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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 15th October, 2018

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O.M.P. 108/2011

FRESENIUS KABI ONCOLOGY LIMITED Petitioner

Through: Mr. Sudhir K. Makkar, Senior
Advocate with Ms. Saomya Gupta,
Adv. (M:9971104284 & 9711959599)

versus

**M/S WELCURE DRUGS &
PHARMACEUTICALS LTD.**

..... Respondent

Through: Mr. Kumar Vikram, Advocate.
(M:9810073178)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. Present petition has been filed challenging the interim award dated 18th October, 2010 passed by the learned Sole Arbitrator, Late Justice Arun Kumar (Retired).
2. The brief background is that there was a product manufacturing agreement entered into between the Petitioner and the Respondent dated 19th August, 2003 by which the Respondent was to manufacture pharmaceutical products for the Petitioner i.e., it was a contract manufacturing arrangement. The agreement contained a termination clause which was invoked by the Petitioner. The case of the Respondent was that there was enormous investment in the manufacturing unit made by it on the assurance of the Petitioner that the products would be sourced from the Respondent for a long period. The termination, which took place, resulted in huge losses to the Respondent thereby resulting in the invocation of the arbitration clause.

3. Learned Sold Arbitrator, admittedly, entered reference in this matter and after completion of pleadings between the parties and oral evidence having been led, came to the conclusion that the termination was bad. The finding of the learned Arbitrator in this regard is recorded herein below:

“17. The termination clause in the agreement is reproduced as under:

“10b. Notwithstanding anything contained in these presents, DIL shall be entitled to terminate this Agreement forthwith any time without any notice and without assigning any reasons and without liability to pay any compensation whatsoever upon happening of any one or more of the following events.

- 1) WDPL committing breach of any of the conditions stipulated in this Agreement or*
- 2) WDPL being amalgamated with/taken over by any other Company, firm or business entity or*
- 3) WDPL taking any action or suffering any action for its re-organisation, liquidation or dissolution.”*

According to this clause the Agreement could be terminated without any notice and without assigning any reason and without liability to pay any compensation upon happening of any of events enumerated in the sub clause. A bare reading of the clause 10b shows that right to terminate the Agreement without any notice or without any reason and without liability to pay any compensation is subject to happening of any of the three events given in the clause. Admittedly, in the present case no notice much less any reasons were given by the respondent before terminating the Agreement. In my view the clause is worded in a manner that happening of any of events is a pre-requisite to exercise of the right to terminate as per the clause. The other party is entitled to know the reason for which the agreement was being terminated. When there is requirement in the clause that

happening of any of the events mentioned therein is a sine qua non for exercise of the right under the clause the words 'without notice and without assigning any reason have to be read as some reasons have to be communicated to the other party for which the agreement was being terminated. The respondent has admitted that no notice or any reason were assigned before termination of the Agreement. Actually all of a sudden, the respondent withdrew its Quality Controller from the factory of the claimant and stopped placing any order. Without certification from the Quality Controller of the goods, no goods could be dispatched to the respondent. Withdrawal of the Quality Controller in fact resulted in termination of the agreement. The result is that, in my view, the respondent committed breach of the Agreement and is therefore, liable to compensate the claimant.'

4. Thus, while the Ld. Arbitrator came to the conclusion that the Respondent had created a manufacturing unit and adequate infrastructure for exclusive use of the Petitioner, the Petitioner had breached the contract by terminating the same, that too without notice and without assigning any reasons. Learned Arbitrator held that the Petitioner is liable to pay compensation to the Respondent for the said breach.

5. However, having come to the above conclusion, the learned Arbitrator did not quantify the damages for compensation to be awarded and observed as under:

"20. The claimant has claimed compensation on the basis of amount spent by it for purchasing additional machinery for its factory which according to claimant was at the insistence of the respondent and for other related projects and equipments which were exclusively for the use of the respondent. The respondent has simply denied this saying that all the expenditure incurred by the claimant were necessary to enable the party to start the dealings. In my view the

parties have not focused really on the question of damages and how the damages are to be calculated. This is a most crucial issue in the case on which there are neither pleadings nor material on record nor the parties have addressed any arguments. Therefore, I feel handicap in deciding the issue. According to me, a fair and just solution in these circumstances would be to give opportunity to parties to place evidence on record to enable the Arbitrator to decide this issue. ”

6. The fundamental grievance of the Petitioner, as submitted by learned counsel, is that the learned Arbitrator could not have given further opportunity to the Respondent to make good its defects/deficiencies in the leading of the evidence and in the pleadings. The learned Arbitrator ought to have determined compensation, if any, awardable to the Respondent on the basis of pleadings, evidence and documents on record. The fact that the learned Arbitrator chose to permit the Respondent to file further evidence shows that sufficient material and evidence was not available for awarding damages/compensation to the Respondent.

7. Learned counsel for the Respondent, on the other hand, submits that all the relevant pleadings, documents and evidence were also on record. The Respondent did not wish to file any further evidence or documents. The Respondent only wishes to compute the compensation/damages, which it was claiming from the Petitioner.

8. Considering the stands of the parties, it is clear that whatsoever pleadings, documents and evidence were to be filed by the parties, have already been filed. Neither of the parties wish to file any further documents or evidence. However, since now the learned Sole Arbitrator, who was seized of the matter, has since passed away, the parties have no objection if

the matter is referred to a new Arbitrator, only for the purpose of determination of compensation liable to be awarded to the Respondent on the basis of pleadings, documents and evidence on record.

9. Accordingly, **Justice S. P. Garg (Retired)** is appointed as the Sole Arbitrator in the present matter to hear the submissions on the question of damages/compensation to be awarded, if any, to the Respondent. Lumpsum fee of the learned Arbitrator is fixed at Rs.2 Lakhs, to be shared equally by both the parties. It is directed that the entire arbitral record, which has been received in this Court, be transmitted to the newly appointed Sole Arbitrator. Pleadings and evidence to be considered by the learned Sole Arbitrator are as they existed on 18th October, 2010. No further document or pleading shall be entertained subsequent to the said date. This does not preclude the parties from filing written submissions or computation charts on the basis of evidence already on record.

10. List before the learned Arbitrator on 1st November, 2018 for directions. Learned Arbitrator is requested to pronounce the award within three months.

11. OMP is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

OCTOBER 15, 2018/dk