THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
13~07~2021	28-07~2021

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.Nos.36 of 2020, 318 of 2021
and A.No.248 of 2020 in O.P.No.36 of 2020

Peepul Capital LLC,
62, ABM Avenue,
Nandanam, Chennai 600035
Represented by its Authorised Signatory
Mr.Kiran Gupta .. Petitioner in O.P.36 of 2020/
Respondent in O.P.318 of 2021

.Vs.

M/s Vimura Investments LLP,
Represented by its Designated Partner
Mr.Muraarie Rajan,
New No.52, Old No.18,
Archbishop, Mathias Avenue,
R.A.Puram,
Chennai 600028. .. Respondent in O.P.36 of 2020/
Petitioner in O.P.318 of 2021

Prayer in O.P.No.36 of 2020: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 06.11.2019 passed by the Arbitral Tribunal in relation to dispute between the Petitioner and the Respondent insofar as it relates to the Award of the sum of Rs.15,84,630/- with interest thereon by allowing this petition.

Prayer in O.P.No.318 of 2021: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitration Award dated 06.11.2019 passed by the Arbitral Tribunal to the extent that the success fees payable by the Respondent to the Petitioner/Claimant as per Annexure of Exhibit C-2 amounting to USD 151,200 (net or retainer fees already paid) and other consequential reliefs have not been awarded and consequently allow the Claims made by the Petitioner in their statement of claim.

For Petitioner in O.P.36 of 2020 and for Respondent in O.P.No.318 of 2021	:	Mr. V.V. Sivakumar
For Respondent in O.P.36 of 2020 and for Petitioner in O.P.No.318 of 2021	:	Mr. P. R.Raman, Senior Counsel for Mr.C. Seethapathy

COMMON ORDER

These two Original Petitions are filed by the Claimant and Respondent in the Arbitral Tribunal, against the Award passed by the Sole Arbitrator dated 06.11.2019. O.P.No.36 of 2020 filed by the Respondent/Petitioner herein against the Award passed by the learned Arbitrator rejecting the claims made by the Petitioner herein on the ground that learned Arbitrator travelled beyond the reliefs sought for by the Claimant and directed the Petitioner herein to pay a sum of USD 13,800/- i.e., Rs.15,84,630/- towards retainer fee for the extended period of three months. Whereas in O.P.No.318 of 2021 the Claimant has challenged the award to the extent that the learned Arbitrator has awarded only USD 13,800 together with cost of Rs.6,00,000/- instead of granting the success fee agreed to be paid by the Respondent to the Claimant amounting to USD 151,200 (less of retainer fees already paid) and other consequential reliefs.

2. Since both the Original Petitions are arising out of the same Arbitral Award, both of them are disposed by this Common Order. Parties are arrayed as per their own rankings before the Arbitral Tribunal for the sake of convenience.

3. The brief facts leading to file these Original Petitions are as follows:

3.(a) The Claimant is a Limited Liability Partnership (LLP) firm represented by its designated partner Mr. Muraarie Rajan who has experience in financial services and has rendered service to several international reputed organizations.

In January 2016 the said Mr.Muraarie Rajan was introduced to the Co-founder and Managing Director of the Respondent, Mr.Sandeep Reddy. After several meetings the Respondent thought it fit to avail expertise of the said Mr.Muraarie Rajan as a financial adviser/consultant for the Respondent to help them manage the Respondent's investment in Loyalty Partners Singapore Pte., Respondent had initially held shares in Loyalty Partners Singapore Pte., Singapore (hereinafter referred to as L.P. Sing) which was a subsidiary of a German Company viz., Loyalty Partners GMBH (hereinafter referred to as L.P.) in which L.P.Sing also held shares. The Respondent initially held 40% of the shares in L.P.Sing which was increased to 42.3% by agreement dated 14.05.2010. In 2011 L.P.was acquired by American Express Company (hereinafter referred to as Amex), which became the top holding company. As the negotiations of the Respondent with Amex regarding to divest their interest in PAYBACK were inconclusive, the expertise of the Mr.Muraari Rajan was availed to revive negotiations with a view to obtain a higher offer. Accordingly, Mr.Muraari Rajan rendered his service in this regard since April 2016. By his mail dated 23.4.2016 he has stated to the Respondent that they should be in a position to sell their interest in PAYBACK for USD 65 Million. To engage the service of Mr.Muraarirajan, the Respondent entered into an agreement with the Claimant on 22.06.2016. The contract period is three months with effect from 22.06.2016 which shall continue in force unless a notice of termination is given by either party. Clause 3 and 4 stipulate the consultation fee, travel allowances for the claimant and procedure for availing the same. Annexure to the Agreement provided the payment terms including success fees as shown below:

Fixed fees	
Retainer fees	USD 4,600 per month for a maximum of 3 months
Success Fees	
Valuation range for PC's stake (USD mn)	Fees Structure
Up to 55	Nill
55-60	USD 90,000
60-63	USD 90,000 + 3% of incremental transaction value over USD 60.0 Mn
63-66	USD 180,000 + 7% of incremental transaction value over USD 63.0Mn
Greater than 66	USD 390,000 + fixed fees of USD 450,000

Note: Fixed Fees will be adjusted against the success fees, upon successful closure of transaction.

3(b) It is the contention of the Claimant, Mr.Muraarie Rajan provided services to the Respondent and was actively involved in the negotiations with representatives of Amex viz., Mr.Avi Beinhacker, V.P.Corporate Mergers & Acquisitions. Though Amex made an offer of 45 Million USD on 18.07.2016, with several round of negotiations and discussions of Mr. Muraarie Rajan with Amex, Amex increased their offer price to USD 55 Million in November 2016. However, Respondent has not agreed to the price and asked Mr.Muraarie Rajan to continue discussions/negotiations. He had continued discussions/negotiations with Amex during November and Decemebr 2016. However, in January 2017 he was informed that Respondent had instructed Amex to directly communicate with it. On 2.8.2017 during the meeting wirh Mr.Sandeep Reddy, Mr. Muraarie Rajan was informed the Amex deal on Playback was closed at a price of 62.5 Million. The issue of payment was also discussed in the meeting. A follow up mail was also sent by Mr.Muraarie Rajan 16.08.2017 and 25.08.2017. Whereas the Respondent stated that the transaction with Amex was ultimately concluded using the Respondent's "governance and shareholders lever" and indicated that the claimant was not entitled to any fee other than the retainer fee which had already been paid. Hence, it is the contention of the claimant that the agreement continued to be in force in the absence of any termiantion under clause 5 of the Agreement. Therefore, he is entitled to any fees due and payable on closure of transaction with Amex (less the retainer fees already paid)at the rate set out in Annexure to the Agreement. Only due to his services the price has been raised upto 62.5 Million. Hence the claim.

4. The main contention of the Respondent that the Respondent was only a fund manager the claim as to the alleged success fee proportionate to the value of the transaction between Peepul Capital Fund II LLC and Amex was beyond the scope of reference of this Tribunal. The Respondent was appointed as the fund manager by Fund II LLC to take steps for divestment of the equity interest in Loyalty Partners Singapore Pte. Ltd., in favour of another equity stake holder, Amex, on appropriate terms and consideration. The claimant through its designated partner wilfully painted a rosy picture and expertise to conclude the said divestment with lucrative returns. The Respondent had been directly engaged him with Amex prior to claimant's participation. It is also denied that the offer price of Amex was increased from 45 million USD to 55 Million USD. The transaction was not successfully closed within the contract period. The efforts put forth by the claimant between October and December 2016 was non-existent compared to the efforts put forth by the respondent's officials. The Claimant did

not take active steps to revive the negotiation with Amex and any effort of the claimant made during October and December 2016 had also failed and all the mail correspondences during the said period would further show that they were in the nature of internal discussions and not a negotiation/revival of negotiation and the Agreement was not extended between the parties and the entire transaction closure/documentation was done by the respondent with Amex without any guidance/participation from the claimant. Transaction was successfully closed by respondent on its own efforts without any assistance/guidance of the claimant. The Respondent was not a party to the alleged discussion between the claimant and Mr.Avi Beinhacker.

5. A rejoinder was filed by the Claimant to the statement of defence. For which sur-rejoinder was also filed by the Respondent denying the allegations in the rejoinder of the Claimant. After hearing the learned counsel of both the parties, the Arbitrator framed the following issues:

1. *whether the claims made by the claimant are maintainable under the law and on the basis of the contract entered into between the parties?*

2. *Whether the Agreement dated 22.06.2016 entered into between the Claimant and the Respondent is determined by efflux of time?*

3. *Whether the Claimant is entitled under the Contract and/or law to obtain details of transaction between Peepul Capital Fund II LLC and American Express Company from the Respondent?*

4. *Whether the Claimant rendered the required Services in accordance with the terms of Agreement?*

5. *Whether the Claimant is entitled to a success fee as claimed in the State of Claim along with interest?*

6. *Whether the Claimant/Respondent is entitled to costs and/or any other relief?*

6. After hearing both sides and considering the documents placed before him and also perused the Arguments of the learned counsel on both sides, the learned Arbitrator has passed the following Award:-

(1) The respondent is directed to pay the claimant a sum of

US Dollars 13,800 towards retainer fee for the extended period of three months;

(2) The Respondent is directed to pay the claimant a sum of INR 6,00,000 towards costs;

(3) The sums above shall be paid within two months from the date of Award failing which the Respondent shall, from the expiry of aforesaid two months until payment, pay interest on the sums awarded at the rate of 9% per annum."

7. The Claimant has challenged the award to the extent that the learned Arbitrator has awarded only USD 13,800 together with cost of Rs.6,00,000/- instead of granting the success fee agreed to be paid by the Respondent to the Claimant amounting to USD 151,200. Whereas the Respondent challenging the Award passed by the learned Arbitrator rejecting the entire claim made by the Petitioner herein and learned Arbitrator has travelled beyond the reliefs sought for by the Claimant and directed the Petitioner herein to pay a sum of USD 13,800/- i.e., Rs.15,84,630/- towards retainer fee for the extended period of three months.

8. The learned counsel appearing for the Respondent in the Arbitral Proceedings and Petitioner in O.P.No.36 of 2020 submitted that the Learned Arbitrator granting Award for Retainer Fees and Cost is beyond the scope of reference. Admittedly, the contract has not been extended beyond the period of three months and there are evidence to show that the service of the claim has not been engaged for closure of transaction. The transaction was closed at the efforts put up by the Respondents. Such being the position, learned Arbitrator having factually found that closure of the transaction was the result of the efforts put by the Respondent alone, not at the services rendered by the claimant, such awarding the Cost and Retainer fee is beyond the scope of reference invoking equitable jurisdiction is contrary to the provision of Arbitration Act. It is his contention that in the absence of any contract it is contrary to the provision of Section 28(2) of the Act. The Respondent was informed about the termination of the contract in the month of January 2017 itself. Thereafter, there was no meeting between the Claimant and the Amex or the Respondent. Such view of the matter, awarding the Retainer Fee and the Cost is contrary to the provision of Section 28(2) of the Arbitration Act. In fact when the relief itself not claimed, learned Arbitrator has invoked equitable jurisdiction which is against law. Hence submitted that Award

passed by the learned Arbitrator is beyond the scope of reference of contract between the parties. Hence submitted that the Award is liable to be set aside.

9. In support of his Contention, he relied upon the following judgments:

1. *Godwill Comtrades Pvt.Ltd. -Vs- Divya Theertha* ***[MANU/TN/2872/2019]***

2. *Food Corporation Of India -Vs- Chandu Construction* ***[2007 (4) SCC 697]***

3. *Associated Engineering Co. -Vs- Government Of Andra Pradesh* ***[1991 4 SCC 93]***

4. *State of U.P -Vs- Ram Nath International Construction (P) Ltd* ***[1996 (1) SCC18]***

10. Mr.P.R. Raman, learned Senior Counsel appearing for the Respondent /Claimant would submit that the Arbitral Tribunal rejecting the claim for Success fee is against the contract. The contract itself provide that unless the contract is terminated by issuing notice, the contract shall be in force. Admittedly, there is no

notice whatsoever given by the Respondent. Even after the three months period there were exchange of correspondence which clearly disclose the fact that the claimant has rendered his services which resulted in increasing the value from 45 Million USD to 55 Million USD. Thereafter, the transaction was concluded at the rate of 65 Million USD. As long as the contract was in force the Respondent was liable to pay Success Fee as agreed in the contract. Hence, it is his contention that the learned Arbitrator has ignored the very contract between the parties. Hence, submitted that the Award suffers from Patent Illegality. It is his further contention that the Learned Arbitrator awarding the Retainer Fees and cost cannot be faulted. Therefore, that part of the Award has to be sustained. . In support of his contention, he relied upon the same judgments relied by the learned counsel appearing for the Petitioner herein.

11. It is not in dispute that the Agreement dated 26.06.2016, wherein the Managing Partner of the Claimant engaged Mr.Muraari Rajan to avail his expertise in fianancial matters. Clause 2 of the Agreement indicate that the Agreement is for a period of three months commencing with effect from 22.6.2016 and shall continue in force unless a notice of termination is given by

either party as per clause 5 of the agreement. From the nature of the agreement entered into between the parties same indicate that the agreement itself entered to avail the service of the claimant to provide expert advice to manage the investment in the Respondent Company namely Loyalty Partners Singapore Pte. Clause 7 deals with reference to the Arbitration. The same is extracted below:

> *"7. Any dispute arising out of the terms of this Agreement shall be reffered by the parties to Arbitration under the Arbitration and Conciliation Act, 1996, India. Such Arbitration shall be held in Chennai. All proceedings of such arbitration shall be in English language. A sole arbitrator shall be appointed mutually by the parties. The award pronounced by the arbitrator shall be final, conclusive and binding upon the parties."*

12. Annexure to the agreement indicate the nature of the fees payable by the Respondent on achieving certain target besides the retainer fee. If the target is achieved in between 55 to 65 Million USD, the Annexure indicate the nature of the fees payable would be USD 90000. Now the dispute seems to be with regard to the claiming this USD 90000. Whereas it is the contention of the Claimant that though the agreement was originally for a period of three years if remain in force

until the notice of termination issued by the Respondent. Hence, his contention that till the transaction was concluded with Amex for 65 Milllion USD, no notice of termination was issued. Therefore, his contention that as per the Annexure of the Agreement he is entitled to Success Fee at the rate of 90000 USD. It is the main contention of the Respondent that the Claimant was engaged to provide his expertise advice to manage the Respondent's investment in Loyalty Partners Singapore Pte., such service was engaged till December 2016 only. Otherwise, it is the contention that from January 2107 itself the service of the Claimant was never engaged and in fact the Respondent was directly engaged negotiations with Amex and with their own efforts the transaction was concluded at 65 Million USD.

13. The learned Arbitrator after analysing the documents in this regard particularly correspondence between the parties factually found that though the agreement was for period of three months originally, it has not been determined and the Managing Partner Mr.Muraarie Rajan was actively engaged with Amex till December 2016. Learned Arbitrator has also recorded finding on the basis of the documents particularly the e-mail sent by one Mr.Beinhacker that originally

the Amex has been made an offer only for 44 Million USD. By the effforts of Mr.Muraarie Rajan Amex had increased offer to 55 Million USD. In para 20 of the Award, the learned Arbitrator in fact after analysing the documents had recorded factual finding in this regard. Similarly, the learned Arbitrator though found that in December 2016 Mr.Muraarie Rajan was interacting with Amex. Thereafter, there was no exchange of rates between them. Taking note of the own admission of P.W.1 in his chief examination that he came to know in the month of January 2017 itself that the Respondent was negotiating directly with Amex and also taking note of the further admission that he has also did not aware of the further discussions in this regard, thereafter he came to know about the closure of transaction at the rate of USD 62.5 Million during August 2017, the learned Arbitrator factually recorded that Mr.Muraarie Rajan role after January 2017 was not in existence till the conclusion of the transaction.

14. Factual findings were recorded based on the documents placed before the learned Arbitrator and finally the learned Arbitrator has held that “merely because the contract was not terminated by issuing notice, the very object of the contract and the requirement of the claimant is that Claimant not only be involved

in assisting the respondent to negotiate the transaction, not only in assisting the Respondent negotiating the transaction with Amex they should lead till the transaction closed." Whereas his service has not continued till the closure of the transaction and finally held that he is not entitled to claim any Success Fee since his service was not extended till the closure of transaction. However, learned Arbitrator considering the services provided till December 2016, the learned Arbitrator awarded Retainer Fee as agreed in the Contract. As indicated above the very purpose of the agreement was to render service and expertise by the Managing Partner to manage the investment. Only when service or expertise required by the Respondent was continuously given which resulted in closure of transaction at the rate of 62.5 Million USD, it could be said that the Claimant is entitled to Success Fee as per the agreement. Whereas without performing or rendering his service as required to manage the fund of the Respondent merely on the basis of Annexure, it cannot be said even without his services continued till e closure of transaction he is entitled to Success Fee.

15. Learned Arbitrator, in fact, recording the finding to the effect that the

service of the claimant should be not only assisting the Respondent in negotiating the transaction with Amex but the same should have continued and the same should have led to the closure of transaction or such service should have continued till the closure of transaction. The finding of the learned Arbitrator, in view of this Court is based on the factual assessment of the documents. Further, interpretation of the contract is also made by the Arbitrator reasonably. Arbitrator jurisdiction to interpret the contract in order to resolve the issue is not beyond the jurisdiction of the Arbitrator. Learned Arbitrator interpreted the contract reasonably and in fact he has allowed the Retainer Fees as agreed between the parties. Though the Retainer Fee for the period till December 2016 has not been claimed, the learned Arbitrator in fact has allowed the relief, which also cannot be faulted. The Arbitrator in fact has jurisdiction to allow the relief and he has not awarded any amount beyond the scope of the contract. In fact, he granted relief based on the agreed retainer fees between the parties. When all the dispute arising out of contract has been referred to the Arbitrator and the Arbitrator. It is well within the powers of Arbitrator to pass any order within the parameter of the contract to advance substantial justice to the parties. Therefore merely because retainer fee is awarded it cannot be said, same violates Section 28(2) of the

Arbitration Act. In fact, the Arbitrator taking note of the documents placed before him has moulded the relief and granted the award as per the contract. Therefore the contention of Mr. Sivakumar learned counsel that the Award is vitiated under section 28(2) cannot be countenanced. The Award was passed by the learned Arbitrator after taking note of the fact contract provide for the Retainer fee, Cost was awarded mainly on the ground that despite availing services of the Claimant till December 2016, Respondent driven the claimant to seek remedy before Arbitration. Therefore, this Court is of the view that Awarding the cost considering the facts and circumstances of the particular case and the nature of service rendered by the Claimant cannot be faulted. At no stretch of imagination it can be held that cost awarded by the Arbitrator vitiates the entire award.

16. In ***State of U.P. vs. Ram Nath International P. Ltd., [(1996) 1 SCC 18]*** the Honourable Apex Court held that Court can interfere award only on the ground set out in Section 34 of the Act. Court cannot re-appreciate the evidence to examine correctness of the conclusions of the Arbitrator.

17. In ***Associated Engineering Company vs. Government of A.P. [(1994)***

4 SCC 93] 's case (supra) the Honourable Apex Court has held that the Arbitrator cannot travel outside the bounds of the contract. If he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

18. In ***Food Corporation of India vs. Chandu Construction and Another [(2007) 4 SCC 697]*** the Honourable Supreme Court has held that if the Arbitrator ignoring specific terms or going beyond the terms or going beyond the four corners of contract Section 30 of the in the Arbitration Act, 1940 , the Award cannot be sustained.

19. In view of the above discussions none of the grounds set out in Section 34 of the Arbitration and Conciliation Act have been made out to interfere with the well reasoned Award passed by the Sole Arbitrator, who is a Senior Counsel having sufficient expertise in the Arbitration matters also. The Award in fact made after appreciating all the documents placed before him. Therefore merely because some other view is also possible that may not be a ground to interfere the

Award. This Court cannot sit as appellate Court to re-appreciate the entire evidence. Accordingly this Court hold that none of the grounds contemplated under Section 34 of the Arbitration and Conciliation Act to interfere the Award is made out. Hence, both the petitions are liable to be dismissed.

20. Accordingly, both the Original Petitions are dismissed. Consequently, connected Application is closed.

28.07.2021

Index : yes/no
Internet : yes
Speaking/Non-speaking Order

N. SATHISH KUMAR, J.
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Common Order in:
O.P.Nos.36 of 2020, 318 of 2021
and A.No.248 of 2020 in O.P.No.36 of 2020

28.07.2021