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O.S.A (CAD) No.143 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **10.04.2024**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

and

THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A (CAD) No.143 of 2021

&

C.M.P.No.20869 of 2021

in

O.S.A (CAD) No.143 of 2021

Peepal Capital LLC

62, ABM Avenue

Nandanam, Chennai – 600 018

(Represented by its Vice President –

Legal and Authorized Signatory Mr.Kiran Gupta)

... Appellant

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 – 600 028

.. Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Section 37(1)(B) of the Arbitration and Conciliation Act, 1996 and Section 13 of Commercial Courts Act, 2015 to set aside the judgment and decretal order dated 28.07.2021 in O.P No.36 of 2020 and consequently allow this appeal.

For Appellant : Mr.V.V.Sivakumar



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For Respondent : Mr.Gautam S. Raman

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned 'Original Side Appeal' ['OSA' for the sake of brevity] is an intra-court appeal which has been filed in this 'Commercial Appellate Division' ['CAD' for the sake of brevity] on 22.11.2021 assailing an 'order dated 28.07.2021 made in O.P.No.36 of 2020 and A.No.248 of 2020 in O.P.No.36 of 2020' [hereinafter 'impugned order' for the sake of convenience and clarity]. To be noted, this 28.07.2021 order has been made by a Hon'ble single Judge of this Court sitting as a Section 34 Court. This 28.07.2021 order is a common order in O.P.No.36 of 2020 and O.P.No.318 of 2021. O.P.No.318 of 2021 has been preferred by claimant before the 'Arbitral Tribunal' ['AT' for the sake of brevity] and it is confined to success fee vide an 'agreement dated 22.06.2016' [hereinafter 'said agreement' which is Ex.C2 before AT] and the same not being awarded. In and by the 28.07.2021 order, which is a common order, Section 34 Court dismissed both the OPs i.e., OP by the respondent before the AT as well as the OP (O.P.No.318 of 2021) by the claimant. Along with dismissal of the OP by the respondent before AT



(O.P.No.36 of 2020), the application thereat being A.No.248 of 2020 also perished. Respondent before AT has preferred the captioned intra-court appeal (O.S.A) before this CAD. Claimant before AT has not preferred any appeal. This is confirmed by counsel on record for the claimant before AT. This submission is recorded.

2. To be noted, the lone respondent before AT is 'Peepul Capital LLC' and the same shall be referred to as 'Peepul' for the sake of brevity and convenience. It is also necessary to record that Vimura is a LLP and it goes by the name Vimura Investments LLP. As the legal drill on hand is one under Section 37 of The Arbitration and Conciliation Act (Act No.26 of 1996) [hereinafter 'A and C Act' for the sake of convenience and clarity], short facts will suffice.

3. Short facts are that Peepul was a Manager qua Private Equity Funds and it required expert advice to manage its investments in a Singapore Company i.e., Loyalty Partners Singapore Pte Ltd., which is a portfolio Company managed by another LLC Peepul Capital Fund II LLC. The Singapore Company was a subsidiary of another German Company but it may not be necessary to dilate further on facts as the entire claim is predicated on Ex.C2 and the services thereat; that it will suffice to say that the arbitration agreement between Peepul and Vimura



is in the form of a clause in the agreement dated 22.06.2016 and that is

Clause 7; that there is no dispute about the existence or validity of the arbitration agreement; that Vimura, after exchange of correspondence, triggered the arbitration clause and made a claim vide claim statement dated 12.06.2019 claiming disclosure of actual value paid by American Express, which made an offer prior in point of time and also sought for a direction to Peepul to pay outstanding success fee vide said agreement i.e., agreement dated 22.06.2016; that a learned designated Senior counsel of this Bar was a sole Arbitrator/AT; that AT entered upon reference and after full contest, AT made an 'award dated 06.11.2019' [hereinafter 'said award' for the sake of convenience] *inter alia* directing Peepul to pay to Vimura a sum of 13,800 USD towards retainer fee for an extended period of three months qua said agreement besides a sum of 6,00,000.00 INR towards costs; that both Vimura and Peepul filed 34 petitions, details of which have been alluded to supra; that as regards 34 petition filed by Vimura as there is no intra-court appeal, we are not going into that aspect but we deem it appropriate to mention that a limited challenge in the light of ***Project Director NHAI Vs.M.Hakeem*** reported in ***(2021) 9 SCC 1*** and reference to a Larger Bench whether such a limited plea {which tantamounts to a modification plea} is a *res*



integra question; that however we leave it at this as there is no intra-court appeal by Vimura; that we would now embark upon the legal drill under Section 37 qua dismissal of the 34 petition by Peepul.

4. Mr.V.V.Sivakumar, learned counsel for Peepul, which is the protagonist of the captioned OSA submitted that the appeal is predicated on one point and that one point is grant of retainer fee till December 2016 though it has not been claimed. Mr.V.V.Sivakumar, learned counsel furthering his submission in this direction submitted that it is nobody's case that the parties resorted to sub-section (2) of Section 28 of A and C Act. To be noted, there is no dispute or contestation on this point. Learned counsel also submitted that this ground was raised before 34 Court under two pigeon holes under Section 34 of A and C Act and they are Section 34 (2A) [patent illegality] and Section 34(2)(a)(iv) to say that the said award deals with the dispute not contemplated by or not falling within the terms of submission to arbitration and that it contains decisions on matters beyond the scope of submission to arbitration.

5. In response to the aforesaid argument, learned counsel for Vimura drew our attention to the oft-quoted ***Ssangyong*** case law [***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019) 15 SCC 131],



more particularly paragraph 59 thereat and submitted that an award will not be subject to annulment when the AT grants reliefs that is different from what a party requested if it is subsumed within the relief that the party requested.

6. Before we go into this aspect of the matter, we deem it appropriate to record the manner in which the aforementioned point was canvassed before Section 34 Court and how the Section 34 Court dealt with this aspect of the matter. This is contained in paragraph 15 of the impugned order and the same reads as follows:

'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.



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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.

(underlining made by this Court for ease of reference)



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7. The reason as to why the Section 34 Court has come to the conclusion that AT cannot be faulted for granting retainer fee for the period till December 2016 (though not claimed) is not far to seek as that has been articulated with clarity and specificity by the AT in Paragraph 24, which reads as follows:

'24.Mr.Rajan as noted above had been actively involved in the negotiations with Amex from 22nd September 2016, when the 3 months period as set out in the agreement ended, till 27th December 2016 when Mr.Beinhacker informed him that the would speak to him at some point in January 2017. Although in paragraph 10 of the Statement of Defence, the respondent has stated that the attempts of the claimant failed in the months of October to December 2016 and did not yield any positive results, Amex did increase its offer from USD 44 Million to USD 95 Million as evidenced by Beinhacker's mail dt 21.11.2016 (Ex.C-10 series). In the said mail it was mentioned that although the valuation methodology suggested a lower number, Amex had offered USD 55 Million to facilitate speedy conclusion to their discussion and that was the highest they would be willing to consider. Paragraph 10 of the Statement of Defence constitutes an admission on the part of the respondent that the claimant was involved in negotiations for a further 3 months after 21st September 2016, the date when the 3 months period specified in the agreement ended. The significant increase in offer of Amex to



USD 55 Million happened in this period. It is evidence that the parties extended the period of the agreement, Ex.C2 by another three months. In the absence of any agreement to the contrary, it should have been on the same terms with respect to the fee. The claimant would thus be entitled to retainer fee for a further period of three months at the rate of USD 4600 per month. The respondent is liable to pay the claimant the sum of USD 13,800 for the services rendered for three months from 22nd September 2016. However, for the reasons noted above, the claimant will not be entitled to claim the success fee specified in the Annexure to the agreement, Ex.C2. The issues are decided accordingly.'

*(Underlining made by this Court
for ease of reference)*

8. A careful perusal of 'SoD' ['Statement of Defence'] brings to light that it may not just be paragraph 10 but it is paragraphs 11 and 12 of SoD also as pointed out by learned counsel for Vimura. Paragraphs 10 to 12 of SoD read as follows:

'10. All the averments made at Paragraphs 10 to 14 of the Statement of Claim are denied as false, misconceived and self-serving. It is specifically denied that pursuant to the Claimant's services/efforts that Amex increased their offer from USD 45 million to USD 55 million and the claimant is put to strict proof of the same. It is submitted that the transaction with Amex did not conclude favorably during the subsistence of the said Agreement. Thereafter, the efforts put forth by the Claimant



between October 2016 and December 2016 as compared to the efforts put in by the Respondent's officials was virtually non-existent as the Claimant was engaged with another transaction with the Respondent ('Komli transaction), pursuant to which, the Claimant's did not actively participate either to revive the negotiation with Amex. Any attempts made by the Claimant in pursuing his discussion with Amex also failed during the month of October to December 2016 and did not yield any positive results. Further, it is evident from the email correspondences exchanged between the parties, and filed as Annexures by the Claimant, that the same were more particularly in the nature of internal discussions / enquiry', as no progress could be made to conclude the transaction with Amex and not a negotiation / revival of negotiation with Amex as falsely portrayed by the Claimant.

11. It is submitted that the said Agreement was not extended between the parties and in fact, the Claimant left the negotiation as it stood at the relevant point in time and took no further part / effort to negotiate or close the transaction between the parties. The fact that the Claimant is not aware of the transaction details between the Respondent and Amex made it more evident that the participation of the Claimant was virtually non-existent and the entire transaction closure / documentation was done by the Respondent with Amex without any guidance / participation from the Claimant whatsoever.

12. The Respondent reiterates that the Agreement stood determined by efflux of time after three months and the



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consultancy fee for the said three months amounting to USD 13,800 has been paid to the Claimant. As regards the success fee claimed by the Claimant, it is submitted that admittedly, a success fee is a compensation structure paid for successfully closing a transaction i.e. conclusion of Phase II between all the parties concerned. The transaction in issue was completed by the respondent on its own



strength, without any assistance lent by the Claimant, and the same is also evident from the Claimant's long and conspicuous silence in not even making any effort in contacting the Respondent and/or Amex. The deal being admittedly finalized pursuant to the efforts and negotiations put in by the Respondent, would lead further credence to the Respondent's contention that legally untenable claims are belatedly being set-up by the Claimant. Further, the Claimant has failed to bring on record and the claim is also bereft of any details as to what kinds of service/assistance was lent by the Claimant in achieving the successful closure of the transaction for which the success fee is being claimed by the Claimant. Also, the sale consideration was crystallized pursuant to negotiation undertaken single handedly by the Respondent, pursuant to which, the terms and conditions for sale/exit was also agreed upon between the Respondent and Amex. Even at this stage, no role/assistance whatsoever was rendered by the Claimant so as to claim the alleged success fee under the said Agreement. It is therefore submitted that the Respondent is under no obligation to pay the Claimant the success fee and the Claimant's claim is also belated, which is evident from the fact no invoice had been raised by the Claimant as regards the alleged success fee until the rejoinder notice was issued by the Claimant on 05.02.2018.'

9. This brings us back to the ground on which the challenge to said award was made.



10. As already alluded to supra, learned counsel for Peepul submitted that grounds were raised under Section 34(2A) and 34(2)(a)(iv) of A and C Act. As regards 34(2)(a)(iv) of A and C Act, the same in our considered view is a non-starter as it cannot be gainsaid that said award contains decisions which are beyond the scope of submission to arbitration. The reason is, the trigger notice is dated 01.12.2017. The trigger notice and response to the same being a reply notice dated 23.12.2017 makes it clear that said award is certainly not beyond the scope of what was submitted to arbitration by AT. The trigger notice dated 01.12.2017 and the reply dated 23.12.2017 were before the AT as Exs.C13 and C14.

11. Learned single Judge in the impugned order has referred to *Associated Engineering* case [*Associated Engineering Co. -Vs- Government Of Andra Pradesh* reported in *1991 4 SCC 93*], which turns on Section 30 settlement and the remit of AT in that regard. Considering the language in which Section 30 is couched, this approach in the given facts and circumstances of the case on hand cannot be found fault with. As regards the other head, namely, Section 34(2A) of A and C Act, it would be appropriate to refer to the oft-quoted *Associate Builders* case [*Associate Builders Vs. Delhi Development Authority* reported in



(2015) 3 SCC 49] which dealt with Section 34(2)(b)(ii) of A and C Act

(public policy) and carved out three facets, namely judicial approach, irrationality / perversity and 'NJP' ('Principles of Natural Justice').

Associate Builders case also set out tests for the same. As regards, judicial approach, it was fidelity of judicial approach, as regards irrationality / perversity, it was the Wednesbury principle of reasonableness and as regards NJP, it was the age old *audi alteram partem*. In *Ssangyong* case law, taking note of the legislative trajectory and amendments, it was made clear that judicial approach is not available now as a facet of Section 34(2)(b)(ii) as a review of an award on merits is impermissible. As regards NJP, it was made clear that it is available but that does not come into play in the case on hand. As regards irrationality / perversity, it was made clear that the same will not be available as a ground under public policy vide 34(2)(b)(ii) of A and C Act but will be available as a ground of patent illegality under Section 34(2A) of A and C Act and learned counsel for appellant very fairly submitted that Section 34 challenge was predicated on Section 34(2A) but 34(2A) patent illegality comes with two riders. One rider is, appreciation of evidence is forbidden and an award cannot be set aside merely on the ground of erroneous application of law. A mere erroneous application of law



therefore passes muster under Section 34 (2A) of A and C Act. In the case on hand, even on a demurrer, if the argument is sustained, at the highest, it would be a mere erroneous application of law. To be noted, at the risk of repetition, this is on a demurrer and at the highest.

12. This brings us back to aforementioned paragraph 59 of ***Ssangyong*** case law, which reads as follows:

'59. Similarly, Gary Born (supra) states:

“There are a number of recurrent grounds for claiming that an Arbitral Tribunal has exceeded its authority. These generally involve claims of either extra petita (the tribunal went beyond the limits of its authority) or infra petita (the tribunal failed to fulfil its mandate by not exercising authority it was granted).

[a] Awards Ruling on Matters Outside Scope of Parties' Submissions

Article 34(2)(a)(iii) permits annulment of awards where the arbitrators “Rule (d) on issues not presented to [them] by the parties” — so-called “extra petita” or “ultra petita” [Allen v. Houna [Allen v. Houna, 2012 EWCA Civ 609 (CA)]] As with other grounds for annulment, most courts are reluctant to accept claims that the arbitrators exceeded the scope of the parties' submissions [see e.g. Stark v. Sandberg, Phoenix & von Gontard PC [Stark v. Sandberg, Phoenix & von Gontard PC, 381 F 3d 793 (8th Cir 2004)] , F 3d at p. 800].



One of the clearest examples of an excess of authority under Article 34(2)(a)(iii) and parallel provisions of other national arbitration legislation is a tribunal's award of relief that neither party requested. A French appellate decision explained the rationale for these limits on the arbitrators' authority (which, in this respect, are more rigorous under French law than some other national arbitration regimes) as follows [Judgment of 30-6-2005, Pilliod v.Econosto[Pilliodv.Econosto, 2006 Rev Arb 687 (Paris Cour d'appel)] , Rev Arb at p. 688]:

“The fact that the contract was governed by French law does not allow the arbitrators to award interest pursuant to Article 1153(1) of the Civil Code on the sole ground that this is permitted under that provision, even in the absence of a request of the parties. There is a difference between the role of a State court and that of an arbitrator, whose jurisdiction is based on the parties' consent and who must therefore preserve the consensual character of the proceedings by consulting the parties on their intention as to the mission of the tribunal.”

Similarly, another court annulled an award on the grounds that the relief ordered by the tribunal “exceeded the arbitrators' powers because it was not sought by either party, and was completely irrational because it wrote material terms of the contract out of existence” [PMA Capital Inc. Co. v. Platinum Underwriters Bermuda Ltd. [PMA Capital Inc. Co. v. Platinum Underwriters Bermuda Ltd., 400 F Appx 654 (3d Cir 2010)] J.

Nonetheless, an award will not be subject to annulment where the arbitrators grant relief that, while different from what a party requested, is subsumed within



relief that the party requested (most obviously, a lower quantum of damages than that requested by the claimant). More generally, courts also accord arbitrators substantial discretion in fashioning remedies, including granting relief that neither party has expressly requested [see e.g. Harper Insurance Ltd. v. Century Indemnity Co. [Harper Insurance Ltd. v. Century Indemnity Co., 819 F Supp 2d 270 (SDNY 2011)] , F Supp 2d at p. 277]. Although categorical rules are impossible to formulate, the decisive issue appears to be whether the relief granted by the arbitrators was subsumed within or reasonably related to that requested by the parties.

Another example of an excess of authority under Article 34(2)(a)(iii) and parallel provisions of other arbitration statutes involves awards deciding issues or disputes that the parties have not submitted to the Arbitral Tribunal [see e.g. Emilio v. Sprint Spectrum LP [Emilio v. Sprint Spectrum LP, 2013 WL 203361 (2d Cir 2009)]]. A tribunal exceeds its authority by ruling on an issue not presented by the parties in the arbitration even if the issue or dispute that it addresses is within the scope of the parties' arbitration agreement. As one court explained: "Arbitrators have the authority to decide only those issues actually submitted by the parties" [AGCO Corpn. v. Anglin [AGCO Corpn. v. Anglin, 216 F 3d 589 (7th Cir 2000)] , F 3d at p. 593].

Doubts about the scope of the parties' submissions are resolved in most legal systems in favour of encompassing matters decided by the arbitrators. Put differently, a



considerable measure of judicial deference is accorded to the arbitrators' interpretation of the scope of their mandate under the parties' submissions [see e.g. Downer v.Siegel[Downer v.Siegel, 489 F 3d 623 (5th Cir 2007)] , F 3d at p. 627]. In the words of one court, “[w]e will not over-scrutinize the panel's language and leap to the conclusion that it exceeded its power in formulating the award” [Certain Underwriters at Lloyd's London v. BCS Insurance Co. [Certain Underwriters at Lloyd's London v. BCS Insurance Co., 239 F Supp 2d 812 (ND Ill 2003)] , F Supp 2d at p. 817].

Some annulment courts have adopted unduly formalistic approaches to the question whether a particular issue or argument was submitted to the tribunal. For example, one recent Singaporean decision held that issues not raised in the parties' “pleadings” had not been submitted to the tribunal, notwithstanding the fact that these issues had been raised in argument during the arbitration [seePT Prima International Development v. Kempinski Hotels SA [PT Prima International Development v. Kempinski Hotels SA, 2012 SGCA 35]]. The better view is not to look to local rules of civil procedure or litigation practices in determining whether an issue was presented to the arbitrators; the proper inquiry is instead a pragmatic one into whether the parties and tribunal had an opportunity to consider and submit evidence and argument on a particular issue.”

*(at pp. 3289-93)
(emphasis supplied)'*



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13. We find that in the light of Paragraph 24 of said award which in turn construes paragraphs 10, 11 and 12 of the SoD as admission, we find that paragraph 59 of *Ssangyong* case law would apply in all force to the case on hand and therefore this is not a case for annulment of said award.

14. In this regard, we also remind ourselves that if the view taken by an AT is a plausible view, a Section 34 Court will not intercede or interfere. In the case on hand, AT proceeding on the basis that paragraphs 10 to 12 of SoD is an admission, the view taken by the AT is clearly a plausible view and therefore, Section 34 Court rightly did not intercede or interfere qua the said award. This Section 37 Court therefore, finds no ground to interfere qua the impugned order.

15. Ergo, in the light of discussion and dispositive reasoning thus far, the sequitur is, captioned OSA fails and the same is dismissed. Consequently, captioned CMP also perishes and the same is also dismissed. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)
10.04.2024

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