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

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Pronounced on: 31.08.2018

+ O.M.P. (COMM) 259/2016

M/S D.B CORPORATION LTD

..... Petitioner

Through Mr.Ankur Mody and Mr.Tarpit Patni,
Advs.

versus

M/S CHD DEVELOPERS LTD

..... Respondent

Through Mr. Jeevesh Nagrath, Mr.Pratham
Sharma and Mr.Rohan Ganpathy, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the 'Act'*) seeking to set aside the impugned award dated 28.10.2014 passed by the learned Arbitral Tribunal (*hereinafter referred to as A.T.*). Some of the relevant facts are that the petitioner Company is engaged in the business of publishing newspapers, periodical and other printing publications under the name of 'Dainik Bhaskar' and 'Divya Bhaskar', etc. The respondent is a public limited company engaged in the business of real estate and is developing housing and commercial complexes.

2. On 12th February, 2008, the parties entered into a Share Subscription Agreement whereby the respondent agreed to issue and allot 7,50,000 equity

shares of the respondent company at a price of Rs.40/- per share, amounting to an aggregate consideration of Rs.3,00,00,000/-. On the same date, the parties also executed an “Advertising Agreement” wherein the petitioner agreed to issue advertisements in different print media in accordance with the agreed terms and conditions aggregating to Rs.3 crores. It is the contention of the petitioner that as per the understanding arrived at between the parties the two arrangements, namely, the Advertising Agreement and the Share Purchase Agreement for all purposes and intents are part of one transaction. It is pointed out that this is evident from the fact that the petitioner made a payment of Rs.3 crores to the respondent by RTGS on 18th February, 2008 for the Share Subscription Agreement. On 27th February, 2008, the respondent returned Rs.3 crores vide RTGS as advance against Advertising Agreement. Thus, the money received from the petitioner was returned to the petitioner.

3. The petitioner contends that it commenced publication of advertisement from April, 2008. Around November 2009, share price of the respondent company dropped from Rs.40/- to Rs.5/- per share and it has been fluctuating around Rs.5 ever since. It is urged that petitioner’s consideration for advertising depended entirely on the assurance and representation provided by the respondent regarding high mark-up of the allotted equity shares. The petitioner communicated its concern about the stooping share price of the respondent company vide e-mail dated 28th November, 2009, but to no effect.

4. Disputes having arisen between the parties, the respondent filed Arbitration Petition No.226/2010 under Section 11 of the Arbitration &

Conciliation Act. This court appointed co-arbitrators. Subsequently, the co-arbitrators appointed the Presiding Arbitrator.

5. The learned A.T. has on 28.10.2014 passed an award against the petitioner and in favour of the respondent. The learned A.T. noted that the following claims/counter-claim have been raised by the parties:-

“12. The Claimant/respondent has raised its Claim as under:-

I. Claim No. 1: In the sum of Rs.1,68,93,480/-, being the balance out of Rs.3,00,00,000/-, which the respondent is liable to refund to the claimant.

II. Claim No. 2: For Rs. 2,00,00,000/- towards loss of business opportunity to the Claimant.

III. Claim No.3: For Rs.1,43,03,100/- being interest on the refundable amount @ 18% p.m. w.e.f. 01.07.2009 to 31.03.2013.

IV. Claim No.4: Interest @ 18% p.a. on the aforesaid refundable amount from 01.04.2013 till realization of the amount.

V. Claim No.5: For Rupees Five Lakhs Towards litigation costs.

VI.

13. The petitioner has raised only one Counter Claim which is as under:

I. Counter Claim I: Counter Claim in the sum of Rs.1,77,08,624/- towards the cost incurred by the Respondent for publishing of the advertisements till November 2009.”

6. A perusal of the Award would show that the learned A.T has noted that claim No.1 is for refund of Rs.1,68,93,480/- in view of the fact that the respondent paid a sum of Rs.3 crores to the petitioner as advance payments for the advertisements which were to be printed in the year 2008-09 and 2010. The total amount of advertisement to be released was worth Rs.3 crores. The amount was claimed as the balance left after considering the value of advertisements released by the petitioner. The learned A.T.

concluded that the Advertising Agreement and the Share Purchase Agreement though of the same date were independent and separate agreements. There was no link between the two except that both the parties had tried to further their respective commercial interest. The learned A.T. further concluded that in none of the two agreements it is stipulated that the fluctuation in price of the equity issued by the respondent was going to impact the deal. The fluctuation of prices of equity/shares is not an abnormal feature. It also did not accept the interpretation of clause 2.7 of the advertising agreement as propounded by the petitioner. The petitioner had pleaded that under the said clause the respondent had waived its right of refund. The learned A.T. held that clause 2.7 comes into play in case the respondent had terminated the agreement and had refused to give further advertising to the petitioner within a stipulated period. Having interpreted the agreements, contrary to the contentions of the petitioner, the learned A.T. accepted the plea of the petitioner and held that the respondent is entitled to refund of Rs.1,22,91,376/- only and not Rs.1,68,93,480/- as claimed by the respondent. An Award to that effect was passed regarding claim No.1.

7. Regarding other claims, claim No.2 for loss of business opportunity was rejected. Claim No.3 regarding interest on the refundable amount the respondent was held entitled to interest @ 12 % per annum from November 2009 to 31.03.2013. For Claim No.4, it was held that the respondent is entitled to interest @ 12% per annum from 01.04.2013 till the date of payment by the respondents. In claim No.5, Rs.5 lacs was awarded as litigation costs. The counter-claims filed by the petitioner were rejected.

8. This matter came up for hearing on 4.2.2015 before this court. This court noting the statement of learned senior counsel for the petitioner issued

notice to the respondent limited to the conclusions arrived at by the learned A.T. on claim No.1 only. Hence, objections of the petitioner regarding the other claims stand concluded by order dated 4.2.2015.

9. I have heard learned counsel for the parties. Learned counsel for the petitioner has strenuously urged that the two agreements, namely, the Share Purchase Agreement and the Advertising Agreements are interlinked and are essentially a single agreement inasmuch as they were executed on the same date and no consideration has really passed between the parties. He submits that in fact it is the petitioner who has been duped as the respondent was obliged to maintain their share price which have dipped heavily. For receipt of no tangible benefits petitioner is burdened with heavy costs and damages which is entirely illegal and contrary to equity. Secondly, he relies upon clause 2.7 of the Advertising Agreement to submit that the respondent had waived off his rights to seek refund of any amount upon termination of this agreement. In view of the said clause it is submitted that the respondent is not entitled to any refund from the said sum of Rs.3 crores or any part thereof and the learned A.T. has completely ignored this clause. Thirdly, it is submitted that learned A.T. has also ignored clause 7.11 of the said agreement which provides that the parties shall be entitled to enforce specifically the terms and provisions thereof in addition to any other remedy which they may be entitled to. It is urged that in view of this clause the respondent could have sought specific performance of the advertising agreement and that the petitioner has no objection to now releasing advertisements for the balance amount instead of releasing money to the respondent.

10. I may deal with the pleas of the petitioner. As far as the first plea is concerned, admittedly, there is no clause in the agreements which stipulate that in the eventuality of the share price of the respondent goes down, the petitioner would have any remedy. The petitioner chose to purchase the shares of the respondent. Having purchased the shares of the respondent company, the petitioner became entitled to all the rights and liabilities as a shareholder of the respondent Company including rights to receive dividends, right to vote in general body meetings, etc. Fluctuation in share prices is a known phenomenon. As noted by the learned A.T., the prices could have also risen. However, the petitioner has made no submission as to what would have been the effect, had the share prices gone up instead of going down. The learned A.T. has rightly held that the petitioner cannot complain that the fall of the share prices was contrary to the terms of the agreement. There is nothing in the agreement to support the plea of the petitioner. Hence, merely because the share prices fell instead of having arisen as hoped by the petitioner no ground is made out to resile from the above agreement. It may be noted that in the Share Purchase Agreement Article 8 of the agreement deals with indemnities which have been given to the petitioner. There is no indemnity regarding the eventuality of drop in the price of shares. Hence, there is no merit in the said plea of the petitioner that the two Agreements are a composite agreement and that the respondent was obliged to keep the share price at some reasonable price.

11. Coming to the next contention of the petitioner, the reliance of the petitioner on clause 7.11 of the Advertising Agreement is misplaced. Clause 7.11 reads as follows:-

“7.11 Specific Performance

Notwithstanding anything stated in the Agreement, each of the Parties acknowledges and agrees that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the Parties shall be entitled to preliminary relief to prevent or cure breaches of the provisions of this Agreement and to enforce specifically the terms and provisions hereof, this being in addition to any other remedy to which they may be entitled by law or equity."

12. It cannot be said that the respondent was obliged to seek relief of specific performance of the agreement and could not seek damages. In fact, Section 14 of the Specific Relief Act provides that a contract for the non-performance of which compensation in money is an adequate relief, the contract cannot be specifically enforced. The submission of the petitioner is contrary to the Specific Relief Act. Further, a perusal of the Award shows that this plea was not even raised before the arbitral tribunal. This plea has no merit.

13. The next contention of the petitioner was his reliance on clause 2.7 of the Advertising Agreement to contend that the respondent had upon termination of the agreement agreed not to seek any refund.

The said clause 2.7 of the Advertising Agreement reads as follows:-

"2.7 The Company, to the extent permitted by law, hereby expressly and in writing waives all and / or any of its right to claim any refund of any part of the Aggregate Amount upon the termination of this Agreement, for any reason whatsoever and / or the expiration of this Agreement

....."

14. As noted above, the said interpretation sought to be raised by petitioner has not been accepted by the learned A.T. This clause was held to ensure that the respondent does not refuse to release advertisements and thereafter seeks refund of advance money paid of Rs.3 crores. The learned A.T. interpreted the above Clause 2.7 of the Advertising Agreement to hold that it cannot be held that the respondent had waived its right to refund under the said Clause of the Agreement. It was held that the said clause would come into play only in case the respondent had terminated the agreement and refused to give further advertisements to the petitioner during the stipulated period. The clause provided protection to the petitioner to ensure that the respondent continued to issue advertisements for the agreed amount and does not claim refund by terminating the Advertising Agreement. Clearly, the interpretation of Clause 2.7 of the Advertising Agreement is a plausible interpretation which would not warrant interference by this court.

15. The legal position with regard to interpretation of the contract is quite clear. The same is within the domain of the arbitral tribunal. In ***McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors., (2006) 11 SCC 181***, the Supreme Court held as follows:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator

to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .)

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors* [(2004) 2 SCC 663] , *Union of India v. Banwari Lal & Sons (P) Ltd.* [(2004) 5 SCC 304] , *Continental Construction Ltd. v. State of U.P.* [(2003) 8 SCC 4] and *State of U.P. v. Allied Constructions* [(2003) 7 SCC 396] .”

16. The learned Single Judge of this court in ***NHAI vs. ITD Cementation India Ltd., MANU/DE/1497/2009*** held as follows:-

“10. Considering the arguments advanced by the counsel for the parties on both sides which were reiterations of their stands before the Arbitral Tribunal, I am of the view that the Arbitral Tribunal has come to the aforesaid conclusion on the basis of a particular interpretation of the relevant clauses of the contract. It is well settled that the interpretation of a contract is within the domain of the arbitrator. Even if the Court does not agree with the interpretation given by the Arbitral Tribunal, the Award cannot be set aside if the interpretation employed by the Arbitral Tribunal is a plausible one and is not absurd see: (i) *McDermott International Inc. v. Burn Standard Co. Ltd* MANU/SC/8177/2006 : 2006(2) Arb.L.R. 498 (SC); (ii) *Pure Helium India (P) Ltd v. ONGC* MANU/SC/0803/2003 : 2003(8) SC 593; (iii) *Himachal Pradesh State Electricity Board v. R. J. Shah & Co.* MANU/SC/0266/1999 : JT 1999(3) SC 151; (iv) *Union of India v. Suchita Steels* 2005 (4) RAJ 378 (Delhi); and (v) *Sudershan Trading Co. v. Govt. of Kerala* MANU/SC/0361/1989 : AIR 1989 SC 890.”

17. In my opinion, the interpretation given to clauses 2.7 of the Advertising Agreement is a plausible interpretation.

18. There are no reasons to interfere in the Award. Present petition is without merits and same is dismissed.

(JAYANT NATH)
JUDGE

AUGUST 31, 2018

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