

FAO-CARB-11-2022 (O&M)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO-CARB-11-2022 (O&M)
Date of decision : 20.03.2023

Nectar Lifesciences Limited and others

.....Appellants

VERSUS

ABB Limited and another

....Respondents

**CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE SANDEEP MOUDGIL**

Present: Mr. Atul V. Sood, Advocate
for the appellants.

Mr. Anand Chhiber, Senior Advocate with
Mr. Vaibhav Saini, Advocate, for respondent No.1.

AUGUSTINE GEORGE MASIH, J.

In this appeal, challenge is to the order dated 15.02.2022 passed by the Commercial Court, Chandigarh, whereby the learned Additional District Judge has dismissed the petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '1996 Act') read with Section 2 (c) and 6 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, for setting aside the arbitration award dated 14.09.2018 passed by the Sole Arbitrator – respondent No.2 in favour of respondent No.1.

2. Learned counsel for the appellants has asserted that the learned Court below has failed to appreciate the mandate of law, which requires the Arbitrator to pass a reasoned award in accordance with Section 31 of the

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1996 Act. It being a non-speaking award, where the pleadings and the evidence tendered before him have not been dealt with while allowing the partial claim of respondent No.1 and rejecting the counter-claim of the appellants in toto cannot sustain. Having admitted the factum that the delay in execution of the project could not be attributed to any one party, rather it was attributable to the appellants as well as respondent No.1 because of the deficiency of both the parties, the Arbitrator has proceeded to travel beyond the pleadings and has partially accepted the claim as projected by respondent No.1 while rejecting the counter-claim

3. Submission has also been made that the amount which has been awarded is more than what was claimed by respondent No.1. Counsel contends that as per sub-Section 3 of Section 31 of the 1996 Act, the arbitral award shall state the reasons upon which it is based unless the parties agree that no reasons are to be given or the award is an arbitral award of agreed terms under Section 30. It being a non-reasoned award would amount to it being opposed to public policy and thus, cannot sustain. The Arbitrator has not looked into the evidence to ascertain and quantify the damages suffered by the appellants on account of non-completion of the work leading to the losses for the delay in making the project functional.

The Arbitrator has proceeded to rely upon the Minutes of Meeting dated 04.01.2008 but has failed to take note of the fact that respondent No.1 did not stick to the schedule recorded therein and failed to complete the project within time, which ground was enough to reject the claim of respondent No.1. Counsel contends that the tendered documents would show that setting up the heating ventilation air conditioner (HVAC)

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and building management system (BMC) for Units VI and VII was on turnkey basis. If that be so, no liability or responsibility could be attributed to the appellants. It is a settled principle of law that the party causing the breach of the contract cannot take any advantage of its own breach to the detriment of the other party. Cause of breach of contract leading to delay in execution or no execution of entire work, the loss which has been suffered by the appellants has been totally overlooked by the Arbitrator. Even the interest which has been awarded by the Arbitrator is patently illegal, arbitrary and without jurisdiction.

4. Learned counsel for the appellants has relied upon the judgment of the Hon'ble Supreme Court in **PSA Sical Terminals Pvt. Ltd. Vs. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin and others** 2021 (3) R.C.R. (Civil) 681 to substantiate his contentions. It is, therefore, prayed by the learned counsel for the appellants that the impugned order dated 15.02.2022 passed by the Commercial Court, Chandigarh, be set aside and the petition preferred by the appellants under Section 34 of the 1996 Act may be accepted.

5. On the other hand, learned senior counsel for respondent No.1 asserts that the order passed by the Commercial Court, Chandigarh, which has been impugned in the present appeal, is based upon proper appreciation of the pleadings, evidence led and in accordance with law. The award as has been passed by the Sole Arbitrator – respondent No.2, dated 14.09.2018, is based upon proper appreciation of the pleadings and the evidence led before him. He asserts that the factum with regard to there being delay in the execution of the project attributed to the appellant as well

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as respondent No.1 although has been recorded but the same has been properly dealt with especially with regard to the claim as has been projected by respondent No.1. Minutes of Meeting dated 04.01.2008 clearly lays down the payments which were admitted and required to be made at the end of the appellants and had not been disbursed to respondent No.1. These Minutes of Meeting has been admitted by the appellants when attached as a list of documents along with the claim in the affidavit of admissions/denials of documents on behalf of the appellants by the Vice-President (Finance), dated 27.02.2015, the said document has been admitted. The earlier aspect prior thereto, therefore, falls into insignificance and it is from that stage, Arbitrator has rightly proceeded to consider the claims and counter-claims of the respective party on the basis of the pleadings and the evidence brought on record leading to the passing of the award dated 14.09.2018.

6. Learned senior counsel for respondent No.2 has also asserted that the Court below has proceeded to pass the impugned order within the limitation as has been prescribed under Section 34 of the 1996 Act. It has rightly been said that in the proceedings under Section 34 of the 1996 Act, it does not act an Appellate Authority and has to exercise its jurisdiction within the limited domain as laid down under the statute.

7. Emphasizing upon the scope and ambit of the judicial review of the award passed by the Sole Arbitrator, learned senior counsel for respondent No.1 has asserted that the award can be interfered with where reasons given are totally perverse or the award is based on wrong presumption of law. The interpretation of the contract and its provisions is the sole domain of the Arbitrator and the Court cannot interfere in exercise

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of its powers under Section 34. The award being not against the specific term of the agreement and being not patently illegal or opposed to the public policy of India does not call for any interference by this Court. He asserts that the Arbitrator is the master of law and facts, and the Court cannot substitute its own view for the decision of the Arbitrator.

8. Learned senior counsel for respondent No.2 has relied upon the judgment of Hon'ble Supreme Court in MMTC Limited Vs. Vedanta Limited 2019 (4) SCC 163 to contend that the conduct of the parties and the correspondence exchanged between them would also be a relevant factor within the power of an Arbitrator to consider the same. In support of this contention, he has placed reliance upon the judgment of the Hon'ble Supreme Court in McDermott International Inc. Vs. Burn Standard Co. Ltd. 2006 (11) SCC 181.

9. As regards the contention of the learned counsel for the appellants that the counter-claim raised by the appellant has been rejected by the Arbitrator without appreciating the evidence which the counsel contends is incorrect. Learned senior counsel for respondent No.1 submits that the counter-claim of the appellants was based upon the documents (Annexures C-1 to C-32), which were upto the year 2007 and were prior to the recording of the Minutes of Meeting dated 04.01.2008. These Minutes of Meeting put to an end to the earlier aspect when the parties agreed to adhere to the terms and conditions settled in those Minutes, which were penned down in writing and were signed by both the parties. The documents as produced in evidence by the appellants having lost their relevance had no bearing and have, thus, rightly been rejected by the

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Arbitrator vide award dated 14.09.2018 leading to the denial of the counter-claim as put-forth by the appellants. On this basis, he has prayed for dismissal of the appeal.

10. Having considered the submissions made by the learned counsel for the parties, on going through the impugned order dated 15.02.2022 as passed by the Commercial Court, Chandigarh as also the pleadings and evidence which has been brought on record along with the judgments relied upon by the respective counsel, we are of the considered view that no interference is required in the impugned order dated 15.02.2022 as the same is in accordance with law and based upon proper appreciation of the pleadings and the submissions made by the counsel.

11. The skeletal facts relevant for the purpose of understanding the *lis* between the parties can be en-capsuled as follows:-

Appellants floated a tender for supply of heating ventilation air conditioner (HVAC) and building management system (BMC) for Units VI and VII to be used for manufacturing of oral drugs and empty hard gelatin capsules at Baddi, Himachal Pradesh. Respondent No.1 was successful and its bid was selected for the tender. Letter of Intent was issued by the appellant leading to respondent No.1 raising relevant purchase/work orders towards heating ventilation air conditioner (HVAC) and building management system (BMC) required at the plant. By mutual agreement, purchase/work orders were amended on various occasions. Basic design and engineering was not in the scope of work of respondent No.1 to be carried out. Initial commissioning date of the project was scheduled as June, 2006 and December, 2006 respectively for Unit VI and Unit VII,

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which was revised from time to time and finally, it stood extended upto 04.01.2008 when the payments were delayed at the end of the appellants.

Disputes arose between the parties and it is, at this stage, the appellants asserted that respondent No.1 had not deputed the qualified and experienced personnel leading to delay and consequential extension of contractual plan dates. Quality of the material and violations of the terms and conditions of the contract were pressed into service which were denied by respondent No.1.

For completion of the installation works within the time as has been agreed between the parties, a meeting was held leading to recording of the Minutes of Meeting dated 04.01.2008. In the said meeting, not only the liabilities for payment were spelt-out at the end of the appellant towards respondent No.1 but the payment schedule was also specified therein. Both the parties signed the said Minutes of Meeting which is an admitted position. The document as has been put-forth by respondent No.1 along with the claim petition and when confronted, appellants had admitted the said document. Perusal of the said Minutes of Meeting, which has been pressed into service by both the counsel for the parties, would show that the schedule of payment by the appellants has been detailed therein and the stages for making payments on completion of a particular process in the form of milestones were also specified. It is apparent that whatever has happened prior thereto, loses significance from that stage as it is this document, which is the one, which would henceforth govern the claims and liabilities of the parties. It is an admitted position that the counter-claim as has been put-forth by the appellants before the Sole Arbitrator is based upon

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the evidence in the form of documents which were prior to the recording of the Minutes of Meeting dated 04.01.2008. The Arbitrator, therefore, has rightly proceeded to come to a conclusion that those documents would not be relevant and cannot be made the basis for accepting the counter-claim as projected by the appellants. The rights and the liabilities of the parties, therefore, flow from these Minutes of Meeting which had been made the basis for considering the claims as put-forth by respondent No.1 and counter-claim as projected by the appellants. It, thus, cannot be said that the award as has been passed is either based upon no evidence or is a non-speaking award.

12. As regards the assertion of the counsel for the appellants that the delay in execution of the project has not been solely attributed to the appellant or respondent No.1, suffice it to say that the said aspect has been properly dealt with in the award. What has been sought to be argued by the learned counsel for the appellants is on the merits of the award based upon the evidence which would not be the domain of this Court in exercise of its powers under Section 37 of the 1996 Act. It is by now settled proposition of law that the Courts while exercising their powers under Sections 34 and 37 of the 1996 Act cannot undertake an independent assessment on the merits of the award. It cannot sit in an appeal over the arbitral award and the interference on merits is limited to the grounds provided under Section 34 (2) (b) (ii) i.e. if the award is against the public policy of India. Compliance of the principle of natural justice and patent illegality means contravention of the substantive law of India as also the contravention of 1996 Act apart from the terms of a contract which would entitle the Court to

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interfere in the arbitral award. It is only if one or more of the conditions as laid down in terms of Section 34 (2)(b)(ii) of the 1996 Act exist, then and only then interference would be permissible. It may be added here that in case the award is arbitrary, capricious or perverse, shocking the conscience of the Court or when the illegality is not trivial but goes to the root of the matter, interference can be resorted to in such award. Reference in this regard may be made to the judgment of the Hon'ble Supreme Court in the case of Associate Builder Vs. DDA 2015 (3) SCC 49.

13. The Hon'ble Supreme Court in *McDermott International Inc's* case (supra) has held that while interpreting the terms of contract, conduct of the parties and correspondence exchanged would also be relevant factors and it is within the Arbitrator's jurisdiction to consider the same. The Arbitrator, therefore, was fully justified in taking into consideration the aspect of agreement having been entered into between the parties culminating into the recording of the Minutes of Meeting dated 04.01.2008, which document was duly signed by both the parties detailing therein the liability at the end of the appellants and the schedule of payment to be made at the stages of the milestones as were laid down therein. The milestones having been achieved, the claims as has been accepted by the Arbitrator as put-forth by respondent No.1 fall from the said Minutes, which cannot be said to be without any basis or justification nor can it be said to be based on no evidence.

14. As regards the judgment relied upon by the learned counsel for the appellants is concerned i.e. *PSA Sical Terminals Pvt. Ltd.* case (supra), the principles as laid down therein are where interference could be made by

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the Court while exercising powers under Section 34 of the 1996 Act, cannot be questioned. As has been held above, pleas as have been sought to be projected by the appellant are not found to be substantiated by the Commercial Court while passing the impugned order. Even we have not found any illegality or any of the grounds as has been laid down in Section 34 (2)(b)(ii) to be existent, which would entitle interference by this Court. The award being, in our considered view, based upon proper appreciation of the evidence led by the parties supported by the pleadings and the conclusion being not perverse, would not call for any interference of this Court. No patent illegality appearing on the face of the award has been found which could be termed as going to the root of the matter calling for interference.

15. The principles as laid down by the Hon'ble Supreme Court in *PSA Sical Terminals Pvt. Ltd.* case (supra), as cited by the counsel for the appellants, would not be of any help to the appellants. It may be added here that the Appellate Court cannot travel beyond the restrictions given under Section 34. For exercise of powers under Section 37, it cannot exceed the scope of the provisions as contained under Section 34. In such circumstances, where the Commercial Court has confirmed the arbitral award, the Appellate Court, in exercise of its power under Section 37, needs to be extremely cautious and slow to disturb such concurrent findings.

16. The power of judicial review being restrictive and governed under Section 34 of the 1996 Act has to be circumspect and restrictive. Restrain has to be exercised by the Court unless one or more of the conditions are met which could enable the Court to exercise its power of

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interference with an arbitral award.

17. In view of the above, we do not find any ground to interfere with the order dated 15.02.2022 passed by the Commercial Court, Chandigarh as impugned in the present appeal and therefore, dismiss this appeal being devoid of merits.

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In the light of the dismissal of the main appeal, no orders are required to be passed in the present application for stay as the same has been rendered infructuous.

Disposed of as such.

(AUGUSTINE GEORGE MASIH)
JUDGE

20.03.2023
Harish

(SANDEEP MOUDGIL)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No