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

Date of Decision: 16th March, 2021

+ O.M.P. (COMM) 121/2021 & O.M.P. (COMM) 122/2021
M/S RWL HEALTHWORLD LIMITED Petitioner

Through: Mr. Gajender Giri, Mr. L.K. Giri,
Ms. Khushboo Tomar and Mr. Rajat
Gupta, Advocates.

versus

ESCORTS HEART INSTITUTE AND RESEARCH CENTRE
..... Respondent

Through: Mr. Sanjeev Kumar and
Mr. Abhishek Kisku, Advocates.

+ O.M.P. (COMM) 122/2021
M/S RWL HEALTHWORLD LIMITED Petitioner

Through: Mr. Gajender Giri, Mr. L.K. Giri,
Ms. Khushboo Tomar and Mr. Rajat
Gupta, Advocates.

versus

M/S FORTIS HOSPITALS LIMITED Respondent

Through: Mr. Sanjeev Kumar and
Mr. Abhishek Kisku, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

I.A. No. 3991/2021 (for delay in filing) in O.M.P. (COMM) 121/2021 &

I.A. No. 3993/2021 (for delay in filing) in O.M.P. (COMM) 122/2021

1. By way of the applications noted above, the Petitioner seeks condonation of delay of 289 days in filing of the present petitions.

2. The learned counsel for the Petitioner states that the said period of three months expired during the lockdown enforced by Government of India in 2020. Supreme Court *vide* Order dated 8th March, 2021, has directed that the period from 15th March, 2020 till 14th March, 2021 shall stand excluded in computing the period of limitation. Thus, the present petitions are filed within time, and therefore, the afore-noted applications are infructuous. The learned counsel for the Respondents does not dispute this position.

3. In view of the above, the applications are disposed of.

O.M.P. (COMM) 121/2021 & O.M.P. (COMM) 122/2021 & I.A. Nos. 3990/2021 & 3992/2021 (for exemption)

4. The present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] impugns the common Arbitral Award dated 22nd January, 2020 passed by the learned Sole Arbitrator in respect of arbitration proceedings arising out of two separate Arbitration Agreements, decided by way of a common impugned Arbitral Award.

5. Having regard to the similarity in facts and identical grounds of challenge, both the petitions are being decided by way of this common

Order.

6. The challenge by the Petitioner, who was the Claimant before the Sole Arbitrator, is confined to the Award of the counter claims to the tune of INR 2,83,44,180/- [in O.M.P. (COMM) 121/2021] in favour of M/s Escorts Heart Institute and Research Centre Ltd. and INR 33,32,495/- [in O.M.P. (COMM) 122/2021] in favour of M/s Fortis Hospitals Ltd [*both together referred to as the “Respondents”*].

Brief Facts:

7. Briefly put, the Petitioner – M/s RWL Healthworld Ltd. [*hereinafter referred to as ‘RWL’*] is engaged in the business of running and operating pharmacy stores pan-India. The Respondents – M/s Escorts Heart Institute and Research Centre Ltd. in O.M.P. (COMM) 121/2021 [*hereinafter referred to as ‘Escorts’*] and M/s Fortis Hospitals Ltd. in O.M.P. (COMM) 122/2021 [*hereinafter referred to as ‘Fortis’*] are engaged in the business of running and maintaining hospitals.

8. The parties entered into Agreements for running Out-Patient Department [‘OPD’] pharmacy stores at the hospitals run and managed by the Respondents, under the following agreements:-

- (a) Pharmacy Agreement dated 25th January, 2015 [in O.M.P. (COMM) 121/2021]; and
- (b) Pharmacy Agreement dated 6th October, 2017 [in O.M.P. (COMM) 122/2021]. [*hereinafter together referred to as the “Pharmacy Agreements”*]

9. The Respondents issued Notices on 16th November, 2018 terminating the afore-noted Agreements. According to RWL, this termination was unjustified and contrary to the terms of the Agreements. Amicable resolution was attempted, but with no success. Consequently, RWL invoked arbitration and nominated an Arbitrator. Thereafter, RWL filed two separate petitions under Section 9 of the Act,¹ against Fortis and Escorts respectively. In the said petitions, RWL *inter alia* sought directions against the Respondents to not give effect to the Notices and dispossess them from the pharmacy stores. During the pendency of the petitions under Section 9, RWL also preferred two separate petitions under Section 11 of the Act seeking appointment of an Arbitral Tribunal.²

10. The said petitions [ARB.P. 100 and 101 of 2019] were taken up for consideration by this Court on 13th February, 2019 along with the petitions filed under Section 9 of the Act. During the hearing, the counsel for the parties agreed that an Arbitration Agreement existed between the parties and an Arbitrator could be appointed in terms of the Arbitration Clause. Accordingly, this Court *vide* Order dated 13th February, 2019, appointed an Arbitrator to adjudicate the disputes between the parties, while reserving the Respondents' liberty to move an application under Section 16 of the Act before the Arbitral Tribunal. It was further directed that the petitions filed under Section 9 of the Act would be placed before the learned Arbitrator who will proceed to treat the same as an application under Section 17 of the

¹ Being O.M.P. (I) (COMM.) 474 and 475 of 2018.

² Being ARB. P. 100 and 101 of 2019.

Act.

11. In this background, both the parties filed their respective claims and counter claims before the Learned Sole Arbitrator. The same have been decided by way of the impugned Arbitral Award, wherein the learned Arbitrator has held that the termination Notices dated 16th November, 2018 were not in consonance with the Agreements and declared them to be invalid. The Respondents have been restrained from giving effect to said Notices. At the same time, the Respondents have been held to be entitled to counter claims, being the amount due as on 31st May, 2019, along with further amounts that became due during the pendency of the arbitration proceedings, till the continued operation of the Pharmacy Agreements.

Submissions of the parties:

12. Mr. Gajender Giri and Mr. L.K. Giri, learned counsels for RWL, impugn the present Arbitral Award on the following basis: -

12.1 The learned Arbitrator has decided the disputes beyond the terms of reference [*hereinafter referred to as 'TORs'*] and does not take into account the terms of payment agreed between the parties;

12.2 When this Court appointed the Sole Arbitrator under Section 11 of the Act, and simultaneously, directed the petitions under Section 9 to be considered as applications under Section 17 of the Act, the scope of reference was confined with respect to the disputes that were urged in the petitions under Section 9 of the Act, and not beyond that;

12.3 The learned Arbitrator failed to appreciate that as per the payment agreement reached between the parties, RWL was not liable to

make payments to the Respondents until they cleared the admitted outstanding dues of Medsource Healthcare Pvt. Ltd. [*hereinafter referred to as 'MHPL'*] the sister concern of the RWL;

12.4 Since the Respondents failed to perform their obligations under the Pharmacy Agreements and make payments of its admitted outstanding dues to MHPL, no monies were payable by RWL under the Pharmacy Agreements;

12.5 Although, there is no written agreement recording the payment agreement between RWL and Escorts/Fortis for the payment to MHPL, yet several communications demonstrate that there was indeed such an understanding. Moreover, the conduct of the parties also establishes such an agreement between the parties;

12.6 Since the Respondents did not, at any time, prior to filing of the counter claims, make any such demand, it is firmly established that the payment was to be made, only if the Respondents cleared the admitted outstanding dues towards MHPL. Payments were in fact made by Escorts/Fortis to MHPL in furtherance of such an understanding.

13. Mr. Sanjeev Kumar, learned counsel for the Respondents, who appears on advance notice, contends as follows: -

13.1 RWL has not placed any document on record to establish the so-called 'understanding' with the third party herein i.e., MHPL;

13.2 The learned Arbitrator has awarded the counter claims strictly in consonance with the terms of the Pharmacy Agreements;

13.3 There is no linkage between the counter claims and the so-called payment agreement, that has been canvassed before this Court

and before the learned Arbitrator;

13.4 The learned Arbitrator has very meticulously examined the counter claims and has, in fact, rejected a part of the counter claim finding the same to not to be flowing from the Pharmacy Agreements between the parties;

13.5 The plea of set off claimed by RWL has been rejected, as the same was not found to be in accordance with law and there were no mutual debits and credits being reflected between the parties.

Analysis and Findings:

14. The Supreme Court in *State of Goa v. Praveen Enterprises*,³ has *inter alia* observed as under: -

“32. The position emerging from above discussion may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the Arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the Arbitration Agreement. The Chief Justice or his designate is not required to draw up a list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the Arbitration Agreement.”

In the opinion of this Court, to hold that the TORs are to be confined to what was stated in the petitions under Section 9 of the Act is wholly incorrect. The Court cannot read the order of appointment to be restricted to adjudication of the claims of the Petitioner. The Respondents were well within their right to raise counter claims arising out of the Pharmacy Agreements between the parties. In fact, as pointed out by Mr. Kumar, the

learned Arbitrator while deciding the counter claims has proceeded to partly reject the counter claims finding the same not to be in accordance with the Pharmacy Agreements. The relevant portion of the Arbitral Award reads as under: -

“60. The counter claims are based on invoices raised by Fortis Hospitals Limited for the 14% of the revenue share, interest on the unpaid amounts and unpaid rent for the premises by the Claimant. The counter claims raised by Escorts Heart Institute and Research Centre Limited are based on invoices raised for 16% of the revenue share and interest thereon. It must be stated that since the disputed rent is not a part of the Pharmacy Agreements between the parties, the counter claim raised by Fortis Hospitals Limited in this regard is rejected. It must also be stated that neither the invoices nor the amounts mentioned therein (which form a part of the record) are in dispute.”

15. Now coming to the payment agreement, the contention seems to have been raised to avoid the counter claim. Let us first understand the nature of the outstanding dues of MHPL that are cited as a ground to set-off the dues of the Respondents. These counter-claims are in respect of the amounts that became due under the terms of the Pharmacy Agreements. These claims were based on invoices raised by Escorts/Fortis. RWL contested the counter claim by contending that the Pharmacy Agreements required RWL to operate a fully equipped pharmacy store for supplying pharmaceutical products to the OPD patients as well as patients admitted in the hospitals. RWL introduced its wholly owned subsidiary known as MHPL for the purpose of supplying drugs, medical consumables, surgical products and such other items that were to be used for the treatment of the patients admitted in the hospitals. RWL contended that it was agreed that

³ (2012) 12 SCC 581.

Escorts/Fortis would buy medical supplies from MHPL. In this arrangement, huge amounts became due and payable by Escorts/Fortis to MHPL and RWL set up a case of set off in respect of the dues payable to MHPL, against the amount receivable from RWL. The learned Arbitrator, however, did not find any merit in this defence and held that as per law, set off cannot be claimed, as the amounts had not arisen out of the same transaction and were connected neither by nature nor through circumstances.

16. The learned Arbitrator has recorded correctly that the said disputes were completely alien to the counter claims. In the absence of any written agreement between the parties, the learned Arbitrator has rightly concluded that such a plea was without any force. The relevant portion of the Arbitral Award on this aspect reads as under: -

*“63. It is not possible to accept the submission of learned counsel for the Claimant with regard to a set off. In **Jitendra Kumar Khan v. Peerless General finance and Investment Company Limited**, the Supreme Court noted that to claim a set off, the mutual debits and credits or cross demands must have arisen out of the same transaction or to be connected in the nature and circumstances. It is quite clear that the arrangement between the Counter Claimant, MHPL and the Claimant had no connection whatsoever with the Preliminary Agreements between the parties to these proceedings, but was de hors these agreements and the mutual debits and credits or cross demands did not arise out of a transaction between them.”*

17. The payment agreement as set up by RWL is completely baseless. There is no written contract shown to the Court that could establish such a payment agreement existing between the parties. The conduct of parties can influence the Court's interpretation of contractual obligations, but then the conduct should clearly demonstrate the same. The facts of the case do not

manifest the payment agreement, as pleaded by the Petitioner. The transactions, if any, between the Respondents and MHPL, cannot establish that there was any payment agreement or arrangement between the parties of the nature that has been canvassed before this Court. Further, merely because Escorts/Fortis did not raise any demand for the payment of the amounts due under the Pharmacy Agreements until filing of the counter claims, cannot in itself lead the Court to conclude that there was such a payment agreement/arrangement for set off or otherwise. There is no infirmity in the view taken by the Arbitral tribunal. Besides that, the jurisdiction of this Court under Section 34 of the Act is limited in view of the settled position in law.⁴

18. In view of the above, this Court does not find any merit in the present petitions and accordingly, the same are dismissed along with all pending applications.

SANJEEV NARULA, J

MARCH 16, 2021

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(corrected and released on 23rd March, 2021)

⁴ See: *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49; *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, (2019) 15 SCC 131.