

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 01, 2023

+ OMP (ENF.) (COMM.) 184/2022

VPS HEALTHCARE PRIVATE LIMITED & ANR.

..... Decree Holders

Through: Mr. Sandeep Sethi, Sr. Adv. with
Ms. Shreya Sethi and Mr. Prateek
Singh, Advs. with Mr. Hafiz Ali,
Authorised Representative

versus

PRABHAT KUMAR SRIVASTAVA & ANR.

..... Judgment Debtors

Through: Mr. Rajshekhar Rao, Sr. Adv. with
Mr. Dinesh Sharma, Ms. Ritika
Jhurani, Mr. Akshay Chitkara and
Mr. Jishnu Bhardwaj, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed by the decree holders under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') seeking enforcement of a consent award dated March 01, 2019 by the Arbitral Tribunal, in arbitration bearing Singapore International Arbitration Centre ('SIAC', for short) Arbitration No. 093/2017.

2. At the outset, I may narrate a brief factual background of the

instant case, as borne out from the petition. Petitioner No. 1 is VPS Healthcare Pvt. Ltd., a part of VPS Healthcare Group and petitioner No. 2 is Medeor Hospitals Pvt. Ltd. (formerly Rockland Hospitals Ltd.), a company wholly owned by petitioner No. 1. The judgment debtors / respondent Nos. 1 and 2 are Mr. Prabhat Kumar Srivastava and Mr. Rishi Kumar Srivastava respectively, who are the erstwhile promoters and shareholders of petitioner No. 2.

3. On August 11, 2015, an agreement was entered into between the erstwhile Rockland Hospitals Limited ('RHL', for short) and Ernst and Young India LLP ('EY', for short), through a Letter of Engagement ('LOE', for short), since RHL had chosen EY to provide professional services with regard to the proposed induction of strategic partners/buyers through sale of significant majority stake in two of its hospitals at Qutub Institutional Area and Dwarka. Thereafter certain disputes arose between the petitioner No. 2 (Medeor/RHL) and EY, resulting in arbitral proceedings before a three-member Arbitral Tribunal constituted as per the rules of the Indian Council of Arbitration ('ICA', for short). Subsequently, arbitration bearing No.AC-2085 commenced before the said Tribunal.

4. On June 29, 2016, petitioner No. 1 and the erstwhile promoters of petitioner No. 2 executed a Share Purchase Agreement by virtue of which, petitioner No. 1 purchased/ acquired 100% shares in the petitioner No. 2 for a consideration of ₹650 crore. The respondents were appointed as the sellers' representative in their individual capacity and on behalf of other shareholders. On execution of the Share Purchase Agreement, petitioner No. 1 stepped into the shoes of

the respondents' / promoters / shareholders / management and became responsible for the management of the day-to-day affairs of the petitioner No. 2 Company. Pursuant to the takeover by petitioner No. 1, certain disputes arose between the parties, which resulted in filing of various complaints/arbitrations/litigations.

5. On August 12, 2017, a notice invoking arbitration was issued, pursuant to which, an Arbitral Tribunal was constituted on October 16, 2017 as per the SIAC Rules. During the pendency of arbitral proceedings, the parties decided to amicably and mutually settle all their disputes and thereby executed a compromise deed dated February 02, 2019. As per the terms of the compromise deed, both the parties are under obligation to withdraw all the complaints/ cases filed before various forums/ courts/ government departments. The respondents are also under the obligation to contest/ defend all the legal matters as recorded in Annexure - I of the compromise deed at its own cost, thereby protecting the interest of the petitioners herein. The Arbitral Tribunal accordingly passed the final consent award dated March 01, 2019 in terms of the said compromise deed dated February 02, 2019. Paragraph 32 (a) of the consent award states as under:-

“From 02.02.2019 (the “Effective Date”), the Respondents undertake and agree to defend/contest at its cost all proceedings detailed in Annexure-I of the Deed of Compromise (as annexed herewith) including legal expenditures on behalf the First Claimant. The First and Second Claimants will provide all necessary assistance in respect of the said proceedings and also furnish a Power of Attorney in favour of the Respondents and its Legal Counsels to defend the said Proceedings. That in the event the said Proceedings culminate in the Forum imposing any

liability on the First Claimant, the Respondents can take all remedies available in law including but not limited to settling a proceeding on behalf of the First Claimant at any juncture and/or filing Appeals/Review, etc. on behalf of the First Claimant till the Highest Court of Appeal, however, the Respondents will ensure that no liability in regard to the said litigation is recovered from the First and Second Claimants by the Forum. The Respondents will keep the First Claimant indemnified of the same and ensure that in case any liability is confirmed by the Highest Court of Appeal, the same will be discharged by the Respondents within a period of 30 days.”

6. The heading to Annexure – I of the compromise deed reads “LIST OF PROCEEDINGS BEING TAKEN OVER BY THIRD-PARTY”, meaning thereby that the respondents have taken over all the litigations mentioned therein. The arbitration bearing AC-2085 for the adjudication of disputes between EY and RHL forms part of Annexure - I of the compromise deed and the consent award and as such, was being handled/ contested on behalf of the petitioner No. 2 by the respondents. A Power of Attorney for the said purpose was also executed in favor of the respondents for contesting and protecting the interest without causing any prejudice to the petitioners herein.

7. On August 17, 2021 in the arbitration bearing No.AC-2085 between the petitioner No. 2 herein and EY, the two co-Arbitrators passed the majority award wherein EY was held to be entitled to ₹10 crore after deduction of retainer fee already paid, along with 9% interest per annum on the awarded amount from the date of the Statement of Claim till the date of actual realisation, and additionally ₹5 lakh as costs of the proceedings. Thereafter, on October 4, 2021, the

Presiding Arbitrator passed a minority award, wherein it was held that EY was not entitled to the success fee as claimed, but only to professional fee to the extent of 50% of the success fee towards consultancy services rendered and additionally ₹5 crore without any interest.

8. Pursuant thereto, the petitioner No.2 issued the Power of Attorney in favour of the respondents for filing an appeal against the majority award and to contest the same on its behalf. Subsequently, a petition under Section 36 of the Act of 1996 bearing O.M.P. (COMM) No.116/2022 was filed, wherein, this Court, on March 4, 2022 issued notice to the respondent while observing that since the majority award is a money award, subject to the petitioner No.2 herein depositing the amount of the arbitral award with this Court within four weeks, the execution of the majority award dated August 17, 2021 would be stayed. The respondent herein filed a review petition bearing No.102/2022 in O.M.P. (COMM.) 116/2022 on behalf of the petitioner No.2 which was dismissed by this Court on April 13, 2022 while stating that in the order dated March 4, 2022 certain conditions were imposed for the grant of stay under Section 36(3) of the Act of 1996 and Order XLI Rule 5(1) of the Code of Civil Procedure, 1908 ('CPC', for short) which grants the court the discretion to stay the execution of a decree for sufficient cause.

9. On March 8, 2022 EY filed a petition bearing O.M.P (ENF.) (COMM.) 81/2022 under Section 36 of the Act of 1996 seeking enforcement of the majority award.

10. On April 25, 2022 when the said petitions were listed, this

Court directed the petitioner No.2 herein not to sell, alienate or encumber the immovable properties mentioned in the amended Schedule-B dated April 22, 2022. Further, the petitioner No.2 was directed to file an affidavit of assets in terms of Order XXI Rule 41 of CPC within two weeks. On May 26, 2022, the petitioner No.2 requested further time to file the affidavit of assets, and the order dated April 25, 2022 was directed to be continued till the next date of hearing.

11. Owing to the respondent's non compliance of the order dated May 26, 2022 passed in OMP (COMM) 116/2022, EY filed the contempt petition bearing CCP(O) No.40/2022 in OMP (ENF) (COMM) 81/2022. On July 25, 2022, the respondents requested the petitioner No.2 to list out the assets so that the same can be filed before this Court. The petitioner No.2 in response to the said email, on July 30, 2022 requested the respondents to extend some security to the satisfaction of this Court in view of the terms of the compromise deed. However, on July 30, 2022 the counsel for the respondents sent an email to the petitioner No.2 stating that this Court is not the highest court of appeal and requested to provide final / provisional balance sheet of petitioner No.2 for the financial years 2020-21, and any major deviation therefrom, based upon which, the affidavit of assets would be drafted.

12. On July 30, 2022 the petitioner No.2 sent an email to the respondent reiterating its stand that it is the responsibility and obligation of the respondent under the compromise deed to take all remedies available in law without causing any prejudice to the

petitioner No.2 and has to deposit the security to the satisfaction of this Court.

13. On August 2, 2022 the counsel for the respondents sent an email to the counsel for the petitioner No.2 stating that the order dated May 26, 2022 does not impose any liability being an interim order, and that the proceedings have not culminated into any final order. It was further stated that the litigations for which the parties agreed to make any statutory pre-deposit were specifically mentioned in Clause (d) of the compromise deed and the pre-deposit arising in the litigation at hand, does not find any mention therein. That apart, it was stated that any adverse action from the petitioners due to non compliance of the directions of this Court would result in termination of the obligation under the compromise deed *qua* the EY litigation.

14. Pursuant thereto, the petitioner No.2 issued a legal notice to the respondents demanding compliance of the following within seven days:

“a. Immediately comply with order dated 04.03.2022 passed by the Hon’ble Delhi High Court in O.M.P. (COMM.) No. 116/2022 titled ‘Medeor Hospital Limited Formerly Rockland Hospitals Limited vs. Ernest and Young LLP’, order dated 25.04.2022 in O.M.P. (COMM.) No. 116/2022 and O.M.P. (I.) (COMM.) No. 75/2022 titled ‘Ernest and Young LLP vs. Medeor Hospital Limited’, order dated 26.05.2022 in O.M.P. (COMM.) No. 116/2022 and order dated 08.07.2022 in C.C.P. (O.) No. 40/2022 in O.M.P. (ENF.) (COMM.) No. 81/2022, by filing the affidavit in terms of Order XXI Rule 41 of the Code of Civil Procedure, 1908 and depositing the arbitral award amount being INR 10 Crores along with 9% interest p.a. on the said amount from the date of the Statement of Claim

till the date of realization and INR 5, 00, 000 as costs of the proceedings.

b. Immediately recall your Emails dated 25.07.2022, 30.07.2022 and 02.08.2022 issued to Our Client.”

The period of seven days mentioned above expired on September 10, 2022 and the respondents have failed to comply with the same.

15. Mr. Sandeep Sethi, learned Senior Counsel appearing for the petitioners stated at the outset that as per the compromise deed dated February 2, 2019 ‘liability’ is defined as “*any Penalty / Fine / Demand / Claim including Interest, which has or has not arisen.*” According to him, a perusal of paragraph 32(a) of the consent award makes it clear that it is the respondents duty and the responsibility that in the event of any liability, whether interim or final is imposed on the petitioner No.2, the respondent will take all remedies available in law on behalf of the petitioner No.2 and ensure that no liability whatsoever, whether interim or final, imposed by any forum for any proceedings is recovered from the petitioners.

16. He stated that the compromise deed provides the following definitions:

“Forum – means any Court/ Court of Appeal/ Authority/ Tribunal/ Statutory Authority/ Ministry/ Judicial/ Quasi-Judicial Authority/ Adjudicatory/ Investigation Officer etc. by whatsoever name called.

Proceedings – means any Suits/ Arbitrations/ Complaints/ Objections/ Hearings/ Appeal/ Proceedings/ References/ Inquiries/ Investigations pending before any Forum by whatsoever name called.

Judgment – means any Order/ Judgment/ Decree/ Award,

which has been passed by a Forum.

Liability – means any Penalty/ Fine/ Demand/ Claim including interest, which has or has not arisen.”

17. His argument is that the said compromise deed was voluntarily, mutually and amicably entered into between the parties to resolve the disputes, and as neither the compromise deed nor the consent award have been challenged either by the petitioners or by the respondents, they have attained finality. Therefore, the respondents are legally bound to abide by the terms of the compromise deed and the consent award. Even the orders of this Court March 4, 2022, April 25, 2022, May 26, 2022 and July 8, 2022, requiring deposit of the awarded amount have not been challenged by either of the parties and have thus attained finality.

18. In view of the above, the email of the respondents dated July 25, 2022 requesting the petitioner No.2 to list out the assets along with the relevant details of the said assets; the email dated July 30, 2022 stating that this Court is not the highest court of appeal and requesting to send across the final/provisional balance sheet of the petitioner No. 2 for the financial year 2020-21 and any major deviation since then till date; and the email dated August 02, 2022 stating that order dated May 26, 2022 does not impose any liability, is an interim order and the proceedings have not culminated into any final order by the highest court of appeal, are incorrect and have no legal basis whatsoever.

19. Mr. Sethi submitted that the contention of the respondents that they are only liable to pay sums imposed by way of a final order passed by the highest court of appeal and not other orders passed by

courts subordinate to the highest court of appeal is not sustainable and is inconsistent with the consent award and compromise deed. He stated that the failure of the respondents to comply with the orders dated March 4, 2022, April 25, 2022 and May 26, 2022 amount to violation of the terms of the consent award and the compromise deed and criminal breach of trust and cheating, which is actionable in law. The respondents fraudulently and dishonestly induced the petitioner No.2 to deliver the list of assets as directed by this Court, which the petitioner No.2 would not have otherwise delivered and as such caused and is further likely to cause damage / harm to the reputation and property of the petitioner No.2, and as such amounts to cheating as per the provisions of the Indian Penal Code, 1860.

20. Mr. Sethi contended that when a contract has been reduced to writing only that writing must be looked at for ascertaining the terms of the agreement between the parties. The terms of the contract ought to be given their plain meaning with regard to the intention of the parties inasmuch as what was intended to be included and what was not. Further, the true construction of a contract depends upon the import of the words used and not upon what the parties choose to say thereafter. The intention of the parties is ascertained from the language used, in light of the surrounding circumstances and the object of the contract. To buttress his submission, he has referred to the judgment of the Supreme Court in the case of *Transmission Corporation of Andhra Pradesh Limited & Ors. v. GMR Vemagiri Power Generation Limited & Anr.*, (2018) 3 SCC 716.

21. He further submitted that courts have to determine the meaning

of the words used in an agreement. If one meaning is more in accord with what the court considers to be the underlying purpose and intent of the contract than the other, then the court must choose the former. In this regard, he has referred to the decision of the Supreme Court in the case of *Bangalore Electricity Supply Company Limited v. ES Solar Power Private Limited and Ors.*, (2021) 6 SCC 718. Further reliance is placed on the judgment *Eureka Forbes Limited vs. Allahabad Bank & Ors.*, (2010) 6 SCC 193, wherein the Supreme Court held that the use of the word ‘any’ as part of the definition of ‘any liability’, shows that the makers of a legislation do not wish to restrict the meaning of the same and as such, it should be given a wider and more liberal meaning, as a narrow interpretation of the same would frustrate the very object of the legislation.

22. Further, he submitted that a contract is a commercial agreement between the parties and must be interpreted so as to give maximum efficacy to the contract. Reliance is placed upon the judgments in *Comed Chemicals Limited v. C.N. Ramchand*, (2009) 1 SCC 91 and *Citibank, N.A. v. TLC Marketing Plc & Anr.*, (2008) 1 SCC 481 to contend that the meaning of a contract must be gathered by approaching it with common sense and it must not be thwarted by a narrow or pedantic interpretation.

23. It is his submission that in view of the above, the respondents herein are required to make good any liability, whether interim or final, which may be imposed by any forum/arising out of any court and in any proceeding, including but not limited to complying with orders dated March 04, 2022 and May 26, 2022 passed by this Court in

O.M.P. (COMM.) No.116/2022 and order dated April 25, 2022 in O.M.P. (COMM.) No. 116/2022 and O.M.P. (I.) (COMM.) No. 75/2022. The respondents are required to file the affidavit in terms of Order XXI Rule 41 of the CPC directed by this Court vide order dated April 25, 2022 in O.M.P. (COMM.) No. 116/2022, O.M.P. (ENF.) (COMM.) No. 81/2022 and O.M.P. (I) (COMM.) No.75/2022 and deposit the arbitral award amount being ₹10 crore along with 9% interest per annum from the date of the Statement of Claim till the date of realisation and ₹5 lakh as costs of the proceedings, as directed by this Court *vide* order dated March 04, 2022 in O.M.P. (COMM.) No.116/2022.

24. Mr. Rajshekhar Rao, learned Senior Counsel appearing for the respondents submitted at the outset that a conjoint and purposeful reading of the consent award would reflect that the present petition is premature and devoid of merit. The parties to the consent award have consciously agreed to a commercial bargain wherein they have classified the ongoing disputes into four different categories with varied treatments as to their obligations under them. The four categories are as under:

Category 1: Disputes that were set out in Annexure-1 of the compromise deed

Category 2: Appeal No. 27/2015 (Rockland Hospitals v. DDA) pending before the Ld. MCD Court, Tiz Hazari District Court.

Category 3: Liability with respect to Lease Rental, Ground Rent, Property Tax, Labour Cess, Enhancement

of Amount of Purchase/Lease, Maintenance Charges, etc.

Category 4: Tax Proceedings mentioned in Annexure 1.

25. He stated that each of these categories of disputes were to be taken forward through different mechanisms and even the treatment of these disputes was also varied as categorically set out in clauses (a), (b), (c) and (d) of paragraph 32 of the compromise deed/ consent award. The reliefs claimed by the petitioners are in relation to the disputes that have arisen between EY and the petitioner No.2 in arbitration. The said disputes falls in Category 1 enumerated above. According to Mr. Rao, the parties had agreed as under for the disputes set out in Category-1:

- 1) The respondents would defend/contest at their cost these proceedings including legal expenditures on behalf of the petitioners.
- 2) The petitioners were to provide all necessary assistance in respect of the said proceedings.
- 3) In the event the proceedings were to culminate in the forum imposing any liability on petitioner No. 2, the respondents were at liberty to take all remedies available in law including but not limited to, settling a proceeding on behalf of petitioner No. 2 and/or filing appeals/review, etc. on behalf of the petitioner No. 2 till the highest court of appeal.
- 4) The respondents would ensure that no liability is recovered from the petitioners by the forum and will keep

petitioner No. 2 indemnified of the same. It was only when such liability was confirmed by the highest court of appeal that it was to be discharged by the respondents within a period of 30 days.

26. The litigation contained in Annexure-1 as mentioned in clause (a) of paragraph 32 of the compromise deed/ consent award encapsulates the word '*forum*'. It is the contention of Mr. Rao that the word '*forum*' means the final court of appeal. In case the final court of appeal confirms any liability on the petitioner, the respondents are liable to make good the same within 30 days. It is only after such confirmation by the highest court of appeal that the liability becomes absolute and that the respondents become duty bound to indemnify the petitioners. He has sought to buttress this argument by drawing a distinction between clause (a) and clause (b) of paragraph 32 of the compromise deed/ consent award. Clause (b) which lists out the dispute between RHL and another party pending before the MCD Court, Tiz Hazari District Court, uses the words "*any forum*". This is to mean that if any liability accrues the petitioner No. 2, pending appeal, at any stage of the litigation, it was to borne by the respondents. Pertinently, the respondents do not have the power to even settle the dispute and has to mandatorily fight it out till the highest court of appeal. This is the reason why the said litigation has not been included in Annexure-1 mentioned in clause (a) of paragraph 32 of the compromise deed/ consent award.

27. He further submitted that the treatment of the litigation in

Category-1 has to be read in contrast with the treatment of litigation in Category-4, i.e., tax proceedings. Litigations for which the parties had *inter se* agreed for a scheme of pre-deposit are specifically mentioned in clause (d) of the compromise deed/ consent award. However, no such pre-deposit was agreed for the EY litigation by the respondents herein which is mentioned at paragraph (a) of the compromise deed/ consent award. Such a deliberate and intentional omission on part of the parties in clause (a) must be construed to give a complete and comprehensive commercial interpretation to the contract. Therefore any requirement of pre-deposit in respect of the litigation provided for in Category-1 is the liability of the petitioner No.2 and that of the respondents.

28. Mr. Rao in support of his submission that a contract must be holistically read to give effect to the words used by the parties has relied upon the judgment of the Supreme Court in ***Khardah Co. Limited v. Raymon and Co. India (P) Ltd., (1963) 3 SCR 183*** wherein it was held as under:

“18. ... We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances...When once a conclusion is reached that

such was the understanding of the parties, there is nothing in law which prevents effect from being given to it. That was the view taken in Virjee Daya & Co. v. Ramakrishna Rice & Oil Mills [AIR 1956 Mad 110] , and that in our opinion is correct.”

29. According to him, even the conduct of the petitioners reflects that the parties understood the contract in the manner suggested by the respondents, i.e., if a liability arises, the same would be indemnified only if the same becomes absolute and is recovered after confirmation from the highest court of appeal. It is for this reason that the petitioners did not approach the court for enforcement after issuance of the majority award or even after the order of injunction was passed against them. His argument is that the proceedings are hopelessly premature at this stage as the respondents have challenged the majority decision passed by the Arbitral Tribunal before this Court. The liability that is sought to be recovered from the petitioners has not been confirmed by the highest court of appeal and as such the petitioners cannot rely upon the consent award at this stage and deviate from the obligations set out in the contract.

30. That apart, Mr. Rao would argue that the present contract is a contract of indemnity and the term indemnity has to be understood in terms of Section 124 and 125 of the Indian Contract Act, 1872 which read as under:

“124. "Contract of indemnity" defined.-A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of

indemnity."

125. Rights of indemnity-holder when sued. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor---

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit."

31. Further he submitted that the compromise deed on the basis of which the consent award was passed set out that the settlement has been arrived at "*on the basis negotiations and discussion with a view to settle all their disputes and claims in finality*". The parties had sought legal counsel with a view to settle the disputes which involved a cumulative sum of ₹400 crore and had agreed on the obligations in view of the legal advice and made the commercial bargain through the compromise deed. Therefore the compromise deed must be read not through the lens of laymen agreeing to a bargain, but through that of a well negotiated and duly considered commercial contract. Reliance in this regard is placed on the judgment of the Supreme Court in ***Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., AIR 1965 SC***

1288 wherein it was held as under:

“.....10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result.....”.

32. Mr. Rao has sought to controvert the reliance placed by Mr. Sethi on the judgment in ***Transmission Corporation of Andhra Pradesh Ltd. (supra)*** by stating that in that case, the Supreme Court has expressly held that the once the parties have clearly enumerated what they intend to agree upon in a contract, they cannot be allowed to go back on their words simply because they consider the enforcement of the same to be now onerous. Paragraph 25 and 26 of the said Judgment reads as under:

“25. In the facts and circumstances of the present case, there can be no manner of doubt that the parties by their conduct and dealings right up to the institution of proceedings by the respondent before the Commission were clear in their understanding that RLNG was not to be included within the term “Natural Gas” under the PPA. The observations in Gedela Satchidananda Murthy [Gedela Satchidananda Murthy v. Commr., Deptt. of Endowments, (2007) 5 SCC 677] are considered apposite in the facts of the present case: (SCC pp. 688-89, para 32)

“32. ... ‘The principle on which Miss Rich relies is that formulated by Lord Denning, M.R. in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [Amalgamated Investment & Property Co. Ltd. v.

Texas Commerce International Bank Ltd., 1982 QB 84 : (1981) 3 WLR 565 (CA)] , QB at p. 121:

“... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it—on the faith of which each of them—to the knowledge of the other—acts and conducts their mutual affairs—they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not—or whether they were mistaken or not—or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.””

(emphasis in original)

26. *A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy...”*

33. He also contested the reliance placed by Mr. Sethi on ***Comed Chemicals Limited (supra)*** by stating that the said decision was rendered in the context of appointment of an arbitrator in a petition under Section 11 of the Act of 1996 and in interpretation of the word ‘commercial’ which does not have any bearing on the facts of this case. Further, the said decision would only apply when the Court is required to give meaning to a contract that has become unworkable or is facing a threat of invalidation. Since the compromise deed can be

interpreted on its own clearly set out terms, no purposeful approach need to be adopted by this Court as there exists no threat to its validity.

34. It is his submission that the petitioners are now attempting to rewrite the agreement between the parties with the *mala fide* intention to impose upon the respondents certain obligations that do not form part of the consent award and to ensue that the respondents are not in a position to defend the ensuing litigation against EY effectively, and as such has sought the dismissal of the petition.

FINDINGS

35. Having heard the learned counsel for the parties and perused the record, this enforcement petition has been filed by the petitioners herein seeking enforcement of the consent award dated March 1, 2019, in view of paragraph 32 (a) of the award, which I have reproduced in paragraph 5 above.

36. According to Mr. Sethi, the filing of the petition was triggered by a separate arbitral award dated August 17, 2021 in arbitration bearing No. AC-2085, in favour of EY, whereby liability has been fastened upon petitioner No.2 herein, i.e., Medeor Hospitals. In substance, it is his case that in view of paragraph 32 (a) of the consent award, it is the respondents herein, who have to satisfy the award dated August 17, 2021.

37. This petition has been opposed by Mr. Rao by stating the following:

- i. That on a reading of the consent award, the present petition is premature and devoid of any merit.
- ii. That it is only when liability is confirmed by the

highest Court of appeal, that the respondents herein would discharge their obligations, that too within a period of 30 days thereafter.

iii. That the term 'Forum' as contemplated in paragraph 32 (a) of the consent award necessarily means the highest Court of appeal.

iv. That a distinction exists between Clause (a) and Clause (b) of paragraph 32.

v. That any liability with regard to Clause (a) imposed by the Forum need to be borne by the petitioner No.2 herein, till the same is confirmed by the highest Court of appeal.

vi. That the agreement is a contract of indemnity and the term indemnity has to be understood in terms of Sections 124 and 125 of the Indian Contract Act.

38. The issue which arises for consideration in view of the rival submissions of Mr. Sethi and Mr. Rao is whether paragraph 32 (a) of the consent award contemplates discharge of liability imposed by the award dated August 17, 2021, by the respondents. In fact, both Mr. Sethi and Mr. Rao have relied upon paragraph 32 (a) in support of their respective contentions. From a perusal of paragraph 32(a), the following position emerges:

- (i) The respondents agreed to defend / contest at its cost all proceedings against the petitioner No.2 herein as detailed in Annexure-I of the deed of compromise.
- (ii) In the event the proceedings culminate in the Forum

imposing any liability on petitioner No.2, the respondents shall take all remedies available in law, including but not limited to settling the proceedings on behalf of petitioner no.2 by filing appeal/review till the highest Court of appeal.

- (iii) The respondents shall ensure that no liability in that regard is recovered from the petitioners.
- (iv) The respondents shall keep the petitioner no.2 indemnified of the same and ensure that in case the liability is confirmed by the highest Court of appeal, the same will be discharged by the respondents within 30 days.

39. The consent award being pursuant to an agreement reached by the parties, and the same having attained finality, is binding on the parties. In order to adjudicate the present dispute, it is now necessary to ascertain, the purport / intent of the parties, while entering into the compromise deed resulting in the consent award.

40. The submission of Mr. Sethi in substance is, the respondents must discharge the liability as per the award dated August 17, 2021. According to him in no case can the liability in that regard be recovered from the petitioners.

41. On the other hand, the plea of Mr. Rao is that the liability, if any, shall be discharged by the respondents only when the same is confirmed by the highest Court of appeal.

42. It is the submission of Mr. Rao that 'Forum' means the 'highest Court of appeal', inasmuch as the compromise deed defines

‘Forum’ to mean “*any Court / Court of Appeal / Authority / Tribunal / Statutory Authority / Ministry / Judicial / Quasi-Judicial Authority / Adjudicatory / Investigating Officer etc. by whatsoever name called*”. Having said that, the reference to Forum in the former part of paragraph 32 (a) shall mean the arbitral tribunal in the context of this case. This I say so as the said reference is in the context of a Forum imposing a liability on the petitioner No.2 herein, which was done by the arbitral tribunal through arbitral award dated August 17, 2021. Though, the compromise deed defined Forum to include Court of appeal also, paragraph 32 of the award dated March 1, 2019 brings about a distinction between the forum imposing the liability and the highest Court of appeal by stating that the respondents are entitled to challenge the imposition of liability by the Forum till the highest Court of appeal. Therefore, the contention of Mr. Rao that the term Forum has to necessarily mean the highest Court of appeal is devoid of any merit.

43. That being said, the argument of Mr. Rao is that the respondents become liable to discharge the liability only when the same is confirmed by the highest Court of appeal. Per contra the argument of Mr. Sethi is that as paragraph 32 (a) states that the respondents shall ensure that no liability falls upon the petitioner No.2, it becomes onerous for the respondents to discharge the liability as soon as the same is imposed by the Forum.

44. Since the counsel for the parties have sought to interpret paragraph 32 (a) in the manner it suits them, this Court is of the view that a purposeful interpretation of paragraph 32 (a) would be necessary

to determine whether the petitioners can seek the enforcement of the consent award. In this regard, Mr. Sethi had contended that when a contract has been reduced to writing, only the writing must be looked at for ascertaining the terms of the agreement between the parties. The terms of the contract must be given their plain meaning with regard to the intention of the parties inasmuch as what was intended to be included and what was not. He has relied upon the Judgment of the Supreme Court in the case of *Transmission Corporation of Andhra Pradesh Ltd. and Ors. (supra)*. There cannot be any dispute to the proposition of law laid down by the Supreme Court in the said Judgment. Similarly, Mr. Rao has also relied upon the Judgment of the Supreme Court in the case of *Central Bank of India (supra)* to contend that the compromise deed must be read not through lens of a layman agreeing to a bargain, but through that of well negotiated and duly considered commercial contract. In fact he has also by referring to *Transmission Corporation of Andhra Pradesh Ltd. and Ors. (supra)* stated that the Supreme Court expressly held that once the parties have clearly enumerated what they intended to agree upon in a contract, they cannot be allowed to go back of their words, simply because, they consider the enforcement to be now onerous. In any case, it is a settled position of law that the contract has to be interpreted through the words used therein. The guiding rule is to ascertain the natural, ordinary and sensible meaning of the language through which the parties have expressed themselves, unless such meaning leads to absurdity. In this regard, I may refer to the Judgment of the Supreme Court in the case of *Bangalore Electricity Supply Co. Ltd. (supra)*

wherein it was stated as under:

“16. Before embarking on the exercise of interpretation of the agreement it is necessary to take stock of the well-settled canons of construction of contracts. Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] summarised the broad principles of interpretation of contract as follows : (WLR pp. 912-13)

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax : see Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd., 1997 AC 749 : (1997) 2 WLR 945 (HL)]*

(5) *The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [Antaios Compania Naviera S.A. v. Salen Rederierna A.B., 1985 AC 191 : (1984) 3 WLR 592 (HL)] , AC at p. 201 : (AC p. 201)*

‘... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.’”

17. *The duty of the court is not to delve deep into the*

intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions (Kamla Devi v. Takhatmal Land [Kamla Devi v. Takhatmal Land, (1964) 2 SCR 152 : AIR 1964 SC 859]). In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings. In those circumstances, the court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the court considers to be the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose the former or rather than the latter. Ashville Investments Ltd. v. Elmer Contractors Ltd. [Ashville Investments Ltd. v. Elmer Contractors Ltd., 1989 QB 488 : (1988) 3 WLR 867 : (1988) 2 All ER 577 (CA)] The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. Bank of India v. K. Mohandas [Bank of India v. K. Mohandas, (2009) 5 SCC 313 : (2009) 2 SCC (Civ) 524 : (2009) 2 SCC (L&S) 32] . Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Bihar SEB v. Green Rubber Industries [Bihar SEB v. Green Rubber Industries, (1990) 1 SCC 731].”

45. Having noted the position of law, on perusal of paragraph 32 (a) of the consent award, it emerges that the respondents have agreed to indemnify the petitioners to ensure that no liability is recovered from the petitioners herein. But at the same time, the paragraph also

stipulates that the respondents shall discharge any liability only after it is confirmed by the highest Court of appeal. In view of this ambiguity, it is necessary for this Court to interpret paragraph 32(a) through the prism of Sections 124 and 125 of the Contract Act, of which reference has been made by Mr. Rao. Section 124 defines a contract of indemnity to be one where a party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. Section 125 stipulates the rights of an indemnity holder when sued.

46. A reading of Section 125 makes it clear that the indemnity holder is conferred with the power to recover from the indemnifier, damages that the indemnity holder is compelled to pay in any suit to which the promise to indemnify applies; all costs the indemnity holder is to pay in any suit and all sums which he may have paid under the terms of a compromise of any suit, provided he has acted prudently, as he would have in the absence of contract of indemnity and if he does not act in contraventions to the directions of the indemnifier, or if the indemnifier authorized him to bring, defend or compromise such suits.

47. A purposeful reading of Section 125 along with contractual terms would reveal that the petitioner No.2 would be entitled to recover from the respondents, any amount it is compelled to pay pursuant to the award dated August 17, 2021.

48. This is not to say that in all contracts of indemnity, the indemnifier becomes liable to indemnify / make good the loss, only after the liability imposed is satisfied by the indemnity holder. It is a law well settled that indemnifier becomes liable to make good any loss

suffered by indemnity holder, as soon as, such loss / liability accrues. However, in the instant case, the contractual stipulation makes it clear as noon day that the respondents (indemnifier) shall discharge the liability cast upon the petitioner No.2 (indemnity holder) only after such liability is confirmed by the highest court of appeal.

49. Mr. Sethi had laid much stress on the stipulation “*the Third Party will ensure that no liability in regard to the said litigation is recovered from the First or the Second Party by the Forum*”, to contend that only the respondents are liable to satisfy the liability imposed by the award dated August 17, 2021 even at the present stage. This contention though, looks appealing on first blush, but it fails to gain traction moving forward, for the reason that the very next word of paragraph 32 (a) stipulates that the respondents shall keep the petitioners indemnify of such liability and would discharge the liability within 30 days after confirmation of the same by the highest Court of appeal.

50. A harmonious construction of all the stipulations contained in paragraph 32(a) reveals that the ultimate intention of the parties while entering into the compromise deed is to ensure that the respondents keep the petitioners indemnify of any damage / loss / liability cashed upon them in the litigations enumerated in Annexure-I of the compromise deed. If that be so, keeping in view the position of law, any sum / costs that the petitioner No.2 herein may be compelled to pay with respect to the litigation mentioned in Annexure-I of the compromise deed including the litigation between the petitioner No.2 and EY can be recovered from the respondents, after the liability is

confirmed by the highest Court of appeal.

51. No doubt, the award dated August 17, 2021, has imposed a liability on the petitioner No.2, but it shall be entitled to recover the same from the respondents by virtue of the consent award dated March 1, 2019, once the liability so imposed has been confirmed by the highest Court of appeal. However, it is necessary to state at this juncture, that no such confirmation has taken place.

52. It is the submission of Mr. Sethi that in view of the interim order dated March 04, 2022 passed in the petition under Section 34 of the Act of 1996 bearing OMP (COMM.) 116/2022, directing deposit of amount of the arbitral award, the respondents herein are required to deposit the same in the Court. This submission has been contested by Mr. Rao, on the grounds which I have noted in paragraph 27 above. At the outset, I may state that I have rejected the petition under Section 34 wherein order dated March 04, 2022 was passed. Even otherwise, Mr. Rao is right in contending that insofar as paragraph 32(d) is concerned, the same is concerned with the litigation in Category 4 i.e. tax proceedings. In any case, paragraph 32(d) also clearly states that it is only in case deposit is a pre-requisite to the filing / hearing of any of the appeals, the same is required to be deposited with the Income Tax Department / Forum. Even the words *“the First Claimant will allow such deposit / adjustment to be made from the TDS recoverable by the First Claimant from the Income Tax Department.”* demonstrate that the same is in the context the litigation relatable to taxes, which is not the case herein. That apart, I have already interpreted paragraph 32 of the award above. Hence, this plea of Mr. Sethi is liable to be rejected.

53. In view of the above conclusion, I am of the view that this petition is liable to be closed at this stage. Surely, the petitioners shall be at liberty to seek enforcement of the award at a future date if the cause accrues. No costs.

V. KAMESWAR RAO, J

MAY 01, 2023/aky/jg

