration and Conciliation Act, 1996.

4. He also submits that the Single Judge erred in holding that the claim of the Respondent was not barred by time. He states that the Appellant communicated its inability to supply the lubricants vide letter dated 19th June 2008 and the limitation for filing the claim by the Respondent expired on 19th June, 2011. He points out that the Respondent filed its claims before the learned Arbitrator on 27th March 2012 which is clearly beyond the limitation period of three (3) years. He emphasises that Respondent-DTC had initially called upon the Appellant to refer the dispute to permanent machinery of arbitration to which the appellant vide letter dated 19th July, 2010 had given its no objection. He, however, contends that subsequently the Respondent-DTC unilaterally appointed a retired Judge of this Court as the Sole Arbitrator.

5. The relevant facts of the present case are that the Respondent-DTC had issued a limited inquiry dated 12th October 2007, inviting tenders from public sector oil marketing companies, including the Appellant, for supply of lubricants. The Appellant's bid dated 23rd October 2007 was accepted, and purchase orders were placed upon the Appellant by the Respondent-DTC.

6. Subsequently on 19th June 2008, the Appellant sent a letter to the Respondent apprising it about rising oil prices in the international market

and the Appellant requested that the prices of the lubricants be increased by Rs. 20.50 per litre. The Respondent-DTC did not agree to the request made by the Appellant vide letter dated 16th July, 2008 and therefore the Appellant did not continue with the supply of the lubricants.

7. In fact it is the case of the Appellant that that due to increase in oil prices internationally, the purchase orders placed by the Respondent-DTC upon the Appellant stood frustrated.

8. On 29th July 2008, the Respondents issued a second tender inquiry and the Appellant's bid was again selected for supplying the same items under same terms and conditions as set out in the first limited inquiry dated 12th October 2007. Needless to state the Appellant was re-awarded the bid at a higher price.

9. Vide legal notice dated 13th May 2010, the Respondent-DTC informed the Appellant about the damages incurred by the Respondent-DTC due to non-supply of items under the first tender and called upon the Appellant to refer the dispute to permanent machinery of arbitration. Appellant vide letter dated 19th July, 2010 stated that it had no objection to the arbitration reference.

10. The Respondent-DTC appointed a retired Judge of this Court as the Sole Arbitrator with consent of the appellant, who subsequently awarded a sum of Rs. 1,09,22,527.42/- along with interest @ 9% per annum in favour of Respondent-DTC vide arbitral award dated 28th November, 2019. The fact that the Sole Arbitrator had been appointed with consent of the appellant is admitted by the appellant in paragraph 2.12 of the present appeal.

11. Subsequently, the Respondent-DTC filed a petition before this Court for execution of the arbitral award on 14th August, 2020.

12. The appellant thereafter filed a petition dated 19th August 2020 under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award.

13. The learned Single Judge of this Court by way of the impugned order dated 16th February 2021 dismissed the petition preferred by the Appellant challenging the arbitral award both on the grounds of limitation as well as merits and imposed costs of Rs. 25,000/- on the Appellant for being 'economical with documents'. The relevant portion of the impugned order passed by the learned Single Judge is reproduced hereinbelow:-

“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.

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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.

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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.”

14. It is settled law that to invoke the arbitration, there should be a dispute and the dispute entails a positive element and assertion of denying not merely inaction to accede to a claim or a request. [See: **Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, (1988) 2 SCC 338**].

15. From the facts stated hereinabove, it is apparent that the dispute between the parties did not arise on 19th June, 2008, as contended by learned counsel for Appellant. In fact, the cause of action arose when the Appellant denied the claim raised by the Respondent-DTC – which could

have only happened after the damages had been calculated i.e. after the purchase order under the second tender had been issued. Further, within the period of three years i.e. on 19th July, 2010, the Appellant had agreed to Respondent-DTC's suggestion to resolve the disputes between the parties by way of arbitration.

16. It needs to be emphasised that though initially the Respondent-DTC had called upon the Appellant to refer the dispute to permanent machinery of arbitration to which the Appellant had agreed vide letter dated 19th July, 2010, yet subsequently, a retired Judge of this Court was appointed as the Sole Arbitrator with the consent of the Appellant as has been admitted in paragraph 2.12 of the present appeal. Consequently, invocation of the arbitration clause by the Respondent-DTC was within the period of limitation.

17. This Court is in agreement with the finding of the learned Single Judge that the Arbitral Tribunal was constituted within limitation as the appointment of the Arbitrator was not beyond the period of three years of the reference being made by the parties to the arbitration.

18. Learned Single Judge has also correctly pointed out that admittedly the impugned award was received by the counsel of Appellant on 28th November, 2019 itself and Appellant for the first time had sent a letter to the learned Arbitrator asking for a signed copy of the award only on 07th February, 2020. Further, even though the Appellant was informed by the learned Arbitrator that a signed copy of the award had been sent to Appellant's office, the Appellant had sent an employee to the office of the learned Arbitrator on 06th June, 2020 i.e. much after the limitation for filing the Award had expired on 02nd March, 2020. This Court is of the

view that the delay of more than two and a half months in asking for a signed copy of the award and thereafter sending an office boy to collect a copy of the signed award after four months is inexcusable as the essence of arbitration is expeditious disposal of the dispute. The appellant is also not entitled to the extended period of limitation vide order of Supreme Court dated 23rd March, 2020 passed in ***Re Cognizance for Extension of Limitation: Suo Moto Writ Petition (Civil) No. 3/2020*** as the limitation had expired prior to the onset of Covid-19 Pandemic.

19. It is further settled law that there is clear distinction between the frustration of contract and the contract being commercially unviable. In the present case, the contract was not frustrated but it definitely ceased to be a commercially viable proposition for the Appellant after the increase of international oil prices. However, commercial unviability of a contract is not a ground to evade performance of a contract. Consequently, neither the impugned award nor the impugned order of the learned Single Judge calls for any interference.

20. Accordingly, the present appeal along with pending applications is dismissed.

21. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

ASHA MENON, J

MARCH 10, 2021
KA/AS