

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Neutral Citation No. 2024:PHHC:003777 -DB

FAO-CARB-1-2024 (O&M)

Decided on : 09.01.2024

Anshul Siroya

....Appellant(s)

Versus

Phillips India Ltd. & others

.... Respondent(s)

**CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MS.JUSTICE LAPITA BANERJI**

Present: Mr.Sumit Ahula, Advocate
and Mr.B.K.Kaundal, Advocate, for the appellant(s).

G.S. Sandhawalia, J. :-

1. Challenge in the present appeal by one of the partners of M/s A.A. Associates-respondent No.2 herein is to the order dated 13.10.2023 passed by the Commercial Court, Gurugram wherein the award passed on 27.04.2017 (Annexure A-1) in favour of respondent No.1-claimant has been upheld while dismissing the petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (for short, the 'Act').

2. The Arbitrator had awarded a sum of Rs.1,95,25,885/- against the initial claim of Rs.4,91,61,916.03. The contractual rate of interest was 16.5% per annum from 01.03.2015 was also allowed. The claimant was also held entitled to encash and appropriate the fixed deposit of the amount of Rs.2,75,00,000/- which was received pursuant to the sale of the equipment along with interest which had accrued thereon apart from the amount of Rs.5,55,000/- towards cost of arbitration which were never paid by the appellant or the partnership concern. Additional cost of Rs.30,000/- was also imposed upon the appellant during the proceedings which were also granted in favour of respondent No.1 while pronouncing the award. The reasoning given by the Commercial Court to uphold the award was that the Court had limited supervisory jurisdiction to interfere with the

award of the Arbitral Tribunal which it had found to be a plausible one

and there was no material irregularity or illegality or perversity in the award which could shock the conscious of the Court to interfere in the same.

3. The argument that 3 machines had not been supplied by the respondent-claimant and that there was misreading of the documents was rejected by noticing that the appellant and the partnership concern was required to pay a sum of Rs.66,45,000/- as down-payment out of the total consideration but only a part-payment had been made. Therefore if the 2 machines had not been supplied but the main CT Machine was supplied and therefore, having not paid the full advance amount, the said defence was not tenable while referring to various clauses of the Hypothecation and Deferred Payment Agreement dated 27.09.2012 (Annexure A-3). It was noticed that failure to make payment entitled the claimant to take possession of the hypothecated equipments and stop the support and maintenance service/equipment and therefore, the conditions were applicable if the claimant had defaulted in making the payment. It was also noticed that there was default in making the deferred payments and therefore, the claimant-company was within its right not to provide services in the absence of the full margin money and there was no such liability of the claimant to supply the other 2 machines. The factum of the appellant residing abroad and having terminated the partnership with M/s A.A. Associates was kept in mind that he had only joined the proceedings before the Arbitrator and filed his statement of defence and also contested the proceedings and therefore could not now hold out that any prejudice had been caused to him.

4. The dismissal of the counter-claim by the Arbitrator and the fact that the Arbitrator had been appointed at the behest of the claimants

was also rejected by noticing that the other persons had not come forward to examine themselves as witnesses and only the appellant/partner had challenged the impugned award which had held the claimants to claim the amount jointly and severally from M/s A.A. Associates and others. The judgment in **Perkins Eastman Architects DPC & another Vs. HSCC (India) Ltd., 2020 AIR (SC) 59** was distinguished on the ground that it was delivered on 26.11.2019 after the award of the Arbitrator on 27.04.2017 and no objection had ever been raised regarding the appointment of the Arbitrator and only time had been sought for payment. The objection had not been raised by the partnership firm and the judgment relied upon was thus distinguished.

5. It is not disputed that the purchase order dated 22.09.2012 had been given to the claimant-company for purchase of 128 slice CT machine, color doppler and PACS, the cost of which were Rs.4,43,00,000/- which was in pursuance of the quotation given by the company on 26.08.2012. The hypothecation and the deferred payment agreement was then entered into dated 27.09.2012 wherein the above-said total consideration had been mentioned and Rs.66,45,000/- was to be advanced to the company. The balance amount of Rs.3,76,55,000/- was payable along with 13.25% interest plus 3% for defaults. The partnership firm apparently paid only Rs.37,00,000/- towards the advance amount and resultantly, communication was sent to pay the balance amount and indications were also given for appointment of the Sole Arbitrator. The matter having been failed to be resolved, notice dated 31.07.2014 was issued recalling the deferred payment facility and asking the persons to pay the outstanding amount along with interest. The arbitral proceedings were then initiated on 30.10.2014 and an application was also filed under

Section 9 of the Act for re-possession of the equipments wherein the Appropriate Court at Gurugram had passed the order on 08.09.2014 and the equipments were re-posessed from Jodhpur on 24.02.2015. Permission was taken from the Arbitrator to sell the equipments vide order dated 11.04.2015 and directions had been issued to keep the money in Fixed Deposit Receipt. Resultantly, the sale price of Rs.2,66,00,000/- along with interest had been allowed to be adjusted which was to the tune of Rs.2,75,00,000/-. In such circumstances, the claim has been allowed of Rs.1,95,25,885/- along with interest @ 16.5% which was as per the agreed interest as per Clauses 2A & 2B of the IIIrd Schedule of the agreement.

6. A perusal of the claim petition filed before the Arbitrator would go on to show that the post-dated cheques issued for repayment of the deferred payment in the schedule mentioned had also been dishonoured and respondent No.1-Company was compelled to file complaints regarding the cheques issued in the months of May, June, July, August and November, 2013 under Section 138 of the Negotiable Instruments Act, 1881 against the partnership concern and its partners. It had been specifically averred that there were 3 complaints which were pending and which were transferred to the Jodhpur Bench from the Court at New Delhi in view of the judgment passed by the Apex Court. The notice dated 05.06.2014 had also been issued to the appellant along with the partners of the company in question wherein the outstanding demand of Rs.96,26,481/- were also raised and also for the invocation of the arbitration agreement and accordingly the Arbitrator was duly appointed by the company in pursuance of Clause 17 which reads as under:

“17. ARBITRATION

If any dispute arises between the Parties out of or in connection with this Agreement whether in the nature of interpretation or meaning of any term hereof or as to any claim by one against the other, or otherwise the same shall be referred to sole arbitrator to be appointed by Phillips and the arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The seat or legal place of arbitration shall be New Delhi. The language to be used in the arbitral proceedings shall be English. The award given by the arbitrator upon such references shall be final and binding upon the parties, and each party shall bear its own expenses in relation to such arbitration. Unless otherwise awarded by the arbitrator, the arbitration fees shall be shared equally by the Parties.”

7. The partnership concern apparently took no steps to challenge the said appointment at that stage and neither filed any application for removal of the Arbitrator and for appointment of neutral Arbitrator at any point of time. The only efforts which were made was to delay the adjudication process by sending a letter dated 18.06.2014 wherein time was sought to settle the dispute. Having failed to negotiate or make any payment, a fresh notice was issued on 31.07.2014 by the company. Reply dated 28.08.2014 was then served upon the claimants and in the meantime, order dated 08.09.2014 was passed by the Addl.District Judge, Gurugram for repossession of the machines in question. It is pertinent to notice that the partnership concern never contested the proceedings before the Arbitrator though it had raised challenge before this Court against the repossession of the machines and therefore, we are of the opinion that the company and its partners are playing a game of hide and seek with the claimant company which would be laid out as we propose to discuss the manner in which the litigation proceeded.

8. The defence of the appellant was that the Arbitral Tribunal has got no jurisdiction and unilateral appointment was in breach of the

terms of the Act. The Arbitrator who was an Advocate was supposed to be closely associated with the company and therefore there was conflict of interest. The appellant had retired on 21.08.2013 from the partnership and vide subsequent notice dated 24.02.2014, dissolved the partnership firm and notice had been served upon the remaining 2 partners and therefore, impleading him in the claim petition was stated to be illegal and unjustified. He being a sleeping partner was not managing any activity and was permanent resident of Dubai and the notice dated 05.06.2014 invoking the arbitration had never been received by him in Mumbai. The factum of the filing of appeal before this Court was denied wherein challenge had been raised to the order dated 08.09.2014 in FAO-8141-2014 titled *A.A.Associates & another Vs. Phillips India Ltd. & others* by the partnership concern wherein directions had also been issued to pay a sum of Rs.44 lakhs on or before 12.08.2014 and a conditional stay had been granted.

9. Counsel for the appellant has thus argued 2 issues before us:

- (i) That the nomination of the Arbitrator at the sole instance of the Company was not liable to be approved and an independent Arbitrator should have been appointed through the process of the Court.
- (ii) That the counter claim had not been permitted to be filed by the Arbitrator and therefore, serious prejudice has been caused to the appellant.

10. It is to be noticed that the specific case of the present appellant was that he had resigned on 21.08.2013 from the partnership concern and the same had been dissolved on 24.02.2014. Notice of dissolution had been duly served upon the remaining partners. The said

stand has been already rejected by both the Arbitrator and the Court below while rejecting the petition under Section 34 of the Act while noticing that the appellant had never intimated the claim before his retirement from the respondent-firm and in view of Section 32(2) of the Partnership Act, 1932 was not liable to be accepted as no agreement was brought on record. It was noticed that the partnership-firm was not contesting whereas the partner who resigned was putting in appearance and objecting to the proceedings. The said objection was accordingly rejected by placing reliance upon the Apex Court judgment in **Syndicate Bank Vs. RSR Engineering Works and others, (2003) 6 SCC 265** by going on to hold that no prejudice had been caused to the appellant. The relevant part of the observations of the Apex Court read as under:

“8. In the instant case, at the time when the partners entered into the agreement for overdraft facility, they were the members of the partnership firm; so also defendants 2 and 4 jointly executed an agreement and obtained loan from the bank. Subsequent retirement of defendants 2 and 3 is of no consequence unless there is a subsequent contract between these members of the partnership firm and the plaintiff. The law on this aspect is succinctly made clear in the celebrated book "Lindley & Banks on Partnership" (Sixteenth Edition) and at page 358, it is stated as under :

"It is perhaps self evident that a creditor's rights will not normally be prejudiced by an agreement transferring an accrued liability from one partner to another unless the creditor is made a party to the agreement or assents to its operation. Otherwise the agreement will, as regards him, be strictly res inter alios acta. Lord Lindley illustrated this proposition for the following example: - let it be supposed that a firm of three members, A, B and C, is indebted to D; that A retires, and B and C either alone, or together with a new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, B and C is not affected by the above arrangement, and A does not

cease to be liable to him for the debt in question. But if, after A's retirement, D accepts as his sole debtors B and C, or B, C, and E (if E enters the firm), then A's liability will have ceased, and D must look for payment to B and C, or to B, C and E, as the case may be."

9. There is no a priori presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into an agreement to discharge him from liability. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him or his rights against the old firm especially when the creditor is not a party to the arrangement and then there is no fresh agreement between the creditor and the newly constituted firm. After the creditor has taken a new security for a debt from a continuing partner, it may be a strong evidence of an intention to look only the continuing partner for the payment due from the firm."

11. The record of FAO-8141-2014 when perused would go on to show that the appeal was filed by the partnership concern and one partner, Dr.G.L.Purohit (respondent No.3 herein) and the present appellant was arrayed as respondent No.2 in the said appeal. In the said FAO there was no such averment made by the partners that the said person had retired from the firm which had been dissolved as it would have been fatal to the maintainability of the appeal. The services of other respondents apart from the claimants had been got dispensed with vide order dated 26.03.2015 in the said FAO. Even in the said proceedings, vide order dated 05.12.2014, after interim order having been passed in its favour, statement was made that a compromise had been arrived at and the first part of the payment would be made by 09.12.2014. Thereafter, on no payment having been made, the claimant company pressed for vacation of the interim stay. On 05.01.2015, directions were issued to pay a sum of Rs.40 lakhs by 05.02.2015 failing which the stay would be vacated. This

Court inspite of the non-payment granted extension on 10.02.2015 to the

extent that a sum of Rs.50 lakhs be deposited by 20.02.2015 failing which the partnership concern would not be entitled to file an application for extension of time or file any application and the interim order would be vacated without further reference. Eventually the appeal was decided on 18.09.2015 upholding the jurisdiction of the Court at Gurugram to pass the said order and the fact that the arbitration proceedings had continued at New Delhi by noticing Clause 16 of the agreement in question which provided situs of the arbitration by noticing that the Arbitrator had already entered into the reference. Clause 16 reads as under:

“16. GOVERNING LAW AND JURISDICTION.

The rights and obligations of the Parties under this Agreement shall be governed by the laws of India, without effect to principles of conflict of laws thereof, and shall be subject to the exclusive jurisdiction of courts at Gurgaon, Haryana.”

12. Thus, it is to be seen that the issue regarding the appointment of the Arbitrator and challenge raised to the situs of arbitration proceedings has already been upheld by the Learned Single Judge of this Court which has further been not challenged by the partnership concern. Not being satisfied, in the meantime, during the pendency of the proceedings, an application was pressed by the present appellant contesting the appointment of the Arbitrator once hearing was held on 21.09.2014 before the Arbitrator. Apparently notice dated 09.10.2014 was received asking for recusal of the said Arbitrator on account of the fact that it was done unilaterally. While placing reliance upon the provisions of Clause 17 of the agreement, the said claim was rejected on 13.10.2014 by a specific declaration that the Arbitrator did not have any interest in the subject matter and therefore no circumstances were available for justifiable doubts as to the independence and impartiality of the Arbitral Tribunal.

13. Still not satisfied with this, another application was filed under Section 16 which was then dismissed on 11.04.2015 by noticing the earlier order. It has been held by the Apex Court in **M/s Gas Authority of India Ltd. & another Vs. M/s Ketu Construction (I) Ltd. & others, 2007 (5) SCC 38** that the plea of jurisdiction should be taken before the Arbitral Tribunal immediately and not at a later stage when the defence is filed. The appellant having filed its reply to statement of claim on 10.04.2015 would only go on to show that he was only trying to delay the proceedings through one of the partners of the firm and therefore we are of the considered opinion that the conduct of the appellant and the main partnership concern disentitles them for any such relief. The Arbitrator while passing the first order dated 13.10.2014 specified regarding the impartiality and that he was not connected with the company and therefore had satisfied the necessary requirements under the Act and therefore there would be no ground under Section 12(5) of the Act and he could not be held to be ineligible to be appointed as Arbitrator as has now been contended. The partnership concern on one hand was contesting the jurisdiction of the proceedings at Delhi before the Arbitrator and has been unsuccessful in the said challenge before the Court. It had an option at that stage also to ask for a neutral Arbitrator but chose not to do so and thus, cannot now at this stage be permitted to contest so on the principle of waiver/estoppel.

14. Regarding the issue of counter-claim also, it is to be noticed that on 10.10.2015, the Arbitrator noticed that none was putting in appearance and four adjournments had been taken on account of talks of settlement. On an earlier occasion on 12.03.2015, the parties had been directed to file reply to the statement of claim as well as the counter-claim,

if any within a period of 4 weeks. The claimant had been given 2 weeks to file the rejoinder and reply to the counter-claim and another 2 weeks had been granted to the respondents to file their rejoinder in the counter-claim. It was noticed that a period of almost one year has lapsed but the pleadings were not complete. Accordingly, one last opportunity was granted to complete the pleadings and the needful was to be done within 2 weeks along with the counter-claim. On the next date of hearing on 28.11.2015, only a proxy counsel had put in appearance on behalf of the appellant and again an effort was made to delay proceedings that the appellant could not attend the arbitration proceedings due to his medical conditions. Resultantly the request for filing the counter-claim was rejected by noticing that the reply had already been filed on 11.04.2015 though reference was made to the provisions of Order 7 Rule 6A CPC. It was also noticed that the appellant was not footing his share of the fees and the burden had shifted upon the claimant-company and directions were accordingly issued to pay the fees. The said order was sought to be reviewed which was rejected on the ground that it was not maintainable and it was also noticed that the claimant-company had agreed that the order be reviewed provided the cost of arbitration be shared which counsel for the appellant had failed to do and therefore, the application for review was rejected vide order dated 10.02.2016.

15. The above sequence of events would thus go on to show that the appellant is refusing even to pay the costs of arbitration and had not filing the counter-claim within the prescribed period and therefore shutting out his claim had rightly been done by the Arbitrator as it was a blatant attempt to delay the proceedings by one way or the other as has been already noticed by approaching different forums through different persons.

Keeping in view the above background, we are of the considered opinion that the order passed by the Addl.District Judge declining to interfere in the award passed by the Arbitrator is well justified in the facts and circumstances. Apparently the amounts were due for the usage of the machine and the partnership-firm was bound by the agreement and they had obtained the machines by paying a paltry sum of Rs.37 lakhs and defaulted in the payment of the other amounts which also led to criminal litigation under Section 138 proceedings. In such circumstances, we are of the considered opinion that keeping in view the limited jurisdiction the Commercial Court was exercising over the award in question we do not feel that any case was made out before the Court concerned which would fall within the provisions of Section 34(2) of the Act. The Arbitrator has dealt with the dispute as contemplated under the Act and the appellant was given proper opportunity of hearing. The Arbitrator had adjudicated on that part of the award which was subject matter of consideration and the appellant cannot show that there was any incapacity that forced it not to adhere to the terms and conditions of the hypothecation agreement in question which he was duly bound as such.

16. Keeping in view the above, we do not find any ground to interfere in the well reasoned order passed by the Commercial Court. Resultantly, the present appeal is hereby dismissed in limine. All pending misc. applications accordingly stand disposed of.

(G.S. SANDHAWALIA)
JUDGE

(LAPITA BANERJI)
JUDGE

January 9th, 2024
Sailesh

Whether speaking/reasoned :	Yes	
Whether Reportable :	Yes	