

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

I.A No: G.A. 2 of 2021

in

A.P. 827 of 2018

Indian Oil Corporation Ltd.

Vs.

Tapas Kumar Das

For the Petitioner : Mr. Jishnu Saha, Sr. Adv.
Mr. M.S. Yadav, Adv.

For the Respondent : Mr. Debajyoti Datta, Adv.
Mr. Subhasish Bandopadhyay, Adv.

Last Heard on : 09.07.2021.

Delivered on : 12.07.2021.

MOUSHUMI BHATTACHARYA, J.

1. This is an application for amending the grounds of challenge in an application under Section 34 of The Arbitration and Conciliation Act, 1996 (the Act). The impugned Award dated 30th July, 2018 was passed by a learned Sole Arbitrator allowing some of the claims filed by the claimant (respondent before this court) in relation to termination of a dealership

executed between the respondent herein and the petitioner Indian Oil Corporation Limited.

2. According to the petitioner, the application for amendment should be allowed since the proposed grounds contained in the Schedule to the application, were urged by the petitioner before the Arbitrator.

3. Mr. Jishnu Saha, learned senior counsel appearing for the petitioner-Indian Oil Corporation Limited, submits that the new grounds pertain to the Marketing Discipline Guidelines for certain types of dealerships of Indian Oil Corporation Limited, which provides for the remedies available to a dealer in the event of termination of the dealership. Counsel submits that the grounds pertaining to the Guidelines were missed out through inadvertence in the application challenging the impugned Award. Counsel submits that the issues framed by the Arbitrator in the impugned Award would show that the petitioner had urged the new grounds in the arbitration proceedings. Counsel relies on *Fiza Developers & Inter-Trade Pvt. Ltd. vs AMCI (INDIA) Pvt. Ltd. & Anr; (2009) 17 SCC 796* on the proposition that an award may be set aside by a court on its own initiative if the subject-matter of the dispute is not arbitrable or the Award is in conflict with the public policy of India. Counsel relies on *State of Maharashtra vs. Hindustan Construction Company Limited; (2010) 4 SCC 518* on the point that court can grant leave to amend an application under Section 34 if the circumstances of the case so warrant. *Venture Global Engineering vs Satyam Computer Services Limited and Another; (2010) 8 SCC 660* has been shown to urge that facts disclosed after passing of the Award may be brought on record as grounds if such facts

have a positive link with the facts constituting the Award. *Emkay Global Financial Services Limited vs Girdhar Sondhi* ; (2018) 9 SCC 49 has been relied upon on the point that if there are matters which are relevant for determination of issues arising under Section 34 and which were not before the Arbitrator, such matters can be brought to the notice of the court.

4. Mr. Debajyoti Datta, learned counsel appearing for the respondent opposes the application for adding new grounds for setting aside the Award primarily on the factual score. Counsel submits that in seeking to introduce new grounds, namely on the lack of jurisdiction, the nature and character of the setting aside application is being changed which is not permissible in law. It is also submitted that the amendments are being carried out beyond the period of 120 days within which an application has to be made for setting aside an Award. Counsel submits that grounds which are sought to be added now do not have a foundational basis in the original application. Counsel submits that if Section 34 (2) (b) is read with the amended Section 34 (2A) of the Act, there will be no need to add the proposed grounds. Counsel relies on *Pushpa P. Mulchandani and others vs Admiral Radhakrishin Tahilani (Retd.) and others*; (2000) 4 Mh.L.J. 819 and *Esteem Mercantile Pvt. Ltd. vs M/s K.H. Parekh and another*; (2002) 2 Mh.L.J. 216 in support of the proposition that amendments cannot be allowed to be carried out beyond the period specified in Section 34(3) of the Act.

5. I have heard learned counsel for the parties and seen the documents relevant for deciding the question whether the petitioner should be allowed to amend the arbitration petition by addition of the grounds set forth in the Schedule to the present application.

6. The grounds contained in the Schedule relate to the Marketing Discipline Guidelines for specific kinds of Dealership and that the contracts entered into between the Public Sector Oil Marketing Companies and such dealers are subject to the terms and conditions of the Marketing Discipline Guidelines. The grounds relate to the agreement between the petitioner and the respondent being subject to the terms and conditions contained in the said Guidelines of 2005 which automatically became a part of the agreement entered into between the parties. The Guidelines were framed by the Ministry of Petroleum for the conduct of certain dealerships of public sector Oil Marketing Companies. From the grounds, the grievance of the petitioner appears to be that the Arbitrator ignored a fundamental term of the agreement between the parties by holding that the Guidelines had been governing the dispute between the parties. As stated above, the petitioner's stand is that the Guidelines also provide the remedies which are available to a dealer on the termination of the dealership.

7. The issue which falls for consideration is whether permitting the petitioner to incorporate the additional grounds of challenge to the existing Arbitration Petition would enlarge the scope of the arbitration petitions beyond permissible limits or allow new grounds to be brought in for the first time to the challenge to the Award. The test is whether the additional

grounds can be traced to the arbitration proceedings that is in pleading or document which was before the Arbitrator. If the contents or point urged in the additional grounds can be found in the contentions urged by the parties before the Arbitrator, it cannot then be said that the additional grounds are sought to be introduced by the petitioner for the first time in a Section 34 proceeding. The only point urged in the additional grounds is the relevance of the Marketing Discipline Guidelines which form part of the agreement between the parties and which the Arbitrator failed to give sufficient importance to. On a perusal of the Award, it is found that the issues were settled over the five and six sittings of Arbitration and Guidelines were incorporated in issue no. 3 which is set out below :-

“3. Whether the Claimant is entitled to challenge the termination of his dealership by the Respondent when the Claimant did not prefer any appeal therefrom in accordance with the Marketing Discipline Guidelines?”

8. Issue No. 20 also mentions the Guidelines which appears as :-

“20. Whether the claimant not having challenged the termination order in accordance with the Marketing Discipline Guidelines is entitled to challenge the show cause notice?”

9. Besides the issues, the submission of Indian Oil Corporation Limited (respondent before the Arbitrator) has also clearly been noted in the impugned Award namely that the claimant, Tapas Kumar Das (respondent before this Court) has not exhausted the remedy provided in the Marketing Discipline Guidelines by preferring an appeal against the order of

suspension and termination. The Award proceeds to discuss the various provisions of the Marketing Discipline Guidelines including the Chapters 5, 6 and Clause VI relating to irregularities for penal action and other actions taken against a dealer. Clause IV provides that in the event of termination, the dealer will have the right of appeal before the appropriate authority empowered to decide the matter within 30 days of the termination order. The claimant's contentions, recorded in the Award, also mentions the Guidelines.

10. The letter of termination dated 15th January, 2013, which was a part of records before the Arbitrator also mentions the Marketing Discipline Guidelines - 2005. It is evident from the above that the Marketing Discipline Guidelines was a crucial part of the proceedings before the Arbitrator and including the issue of whether the arbitration proceedings were maintainable at all or not. The present application does not call for a decision on whether the Arbitrator's view on the Guidelines was correct or not. The limited question is whether the petitioner should be prevented from incorporating the Guidelines as part of its grounds for challenge to the Award under Section 34 of the Act.

11. The ratio of the decisions shown by the parties can be summarized on the premise that a new ground is generally not permitted to be introduced by way of an amendment whereas a ground which has a foundational link to the unamended ground would pass muster. The logic to the aforesaid rule can be found in the limitation envisaged in Section 34(3) of the Act which provides a specific time frame of three months from the date of receiving the

Award for making an application for setting aside the Award. An additional period of 30 days has been given to a party for making such application upon satisfaction of the Court that the applicant was prevented by sufficient cause from making the application within the three months. Allowing an applicant to introduce a new ground to an existing application under Section 34 would defeat the statutory objective of 34(3) which permits an aggrieved party to approach a court within the statutory time limit and not beyond. A ground which does not have any link to an existing petition would become a new ground and hence the subject matter of a separate Section 34 application.

12. In *Venture Global*, the Supreme Court allowed facts to be brought in on the basis that the said facts which were disclosed after passing of the Award have a causative link with the facts inducing the Award. The Supreme Court held that facts which would have a bearing on the proceedings for setting aside and for determining whether the Award was induced by fraud may be made part of the Section 34 proceedings. In *Emkay Global*, the Supreme Court was of the view that an application for setting aside an Arbitral Award will not ordinarily require anything beyond what was before the Arbitrator. The Supreme Court in fact held in favour of bringing matters to the notice of the Court by way of affidavits even where they were not part of the records in the arbitration proceedings, but were relevant for determination of the issues before the court. In *Fiza Developers*, the Supreme Court was of the view that the scope of amendment in a section 34 application is restricted to the question whether any ground

exists for setting aside of the Award and also held the necessity for framing of issues where material facts are in dispute. The decisions sought to be relied upon by learned counsel appearing for the respondent, who opposes the application for amendment proceed on the basis that if the existing petition does not contain the ground proposed to be added, the additional grounds must be rejected since it would have a bearing on Section 34(3) of the Act (Ref: *Esteem Mercantile*) and on the general proposition that amendments beyond the prescribed period of limitation cannot be allowed since that would amount to entertaining a fresh petition (Ref: *Pushpa P. Mulchandani*). In *Prakash Industries Ltd. vs Bengal Energy Ltd. and Another*; AIR 2020 Cal 279 the proposed amendments were disallowed on the ground that the amendments were more than amplification of the existing grounds. The facts in that case make it clear that the petitioner sought to bring in grounds in relation to the Sale of Goods Act which did not have a foundation in the Section 34 application which had already been filed. The application of the petitioner was hence rejected on that basis. Ground No. XVII of the existing grounds in the present case broadly covers the right of the respondent (claimant in the arbitration) to make claims and in the reference for an award. Although the Guidelines have specifically been referred to in the existing grounds, there are other grounds which go to the root of the Arbitrator's power to decide the disputes between the parties. Read with the other pleadings which were before the Arbitrator and which expressly mentions the Marketing Discipline Guidelines, it cannot be said that the additional grounds are new grounds despite a pleading to such effect in paragraph 6 of the instant application. The relevant test is whether the

petitioner would be constrained to file a new application under Section 34 for challenging the Award under the additional grounds. The petitioner would pass the test since the Marketing Discipline Guidelines constitutes a prominent and significant part of the records before the Arbitrator and disallowing the petitioner from bringing the said Guidelines into the existing application would deprive the petitioner from an important challenge to the impugned Award. This would militate against the liberal stand taken by the courts in respect of amendments where the objective is to primarily allow a party to amend its pleading as may be necessary for the purpose of determining the real questions in controversy between the parties. There is no doubt that the Marketing Discipline Guidelines go to the very root of the matter and are crucial for determining the challenge to the impugned Award.

13. The admitted factual position is also that the existing Section 34 was made within the 120 days statutory time limit, although the present application for amendment has been filed after three years.

14. G.A No. 2 of 2021 is allowed by reason of the above discussion. The petitioner is given leave to amend A.P. No. 827 of 2018 in the manner as indicated in the Schedule annexed to the application. The petitioner is given leave to re-verify the petition upon the same being amended within four weeks from the date of this order. The Department is accordingly directed to take requisite steps within the aforesaid time frame. A copy of the amended and re-verified petition should be served on the respondent within a week from the amendments being carried out. A.P No. 827 of 2018 shall be listed

upon mentioning. The petitioner will however be liable for payment of costs assessed at Rs. 25,000/- to be paid to the State Legal Services Authority, for the delay in filing the present application.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Moushumi Bhattacharya, J)