

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

*Judgment reserved on March 03, 2015*

*Judgment delivered on March 12, 2015*

+ **O.M.P. 201/2015**

SANDEEP MATHUR AND ANR.

..... Petitioner

Through: Mr.Rohit Puri, Advocate

Versus

ASSOCIATED INDUSTRIAL FURNACES (P) LTD. & ORS.

..... Respondents

Through: Mr.Ramesh Singh, Advocate with  
Mr. S.Patra, Mr.Shikhar Srivastava  
& Mr.Ashish Goel, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE V.KAMESWAR RAO**

**V.KAMESWAR RAO, J.**

The challenge in this petition is to the findings of the learned Arbitrator on issue Nos.8 & 9 in the Award dated August 25, 2014. The said issues are the following:-

*“(8)Whether the claimants are liable to compensate the respondents for making wrong projections with regard to the expenditure involved, recoverable amounts and completion dates with regard to various projects mentioned in MOU.*

*(9)Whether the claimants are liable to compensate the respondents for their failure in returning the intellectual*

*property including drawings, designs of MIL as per the terms of MOU.”*

2. On a finding on the above two issues, the learned Arbitrator has granted an amount of Rs.6,42,300/- after adjusting an amount of Rs.2 lacs and Rs.68,88,700/- from Rs.77,31,000/- to the petitioners. The amount of Rs.2 lacs was granted in favour of the respondent No.1 on a counterclaim filed by the respondent No.1 for incurring expenditure for obtaining the drawings. Similarly Rs.68,88,700/- was adjusted being 10% of the extra cost spend on the projects and for short recoveries.

### **Facts**

3. The facts in brief are that the respondent No.1- Associated Industrial Furnaces (P) Ltd. was incorporated in the year 1987 by the father of the petitioners herein and one Shri P.P. Kapahi. After the demise of Sh.A.B. Mathur the father of the petitioners, the petitioners were inducted in the respondent No.1 company. Certain differences arose between the parties and the petitioners decided to leave the respondent No.1 company. After some negotiations, it was decided that the respondent No.1 would purchase the 30% shares held by the petitioners in the company. A Memorandum of Understanding (‘MOU’ in short) dated March 15, 2008 was executed in terms of which the petitioners agreed to sell 30% of their holding i.e. 1,23,000 shares at Rs.125 per equity share.

4. That on February 09, 2008 before the MOU was executed, a Release Agreement was executed by M/s Mechathern International Ltd. ('MIL' in short). MIL had a license agreement with respondent No.1 for transfer of knowhow and technical information. The case of the petitioners was that they had been specifically released, jointly and singly from confidentiality clause and obligations implied or signed in the past by MIL. The MOU dated March 15, 2008 reads as under:-

*"A) The current fully paid up equity share capital of AIFPL as on the date of this MOU is Rs. 41 lacs and is represented by 4,10,000 number of equity shares of the face value of Rs.10 each. This is currently been lawfully subscribed by the following:*

| <u>Group</u>               | <u>Number of shares held</u> | <u>% of sharerholding</u> |
|----------------------------|------------------------------|---------------------------|
| <i>First Party</i>         | <i>205,000</i>               | <i>50%</i>                |
| <i>Second Party/seller</i> | <i>123,000</i>               | <i>30%</i>                |
| <i>P P Kapahi</i>          | <i>82,000</i>                | <i>20%</i>                |
| <b>Total</b>               | <b>4,10,000</b>              | <b>100%</b>               |

*B) Seller wishes to sell and First Party wishes to buy the entire shareholding held by Seller in AIFPL subject the terms and conditions outlined in this MOU.*

*3) Seller has given an unsecured loan to AIFPL which amounts to Rs. 17,09,950/- along. with interest. The salary incentive and gratuity payable to seller amounts to Rs.12,40,076/-. These will be repaid on signing of this MOU.*

*The details of the same are given in Annexure F.*

*4) The seller will be paid the value of his equity at the rate of Rs.125/- per equity share as per the due diligence done by KSMN & Co. This price is to be paid in instalments as specified in para 5 read with Annexure A. However, in case there is any bad debt/short recovery then such bad debt/short recovery will be duly adjusted in the instalment to be made to the Seller.*

*5) The total payment due to the Seller by the First Party and the schedule of payment is given in Annexure A. On signing of this MOU the First party will release the first payment as per schedule and keep the related balance dues in post dated cheques as per Annexure A with Mr. K S Mehta, Senior Partner, S S Kothari Mehta & Co. These will be released by Mr. Mehta to the seller as per the given payment schedule to the extent of collections as explained in Annexure A. The Seller dues will be payable to the seller by Mr. Mehta on a monthly basis on receipt of the statutory auditor's Certificate specifying the recoveries/adjustments made/payments made to a third party on .behalf. of AIFPL relating to outstandings given in Annexure C. The certificate along with the bank statement will be sent to Mr. K S Mehta and the seller by the 10<sup>th</sup> of each month for the immediately preceding month for necessary payment to the seller by Mr.Mehta within 4 days subsequently. In case of delay beyond stipulated date, Mr.*

*Mehta will release 10% of the total payments due as per items 891) and (ii) of Annexure A in the month of such delay and such payment will be adjusted in the next month's payment."*

*8) First party and AIFPL will immediately initiate the process of getting released the collateral securities that Seller has given to the company bankers as security. It will be the responsibility of the First Party to get these released within 45 days from the date of this MOU. In case of delay beyond the stipulated 45 days interest at the rate of 12% p.a. on Rs. 100 lacs will be paid for any such delay beyond 45 days. In case of delay beyond 90 days of this MOU, it will be the responsibility of the First Party to give related FD to the bank and give the collateral security of seller released immediately.*

*9) First party will immediately initiate the process of AIFPL takeover on signing of this MOU to ensure smooth conduct of the existing AIFPL business including the following:*

*i) installing its own team to ensure continuance of AIFPL business in a smooth manner.*

*ii) installing of its representative as the authorized signatory in the banks.*

*10) Seller shall ensure the following:*

*i) Assist in all matters relating to AIFPL business to ensure smooth takeover of management by the first party and other company directors including the handing over of all company documents/information/computer administrator details etc. in their possession to the first party.*

*ii) Seller will continue to assist AIFPL in its business and ensuring smooth takeover till the existence of this MOU for and as required for the smooth implementation of this MOU in regard to projects mentioned in para 11 and recoveries mentioned in Annexure C. It is the joint responsibility of the seller and the first party to implement the projects. The sellers has agreed that till completion they shall support, guide and act as required by the first party for the successful implementation including recoveries. To facilitate this process a monthly meeting to review the progress of projects and remove bottlenecks if any shall be held regularly between seller and first party representatives.*

*11) AIFPL is currently engaged in the execution and implementation of a number of projects. Seller confirms that it will give full assistance & advice in successful execution of these projects including recovery of related dues from these customers. These projects being currently executed include the following:*

- (a) Balco, India*
- (b) Sterlite, India*
- (c) Lucky, Dubai*
- (d) Sahindler, Turkey*
- (e) Ashkar*
- (f) Cera*
- (g) HAL*

*The work completion schedule of the above projects as per discussion with the Seller is given in Annexure B of this MOU.*

*12) It is also agreed that normally, seller shall provide Delhi based assistance in the above matters to AIFPL from their own office. AIFPL team will normally visit Seller Office in these matters. AIFPL will pay Advisory Fee to Seller on time spent by seller outside of NCT region of Delhi on a Rs. 3500/- per day basis. All travel related expenses including air/train fare, lodging boarding etc. will be additionally borne by AIFPL commensurate to the existing facilities availed by the seller. In case of any time spent by seller outside of seller office even in NCT of Delhi, the same rate will apply.*

*13) The sellers have been allowed to take copies of the engineering drawings of furnaces and components made upto 1998 for their own business use or in the use of the company*

*controlled by them. They shall not impair in other Intellectual Property of AIFPL. They are not entitled to sell these drawings to any third party. Any such infringement/impairment will result in the approximate price adjustment that is payable by First Party to the seller in terms of this MOU."*

5. The claims of the petitioners before the learned Arbitrator were as under:-

*"a) Balance amount of the sale price amounting to Rs. 77.31 lakhs;*

*b) Amount of interest on the collateral from 1st June, 2008 to 15<sup>th</sup> June, 2009 Rs. 33.85 lakhs;*

*c) Loss of profit suffered by the claimant on account of delay in release of share payment and collateral security to which they were not able to utilize the said security to avail sanctioned bank loan amounting to Rs. 758.75 lakhs."*

6. The stand of the respondent No.1 was primarily that the petitioners were guilty of the violation of provisions of MOU. The violation pointed by the respondent No.1 was with regard to delay of pending projects.

7. According to respondent No.1, in terms of the MOU the petitioners were to assist in the ongoing projects and recoveries. The payment to be

made to the petitioners was according to the recoveries to be made. The respondent No.1 stand was also, the petitioners had formed a company, doing similar business. It was the case of respondent No.1 that the petitioners themselves were handling the projects on behalf of respondent No.1 company and directly dealing with the clients. According to respondent No.1, the petitioners' actions have caused great prejudice to it.

8. On issue No.8, the learned Arbitrator was of the view that the respondent No.1 company did not employ proper persons. It was the primary duty of respondent No.1 to do so because they would be the persons who would be running the projects and complete the same. The learned Arbitrator was also of the view that the petitioners were only to give assistance and cannot be burdened with the entire responsibility. The learned Arbitrator held that there has to be certain amount of conjectures and the respondent No.1 being primarily responsible, the petitioners can only be held to be liable for any shortcomings, damages, liquidated amounts to the extent of 10% and concluded the respondent No.1 company had to spend an amount of Rs.110.26 lacs for extra costs and Rs.578.61 lacs are short recoveries and there was no cross examination in that regard and directed an adjustment of 10%, amounting to Rs.68.88 lacs.

9. On issue No.9 regarding drawings, the learned Arbitrator had concluded that the drawings were with the petitioners which they failed to

give. After noting that the respondent No.1 company could not prove that they had spent a huge amount of money for obtaining the drawings on the test of reasonableness had allowed Rs.2 lacs in favour of the respondent No.1 company.

10. Mr.Rohit Puri, learned counsel for the petitioners would submit that the learned Arbitrator has failed to consider clause 10.2 of the MOU, wherein the petitioners were to assist the respondent No.1 company and to facilitate the process of completion of the projects and they were also to participate in the monthly meetings to review the progress of the projects and remove the bottlenecks. According to him, the petitioners had attended the review meetings as and when called for. He would rely upon the question No.53 posed to Mr.Arora, witness of the respondent No.1, who had stated that the company had sought the help of the petitioners in execution of the incomplete work, the recovery of money and dealing with the customers. He would state, the sale consideration which was being paid monthly was stopped by the respondent No.1 in the month of May, 2003 and would justify, the petitioners not attending the subsequent meeting held in June, 2008. He would ultimately state that the conclusion of the learned Arbitrator was based on surmises and conjectures. On the issue of drawings, it was his submission that under clause 13 of the MOU, the petitioners were allowed to take copies of the engineering drawings of the

furnaces and the components made upto the year 1998 for their own business or in the use of the company controlled by them. He would state that the drawings post 1998 were not with them and there was no question of the petitioners retaining the drawings as held by the learned Arbitrator. He would also state that the drawings of the MIL were outside the purview of the MOU and could not have been arbitrated upon. He would rely upon the judgment of this Court in the case reported as ILR (2007) 1 (Del.) 188 ***Government of NCT of Delhi vs. Ved Prakash Mehta & Anr.***, more specifically para Nos.7, 9 & 12 to support his contentions.

11. On the other hand, Mr.Ramesh Singh, learned counsel for the respondent No.1 would submit that in terms of clause 10 of the MOU, the obligation of the petitioners was not only confined to attending the review meetings but to assist the respondent No.1 company in its business and ensuring smooth takeover till the existence of the MOU and as required they were responsible for the smooth implementation of the projects and recoveries. According to him, such obligations were incorporated as they were at the helm of the affairs and had working knowledge about the projects. According to him, the petitioners instead of assisting in the successful implementation of the projects had acted to the detriment of the company and had started a company with a name deceptively similar to that of respondent No.1 company. According to him, the witness Mr.Arora

of the respondent No.1 had in his deposition stated that the petitioners had stopped attending the review meetings, which would show that they have failed to discharge their obligation under the MOU. He would also rely upon the conclusion of the learned Arbitrator wherein the learned Arbitrator held that the help from the petitioners for the completion of the projects was not forthcoming. He further states that the petitioners had not challenged the figures of cost overrun and short recoveries of Rs.110.26 lacs and Rs.578.61 lacs. He also states that in his testimony the witness of the respondent No.1 company had confirmed so. He had also stated that the learned Arbitrator has observed that there was no cross examination in that regard. He states that it is not a case of no evidence but is a case of apportionment of the omissions and commissions on the part of both the parties. He would also justify the conclusion of the learned Arbitrator with regard to a finding that the drawings were with the claimant by not accepting the stand of the petitioners that the laptop had crashed, as according to the learned counsel for respondent No.1, the observation of the learned Arbitrator that if the stand of the petitioners was that the drawings are not available with them there was no occasion for stating the laptop had crashed becomes relevant. He would also state that the drawings which the respondent No.1 company had sought for was the ones which have been licensed by MIL. He states that there was sufficient evidence for

the learned Arbitrator to come to the conclusion which he did in the award. He would rely upon the judgment of the Division Bench of this Court in the case of ***BHA Associates Pvt. Ltd. vs. Biba Apparels Pvt. Ltd.*** FAO(OS) 577/2012, decided on December 05, 2012 in support of his contentions.

12. Having heard the learned counsel for the parties, the short question which arises for consideration is, whether there was sufficient evidence for the learned Arbitrator to conclude on both the issues that both the parties were responsible in not discharging their respective obligations and had rightly held that the petitioners are liable for shortcomings/damages/liquidated amount to the extent of 10% on the first issue and invoking the test of reasonableness for holding the drawings were with the petitioners on the later issue. The answer to these issues lies in the following observations of the learned Arbitrator:-

“On issue No.8

*On strength of these cross examinations it was urged that it is an admission by the witness that the claimants were not called and therefore they cannot be held to have failed to render assistance. On closer scrutiny of the questions and answers it is obvious that it cannot be taken to be an admission. One has to see the totality of the facts to note if it was the fault of the claimants or not. On closer scrutiny*

*it is obvious that claimants in this regard had failed to render the proper assistance to the respondent company because they were looking after the project before the MoU. This is apparent as one glances through the record. The claimants admitted that there was a notice received in June 2008 but it was alleged that it was not a notice for meeting. One wonders as to whether one has to be called strictly in accordance with legal ways. In fact in page 53 of the reply to the rejoinder filed by the claimants to the counter claim, the claimants asserts that they would not be in any manner wanting to be associated with the respondent company. At page 28 of the same they again mentioned that they would not like to continue to help the respondent company. The propensity and probabilities also show that when the projects were not being completed necessarily the respondent company would seek help which obviously was not forthcoming. It must, therefore, be held that the claimants did not render the help in accordance with the MoU.*

*The cumulative effect of the aforesaid is that the respondent company did not employ proper persons. It was the primary duty to do so because they would be persons who would be running the project and complete the same. The claimants were only to give assistance and cannot be burdened with the entire responsibility. There has to be certain amount of conjectures herein and in the*

*opinion of this Tribunal the primary responsibility was of the respondent company and claimant can only be held to be liable for any shortcoming/damages/liquidated amount to the extent of 10%.*

*The respondent company had to spend Rs. 110.26 lakhs for extra cost and Rs. 578.51 lakhs for short recoveries. There was no cross examination in this regard and one has no reason to discard the same. 10% for which the adjustment can be given would amount to Rs. 68.887 lakhs.”*

*“On Issue No.9*

*The next dispute pertaining to these issues was that the claimants had not given back the drawings to the respondent company. The claimants learned counsel relied upon paragraph 13 of the MoU to urge that it specifically states that the claimants have been allowed to take copies of the engineering drawings of furnaces and components up to 1998.*

*As one closely reads it is obvious that the claimants were also to take the drawings but it is not specifically mentioned as to whose custody the drawings have been placed. The claimants were under an obligation to hand over the documents including the drawings of knowhow.*

*Shri Arora was subjected to cross examination and his answers to question nos. 94, 95 and 130 are as under:*

*Q.94 Has the respondents ever demanded from the claimant any specific drawings?*

*Ans. As per terms of MOU claimants were required to hand over all drawings, designs and data to the respondent company. Since the same were not handed over/returned, respondent company time and again has requested the claimant for return of the same. I do not remember if there is any specific drawing was asked from the claimant.*

*Q.95. Can you state as to how MIL was transmitting the designs and drawings to the respondents?*

*Ans. As per e-mail of Mr. Roy Jones of MIL 95% of the designs and drawings were being sent to claimant no. 1 and 5% to Mr. Mathews who is now with claimant company. These were being mainly sent by e-mail to above officials. Before 15<sup>th</sup> March 2008 it was never sent directly to the respondent.*

*Q.103. Is it a fact that in the year 2007 Shri Vijay Kumar Aggarwal was informed by the claimants that they intend to start their own company in the same business?*

*Ans. Yes but as per the additional list of documents filed by the claimant at page 78 and 79 at sr. no.2 it was made clear that since claimants will get full salary and perks and privy to all inside information of respondent company, claimant cannot directly or indirectly initiate any competing activities until working relationship with respondent company is parted.*

*It shows that the respondent company was demanding the drawings from the claimants.*

*If the drawings had been given to the respondent company, there was no occasion for demanding the same from the claimants.*

*Reference in this connection to certain e-mails exchanged would make the position clear. Vide e-mail dated 10<sup>th</sup> May, 2008 Annexure R25 the respondent company requested the claimant to send the complete backup of the two laptops held by them and give a declaration that copies have not been retained. A reply was sent on 15<sup>th</sup> May, 2008 and the claimant stated that the said documents brought by them were for reference purposes only. Subsequently claimants wrote that laptops have crashed. If the claimants did not have the drawings there was no occasion for stating that laptops have crashed. It*

*only leads to the inference that the drawings were with the claimants.*

*The witness of the respondent company Shri Arora proved as Exhibit R 27 to state that huge amount had been spent running into crores for obtaining the drawings.*

*Respondent company feels shy of producing vouchers to state that payment was made for so much of drawing, no bills are forthcoming, nothing is shown that TDS was deducted and, therefore, Exhibit R27 which was not prepared by Shri Arora must be rejected. One can only go by the test of reasonableness and hold on reasonableness I only allow Rs.12 lakhs in this regard.”*

13. From the reading of the above, I agree with the learned Arbitrator that there are certain amount of conjectures as is seen the learned Arbitrator although held that it was the responsibility of the respondent No.1 company, he was also of the view that there was failure on the part of the petitioners to render proper assistance. He has rightly apportioned the liability for any shortcoming to the extent of 10%. The 10% apportioned is not very high only 1/10 of the extra expenditure incurred and the short recoveries. Similarly, on issue No.9 the learned Arbitrator did not agree with the stand taken by the petitioners that the drawings were not with them, as according to the learned Arbitrator if the petitioners did not have

drawings there was no occasion for stating that the laptops have crashed. Such a plea was held to be contradictory by the learned Arbitrator and had only granted an amount of Rs.2 lacs that was also adjusted. On this count also, I do not see any infirmity in the award of the learned Arbitrator.

14. Suffice to state that this Court is not sitting in an appeal over the findings of the learned Arbitrator, whereby this Court can re-appreciate the evidence and come to a different conclusion. The scope of Section 34 of the Arbitration & Conciliation Act, 1996 is very limited.

15. The Supreme Court in the case of ***ONGC vs. Saw Pipes Ltd. 2003 (2) ARB.LR (5) SC*** has held that the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. Suffice to state that there is no conclusion of the learned Arbitrator which is beyond the MOU. It is not the case of the petitioners that the Award is against public policy being in violation of any statutory provisions. For this Court to interfere in an Award of this nature, the illegality must go to the root of the matter. Nothing has been pointed out in that regard. The legal position was crystallized by the Supreme Court in the case of ***Steel Authority of India vs. Gupta Brothers Steel Tubes Ltd. 2009 (10) SCC 63***, wherein the Supreme Court has held as under:-

*“18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the*

*decision of this Court can be summarised thus:*

- (i) In a case where an Arbitrator travels beyond the contract the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.*
- (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 and such error is not an error on the fact of the award.*
- (iii) If a specific question of law is submitted to an Arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.*
- (iv) An Award contrary to substantive provisions of law or against the terms of contract would be patently illegal.*
- (v) When the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sums specified in the contract and not in excess thereof. In other words no award of compensation in case of breach of contract if named or specified in the contract*

*could be awarded in excess thereof.*

(vi) *If the conclusion of the arbitrator is based on a possible view of the matter, court should not interfere with the award.*

(vii) *If it is not permissible to a court to examine the correctness of the findings of an arbitrator as if it was sitting in appeal over his findings.”*

16. I agree with the reliance placed by the learned counsel for the respondent no.1 on the judgment of Division Bench of this Court and the relevant observation of the Division Bench in ***BHA Associates Pvt. Ltd.*** (*supra*) is noted for benefit and the same is reproduced as under:

*“In our considered view the aforesaid finding cannot be assailed within the parameters of Section 34 of the said Act merely by predicating its case on a plea of violation of public policy. Public policy cannot be cited as an unruly horse. No doubt, the methodology of calculation of damages provided in the statutory provisions of the country have to be followed, but the arbitrator may not accept a particular methodology of computation of damages and may adopt another methodology. That is what appears to have been done. No doubt, there is some element of guess work involved in working out this amount but the same is based on some material which was produced by respondent No.1. Thus, this, falls within the parameters of appreciation of evidence coupled with the application of the general principles to work out damages*

*which the party has suffered.”*

17. Insofar as the submission of learned counsel for the petitioners that the issue of drawings being outside the scope of MOU is concerned, I note that in support of this contention the petitioners have averred in para (n) as under:-

*“(N) BECAUSE the Ld. Arbitrator failed to appreciate that by a Release Agreement, Respondents agreed that the drawings are kept in the office of Respondent 1 and Petitioners were discharged of any obligation qua the drawings. The issue of possession of drawings thus fell within the scope of Release Agreement and was outside the scope of the MoU. The Ld. Arbitrator travelled outside his jurisdiction in awarding Rs. 200,000.00 to Respondents.”*

18. From the perusal of the award, it is noted that no such contention was raised before the learned Arbitrator. The only submission on the arbitrability of a claim was raised in an application filed under Section 16 of the Act, wherein the petitioners have challenged the counterclaim of the respondent No.1 seeking recovery of the overrun/extra expenditure on the projects on the ground that the dispute, if any, has arisen subsequent to signing of the MOU. Suffice to state that the learned Arbitrator rejected the said application. I note that the ground (n) is substantially different from the issue raised in the application under Section 16. Nothing precluded the

petitioners from raising the issue of drawings of MIL being outside the MOU in the application filed under Section 16. Having not raised before the Arbitrator, the petitioners are not entitled to raise such an issue now at this stage.

19. I do not find any merit in this petition. The same is dismissed with no order as to costs.

**(V.KAMESWAR RAO)**  
**JUDGE**

**MARCH 12, 2015**  
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