IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1262 OF 2016

ASG Biochem Pvt.Ltd. ...Petitioner
vs
Organon (India) Pvt.Ltd. ...Respondent

Mr.H.L. Tiku, Senior Advocate, with Yashmeet and Sumeet Bansod I/b. LJ Law for Petitioner.
Mr.J.P. Sen, Senior Advocate with Vaibhav Ghogare, Padmaja Dholakia and Epsita Chatterjee I/b. Dholakia Law Associates for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 8 APRIL 2019

P.C. :

This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of what was termed as a "Loan Licence Agreement" between the parties.

2 The Petitioner herein, who was the claimant before the arbitral forum, carried on the business of manufacture of pharmaceutical products, having the requisite manufacturing licence, technical expertise, capability, man power and other infrastructure facilities required for manufacturing pharmaceutical products, including active pharmaceutical chemicals and intermediate ingredients. By an agreement dated 30 June 2004 ('DMD Undertaking Agreement"), the Respondent, who was in the same business, transferred its Diosynth Manufacturing Division at Ganganagar to the Petitioner. At the time of this transfer, the Respondent had in its books an amount of Rs.23.87 lakhs as unutilised balance of CENVAT credit in respect of goods purchased by the Respondent for manufacture of finished goods

prior to the sale of the undertaking. It was agreed between the parties that this amount would continue to belong to the Respondent. After the sale of the undertaking, by an agreement dated 1 January 2005, termed as a "Loan Licence Agreement", the Respondent agreed to supply to the claimant raw material as well as packing material for manufacturing finished goods on a job work basis. Excise duty paid by the Petitioner on the finished goods produced during the course of execution of the Loan Licence Agreement was entitled to adjustment/set-off against the duty paid by the Respondent at the stage of purchase of inputs. Net excise duty payable was accordingly recovered by the Petitioner from the Respondent. The Loan Licence Agreement provided for payment of excise duty in connection with or under the agreement in advance as and when the Petitioner required to pay such duty. The agreement provided that the Respondent shall be entitled to credit of excise duty paid on purchases made by the Respondent and the Petitioner would pass on the benefit of such MODVAT credit to the Respondent based on duty paid on inputs as per the Central Excise Rules. The agreement provided that if any such credit was lost due to negligence, lapse or non-compliance on the part of the Petitioner or its employees, such loss would be made good by the Petitioner. It was the Respondent's case before the arbitral tribunal that both parties clearly understood that it was the Respondent, who would be entitled to the benefit of Rs.23.87 lakhs lying in the books of the Petitioner as excise duty paid on inputs; and the Petitioner would use the credit of that amount and pass on its benefit to the Respondent. It appears that the Excise Department issued a show cause notice on 19 February 2009 calling upon the Petitioner to show cause why this sum of Rs.23.87 lakhs ought not to be recovered from it on the basis that the credit was irregularly transferred to it. The show cause notice was contested by the Petitioner, whereupon the notice was dropped by the Additional Commissioner of Central excise vide drop order dated 31 July 2009. Even after the passing of the drop order, the Petitioner did not utilize this CENVAT credit lying in its books. The Respondent, for its part, sought set-off of a sum of Rs.23.87 lakhs that was specifically stated to be to the Respondent's benefit against its dues payable to the Petitioner. This really was the bone of contentions between the parties. Though the disputes between them purportedly arose on two unpaid invoices raised by the Petitioner on the Respondent in respect of supply of goods, the real dispute between the parties was not about the payment due to the former on account of the two invoices but the set-off the Respondent claimed against such payment to the extent of the sum of Rs.23.87 lakhs. In fact, it appears that at the stage of a company winding up petition filed by the Petitioner against the Respondent for non-payment of the two invoices, the Respondent had offered to pay the net amount due and payable by the Respondent to the Petitioner after adjusting such set-off, in full and final settlement of the Petitioner's claim. This offer was not accepted by the Petitioner and as a result, disputes arose between the parties.

3 The main question before the sole arbitrator, thus, pertained to the Respondent's entitlement to the set-off in the sum of Rs.23.87 lakhs on account of CENVAT credit and the issues raised in the arbitration reference only pertained to this set-off or the Respondent’s entitlement thereto.

4 Apart from contesting the merits of the Respondent’s claim in this behalf (by taking up a position, contrary to its contemporaneous

correspondence, and dishonestly, according to the learned arbitrator, that the credit of Rs.23.87 lakhs actually belonged to the Petitioner), the Petitioner contested the arbitrator's jurisdiction and authority to consider the claim of set-off. It was submitted that this claim really arose under the DMD Undertaking Agreement and not under the Loan Licence Agreement. It was submitted that since it was a credit as of the date of the DMD Undertaking Agreement and the Loan Licence Agreement did not make any provision in respect thereof so as to enable the Petitioner to utilize it and set off excise duty payable on the final products manufactured by it for the Respondent, the arbitrator could not have decreed the set-off in favour of the Respondent.

5 Clause 3.4 of Loan Licence Agreement provided as follows :

> "3.4 It is also clearly agreed between the parties that each party shall be solely and exclusively liable to make good payments of all taxes, duties and levies payable by it including Excise Duty, Ocroi and Sales Tax, if any, but not any penalties or interest arising from any default of the other party in connection under this Agreement. Organon shall arrange to pay equivalent amount towards Excise Duty in advance as and when ASG informs Organon to enable ASG to comply with the Excise Duty payment. Organon shall be entitled to the credits on account of excise duties etc. for purchases made by Organon and ASG will pass on the benefit of MODVAT to Organon for the excise duty paid by them for the input materials as per the Central Excise Rules. If any MODVAT credit is lost due to negligence, lapse or non-compliance of law on the part of ASG / its employees, ASG shall make good such loss to Organon."

This clause was read by the arbitrator to mean that the credit of Rs.23.87 lakhs was to be set-off against excise duty payable on the products manufactured by the Petitioner for the Respondent under the Loan Licence

Agreement. The arbitrator's view in this behalf can be said to be based on a reasonable construction of the Loan Licence Agreement in the light of contemporaneous correspondence between the parties indicating clearly the intention of both parties. Initially, the credit in the Petitioner's books of the sum of Rs.23.87 lakhs was contested by the Central excise Department having regard to Rule 10 of CENVAT Credit Rules, 2004. The audit report of the Excise Department in this behalf was forwarded by the Petitioner to the Respondent under cover of its email dated 22 February 2006. This was followed by show cause notice issued by the department on 19 February 2009 calling upon the Petitioner to show cause why the sum of Rs.23.87 lakhs ought not be recovered from the Petitioner on the basis that it was irregularly availed of. By their reply dated 16 March 2009, the Petitioner asserted that the amount appearing in their books was in due compliance of requirements of Rule 10 of CENVAT Credit Rules, 2004. Finally, by his order dated 31 July 2009, Additional Commissioner of Central Excise dropped the show cause and found that there had been no irregular availment as alleged. By their email dated 18 August 2009 addressed to the Respondent, the Petitioner communicated the dropping of the show cause notice. It, however, referred to a written permission that was required to be obtained from the Central Excise authorities before the Petitioner could actually start using the credit and that they would inform the Respondent as and when they did so. This correspondence unmistakably shows that the Petitioner was expected to utilize the credit of Rs.23.87 lakhs to set-off excise duty payable on the products manufactured by it on behalf of the Respondent and such arrangement would strictly be under the Loan Licence Agreement. The relevant clause of the Loan Licence Agreement (Clause 3.4), in the light of contemporaneous correspondence between the parties, clearly indicates a consensus on the CENVAT credit of the sum of Rs.23.87 lakhs in the books of the Petitioner. The arbitrator's conclusion that the set-off claimed by the Respondent was capable of adjudication in the arbitration reference is, thus, clearly justified.

6 Coming now to the merits of the claim, the correspondence between the parties referred to above as well as further correspondence in that behalf, in terms of letters dated 16 June 2010, 6 July 2010 and 11 August 2010, some of which have been referred to in the impugned award, clearly lends support to the Respondent's entitlement to the benefit of CENVAT credit of Rs.23.87 lakhs in the Petitioner's books. In its letter of 16 June 2010, the Petitioner, whilst reproducing clause 9.2 of DMD Undertaking Agreement, clearly took a position that the amount of Rs.23.87 lakhs belonged exclusively to the Respondent and that the Petitioner had no right or claim thereto. It was once again reiterated by the Petitioner in its response to the Respondent's letter of 6 July 2010, by its letter dated 11 August 2010, that CENVAT credit of Rs.23.87 lakhs was due to the Respondent. In the face of the two agreements, i.e. the DMD Undertaking Agreement and the Loan Licence Agreement, and in the light of the correspondence between the parties referred to above, it is not possible to believe that the credit of Rs.23.87 lakhs in its books actually belonged to the Petitioner. The arbitrator's conclusion on merits in this behalf is, thus, perfectly justified and admits of no interference.

7 That leaves only the issue of limitation on merits of the principal claim. The claim in respect of CENVAT credit for the sum of Rs.23.87 lakhs being an equitable set-off, there is no question of applying

any rule of limitation to it. In any case, this claim has been admitted by the Petitioner in its correspondence including its last letter of 11 August 2010 on the subject. The relevant date of *terminus a quo* as far as the claim of set-off or counter-claim in this case is concerned is the date on which the Respondent contested the Petitioner's Summons for Judgment in Summary Suit No.2368 of 2012 by filing an application under Section 8 of the Arbitration and Conciliation Act, 1996. That date should be reckoned as the correct date of invocation of the arbitration agreement in respect of its dispute concerning the set-off/counter claim. Considered in the light of the last acknowledgement made as of 11 August 2010 and the arbitration agreement invoked as of 12 December 2018 (i.e. the date of the application under Section 8), the set-off would be clearly within time.

8 Coming now to costs awarded to the Respondent, the arbitrator has made it clear at the very outset, and this is also reflected in the Respondent's written submissions, that the Respondent never contested the Petitioner's claim comprised in its unpaid invoices aggregating to Rs.31.02 lakhs. As we have noted above, at one stage, the Respondent had even offered the net of this amount, i.e. the difference between Rs.31.02 lakhs, and Rs.23.87 lakhs, in full and final settlement of the Petitioner's claim. Though the claim in the two invoices was contested by the Respondent in its written statement filed before the arbitrator, its written submissions as well as the arbitrator's own statement at the opening of his award make it clear that what was really in dispute before the arbitrator was the Respondent’s claim of set-off of Rs.23.87 lakhs. The whole dispute in the arbitration reference revolved around this set-off. If that is so and if the Respondent unequivocally succeeded in proving the set-off, there is no

reason why it should not be awarded costs of the reference, even if, a net amount is found payable by the Respondent to the Petitioner in the award. In fact, the arbitrator came to a conclusion that the conduct of the Respondent in going back on its admissions on the subject of the Respondent’s entitlement to the CENVAT credit of Rs.23.87 lakhs, was inconsistent and unfair. In the light of these circumstances, if the arbitrator were to foist the entire costs of arbitration incurred by the Respondent on the Petitioner, it cannot be said that this would be either an impossible view or a view which no fair or judiciously minded person would be expected to take. There is nothing in it to shock the conscience of the court. The courts have made it clear that costs in a given case can appropriately be awarded even against a successful party. The issue of costs has to be seen with reference to the controversy before the court and the approach adopted by the respective parties in the proceedings. If the Respondent was not contesting the Petitioner's claim of Rs.31.02 lakhs and was ready to offer the net amount after adjusting its set-off and the Petitioner did not take the bet and instead chose to prosecute its arbitration reference, eventually to find itself to be unsuccessful, nothing could prevent the court or the arbitrator, as the case may be, from saddling it with costs, even if the net amount of the decree or award is in its favour.

9 Learned Counsel for the Petitioner submits that there is no quantification of this amount. Parties had admittedly submitted their respective statements of costs actually incurred, based on which the present assessment of costs appears to have been made. In any event, this being a possible view, which is clearly within the jurisdiction of the arbitrator, no fault can be found with the assessment of costs within the parameters of

the law of challenge to an arbitral award under Section 34 of the Act.

10 Accordingly, there is no merit in the challenge to the impugned award. The arbitration petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)