



2024:DHC:6575-DB

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

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Judgment delivered on: 30.08.2024

+ **FAO (COMM) 5/2024 and CM No.1309/2024****RAKESH KALIA**

..... Appellant

versus

SANJAY KUMAR VYAS

..... Respondent

Advocates who appeared in this case:For the Appellant : Mr R. Santhanam and Mr Arjun Prasad
Sinha, Advocates.For the Respondent : Ms Tamali Wad, Mr Gurudutt Sharma and
Mr Akash Srivastava, Advocates.**CORAM****HON'BLE MR JUSTICE VIBHU BAKHRU****HON'BLE MS JUSTICE TARA VITASTA GANJU****JUDGMENT****VIBHU BAKHRU, J**

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 04.11.2023 (hereafter *the impugned judgment*) passed by the learned Commercial Court rejecting OMP(COMM) 25/2019. The appellant had filed the aforementioned application [OMP(COMM) 25/2019] under Section 34 of the A&C Act assailing the arbitral award dated 21.12.2018 (hereafter *the impugned award*).



2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Memorandum of Understanding dated 15.01.2011 entered into by four individuals including the appellant and the respondent. The disputes were referred to an arbitral tribunal of three members (hereafter *the Arbitral Tribunal*). The said members are referred by their initials, VKA, RCC and JKM. VKA was appointed on behalf of the respondent and RCC was appointed by this Court on behalf of the appellant. They had appointed JKM as the presiding arbitrator. The impugned award has been rendered by the majority constituting VKA and JKM. RCC had recused from the arbitration on the eve of pronouncement of the impugned award. He had, one day prior to the pronouncement of the impugned award, sent an e-mail stating that he did not wish to continue as a co-arbitrator.

3. The appellant contends that the impugned award is *non-est* as the Arbitral Tribunal did not exist on the date of the pronouncement of the impugned award, as by an email dated 20.12.2018 RCC had recused himself from the arbitration. Although, the appeal filed by the appellant also includes grounds to challenge the impugned award on merits, no such grounds were pressed.

FACTUAL CONTEXT

4. As noted above, the disputes between the parties arose in the context of the Memorandum of Understanding dated 15.01.2011 (hereafter *the MOU*). The said MoU was signed by four individuals (the appellant, the respondent, Shri Ravi Doraiswamy and Dr Manoj Verma)



including the parties to the present proceedings. The appellant was engaged in the business of dealing with information regarding tenders from India and around the world and was carrying on the same business under the proprietorship concern named 'Tendernews'. In terms of the MOU, all four signatories to the MoU had agreed to join hands to grow the said business.

5. The relevant terms of the said MOU are set out below:

“Background Information:

Mr. Rakesh Kalia is owning and running a proprietorship concern in the name of Tendernews which is dealing with tender information from India and around the world. Mr. Sanjay Kumar Vyas, Mr. Ravi Doraiswamy and Dr. Manoj Verma are 3 individuals having vast knowledge of Tendering domain. All 4 parties have mutually agreed to join hands and grow the business together, following points have been discussed and agreed between the parties involved and are signatories of this MoU:

1. Promoters: Mr. Rakesh Kalia, Mr. Sanjay Kumar Vyas, Mr. Ravi Doraiswamy and Dr. Manoj Verma will be the main and initial promoters of the company. The 3 promoter directors namely Mr. Sanjay Kumar Vyas, Mr. Ravi Doraiswamy and Dr. Manoj Verma will be exclusive full time Directors of the company, whereas Mr. Kalia would be acting as Managing Director and Chairman of the Board.

2. Company Formation: A Private Limited company will be formed under the name 'KRB Netsoft', which will be registered in ROC NCT of Delhi and Haryana.

3. Share Capital: The initial authorized share capital of the company will be Rs.10 lacs. Out of which subscribed and paidup share capital would be Rs.1 lac. The authorized



share capital of the company will be increased as & when required in accordance with Companies Act, 1956 and other applicable laws in force.

4. Holding: Mr. Rakesh Kalia will have 58% of the equity whereas Mr. Sanjay Kumar Vyas, Mr. Ravi Doraiswamy and Dr. Manoj Verma will have 14% of equity each. Each promoter will subscribe to his part of equity from his personal account.

5. Directorship & Shareholding: The initial Directors appointed on the Board shall remain on the Board for a minimum period of five years. If existing Directors wish they can appoint their nominee in the Board (even during the initial period of 5 yrs).

Similarly, no share holder will be allowed to sell or transfer his share to any other person for a period of 5 years, except in case of direct family members or to the other Directors. The board will have only four Directors during first 5 years.

6. Existing and Future Business: All existing tender related business of Tendernews will be transferred to the new Company 'KRB Netsoft Private Limited'. Similarly any/all new tenders/public procurement related business will be with the new entity only.

7. Domain Name: The domain name 'Tendernews' will be the personal property of the Mg. Director Mr. Rakesh Kalia. But the company will have the perpetual rights to use this domain forever. In future if the company is merged with the bigger group or sold out to a new group, in that case the domain name. 'Tendernews' will also be transferred to the new entity/purchaser. In case of winding up (dissolution) of the company none of the directors shall have any right or claim over the domain name 'Tendernews'.

8. Funding: Mr. Rakesh Kalia will bring the cash in the form of Interest free unsecured loan/debt/creditors, for



running the company for a period of one year. By this time the company is supposed to attain the cash break even. (Refer the attached working sheet). In the rare case scenario share further funds are required, Mr. Rakesh Kalia will arrange for the same in his personal capacity or he can arrange through any financier. In this case the company will pay the interest on these borrowed funds at the prevailing market rates or at actual, whichever is higher. The investment of Mr. Rakesh Kalia shall be due for return after 15th month & no interest shall be payable by company till 15 months & any amount outstanding after 15 months will be chargeable @ 15% interest p.a.

9. Remuneration: All 4 Directors shall be entitled to draw a salary of Rs.1 lac per month each till the profitability is established or one year whichever is later. All four members will revisit the salary issue after achieving the breakeven point and will revise it as per market & our business conditions.

10. Sell/M&A: At any time in future if the company gets an offer for buy out or to be merged with a new entity at a good valuation, then in that case all parties to this MoU are ready to encash the opportunity and exist from the business.

Other Points:

12. This Mou has been entered and agreed as a provisional legal document to start the functioning of the mentioned business herein and processes to be initiated on Immediate basis. This MoU will be prepared in 4 original copies, one for each member. The effective date of this collaboration & business initiation will be 1st January, 2011.

13. All above understanding is based upon achieving minimum, cumulative revenue of Rs.55 cores in 5 years. In the eventuality of the Company achieving only 50% of the said 55 crores. The Chairman shall have the right to



dissolve the existing board and appoint new Directors and/or CEO, who will run the company and take it to next level. The 3 Directors will then work as senior executives of the company and will report to the new board. They will continue to hold their equity.”

6. The respondent claims that in terms of the MOU, all four signatories to the MOU incorporated a company by the name of M/s KRB Info Services Private Limited (hereafter also referred to as *the company*) on 08.03.2011. The MOU contemplated incorporation of a company named M/s KRB Netsoft Private Limited. The respondent claims that the said name was not available with the Registrar of Companies and therefore, the company by the name of M/s. KRB Info. Services Pvt. Ltd. was incorporated instead.

7. The respondent claims that he issued a legal notice dated 22.07.2013 claiming a sum of ₹7.5 crores plus cost of notice as compensation for alleged breach of the MOU. However, the disputes were not resolved. Thereafter, he sent a letter dated 03.10.2013 invoking the arbitration agreement as embodied in Clause 14 of the MOU and nominated VKA as an arbitrator. However, the appellant did not nominate an arbitrator. In these circumstances, the respondent filed a petition before this Court being Arb. P. 23/2014 praying that an arbitrator be appointed. The said petition was allowed and by an order dated 31.10.2014, this Court appointed RCC as an arbitrator to conduct the arbitration under the aegis of Delhi International Arbitration Centre (hereafter *the DIAC*) and in accordance with its Rules. Subsequently, by an order dated 12.02.2015, this Court clarified that RCC was



appointed as an arbitrator on behalf of the appellant and directed that both the arbitrators (VKA and RCC) would decide the name of the Presiding Arbitrator within a period of four weeks. The said arbitrators agreed for appointment of JKM as the learned Presiding Arbitrator.

ARBITRAL PROCEEDINGS

8. The respondent filed the Statement of Claim. It is his case that the appellant had breached the terms of the MOU by not transferring his existing business carried on under the name ‘Tendernews’ to the company. The appellant also failed and neglected to fund the company for payment of the remuneration to its directors or for carrying on its operations. Admittedly, the appellant funded the monthly remuneration of the respondent for the first three months, but failed to fund further remuneration thereafter. The respondent claims that consequently, the company, KRB Info Services Pvt. Ltd. could not carry on any business and continues to exist without any business activities. However, the appellant continues to carry on its business under the name ‘Tendernews’.

9. On the aforesaid premises, the respondent claimed balance remuneration for the remaining period of nine months of first year (01.01.2011 to 31.12.2011) quantified at ₹9 lakh at ₹1 lakh per month along with interest at the rate of 18% per annum on the said amount (Claim no.1). Additionally, the respondent also claimed salary at the rate of ₹1 lakh per month for the period of four years till 31.12.2015 (Claim no.2) quantified at ₹61.24 lakhs. The respondent computed the



said amount by factoring a 10% increase in salary each year and in addition, interest payable thereon at the rate of 18% per annum.

10. The respondent also made other claims: Claim no.3 for loss of profits that would have accrued to the respondent against 14% equity shares in the company – M/s KRB Info Services Pvt. Ltd.; Claim No.4 for loss on account of capital computed at ₹1,40,00,000/- on the basis of the anticipated increase in net value of 14% equity interest in the company; Claim no.5 for compensation for mental agony and loss of reputation quantified at ₹10 lakhs along with interest at the rate of 18% per annum; Claim no.6 for cost of litigation before the High Court quantified at ₹2 lakhs; and Claim no.7 for cost of arbitration.

11. The appellant filed his Statement of Defence to the Statement of Claim and also raised counter claims. He contended that the MOU is not a binding agreement. The appellant also claimed that the respondent and other signatories to the MOU had also agreed to certain performance parameters that were annexed with the MOU, which were not met. He stated that despite payment of salary, the respondent was not able to garner any work and had abandoned the company. The appellant alleged that the respondent had taken up employment with another entity and therefore, was not entitled to any remuneration.

12. The appellant also contended that he was not the employer of the respondent and no employee - employer relationship existed between the parties. Therefore, the appellant did not have any liability to pay remuneration to the respondent.



13. The appellant also raised counter claims including for alleged expenditure of a sum of ₹67,73,362/- during a period from January, 2011 to March, 2011.

14. The arbitration was conducted under the aegis of the DIAC. There is no dispute that the parties were heard and the matter was reserved for passing an award. On 10.12.2018, the DIAC was informed that the impugned award by majority, was ready for pronouncement. Accordingly, the DIAC scheduled pronouncement of the arbitral award on 21.12.2018 at 02:00 p.m. The majority arbitrators (VKA and JKM), pronounced the impugned award by majority on the said date. The impugned award was signed and delivered to the parties on the same date.

15. On 20.12.2018, one day prior to the scheduled date of delivery of the impugned award, RCC, the learned arbitrator appointed by this Court as a nominee of the respondent, circulated an email addressed to the learned Presiding Arbitrator (JKM). The contents of the said email are reproduced below:

“Respected Brother,

In the captioned Arbitral matter pending with Delhi International Arbitration Centre, the Arbitral Tribunal is comprised of your goodself as the Presiding Arbitrator, Mr. V.K Aggarwal, Co-Arbitrator and myself as the other Co-Arbitrator.

In the last hearing held at your residence the parties were directed to file Written Submissions and the matter was reserved for passing the Award. You may recall that even



before the receipt of the Written Submissions from both the parties Mr. V.K Aggarwal came to you with an Award and requested you to sign the same. You were good enough to ask him to hand over a copy of the said prepared Award to me so that I may go through the same before finalizing the Award. He delivered a copy of the Award prepared by him to me. On perusal of the proposed Award, I was of the view that the findings arrived at by Mr. Aggarwal, could not be agreed to and as such I telephonically requested you to convene a meeting of the Arbitrators to discuss the case and finalize the Award. However, on account of your own difficulties you could not convene a meeting and as such the matter remained pending for discussions.

On 10th of December, 2018, I received an email from the Advisory Counsel at DIAC informing the parties that the matter is fixed for pronouncement of the Award on 21st of December, 2018 at 2 PM at DIAC. It was a shock to me as neither any discussions were held before finalizing the Award nor any copy of the proposed Award has been made available to me till date. I again contacted your goodself on telephone and told you that I do not know anything about the Award proposed to be announced on 21st of December, 2018 upon which you assured me that you would ask Mr. Aggarwal to supply a copy to me. No copy has been given to me till date and as such I am completely in dark about the contents of the Award proposed to be announced on 21st December, 2018. Whatever Award has been prepared is without any consultations with me and as such I am not a party to the said Award.

I hereby convey that I do not want to continue as a Co-Arbitrator in the aforesaid Arbitral matter and as such I recuse myself. The Respondent may nominate some other Arbitrator in accordance with law.

With Regards”



16. The majority (VKA and JKM) proceeded to render the impugned award on 21.12.2018. They also noted that RCC may deliver a separate arbitral award. In terms of the impugned award, the respondent's claim for loss of salary for the remaining period of five years (four years and nine months) was allowed at the rate of ₹1,00,000/- per month, albeit without any annual increase. The respondent was also awarded costs of litigation and arbitration. The appellant's counter claim was rejected.

APPLICATION UNDER SECTION 34 OF THE A&C ACT

17. The appellant filed an application for setting aside the impugned award under Section 34 of the A&C Act, which was rejected by the learned Commercial Court in terms of the impugned judgment.

18. It is relevant to note that the appellant did not challenge the findings arrived at by the majority. The impugned judgment records that the appellant had challenged the impugned award "*only on the ground that one of the member recused prior to the passing of the award*".

19. Aggrieved by the decision of the learned Commercial Court, the appellant has preferred the present appeal.

REASONS AND CONCLUSION

20. At the outset, it is necessary to state that the only ground on which the appellant has challenged the impugned award is that it was rendered by majority after one of the arbitrators had recused from the arbitration proceedings. It is contended that the Arbitral Tribunal, which was to be constituted by three members was not competent to render the



impugned award on account of the vacancy that had arisen consequent to recusal of one of the arbitrators.

21. Chapter III of the A&C Act contains provisions regarding composition of an arbitral tribunal. In terms of Section 10 of the A&C Act, the parties are free to determine the number of arbitrators, provided that such number is not an even number. Sub-section (2) to Section 10 of the A&C Act provides that in the absence of any such determination by the parties, the arbitral tribunal would consist of a sole arbitrator.

22. In the present case, the parties had determined that the Arbitral Tribunal would comprise of three arbitrators.

23. There is no dispute that an Arbitral Tribunal comprising of three arbitrators was duly constituted to consider the disputes between the parties.

24. The controversy has arisen on account of recusal by one of the learned arbitrators, one day prior to the date fixed for pronouncement of the impugned award.

25. It is relevant to refer to Section 15 of the A&C Act, which reads as under:

“15. Termination of mandate and substitution of arbitrator.-(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or



(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

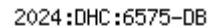
(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

26. In terms of Section 15(1)(a) of the A&C Act, the mandate of the arbitrator would terminate when he withdraws from office for any reason. In the present case, RCC had withdrawn from his office and therefore, his mandate was terminated.

27. In case, where a mandate of the arbitrator is terminated, a substitute arbitrator is required to be appointed. Unless otherwise agreed by the parties, any hearings previously held may be repeated at the discretion of the Arbitral Tribunal. Thus, in terms of Section 15(2) of the A&C Act, a substitute arbitrator was required to be appointed in place of RCC on his recusing from the arbitration proceedings.

28. However, the stage at which RCC had recused is material. The record shows that the DIAC was informed on 10.12.2018 that an arbitral award by majority arbitrators was ready for pronouncement. A



substitution of an arbitrator at the stage would be of little relevance after the majority had already arrived at a decision and had communicated their intention to pronounce the award.

29. Section 31 of the A&C Act contains provisions regarding the form and contents of an arbitral award. Section 31(1) of the A&C Act requires that an award be made in writing and be signed by the members of the arbitral tribunal. In the present case, the impugned award is signed by the members of the Arbitral Tribunal (JKM as the Presiding Arbitrator and VKA as the co-arbitrator). The impugned award is not signed by RCC as he had, one day prior to the pronouncement of the impugned award, recused from the arbitration.

30. It is also important to refer to Section 31(2) of the A&C Act, which reads as under:

“31. Form and contents of arbitral award.-

(1) xxx xxx xxx

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.”

31. The impugned award is substantially compliant with provisions of Section 31(2) of the A&C Act inasmuch as it has been signed by the majority of the members of the Arbitral Tribunal. However, the reasons for omission of the signatures of RCC are not stated in the impugned award. There is handwritten notation at the end of the impugned award,



which is signed by the majority, to the effect that RCC may deliver a separate award.

32. It is apparent from the contents of the email dated 20.12.2018 sent by RCC that his signatures are absent on the impugned award as he had decided to recuse from arbitration.

33. The contents of the said email indicate that one of the arbitrators – VKA had made an arbitral award and had requested the Presiding Arbitrator JKM to sign the same. A copy of the draft of the arbitral award prepared by VKA was furnished to RCC. However, on perusal of the same, he found that he was unable to agree to the same. The email further indicates that RCC had asked the learned Presiding Arbitrator (JKM) to convene a meeting of the arbitrators to discuss and finalise the impugned award. But the said meeting was not convened. RCC had received an email from the Advisory Counsel of DIAC on 10.12.2018 informing the parties that the matter was fixed for pronouncement of the impugned award on 21.12.2018 at 02:00 p.m. In his email dated 20.12.2018, RCC had raised an objection that the arbitral award proposed to be pronounced had not been supplied to him and asserted that he was not aware of the impugned award proposed to be pronounced on 21.12.2018.

34. The impugned award indicates that it was signed by VKA, on 10.12.2018. Indisputably, a draft arbitral award made by him was provided to RCC as is apparent from his email. It is also apparent that RCC had not concurred with the same. The Presiding Arbitrator, JKM



was agreeable with the draft arbitral award. It is also apparent that the impugned award was, thus, signed by VKA on 10.12.2018 and was subsequently signed by the Presiding Arbitrator on the date of its pronouncement on 21.12.2018.

35. It is apparent that RCC was not agreeable to the findings as recorded in the impugned award. However, that is not material in view of Section 29(1) of the A&C Act. Section 29(1) of the A&C Act provides that unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

36. In *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited: AIR 2021 SC 2493*, the Supreme Court had considered the expression ‘arbitral award’ as defined under Section 2(1)(c) of the A&C Act, in the context of Section 29(1) of the A&C Act and held that the decision made by the majority members of an arbitral tribunal would be final and binding on the parties. The relevant extract of the said decision is set out below:

“18. Section 2(1)(c) of the 1996 Act defines “arbitral award” to include an interim award. The phrase “arbitral award” has been used in several provisions of the 1996 Act. The statute recognises only one arbitral award being passed by an Arbitral Tribunal, which may either be a unanimous award, or an award passed by a majority in the case of a panel of members. An award is a binding decision made by the arbitrator(s) on all the issues referred for adjudication. The award contains the reasons assigned by the Tribunal on the adjudication of the rights and obligations of the parties arising from the underlying commercial contract. The award



must be one which decides all the issues referred for arbitration. The view of a dissenting arbitrator is not an award, but his opinion. However, a party aggrieved by the award, may draw support from the reasoning and findings assigned in the dissenting opinion.

XXX

XXX

XXX

21. Section 29 of the 1996 Act deals with decision-making by a panel of arbitrators. Section 29 reads as:

“29. Decision-making by a panel of arbitrators.—(1) Unless otherwise agreed by the parties, *in arbitral proceedings with more than one arbitrator, any decision of the Arbitral Tribunal shall be made by a majority of all its members.*

(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the Arbitral Tribunal, questions of procedure may be decided by the presiding arbitrator.”

(emphasis supplied)

Sub-section (1) provides that unless the parties agree otherwise, in arbitral proceedings with more than one arbitrator, “any decision of the Arbitral Tribunal shall be made by a majority of all its members”.

22. An “arbitral award” is the decision made by the majority members of an Arbitral Tribunal, which is final and binding on the parties. Section 35 provides that an arbitral award shall be “final and binding” on the parties and persons claiming under them. A dissenting opinion does not determine the rights or liabilities of the parties which are enforceable under Section 36 of the Act.

23. The reference to the phrase “arbitral award” in Sections 34 and 36 refers to the decision of the majority of the members of the Arbitral Tribunal. A party cannot file a



petition under Section 34 for setting aside, or under Section 36 for enforcement of a dissenting opinion. What is capable of being set aside under Section 34 is the “arbitral award” i.e. the decision reached by the majority of members of the Tribunal. Similarly, under Section 36 what can be enforced is the “arbitral award” passed by the majority of the members.”

37. It is also settled law that a dissenting opinion of an arbitrator is not an arbitral award as explained by the Supreme Court in ***Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited*** (*supra*). The A&C Act recognises only one arbitral award and that is, the decision of the majority arbitrators in a panel of arbitrators.

38. We are unable to accept that a member of the arbitral tribunal holding a dissenting opinion can stall the arbitral proceedings by recusing from the arbitration once the majority has taken a decision. In the present case, it is apparent that the majority arbitrators had made a decision. One of the arbitrators, VKA had prepared a draft and had circulated the same. Although there was consensus between the Presiding Arbitrator (JKM) and VKA, RCC had not concurred with the draft award. Plainly, the majority of the Arbitral Tribunal could not be prevented from rendering their decision on account of recusal by the dissenting member at the last hour.

39. In terms of Section 31(2) of the A&C Act, it was necessary for the impugned award to clearly state the reasons for omission of the signatures of RCC. However, we are unable to accept that such an omission calls for setting aside of the impugned award.



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40. The appeal is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

AUGUST 30, 2024
RK