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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 13th February, 2018

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O.M.P. (COMM) 115/2017 & IA 14290/2017

MOHAN MEAKIN LIMITED

..... Petitioner

Through: Mr.Sandeep Sethi, Sr. Adv. and
Mr.Darpan Wadhwa, Sr. Adv. with Mr.P.K.Mittal,
Mr.Ashish, Advs.

versus

INTERNATIONAL BREWERIES (P) LTD

..... Respondent

Through: Ms.Suruchi Mittal, Mr.Abhishek
Gautam, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 25th February, 2017 passed by the Sole Arbitrator in the arbitration proceedings titled Mohan Meakin Limited vs. International Breweries (P) Ltd.

2. The disputes between the parties are in relation to the 'Contract Brewing Agreement' dated 14th June, 2001. Some of the terms and conditions of the contract that are relevant for the purpose of the present petition are reproduced herein below:-

"2.7 MML shall sell the Beer under the BRANDS of IBPI to

IBPL or to the indenters holding necessary permits/license (under the relevant excise laws and regulations) to purchase/deal in BEER (hereinafter called INDENTORS) as IBPL may from time to time advise.

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3.4 IBPL shall be responsible for sending duty paid import/bond permits to MML to enable MML to despatch BEER of the BRANDS of IBPL to IBPL or to the INDENTORS as the case may be IBPL shall ensure that all permits, excise documents submitted by IBPL or its representatives shall be genuine and not forged or mutilated IBPL shall keep indemnified MML against all costs and damages which MML is forced to incur as a result of such eventuality. IBPL shall be responsible to obtain the verification certificate and/or other evidence from the excise authorities with regard to the receipt of BEER at the destination and furnish the same to MML within time stipulated in Excise Rules. IBPL understands that failure on part of IBPL to furnish verified passes will make it liable for demands of Excise Duties or penalties which may be demanded from MML and IBPL undertakes to indemnify and reimburse MML all amounts paid by MML on this account.

3.5 IBPL shall be responsible to ensure payment of agreed ex-factory prices. Statutory levies, Sales Tax and any other liabilities including but not limited to taxes, duties, charges, levies and other normal charges etc. on the due date in regard to the BRANDS that may be sold by MML to IBPL or to the INDENTORS, as the case may be.

3.6 IBPL shall otherwise be free to resell or direct the sale to the INDENTORS the BEER of the BRANDS on such terms and conditions as IBPL may decide.

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ARTICLE 4: PRICES

4.1 The Ex-brewery prices of BEER case of 12 bottles of 650 mls. each shall be as under:-

*AUSTRALIAN LAGER RS.150/- PER CASE
MAX. BEER RS. 157/- PER CASE.*

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4.4 The parties agree that in respect of all sales of BEER of BRANDS either to IBPL OR to the INDENTORS recommended by IBPL it shall be a term and an essence of the agreement, that MML shall receive from IBPL the price mentioned in clause 4.1 above along with Sales Tax, Excise Duties, Export Pass Fees, Octroi transport insurance and other statutory taxes and levies charged in the sales invoices. MML shall remit all statutory levies and indemnify IBPL against any liabilities arising therefrom.

4.5 IBPL agrees to pay after 20 days from the date of production by demand draft towards the price of Beer as per article 4.1 of agrees to reimburse such taxes, duties and levies arising out of the sales of Beer Brands of IBPL three days before the due for payment by MML

4.6 The parties agree that the Sales of Beer of IBPL Brands shall be made according to the despatch instructions issued by IBPL. The invoices shall be raised by MML at the prices communicated to them periodically.

4.7 MML shall give credit to IBPL for the difference between the invoice price and Ex.-brewery price agreed to in 4.1 above towards the royalty, marketing and technical service charges.

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4.9 As mentioned above, excise duties, sales taxes and levies leviable or chargeable or levied or charged by any Government

or local authority from time to time and in force other than those included in the basic price mentioned in Clause 4.2 above) shall be charged to IBPL or the INDENTORS and IBPL or the INDENTORS as the case may be, shall always pay all such tax or duty.”

3. The petitioner, claiming that in terms of the above agreement, the respondent had not cleared its liability towards the ‘Ex-Brewery prices’ for the supplies made by the petitioner to the respondent or to the INDENTORS, invoked the arbitration agreement. The said invocation led to an Award dated 23rd April, 2008, which was set aside by this Court vide order dated 28th July, 2010, appointing the arbitrator who has passed the impugned Arbitral Award.

4. The impugned Arbitral Award, while rejecting the claims made by the petitioner, has allowed the counter claim of the respondent based on the purported admission of the petitioner that an amount of Rs.1,54,09,930/- on account of Beer supplied in the State of U.P. and Rs.24,61,381/- on account of Beer supplied in the State of Rajasthan was payable by the petitioner to the respondent.

5. The first claim of the petitioner was for an amount of Rs.1,38,68,733.68 which it claimed was owed by the respondent to the petitioner under the above mentioned agreement on settlement of accounts. The said figure was arrived at by the claimant in the following manner:-

“Amount recoverable/receivable by the Claimant Company from the Respondent Company

- (A) *Amount recoverable from Respondent Company*
 - (i) *On account of sale of goods*

	<i>by the Claimant to the nominated parties of the Respondent Company</i>	<i>Rs.3,02,37,601.00</i>
(ii)	<i>Cost of unused Packing materials</i>	<i>Rs.32,23,747,71</i>
(iii)	<i>Cost of unsold finished goods of IBPL Brands</i>	<u><i>Rs.2,78,696.00</i></u>
	<i>TOTAL</i>	<u><i>Rs.3,37,40,044,71</i></u>
(B)	<i>Less : Entitlement of Respondent Company</i>	
(i)	<i>Entitlement due on sale of Beer to Nominated customers in the States of Uttar Pradesh Rajasthan</i>	<i>Rs.1,54,09,930.00</i> <u><i>Rs. 24,61,381.00</i></u> <i>Rs.1,78,71,311.00</i>
(ii)	<i>Security Deposit received</i>	<u><i>Rs.20,00,000.00</i></u>
	<i>Total entitlement of Respondent As per Agreement*</i>	<u><i>Rs.1,98,71,311.00</i></u>
(C)	<i>Net amount recoverable by Claimant Company from the Respondent Company (A)-(B)=(C)</i>	<u><i>Rs.1,38,68,733.71</i></u>

** Respondent Company is entitled to this amount only if the Respondent Company makes payments to Claimant Company in respect of supplies made by the Claimant Company to the nominated parties of Respondent Company. ”*

6. The Arbitrator in his impugned award has rejected the said claim holding as under:-

“32) On behalf of the claimant-MML, two witnesses were produced to establish its claim, namely, CW-1 Mr. S.C. Sahai working as Sales Manager and CW-2 Mr. K.N. Kapoor working as Chief Manager (Accounts), with M/s. Mohan

Meakin Ltd. During his cross examination, CW-1, Mr. S.C. Sahai admitted that he filed his evidence by way of affidavit which is Exh. CW-1/A and also exhibited the documents from Exh. CW-1/1 to CW 1/18. It is further admitted by CW-1 Mr. Sahai that the respondent-IBPL used to bring the orders along with the indent from the third parties on the parties' letter head along with covering letters of respondent company (IBPL) and also payment towards the excise duty by way of cheque. It is further admitted by the witness that the cheques were issued in the name of claimant-company (MML) but it used to be brought by the officials/employees of the respondent-company (IBPL) along with their covering letter. The witness further says as Vol. as per excise laws, the claimant company (MML) can only supply to a license holder and raise invoice in the name of License Holder.

33) Thus, from the above situation it is clear that supply of the goods used to be made directly to the indented parties after receiving order from the indented party on their letter head along with payments towards excise duty by way of cheques in advance directly to Claimant and the bills used to be raised directly to the indented third parties and the payments used to be received only in the name of claimant-MML and thereafter, claimant-MML used to pay/credit respondent-IBPL differential of the cost of goods for MML and the invoice value.

34) That when Claimant MML was receiving payments directly from the indented parties and only differential used to be credited to Respondent IBPL, Claimant has not been able to satisfy me as to how IBPL is liable for claims of supply of beer to third parties and when only Claimant MML could have received payments being a licensed manufacturer and licensed retailer could also make payments only to Claimant MML. The Respondent IBPL does not play any role in this process except that it has to only secure orders from these licensed retailers or indenters and take away the differential of the invoice value and cost of beer as agreed in the agreement. Moreover, the supply of beer of claimed amount is itself not established by the

Claimant for it to be claimed from Respondent IBPL. The CW-2, Mr.K.N.Kapoor produced by the claimant to prove an alleged account statement states in his cross examination that neither he has certified the account statement nor prepared the accounts for the Respondent. He seems to have no idea about the dealings and transactions between the parties, and makes contrary statements thereto.

35) The claim for unused packing materials has again surprisingly found no place or mention in the claims of Claimant MML in earlier award and even admitted by CW-1 that the claim and invoice for the same was raised as late as on 30.03.2010, when the matter was pending before the Hon'ble Delhi High Court, however, no such invoice forms part of record nor any proof of the packing material of the said value under the name of IBPL with Claimant MML. Thus, the said claim was raised for the first time in claim petition filed in November 2010, when the alleged claim had become time barred and could not be claimed. Similar is the case for unsold stock. The above mentioned claims for the unused packing material and unsold stock being barred by limitation, without any document to substantiate the same and not claimed in the earlier proceedings are beyond the scope of reference, hence are rejected.”

7. Learned senior counsel for the petitioner submits the Arbitrator in his impugned award has acted in complete ignorance of the terms of the agreement. In fact, barring reproducing some of the terms of agreement in the initial part of the award, while dealing with the claim made by the petitioner, there is no mention to any of the terms of the agreement. He further submits that the Arbitrator has held that the respondent does not play any role in the process of receiving payments and its role is confined only to secure orders from the licence dealers or industries, this is totally contrary to clause(s) 3.5

and 4.4 of the agreement reproduced herein above. He further submits that the Arbitrator has not discussed the evidence that was led by the petitioner in support of his claim and has merely brushed it aside by holding that the supply of beer of claimed amount is not established by the petitioner. He draws my reference to the affidavit by way of evidence of Mr.S.C.Sahai, Sales Manager of the petitioner to show that along with that the affidavit, the said witness had referred to the Statement of Accounts, invoices, Indent, Dispatch Challan, Gate passes, etc., of various dealers/distributors of the respondent. He submits that this entire evidence has been completely ignored by the Arbitrator and brushed aside by a single sentence holding that the petitioner has been unable to prove sales made by it under the contract.

8. Learned counsel for the respondent submits that as the invoice to the Indentors were raised by the petitioner in its own name, it is the petitioner who has to ensure receipt of payment against the same. In her submission, clause 3.5 of the agreement is merely to suggest that the respondent would render all assistance to the petitioner in receiving payments from the Indentors, however, in case full payments are not received against such invoices, the respondent cannot be saddled with the liability thereof. She further submits that it was for the petitioner to have proved from the evidence as against which invoice the payment was not received by it and having failed to do so, the claim of the petitioner has been rightly rejected by the Arbitrator.

9. I have considered the submissions made by the learned senior

counsel for the petitioner and the counsel for the respondent.

10. A reading of the Award would show that the arbitrator has not discussed the liabilities and obligations *inter se* owed by the parties in terms of the agreement. Though both the parties have made submissions on the true purport of Clauses 3.5 and 4.4 of the agreement, I find that the Award is totally silent and, in fact, is oblivious of the existence of these clauses and effect thereof on the claims and counter claims of the parties. Mere reproduction of these clauses in the initial part of Award, would not suffice as consideration thereof by the Arbitrator. The arbitrator has, therefore, acted in complete ignorance of the terms of the agreement. It was for the arbitrator to have considered the effect of Clause 3.5, which expressly states that the respondent shall ensure the payment of agreed ex-factory prices to the petitioner. The respondent cannot brush aside this responsibility by contending that as the invoices on the INDENTORS were raised by the petitioner, the petitioner alone is responsible if full payment there against is not received.

11. The arbitrator has also not considered the effect of clause 4.5 of the Agreement, which expressly states that the respondent agrees to pay after 20 days from the date of production, by demand draft, the price of the beer as per clause 4.1.

12. Section 28 (3) of the Act casts an obligation on the arbitrator to decide the disputes in accordance with the terms and conditions of the contract as agreed between the parties. However, as noted by me, the Arbitral Award in this case, does not indicate that the arbitrator was alive to the terms and conditions of the contract or considered the

effect thereof on the claims or counter claims of the parties. This itself, in my view, is sufficient to set aside the arbitral award.

13. Learned Senior counsel for the petitioner is also correct in his submission that the Arbitrator has not considered the evidence led before him by the parties. It is not as if the arbitrator has considered the evidence and found it to be unreliable or insufficient to prove the claim of the petitioner. In fact, a reading of the Award would show that there is absolutely no discussion in the entire Award on the evidence led by the parties. It is true that if the arbitrator, after consideration of the evidence, comes to a conclusion on facts, this Court in exercise of its power under Section 34 of the Act would not re-appreciate the same. However, the present is a case where there is absolutely no appreciation of evidence at all by the Arbitrator. In my opinion, therefore, the Award is liable to be set aside on this ground as well.

14. As far as the allowance of the counter claim of the respondent is concerned, the Arbitrator has relied upon the above quoted table and the pleadings in the statement of claim to conclude that there was an admission of liability on part of the petitioner in this regard. In my opinion, this finding is also fallacious. An admission made by a party is to be read as a whole and cannot be bifurcated in parts, (*Dudhnath Pandey vs. Suresh Chandra Bhattasalli (1986) 3 SCC 360*).

15. The petitioner had claimed the amounts owed by the respondent to the petitioner and as a settlement of account had also shown the corresponding amounts that the respondent would be entitled to upon

payment of full amounts under the agreement. This was, therefore, a conditional admission of liability. The arbitrator, apart from relying on the alleged admission, does not go into the merit of the counter claim of the respondent to award the said amount. In my opinion, the counter claim could not have been granted merely on the above alleged admission of the petitioner.

16. As far as the objection with respect to the disallowance of the claim for the amount of packing material and unsold stock is concerned, in my opinion, the arbitrator has rightly held that there is no evidence on record to substantiate the said claims of the petitioner.

17. Learned senior counsel for the petitioner has drawn my reference to para 14 of the affidavit of evidence filed by Mr. S.C.Sahai, Sales Manager of the petitioner to contend that the same would amount to an evidence in support of this claim. The said para is quoted herein below:-

“14) I say that the following amounts have become due and payable by the Respondent Company to the Claimant Company. The gross amount recoverable by the Claimant Company from the Respondent Company towards supply of goods to the nominated parties of the Respondent Company works out to Rs.3,02,37,601/- (Rupees Three Crores Two Lakhs Thirty Seven Thousand and Six Hundred One only). At the same time, the Claimant Company got the packing materials printed for packing of finished goods but, however, the Respondent Company had abruptly discontinued, without notice, placing the indents upon the Claimant Company without any advance notice and(or in violation of the terms of the Contract. The claim towards Packing Materials is Rs.32,23,747.71 (Rupees Thirty two lacs twenty three thousand and seven hundred forty

seven and paise seventy one only). Further, at the same time, there were stocks of finished goods which the Claimant Company manufactured at the instance of the Respondent Company but later on, there were no instructions from the Respondent Company about its dispatched and hence finished goods under the brand name of Respondent Company worth Rs.2,78,696/- (Rupees Two Lacs Seventy Eight Thousand Six hundred Ninty Six Only) was lying with the Claimant Company. This stock is due to abrupt and sudden discontinuance of placing orders, in an illegal manner, by the Respondent Company upon the Claimant Company.”

18. In my opinion, this would be a bald statement of the witness without any proof of the contents of the same. It was for the petitioner to prove the extent of packing material and unsold finished goods if any, lying with the petitioner at the time of termination of the agreement. Mere statement in this regard cannot take the place of proof of the same.

19. Be that as it may, for the reasons recorded above, the impugned Award cannot be sustained and is liable to be set aside with no order as to costs, leaving the parties open to initiate fresh proceedings in accordance with law, wherein the parties would be entitled to claim the benefit of Section 43(4) of the Act as far as the period of limitation is concerned.

20. The petition is allowed in the above terms, with no orders as to costs.

NAVIN CHAWLA, J.

FEBRUARY 13, 2018/RN