

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 103 of 2013

**ENJAYES SPICES & CHEMICAL OIL LTD.
& ANR.**

..... Petitioners

Through: Mr. Ramji Srinivasan, Senior Advocate
with Ajit Pudussery, Ms. Shruti S. Hazarika and
Ms. Sara Sundaram, Advocates.

versus

**NATIONAL RESEARCH DEVELOPMENT
CORPORATION (NRDC) & ANR.**

..... Respondents

Through: Mr. Joydeep Sharma, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
20.01.2015

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 29th September 2012 whereby the Petitioner has been asked to pay the Respondents a sum of Rs.4,16,13,361 together with interest @12% per annum from the date of the Award.

2. Petitioner No.1 is Enjayes Spices & Chemical Oil Ltd. ('ESCOIL') and Petitioner No.2 Mr. N.S. John. Respondent No.1 is the National Research Development Corporation ('NRDC').

The licence agreement

3. NRDC acquired from the Council for Scientific & Industrial Research

(‘CSIR’) the absolute ownership of the know-how for manufacture of ‘Spices Oleo Resins’ developed by the Central Food Technology Research Institute (‘CFTRI’), Mysore, Karnataka. It is stated that Petitioner No.2 Mr. N.S. John applied to the NRDC on 31st January 1979 for grant of a licence to use the aforementioned technology and right to use, exploit and practice know-how and process of manufacture of the articles developed by CFTRI and to sell commercially, the articles so manufactured. After negotiations between NRDC and Mr. John, the NRDC by an agreement of licence dated 17th March 1980 agreed to give a non-exclusive licence to Mr. John for use of the know-how to manufacture ‘Spices Oleo Resins’.

4. In terms of the licence agreement, Mr. John was granted “the right to use the said invention for the manufacture of ‘Spices Oleo Resins’ at the grantees own factory and sell the product manufactured in accordance with the said invention.” The licence was for a minimum period of 14 years which was to be computed from the date of the commencement of manufacture. Clause 3 (1) specifies that the consideration was Rs.5,000 to be paid by Mr. John by way of premium and royalty to be paid in the manner specified in the agreement. Clause 3(1) stated that the licence was to continue to remain in force for 14 years after the commencement of manufacture. Royalty was to be paid @ 1½% on the net ex-factory sale price of the material manufactured by Mr. John in accordance with the said invention and marketed by him. In terms of Clause 3 (ii) of the licence agreement, the licensee was to keep books of accounts relating to the royalty containing information and particulars for enabling the amount of royalty to be paid. NRDC was permitted to inspect the said record and take copies of

the extracts thereof.

5. Under Clause 5(i) if the licensee failed to commence manufacturing within 12 months from the date of the licence i.e. 1st January 1980 or he was unable to set up production within 31st December 1980 due to unavoidable reasons, he could make a request to NRDC for extension of time before expiry of that date. Under Clause 5 (iii) if the arrears of royalty was not cleared within three months after becoming due, the NRDC could determine the licence forthwith. The licence agreement contained an arbitration clause.

6. Among the documents placed on record is an application dated on 27th October 1979 signed by Mr. John describing himself as Director of ESCOIL (Petitioner No.1). However, when the licence agreement was executed it was only between Mr. John and NRDC. It did not mention the name of the licensee as ESCOIL. A letter dated 23rd February 1979 written by NRDC to Mr. John, in response to his earlier letter dated 31st January 1979, communicates that NRDC had decided to grant him licence for commercial development of 'Spices Oleo Resins'. The letter dated 2nd January 1980 by NRDC is also addressed only to him enclosing a copy of the licence agreement typed on stamp paper for his signature. The half-yearly return filed on 30th September 1980 with the NRDC stated that the factory was still under construction. Mr. John, inter alia, stated therein that he had "not yet received the technology (complete from CFTRI)". There is another return filed for the period ending 31st September 1981 stating that the construction was not yet complete. This is dated 10th November 1981 and signed by Mr. John as Managing Director of ESCOIL. Mr. John at one time did write to

NRDC asking that the licence be transferred in the name of ESCOIL. However, NRDC did not act on that request. As a result, the only parties to the licence agreement were Mr. John and NRDC.

Correspondence between the parties

7. It appears that for nearly 8 years after the filing of the above return in 1981, NRDC did not follow up the matter with Petitioner No.2. On 20th March 1989, it wrote to him on the subject of payment of royalty for the period half-yearly ending on 31st March 1989. The letter enclosed the royalty return forms and further told him that in case no production had been started in the period in question he had to send 'nil royalty return'. Another reminder was sent on 11th June 1989 by NRDC, this time addressed to ESCOIL stating that it had not yet sent the royalty returns for the years ending 31st March 1982 to 31st March 1989. In response thereto on 21st July 1989, Mr. John signing as MD of Petitioner No1 in a letter to NRDC, stated as under:

“In this connection we may inform you that M/s. Enjayes Spices and Chemical Oils Pvt. Ltd. have not received any technical know-how either from NRDC or from CFTRI and as such this company have not manufactured or marketed any product using that technical know-how.”

8. More than 9 months later, on 8th February 1990, NRDC responded claiming that it was surprised to note the contents of the said letter. The NRDC informed Petitioner No.2 as under:

“Now we understand that you are manufacturing and marketing the above product successfully in the country and abroad. We would, therefore, request you to pay us

the due royalty @ 1½% on the net ex-factory sale value from the date of starting the production.

We hope, you will co-operate with us to avoid litigation in the matter.

Thanking you and looking forward for your co-operation.”

9. This was responded to by Mr. John by his letter dated 16th April 1990 as under:

“Dear Sirs,

I am in receipt of your letter No. Royalty/NRDC/N-82 dated 8th February 1990 along with its enclosures.

As correctly pointed out by you, the agreement with you had been signed by me carrying on business under my own name and style as the sole proprietor thereof. Subsequently I had requested you either to change my address in the agreement as that of the company or transfer the agreement in the name of the company, but this was not done by you.

Further as is evident from the half-yearly royalty return for the period ending 30th September 1980, a photocopy of which has been enclosed with your letter under reference, the technology had not been completely transferred to me and as such the terms of the agreement with me have not been fulfilled by you.

Under the circumstances you will please appreciate that I have not manufactured or marketed any product using your technology and as such I am not liable to pay any royalty to you.”

10. NRDC wrote to CFTRI on 28th April 1990 for a copy of the certificate of the training imparted by CFTRI to Petitioner No.2. On 19th July 1990, CFTRI wrote to NRDC stating that no such copy of any training certificate could be traced. This was followed by a long period of inaction by NRDC. They appear to have been collecting details of the sales figures of 'Spices Oleo Resins' of ESCOIL from the Spices Board. This was furnished to NRDC by a letter dated 1st February 2001 by the Spices Board.

11. In the meanwhile, NRDC sent a letter on 28th March 2000 to ESCOIL stating:

“Dear Sir,

The Corporation had licensed to you the above process vide Licence Agreement dated 17th March 1980. The Corporation vide its various letters informed and requested you to submit the royalty returns and pay royalty on the same. We for the first time came to know vide your letter dated 21st July, 1989 that you are the manufacturer and exporter of Spice Oleoresins. Thus the statement made in the contents of your letter stating that you are not manufacturing the said product is not correct. You are therefore again requested to submit the royalty returns upto date and pay royalty failing which we shall have no other option but to resort to legal recourse.”

12. For nearly another two years nothing happened. On 19th February 2002, NRDC had sent a notice to both Petitioners calling upon them to immediately submit the half yearly returns from the date of the start of manufacture to enable NRDC to determine the exact amount of royalty due and further to make payment of the royalty amount on provisional basis.

Interestingly, even in this letter the arbitration clause was not invoked.

13. The Petitioners replied to the above letter on 21st March 2002 in which it was reiterated that “in spite of our best efforts and repeated requests, CFTRI did not transfer the technology and process till date.” It was pointed out that ESCOIL started functioning in 1980-81 “using higher expert technical know-how procured from elsewhere.” Accordingly it was asserted by Mr. John “as such NRDC had no right to claim royalty” from him or ESCOIL. Thereafter that an Arbitrator was appointed by the Court in an application filed by NRDC under Section 11 of the Act.

Findings of the learned Arbitrator

14. Two of the questions that arose for consideration before the learned Arbitrator were “whether the claim of the claimant is within limitation?” (Question No.1) and “What is the effect of Respondent not supplying and furnishing account and statement of articles manufactured by them by use of the know-how or manufactured etc. or processed under the term of the Licence Agreement?” (Question NO.3) In the impugned Award the learned Arbitrator considered both the questions together.

15. The question to be examined was when did NRDC come to know about the commencement of manufacture of ‘Spices Oleo Resins’ by the Petitioners? The learned Arbitrator concluded that this happened only when NRDC made enquiries from the Spices Board in 2001 and that it was only in response to the legal notice dated 19th February 2002 that the Petitioners by the letter dated 14th March 2002 denied liability to pay any royalty. After

discussing the entire correspondence between the parties, the Tribunal concluded as under:

“Thus it is established beyond doubt that the Respondent has been concealing from the Claimant factum of manufacture of Oleo Resins and Articles by them. They should have told from the start that they were manufacturing these articles from a particular month or from a particular year, but under know-how received from other sources by them, independent of Claimants sources or independent from CFTRI, but they did not do so. Concealment of this fact of manufacture of the articles is deliberate concealment and amounts to nothing less than fraud played by the Respondent on Claimant.”

16. It was further concluded by the learned Arbitrator that the denial by the Petitioners that they were using the technology supplied to them by the NRDC for manufacture of ‘Spices Oleo Resins’ was “sheer falsehood and merely to avoid liability and in fact concealment of facts and amounts to fraud played by them on the claimant and such denial is impermissible.” According to the Tribunal because the Petitioners had practised fraud, Section 17 of the Limitation Act, 1963 ('LA') would apply.

Submissions of counsel

17. It was submitted by Mr. Ramji Srinivasan, learned Senior counsel appearing for the Petitioners, that there was no licence agreement, and therefore no arbitration agreement between ESCOIL and NRDC, no liability could be fastened on ESCOIL. It was not even a proper party to the arbitral proceedings. Secondly as far as Mr. John was concerned, the claim of NRDC against him was time barred. He pointed out that NRDC was aware

of Mr. John's denial of any liability even on 21st July 1989. In any event, even by his letter dated 11th April 1990 to the NRDC, Mr. John had reiterated the denial of any liability. Thirdly, it was submitted by Mr. Srinivasan that the Arbitrator erred in entertaining the issue of fraud which was raised for the first time in the arguments and not pleaded or proved by NRDC. Reliance was placed on the decisions in ***Mohan Lal v. Anandibai (1971) 1 SCC 813***, ***Saradamani Kandappan v. S. Rajalakshmi (2011) 12 SCC 18*** and ***Shanti Budhiya Vesta Patel v. Nirmala Jayprakash Tiwari (2010) 5 SCC 104***.

18. Mr. Joydeep Sharma, learned counsel appearing for NRDC, on the other hand referred to the decision dated 23rd October 2007 of this Court in OMP 561/2006 (***National Research Development Corporation v. Pulver Ash Project Ltd.***) where in similar circumstances it was held that NRDC would be entitled to make a claim for the whole period of the agreement after completion of the period of licence. It was submitted by Mr. Sharma that NRDC could have waited for the conclusion of 14 years of licence, not only from the date of licence agreement but from the date of the commencement of manufacture of the product by the Petitioners, and then claim royalty. Reference was also made to the decision in ***ITE India Private Ltd. v. Mukesh Sharma 2006 (1) R.A.J. 200 (Del)*** to urge that ESCOIL could be made liable for payment of royalty notwithstanding that it was not a party to the licence agreement since the application in the first instance was in the name of ESCOIL.

Scope of interference under Section 34

19. The Court would first like to advert to the scope of its powers under Section 34 of the Act for interference with an Arbitral Award. Under Section 34 (2) (b) (ii) of the Act, an arbitral Award which is in conflict with the public policy of India is vulnerable to being set aside by the Court. The above phrase has been interpreted in several decisions of the Supreme Court including ***ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***, and recently in ***Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (2014) 9 SCC 263***. It has been explained that an Award could be set aside if it is contrary to the fundamental policy of Indian law or even the interest of India or justice or morality or “if it is patently illegal”. It has been further explained that the illegality “must go to the root of the matter”. An Award could also be set aside “if it is so unfair and unreasonable that it shocks the conscience of the Court”. Another ground is where the arbitrator has drawn an inference “which on the face of it is untenable resulting in miscarriage of justice.” In ***Associate Builders v. Delhi Development Authority 215 (2014) DLT 204 (SC)***, it has been held *inter alia* that under the 1996 Act “a contravention of a substantial law of India would result in the death knell of an arbitral Award.”

ESCOIL not liable

20. At the outset it requires to be noted that the impugned Award makes ESCOIL liable for payment of royalty to NRDC jointly with Mr. John in terms of the licence agreement. In doing so, the learned Arbitrator has virtually re-written the licence agreement to fasten liability on ESCOIL which, as discussed earlier, was not a party to it. The mere fact that at one

stage prior to the licence agreement being executed the application was signed by Mr. John on behalf of ESCOIL, will not by itself make ESCOIL liable when clearly it is not, and was never, a party to the licence agreement. As noted in the impugned Award, the request made subsequently by Mr. John to NRDC to transfer the licence to ESCOIL was not acted upon by NRDC. Consequently, the impugned Award to the extent it makes ESCOIL jointly liable for payment of royalty to NRDC proceeds on an erroneous reading of the provisions of the licence agreement and is legally unsustainable.

NRDC's claim barred by limitation

21. The question whether a claim is barred by limitation goes to the root of the matter. The basis on which the learned Arbitrator has held the claim of NRDC not to be time barred is by resorting to Section 17 (1) (b) of the LA in terms of which the period of limitation shall not begin to run till such time the claimant “has discovered the fraud or mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the Plaintiff or the applicant first had the means of producing the concealed document or compelling its production.” According to the learned Arbitrator it is only after the Spices Board in 2001 furnished to NRDC the details of manufacture of ‘Spices Oleo Resins’ by ESCOIL did NRDC discover the ‘fraud’.

22. Learned counsel for NRDC was unable to show that in its claim before the learned Arbitrator NRDC had pleaded fraud. In fact before this Court, his submission was that limitation did not begin to run till the period of 14

years after commencement of manufacture was over. For the plea of fraud to succeed it must not only be specifically averred but proved by leading evidence to substantiate such plea. In the present case, the record shows that way back on 21st July 1989, NRDC was told by Mr. John that no royalty in terms of the agreement was owed to it since they had not received the complete technical know-how from the CFTRI. In its letter dated 8th February 1990 NRDC claimed to have learnt by then that the Petitioners were “manufacturing/marketing the above product in the country and abroad.” In response to the said letter, Mr. John by letter dated 16th April 1990 categorically stated that “the technology had not been completely transferred to me and as such the terms of the agreement with me have not been fulfilled by you.” He stated that “I have not manufactured or marketed any product using your technology...” Therefore if not from July 1989, then certainly from April 1990 onwards NRDC was aware that Mr. John had denied any liability owed by himself or ESCOIL to NRDC under the licence agreement. The limitation for NRDC to make a claim for royalty therefore began to run from either of those dates.

23. The statement by NRDC in its letter dated 8th February 1990 that it had learnt by then it knew that ESCOIL and Mr. John had commenced manufacturing spices oleo resins, belies its plea that it knew of this fact only when the Spices Board furnished it the details in 2001. If NRDC chose not to write to Spices Board for more than 10 years thereafter, it certainly cannot take benefit of Section 17 LA by pleading that it discovered a "fraud" only when the Spices Board wrote to it.

24. Even this does not help NRDC because it is not the case of NRDC that Spices Board informed it that the technical knowhow licensed by it was used by the Petitioners in the manufacture of the product. That cannot be simply assumed in the absence of evidence and particularly where Petitioners have repeatedly taken the stand that they had never used the technology licensed to Petitioner No.2. This was, clearly, a matter for evidence and not for inference. The finding of the learned Arbitrator on the aspect of fraud is, therefore, perverse inasmuch as it is not based on any evidence whatsoever. It appears to be based on surmises and conjectures. The learned Arbitrator appears to have simply concluded, without any evidence, that the so-called 'concealment of evidence' by the Petitioners amounted to a fraud. The correspondence on record, also referred to by the learned Arbitrator, far from revealing that Petitioners concealed facts, show that Mr. John repeatedly told NRDC by the letters dated 21st July 1989 and 11th April 1990 the technical knowhow licensed to him was not used in the manufacture of products. The learned Arbitrator has drawn an inference which on the face of it is untenable resulting in miscarriage of justice.

25. What the learned Arbitrator also overlooked was that NRDC had slept over the matter for a long number of years without taking any steps. In terms of the clauses of the licence agreement, notice hereinbefore, if royalty returns were not filed and royalty paid for more than three months from the date when it fell due, NRDC could have proceeded to terminate the licence agreement. NRDC took no steps in that regard. The Court is unable to agree with the proposition that NRDC could have waited for the expiry of the entire licence period of 14 years and then proceeded to recover the royalty

dues. The right to recover royalty accrued on the date when such claim was asserted and that claim was denied by the Petitioners. The last time it was denied by Mr. John was on 11th April 1990. Clearly, therefore, a limitation for recovery of royalty began to run from that date. The claim by NRDC before the learned Arbitrator was time barred. The Court is, therefore, unable to sustain the impugned Award inasmuch as it concludes that the claims of NRDC, was not barred by limitation. The impugned Award is contrary to the law of limitation and is a “patent illegality” that goes to the root of the matter. It is contrary to the ‘public policy of India’ as explained by the Supreme Court in the aforementioned decisions.

26. In the considered view of the Court, the Award is vulnerable to be set aside on the ground spelt out in Section 34 (2) (b) (ii) of the Act.

Going beyond the scope of the reference

27. The learned Arbitrator awarded royalty for a period beyond what was claimed by NRDC. The royalty awarded was for the period from 1991 to 2005 when in fact the claim of NRDC was for a period from 1982 to 1996. Clearly, therefore, the Award was, in terms of Section 34 (2) (b) (ii), beyond the scope of the matter for arbitration.

28. Another ground raised by the Petitioners concerns the delay in the pronouncement of the Award. The learned Arbitrator heard final arguments and written submissions were filed by the parties on 23rd August 2007 itself. However, counsel on both sides were recalled by the learned Arbitrator 4 years later, on 25th October 2011, to address further submissions on the

evidentiary value of a letter dated 12th September 2001 of the Spices Board. The Award was thereafter delivered on 29th September 2012. It is accordingly submitted that the Award is vitiated by the unexplained delay in delivering it nearly 5 years after written submissions filed before the learned Arbitrator. Considering that the Award is found even otherwise to be unsustainable in law, the Court does not consider it necessary to deal with further submission regarding delay in the delivery of the Award.

29. For the aforementioned reasons, the impugned Award dated 29th September 2012 is hereby set aside. The petition is accordingly allowed but in the circumstances with no order as to costs.

JANUARY 20, 2015
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S. MURALIDHAR, J