

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

% Judgment delivered on: March 07, 2013

+ OMP.No.197/2013

RAVI MITTAL Petitioner
Through Mr.Ashish Mohan Adv. with
Mr. Chetan Rai Wahi Adv.

versus

PANKAJ AGRAWAL Respondent
Through Mr.Sanat Kumar, Adv.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J. (Oral)

1. The petitioner has filed objections under Section 34 of The Arbitration and Conciliation Act,1996 (hereinafter referred to as the 'Act') against the award dated 6th November, 2012 passed by the independent sole Arbitrator who is former Chief Justice of Punjab and Haryana High Court at Chandigarh.
2. Brief facts are that the petitioner who is one of the promoters of Shree Acids and Chemicals Ltd. (hereinafter referred to as SACL) a public Ltd. Company approached the respondent, a businessman and a director in a number of companies, and represented that the proceedings for settlement of disputes with his brother Sh. Sandeep Mittal a co-promoter are pending and further SACL had become a sick company and is registered with BIFR.
3. The case of the petitioner is that due to paucity of funds he is not in a

position to pay off the dues and thus revive SACL and that a minimum of ₹1350 lakhs would be required to settle the dues of both secured and unsecured creditors and other statutory dues.

4. The petitioner offered the respondent that in case the respondent agrees to provide/arrange ₹1350 lakhs as required for the revival of SACL he would be issued equity shares in the said company.

5. The respondent accepted the proposal of the petitioner and agreed to arrange funds to the tune of ₹1350 lakhs and an agreement (MOU) dated 23rd July, 2008 was entered into between the respondent and the petitioner.

6. As per Clause 2 of the MOU the petitioner was required to make available all the documents, information which was in his possession to the respondent to enable him to settle the dues in order to revive SACL. As per Clause 3 of the MOU the respondent was required to pay to the petitioner ₹200 lakhs, initially out of which sum of ₹25 lakhs was to be paid upon signing of the agreement and a further sum of ₹75 lakhs was to be paid upon the settlement being arrived at with the secured creditors and the balance of ₹100 lakhs to be paid upon the circulation/sanction of the revival scheme by BIFR.

7. The petitioner submits that as per Clause 5 a revival scheme of SACL was to be jointly submitted to BIFR by both the parties. Further, as per Clause 6 and 7 the said process of submission and sanction was to be completed by 30th June, 2009. In case of any delay beyond the stipulated date of 30th June, 2009 for any reason, it would be open to the respondent to abandon the revival package of SACL and the amount paid by the respondent was to be refunded to the respondent within one month of such intention being expressed by the respondent.

8. As per the agreement, the respondent paid ₹25,00,000/- to the petitioner on the date of signing the agreement. However, the respondent abandoned the agreement in terms of clause 6 & 7 of the MOU and called upon the petitioner to return ₹25 lakhs paid to him.

9. The petitioner submits that the respondent had taken no action, save and except the initial payment of ₹25 lakhs and all details of the creditors had been given to the respondent.

10. The parties agreed that the disputes be referred for arbitration to Hon'ble Mr. Justice Mukul Mudgal (Retd.) for adjudication of the dispute between the parties.

11. The issue which arose for consideration of the tribunal was whether the respondent could abandon the MOU in terms of Clauses 6&7 and thus claim the refund of the amount of ₹25 lakhs paid to the petitioner and whether the petitioner was entitled to claim damages for non-performance of the agreement.

12. The relevant clause of MOU dated 23rd July, 2008 are as follows:

“1. Shri Pankaj Agrawal shall infuse/get infused/arrange funds to the tune of minimum of Rs.1350 lakhs to pay off the dues/settle the statutory dues, dues of the banks and financial institutions and settle secured as well as pressing creditors and also labour dues so that the said SACL becomes a net worth positive company.

2. Shri Ravi Mittal shall work with and also make available all the documents, information etc. which are in his possession to enable Shri Pankaj Agrawal to settle the dues of the secured and unsecured creditors including the labour dues in order to revive SACL.

3. Shri Ravi Mittal shall be paid a sum of Rs.200 lakhs

by Shri Pankaj Agrawal in the following manner:

- a) Rs.25 lakhs upon signing of these presents;
- b) Rs.75 lakhs on settlement being arrived at with the secured creditors; and
- c) The balance Rs.100 lakhs upon circulation/sanction of the revival scheme by BIFR.

4. Shri Ravi Mittal along with Shri Pankaj Agrawal shall jointly present a scheme for revival of SACL to BIFR/AAIFR and/or any other authority or court as the case may be.

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6. It is contemplated by both Shri Ravi Mittal and Shri Pankaj Agrawal that the said process of submission and sanction of revival scheme would stand concluded by 30th June 2009 and in case of any delay because of any reason, beyond the stipulated date of 30.06.2009, it will be open for Shri Pankaj Agrawal to abandon the revival package of SACL and the instant MOU shall become void.

7. In case Shri Pankaj Agrawal decides to abandon the said revival package then Shri Ravi Mittal shall, within a period of one month of such intention being expressed by Shri Pankaj Agrawal, repay all amounts received by him under this MOU to Shri Pankaj Agrawal without any demur.”

13. The petitioner in the objections under Section 34 of the Act, inter alia, has challenged the award mainly on the ground that the learned Arbitrator did not appreciate that the respondent was obliged under the agreement dated 23rd July, 2008 executed between the parties to infuse an amount of ₹1350 lakhs to settle the creditors of SACL as the respondent had represented to the petitioner that he had sufficient funds and resources to

ensure that adequate funds were available to revive the company. This representation constituted the very basic foundation of the agreement between the parties. The respondent failed to garner the resources to pay the amount ₹1350 lakhs and this was the real reason for his backing out of the agreement dated 23rd July, 2008 after a period of one year. By letter dated 3rd/8th October, 2009 the respondent had wrongly abandoned the project claiming refund of the money paid by him. The learned Arbitrator incorrectly based his Award on the reason that the respondent did not have the funds to settle the creditors and erroneously rejected the said contention as the two companies acquired by the respondent were a fraction of the value of the amount required to infuse by the respondent under the agreement dated 23rd July, 2008 because as per the statement of the respondent himself Gujarat Gas Limited was acquired for an amount of only ₹1.10 crores and Ganga Poly Products was acquired for ₹75 lakhs. Thus, the finding of the Ld. Arbitrator that the respondent was in a position to arrange the funds of ₹1350 lakhs is based on no evidence.

14. It is also alleged by the petitioner that the learned Arbitrator wrongly interpreted Clause 6 of the MOU that even if the revival scheme could not be submitted due to default on the part of the respondent, the respondent would have an unbridled free hand to abandon the project at his discretion and the finding of the Ld. Arbitrator that the petitioner had not supplied the information regarding the creditors is also negated as during the entire correspondence, the respondent never asked for any such lists since apparently he already had the same, but rather on one pretext or the other tried to wriggle out of his obligations under the agreement. It is also stated that Mr Bhagwan of M/s Windsor trading and Financial Consultancy was

engaged by the respondent only after he had taken an informed decision to invest in the rehabilitation of SACL and after satisfying himself of the proposal including the creditors dues and erroneously rejected the counter claim of the petitioner without considering the huge opportunity loss which resulted as a consequence of the agreement dated 23rd July, 2008 executed between the parties.

15. Learned Arbitrator in his award has given his detailed findings after considering the rival submissions of the parties and evidence to the effect:

- i) In any event the fact that whether details of the dues were supplied by the respondent and whether the claimant had funds available for reviving the company pale into insignificance in view of the clear mandate of Clause 6 and the consequential Clause 7. Clause 6 clearly provided an option to the claimant to abandon the revival agreement in case of any delay in sanction of the scheme beyond 30th June 2009 for any reason. Thus the clause did not stipulate that for the abandonment of the project any reason was required to be given by the claimant save and except the non-sanction of the revival scheme. It is not in dispute that the revival scheme had not even been submitted let alone sanctioned by 30th June 2009.
- ii) Consequently as per Clause 7 the respondent within one month of the intention to abandon expressed by the claimant by the claimant by his letter dated 3rd/8th October, 2009 was required to refund the amount of ₹25 lakhs received by him to the claimant. This not having been done the claimant has established that he was entitled to claim back the sum of ₹ 25

lakhs from the respondent.

- iii) So far as the sum of ₹5 lakhs paid to M/s Windsor Trading & Financial Consultancy Pvt. Ltd. Is concerned this does not form part of the MOU and engagement of M/s Windsor Trading & Financial Consultancy Pvt. Ltd. was done by the claimant prior to the signing of the MOU and whether or not it was at the behest of the respondent is not relevant.” Hence the petitioner files the present claim petition against the Award dated 6th November, 2012 passed by the Ld. Arbitrator allowing the claim petition filed by the respondent directing the petitioner to refund an amount of ₹25,00,000/-to the respondent.

16. In case the entire award is read carefully, it is apparent that the findings given in the award are on the basis of facts and evidence adduced by the parties and the learned Arbitrator has taken one view of the mater. The question before this Court is to whether the said finding can be interfered with under those circumstances with the preview of grounds available under Section 34 of the Act. The simple answer is ‘no’ in view of settlement provisions of the Act and the law.

17. The Supreme Court has repeatedly held that even if two interpretations are possible, if the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a different view, the Award will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of *M/s. Arosan Enterprises Ltd. Vs. Union of India*, (1999) 9 SCC 449, in paragraph 39 of the said judgment, has held as under:

“39. The court as a matter of fact, cannot substitute its

evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.”

18. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. In the present case, the parties by themselves have agreed in the contract to accept the Award as final and conclusive. The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of ***Markfed Vanaspati and Allied Industries Vs Union of India, (2007) 7 SCC 679***, where in paragraph 17 of the said judgment it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible”.

19. The scope of section 34 of the Act is limited to the stipulations contained in Section 34(2) of the Act. The jurisdiction of the Court to interfere with an Award of the Arbitrator is always statutory. Section 34 of the Act is of mandatory nature, and an Award can be set aside only on the Court finding the existence of the grounds enumerated therein and in no other way. The words in Section 34(2) that “*An Arbitral Award may be set aside by the Court only if*” are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section. The Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares***

and Stock Brokers Private Limited Vs B.H.H. Securities Private Limited And Others, (2012) 1 SCC 594 is apposite in this regard and the relevant portion, contained in paragraph 21 of the said judgment is, reproduced as under:

“21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at”.

20. The petitioner has challenged the arbitral award on the grounds as set out in the petition but there is not even a single ground as to how his case falls under the limited and narrow mandate of Section 34 of the Arbitration and Conciliation Act, 1996. Even if the additional grounds under Section 34, as laid down by the Supreme Court in the case of *ONGC Vs. Saw Pipes Ltd.*, AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contract provisions or that the Award shocks the conscience of the Court, no such facts are narrated in the Petition. The endeavor of the petitioner is thus to convert the challenge to the arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence which endeavor as per the consistent dicta of the Supreme Court is impermissible in law.

21. It is settled law that the award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. The entire objections of the petitioner, as contained in the

grounds, are contrary to the scheme of Section 34 of the Act. There is no averment in the petition as to the existence of any illegality that is apparent on the face of the arbitral award.

22. There is no error in the interpretation of the contract clauses by the Arbitral Tribunal. However, even if it were to be assumed, without admitting, that the contention of the petitioner is correct even then this Court would not interfere with the arbitral award for the reason that it is settled law that an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction. The Supreme Court in the case of *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 has summarized the law on this point, in paragraph 26 of the said judgment, as follows:

“26. (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.”

23. In view of above, there is no merit in the petition filed by the petitioner under Section 34 of the Act. The objections are dismissed.

24. In case any excess court fee has been deposited by the petitioner as submitted by the learned counsel, the same be refunded by the Registry within two months from today.

25. No costs.

(MANMOHAN SINGH)
JUDGE

MARCH 07, 2013