

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

+ **O.M.P. 61/2009**

M/S NATALAI DYECHEM (P) LTD Petitioner
Through Mr. Manoj Singh, Advocate.

versus

M/S ALASKA PHARMA (P) LTD Respondent
Through Mr. B.B. Gupta, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **12.03.2012**

1. This petition is by M/s. Natalai Dyechem (P) Limited ['Natalai'] challenging the Award dated 6th January 2009 made by the learned Sole Arbitrator in the dispute between Natalai and the Respondent M/s. Alaska Pharma (P) Limited ['Alaska'] arising out of the agreement dated 18th March 1998 entered into between the parties.

2. It may be mentioned that in the present petition, i.e., OMP No. 61 of 2009 the name of the Petitioner has been indicated as Natalai Dyechem (P) Limited in the memo of parties and Natali Dyechem (P) Limited in the Award and in the correspondence between the parties. For the purposes of the present petition both names shall be indicative of the Petitioner.

3. The Petitioner states that it was running a small scale industry of dyes manufacturing unit which had to shift from Delhi to Sikandrabad, District Bulandshahr (Uttar Pradesh) in June 1997 pursuant to the orders of the Supreme Court of India. In February 1998 the Respondent Alaska approached the Petitioner proposing to invest Rs. 45 lakhs in the Petitioner's unit to meet working capital requirements of the unit on a profit sharing basis. Pursuant to this, an agreement was entered into between them on 18th March 1998. Under Clause No. 3 of the Agreement the present market value of existing fixed investment on the unit was estimated and agreed at Rs. 45 lakhs. Alaska agreed that he would invest Rs. 45 lakhs before 1st April 1998. *Inter alia* in terms of the agreement between the parties it was agreed that the net profit of the unit would be shared by the parties equally. The Petitioner guaranteed Alaska that it would get a minimum net profit of 3% per month on its investment and in case of shortfall the Petitioner assured to make it up from its own pocket on or before 10th of every month.

4. Admittedly, Alaska invested in the Petitioner between 20th March and 13th May 1998 a total amount of Rs. 20 lakhs. According to the Petitioner, Alaska represented to it that Alaska had to receive a sum of Rs.

20,80,000/- from M/s. Crown Consultants Limited [‘Crown’], having its registered office in Indore (M.P.) and that Crown had agreed to pay to Alaska the said amount through the Petitioner. Alaska further represented that on receipt of the said amount from Crown, the Petitioner would give credit for the said amount in the account of Alaska and further that Alaska would be authorized to recover the said amount from the Petitioner. Consequently, a tripartite agreement was entered into on 20th April 1998 between the Petitioner, Alaska and Crown, the relevant portions of which read as under:

“Whereas Party No. 1 has to pay Rs. 20,80,000/- to Party No. 2. Whereas, Party No. 1 has agreed to pay the said amount to Party No. 2 through Party No. 3 and Party No. 3 has agreed to give credit for the same to Party No. 2 on behalf of Party No. 1 on the following terms and conditions:

(i) Party No. 2 has to receive Rs. 20,80,000/- from Party No. 1 as full and final settlement in full settlement of their account. Party No. 1 hereby agrees to pay to Party No. 2 the said amount through Party No. 3 as full and final payment in full settlement of account, which is hereby confirmed by Party No. 2 and 3.

(ii) Party No. 3 agrees to credit the said amount of Rs. 20,80,000/- in account of Party No. 2 and Party No. 2 is authorized to recover the amount from Party No. 3 in the manner in which Party No. 2 and Party No. 3 thinks fit.”

5. Disputes arose between the parties with the Petitioner alleging that Alaska had not invested Rs. 45 lakhs in terms of the agreement dated 18th

March 1998 and that consequently it had suffered heavy losses. Alaska contended that the promised returns were not forthcoming on the investments made by it. Alaska invoked the arbitration clause and filed Arb. Petition No. 150 of 1999 in this Court. By an order dated 22nd September 2000 this Court referred the disputes to the sole arbitration by Mr. M.L. Jain, Advocate. In the statement of claims filed by Alaska before the learned sole Arbitrator it claimed that the Petitioner should pay it Rs.12,18,745/- as on 31st March 1999, Rs.1,35,000/- per month, increase its production capacity and submit statements regarding purchases and production and give access to its books of accounts. By a further amendment, Alaska prayed that the Petitioner should pay it a sum of Rs. 50,67,208/- as on 14th November 2000, continue payment of Rs. 1,35,000/- per month and render and settle the accounts. The alternative prayer was that the Petitioner should return to Alaska the invested sum of Rs. 45 lakhs together with compensation for deprivation of its use and benefit from the date of payment at the rate of minimum guaranteed net profit of 3% per month.

6. In reply to the statement of claim, the Petitioner asserted that the tripartite agreement dated 20th April 1998 was a forged document; that Alaska had paid only Rs. 20 lakhs and had committed default in not

investing Rs. 45 lakhs, as it was obliged to under the agreement dated 18th March 1998, before 1st April 1998.

7. On the basis of the pleadings, the learned Arbitrator framed the following issues:

“(i) Whether the agreement dated 18th March 1998 entered into between the parties did not come into effect as claimed by the Respondent – how and to what effect?

(ii) Whether the Respondents are not bound by the Tripartite Agreement dated 20th April 1998 – if so how and to what effect?

(iii) Whether amount of Rs. 4,21,000/- was paid in cash by the claimant, if so its effect?

(iv) Which of the parties committed breach of contract per agreement dated 18th March 1998, how and its effect?

(v) Whether the Respondent has suffered any loss of goodwill etc. claimed in reply to the claim statement and is it entitled to recover the same from the claimant?

(vi) Relief?”

8. By an Award dated 7th September 2001 (hereinafter referred to as ‘First Award’), the learned Arbitrator rejected the claim of Alaska for specific performance of Agreement dated 18th March 1998. The learned Arbitrator awarded Alaska Rs. 45,01,000/- as principal amount and Rs. 16,31,612/- as interest accrued thereon on account of damages for the Petitioner’s wrongful withholding of the said amount together future interest under

Section 31 (7) (b) of the Arbitration and Conciliation Act, 1996 ('Act').

9. Aggrieved by the First Award, the Petitioner filed OMP No. 397 of 2001 in this Court. By an order dated 19th February 2008 this Court set aside the First Award and remanded the matter to the learned Sole Arbitrator for fresh determination.

10. The proceedings that transpired thereafter before the learned Arbitrator are recorded in para 7 of the impugned Award as under:

“7. After framing of the issues on 2nd September 2008, as agreed between the parties, evidence was to be led by filing affidavits on 30th September 2008 with right to each party to cross-examine the deponents of the other. On 30th September 2008 the Petitioner claimant filed affidavit by way of evidence. None appeared on behalf of the Respondent company that day, or later, nor was any affidavit filed on its behalf, despite specific fore – warning in terms of Section 25 (C) of the Act, made on 29th August 2008, that in case of any of the parties/its counsel/duly authorized representatives failing to attend or comply with the directions made the matter would be proceeded further. However, as none put in appearance on 30th September 2008, or later, for the Respondent, to enable it to do the needful, the matter was fixed for cross-examination of the claimant's affiant on 1st October 2008 and then on 8th November 2008, with a direction to the claimant to send a copy of its affidavit filed, to the Respondent and its counsel Mr. S.L. Gupta, Advocate, to enable the Respondent to come and cross-examine the claimant's affiant. In compliance copies of letters dated 1st November 2008 written to both, along with registered speed post receipts and A.D. Card for its delivery to the counsel for the Respondent, were filed on 8th November 2008. They were thus duly

informed but all in vain. None appeared on behalf of the Respondent, which, incidentally exhibits disinclination/inability of the Respondent to defend claimant's claim or support/prove its own counter claims.

On 8th November 2008, for clarification, some queries were put to the claimant's affiant and answered by him on oath."

11. On Issue No. (i), the learned Arbitrator held that the acceptance of the amounts by the Petitioner from Alaska after 1st April 1998 showed that time for payment was not the essence of the contract. It could not, therefore, be said that agreement dated 18th March 1998 was without consideration or that it did not come into effect. As regards Issue No. (ii), the learned Arbitrator disbelieved the case of the Petitioner that the tripartite agreement dated 20th April 1998 was a forged document. After discussing the evidence on record it was concluded as under:

"17. The net result is that on Crown's bare agreement to pay the amount to Natali, the latter undertook to give credit of it to Alaska, Natali was enjoined to credit the amount of Rs. 20.80 lakhs in the Claimants account with the Respondent and in case Crown failed to pay the amount to the Respondent, the latter could and was competent amply to recover the amount from Crown. Natali thus cannot be heard to say that it is not bound by the agreement Ex.C-5 or give credit of Rs. 20.80 lakhs to the Petitioner claimant. I find accordingly."

12. On Issue No. (iii), the learned Arbitrator held that the amount of Rs. 4,21,000/- was indeed paid to the Petitioner. It was held that the Petitioner has committed a breach of the agreement dated 18th March 1998. The learned Arbitrator rejected the prayer of Alaska for specific performance.

The plea of the Petitioner that it had not received a sum of Rs. 20,80,000/- from Crown in terms of the tripartite agreement and, therefore, it was not liable to pay the said amount to Alaska was negated by the learned Arbitrator by observing as under:

“The plea of non-receipt of this sum from Crown raised by the Respondent, for the first time, in the arbitration proceedings and likewise the plea that Crown did not owe the said amount to Alaska, taken up towards the close of arguments, before the earlier award, and some added after remand are otiose, misconceived and afterthought. Under the said agreement, the Petitioner claimant forfeited a valuable right to directly recover the amount from its debtor ‘Crown’. For the alleged non-payment of the amount by Crown, to the Respondent and, if so, the latter’s lapse and negligence to recover it from Crown by an action against it, the Respondent has only to blame itself. The Respondent was thus liable to pay the said principal amount of Rs. 45,01,000/- to the Petitioner claimant.”

13. The learned Arbitrator then held that keeping in view the interest rate structure for advances including term loans or working capital advances during the relevant period (1998 to 2000), damages should be assessed by way of interest on the principal amount @ 12% per annum for the period from 1st September 1998 till the date of the award. The operative portion of the Award reads as under:

“In the result, an Award for Rs. 45,01,000/- being the principal amount, plus Rs. 55,90,242/-, by way of damages assessed at the rate of Rs. 12% per annum for wrongful withholding of the said amount, and depriving the claimant of its use from 1st September 1998 to the date of the Award, totaling to Rs. 1,00,91,242/- minus Rs. 3,40,000/- paid back by the

Respondent to the claimant in the year 2007 (paragraph 22 supra), thus in all amounting to Rs. 97,51,242/- with costs assessed at Rs. 50,000/- is passed in favour of the claimant and against the Respondent, with future interest at the rate of prescribed under Section 31 (7) (b) of the Arbitration and Conciliation Act, 1996 from the date of the Award till payment.”

14. Learned counsel for the Petitioner submitted that there was nothing to show that the Petitioner had received a sum of Rs. 20,80,000/- from Crown and the burden was on Alaska to prove this fact before the learned Arbitrator. It was contended that the learned Arbitrator failed to take note of a certificate issued by Crown’s statutory auditor to the effect that there was nil balance of Alaska in the books of account of Crown. It was submitted that the finding of the learned Arbitrator that, notwithstanding the Petitioner not having received Rs. 20,80,000/- from Crown in terms of the tripartite agreement dated 20th April 1998, it was liable to compensate Alaska for the said amount was patently illegal. It is maintained that the tripartite agreement dated 20th April 1998 was not a valid document creating any binding obligation on the Petitioner.

15. The above submissions are without merit. The Petitioner, despite being given opportunities to cross-examine the witness of Alaska, failed to do so. There was no explanation offered by learned counsel for the Petitioner for not availing the opportunities of participating in the arbitration

proceedings. In fact there was no rebuttal of the evidence of Alaska. It is not possible for this Court in the present petition under Section 34 of the Act to entertain any evidence sought to be tendered by the Petitioner when such opportunity was available to it before the learned Arbitrator and was not availed of by it.

16. Nevertheless this Court has perused the certificate titled “To Whomsoever It May Concern”, purportedly issued by one Mr. Sanjay Airen, a partner of M/s. Sanjay & Sanjay Associates, Chartered Accountants located in Indore. The said certificate dated 11th August 2001 states that the said firm “have checked and verified the books of accounts and other records of M/s. Crown Consultants Limited, Indore” and that “on the basis of the information and explanations given to us, we hereby certify that there was Nil balance of M/s. Alaska Pharma Private Limited.....” in the books of accounts of M/s. Crown Consultants Limited, Indore as on 31st March 1998. The said certificate is stated to have been issued “on the request of Mr. N.K. Manocha, who has introduced himself to me as Director of one M/s. Natali Dyechem Private Limited, New Delhi.” It is plain therefore that on the reading of the above document, it was issued without knowledge of or consent of Crown. That apart, no attempt was made by the Petitioner to prove the certificate by either marking it as an

exhibit or examining Mr. Sanjay Airen in the arbitral proceedings. Consequently, the said document does not relieve the Petitioner of its obligation under the tripartite agreement dated 20th April 1998.

17. As far as the Respondent Alaska is concerned, it had discharged its burden of demonstrating the Petitioner's liability by producing the tripartite agreement dated 20th April 1998. There was no evidence produced by the Petitioner to support its case that the said agreement was forged. The learned Arbitrator has given clear and cogent reasons for allowing the claim of Alaska for return of the principal amount invested by it and a reasonable sum as damages as interest on the principal amount. No fault can be found with either the reasoning or the conclusion arrived at by the learned Arbitrator. Given the limited scope of powers under Section 34 of the Act this Court is not persuaded to interfere with the Award on the above issues.

18. As regards the costs and interest, the learned Arbitrator awarded 18% per annum during the post-Award period in terms of Section 31 (7) (b) of the Act. Considering that the arbitration proceedings were pending for over ten years and the disputes between the parties for even longer it is considered appropriate to modify the impugned Award in this regard only

to the extent of directing that post-Award interest will stand revised from 18% per annum to 9% per annum. Subject to the above modification, all other objections to the impugned Award are rejected.

19. The petition is disposed of, in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J

MARCH 12, 2012

rk