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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on : April 12, 2012
Judgment Pronounced on: April 17, 2012

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FAO (OS) 494/2007

RELIANCE INDUSTRIES LTD. Appellant

Represented by: Mr.J.P.Sengh, Sr.Advocate
instructed by Mr.Manoj Arora,
Mr.Arjun Sirohi, Mr.Sumeet Batra
and Ms.Ankita Gupta, Advocates.

versus

MADAN STORES P. LTD. Respondent

Represented by: Mr.Rakesh Khanna with Mr.Sanjeev
Saraswat and Mr.Nitin Gupta,
Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. An award dated August 31, 2005 passed by the Arbitral Tribunal comprising Justice A.M.Ahmadi (Retd. Chief Justice of India), Justice A.B.Rohtagi (Retd.) and Justice S. Sahay (Retd.) has been upheld by the learned Single Judge vide impugned order dated November 06, 2007.

2. While upholding the award, the learned Single Judge has corrected the apparent calculation mistakes and in respect of which there is no dispute between the parties; of course, whether the amount would be payable by the appellant to the respondent as recalculated would be subject

to the answer to the main question: Whether the impugned award is contrary to the public policy as per the law declared by the Supreme Court in the decision reported as AIR 2003 SC 2629 ONGC Ltd. v. Saw Pipes Ltd.

3. Since we are agreeing, with the view taken by the learned Single Judge who has extensively dealt with the challenge laid to the award, and since before us the same contentions which were urged before the learned Single Judge were re-agitated, we would briefly note the controversy and would thereafter state our reasons of agreement with the learned Single Judge.

4. The predecessor-in-interest of the appellant, Indian Petro Chemical Corporation Ltd. (IPCL) had appointed the respondent as its stockist distributor as per terms and conditions contained in the agreement dated January 13, 1991. Under the agreement, IPCL products were supplied by IPCL to the respondent on principal to principal basis requiring the respondent to bear the cost of godowns/warehouses and business establishment to stock the product of IPCL. Vide clause-8 of the agreement the distributor could not sell the product at a price higher than the one indicated by IPCL but could do so at the lower price. The respondent was liable to pay octroi, terminal tax, sales tax and all local taxes or levies and being indirect taxes, was obviously entitled to recover the same from the ultimate consumer i.e. the person to whom the respondent sold the goods. Needless to state the respondent was not to act as the agent of IPCL and thus vide clause-15 of the agreement it was the responsibility of the respondent to recover the dues from such parties to whom the respondent sold the product. Vide clause-20, the respondent was to use its own bill forms and was responsible for the sales effected.

The consideration which the respondent was entitled to receive for the sales effected was as per para 16 of the agreement.

5. Clause-15(a) of the agreement strikes a discordant note to the general tenor of the agreement. It is this clause which was the focus of debate before the learned Arbitrators and the learned Single Judge. Not its interpretation, but its applicability as the parties implemented the agreement. The clause reads as under:-

“15(a) It is clearly understood that the Distributor shall act as “Del credere Agent” for the company vis-à-vis customers/buyers in respect of money due to the company from such customers/buyers on account of sales effected by the company through the Distributor irrespective of whether such sales take place out of stocks held by the company at its works or warehouses, or out of stock held by the Distributor on behalf of the company at his warehouse.”

6. IPCL entered into direct Memorandum of Understanding with third parties to supply its product to said parties at prices negotiated by IPCL with said third parties, which obviously were bulk purchasers and hence at a discounted rate. Some supplies under the MOUs were directly effected by IPCL from its works or warehouses and some supplies were effected at the asking of IPCL by the respondent. Some of these parties defaulted in making payments and undisputably since these parties had issued post-dated cheques directly to IPCL, upon the said cheques being dishonoured, IPCL filed criminal complaints under Section 138 of the Negotiable Instruments Act.

7. With respect to such supplies which were got effected to said third parties to the respondent, the respondent adjusted the account maintained by it pertaining

to deliveries made by IPCL to the respondent as the stockist and IPCL took the stand that being the Del Credere Agent pertaining to these supplies, as per clause-15(a) of the agreement, as a Del Credere Agent, the respondent was liable to effect recoveries from said third parties and as far as IPCL was concerned, the respondent was liable to pay the requisite amount to IPCL. Taking said stand, IPCL encashed the bank guarantee in sum of ₹1.25 crores and sold certain shares pledged by the respondent to it and therefrom realized ₹27,88,928/-.

8. Invoking the arbitration clause, the principal ground urged by the respondent before the learned Arbitrators, as per pleadings in the statement of claim, was that it had never acted as the Del Credere Agent of IPCL pertaining to supplies effected to various parties with whom IPCL had executed Memorandums of Understanding inasmuch as a Del Credere Agent is a person who acts as an intermediary between two principal parties, being the agent of one principal party and since he is paid an additional remuneration he assumes the responsibility to realize the money due from the party to whom the goods are sold. It was the case of the respondent that it never acted as IPCL's agent while dealing with the said third parties and that IPCL and the said third parties conducted business directly on principal to principal basis. Its involvement in effecting part deliveries of the goods to third parties was not in its capacity as an agent, but as a facilitator, being the stockist distributor of IPCL.

9. Needless to state, IPCL took the stand that pertaining to these transactions, the respondent acted as its Del Credere Agent.

10. It is but natural that the foremost consideration before the learned Arbitral Tribunal was to consider and interpret the Memorandum of Understanding(s) entered into by IPCL and third parties. The learned Arbitral Tribunal has so discussed, in paragraphs 58 and 59 of its award, which two paragraphs read as under:-

“58. Now we may have a look at be MOU contract. The claimant has referred to three MOU contracts which have been placed on record by way of specimen. There is not a single MOU contract like the Distributorship Agreement which has been produced or relied upon by any of the parties. The first MOU contract is between IPCL and one M/s Suresh Raj Package Pvt. Ltd. A perusal of this document will shows that the IPCLK (described as supplier) and M/s. Suresh Raj Packaging (described as customer) entered into a memorandum of understanding (MOU) on sales/purchase of LLDPE (Product) as per the terms and conditions contained therein for the year 1999-2000. It was to remain inforce from 1.4.1999 to 31.3.2000. the quantity (M.T./Month) of the product other than OG/ES/GS and ex grade is specified in clause-3. Clause-4 states that the price would be such as prevailing on the date of delivery and IPCL would endeavor to offer at competitive price. The eligibility of MOU discount is mentioned in Clause-6 and its sales that the minimum monthly purchase should be 80% of monthly MOU quantity. However, they should complete 100% of MOU quantity in quarter. MOU discount shall be restricted to maximum of 125% quantity. The MOU discount as stated in clause-6 shall be Rs.500/- per metric ton. Rs.300/- per metric ton would be release on completion of annual MOU quantities. Clause-7 to 11 are not contained in the document filed by the document. Clause-12 which refers to other terms and conditions provides that quantity discount/cash discount shall be as applicable from time to time. Clause-13 referring to availability/supplies provides that the supplies are subject to force majeure clause. However, supplies would be made on

priority to MOU customers in the event of limited availability. Clause-14 refers to group companies, but no name of any company is mentioned. Clause-15 the raw material purchase is for self consumption and not for resale; and Clause-16 is "supplies" through Madan Stores Pvt. Ltd. (name of the distributor). It is indicated that the original memorandum of understanding was signed on behalf of both the parties.

59. An other example of MOU which has been filed by the claimant in this case is a memorandum of understanding between IPCL and Gyan Packaging Industries Ltd. on sale/purchase of LDPE/LLDPE and LLDPE from 1st September, 1993 to 31st March, 1994. Clause-1 provides that the grades of LDPE/LLDPE products shall be as mutually agreed. Clause-2 provides that the customer agrees to buy a minimum quantity of 360 MTS of LDPE/LLDPE during the MOU period to be uplifted at a reasonable uniform rate. Clause-3 provides that the selling price shall be the IPCL price applicable to all customers from time to time. The IPCL confirmed that this price will be competitive. The present selling prices are stated in the schedule to Clause-3. It is stated that the prices in the case of LDPE & LLDPE would be as applicable as per price list. Clause-4 & 5 are not available. Clause-6 provides that on 31.3.1993 on successful completion of the total agreed MOU quantities. The balance 20% discount will be passed on. Clause-7 provides that the customers agree to uplift the quantities on a reasonably uniform monthly rate. However, the IPCL agrees to condone certain non uniform upliftment due to valid reasons, provided the customer uplifts the applicable quantities during each quarter as a whole. Clause-8 provides that as the customer joins the MOU in September, 1993, all the quantities of the products covered under this MOU upliftment by the customers from 1st September, 1993, will be considered as upliftment forming part of this MOU. Clause-9 provides that the benefit passed on in general to customers including interstate ex works sale scheme like freight reimbursement insurance and other savings reimbursement and interest free credit

applicable from time to time on such sale will be available to the customers in addition to benefit mentioned in Clause-4. Clause-10 provides that LDPE/LLDPE purchased under the MOU is for consumption by the customer and not for resale. The MOU in the end whereas the signature of the representative of the IPCL and the customer Gyan Packaging Industries.”

11. The next relevant consideration to be discussed by the Arbitral Tribunal was obviously to find out the jural relationship between IPCL and the respondent with reference to the MOUs and this has been discussed by the Tribunal in para 70 of the award, which reads as under:-

“70. We have considered the respective submissions of the parties. The jural relationship between the claimant and the respondent and the legal incident thereof are to be governed by the Distributorship Agreement referred to above. The said agreement is confined to the rights and liabilities arising out of the transactions relating to sale of the products of the company by the claimant to its own customers on behalf of the respondent in accordance with the terms and conditions incorporated in the Distributorship Agreement. The claimant cannot be held answerable for sales to any other party under different and separate agreements and cannot be fastened with liability arising out of and in respect of such sales. The MOU sales are covered by separate agreement between the respondent and the MOU customers. A memorandum is an informal record, note or instrument including something which the parties desire to fix in memory by aid of written evidence or which is to serve as the basis of a future formal contract or deed. It is also a brief of written statement outlining the terms of an agreement or transaction (see Judicial Dictionary by Aiyar/Black’s Law Dictionary). Thus a memorandum of understanding purports to be a record of the understanding arrived at between the respondent and the MOU customers. But as a matter of fact it embodies in the present, case as

can be seen from the document on record, an agreement between the respondent and the MOU customers in respect of matters stated therein, such as, the lifting of a specified quantity of the company products during a specified period, the right to receive MOU discount, the sale by the company directly to the MOU customers and so on. The claimant was not a party to the agreement between the respondent and the MOU customers as embodied in the MOU and as such it was not open to the respondent to bind the claimant with the agreement or to impose any liability on the respondent relating to that agreement and to enforce the same against the claimant. The terms and conditions of the agreement as between the respondent and the MOU customers are not relevant for the determination of the liability of the claimant vis-à-vis the MOU customers. The transaction between the claimant and third parties like bank and other authorities in matters such as hypothecation of book debts is also not relevant. Any transaction between the claimant and third party, going to such an extent as even perpetuation of fraud of them would not create any liability enforceable against the claimant by the respondent and cannot be determinative of the inter se rights and liability of the claimant and respondent in respect of MOU sales. In this view of the matter it was not open to the respondent to debit any amount to the claimant's account in respect of the MOU sales. The rights and liabilities of the various parties in individual cases may have to be determined in the light of relevant agreement between them and the provisions of law applicable to them. But it would be a different situation. The claimant is therefore entitled to recover the amount shown to have been wrongly debited by the respondent to the account of the claimant as regards MOU sales."

12. Lastly, it had to be considered by the Tribunal as to whether IPCL could justify its action with reference to clause-15(a) of the stockist agreement and this necessitated the Tribunal to discuss the law pertaining to the liability of a Del

Credere Agent and also as to who could be labeled as a Del Credere Agent. The discussion on the subject is to be found in paragraphs 85 to 88 of the award, which paragraphs read as under:-

“ 85. The respondent has not pleaded that before debiting the amount in question to the claimant's account in the instant case, the condition precedent was satisfied, namely, that the customers' cheques were deposited on due dates and were dishonoured. In the absence of the specific plea to that effect, it will be superfluous to refer to any other material as contended by the respondent. However, it would be necessary to deal with the contention of the respondent founded on clause 15(a) of the Distributorship Agreement, that the claimant accepted his liability as del credere agent and stood guarantee for the payment of the dues of the customer (M/s Venus Extrusion in this case) in respect of RPDA sales. Clause 15(a) which has been referred to earlier read as follows:-

“15(a) It is clearly understood that the distributor shall act as del credere agent for the company vis-à-vis customers/buyers on account of sales effected by the company through the distributor irrespective of whether such sales take place out of stocks held by the company and its works or warehouses or out of stock held by the distributor on behalf of the company at his warehouse.”

86. It will be seen that the distributor shall act as del credere agent for the company, not generally but in respect of money which is due to the company in respect of money due from the customers/buyers on account of sales effected by the company through the distributor. It is immaterial in such cases that the sales take place out of stock held by the distributor on behalf of the company at his warehouse. The place of sale is not material, nor the stock out of which the sale is

effected. The sale may be made by the company out of its own stock at its work or warehouses; or the sales may be made by the distributor at his warehouse out of the stock held by the distributor on behalf of the company. What is material is that the sales are effected by the company through the distributor and it is only in respect of money due to the company from the customers/buyers of such sales that the distributor shall to be fastened with the liability of a del credere agent. If the sales are made by the company without the intervention of the distributor, even then the distributor would not incur the liability of a del credere agent. If the distributor sells out of his stock on his own behalf, even then he will not be del credere agent. The sale must be effected by the distributor as an agent of the company out of the stock held by him on behalf of the company.

87. A del credere agent is primarily an agent. A del credere agent is one who usually for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts. (See Black's Law Dictionary-6th Ed.) [Halsbury's Laws of England Fourth Edition-Reissue-Vol.1(2)] A del credere agent is one who for extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. By reason of the fact that del credere commission is charged by him, he assumes responsibility for the solvency and performance of their contract by the vendees and thus indemnifies the employer against loss. He gives an additional security to the seller, but does not shift the responsibility of payment from the buyer to the seller. The del credere commission is the premium or price given by the principal to the agent for the guarantee given by the latter. A demand on the principal debtor must be proved before the agent can be held liable. The guarantor is to answer for the solvency of the vendee and to pay the money if the vendee does not (Morris V. Cleasby 4 M & S 566). A del credere agent is like any other agent bound to handover the money to the principal, as soon as he receives it, but is distinguished from

other agents simply in this that he guarantees that those person to whom he sells shall perform the contracts which he makes with them.

88. So far as a del creder agent is concerned, it is of the essence of the matter that extra commission is paid to him for the services offered by him to stand guarantee for the due performance of his part of the contract by the principal debtor and that a demand on the principal debtor is made before the principal debtor can be held liable. In the present case, there is no plea that any extra remuneration was agreed upon between the claimant and the respondent by way of del creder commission, for the undertaking given by the claimant that the customer will be in a position to perform and shall perform his duty under the contract of sale. It cannot be implied that the commission which was payable to the distributor under the Distributorship Agreement for sales of stock effected through the distributor on behalf of the company included the extra remuneration also for acting as del creder agent and in any case it cannot be specified as how much was payable as normal commission under the Agreement and how much was payable as del creder commission. There is also no plea for anything to show that any demand was made on the customer M/s Venus Extrusion, before the liability of the claimant as del creder agent, was actually sought to be enforced by debiting the amount to the account of the claimant straight way. This aspect of the matter is clearly reflected in the provision made in the RPDA scheme that the distributors cheques will be deposited in case the customers' cheques are deposited on due dates and are dishonoured. There is nothing to show that this procedure was followed and the condition precedent for the enforcement of the claimant's liability as del creder agent was satisfied. Therefore the contention of the respondent based on clause 15(a) of the Distributorship Agreement which contains a general provision that the distributor shall be a del creder agent is not tenable."

13. The learned Single Judge has revisited the same fields on which the learned Arbitral Tribunal has laboured. The learned Single Judge has discussed the issue with reference to Section 34 of the Arbitration and Conciliation Act 1996 which permits a challenge to an award on the grounds limited thereunder; and not by way of an appellate challenge to an award.

14. Now, it is settled law that interpreting the terms of a contract, if falls for consideration is an exercise which has to be carried out by an Arbitral Tribunal and as long as the interpretation placed is not perverse, the view taken by the Arbitral Tribunal cannot be questioned. In any case, it is not the case of the appellant that the Tribunal has wrongly interpreted the dealership agreement dated January 13, 1991. It is also not in dispute that the MOU sales were effected pursuant to MOUs directly executed by IPCL and third parties directly. The only issue of substance was whether IPCL could predicate a stand under clause-15(a) of the stockist agreement dated January 13, 1991. The rival versions of the parties were, whereas IPCL was urging that as per clause-15(a) the admitted legal position would be the liability of the respondent to recover the amounts from the said third parties to whom MOU sales had been effected vis-à-vis the stand taken by the respondent was that admittedly neither was any commission paid to it to act as an agent nor was any extra remuneration paid to it to undertake the liability to guarantee due performance of the contract by the said buyers and thus pertaining to the MOU sales, it did not act as the Del Credere Agent.

15. The dispute between the parties required the Tribunal to consider the evidence and apply the law pertaining to Del Credere Agent, which the Tribunal did. The Tribunal has thus acted within the scope of its mandate.

16. Unlike the situation found by the Supreme Court in Saw Pipes' case (supra), where the Tribunal ignored the law of the land and hence rendered the award as contrary to the public policy in India, in the instant case the appellant could neither demonstrate before the learned Single Judge nor before us any principle of law which has been ignored by the Tribunal.

17. Before bringing the curtains down, we must note that the learned Arbitral Tribunal has considered the evidence favourable to the appellant in the form of the respondent making entries in its books of account showing money due by the said third parties to the respondent, a piece of evidence which at the first blush would result in a striking revelation that the respondent, of its own documents, and hence of its own admission, had assumed the liability and thereby giving birth to an argument that the award is perverse. But, the learned Arbitral Tribunal has not only noted but has discussed the legal effect of the said documentary evidence. The finding arrived at is that a wrong conduct of the respondent would not fasten it with liability as a Del Credere Agent on account of the findings returned by the Tribunal as per discussion in paragraphs 85 to 88 of the award. We concur with the approach of the Tribunal on the said aspect as also the view taken by the learned Single Judge.

18. The appeal is dismissed but without any order as to costs.

19. The amount as per award was deposited by the appellant in this Court in terms of the interim order dated July 08, 2008 which has been withdrawn by the respondent in terms of the same order after furnishing security pertaining to flat No.820, 8th Floor, Kasturba Gandhi Marg, New Delhi and thus we direct the Registrar (Appeals) to make the necessary endorsement on the title deeds of the property indicating it being released as a security. The security bonds furnished by the respondent are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

APRIL 17, 2012
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