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

+ FAO(OS) 215/2017

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Date of decision : 7th March, 2018

M/S WELCURE DRUGS & PHARMACEUTICALS LTD

..... Appellant

Through : *Mr. Nalin Tripathi, Adv.*

versus

FRESENIUS KABI ONCOLOGY LIMITED

..... Respondent

**Through : *Mr. Sudhir K. Makkar, Sr. Adv.*
with Ms. Saumya Gupta and Mr.
*Sudhanshu Suman, Adv.***

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. By way of the present appeal, filed under Section 37 of the Arbitration & Conciliation Act, 1996, the appellant assails an order dated 31st January, 2017 whereby the ld. Single Judge held the arbitral proceedings itself to have been closed, without considering or passing an order on the objections filed by the respondent herein against an interim Arbitral Award dated 18th October, 2010.

2. The primary ground of challenge is that by the impugned order, the learned Single Judge has not returned any finding that the interim award was contrary to law or liable to be set aside. Instead, the learned

Single Judge has held that the appellant had abandoned its claim in the arbitration proceedings and directed that the said proceedings be treated as closed with the mandate of the Arbitrator having been terminated without any consequential award.

3. It is undisputed that disputes between the parties arose out of a product manufacturing agreement dated 19th August, 2003 under which the Welcure Drugs and Pharmaceuticals Limited, appellant herein (WDPL hereafter) could manufacture the products of the respondents at its manufacturing unit by adhering to requisite quality standards.

4. These disputes were referred to arbitration by a sole Arbitrator. In these proceedings, an interim award dated 18th October, 2010 was passed by the learned Arbitrator holding that the respondents had committed breach of the contract by terminating the same without assigning reasons and therefore, it was liable to compensate WDPL. The Arbitrator had also observed that there were neither pleadings or material on record, nor the parties had addressed any arguments and he therefore, gave opportunity to place the same on record.

5. The respondents herein assailed the interim award by way of objections under Section 34 of the Arbitration & Conciliation Act, 1996 which were registered as OMP No. 108/2011.

6. Mr. Sudhir Makkar, learned Senior Counsel for the respondent makes no dispute to the fact that the entire Arbitral record was called for before the learned Single Judge and had been received in the Registry of the court, where it has remained for all these years.

7. OMP No. 108/2011 remained pending in the court. During its pendency, it appears that the learned Sole Arbitrator expired in the year 2013. WDPL appears to have not taken any steps for appointment of another Arbitrator towards further proceedings in the arbitration proceedings.

8. So far as OMP No.108/2011 is concerned, on 14th February, 2012, the court directed that the matter be placed in the finals list, where it has remained for several years, without the matter having been taken up.

9. On the 31st of January, 2017, when the matter was called out, the appellant (*respondent in OMP No. 108/2011*) was not represented. On this date, by the impugned order, the learned Single Judge has held as above. Aggrieved by the order dated 31st January, 2017, the appellant first filed Review Petition No. 120/2017 which was dismissed without issuance of notice by the order dated 27th March, 2017 holding that no grounds for review of the order had been made. It is in these circumstances that the present appeal has been filed.

10. It is submitted by Mr. Nalin Tripathi, learned counsel for the appellant that the impugned order has not considered the challenge to the interim Award and has not set aside the interim Award dated 18th October, 2010. It has also been contended that the circumstances in which the appellant was not represented has not been considered.

11. It is contended before us that further proceedings could not take place before the Arbitral Tribunal in the absence of the record which was lying tagged with OMP No. 108/2011. The appellant has further submitted that it was not aware of the demise of the learned Arbitrator

and that no notice was received from the office of the learned Arbitrator intimating the same or that the mandate of the Arbitral Tribunal stood terminated.

12. On behalf of the respondents, Mr. Sudhir Makkar, learned Senior Counsel has contended that the appellant was guilty of gross delay in the matter and that it was bound to have acted diligently in prosecution of the arbitral proceedings. It is contended by Mr. Makkar that the impugned order was justified, in the facts and circumstances of the case, and deserves to be sustained.

13. We have considered the rival submissions and also perused the available record. OMP No. 108/2011 was confined to a challenge to the interim award dated 18th October, 2010 before the learned Single Judge and nothing beyond that.

14. By this interim Award, the learned Arbitrator had specifically held that the termination of the contract by the respondent was illegal and that it was liable to pay compensation to the appellant.

15. Admittedly, this finding has not been interfered with or set aside by the learned Single Judge by the impugned order dated 31st January, 2017. In fact, the impugned order fails to record any order on the challenge made by the respondent by way of the objections under Section 34 of the Arbitration & Conciliation Act, 1996. No appeal has been preferred by the respondent for the above reason.

16. So far as the finding that the arbitral proceedings had been concluded and that the mandate of the Arbitrator stood terminated is concerned, we find substance in the submissions made on behalf of the

appellant. No material was available on the record before the learned Single Judge nor is placed before us that any notice of the demise of the sole Arbitrator had been sent to or received by the appellant.

17. The appellant points out that on 13th July, 2015 the matter was actually called out when the respondent was not represented and the matter was kept on board. Thus an opportunity afforded to the respondent was on 31st January, 2017 denied to the appellant. So far as the failure to appear before the learned Single Judge on 31st January, 2017 is concerned, we are of the view that given the fact that the matter was pending for almost five years since 14th February, 2012 in the finals category before the learned Single Judge when it was so directed, atleast one opportunity to appear and explain their position was required to be given.

18. It is not disputed that the appellant had filed additional written submissions alongwith relevant record/documents on the 31st of December, 2010 before the learned Arbitrator. Certainly, the fact that the appellant had filed written submissions and additional documents.

19. In view of the admitted position that the record of the Arbitral Tribunal stood summoned by the learned Single Judge and had been sent to this court, there is merit also in the submission on behalf of the appellant that the Arbitrator could not proceed to decide the claim of the appellant in the absence of the arbitral records. The material fact that the entire arbitral record was lying in the Registry of this court deserved to be considered before a view was taken that the proceedings stood closed.

20. Furthermore, before taking note of the fact that the learned Arbitrator had since expired, it would have been in the fairness of the matter for the court to have recorded a satisfaction that the appellant had knowledge of this fact and had failed to take action despite the same.

In view of the above, the order dated 31st January, 2017 cannot be sustained and is hereby set aside and quashed.

21. OMP No. 108/2011 be placed for directions before the learned Single Judge on 10th April, 2018.

22. We make it clear that we have not expressed any opinion on the merits of the rival contentions. Nothing herein contained will be treated as a finding or final expression of opinion on the merits of the case. The learned Single Judge would take a view in the matter uninfluenced by any observations herein contained.

ACTING CHIEF JUSTICE

MARCH 07, 2018/kr

C.HARI SHANKAR, J