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

% *Date of Judgment: 3rd October, 2018*

+ **FAO(OS) (COMM) 225/2018**

M/S DB CORP LTD.

..... Appellant

Through

Mr. Dhruv Mehta, Senior Advocate
with Ms. Nikita Chitale, Advocate

versus

M/S CHD DEVELOPERS LTD.

..... Respondent

Through

Mr. Jeevesh Nagrath and Mr. Chandan
Dutta, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J. (ORAL)

CAV.PET.919/2018

1. Counsel for the caveator has entered appearance.
2. The caveat petition stands disposed of.

CM.APPL41080/2018(Exemption)

3. Exemption allowed, subject to all just exceptions.
4. The application stands disposed of.

FAO(OS) (COMM) 225/2018

5. The present appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter the "Act") read with Section 13 of the Commercial Courts, Commercial Division & Commercial Appellate Division of the High Court Act, 2015 directed against the order dated 31.08.2018 passed by the learned Single Judge of this Court, by which the objections to the Award stand dismissed.

6. Some necessary facts which are required to be noticed for the disposal of the present appeal are that the appellant is a public listed company, which is engaged in the business of publishing newspaper from different states in the country whereas the respondent is a public listed company engaged in the business of the real estate. The respondent approached the appellant with the proposition of publishing advertisements for the respondent in the appellant's newspaper for the period of three years, in exchange of receiving the respondent's equity worth Rs. 3,00,00,000/- (Rupees Three Crores only) at the rate of Rs. 40/- per share (Rs. 2 nominal value + Rs. 38 premium per share). Pursuant to which, the parties entered into two agreements, viz., Share Subscription Agreement (SSA) and Advertising agreement dated 12.02.2008.
7. As per the agreement, the appellant made the payment of Rs. 3,00,00,000/- (Rupees Three Crores only) to the respondent on 18.02.2008, in return the respondent paid Rs. 3,00,00,000/- (Rupees Three Crores only) as advance against the advertising agreement. As per clause 2.7 of the advertisement agreement, in case of termination under no circumstances, the respondent would be entitled to claim refund of the money paid by it to the appellant towards the agreement.
8. According to this advertising agreement, the respondent was to place advertisements of the value of Rs.3.0 crores in the following manner:

Sub-Term	Annual Commitment(Rs.)
First Year-Term	1,00,00,000
Second Year-Term	1,00,00,000
Third Year-Term	1,00,00,000
Total	3,00,00,000

9. The appellant contented that it commenced publication of advertisement from April, 2008. Around November 2009, the equity share price of the respondent company dropped down to Rs. 5 per share and since then, it has been fluctuating around Rs. 5/-. It is urged before us that appellant's consideration for advertising depend entirely on the assurance and representation provided by the respondent regarding high mark-up of the allotted equity shares. The appellant communicated its concern about the dropping share price of the respondent company vide e-mail dated 28th November, 2009 and intimated the respondent that it has decided to withhold publication of their advertisements until a concrete proposal is put-forth by the respondent as to how it proposes to overcome the said financial crisis, thus terminating the agreement. On the other hand, the respondent failed to come up with any concrete proposal to overcome its precarious financial position, rather the respondent invoked the arbitration clause in the advertisement agreement and submitted a Statement of Claims on 14.03.2013.
10. The Arbitral Tribunal on 28.10.2014 after recording the evidence and hearing the parties passed the award in favour of the respondent by awarding Rs. 1,22,91,376/- (Rupees One Crore Twenty Two Lakhs Nineteen Thousand and Three Hundred Seventy Six only) with interest at the rate of 12 % per annum from November 2009, along with the awarding cost of Rs. 5,00,000/- (Rupees Five Lakh only) for litigation expenses. Simultaneously, by dismissing the counter-claim of the respondent in its entirety. The learned Single Judge further upheld the award, giving rise to the present appeal.

11. Some of the terms of the advertising agreement, which has been relied upon by Mr. Mehta, learned Senior Counsel for the appellant are being reproduced below to appreciate the submissions made before this Court.

“2.1. The Company hereby agrees to advertise only its Products, services and Brands in accordance with DBCL’s extant policies prevailing at the time of the advertisement and DBCL hereby agrees to carry such advertisements in DBCL Media in accordance with the terms and conditions set out in this Agreement. Provided that in respect of the advertisement spend of the Agreement, only the incremental advertisement spend (being any advertisement spend over and above the spend incurred by the previous owner of such products/brands in DBCL) computed on a yearly basis shall be deemed to be part of the Aggregate Commitment as defined in Article 2.2 below, that can be utilized by the Company.

2.2 The Company hereby agrees to place advertisements of the value of Rs.3,00,00,000/- (Rupees Three Crores Only) net of agency commission in the DBCL Media (the “Aggregate Commitment”) during the First Year Term, the Second Year Term, the Third Year Term, (in each year term, the “Annual minimum Commitment”) in the manner set out below:

2.3

Sub-Term	Annual Commitment(Rs.)
First Year-Term	1,00,00,000
Second Year-Term	1,00,00,000
Third Year-Term	1,00,00,000
Total	3,00,00,000

Minimum commitment for any Year will be Rs.100.00 Lacs. In case of any unutilized amount for any year, the same may be carried forward to the next Year. At the end of 3 years, if

there is any un-utilised amount, the same will be forfeited by DBCL after a grace period of 6 months.

- 2.4 The Company hereby agrees to make the payment for the entire amount of the Aggregate Commitment on or before the Commencement Date (“Aggregate amount”). Such payment shall be made by a pay order or demand draft or cheque drawn on a recognized bank or such other means that is acceptable to DBCL.

.....

- 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.

.....

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. Counsel for the appellant submits that a back to back Share Subscription Agreement dated 12.02.2008 (hereinafter referred to for short as ‘SSA’) was also executed between the parties. The respondent company received a sum of Rs.3.0 crores from the appellant for purchase of 7,50,000 shares at a price of Rs.40/- per share. The

respondent placed advertisements with the appellant company for almost 1½ years, during which period there was no dispute between the parties. However, the price of shares of the respondent company which had been purchased at Rs.40/- per share dropped to Rs.5/- per share, which led to disputes between the parties. The appellant refused to release the advertisements which led to the respondent approaching this Court by filing a petition under Section 11 of the Arbitration and Conciliation Act, 1996. (The arbitrators were appointed by the Court.)

13. Mr. Mehta, learned Senior Counsel for the appellant submits that both the arbitral tribunal and the learned Single Judge erred by interfering with the clear and unambiguous conditions of the agreement by misinterpreting Clause 2.7 of the advertisement agreement, where the plain reading of the said clause clearly manifested the intentions of the party to disclaim/ waive any right to recover monies or claim refund under any circumstances. Mr. Mehta further submits that the tribunal cannot pass an award allowing claims, which are prima facie barred by the conditions of the agreement, as the Clause 2.7 of the agreement clearly manifest the intent of the parties behind executing such agreement. Clause 2.7 does not permit a claim for refund on account of termination, the effect and the consequences of the said clause cannot be rejected merely by interpreting it in a manner so as to defeat its very intent, object and purpose as intended by the parties.
14. Mr. Mehta, learned Senior Counsel for the appellant has strongly relied upon Clause 7.11 of the advertising agreement to submit that the learned Single Judge erred in reading Clause 7.11 out of the context

and the only remedy available with the respondent was to seek specific performance. Mr. Mehta further submits when Clause 7.11 is read with Clause 2.7, it clearly reflects that the parties intended to foreclose their right with regard to claiming of refund.

15. Learned Senior Counsel for the appellant further submits that the reason of foreclosing the respondent's right to claim refund is not valid because no money was paid by the respondent out of its pocket towards publication of the advertisement. Thus, it was stated in the agreement that the respondent shall not claim any refund under any circumstances. Mr. Mehta submits that the purpose of Clause 2.7 was only to ensure a continuous flow of advertisement by the respondent to the appellant during the stipulated period of the agreement. Clause 2.7 nowhere specifies that it will be triggered only when the respondent terminates the agreement and not vice versa. Counsel further submits that the learned Single Judge has failed to appreciate the main grievance of the appellant with regard to Clause 2.7 being an unambiguous manifestation of the intention of the parties and being subject to the interpretation, when there is no ambiguity traced in the plain reading of the said clause.
16. Learned Senior Counsel labored hard to submit that in fact, both the agreements are not only signed on the same date, but they are also back to back agreement and upon the price of share falling low to Rs.5/- per share from Rs.40/- per share, the appellant was well within its right to terminate the agreement and forfeit the amount. As per clause 2.7 which was the express understanding between the parties,

neither the Arbitral Tribunal nor the learned Single Judge could have read into the agreement and granted the relief so claimed.

17. Mr. Jeevesh Nagrath, learned counsel for the respondent has opposed this appeal. It is contended that except the fact that both the agreements were signed on the same date there is no other connection and no consideration was passed between the parties, there is no correlation between both the agreements and thus, cannot be treated as back to back agreements. There is no reference of SSA in the advertising agreement or vice versa and neither there was no correlation in any of the clauses of advertising agreement and SSA. In effect, they are completely independent agreements. Reliance is placed on clause 7.4 of the advertising agreement, which we reproduce below, wherein it has been agreed between the parties that the present agreement would supersede all prior discussions and agreements between the parties and it contains the sole and entire agreement between the parties.

“7.4 Entirety

This Agreement supersedes all prior discussions and agreements between the Parties with respect to the subject matter of this Agreement (together with any amendments or modifications thereof and policies referred to), and contains the sole and entire agreement between the Parties hereto with respect to the subject matter hereof.”

18. In response to the submissions of Mr. Mehta, learned counsel for the appellant, Mr. Jeevesh Nagrath, learned counsel for the respondent submits that the entire clause should be read as a whole. He relies on clause 2.6, which we reproduce below:

“2.6 The Company acknowledges and recognizes that based on the Aggregate Commitment given by it under Article 2.2 of this Agreement, DBCL shall make necessary arrangements to ensure that the advertising space in DBCL Media, will be available to the Company for the advertisement of its Products, services and Brands during the Term of this Agreement as per and subject to the terms hereof. In view of the said arrangement to be made by DBCL, the Parties hereby agree that any failure by the Company to meet its Aggregate Commitment, will cause considerable loss to DBCL and to mitigate such loss, the Company has agreed that it shall not be entitled to refund of any part of the Aggregate Amount paid under this Agreement under any circumstances whatsoever and such amount shall only be set off against the advertisements to be placed in DBCL Media in the manner provided herein. Accordingly, any part of the Annual Commitment unutilized and/or unadjusted in terms of Article 2.2 above, shall stand forfeited and DBCL shall not be liable to refund the same to the Company under any circumstances whatsoever. It is specifically agreed that any termination of the Agreement for any reason other than a material breach by DBCL of its obligations under this Agreement in terms of Article 6 or expiry of the Term of this Agreement shall result in the forfeiture of the Aggregate Commitment remaining unutilized and/or unadjusted at the time of such termination or expiration, as the case may be and DBCL shall not be liable to refund the same to the Company under any circumstances whatsoever.”

19. Mr. Jeevesh Nagrath submits that reading of clause 2.6 would show that parties had specifically agreed that any termination of the agreement for any reason other than a material breach by the appellant herein of its obligations under the terms of the agreement or on expiry of the term of the agreement, would result in forfeiture. The counsel further submits that the respondent has not waived its right of refund

under Clause 2.7 of the Advertisement Agreement. In effect, the benefit of Clause 2.7 would accrue in favour of the appellant only in case of breach by the respondent and not in case of breach by the appellant. Mr. Nagrath further submits that Clause 2.7 is to protect the interests of the appellant, only to ensure that the respondent would not stop issuing advertisements midway or terminate the Advertisement Agreement and claim refund of the amount for which the advertisements had not been issued till termination, or expiration of the Agreement. Whereas, in the present case the breach is on the part of the appellant. According to the counsel for the respondent, Clause 2.7 did not vest the appellant with any authority to terminate the Advertisement Agreement or refuse to print the advertisements worth Rs. 3 crores during the stipulated period of three years or link the same with fluctuation in the price of the equity shares. It is also contended that in case of any ambiguity with respect to the terms of the agreement, it is settled law that a clause prior would override the subsequent clause which has led to the ambiguity.

20. Additionally, the counsel for the respondent submits that it is contended that the scope of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is narrower than the hearing under Section 34 of the Arbitration and Conciliation Act, 1996. He has placed reliance on a judgment in the case of *NHAI v. M/s. BSC-RBM-Pati Joint Venture*, reported at *2018 SCC OnLine Del 6780*, more particularly paragraphs 66 and 74, which is reproduced below:

“66. We have already highlighted, hereinabove, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of

the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of the learned arbitrator/Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this regard, to the following postscript, entered by this Court in its judgment in *P.C.L. Suncon (JV) v N.H.A.I.*, MANU/DE/3364/2015:

"As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.

....

74. Before parting with this judgment, we are constrained to note that, in case after case, we find that factual findings, in respect of which the learned Arbitral Tribunal is the final authority, are being successively challenged, under Section 34 and thereafter, under Section 37 of the Act. This has effectively reduced the exercise of arbitration to the civil trial, and petitions under Sections 34 and 37 of the Act to first appeals and second appeals. In fact, while second appeals under Section 100 of the Civil Procedure Code, 1908, would lie only on questions of law, we find that arbitral awards are being challenged, even on facts, under Section 37 of the Act. Despite wealth of judicial authority on this point, and repeated disapproval voiced by the Supreme Court and as well as several High Courts including this Court thereon, it is almost invariably seen that every award passed by the arbitrator/Arbitral Tribunal, especially, where the awards are commercial in nature, are challenged, first before the Single Judge and thereafter before the Division Bench merely because the "aggrieved party" possess the financial wherewithal to do so. It is a matter of concern that the majority of such challenges are by public sector undertakings, the appellant before us being one of the main contributors thereto. Such attempts contribute, in a great deal to the menace of "docket explosion", which plagues our Courts and consumes valuable time which could be used for settling more important disputes. We unhesitatingly deprecate this practice.

21. We have heard the learned counsel for the parties and considered their rival submissions, perused the arbitral award and the impugned order passed by the learned Single Judge and also gone through the matter placed before us.
22. The learned Single judge has rightly upheld that the agreement does not speak about any clause, which stipulates that in the eventuality of the share price of the respondent goes down, the appellant would have any remedy. The fact that appellant chose to purchase the respondent's shares automatically makes the appellant entitled to all the rights and

liabilities of the respondent company. Thus, the ground urged by the appellant regarding the dropping price of the share holds no merits.

23. As far as plea of the appellant with regard to specific performance is concerned, we find that this issue has not been raised because it has nowhere been dealt with in the Award and the same cannot be pressed at this stage. Be that as it may, as it has been raised before us, we may only say that the specific performance was to be performed out by the appellant, which the appellant did not volunteer, besides the clause 7.11 if carefully read would show that this is a relief which would be available to the respondent.
24. We find no infirmity with the view that there is no linkage between the two agreements, except their common date, as both the agreements cater the commercial interests of the parties. The bare perusal of both the agreement nowhere mentions that a fluctuation in the price of the equity would to impact the rights between the parties. Even otherwise, fluctuation in the price of the equity is not an abnormal feature, moreover by purchasing the equity of the respondent, the appellant exposed itself to the rights and liabilities of the respondent company.
25. Furthermore, Clause 2.7 nowhere states that the respondent had waived its right to refund rather it acts as a protective measure for the appellant, in case the respondent terminates the agreement and refused to give further advertisements before the expiration of the stipulated period of three years. The aim of Clause 2.7 is to act as a clause to protect the appellant from the damages and not to act punitive against the respondent.

26. Additionally, the Supreme Court in ***M.P. Housing Board vs. Progressive Writers and Publishers*** reported at (2009)5SCC678 categorically held as under:-

“30. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law.

“4...An error apparent on the face of the records would not imply closed scrutiny of the merits of documents and materials on record. "Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering...."

[See *Sudarsan Trading Co. v. Govt. of Kerala* [1989]1SCR665 and *State of U.P. v. Allied Constructions*, (2003)7SCC396 at SCC p.398, para 4.].

27. Moreover, this court time and again in its earlier judgements, *FAO (OS) (COMM) 86/2016* titled as ***M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra***, *FAO(OS)(COMM) 55/2018* titled as ***M L Lakhanpal vs. Darshan Lal & Anr.*** and in *FAO(OS)(COMM) 201/2017* titled as ***ADTV Communication Pvt. Ltd Vs. Vibha Goel & Ors.***, repeatedly mapped the limited scope of intervention in an appeal under section 37 of the Act held as under:-

“It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of *State Trading Corporation of India Ltd. v. Toepfer*

International Asia Pte. Ltd., reported at 2014 (144) DRJ 220 (DB), in para 16 it has been held as under:

“16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India and Shree Vinayaka Cement Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.”

In the case of *Steel Authority of India v. Gupta Brothers Steel Tubes Limited*, (2009) 10 SCC 63, the Supreme Court has laid down that an error relating to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

The Apex Court in *J.G. Engineers (P) Ltd. v. Union of India*, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of *ONGC Ltd. v. Saw Pipes*, in paragraph 19, held as under:—

28. *Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”*

29. Resultantly, we find no infirmity in the order dated 31.08.2018 passed by the learned Single Judge.

30. Accordingly, the appeal stands dismissed.

CM.APPL 41079/2018 (Stay)

31. The application stands dismissed in view of the orders passed in the appeal.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

OCTOBER 03, 2018

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