

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

F.A.O.No.2406 of 2014 (O&M)

Date of Decision: October 21st, 2016

M/s Ballarpur Industries Limited

...Appellant

Versus

Punjab State Industrial Development Corporation Limited, Chandigarh

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

**Present: Mr.Anand Chhibbar, Senior Advocate with
Mr.Mrigank Sharma, Advocate,
for the appellant.**

**Ms.Madhu Dayal, Advocate,
for the respondent.**

AMIT RAWAL, J.

The appellant is aggrieved of the impugned order dated 16.1.2014 rendered by the Additional District Judge, Chandigarh, whereby objections filed by the appellant under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (for short "1996 Act"), has been dismissed and the award of the Arbitrators dated 30.6.2003 and the majority decision of two Arbitrators out of three, has been upheld.

Mr.Anand Chhibbar, learned Senior Counsel assisted by

Mr.Mrigank Sharma, Advocate representing the appellant submitted that

a Letter of Intent dated 8.4.1983 from the Government of India was received by a 100% wholly owned subsidiary company (M/s Punjab Wireless Systems Ltd.) of Punjab State Industrial Development Corporation (for short "PSIDC") for establishment of a new undertaking for manufacture of Electronic PABX/PAX and allied systems in the State of Punjab. However, on 14.5.1985, the PSIDC entered into an agreement with the appellant for implementation and operation of the aforementioned project vide Annexure A-1. As per the collaboration agreement, PSIDC invested a sum of ₹1,02,00,600/- fully paid up equity shares of ₹10/- each of NODE (approximately 11% share capital) of the aforementioned amount, whereas the appellant invested 40% of the fully paid up share capital.

He further submitted that Clause 36 of the agreement provided that the agreement would be subject to the approval of Government of India under the various laws governing companies and the transactions between them. Subsequently, a supplementary agreement dated 29.1.1986 (Annexure A-2) was executed amending some of the provisions, whereas the proportionment of the share holding was changed and rest of the terms and conditions of the agreement remained the same, except "**The Right of Pre-emption**" was introduced through Clause 4, wherein it has been held that either of the respondent

Corporation or the Collaborator in case desires to dispose off its equity shareholdings in the company, the other party shall have the first option to purchase or acquire the said equity shares from the party desiring to dispose of the shares. In fact, there was a specific bar as per the provisions of Section 20 of the Securities Contract (Regulation) Act, 1956 (for short “1956 Act”), in essence the provisions of the Act could not bind the appellant to purchase the aforementioned equities invested by the PSIDC. However, the said contracts for pre-emption were introduced as per notification dated 27.6.1961. However, the notification dated 27.6.1961 promulgated by the Central Government of India under Section 16(1) of the Act specifically provided that no person in the territory to which the said Act extends shall with the permission of the Central Government enter into any contract for the sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery in any securities as is permissible under the said Act and the rules, bye-laws and regulations of a recognised stock exchange.

The respondent Corporation, as a measure of arm twisting, secured an unilateral undertaking on the very next day, i.e., 29.1.1986 by way of the side-letter (Annexure A-3) from the appellant, which was clearly contrary to the terms of Clause 4 of the collaboration agreement.

He has drawn the attention of this Court to the aforementioned side letter. As per the terms and conditions of the contract, the appellant was to buy-back the equity shareholdings from the PSIDC after five years of the commercial production. Vide letter dated 30.5.1992, the appellant informed the respondent Corporation that it had started its commercial production on 19.9.1987 and before 19.9.1992, the appellant would purchase the entire equity held by the respondent Corporation and also annexed a cheque of ₹50.00 lacs as advance payment. However, the respondent Corporation, vide letter dated 8.10.1992, acknowledged the offer for purchase of its equity at ₹28/- per share but informed the appellant that the matter was being examined. However, in the meanwhile, respondent Corporation called upon the appellant to pay the balance amount of ₹2,35,60,680/- at the rate of ₹28/- per share. In the meantime, the company had approached the Board of Industrial and Financial Reconstruction (BIFR) for its rehabilitation under the provisions of Sick & Industrial Companies Act, 1985 and the BIFR, vide its order dated 12.12.1995 (Annexure A-12), recommended the merger of appellant with M/s Crompton Greave Ltd. The representatives of the PSIDC also presented its claim before the BIFR. The BIFR, while passing the order and sanctioning the scheme, directed that a paragraph be inserted in the scheme to the effect that the appellant would purchase

shareholding of PSIDC at a mutually agreed price. Accordingly, a settlement agreement dated 22.3.1996 (Annexure A-13) was entered into containing the following terms and conditions:-

“AND WHEREAS subsequent to the commencement of commercial production, the Collaborator exercised its option to buy-back the entire equity shareholding of the Corporation which was accepted by the Corporation.

AND WHEREAS a dispute had arisen between the parties regarding the price per share of the Company as on 18.9.92 i.e. due date of buy-back.

AND WHEREAS the collaborator maintains that the price of share of the Company be taken as Rs.28/- per share in terms of the said Agreement.

AND WHEREAS the Corporation maintains that the price of share of the Company as on the due date be taken as Rs.40/- per share in terms of the said agreement.

AND WHEREAS the Collaborator had put up a proposal that they were willing to make the entire payment of amount due to PSIDC on its shareholding in the Company @ Rs.28.00 per share alongwith interest from the due date till the date of payment and further they are agreeable to refer to the dispute with regard to the price of Rs.28.00 or Rs.40.00 to the Arbitration in terms of the provisions contained in the said Agreement;

AND WHEREAS the Corporation has accepted the proposal of the Collaborator.

AND WHEREAS the Company had become sick and was

therefore, referred to the Board for Industrial and Financial Construction (BIFR) in terms of the provisions of The Sick Industrial Companies (Special Provision) Act, 1985;

AND WHEREAS BIFR after hearing submissions sanctioned the draft Rehabilitation-Cum-Merger Scheme for revival of the Company in terms of the Order as passed on 12.2.95 in the presence of the representative of the Corporation;

AND WHEREAS in terms of the Order of the BIFT the Company is to be merged with M/s Crompton Greaves Ltd. and the entire undertaking of the Company shall be transferred to Crompton Greaves Ltd. on the terms and conditions as mentioned therein;

AND WHEREAS the parties hereto have agreed to the following terms and conditions with a view to arrive at the expeditious settlement of the dispute.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared by and between the parties hereto as under:-

“1. On receipt of the consideration amount of Rs.28.00 per share alongwith interest till the date of payment, the dispute as to the price of Rs.28.00 or Rs.40.00 will be referred to the Arbitration Agreement dated 14.05.1985.

2. The corporation will transfer its entire shareholding in the company to the collaborator simultaneously after receipt of the aforesaid amount @ Rs.28 per share and will hand over the necessary share certificates also to the collaborator.

3. The Collaborator agrees to pledge 3,10,000 equity shares of its associate company viz. A.P.Rayons Limited

which is listed on recognized Stock Exchange, along with duly executed transfer deed, on the basis of average market price for three months before signing of the deed, as security for the balance amount.

4. *In case the price of shares is finally determined in Arbitration as Rs.28.00 per share, the corporation shall forthwith release the shares pledged with it along with the transfer deeds.*

5. *In case the price of shares determined in Arbitration is higher than Rs.28.00, the Collaborator shall pay the difference in the amount to the corporation as per the Arbitration Award within one month of the award of the Arbitration failing which interest @ 18% will be levied till the date of payment as per the financial collaboration agreement.*

6. *In case the collaborator fails to make the payment within three months of the award of the arbitration, the corporation will be at liberty to sell the shares pledged with it at the risk and cost of the collaborator without prejudice to its other rights under the agreement.*

7. *On signing of this Deed of Settlement, the corporation will withdraw its nominee from the Board of the Company.*

8. *The Award of the Arbitration with regard to the price per share as on the date of option shall, subject to provisions of the Arbitration Act, be final and binding upon both the parties. The parties shall be at liberty to raise all possible pleas and contentions before the Arbitrators during the course of Arbitration.”*

In lieu of the aforementioned settlement, the appellant paid the outstanding amount taking the price of the share as ₹28/- along with 18% interest and the dispute with regard to the rate of the share to be treated as 28 or 40 for adjudication was referred to the Arbitral Tribunal. The Arbitrators have committed illegality and perversity in taking the price of the share as ₹40/- and not ₹28/- as numerous documents of various exchanges in this regard have been placed on record containing the value of the share at the relevant point of time, i.e., on 18.9.1992 to be ₹28/-. He further submits that the Arbitrators have also granted the interest at the rate of 12% for the pre reference, reference and post decision, which could not have been granted in the absence of any specific clause in the agreement. Even otherwise, in view of the provisions of law, the aforementioned compulsory purchase of the share is against the public policy as it violated the pre-emption.

He further submits that when the parties have entered into collaboration agreement and amended agreement, there was a specific bar under Section 20 of 1956 Act. The right of pre-emption was introduced in Clause 4 of the amendment agreement on 29.1.1986, which, as per Section 28(2) of 1956 Act, was in consonance with the notification dated 27.6.1961. The terms and conditions of the collaboration agreement were subject to the security and approval of the

Central Government, but in view of the unilateral undertaking dated 29.1.1986, the majority opinion of the Arbitrators did not accept the conditions, whereas the third Arbitrator gave the dissenting view and instead held that the agreement was against the provisions of Securities Contracts (Regulation), Act, Companies Act and the notifications dated 27.6.1961 and 27.6.1969. All these factors were also raised before the Objecting Court, but the Objecting Court has failed to address on the aforementioned issues. The claim of the respondent Corporation before the Arbitrators was, *ex-facie*, time barred. As per the terms and conditions of the settlement agreement, the limitation was to begin within one month of the exercise by the Corporation of its rights to sell its shares in NODE to BILT. However, the Corporation filed its claim before the Arbitrator on 22.6.2001, which is before four years and few months and in support of his contention, has relied upon the ratio decidendi culled out by the Hon'ble Supreme Court in paragraph 18 of the judgment rendered in **State of Goa Versus Praveen Enterprises, (2012) 12 Supreme Court Cases 581**. He further submits that the majority view of the Arbitrators suffers from patent illegality as the same has been brought within the embrace of "Public Policy" in view of the ratio decidendi culled out by the Hon'ble Supreme Court in **Associates Builders Versus Delhi Development Authority, (2015) 3 Supreme**

Court Cases 49 and reiterated in **National Highways Authority of India Versus ITD, Cementation India Limited, 2015(5) SCALE 554**. He has also drawn the attention of this Court to the findings given by the Arbitrators vis-a-vis rejecting the argument qua charging of interest to make this Court to believe that the award is patently illegal and, therefore, the objections under Section 34 of 1996 Act before the Objecting Court were maintainable. The appellant never agreed for charging of interest as noticed in the majority view.

Regarding assessing the right of the share, the Arbitrators have ignored the prices of the transactions quoted which were ₹35/- ₹40/- and ₹28/-, but yet taken the price as ₹40/-, whereas the closing rate on the same date, i.e., 18.9.1992 was ₹28/-. He has also cited various other following judgments to enable this Court to *prima-facie* form an opinion that the award is not sustainable in the eyes of law:-

- 1) **T.N. Electricity Board Versus Bridge Tunnel Constructions and others, (1997) 4 Supreme Court Cases 121;**
- 2) **Rajasthan State Mines & Minerals Ltd. Versus Eastern Engineering Enterprises, (1999) 9 Supreme Court Cases 283;**
- 3) **MD, Army Welfare Housing Organisation Versus**

Sumangal Services (P) Ltd., (2004) 9 Supreme Court Cases 619.

Per-contra, Ms.Madhu Dayal, learned counsel for the respondent Corporation submits that there was no delay on the part of the respondent Corporation in initiating the arbitration proceedings. In fact, the respondent-claimant had intimated the appellant vide letter dated 25.4.1996 regarding the appointment of the Arbitrator from their side, whereas the appellant had intimated vide fax dated 20.6.1996 regarding appointment of the second Arbitrator. Thereafter, the respondent Corporation had been writing to the appellant to remain in touch for arranging a meeting of the two Arbitrators for appointment of the third Arbitrator. Since the two Arbitrators could not meet for a considerable time, the respondent claimant ultimately in October, 1997 filed an application for appointment of the third Arbitrator. In the meantime, the second Arbitrator tendered his resignation on 18.10.2000 due to the health reasons and thereafter another Arbitrator was appointment and, thus, there was no delay on the part of the claimant at any stage. In support of her contention, she has relied upon the judgment rendered in

Visakhapatnam Port Trust Versus Continental Construction Company, (2009) 4 Supreme Court Cases 546 and Cash and Grain Finance and Investments Rep.by its Managing Partner, S.Vasatha

Versus Manjula Udaya Shankar, 2009 (2) CTC 234 to contend that the period spent in seeking appointment would be excluded for the purpose of computation of the limitation as the parties have exercised their right to file the objections within the period of limitation, in essence there was no fault of the respondent Corporation as the Arbitrators could not meet to appoint third Arbitrator.

Vis-a-vis the applicability of the notification and the provisions of 1956 Act, the aforementioned provision came to be debated upon by this Court in **Civil Writ Petition No.12861 of 2006 titled as “M/s Rama Petrochemical Limited and others Versus Punjab State Industrial Development Corporation Limited and others”**, decided on 27.11.2009, wherein in paragraph 41 of the judgment, this Court had an occasion to discuss the provisions of law and held that the financial terms and conditions of the agreement, supplementary agreement and agreed settlement are sacrosanct as by virtue of the particular clause in the financial collaboration agreement, the appellant had to buy-back the equity shareholding of the PSIDC. She further submits that the dissenting view of the third Arbitrator would not be applicable in law as the majority view is in favour of the respondent Corporation. The Arbitrators have only treated the claim as a proof, but in fact examined every evidence brought on record, i.e., agreement, corroboration agreement,

supplementary and settlement agreement, therefore, the majority decision cannot be said to be a misconduct and error on the face of the award. On the contrary, the respondent Corporation has produced on record the material to show that the value of the share at the relevant date as ₹40/-. In the absence of any terms and conditions of granting interest, the Arbitrator is well within his power to grant any interest pre reference, during the reference and post reference and, therefore, awarding of interest at the rate of 14% which as per the provisions of Section 31(7)(b) of 1996 Act could have been granted. In support of her contention, relied upon **State of Rajasthan and another Versus Ferro Concrete Construction Private Limited, (2009) 12 Supreme Court Cases 1** and, thus, urges this Court for affirming the findings.

I have heard the learned counsel for the parties and appraised the paper book.

I would not be extracting the relevant clauses of the collaboration agreement and supplementary agreement as both the parties are not disputing the execution of the same. After the decision of the BIFR dated 12.1.1995, the parties had set their hands together in arriving at a settlement agreement dated 22.3.1996 (Annexure A-13). The contents of the same are extracted supra, whereas as per the aforementioned agreement, the parties have acknowledged the execution

of the financial collaboration agreement dated 14.5.1985, subsequent agreement dated 29.1.1986 and the letter dated 29.1.1986. Not only this, undisputedly, the collaborator had the option to buy-back the equity shareholding of the corporation in the said company at any time after the commencement of commercial production on the terms and conditions contained in the agreement and was bound to buy-back the entire shareholding of the Corporation within five years of the commencement of commercial production.

Since a dispute arose between the parties regarding the price per share of the company as on 18.9.1992, the matter was agreed to be referred to the arbitrator. It is also conceded position on record that the appellant had paid the entire consideration amount at the rate of ₹28/- per share along with 14% interest and both the parties had also set their hands together that in case the price of the share determined in the arbitration is found to be higher than ₹28/-, the difference in the amount shall be paid by the collaborator as per arbitration award within one month of the award, failing which it would entail interest at the rate of 18%. The Arbitrators, while assessing the price of the share, gave the following majority view:-

“Both the parties rely upon the publication of the value of the shares by the different Exchanges. Exhibit P-10 is being

relied upon by the claimants to indicate that on the relevant date i.e. 5 years after starting commercial production by the NODE, the price of the share as on September 18, 1992 was Rs.40/-, the price quoted on that date. The prices of the transactions quoted were Rs.35/-, Rs.40/- and Rs.28/-. The Delhi Stock Exchange as per Exhibit P-9 quoted the rates as Rs.28 and Rs.26/- as on September 18, 1992. On behalf of the respondent, reliance was placed on Exhibit R-3 and Annexure attached hereto. On September 18, 1992, the share of the NODE was listed at Rs.35/-, Rs.40/- and Rs.28/- per share, the highest being Rs.40/-. At this stage, it may be observed that a day earlier thereto i.e. on September 17, 1992 there was transaction of sale of shares of the NODE at Rs.40/- per share in the Mumbai Stock Exchange. Thus, on the basis of the documents produced by both the parties, it is clear that on the relevant date, the highest price of the share of the NODE that fetched in the stock exchange was Rs.40/-. The claim of the claimant-Corporation is, thus, fully justified, claiming the value of the share at the rate of Rs.40/- per share, as per agreement.”

In my view, the findings of the Arbitrators are not only perverse but patently illegal and were against the public policy, for, on perusal of the rates of stock exchange Bombay (Annexure A-18), on 18.9.1992 the share opened with the price at ₹35, reached upto ₹40/- and ultimately closed at ₹28/-. For the sake of brevity, relevant portion of the

same reads thus:-

“18/09/92 35.00 40.00 28.00”

' The Arbitrators though mentioned the rate as ₹28/-, but the reason assigned is totally fallacious in assessing the value of the share as ₹40/-. The *bonafide* of the appellant can be examined from the point of view that while entering into the settlement agreement, paid the entire amount by taking into consideration the price of the share at ₹28/- along with interest @ 14%.

 The claim of the respondent Corporation was nothing but an act of aggrandizement, thus, in my view, there is force and merit in the submission of Mr.Chhibbar on this premise, whereas on the contrary the argument of Ms.Madhu Dayal is hereby repelled.

 As regards the claim being barred by law of limitation, I am of the view that the contention of Ms.Madhu Dayal, noticed above, would leave no manner of doubt that the Corporation in 1996 itself had written a letter to the appellant for appointment of the Arbitrator, who had also given their consent and appointed Arbitrator, but the matter for appointment of third Arbitrator kept hanging for some time and in the meantime, one of the Arbitrators had showed his unwillingness owing to the ill-health and in this process, the Arbitrator entered a reference in the year 2001, therefore, the claim cannot be said to be beyond limitation.

 In Para 18 of the judgment in **State of Goa (supra)** relied

upon by Mr. Chhibbar, the Hon'ble Supreme Court had held that the relevant date for deciding the claim would be as per the provisions of 21 of 1996 Act, i.e., the date of commencement of the arbitration proceedings, though the said view would not help Mr.Chhibbar, but rather would come to the aid of respondent Corporation.

I am in agreement with the submission of Ms.Madhu Dayal, who had relied upon the judgment rendered in **Visakhapatnam Port Trust (supra)**, with regard to controversy of claim having been filed within the prescribed period of limitation or not. For the sake of brevity, the findings rendered in Paras 22, 23, 24 and 25 read thus:-

“22. The contractor on 15-5-1975 appointed its arbitrator and gave notice to VPT requiring them to appoint their arbitrator. VPT also appointed its arbitrator but the arbitrators could not enter upon the reference. It was in the year 1979, then that the contractor approached the Principal Subordinate Judge, Visakhapatnam by filing suit under the Arbitration Act, 1940 which was allowed vide order dated 10-9-1984 directing each party to appoint its arbitrator within 15 days. In compliance therewith, the parties appointed their arbitrators and on 16-3-1985 the contractor filed its statement of claim for payment of hire charges for power-driven survey boat.

23. Sub-section (3) of Section 37 of the 1940 Act, inter alia, provides that an arbitration shall be deemed to be commenced when one party to the arbitration agreement

serves on the other party thereto a notice requiring the appointment of an arbitrator.

24. The core controversy is: in the facts and circumstances of the case, when can the arbitration be said to have commenced.

25. In what we have already noticed above, the dispute with regard to charges for the power-driven survey boat arose on 3-2-1975 and after the claim was rejected by the consulting engineers on 3-5-1975, the contractor appointed the arbitrator on 15-5-1975 and asked VPT to appoint its arbitrator. In other words on 15-5-1975, the contractor served on VPT a notice requiring them to appoint their arbitrator under the agreement. Thus under Section 37(3), the arbitration shall be deemed to have commenced on 15-5-1975 i.e. well within time and the High Court rightly rejected the objection of VPT that the claim with regard to charges for the survey vessel was time-barred. Merely because the arbitrators could not enter upon reference and the contractor had to approach the court in the year 1979 by filing suit which was allowed on 10-9-1984 and new arbitrators were appointed by the parties and statement of claim was filed by the contractor on 14-3-1985, that would not render the contractor's claim time-barred."

Similar is the view expressed in various other judgments, but

I would not be delving upon the findings in the other judgments as one judgment is enough for adjudication of the lis.

No doubt, the Court has to be very circumspect in setting-

aside the award, but cannot shut its eyes where the award of the Arbitrator is patently illegal. The aforementioned view of mine is fortified by the ratio decidendi culled out by the Hon'ble Supreme Court in **National Highways Authority of India's case (supra)**. For the sake of brevity, paras 19 and 20 of the judgment reads thus:-

*"19. In a recent decision in **Associate Builders v. DDA, (2015) 3 SCC 49** while discussing "the public policy of India" contained in Section 34(2) (b) (ii) of the Arbitration Act, 1996 this Court dealt with each of the heads contained in Saw Pipes Judgment (Supra) in the light of three distinct and fundamental juristic principles added in **ONGC Ltd. v. Western Geco. International Ltd.** (Supra). "Patent-illegality" which is one of the heads contained in Saw Pipes judgment (Supra) was then elaborated and we quote paras 42 to 42.3:-*

***42.** In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads:*

***42.1 (a)** A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:*

"28. Rules applicable to substance of dispute.

(1) Where the place of arbitration is situated in India,

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2 *(b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.*

42.3(c) *Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:*

"28. Rules applicable to substance of dispute.-

*(1) -- (2) * * **

(3) In all case, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

20. *It is thus well settled that construction of the terms of*

a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

Therefore, it would be total farcical exercise for this Court to delve upon the applicability of provisions of 1956 Act and as well as the notifications, noticed above.

For the foregoing reasons, the award of the Arbitrators is hereby set-aside. Resultantly, the order of the Objecting Court is also set-aside.

Appeal stands allowed.

October 21st, 2016
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No