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

***Date of decision: 1<sup>st</sup> May, 2018***

+ O.M.P. (COMM) 124/2016 & IA No. 18229/2015  
A.B. GRAIN SPIRITS PVT. LTD. .... Petitioner  
Through: Mr.Rajeev kumar Yadav, Adv.

versus

RAKESH KUMAR PAHWA .... Respondent  
Through: Mr.Suneel K. Atreya, Adv.

+ O.M.P. (COMM) 329/2016  
A.B GRAINS SPIRITS PRIVATE LIMITED .... Petitioner  
Through: Mr.Rajeev Kumar Yadav, Adv.

versus

RAKESH KUMAR PAHWA .... Respondent  
Through: Mr.Suneel K. Atreya, Adv.

**CORAM:**  
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) have been filed by the petitioner challenging the Award dated 31.10.2014 in OMP.(COMM.) 329/2016 and the Additional Award dated 12.01.2015 in OMP.(COMM.) 124/2016.
2. The disputes between the parties had arisen in relation to the Agreement dated 28.07.2010 whereunder the respondent was to supply old bottles as per the terms and conditions of the Delhi Government Country

Liquor Policy to the petitioner. The petitioner was to pay to the respondent at the rate of Rs. 55/- per case for the said bottles for the period commencing from 01.08.2010 to 31.03.2011. The respondent claiming default in payment of the above agreed consideration by the petitioner, stopped supply of the bottles to the petitioner from January, 2011 and the disputes were referred to arbitration resulting in the Impugned Awards.

3. The learned counsel for the petitioner submits that the Arbitrator has erred in awarding the amounts in favour of the respondent on the basis of unauthenticated accounts. He further submits that in terms of the Agreement, the petitioner had paid Rs. 10 Lakhs as advance to the respondent, however, this has not been taken into account while the amounts were awarded in favour of the respondent. He further submits that once the amount had been awarded in favour of the respondent on the billed amount, no further amount should have been awarded as has been done by the Arbitrator in paragraph 23 of the Impugned Award dated 31.10.2014.

4. He further submits that the respondent is the sole proprietor of M/s Jitesh Traders, who never appeared as a witness before the Arbitrator. Only Mr. Yashpal Pahwa had appeared as a witness on behalf of the respondent. Therefore, the Arbitrator should have held the respondent as having failed to prove its case.

5. The learned counsel for the petitioner further submits that the Arbitrator has made an error in rejecting the Counter Claim of the petitioner which was based on the admitted fact of the respondent refusing to supply the bottles beyond January, 2011. He submits that due to the said non supply, the petitioner suffered loss which is the basis of its Counter Claim.

6. I have considered the submissions made by the petitioner, however, I

find no merit in the same. In the present case, the accounts filed by the respondent remained unchallenged by the petitioner. The respondent through the affidavit of Mr.Yashpal Pahwa, CW1, had given monthly details of supplies made, supplies consumed, bills raised and payments made by the petitioner. In the entire cross-examination of the witness not even a single question on the accounts was put to the said witness. The witness had also proved copies of these bills, stock register and the statement of account. The same remained uncontroverted by the petitioner.

7. The Arbitrator has also discussed the evidence led before him and has concluded as under:

*“.... To determine the alleged violation, the claimant in his affidavit Ex.CW1/A has given in details the supplies made and payments received particulars. The supply and payment details have been admitted by the Respondent as mentioned in the affidavit of CW1 Sh. Yash Pal Pahwa.”*

XXXXX

*“23. The claimant has raised a total claim of Rs. 42,03,107.46 and this is inclusive of Rs. 10,00,000/- advance for stocks for 15 days with the Respondent, Rs. 8,45,000/- for the additional stock lying with the Respondent, Rs. 4,27,000/- for broken glasses, rejected bottles, Rs. 18,000/- for gunny bags. The claimant has furnished Affidavit by way of evidence Ex. CW1/A of CW1 Yash Pal Pahwa. In para-16 to 24 of Ex. CW1/A, the calculation of total bottles supplied, used bottles and balance bottles have been mentioned. (Some paras from 16 to 24 of Affidavit Ex. CW1/A have been objected to by the opposite counsel, but these are the details of account and to be considered). The counter claimant neither furnished its accounts nor controverted the accounts placed by the claimant. The contents of the affidavit Ex. CW1/A are*

*corroborating with the statement of accounts and other documents proved on record. The Respondent could not falsify the same. The total supply of cases during the months of Aug. To Dec. 2010 was 1,98,443 cases. Bills were already raised for 1,54,220 cases. As per agreement 9% breakage is to be deducted from the total supply which comes to 13901. The remaining cases comes to  $(198443 - 13901) = 184542$ . Now, the balance supply comes to  $1,84,542 - 1,54,220 = 30322$  cases and its value is  $30322 \times 55 = 16,67,710$ . The admitted supply of goods was for Rs. 90,74,161.46. The total amount received was Rs. 71,74,860/-. The balance amount comes to Rs. 90,74,161.46 – Rs. 71,74,860/- = Rs. 18,99,301.46. The claim of the claimant comes to Rs. 35,67,011.46. (Rs. 16,67,710 + 18,99,301.46). The Counter claimant has not challenged these averments of CWI Yash Pal Pahwa.”*

8. As far as the duplicate amount being awarded in favour of the respondent is concerned, paragraph 23 of the Impugned Award dated 31.10.2014, in my opinion, clearly clarifies that there is no overlap between the two amounts awarded. A reading of the same would show that Rs. 16,67,710/- was awarded in favour of the respondent for the supply of the cases which remained unbilled. As far as the billed amount is concerned, taking into account the amount already paid, Rs. 18,99,307.46/- was found due and payable in favour of the respondent. Therefore, amounts relating to billed and unbilled transactions remained outstanding in favour of the respondent and there is no overlap between the two.

9. Equally, as entire payment made by the petitioner has been taken into account while determining the amount outstanding, no separate credit of Rs.10 lakhs can be claimed by the petitioner.

10. As far as the Counter Claim is concerned, admittedly the petitioner

was in default in making of the payments in terms of the Agreement. Clause 6 of the Agreement provides that in case the petitioner fails to make the payment, the respondent may withhold further supply to the petitioner. Clause 6 of the Agreement is reproduced hereinunder:

*“6. That the Second Party shall not be responsible for short supplies if the First Party shall not fulfill the payment terms as per Para no.5 of this agreement. In that case Para no.9 of this agreement shall not be applicable.”*

11. The respondent therefore, had exercised his contractual right in withholding the supply. In any case, the petitioner being in default of the Agreement cannot claim performance of the same from the respondent and consequently, in absence of such performance, cannot claim damages from the respondent. The Arbitrator has also considered the above issue in detail in his Award dated 31.10.2014 as under:-

Issue no.2

*“..... The claimant continued to supply the bottles despite the fact that the Respondent violated the terms and conditions of payment from the beginning till the end of Dec. 2010. The claimant dis-continue the supply before the end of contractual period. The Respondent stated the reasons for non-supply of goods was due to the fact that the request of the claimant was for enhancement of Rs.10/- per case was not acceded to as mentioned in notices Ex. CW1/23A to D and Ex. CW1/25A to D dated 30.11.2010 and 31.12.2010 respectively of the claimant. The claimant controverted this contention by stating that the Respondent had failed to perform his part of the contract. Actually no such increase was effected and the terms and conditions of the agreement Ex. CW1/1 remained the same. However, the non supply of goods was well protected by clause-6 of the agreement. The best part of the contract was that during the period from Aug. 2010 to Dec. 2010, there was no violation*

*of supply of goods by the Respondent to the Govt. of Delhi because these were regular supplies by the claimant payments to the Respondent However, there might be violation of the claimant.”*

12. The Arbitrator further found that even otherwise, the petitioner had been unable to prove any loss suffered due to the acts attributable to the respondent herein.

13. The Arbitrator having considered the evidence led before him by the parties in detail, it is not for this Court to re-appreciate the same while exercising its jurisdiction under Section 34 of the Act. This Court cannot act as a Court of Appeal against the Impugned Award.

14. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court had re-emphasized the limitation of the jurisdiction vested in any Court under Section 34 of the Act in the following words:

*“33. 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.”*

15. As far as the non production of Mr.Rakesh Kumar Pahwa as a witness is concerned, the counsel for the respondent submits that as the business of the respondent was being handled by Mr.Yaspal Pahwa and he was the one who was dealing with the petitioner in relation to the Agreement, he was

produced as a witness in support of the case and non production of Mr.Rakesh Kumar Pahwa would not make any difference in the peculiar facts of the case. He places reliance upon the judgment of the Supreme Court in ***Rattan Dev v. Pasam Devi***, (2002) 7 SCC 441.

16. I have considered the submissions made by the learned counsels for the parties on this issue. In ***Man Kaur v. Hartar Singh Sangha***, (2010) 10 SCC 512 the principle relating to who should give evidence in regard to the matters involving personal knowledge were summarized as under:

*“18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:*

*(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.*

*(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.*

*(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*

*(d) Where the principal at no point of time had personally handled or dealt with or participated in the*

*transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.*

*(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.*

*(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.*

*(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bona fide” need and a purchaser seeking specific performance who has to show his “readiness and willingness” fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holders are a husband/wife exclusively*

*managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.”*

17. In the present case, it could not be disputed by the petitioner that Mr.Rakesh Kumar Pahwa was not handling any part of the transactions with the petitioner and on the other hand, it was Mr.Yashpal Pahwa who was handling all transactions with the petitioner.

18. In view of the same, the non-production of Mr.Rakesh Kumar Pahwa was not material. In any case, non-production of Mr.Rakesh Kumar Pahwa at best could have led an adverse inference being drawn against the respondent. However, once it is held that the respondent was able to prove its case through other oral and documentary evidence produced before the Arbitrator, it must be held to have been able to discharge the onus which lay on it and mere abstention of the respondent himself from the witness box would pale into insignificance.

19. The Arbitrator has also considered the fact of Mr.Rakesh Kumar Pahwa not entering into the witness box and relied on the fact that it was Mr.Yashpal Pahwa who was personally supervising the transactions with the petitioner and that even the Agreement between the parties was signed by Mr.Yashpal Pahwa on behalf of the respondent. Hence, mere fact that Mr.Rakesh Kumar Pahwa was not produced as a witness could not result in rejection of the claim raised by the respondent.

20. I, therefore, find no merit in the objections raised by the learned counsel for the petitioner.

21. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

**NAVIN CHAWLA, J**

**MAY 01, 2018/rv**