

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

**Judgment delivered on: February 24, 2020**

+ O.M.P. (COMM) 283/2018 & IA. 8797/2018

SUDHA GUPTA & ANR.

..... Petitioners

Through: Mr.Manish Vashisht, Mr.A.K. Thakur,  
Mr.Jeevesh Nagrath, Mr.Manashwy  
Jha, Mr.Chandan, Ms.Urvi Kapoor and  
Ms.Anushruti, Advs.

versus

A K GUPTA & ANR.

..... Respondents

Through: Ms.Panchajanya Batra Singh,  
Ms.Garima Gupta, Ms.Divya  
Vishvapriya and Mr.Mahavir Singh,  
Advs. for respondents

**CORAM:**

**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**J U D G M E N T**

**V. KAMESWAR RAO, J**

1. This is a petition filed by the petitioners under Section 34 of the Arbitration and Conciliation Act 1996 ('Act', for short) challenging the Arbitral Award dated January 31, 2018 ('impugned Award', for short) passed by Ms. Justice Sharda Aggarwal (Retd.) with the following prayers:

*"In view of the foregoing facts and circumstances, it is most respectfully prayed that this Hon'ble Court may most graciously be pleased to:*

*(a) call for the entire records of arbitration proceedings before the Ld. Sole Arbitrator;*

*(b) set aside the impugned Arbitral Award dated 31.01.2018 passed in Arbitration proceedings titled as Shri Pawan Kumar Gupta & Anr. Vs Shri A.K.Gupta by the Ld. Sole Arbitrator;*

*(c) pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.*

2. The current petition has been preferred by petitioner No.1 Sudha Gupta, who is the wife of the claimant i.e. late Pawan Kumar Gupta ('late Claimant', for short) who had passed away during the pendency of the arbitral proceedings on August 10, 2008. Petitioner No.2, Tarun Gupta, is the son of Late Claimant. The petitioners were impleaded as legal heirs in the arbitration proceedings.

3. The respondent no.1 herein is A.K. Gupta and respondent No.2 Mohit Gupta is also the son of late Claimant. It may be stated here that respondent No.2 Mohit Gupta was claimant No.2 before the arbitration proceedings along with his father, i.e., the late Claimant.

4. Before going into the merits of the controversy, it would be appropriate to briefly state the facts of the case which can be culled out from the record.

5. The respondent No.1 with one Nitin Gupta were engaged in the business of pharmaceuticals products, whereas the late claimant and his son respondent No.2 being engaged in the business of iron and steel, were interested in marketing of pharmaceutical products and one Jitender Sharma was engaged in overseas marketing of pharmaceutical products. The parties mentioned herein executed a Memorandum of Understanding dated January 1, 2003 ('MoU', for short); wherein it

was agreed that a company by the name of M/s. Strategic Overseas Pvt. Ltd. would be constituted having its Registered Office at Delhi to transact and deal with the export of medicinal and pharmaceutical products to Angola.

6. This MoU was entered into by the parties in their individual capacity and on the same date i.e. January 1, 2003, a Memorandum of Agreement dated January 1, 2003 ('MoA', for short) was entered into amongst the three companies named hereunder:-

- a. M/s. Strategic Overseas Pvt. Ltd., having its registered office in Delhi.
- b. M/s. Balajee-Comeric General LDA, having its registered office in Luanda, Angola
- c. M/s. Brawn Laboratories Ltd. having its registered office in Delhi.

7. The following arrangement was entered into between the said companies; firstly it was agreed that M/s Brawn Laboratories Ltd. would sell its products to M/s. Strategic Overseas Pvt. Ltd. and M/s. Strategic Overseas Pvt. Ltd. would then deal with M/s. Balajee at Angola, i.e., the company which was engaged in the business of sale and marketing of pharmaceutical and other medicinal products in Angola.

8. M/s. Balajee situated at Angola was supplying the pharmaceutical products manufactured by M/s. Brawn Laboratories Ltd., received through M/s. Strategic Overseas Pvt. Ltd. to a company based in Angola by the name of "Neopharma". In return M/s. Neopharma was to pay M/s. Balajee for the product on realisation basis, which in turn was used to make payment to M/s. Brawn

Laboratories after meting out its expenses. As there was no further export done by M/s. Brawn Laboratories to M/s. Balajee since January 01, 2003, the parties wanted to settle their accounts.

9. According to clause 10.1 (a) of the MoU, it was agreed by all the parties to terminate the said MoU and to execute the supplementary MoU dated December 1, 2003 ('supplementary MoU', for short). As such the MoU was terminated and the supplementary MoU was executed. Annexure-A to the supplementary MoU gives the working for distribution of an amount of ₹268.52 Lacs. This Statement of Account shows that ₹219.52 Lacs was due to the late Claimant and his associates whereas ₹49 Lacs was payable to M/s. Brawn Group of Companies of which the respondent No.1 was the Director.

10. Thereafter, issues arose with regard to the settlement of dues, pursuant to which a legal notice dated December 31, 2004 was issued by M/s. Brawn laboratories to the late Claimant, demanding the settlement of the monies due, on the allegation that he had received post-dated cheques of USD 2,83,287.46 and USD 2,75,121.00. The late Claimant replied to the said legal notice denying such averments.

11. Then on June 8, 2006 the late Claimant issued a notice to respondent No.1 through which the arbitration clause in the MoU was invoked. Thereafter, a petition under Section 11 of the Act was filed by the late Claimant, being Arb.P. 409/2006. Accordingly, this Court vide order dated January 22, 2008 in the said petition had appointed Ms. Justice Sharda Aggarwal (Retd.) as the sole Arbitrator to adjudicate the disputes between the parties.

12. The late Claimant along with respondent No2. had preferred a claim for ₹219.52 lacs along with interest against respondent No.1

before the learned sole Arbitrator. Thereafter, on June 4, 2008 respondent No1 filed his reply-cum-counter claim for ₹49 Lacs along with interest. It was after that the respondent No.2 filed reply to the counter-claim and also a rejoinder to the statement of claim, wherein the averments in the counter-claim were denied. Further, respondent No.1 filed a rejoinder to the reply to counter-claim on December 31, 2008.

13. The Ld. Arbitrator passed the impugned award on January 31, 2018, wherein the claims of the petitioners / claimants herein were rejected and the counter-claim of respondent No.1 was allowed.

14. It was the petitioners' case before the learned Arbitrator that in terms of Article 5 of the Supplementary MoU, the late Claimant was to pursue the matter with M/s. Neopharma at Angola to release the payment of ₹286 Lacs so that the accounts could be settled in terms of the said MoU. M/s. Brawn Laboratories was to receive an amount of ₹49 Lacs after all adjustments who was represented by respondent No.1, the Director of the said company. Article 5 of the Supplementary MoU, reads as under:-

*“Article-5 INDIVIDUAL OBLIGATIONS OF FIRST AND THIRD PARTY:*

*i. That the third party Shri Pawan Kumar Gupta has agreed to pursue to the concerned Angola Parties and taking full responsibility of remittance by M/s. Balajee for the aforesaid balance payment to M/s. Brawn Pharmaceuticals Ltd.*

*ii. That upon receipt of the aforesaid payment in the account of M/s. Brawn Pharmaceuticals Ltd., the obligation of the First Party to disburse the same as*

*per the terms mentioned herein above in point No.4.2 (V).*

*iii. The aforesaid realization and disbursement of funds shall be finished within a maximum period of eight months from the date of execution of this supplementary MoU subject to fulfillment of the obligations by first and third parties as mentioned i), ii) and iv) of Article-5. The third party is bound to arrange remittance within stipulated time mentioned above provided first party is not making any default improper distribution of the receipts.*

***iv. In spite of fulfilling the obligation by first party as stated above, in case of non-receipt of total payment from territory of Angola, Mr. Pawan Kumar Gupta is personally liable to pay to M/s. Brawn Pharmaceuticals Ltd., the unrealized portion of their share amounting to Rs. 49.00 lakhs (Rupees forty nine lakhs only), M/s Brawn will have no claim for any balance payment from M/s. Balajee.” (emphasis supplied).***

15. It was further claimed that after the closure of business in Angola, the parties were to get an amount of ₹268.52 Lacs released from Neopharma, so that it could be distributed as per Statement of Account found at Annexure-A to the supplementary MoU. As per the said Statement of Account, it is the case of the petitioners that they were entitled to an amount of ₹219.52 Lacs and it is also admitted position that M/s. Brawn Laboratories represented by respondent no.1 was entitled to ₹49 Lacs.

16. It was the case of the petitioners as per Article 5, the late claimant had to pursue the matter with M/s Neopharma to release the payment so that the accounts could be settled in terms of the MoU. It was alleged by the late claimant that despite his various emails to Neopharma requesting to release the payment and despite his personal

visit to Angola, the money could not be released because of non-cooperation and malafide approach of the respondent No.1. The petitioners therefore prayed for directions to respondent No.1 to either cooperate with petitioners to get the money released from Neopharma, Angola or in the alternative the petitioners prayed that respondent No.1 be directed to pay the sum of ₹219.52 Lacs with interest.

17. Whereas the respondent No.1 contended before the learned Arbitrator that there was no dispute about the execution of the Supplementary MoU between the parties in their individual capacity and their accounts were to be settled as per Annexure-A to the said MoU. It was also not disputed by respondent No.1 before the learned Arbitrator that the sum of ₹268.52 lacs was due and payable from M/s. Neopharma, i.e. the Angolan Company, to M/s. Balajee which in turn had to be apportioned between the parties as per Annexure-A to the Supplementary MoU. It was the case of the respondent No.1 that this money had to be remitted first by M/s. Balajee in the account of M/s Brawn Laboratories and thereafter it was to be apportioned as per Annexure-A of the supplementary MoU.

18. It was the case of respondent No.1 before the learned Arbitrator that after the execution of the Supplementary MoU, M/s. Balajee through its Director Jitender Kumar tendered two cheques dated February 27, 2004 for 2,83,287.46 USD and 275121 USD (total value being INR 2,35,95,000) favouring M/s. Brawn Laboratories Ltd., the company of respondent no.1. The respondent No.1 further averred that these two cheques were not encashed and were returned by the bank with the remarks that they were negotiable only in Angola. The petitioners had then denied the issuance of any such cheques.

19. It was the case of the respondent No.1 and also argued by the respondent No.1 that the late claimant had already collected the amount of ₹2,68,52,000 (268.52 Lacs) which included ₹49 Lacs, the share of the respondent No.1 company, i.e., from M/s. Neopharma by forging a Resolution of the M/s. Brawn Laboratories. The petitioners, however, denied having issued the said cheques or having received money from M/s. Neopharma.

20. It was also the case of the respondent No.1 that that the petitioners had falsely alleged that the respondent No.1 did not cooperate in recovering the money from M/s. Neopharma. It was further alleged that the since the petitioners had already recovered the money from the Angolan company and therefore the respondent was entitled to the share claimed that is of ₹49 Lacs.

21. It was further argued that irrespective of the facts whether the claimants had recovered the amount of ₹49 Lacs under the supplementary MoU, it was the personal liability of late claimant to pay the sum of ₹49 Lacs to the respondent No.1/counter-claimant, after a maximum period of 8 months from the date of execution of Supplementary MoU, and that the said period expired on July 31, 2004 due to which the respondent No.1 had claimed the aforesaid amount with 18% interest w.e.f. September 01, 2004.

22. The Arbitrator went on to frame the following issues:

*“1. Whether the parties are bound by the two agreements (Annexure P-1 and Annexure P-2 to the statement of Claim) dt 01.12.2003 ? OPC*

2. Whether the amount of Rs. 219.52 Lacs (Two crores Nineteen Lakhs Fifty Two Thousand) stood released by M/s. Neopharma at Angola to the claimant as alleged by the respondent? OPR

2A. Whether the amount of Rs.219.52 (Two crores Nineteen Lakhs Fifty Two Thousand) as alleged by the claimant, is still lying with M/s. Neopharma at Angola? OPC

3. Whether the two cheques for the amount of USD 2,83,287.46 & USD 2,75,121 were issued by M/s. Balaji of Angola in favour of M/s. Brawn Pharma Ltd. Towards discharge of liability as alleged by the respondent? OPR

4. Whether the respondent/counterclaimant is entitled to a sum of Rs. 90,89,500/- (Rs. 49 Lakhs + Interest Rs. 41,89,500/- @ of 18% p.a. w.e.f. 1.9.04 till the filing of counter claim) with interest as claimed in the counter-claim? OPR

5. Whether the counter-claim of the respondent is barred by limitation? OPC

6. Whether the claimant is entitled to a direction against the respondent to co-operate with the claimant with the claimant in realizing the amount of money from M/s. Neopharma at Angola, in terms of prayer No.1 of the claim? OPC

*7. In case issued No.6 is decided against the claimant whether the claimant is entitled to relief as claimed in prayer No. (iii) of the Statement of Claim?*

*8. Relief”*

23. It was the considered view of the learned Arbitrator in as much as Issue No.1 is concerned, regarding the question, whether the parties are bound by the two agreements i.e. Supplementary MoU executed between parties for settling the accounts after termination of the MoU and Supplementary Agreement dated December 01, 2003 executed between the companies after the termination of MoA, that both the agreements were admitted documents and the parties had placed reliance on them and hence it was held that the parties were bound by the said agreements.

24. The Learned Arbitrator then went onto deal with issues Nos 2, 2A and 3. It was recorded that the facts of the case revealed that the sum of ₹268.52 lacs was to be recovered from M/s. Neopharma, Angola through M/s. Balajee. The amount was then to be distributed between the late Claimant and the respondent No.1 being the Director of M/s. Brawn Laboratories as per Annexure-A of supplementary MoU. It was also recorded by the learned Arbitrator that there was no dispute regarding the supplementary MoU wherein a sum of ₹ 219.52 lacs was to come to the share of the late Claimant and ₹ 49 lacs was to come to the share of M/s Brawn Laboratories Ltd. i.e. respondent No.1's Company.

25. The learned Arbitrator went on to observe on issue No.2 and issue No.2A that the petitioners had failed to prove the emails written

by the petitioners and the personal visit made by late Claimant to Angola for requesting M/s. Neopharma to release the money.

26. The learned Arbitrator on issue No.3 observed, the fact remained that the payment did not reach the respondent No.1 while holding that since the two cheques for an amount of USD 2,83,287.46 and USD 2,75,121 (INR valuing ₹ 2,35,92,000) were not proved and in the absence of cheques and other related documents, it cannot be stated that the two cheques were issued by M/s. Balajee in discharge of their liability.

27. The learned Arbitrator observed, that M/s. Neopharma had no direct dealing with the respondent No.1's company i.e. M/s. Brawn Laboratories Ltd and as per the agreement M/s. Neopharma had to make payment to M/s. Balajee according to its realization upon sale. M/s. Balajee was obligated to make payment, after deduction of expenses to M/s. Brawn Laboratories and the money so received was to be distributed as per the agreement. It was further held by the learned Arbitrator that respondent No.1 had failed to prove that the petitioners had received or recovered the aforesaid amount from M/s. Neopharma or the amount of ₹ 219.52 lacs stood released by M/s. Neopharma at Angola.

28. It was further held by the learned Arbitrator that, since it was the case of the petitioners that the money was still lying with M/s. Neopharma, it was not possible to give a finding on the question if the money was still lying with M/s. Neopharma. It was also held that M/s. Neopharma had to pay M/s. Balajee and not the petitioners or the respondent No.1 directly. There was no evidence to suggest that M/s. Neopharma paid the proceeds of the sale to M/s. Balajee or not and

also due to the absence of M/s. Neopharma or M/s. Balajee as parties to arbitration proceedings, the learned Arbitrator observed that, it was impossible to ascertain the question whether the money was in possession of M/s Neopharma or M/s. Balajee. Thus, the learned Arbitrator decided Issue No.2 in favour of petitioners while deciding Issue no. 2A in favour of respondent No.1, however, Issue no. 3 was decided against respondent.

29. The Arbitrator deemed it to fit to adjudicate issues Nos. 4 and 5 relating to counter-claim together. It was thus held by the learned Sole Arbitrator in view of Article 5(iv) of the Supplementary MoU, that the late Claimant having failed to realise the said amount from M/s. Neopharma or M/s. Balajee of Angola, had become personally liable to pay ₹49 lacs to M/s. Brawn Pharmaceuticals Ltd, a company owned by the respondent No.1. As per supplementary MoU, it was the late Claimant who was bound to arrange remittance of the said amount within 8 months from December 01, 2003.

30. It was thus held by the learned Arbitrator that the respondent No.1, was therefore entitled to the counter-claim of ₹49 lacs from the petitioners. The learned Arbitrator also awarded a simple interest @ 8% p.a. thereby holding issues Nos. 4 and 5 in favour of respondent No.1.

31. The learned arbitrator while dismissing the claims of the petitioners observed that the Supplementary MoU does not say as to how the respondent No.1 was supposed to co-operate with the petitioners in realising the money from M/s. Neopharma. It was also observed that the third-Party to the Supplementary MoU i.e. the late Claimant had agreed to take full responsibility of remittance by M/s.

Balajee for the balance payment to M/s. Brawn Pharmaceuticals Ltd. While referring to Article 5(i) of Supplementary MoU, the learned Arbitrator decided issue No.6 against the petitioners. The learned Arbitrator also decided accordingly the issue No.7 against the petitioners.

32. Thus, the learned Arbitrator, vide impugned Award, awarded a sum of ₹49 lacs by way of counter-claim along with simple interest @ 8% p.a. with effect from September, 01, 2004 till realization awarded in favour of respondent.

33. The petitioners have, in substance, taken the following grounds for challenging the impugned award:

- (i) The Learned Arbitrator did not consider that late claimant had agreed that by or before August 01, 2004 he would ensure the payment of ₹ 49 lacs to M/s. Brawn Pharmaceuticals Ltd. and not to respondent No.1 in his personal capacity. Despite this, the award for payment has been made to respondent No.1 in his individual capacity.
- (ii) The learned Arbitrator failed to consider that no agreement existed between late claimant and M/s. Brawn Pharmaceuticals Ltd. and that no claim could have been made by it against the late claimant.
- (iii) M/s. Brawn Pharmaceuticals not a party to the arbitration agreement contained in the MoU dated January 1, 2003 or in the supplementary MoU.
- (iv) That also M/s. Brawn Pharmaceuticals Ltd. had made no claim or counter claim or demand against the late claimant for payment of money.

- (v) respondent No.1 is only a director/shareholder of M/s. Brawn Pharmaceuticals Ltd. who had made the counter claim in his individual capacity and the amount had been awarded to him in his individual capacity.
- (vi) That the learned Sole Arbitrator having herself held that under the agreement, payment was to be made to M/s. Brawn Pharmaceuticals Ltd. then directed the payment to be made to respondent No.1 as if they were one and the same.
- (vii) It was the reply of respondent No.1 to the Section 11 Petition wherein the respondent No.1 stated that there existed no dispute between the petitioners and respondent No.1 in his individual capacity.
- (viii) Counter claim made by respondent No.1 is barred by time. The amount had to be paid by late claimant to M/s. Brawn Pharmaceuticals Ltd. by or before August 01, 2004 subject to fulfilment of conditions in the agreements.
- (ix) That no acknowledgement by late claimant regarding any payment to respondent No.1 which would extend the period of limitation.
- (x) The learned Arbitrator acted contrary to S. 28 (a) of the Contract Act for the following reasons:
  - i. That late claimant had agreed before August 01, 2004 he would ensure payment of ₹ 49 lacs to M/s. Brawn Pharmaceuticals Ltd. and not to respondent No.1 in his personal capacity.
  - ii. No arbitration agreement existed between the late claimant and M/s. Brawn Pharmaceuticals Ltd.

- iii. M/s. Brawn Pharmaceuticals Ltd. was not a party to the arbitration agreement which was entered into by the parties in their individual capacity.
- iv. M/s. Brawn Pharmaceuticals Ltd. was not a party to the arbitration proceedings.
- v. M/s. Brawn Pharmaceuticals Ltd. had made no claim/ counter claim / demand against the late claimant for payment of money.
- vi. There was no obligation on the late claimant to make any payment to respondent No.1. The late claimant had agreed to make the payment to M/s. Brawn Pharmaceuticals Ltd. subject to fulfilment of obligations by respondent No.1.
- vii. respondent No.1 who is a director/ shareholder of M/s. Brawn Pharmaceuticals Ltd. had made the claim in his individual capacity and the amount has also been awarded to him in his individual capacity, even though the sole Arbitrator in para 11 & 18 of the impugned award held that late claimant would be personally liable to pay M/s. Brawn Laboratories Ltd, the company of the respondent.
- viii. Even in para 3 of reply-cum-counter-claim it was the case of the respondent No.1 himself that it was M/s. Brawn Pharmaceuticals Ltd. which was entitled to the payment.
- ix. So also in Para 4, 6 & 8 the reply filed by the respondent No.1 himself to the Petition Under Section 11 of the the Act of 1996; wherein the respondent No.1 had stated that there exists no dispute between petitioners and respondent No.1 in his individual capacity; the petition under reply is unsustainable since the respondent No.1 is not a party to the supplementary MoU.

- x. respondent No.1 was not entitled to payment of any money from the late claimant. It is settled law that individual shareholder has no right in the property of the company and further that no relief could be granted in favour of respondent No.1 in his individual capacity for any amount allegedly due by late claimant to M/s. Brawn Pharmaceuticals Ltd. merely because the respondent No.1 is the director/ shareholder of M/s. Brawn Pharmaceuticals Ltd.
  - xi. The amount to be paid by the late claimant to M/s. Brawn Pharmaceuticals Ltd. by or before August 01, 2004, was subject to fulfilment of the conditions in the agreements/MoUs. That no counter claim/claim has been made by M/s. Brawn Pharmaceuticals Ltd. against late claimant till date. That respondent No.1 was not entitled to make any claim and that the counter claim has been filed by respondent No.1 only on June 04, 2008 i.e. after the expiry of more than 3 years, i.e. the counter claim was barred by time.
- (xi) The learned Arbitrator has passed the award on the basis of surmises and conjectures.
- (xii) The impugned award is not sustainable in eyes of Law.
- (xiii) The learned Arbitrator failed to appreciate that RW-1 failed to prove that the amount of ₹ 219.52 lacs stood released by M/s. Neopharma at Angola to the claimants.

34. It is pertinent to note at this juncture that there was, in fact, a delay of 14 days in filing the Petition. The Petition was filed after the period of 90 days expired but before expiry of 120 days. This delay was condoned by this Court vide order dated January 28, 2019.

35. It is the case of the petitioners and contended by the counsel that the impugned Award was rendered after reserving the same on October

29, 2014, i.e., after the period of almost three years and three months and the same is against principle of natural justice, fair play and public policy. That this ground is in itself sufficient to set aside the Award. To buttress his arguments, the learned counsel for the petitioners has cited the following judgments:

- i. *Kanhaiyalal & Ors. vs. Anupkumar & Ors. (2003) 1 SCC 430*
- ii. *Harji Engg. Works Pvt. Ltd. vs. Bharat Electricals Ltd. & Anr. 153 (2008) DLT 489*

36. It is further contended that the counter-claims are governed by Section 3(2)(b)(ii) of the Limitation Act, 1963 and that the limitation has to be tested as to the date on which the cause of action to claim money arises. It is an admitted position that the petitioners were the claimants before the learned Arbitrator and that the claim was filed seeking recovery of amount of ₹ 2,19,52,000/- with 12% interest against the respondent No.1.

37. It is also the case of the petitioners that the claim was based on the Supplementary MoU and the liability of respondent No.1 was to pay to the claimant in terms of Annexure-A of the said MoU. One of the terms of the Supplementary MoU was that the realisation and disbursement of the amount was to be finished within a maximum period of 8 months from date of execution of agreement.

38. It is submitted by the petitioners in the legal notice dated December 31, 2004 which was issued by M/s. Brawn Pharmaceuticals Ltd., through the respondent No.1 seeking certain amounts from the petitioners, the emphasis was made on the obligations of the petitioners. It is contended that a reply dated February 22, 2005 was

given to abovementioned legal notice and the liability was denied by the petitioners.

39. It is argued by the petitioners that not only did the respondent No.1 fail to fulfil its obligation under the Supplementary MoU but rather he started filing vexatious criminal proceedings against the late Claimant and Mohit Gupta, respondent No.2; and that a legal notice under Section 11 of the Act of 1996 dated June 08, 2006 was issued to the respondent No.1 seeking his consent for appointment of Justice R.C. Chopra (Retd.) as the Sole Arbitrator. The petitioners state that neither any reply was given to the legal notice nor did the respondent No.1 make any request for appointment of an arbitrator furthermore respondent No.1 did not give any consent to initiate arbitration proceedings. It is further contended that when the petitioners filed a petition under Section 11 of the Act, being Arb. P. No. 409/2006, seeking the appointment of an arbitrator, the same was vehemently objected to by the respondent No.1 in his Reply to the said petition, wherein a stand was taken by the respondent No.1 that there existed no dispute between petitioners and the respondent No.1.

40. This Court vide order dated January 22, 2008 allowed the petition bearing Arb. P. No. 409/2006, appointing an arbitrator to adjudicate the dispute between the parties. The petitioners filed their claim before the Arbitrator in April, 2008.

41. It the case of the petitioners that the counter-claim was filed only on June 04, 2008 by none other than the respondent No.1 even though he opposed any liability, agreement or the existence of an arbitration agreement itself. It is submitted by the petitioners that the respondent No.1 did not make a request or took any steps seeking appointment of

an Arbitrator for adjudication of his alleged counter claim within the period of limitation. It is also the case of the petitioners that for these afore-stated reasons the counter claim is barred by limitation and the arbitrator erred in holding otherwise. To support his submission, the petitioners have relied on the following case laws:

- i. *Thomas Mathew vs. Construction Engineer KLDC (2018) 12 SCC 560*
- ii. *Voltas Limited vs. Rolta India Limited (2014) 4 SCC 516*
- iii. *State of Goa vs. Praveen Enterprises (2012) 12 SCC 581*
- iv. *Ten Creative Studio P. Ltd. & Ors. vs. Nelson Planning & Design P. Ltd. 253 (2018) DLT 197.*

42. The counsel argued that the learned Arbitrator has given erroneous findings de-hors the evidence. Even though, the learned Arbitrator had accepted that the respondent No.1 failed to prove his defence to the effect that the petitioners were able to get the amount of ₹219.52 lacs released from M/s. Neopharma at Angola, on the issue No.2A went on to give a contrary finding that the petitioners were unable to prove that the money was still lying at Angola.

43. It is further argued that due to the inordinate delay in passing the impugned Award, the learned Arbitrator overlooked that an application under Section 17 of the Act was filed by the petitioners seeking direction to the respondent No.1, wherein it was sought that the respondent No.1 was to write a letter to M/s. Neopharma seeking the release of amount and to deposit the same in any branch of Punjab National Bank under the direct control of the learned Arbitrator. The petitioners have stated that this application was opposed by the

respondent No.1 and it is the case of the petitioners that no adjudication was done on this application and further that the contents of the application were sufficient to allow the prayer of the petitioner. It is the contention of petitioners that the money is still lying at Angola and for want of cooperation in the nature of personal obedience, the respondent No.1 was liable to suffer the Award. It is also urged, that, the award of counter-claim in favour of respondent No.1 is unsustainable, and contrary to the Supplementary MoU. Thus the impugned award be set aside and the petitioners be awarded the claimed amount with interest.

44. On the other hand, learned counsel for the respondents justifies the Award. According to him, the learned Arbitrator has rightly, on an interpretation of the Supplementary MoU, allowed the counter-claim in favour of the respondent No.1 and the same should not be disturbed by this Court, more so, in exercise of its jurisdiction under Section 34 of the Act.

45. Having heard the learned counsel for the parties, the issues, which arise for consideration are; (i) whether the impugned Award is barred on the ground that it has been passed after more than three years; (ii) whether the counter claim filed by the respondent No.1 was barred by time and; (iii) whether the counter-claim could have been awarded contrary to the stipulation in the Supplementary MoU.

46. Having noted the three issues, which fall for consideration, I intend to deal with issue No.3 first. To understand the issue, it is necessary to reproduce the relevant stipulation of the MoU, which has already been reproduced in para 16 (iv). I again reproduce the same for better understanding.

***“16. iv. In spite of fulfilling the obligation by first party as stated above, in case of non-receipt of total payment from territory of Angola, Mr. Pawan Kumar Gupta is personally liable to pay to M/s. Brawn Pharmaceuticals Ltd., the unrealized portion of their share amounting to Rs. 49.00 lakhs (Rupees forty nine lakhs only), M/s Brawn will have no claim for any balance payment from M/s. Balajee.” (emphasis supplied).”***

47. The submission of the learned counsel for the petitioners is primarily that in terms of the said stipulation, the amount was to be paid to M/s. Brawn Pharmaceuticals Ltd. Admittedly, M/s. Brawn Pharmaceuticals Ltd. was not a party before the learned Arbitrator. In fact, it is his submission that the respondent No.1 has resisted the petition filed under Section 11 of the Arbitration & Conciliation Act, 1996 by stating that there is no dispute between the petitioner and the said respondent. The grant of the counter claim in favour of the respondent No.1 is contrary to the stipulation in MoU.

48. I agree with the submission made by the learned counsel for the petitioners, inasmuch as the stipulation, as reproduced above clearly states that predecessor-in-interest of the petitioners herein Late Pawan Kumar Gupta was personally liable to pay M/s. Brawn Pharmaceuticals Ltd. the unrealised portion of their share amounting to ₹49 lacs. Concedingly, M/s. Brawn Pharmaceuticals Ltd. has not raised a claim before the learned Arbitrator. In fact, I note, the learned Arbitrator has, in para 19 of the Award conceded the position that the amount is payable to M/s. Brawn Pharmaceuticals Ltd. I reproduce the same as under:-

*“19. Thus the claimant No.1 (Since deceased) having failed to realize the said amount from M/s. Neopharma or M/s. Balajee of Angola had become personally liable to pay the same to M/s. Brawn Pharmaceuticals Ltd, a company owned by the respondent. By virtue of the M.O.U dated 01.12.2003, Mr. Pawan Kumar Gupta was bound to arrange remittance within 8 months from 01.12.2003. Therefore Limitation of three years started w.e.f. 01.08.2004 (8month after 01.12.2003) which expired on 31.07.2007.”*

49. If that be so, the conclusion arrived at by the learned Arbitrator in favour of the respondent No.1 cannot be justified and to that extent the counter claim awarded by the learned Arbitrator in favour of the respondent No.1 need to be set aside. This I say so because M/s. Brawn Pharmaceuticals Ltd. is a separate entity in the eyes of law, whereas the respondent No.1 herein is only a Director of the Company and as a Director, he is different from the entity called M/s. Brawn Pharmaceuticals Ltd. The benefit under the Supplementary MoU could only flow to the entity M/s. Brawn Pharmaceuticals Ltd. In the absence of any claim by M/s. Brawn Pharmaceuticals Ltd., the learned Arbitrator could not have allowed the counter claim of the respondent No.1 in his favour. The award to that extent is liable to be set aside.

50. In this regard, I may refer to the judgment of the Supreme Court in the case of ***Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154***, wherein it was held that the Arbitrator cannot travel beyond the scope/parameters of the contract. The relevant paragraph 22 read as under:

*“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contracts. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records.”*

51. In view of my above conclusion, it is not necessary to go into issue Nos.1 and 2, raised by the petitioners. The petition is allowed. No costs.

**I.A. 8797/2018 (under Section 151 CPC for stay of the execution proceedings of the Award dated January 31, 2018)**

Dismissed as infructuous.

**V. KAMESWAR RAO, J**

**FEBRUARY 24, 2020/aky/ak**