

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

Reserved on: 06.05.2013

Decided on: 22.05.2013

+

FAO (OS) 72/2009

M/S. SANGHU CHAKRA HOTELS PVT. LTD. AND ANR.

.....Appellant

Through: Mr. G. Umapathy and Ms. R. Mekhala,
Advocates.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mr. Rajeeve Mehra, ASG with Mr. A.
Makwati and Mr. Aditya Malhotra, Advocates, for
UOI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

%

1. The appellant (hereafter called “Sanghu Chakra Hotels”) challenges the correctness of the judgment of the learned Single Judge dated 08.08.2008 in OMP 374/2006. By the impugned judgment, the application of the Union of India (UOI) [hereafter referred to as “the objector” or “the Union”] in respect of an award, was allowed.

2. Sanghu Chakra Hotels successfully bid during the disinvestment process, and acquired shares in the Madurai Hotels

Private Limited. As part of this transaction, the Share Purchase Agreement dated 31.01.2002 was executed between Sanghu Chakra Hotels and Madurai Hotels Private Limited, a unit of India Tourism Development Corporation (ITDC). Earlier, Madurai Hotels Private Limited had been incorporated and brought into existence on 23.08.2001; it constituted an underlying asset in the Scheme of Demerger approved by the Union Department of Company Affairs on 09.11.2001. At the time of bidding, a balance sheet – as on 31.03.2001 – had been prepared and it formed the basis for invitation to tender an acceptance of the offer. It is a matter of record that Sanghu Chakra Hotels tendered for acquisition of the shares on 06.11.2001. Its final bid was approved on 13.11.2001 and ultimately culminated in Share Purchase Agreement on 31.01.2002. Clauses 2.2 (a) to (f) of the Share Purchase Agreement provided for post-closing adjustment of various parameters to determine the extent of liability of the parties. In effect, it constituted the transitional arrangement for dealing with operations and liabilities arising out of such activities for the period 31.03.2001 and 31.01.2002. The dispute between the parties centred around liabilities to the extent of Rs. 26,11,092.85/-. This was recorded in the books of the corporate office of ITDC and shown as payable by Madurai Hotels Private Limited on account of expenses incurred by it (ITDC). Sanghu Chakra Hotels disputed this liability and stated that the amounts were not payable by Madurai Hotels Private Limited and were not part of any provisions under Clause 2.2. The dispute was referred to arbitration.

3. During the course of arbitration, Sanghu Chakra Hotels had

contended that the disputed amount did not form part of the disclosures made in what are known as “Data Room Documents”. That contention, however, was turned-down. The arbitrator took note of the fact that the stipulations in Clause 2.2 only envisioned liability defined and limited to Rs. 810,893.91/-. He also noticed that the liabilities, as per the balance sheet as on 31.01.2002, were to the extent of Rs. 7,02,965/-. He thereafter reasoned that the structure of Clause 2 contemplated a comparison of figures of net current assets during the period in question, i.e. 31.03.2001 and 31.01.2002 in order to ensure that any change during the period would not place the purchaser, i.e. Sanghu Chakra Hotels at any disadvantage. He accordingly observed and held as follows:

“I have studied and analyzed the Balance Sheet as at 31st January, 2002 with special emphasis on Net Current Assets. Only the following liabilities have been accounted for in the net current assets as at 31st January, 2002.

(Rs.)

- | | |
|----|------------------------------------|
| 1. | <i>Contractors Credit Balances</i> |
| | <i>2,40,630</i> |
| 2. | <i>Security Deposits</i> |
| | <i><u>4,62,335/-</u></i> |
| | <i>Total</i> |
| | <i>7,02,965/-</i> |

All these liabilities pertain to period before 31st March, 2001, but were not stated in the Balance Sheet as at 31st March, 2001 under the head Current Liabilities.

It is obvious that the Share Purchase Agreement by clause 2 seeks to compare the figures of net current

assets in order to ensure that any change in net current assets in the period between the two Balance Sheet dates brought out and the Claimants are not put to disadvantage; any liability which has accrued and was part of the documents on the date of executing the Share Purchase Agreement cannot be now shown as Current Liabilities and taken advantage of. The net current assets comparison must take place between equals and the difference must represent the transactions which took place during the relevant period.

Any amount accounted for under net current assets which is not an asset or liability pertaining to the intervening period i.e. 01-04-2000 to 31-01-2001 cannot now be allowed to creep in. The above liabilities admittedly were merely transferred from Sources of Funds (01-04-2000) to Current Liabilities (31-01-2001) and must not be accounted for in computing the net current assets for the purpose of clause 2 of the Share Purchase Agreement.

Further, the balances of Project Division would fall under the wider definition of Audited Financial Statement as defined by Share Purchase Agreement and any differences in Balance between 31-03-2001 and 31-01-2002 are to be accounted for. These differences amount to Rs.2,56,486.

In view of the above the claim of the Claimants to this extent is not allowed.

(Rs.)

Amount Claimed
70,33,558

Less: (1) Current Liabilities shown under Project Balances 31st March, 2001, but shown under Net Current Assets as on 31st January, 2002

7,02,965

(2) *Difference in Project Division Balance*
between the two dates 2,56,486 9,59,451
60,74,107

<i>Claim=89.97%</i>	<u>54,64,874</u>
<i>Less: Paid by Respondents</i>	<u>39,78,892</u>
<i>Claim Awarded</i>	<u>14,85,982</u>

Rounded off: 14,85,000

Accordingly, an amount of Rs.14,85,000 (Rupees Fourteen Lakhs Eighty Five Thousand Only) is awarded to the Claimants.

XXXXXX

XXXXXX

XXXXXX”

4. Learned Single Judge was impressed by the fact that the net current assets, in the balance sheets dated 31.03.2001 of Madurai Hotels Private Limited was Rs.810893.91/- and that Rs. 26,11,092.85/- payable by the demerged company, i.e. Madurai Hotels Private Limited to ITDC was for the period ending 31.03.2001. He was of the opinion that since there was no dispute about the fact that the Data Room Documents were disclosed to Sanghu Chakra Hotels, and it became the successor in respect of the liabilities which existed as on 31.03.2001, having conducted the due diligence exercises, the sum of Rs.26,11,092.85/- was payable by it. Learned Single Judge recorded the submission of the Union – the objector, that in terms of Clause 3.3(c) of the Scheme of Arrangement, which was part of the demerger process, of datas and liabilities, of Madurai Hotels Private Limited were transferred to Sanghu Chakra Hotels. In view of these,

learned Single Judge concluded that the reasoning of the arbitrator was mutually contradictory.

5. Learned Single Judge, during the course of the impugned judgment held that the arbitrator did not notice that the liability of Rs.26,11,092.85/- pertained to the period prior to 31.03.2007 and consequently Clause 2.2 of the Share Purchase Agreement was of no relevance since it dealt with another period and provided for another eventuality. Learned Single Judge was of the opinion that since the Data Room Documents were disclosed on the date when Share Purchase Agreement was made, Sanghu Chakra Hotels was aware of the said liability. Drawing strength from the decision in *Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd.* 2003 (5) SCC 705 and *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* 2006 (4) SCC 445, the impugned judgment concluded that a mutually contradictory award would be contrary to public policy as it suffered from patent illegality and was unjust. In the course of his findings, the learned Single Judge observed as follows:

“23. No doubt, figure of Rs.8,10,894/- finds mention in Clause 2.2 (a) of the share purchase agreement but this figure is taken from the balance sheet of the respondent No. 2 as on 31st March, 2001. The contention of the petitioners, on the other hand, is that the audited financial statement as defined in the agreement and as per Annexure-B or the Financial Statement should be made basis for computing the amount payable in Clause 2.2 (e) and (f). The petitioners also rely upon the definition of the term data room and the data room documents in support thereof. To be fair to the respondents, the aforesaid contention of the petitioners is debatable in view of Clause 2.2 (a), (b) and (c) in which

reference has been made to the balance sheet of the company as on 31st March, 2001 and figure of Rs.8,10,894/- is stated. The finding of the ld. Arbitrator that the scheme of demerger is also part of the share purchase agreement is debatable in view of clauses 8.4 and 8.10 of the share purchase agreement. However, in the present case I am not required to go into this controversy and go into these questions as the award is liable to be set aside as the reasoning given by the ld. Arbitrator is self contradictory, if not mutually destructive. While deciding this appeal under Section 34 of the Act, I am concerned with the Award and the reasoning given by the learned Arbitrator. The Award cannot be re-written by giving entirely new reasons. I cannot substitute the reasons given by the learned Arbitrator and uphold the claim of the respondent for entirely different grounds and reasons. The role of this Court is limited to examine grounds and reasons mentioned in the award and whether the award can be set aside as being contrary to public policy under Section 34 of the Act.”

6. It is argued on behalf of the appellant that the conclusions and approach of the learned Single Judge in setting-aside the award, cannot be sustained. In this context, it is submitted that the interpretation placed upon Clause 2.2 led the arbitrator to conclude that since the preparation of balance sheet at all points of time was within the control of the transferor and subsequently the ITDC, the non-inclusion of Head Office expenses, on the one hand and the express mention of Rs.810,893.91/-; as the value of current assets, as on 31.03.2001, was conclusive of the matter. Learned counsel also relied upon Clause 2.2(d) to say that the closing date statement delivered by the auditors to the purchaser except to the extent of

shares borne on the face of the record were final and binding upon the parties. Since these concededly did not include the Head Office expenses, allegedly payable by Madurai Hotels Private Limited, Sanghu Chakra Hotels notwithstanding its awareness or despite disclosure of the Data Room Documents could not be made to bear the burden. It was next submitted that the Single Judge failed to notice that the demerger process, submission and finalization of the bid and execution of the Share Purchase Agreement were all later to the completion of due diligence. During this period, it was open to the Government to factor-in the Head Office liability which ought to have been reflected by the transferor and reflected in the balance sheet as on 31.03.2001. In other words, the Head Office expenses and others that ought to have been included as on 31.03.2001 were in fact not included and the Share Purchase Agreement subsequently mentioned a broad sum as the value of the net assets (which was arrived at after taking note of the liabilities as on the concerned date); there was no question of supplying the liability in that regard upon Sanghu Chakra Hotels, the purchaser.

7. Learned ASG for the UOI argued that the learned Single Judge had arrived at the right conclusions in holding that the contradictory findings in the award constituted a palpable error, which led to failure of justice. It was submitted that having conceded that the Data Room Documents, Ex. B-52 and B-53 were disclosed to the Sanghu Chakra Hotels before it submitted the bid, there was no question of its disputing the liability. It made the bid and accepted all liabilities – in terms of Clause 3.3(a) of the Scheme of Amalgamation, with open

eyes. Once the arbitrator rejected its contentions, regarding non-disclosure of the Data Room Documents, the only conclusion that can reasonably and logically be arrived at was that the Head Office liabilities were made known as contingent or potential liabilities which the purchaser had to bear. Having acquainted itself of these facts, and consciously bidding for the shares, and subsequently entered into the Share Purchase Agreement, the mere fact that some other figure pertaining to the net assets as on 31.03.2001 were disclosed in one of the conditions, did not conclude the matter.

8. Before a discussion on the rival merits of the case, it would be necessary to notice some of the conditions of the Share Purchase Agreement of 31.01.2002, which are extracted below:

“2.2 Post-Closing Adjustments

*(a) The Purchaser acknowledges and agrees that it has reviewed the balance sheet of the Unit included in the audited Financial Statements (the “**Last Balance Sheet**”), and that the value of the Current Assets reflected on the Last Balance Sheet is Rs.8,10,894/- (Rupees Eight Lakhs Ten Thousand Eight Hundred and Ninety Four Only) (the “**2000/2001 Net Current Assets Amount**”). The Purchaser further acknowledges and agrees that it has had the opportunity to review and is familiar with the accounting principles and specific calculations used to prepare the Last Balance Sheet and the 2000/2001 Net Current Assets Amount and accepts as true and correct both the Last Balance Sheet and the 2000/2001 Net Current Assets Amount. As used in this Agreement, the term “**Net Current Assets**” means those current assets of the Company under the accounting principles used to prepare the Last Balance Sheet less those liabilities of the Company reflected on the Last*

Balance Sheet that constitute current liabilities of the Company under the accounting principles used to prepare the Last Balance Sheet.

XXXXXX

XXXXXX

XXXXXX

(d) The Purchaser shall ensure that the Auditor prepares and finalizes the Closing Date Statement in good faith and submits the statement within 45 days of being called upon to prepare the same by the Purchaser and the Government as contemplated at Article 2.2(c) above. The Closing Date Statement delivered by the Auditors to each of the Purchaser, the Government and the company shall, except the errors apparent on the face of records, be final and binding on the Parties to this Agreement. To enable the Auditors to prepare Closing Date Statement, the Purchaser shall cause the Company to, permit the Auditors and the Auditor's authorized representatives and employees to review, during normal business hours, the books, records, internal management accounts and work papers of the Company. Without limiting the generality or effect of any other provision of this Agreement, the Company shall, and the Purchaser shall cause the Company to (i) provide the Auditors and its authorized representatives and employees access, during normal business hours, to the facilities, personnel and accounting and other records of the Company necessary to permit the Auditors to prepare the Closing Date Statement as provided in this Agreement; (ii) cooperate with the Auditors and its authorized representatives and employees in the preparation of the Closing Date Statement; and (iii) take such actions as may reasonably be requested by the Government to close, or to assist the Government in Closing Date, as of the close of business of the Company on the Closing Date, the books and accounting records of the Company.

(e) If the Closing Date Net Current Assets Amount is greater than the 2000/2001 Net Current Assets Amount, the Purchaser shall pay the Government an amount in Rupees by bank draft, equal to the difference between the Closing Date Net Current Assets Amount and the 2000/2001 Net Current Assets Amount multiplied by 89.97%. If the 2000/2001 Net Current Assets Amount is greater than the Closing Date Net Current Assets Amount, the Government shall pay the Purchaser an amount in Rupees, by bank draft, equal to the difference between the 2000/2001 Net Current Assets Amount and the Closing Date Net Current Assets Amount multiplied by 89.97%.”

9. The expression “Audited Financial Statement” was defined as “audited accounts of the unit as on 31.03.2001 which was made available to the purchaser”, as per Annexure-B – Financial Statement. In the course of arbitration proceedings, the balance sheet of the Madurai Hotels Private Limited unit as on 31.01.2002 showed a negative figure of Rs. 79,58,574.66/- towards net assets. It was argued that the difference is due to adjustments on account of gratuity and leave encashment indicated by the respondent/Union and accepted by the claimants.

10. The Union, however, disputed the figure of net asset as on 31.01.2002 and balance due to the Project Division of ITDC and Head Office assessment as on 31.03.2001 should be adjusted and the final figure payable should be arrived at. The arbitrator, however, noticed that even though disclosure of these figures and documents were made, the liability on account of the Project Division and Head Office adjustment which existed on both the dates of 31.03.2001 and

31.01.2002 were not included in the net current assets as on 31.03.2002. Only part of it was included in net current assets as on 31.03.2002. He, therefore, proceeded to strictly construe the liability in terms of Clause 2.2 and the consequence arising out of it under Clause 2.2(a) and (d). Learned Single Judge accepted the Union's arguments that the findings were contradictory and amounted to palpable error in law, warranting interference.

11. It is well settled that in the absence of manifest and patent error of law, apparent in an award or an approach and conclusion which is plainly contrary to the public policy and a loss in India, the Court in exercise of its jurisdiction under Section 34 should be circumspect in interfering with arbitrary awards under the Arbitration and Conciliation Act, 1996. This Court notices that the learned Single Judge in the present case acknowledged that the contention of the present appellants, that their liability was limited in view of the figure of Rs.810,893.91/- mentioned in Clause 2.2(a), was debatable. He further noticed that in view of Clauses 8.4 and 8.10, there could be no finding that the Scheme of data merger was also part of the Share Purchase Agreement.

12. Having recorded these findings, the learned Single Judge, in the opinion of the Court, should not have quashed the award on the assumption that it contained contradictory findings. As is evident from a plain reading of the award, the appellant's contention of non-disclosure of the Data Room Documents was rejected. However, that did not necessarily lead to the conclusion that the liability arising out of such documents had to be fastened upon them. As things stood on

31.01.2002, the books of Madurai Hotels Private Limited did not fully reflect the Head Office and Project Division liabilities. The structure and phraseology of Clauses 2.2(a), (b) and (d) being as it stands, the appellants had the right and did contend that the value of net assets as on the determinative date, i.e. 31.03.2002 having been fixed by the seller, which was in control of all the facts and could have included any further amounts, the mention of specific figure, i.e. Rs. 8,10,893.91/- precluded adding of any other amount notwithstanding their disclosure. The arbitrator accepted this contention and proceeded to determine the entitlement of the appellant. Such an approach cannot be termed arbitrary merely because the appellants were aware of some facts. Being in the know and in full control of the task of preparing the balance sheet which would in fact have determined their rights and liabilities, the fact that the seller/Union chose not to reflect these in a proper manner but instead reflected or recorded a much smaller amount, lent itself to the interpretation which the arbitrator adopted. Such a construction of the contract cannot, in the opinion of the Court, be contrary to terms of the contract itself.

13. The Court, in exercise of its rights under Section 34, can no doubt interfere when the award discloses ex-facie a patently illegal approach or a conclusion that is contrary to the public policy of India. It can even interfere when the award is contrary to the terms of the contract. Here, however, the award was not contrary to the terms of the contract, rather the terms were subject matter of interpretation which the learned Single Judge acknowledged, was a debatable one. Thus, the conclusion of the learned Single Judge is unsupportable in

law and contrary to the principles governing Section 34 where the reasonableness of the conclusions in an award cannot be the subject matter of Court's scrutiny unless in the absence of any illegality or a plainly manifestly erroneous approach.

14. In view of the above discussion, this Court is of the opinion that the appeal has to succeed; the judgment and order of the learned Single Judge is consequently set-aside; the award is consequently upheld and the parties are held bound by the terms of the award. The appeal, therefore, is allowed in the above terms. No costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

MAY 22 2013