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

+ **O.M.P. (COMM) 25/2016**

**UNIVERSAL EMPIRE INSTITUTE
OF TECHNOLOGY**

..... Petitioner

Through: Mr Jaimon Andrews and Mr Rakeesh
N.P., Advocates.

versus

**INDIRA GANDHI NATIONAL OPEN
UNIVERSITY& ANR.**

..... Respondents

Through: Ms Raji Joseph, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **14.09.2016**

VIBHU BAKHRU, J

IA No. 1241/2016

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

IA No. 1242/2016

3. For the reasons stated in the application, the delay in re-filing is condoned.
4. The application stands disposed of.

O.M.P. (COMM) 25/2016

5. The petitioner(hereafter 'UEIT') - a company registered in United Arab Emirates - has filed the present petition under Section 34 of the

Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the Arbitration award dated 20.07.2015 (hereafter 'the impugned award') passed by the Sole Arbitrator, Justice M.A. Khan (Retired), a former Judge of this Court.

6. UEIT had entered into a Memorandum of Understanding dated 16.11.2005 with respondent No.1 (hereafter 'IGNOU') for jointly executing a distance education project in Dubai. The said agreement was subsequently renewed by an agreement dated 01.05.2009 (hereafter 'the Agreement') for a further period of three years. The Agreement was similarly worded as the agreement of 16.11.2005. Certain disputes arose between the parties in respect of the Agreement which were referred to the Sole Arbitrator. IGNOU preferred certain claims against UEIT and UEIT in turn, raised certain counter-claims against IGNOU.

7. IGNOU claimed an aggregate sum of US\$ 14,48,046 out of which US\$ 6,63,653 was claimed as charges due under the agreement and US\$ 5,00,001 was claimed as compensation for loss of goodwill. UEIT also raised counter claims aggregating US\$ 49,81,798. These claims were in the nature of damages; UEIT claimed compensation for on account of business loss; expenses of salary and staff settlement; losses of licence expenses as

well as compensation for loss of reputation.

8. The fact that UEIT had failed to make the payments due to IGNOU under the Agreement is not disputed. However, it is UEIT's case that there was difficulty in making timely payment from 2008 onwards due to various reasons including certain hindrances that were created by IGNOU as well as the worldwide recession. The Sole Arbitrator considered the rival contentions and the evidence on record and found that the worldwide recession did not have an adverse effect on the revenues of UEIT and, therefore, concluded that there was no merit in the UEIT's contention that it was disabled in making timely payment due to worldwide recession.

9. The Arbitrator also found that IGNOU had not impeded or frustrated UEIT's efforts to obtain finances from the strategic investor as was contended by UEIT. In view of the above findings, the Arbitrator rejected the counter-claims preferred by UEIT.

10. Mr Andrews, the learned counsel appearing for UEIT contended that the present petition has been filed by UEIT only to assail the impugned award to the extent that UEIT's counter-claims have been rejected.

11. The only argument advanced by the learned counsel is that in terms of

clause 4.1 of the Agreement, it was not terminable except by consent of the parties and, therefore, IGNOU had wrongfully terminated the Agreement. He, earnestly, contended that the Agreement was valid for a period of three years and could be terminated by one month's notice with the consent of both parties; and even in that case, the period of validity of the Agreement would be extended to enable the students to complete their course. He stated that as far as the payment obligations of UEIT are concerned, IGNOU was at liberty to take measures to enforce the same and the issues regarding such obligations could have been agitated by IGNOU before the Arbitrator; however, failure on the part of the UEIT to honour its payment obligations did not entitle IGNOU to terminate the Agreement. He contended that the Arbitrator had grossly erred in ignoring the effect of clause 4.1 of the Agreement and had not considered the contention advanced in that regard.

12. I have heard Mr Andrews, the learned counsel for the UEIT.

13. At the outset, it is necessary to refer to clause 4.1 of the Agreement, which reads as under:

“4.1. Effective Date, Duration and Termination

The Agreement shall enter into force as from the day of 16th November of 2008 for and on behalf of the two institutions, and

will be valid till date and to extend for a period of three years. During the period, the Agreement is under operation, it would be terminable on a month's notice with the written consent of both the parties. However, students admitted to any programme during the period of validity of this agreement will be enabled to complete their programmes of study and appear in the relevant examinations, and the obligations of the respective parties will continue to be in force during such period irrespective of termination of the agreement.”

14. Plainly, the above clause only refers to termination by consent of the parties. The clause does not contemplate termination of the Agreement by a party on account of breach by the other party. In the present case, it cannot be disputed that UEIT had failed to perform its obligations under the Agreement. As noted hereinbefore, the Arbitrator had examined the contentions and found that the defences raised by UEIT for not performing its payment obligations were unjustified. The Arbitrator further held that IGNOU was not in breach of the Agreement and its unilateral termination of the Agreement was justified as UEIT was in continuous default of its payment obligations. The Arbitrator also observed that UEIT had failed to clear the arrears despite several interactions as well as a legal notice. In the circumstances, IGNOU could not permit UEIT to enroll more students and pocket the entire fees. It is, in this context, that the Arbitrator held that UEIT was in breach of the Agreement and IGNOU wasn't. Accordingly,

UEIT's counter-claims were rejected. Further, the Arbitrator also held that UEIT failed to prove any of the counter claims; thus, in any view, the counter-claims could not have been awarded and the Arbitrator had rightly rejected the same. In view of the unequivocal findings of fact, the rejection of counter-claims by the arbitrator cannot be faulted.

15. This Court cannot interfere with the impugned award except on the grounds as specified under Section 34(2) of the Act. UEIT had sought to place its case under Section 34(2)(b)(ii) of the Act; that is, the award is in conflict with the public policy of India. In my view, the impugned award cannot by any stretch be held to be in conflict with the public policy of India. Even if it is assumed - although in this case that there is no reason to do so - that the Arbitrator had made an error in rejecting the counter-claims by UEIT, the same was clearly within the jurisdiction of the Arbitrator. And an error made by the Arbitrator is not a ground for setting aside an arbitral award.

16. 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.”

17. 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.”

18. In the present case, the UEIT’s counter claims have been rejected on the basis of the finding that the UEIT was in breach of the Agreement as it had failed and neglected to pay the amounts due to IGNOU in terms of the Agreement. This finding cannot by any stretch be considered to be perverse or unreasonable and as explained in *Associate Builders* (*supra*) cannot be

interfered with. The impugned award also cannot be held to be unreasonable on the anvil of the *Wednesbury* principle.

19. Accordingly, the petition is dismissed.

VIBHU BAKHRU, J

SEPTEMBER 14, 2016
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