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

+ **O.M.P. (COMM) 62/2016**

ROENTGEN ONCOLOGIC SOLUTIONS
PVT LTD AND ORS

..... Petitioners

Through: Mr Abhinav Vasisht, Senior Advocate
with Mr Abhimanyu Mahajan, Mr
Milan Deep Singh and Ms Anubha
Goel, Advocates.

versus

DR KIRTI JAIN

..... Respondent

Through: Mr Mrigank Prabhakar, Mr Aditya
Samaddal and Mr M. R. Shamshad,
Advocates.

AND

+ **O.M.P. (COMM) 295/2016**

DR KIRTI JAIN

..... Petitioner

Through: Mr Mrigank Prabhakar, Mr Aditya
Samaddal and Mr M. R. Shamshad,
Advocates.

versus

ROENTGEN ONCOLOGIC SOLUTIONS PVT
LTD AND ORS

..... Respondents

Through: Mr Abhinav Vasisht, Senior Advocate
with Mr Abhimanyu Mahajan, Mr
Milan Deep Singh and Ms Anubha
Goel, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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14.09.2016

VIBHU BAKHRU, J

1. These are petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award (hereafter 'the impugned award') dated 01.02.2016 passed by the Sole Arbitrator Justice C. M. Nayar (Retd.), a former judge of this Court.

2. Roentgen Oncologic Solutions Pvt. Ltd. (hereafter 'ROSPL') is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter alia*, engaged in the business of setting up, running and/or managing oncology centres in India. Mr S. L. Kapoor, Dr S. Hukku, Mrs Rachna Hukku, Mrs Rekha Kapoor and Dr Shikha Haldar (hereafter referred to as 'the Promoters') are the promoters of ROSPL.

3. OMP No.62/2016 is preferred by ROSPL and the Promoters. OMP No.295/2016 is preferred by Dr Kirti Jain.

4. The parties entered into a shareholder's agreement dated 30.06.2008 (hereafter 'the Agreement') whereby Dr Kirti Jain agreed to acquire 49% of the outstanding share capital of ROSPL for a consideration of ₹1,21,85,143/-. In terms of clause 5.3.1 of the Agreement, Dr Kirti Jain also agreed to arrange funds equivalent to ₹5,64,94,120/-. The said clause is quoted below:-

“5.3.1 As on date, the company has a liability in its books of accounts of Rs.5,88,00,000/- (Rupees Five crores Eighty Eight Lakhs only) raised as loan from GE Capital, against which the Promoters have provided their personal assets as collaterals. It is agreed between the parties that the Investor shall be issued 22,578 shares (49%) subject to fulfilment of the condition that

the Investor arranges for funds equivalent to Rs.5,64,94,120/- (Rupees Five Crores Sixty Four lacs Ninety Four Thousand One Hundred and twenty only) i.e. proportionate to the loan already raised by the company from GE Capital against collaterals provided by the Promoters by way of debt in the name the company by providing his (i. e. the Investors') personal collaterals. It is agreed that such loan arranged for the Company by the Investor shall be subject to a maximum ceiling of interest rate, being the prevailing rate of interest payable by banks in India on similar loan portfolios. The Investor hereby gives the undertaking that for this Agreement to be valid he would provide appropriate collateral so that the company can raise debt aggregating Rs.5,64,94,120/-.”

5. Certain disputes arose between the parties in relation to the Agreement. It is the case of ROSPL and the Promoters, that Dr Kirti Jain had failed to arrange for the funds as agreed by him. This is disputed by Dr Jain. According to him, he was not required to arrange for funds but only to provide collateral for the loan to be arranged by ROSPL/the Promoters. It is also Dr Jain's case that ROSPL had failed to provide the relevant documents necessary for arranging the required funds. He further asserts that he was not made a Director of ROSPL and this also hindered his ability to raise the funds required by ROSPL.

6. The Arbitrator considered the rival contentions and concluded that although there may have been lapses on the part of the ROSPL and the Promoters but Dr Jain neither arranged the loan nor provided any collateral;

therefore, the terms of the Agreement were not satisfied.

7. The Arbitrator categorically found that the condition imposed on Dr Kirti Jain was not fulfilled. He further observed that *“the fait accompli is that the provisions of Clause 5.3.1 remain unsatisfied and are not complied with irrespective of the averments made by the claimant and counter averments as made by the respondents.”* In view of the findings, the Arbitrator concluded that the allotment of shares to the extent of 49% to Dr Kirti Jain could not be justified. He accordingly, directed that the amounts paid by Dr Kirti Jain be refunded along with interest.

8. Mr Vasisht, the learned senior counsel appearing for ROSPL and the Promoters contended that although the Arbitrator had found in favour of the ROSPL and the Promoters that Dr Kirti Jain had not arranged the loan, he had nonetheless awarded interest on the amount paid by him and also awarded costs. He submitted that the award of interest could not be justified as ROSPL had already offered to refund of the amount and had also offered to pay interest at the rate of 12% p.a. He contended that in the circumstances, award of compounded interest at the rate of 15% and that too compounded on monthly rests was wholly unsustainable and perverse. Mr Vasisht also attempted to assail the finding that there may have been lapses

on the part of ROSPL and the promoters and contended that all relevant documents were provided to Dr Kirti Jain.

9. Mr Prabhakar, the learned counsel appearing for Dr Jain contended that Dr Jain was ready to arrange/invest funds but the necessary resolutions and documents were not provided by ROSPL/the Promoters. He states that in absence of the necessary documents, Dr Jain was severely handicapped in arranging the funds as insisted upon by ROSPL and the Promoters. He submits that the arbitrator's finding that Dr. Jain had not performed the contract is, thus, perverse and the impugned award is liable to be set aside.

10. Insofar as awarding compounding interest is concerned, Mr Prabhakar states that the award of compound interest is not opposed to the public policy of India and, therefore, the impugned award cannot be interfered with for that reason.

11. I have heard the learned counsel for the parties. Curiously, Mr Prabhakar has assailed as well as defended, the impugned award.

12. It is trite law that the Court examining a petition under Section 34 of the Act does not sit in appeal to re-appreciate the evidence. The Supreme

Court had also explained that findings of fact cannot be interfered with unless the Court finds that the same are perverse and unreasonable.

13. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

14. In **Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd: (2014) 9 SCC 263**, the Supreme Court held as under:

“No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury’s principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.”

15. In the present case, it is difficult to accept that the aforesaid findings arrived at by the Arbitrator are perverse or that no reasonable person could have arrived at the conclusions reached by the Arbitrator. In the present case, the Arbitrator found that *"The contract executed between the parties has remained inconclusive and the terms of the conditions are not satisfied prima facie by the claimant and to some extent by the respondents"*. Thus, according to the Arbitrator, Dr Jain could not be held to be solely responsible for non-performance of the Agreement. As explained in *Associate Builders (supra)*, the said finding - even if it is erroneous - cannot be interfered with.

16. ROSPL and the promoters do not dispute that they have used the funds invested by Dr Jain. They also offered to refund the sum with interest at the rate of 12% pa. Thus, the only question that remains to be considered is whether the award of compound interest could be faulted. In my view, the Arbitrator has exercised his discretion to award compound interest at the rate of 15% pa. The same is clearly neither unreasonable nor suffers from patent illegality. Thus, in my view, the same cannot be interfered with.

17. However, it is noticed that the Arbitrator has awarded compound interest at yearly rest, as indicated by the formula as reproduced in

paragraph 44 of the impugned award [Compound Interest: Amount = Principal x (1 + (Rate/100))Time]; but, the interest awarded works out to be compound interest at 15% p.a. with monthly rests. This is clearly an error in the face of the impugned award as the amount computed does not conform to the award. It appears that the Arbitrator had accepted the calculations as provided on behalf of Dr Jain without verifying the same. The error is obvious and therefore, the amount payable under the award needs to be corrected. The amount payable with compound interest works out to be ₹3,47,58,772/- and not ₹3,77,37,970/- as provided in the impugned award. Insofar as the award of costs is concerned, this Court would not like to interfere with the discretion exercised by the Arbitrator.

18. Accordingly, the petitions are dismissed and the amount awarded is recomputed at ₹3,47,58,772/-.

19. At this stage, Mr Vasisht, the learned senior counsel for the petitioner points out that the matter could have been settled except that Dr Kirti Jain is insisting on receiving the awarded sum without any deduction of tax at source. Indisputably, the payer - ROSPL and/or the Promoters as the case may be - would have to deduct tax at source, if required, in terms of the Income Tax Act, 1961. Needless to mention that if Dr Jain claims that his

tax liability is less than the amount of tax deducted, it will be open for him to file a return in accordance with law and claim a refund from the Income Tax Department.

20. The petitions are disposed of with the above observations.

SEPTEMBER 14, 2016
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VIBHU BAKHRU, J

