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

+ **ARB. A. (COMM.) 61/2018**

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Date of decision: 2.8.2019

VISIONINDIA AYURVED PVT LTD

..... Appellant

Through Mr. S.P. Srivastava and Ms. Shefali  
Aggrawal, Advs.

versus

N K SHARMA PROPRIETOR

..... Respondent

Through Mr. Kamlesh Kumar, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J. (ORAL)**

1. This is an appeal directed against the order dated 16.8.2018 passed by the learned arbitrator on an application moved under Section 16 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') by the respondent.

2. Notice in this appeal was issued on 21.1.2019 and the returnable date fixed in the matter was 15.5.2019.

3. On 15.5.2019, there was no representation by either party. Accordingly, adverse orders were deferred and the matter was posted for hearing today.

4. Since it is an appeal under Section 37 of the 1996 Act, learned counsel for the respondent says that he will argue on the basis of the record. The record shows that the respondent was appointed as a clearing and forwarding agent by the appellant pursuant to Clearing & Forwarding

Agency Agreement dated 1.9.2013 (for short 'C&F Agreement'). It appears that the tenure of the C&F Agreement was one year. Consequently, the tenure of the C&F Agreement was to expire on 31.8.2014. It appears that the respondent, in fact, was the clearing and forwarding agent of the appellant till 11.9.2014.

5. It is not in dispute that disputes arose between the parties with regard to C&F Agreement. As a result of eruption of disputes, the appellant approached this Court by way of a petition under Sections 9 and 11 of the 1996 Act.

6. The Section 9 petition was numbered as O.M.P.(I) No.75/2015, while the Section 11 petition was numbered as ARB. PET. No. 91/2015.

7. The record shows that in the Section 9 petition the following substantive relief had been claimed by the appellant:

*“a) grant injunction in favour of the Petitioner and against the Respondent and thereby restrain the Respondent, his representatives, servants, employees from transferring, alienating, encumbering, parting and/ or creating any third party interest with regard to medicines of the Petitioner lying in. the go down of Respondent situated at 73/1, First Floor, Mangolpur Kalan, Near Tula Ram Public School, Delhi-110085”*

8. This claim was made by the appellant, as is evident on perusal of paragraph 6 of the Section 9 petition on account of the fact that an assignment of medicines was lying in the custody of the respondent. According to the appellant, the worth of this consignment was a sum of Rs.41 lakhs.

9. I may also indicate that in the Section 9 petition the petitioner had also made an averment to the effect that it was wrongly burdened with

liability for payment of central taxes to the Government at the rate of 3 per cent on account of the fact that the respondent had not provided C-Forms. The burden on this account was pegged at Rs.2.25 lakhs. There is also an averment to the effect that the appellant had suffered loss of business and goodwill. These assertions have been made in paragraph 4 of the Section 9 petition.

10. Likewise, assertions with regard to the possible claims of the appellant have been made in paragraphs 7 and 9 of Section 11 petition.

10.1 For the sake of convenience, these paragraphs are culled out hereafter:

*“7. That on 5th Dec., 2014 the respondent with ulterior motives sent a letter to the Petitioner leveling false allegations against the Petitioner company and threatening that respondent will dispose of the stocks of medicines lying with them which is of more than Rs.42 lacs of value and has also threatened that respondent shall put a date on the aforesaid cheque of Rs.9,29,838/- and present the same in the bank for encashment. On receipt of aforesaid threatening letter from the respondent, Petitioner immediately replied to the said false and frivolous letter and requested Respondent not to dispose of the stock of medicine as the same does not belong to it and Respondent was required to return the same on expiry of C&F Agreement which Respondent has been illegally retaining and also requested you not to present the said cheque as Respondent have failed to discharge its duties and liabilities arising out of and in consequence of expiry of said C&F Agreement. Further, Respondent was required to submit stock statement regularly but after 28th May,2014 Respondent has not submitted any periodic stock statement to Petitioner whereas Petitioner forwarded statement of accounts on 4th June,2014. After its receipt no action was taken by Respondent with regard to stock etc. This has been intimated to Respondent by Petitioner through its letter dated 14th June, 2014. Finally, after expiry of tenure of the C&F Agreement the final a/c statement of accounts was forwarded to Respondent on 5th Sept.2014 by Petitioner.*

9. *That the respondent has caused substantial losses to the Petitioner by not returning stocks of medicines lying with the respondent after respondent stopped working on expiry of tenure of said C & F Agreement dated 1st Sept., 2013. Consequently, Petitioner could not supply medicines against orders received to the tune of Rs.3,50,000/- and could not take fresh orders from various buyers/stockists/distributors as respondent has illegally retained medicines worth over 41 lacs in its godown situated 73/1, 1st Floor, Mangolpur Kalan, near Tula Ram Public School, Delhi-110 085 situated 73/1, 1st Floor, Mangolpur Kalan, near Tula Ram Public School, Delhi-110 085 and not returned the same to petitioner. Marketing team of Petitioner has left the Petitioner's company for want of work and uncertainty with the result that business of Petitioner has come to standstill and given bad name to it causing loss of goodwill and reputation in the marked and industry. Besides, the Petitioner has to incur recurring expenses towards rental of its office premises, salary to staff and other incidental expenses without any business and income. Respondent is liable to return stocks of medicines/pay value thereof lying in its godown situated 73/1, 1st Floor, Mangolpur Kalan, near Tula Ram Public School, Delhi-110 085 situated 73/1, 1st Floor, Mangolpur Kalan, near Tula Ram Public School, Delhi – 110085 worth over Rs.41 lacs as on 11th Sept., 2014 till respondent actually worked and submitted bills/vouchers, return Rs.95,691.56p. being sales proceeds of medicines from 31st Aug., 2014 to 11th Sept., 2014 which respondent has not paid to Petitioner till date, value of stocks of VINSUM capsules and Ortho relief tablets which were to be returned to manufacture for defects noticed and for which Form-38 for return of the same was given by Petitioner to respondent in last week of August, 2014 but respondent failed to return the same to manufacturer nor released the stock to petitioner till date, causing thereby a loss of Rs.1,20,831.24p. to Petitioner. Apart from above, respondent as per C & F agreement dated 1st Sept., 2013 was liable to collect sales tax, VAT from customers*

*file returns and pay taxes which is not known as to whether or not any returns/taxes are due to be paid which respondent is liable to pay, if still remains unpaid by respondent.”*

12. It is not disputed before me that the parties executed a Settlement Agreement dated 4.5.2015 (in short “Settlement Agreement”) which was placed before the Court as part of I.A.9979/2015. This interlocutory application was filed in the Section 9 petition i.e. O.M.P.(I) No.75/2015. The substantive prayers made in the application read as follows :

- a) allow the present application filed by the applicants i.e., Petitioner and respondent jointly;*
- b) dispose of the petition bearing OMP (I) No. 75/2015, titled M/ s. Visionindia Ayurved pvt. Ltd. versus M/s. Shivalik Enterprises in terms of Deed of Settlement (Annexure-A) leaving the parties to bear their own costs;*
- c) pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the interest of justice;*

12.1 The Court having regard to the contents of the application and the settlement agreement permitted the appellant to withdraw the Section 9 petition i.e. O.M.P.(I) No.75/2015 vide its order dated 12.05.2015.

13. Thereafter, when Section 11 petition came up for hearing it was disposed of on 14.12.2016 on the ground that parties had already settled.

14. It is important to note that on 14.12.2016 the appellant was not represented.

15. Given this background, the appellant filed an application being I.A. No.282/2017 for recall of the order dated 14.12.2016. This led to the Court passing an order on 9.3.2018. The Court allowed I.A. No.282/2017 and, consequently, recalled the order dated 14.12.2016.

16. The principal reason for recall of the order dated 14.12.2016 was two-

fold.

16.1 First, that the appellant had been able to show sufficient cause for non-appearance on 14.12.2016.

16.2 Second, according to the Court, the effect of the Settlement Agreement had to be determined by the arbitrator after hearing the parties.

16.3 To be noted, the Court via the very same order i.e. 9.3.2018 in Section 11 petition proceeded to appoint an arbitrator with the consent of parties.

16.4 The relevant portion of that order is extracted hereafter:

*“With the consent of the parties, I appoint, Mr. Abhijat, Advocate (R/o A-80, Defence Colony, New Delhi-110024, Mobile: 9811800833) as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties. The question whether the Settlement Agreement amounts to a full and final settlement of all the claims of the petitioner under the C&F Agreement shall be considered by the Arbitrator uninfluenced by any observation made by me in this order and may even be considered as a preliminary issue. Equally, whether the claims of the petitioner arising out of the Settlement Agreement or breach thereof are itself arbitrable, shall also be determined by the Arbitrator.”*

17. It is in this backdrop that the impugned order has been passed by the learned arbitrator. The appellant’s counsel submits that the learned arbitrator has erroneously concluded that all disputes between the parties stood settled with the execution of the Settlement Agreement.

18. According to the learned counsel, the learned arbitrator has given undue emphasis to the expression “all” appearing in Settlement Agreement without taking into account the entirety of the facts and the material that is on record.

18.1 In this behalf, my attention has been drawn to the contents of the

application being I.A. No.9979/2015.

18.2 Learned counsel says that a perusal of that application would show that only the dispute pertaining to the material which was in the custody of the respondent was settled. Insofar as the remaining disputes were concerned, that is, those which related to loss of business, goodwill and the liability towards taxes, they remained outstanding and, therefore, a request was made to this Court on 9.3.2018 that an arbitrator be appointed.

19. On the other hand, Mr. Kamlesh Kumar, who appears for the respondent says that there is no error committed by the learned arbitrator. The parties outside the purview of the Court had decided to settle all outstanding disputes and, therefore, nothing survived for adjudication as has been held by the learned arbitrator.

19.1 Furthermore, learned counsel for the respondent says that if this Court was inclined to refer the parties once again to the learned arbitrator for adjudication, then, an opportunity ought to be given to the respondent to file his counterclaims in the matter.

20. I have heard the learned counsel for the parties and closely perused the record.

21. According to me, the averments made in the Section 9 petition as well as in Section 11 petition show that there were several claims that the appellant had wanted adjudication of. One such claim, concededly, concerned goods which were in the custody of the respondent.

22. It appears that the respondent was holding on to the goods as he has unpaid claims against the appellant. It is not in dispute that the appellant after the execution of the Settlement Agreement has paid monies, *albeit*, after some amount of delay to the respondent.

22.1 In fact, the cheque given in the first instance for payment of monies as envisaged in the Settlement Agreement was dishonoured which compelled the respondent to initiate proceedings under the Negotiable Instruments Act, 1888. It is only, thereafter, that the appellant, it appears, paid the requisite monies to the respondent.

23. Be that as it may, as indicated above, there are disputes other than which related to goods held by the respondent that require adjudication. The relevant paragraphs which point out in this direction have already been culled out hereinabove by me while narrating the facts obtaining in the present matter.

24. Therefore, the conclusion reached by the learned arbitrator that all disputes between the parties stood settled with the execution of the settlement agreement, cannot be sustained. The expression ‘all’ appearing in the Settlement Agreement given the facts and circumstance obtaining in the matter present a case of “latent ambiguity”. The fact that I.A.No.9979 of 2015 sought withdrawal of only Section 9 petition provided extrinsic evidence as to how parties had interpreted the width and amplitude of the Settlement Agreement. They had obviously agreed to settle a part of the dispute which related to goods which were at that point in time in possession of the respondent.

24.1 If the terms of the agreement do not present an ambiguous circumstance then one would have to decipher the intent of the parties by examining the plain terms of the agreement, however, where there is ambiguity as in this case, to my mind, then, there is no better interpretative tool to ascertain the intent of parties than the subsequent conduct of the parties. The conduct of parties provides a clue as to how parties understood

the terms of the agreement.

24.2 The following observations of the Supreme Court in ***Godhra Electricity Co. Ltd. & Anr. v. State of Gujarat & Anr.***, (1975) 1 SCC 199, being apposite in this contract are extracted hereunder :

*“11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see Corbin on Contracts, Vol. 3, pp.249 & 254-56).*

**14.** As regards Watcham case [(1919) AC 533] , this is what Lord Reid said in *Schuler A.G. v. Wickman Ltd.*:

*“It was decided in Watcham v. Attorney-General of East Africa Protectorate that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise I find no substantial support in*

*the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to Watcham case [AIR 1969 SC 267 : (1969) 1 SCR 589] but repeat my view expressed in Whitworth with regard to the general principle.”*

**16.** *We are not certain that if evidence of subsequent acting under a document is admissible, it might have the result that a contract would mean one thing on the day it is signed but by reason of subsequent event it would mean something a month or year later. Subsequent “interpreting” statements might not always change the meaning of a word or a phrase. A word or a phrase is not always crystal clear. When both parties subsequently say that by the word or phrase which, in the context, is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the inquiry is as to what the intention of the parties was from the language used. And, why is it that parties cannot clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situation might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.*

*“The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is ‘No.’ (See Odgers’ Construction of Deeds and Statutes, 5th Edn. by G. Dworkin, pp. 118-19).”*

*But, as we said, in the case of an ambiguous one, the answer must be “yes”. In Lamb v. Goring Brick Co. [(1932) 1 KB 710, 721] a selling agency contract contained the words “the price shall be mutually agreed”. Documents showing the mode adopted for ascertaining the price were put in evidence without objection. In the court of appeal Greer, L.J. said:*

*“In my opinion, it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction on the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning.”*

*18. In these circumstances, we do not think we will be justified in not following the decision of this Court in Abdulla Ahmed v. Animendra Kissen Mitter [AIR 1950 SC 15 : 1950 SCR 30, 46] where this Court said that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument.”*

25. Thus, for the foregoing reasons, I am inclined to allow the appeal. It is ordered accordingly.
26. The order dated 16.8.2018 is set aside.
27. The matter is remitted to the learned arbitrator for adjudication *qua* the remaining claims.
28. The learned arbitrator will, however, give an opportunity to the respondent to file counterclaims.
29. The appellant will have an opportunity to file a reply to the same and take all defences that may be available *qua* the counterclaim(s), if any, preferred by the respondent.
30. For this purpose, parties and their counsel will approach the learned

arbitrator for fixing the date in the matter to enable him to continue with the arbitration proceedings from the stage on which they were positioned on the date when the impugned order was passed.

31. The parties shall, however, bear their respective costs.

**AUGUST 02, 2019**  
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**RAJIV SHAKDHER, J.**