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

Judgment pronounced on : 01.10.2024

+ **FAO (COMM) 133/2022**

ALL INDIA MEDICOS THR ITS PROP.
MONIKA CHAWLA

..... Appellant

Through: Mr. Arun Batta, Mr. Rohan Sharma,
Ms. Ranjna Ahuja and Mr. Abdul
Vahid, Advocates.

versus

ALL INDIA INSTITUTE OF MEDICAL
SCIENCES

..... Respondent

Through: Mr. Atul Kumar, Ms. Sweety Singh
and Mr. Rahul Pandey, Advocates.

CORAM:

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the A&C Act*') challenging the judgment dated 28.04.2022 passed by the learned District Judge in O.M.P. (COMM) 21/2021 (hereinafter '*the impugned judgment*'). The impugned judgment allows the petition filed on behalf of the respondent under Section 34 of the A&C Act, and sets aside the arbitral award dated 11.03.2020 (hereinafter referred to as '*the impugned award*').
2. The impugned award was rendered in the context of an arbitration agreement incorporated in a License Agreement dated 21.11.2011 between



the parties, whereby, the appellant was granted the license to occupy a built structure comprising 357 Sq. ft. (33.15 Sq. m.) at the rate of ₹ 455/- per sq. mt., temporarily at the All India Institute of Medical Sciences (AIIMS).

3. Under the said Agreement, the license was for a period of two years with effect from 21.11.2011, that is, the date of the signing of the License Agreement. The License Agreement contained a stipulation for a further extension of one year on mutual agreement of the parties.

4. The said License Agreement contains a stipulation that the licensee shall deposit a performance security ~~₹50~~ Lakhs in the form of bank guarantee which should be refunded only after expiry of the Agreement or upon its termination. The relevant stipulations are as under :-

“2. Performance Security-The Licensee shall have to deposit a performance security of Rs. 50,000,00/- (Rupees Fifty Lakhs Only) in form of Bank Guarantee Deposit which will be refunded only after expiry of the Agreement or its termination and payable only after removal by the Licensee of its belongings from the site in question.

3. Forfeiture of Performance security- The amount of Performance Security shall be liable to be forfeited if the medicines/surgical consumable, etc supplied by the authorized Chemist against the request placed on them in pursuance of this contract are subsequently found as not conforming to quality as per prescribed norm/specification.

Performance Security is liable to be forfeited if selected chemist:

- i. Fails to adhere to the terms and conditions of the contract
- ii. Supplied any sub-standard, spurious medicines, substituted medicines, etc.
- iii. Non-availability of common medicine/surgical consumables, etc
- iv. Over-charging i.e. not offering the pre-determined discount
- v. Non-payment of rent/any other dues.



The Chemist should not stop the sale of the Medicines/ Surgical Consumables/Implants/Orthotic and Prosthetic Devices etc. without giving 30 days prior notice to AIIMS.

24.Termination of the contract- The AIIMS may, without prejudice to any other remedy for breach of contract, by written notice of default sent to the bidder terminate the Contract in whole or part by giving one month notice:

- (i) If the bidder fails to provide any or all the service within the period(s) specified in the Contract
- (ii) If the bidder fails to perform any other obligation(s) under the contract
- (iii) If the bidder, in the judgment of the AIMS has engaged in corruptor fraudulent practices in competing for or in executing the Contract”

5. During the currency of the License Agreement, the respondent received several complaints against the appellant with regard to non-availability of prescribed medicines, supply of substituted drugs, misbehaviour by the pharmacy staff of the appellant, tampering of the complaint box and involvement of the appellant’s co-owners in illegal activities such as the transportation of banned drugs.

6. With regard to the aforesaid complaints, the respondent issued multiple show cause notices to the appellant on 16.08.2012, 16.10.2012, 12.03.2013, 13.06.2013, and 27.08.2013. These notices were duly replied to by the appellant.

7. On account of alleged violations of the terms and conditions of the License, a penalty was imposed on the appellant *vide* order dated 28.02.2013. The said order reads as under :-

***“ALL INDIA INSTITUTE OF MEDICAL SCIENCES
ANSARI NAGAR, NEW DELHI-29*”**



F. NO. Estate/40-9/2002

Dated: 28 Feb 2013

ORDER

WHEREAS Shri Himanshu Singh, vide letter dated 02.8.2012 had filed a complaint against M/s All India Medicos, alleging that the medical store provided the medicine totally different from the prescription of the doctor. The said complaint was forwarded to Dr Y.K. Gupta, Chairman of Monitoring Committee for examination and submission of report on same,

AND WHEREAS the Monitoring Committee in its report dated 16.08.2012 had reported that there has been substitution in the instant case and recommended invoking the clause 31.3 of Licence Deed dated 21.11.2011, prescribing imposing of the penalty of Rs1000/- plus cost of the specific brand of such default. The report of the Monitoring Committee was forwarded to M/s All India Medicos to submit their reply as to why above mentioned penal clause should not be invoked. In response to this, the All India Medicos had submitted reply dated 22.08.2012. The report of Monitoring Committee and submission of the Chemist Shop has been considered by the Competent Authority and after careful consideration of the matter, it has decided to invoke clause 31.3 of Licence Deed dated 21.11.2011 and impose the penalty of Rs.5331/- in the instant case. Accordingly the M/s All India Medicos is hereby directed to deposit Rs.5331/-(Rs.4000/- as penalty for four nos of default plus Rs.1331/- as cost of substituted medicines) through Demand Draft, in favour of Director, AIIMS.

It is further decided that M/s All India Medicos would display a notice board (bilingually) on the shop front to inform public about the authorities of the Institute {namely Dr. Y.K.Gupta (Tel no -011-26593282), Dr. Surinder Singh (Tel no : 011-26591760), Dr. Jitendra Katiyar (Tel No: 011-26597172), Sh. Razi Jawaaid (Tel no : 011-26594318)} to whom they should contact in case any medicine is substituted and about the provisions of fine plus cost of medicine. It should also contain the provisions of clause 31, according to which in case of non



availability of prescribed medicines it will be the duty of the M/s All India Medicos to provide the same to the patient from open market within an hour and in case of failure to do so, appropriate penalty will be imposed.

Further M/s All India Medicos, is also warned not to undertake brand substitution in future.

*FOR & ON BEHALF OF THE DIRECTOR, AIIMS
SD/-
(SANJIV CHATURVEDI)
DEPUTY SECRETARY & CVO*

8. Thus, whenever required, the respondent exercised the option of levying appropriate penalty upon the appellant.

9. As the term of the Lease Deed was coming to an end, the appellant requested an extension from the respondent. The respondent rejected the said request by letter dated 18.11.2023. The said letter reads as under :-

*“ALL INDIA INSTITUTE OF MEDICAL SCIENCES
ANSARI NAGAR, NEW DELHI - 110029*

F. NO. XX - 277/Chemist Shop/10-11 Dated the 18 NOV 2013

*To,
Shri Paras Jain,
GM (Administration)
M/s. All India Medicos,
Between Cooling Tower and Lecture Theatre
Of Nursing College, AIIMS Campus,
Ansari Nagar, New Delhi -110029.*

*Sub: Contract for running of retail Pharmacy in AIIMS
premises extensions -reg.*

Sir,



2024:DHC:7546-DB



I am directed to convey that your request for extension of contract for one year beyond 20.11.2013 was considered and not accepted by Director, AIIMS.

Accordingly, your contract in respect of above chemist shop with this Institute stands terminated w.e.f. 21.11.2013 as per clause-1 of the licence deed.

You are, therefore directed to vacate the said premise by 21.11.2013(Morning) positively failing which you will be liable to pay damage charges as prescribed in the licence deed.

*Yours Faithfully,
Sd/-
(M.S. Yadav)
Administrative Officer (Estate)"*

10. It is notable that till the date on which the aforesaid letter was issued, there was no inkling or information to the effect that the respondent had taken any decision to forfeit the performance security deposit furnished by the appellant to the respondent.

11. Thereafter, the appellant filed a writ petition being W.P.(C) 7237/2013 in this Court seeking that the terms of the License be extended for a further period of one year. The said writ petition was disposed of by order dated 20.11.2013, whereby, the respondent was directed to consider the appellant's request for extension and give its decision thereon. Pursuant thereto, the respondent by order dated 25.11.2013 declined the request for extension. While declining the said request, the respondent referred to alleged violations by the appellant of the terms and conditions of the License including violation of Clause 21 (misbehaviour with patients), tampering with complaint box, setup to receive complaints from patients, registration



of a criminal case under the NDPS Act against one of the associates of the co-owners of the licensee Firm. The order dated 25.11.2013 issued by the Administrative Officer of the respondent concludes as under :-

“... ”

NOW THEREFORE, considering all the facts and circumstances of the case including the recommendations of the Monitoring Committee, report of the Delhi Police and the submissions of the licensee, it has been decided by the competent authority not to further extend the contract entered into with M/s All India Medicos beyond 20.11.2013, in view of the performance of the licensee not being found satisfactory. Accordingly, the request for extension of time, by the licensee, submitted vide representation dated 19.11.2013 is hereby rejected and the licensee is directed to immediately stop the transaction of all the business including sale of medicine/surgical equipments/any other item from the said shop located within the Institute premises, with immediate effect. The licensee is further directed to vacate the Institute premises within 10 days from the date of receipt of the instant order.”

12. It is noticed that even in the aforesaid order dated 25.11.2013, there is no reference to forfeiture of the performance guarantee amount of ₹50 Lakhs. Upon the receipt of the order dated 25.11.2013, the appellant filed another writ petition being W.P.(C) 7520 of 2013 which was dismissed on 29.11.2013. Following this, the appellant vacated the premises on 07.12.2013 and requested the respondent to refund its earnest money deposit and also requested for release of the bank guarantee.

13. In response, the respondent issued a letter dated 17.12.2013, notifying the appellant that the performance security of ₹50 Lakhs had been forfeited in accordance with Clause 3 of the License Deed dated 21.11.2011. The



earnest money deposit of ₹2 Lakhs was returned. The relevant portion of the said letter is as under :-

“With reference to your letter dated 7.12.2013, it is intimated that, on account of violations of various clauses of license deed during the two-year tenure of the said license (from 21.11.2011 to 20.11.2013), M/s All India Medicos (hereinafter referred as “licensee”) was issued show cause notices from time to time. These violations included not only instances of adverse medical impact on the patients due to arbitrary substitution of the medicines prescribed by the Institute doctors but also rampant misbehaviour with the general public coming into the Institute. It was also found that, the licensee never bothered to file monthly returns of sales, to the Institute which was mandatory as per clause No. 13 of the license deed. It was also intimated to the Institute authorities by Delhi Police, that the associates/relatives of the co-owners of M/s all India Medicos were arrested and an FIR was also got registered by Delhi Police under Sections of NDPS Act, 1985 in case of illegal transportation of a consignment of banned drugs of crore of rupees. The Addl. Dy. Commissioner of Delhi Police (Crime Branch) also asked for the action taken report from the Institute authorities, sighting malpractices of the licensee into the Institute in the background of the above mentioned FIR. All these acts on the part of M/s All India Medicos caused severe damage to the reputation of this prestigious Institute.

It is further to be mentioned here that there was no change in the attitude of licensee, despite imposition of penalties vide orders dated 28.2.2013. Further, as per clause 25 of the said license deed, licensee was bound to vacate the space given for running the said chemist shop, on expiry of the said license deed and handover the same to the Institute authorities, but in utter violation of the same, and concealing the vital material facts from the Hon'ble High Court, licensee moved a writ petition for further extension. In the said Writ petition, it was claimed by the licensee that, there was no complaint against them, by any doctor or patient, during entire tenure, while the



fact was that, not only there were a number of complaints but also fines were imposed against licensee in some cases. The said writ petition was disposed off by the Hon'ble High Court, by directing the Institute to pass a speaking order within three working days. Accordingly, the Institute passed a speaking order on 25.11.2013, detailing all the violations committed by M/s All India Medicos, but even then, instead of vacating the space provided, as per clause 25 of the license deed, licensee again moved a writ petition before the Hon'ble High Court against the said speaking order. This writ petition was dismissed by the Hon'ble High Court on 29.11.2013.

The above mentioned omissions and commissions on the part of M/s All India Medicos including use of frivolous litigation by concealing the fact from the Hon'ble High Court, not only caused severe damage to the reputation of this prestigious institute but also resulted in financial loss and wastage of precious man hours. In view of all these facts, including the report of Monitoring Committee on the replies submitted by licensee in response of various show cause notices, the competent authority, decided to forfeit the performance security, amounting Rs.50 lac as per clause 3 of the license deed dated 21.11.2011 and subsequently the said amount was got transferred into the account of Director, AIIMS. However, Earnest Money Deposit amount of Rs.2 lakh (Rupees Two lakh only) is being returned and the Cheque of the same is being enclosed herewith.”

14. A reading of the aforesaid order reveals that it seeks to castigate the appellant for filing multiple writ petitions in this Court and/or “concealing the vital material facts” from this Court. The order concludes that the omission and commission of the appellant “including the frivolous litigation by concealing the facts from High Court, not only caused severe damage to the reputation of the prestigious institute but also resulted in financial loss and wasted a precious man hours”. In light of the same, the concluding



paragraph of the order records that the competent authority “decided to forfeit the performance security amounting to ₹50 Lakhs as per the Clause 3 of the License Deed dated 21.11.2011 and subsequently, the said amount was got transferred into the account of Director, AIIMS”.

15. It is evident that the decision to forfeit the performance security of ₹50 Lakhs was taken after the appellant had vacated the premises. Also, the transfer of the said amount into the account of the Director, AIIMS was evidently without any prior notice or intimation to the appellant.

16. In the aforesaid background, disputes having arisen between the parties, the appellant filed an arbitration petition [ARB.P. No.156/2014] under Section 11(6) of the A&C Act seeking appointment of an independent arbitrator to adjudicate the said disputes. *Vide* order dated 04.03.2015, this Court appointed a sole arbitrator to adjudicate the disputes between the parties.

17. In the arbitration proceedings, the appellant submitted a claim of ₹62,75,000/- along with interest at the rate of 18% per annum. The arbitral proceedings culminated in the arbitral award dated 11.03.2020. The operative portion of the said award reads as under :-

“10. I have considered the rival contention and have gone through the entire record. The undisputed fact in the matter is that the Bid of the claimant was accepted by the respondent. Consequent thereto the claimant furnished Performance Security in the form of Bank Guarantee for a sum of Rupees Fifty lacs and besides that the earnest money of Rs.2 lacs too was deposited. Thereafter, the License Deed Ex.CW1/I was executed between the parties and then the respondent put the claimant in possession of the premises i.e. built structure of 350 sq. ft. @ 455/- per sq. meter for running the chemist shop from the said premises. The said license was for a period of 2



years w.e.f. 21.11.2011. However, the agreement also provided the stipulation that on the basis of satisfactory performance the License could be extended for a further period of one year. But here it is also an admitted case that the License in favour of the claimant was not extended for any further period. It is also not in dispute that since the license period of the claimant was not extended by the respondent, so, the claimant then vacated the premises on 07.12.2013, since he did not get any relief regarding the extension of the period even by filing petition in the Hon'ble High Court and then by letter dated 07.12.2023 (Ex. CW1/A) the claimant requested the respondent to return the earnest money deposit and release the Bank Guarantee. However, as consequence thereto, the earnest money of Rs.2 lacs was returned, but, the respondent decided to forfeit the Bank Guarantee of Rs.50 lacs. The respondent while forfeiting the said Performance Guarantee of Rs. 50 lacs (Rupees Fifty lacs only) has enumerated various reasons viz. a letter written against the claimant by one Shri Karan Singh Tanwar containing certain allegations, the misconduct on the part of the claimant with the customers, supplying medicines of different brands, the registration of a criminal case against relative of one of the co-owners, non-filing of monthly returns etc etc. However, after hearing the Ld. Counsel for the parties and perusing the records, it is apparent that only in one case on a complaint dated 06.10.2012 filed by one Sh. Praveen Kumar, a fine of Rs. 5331/- was imposed upon the claimant which was duly paid. Otherwise, in all other cases there were mere unsubstantiated allegations & those too without any proof against the claimant. However, all these allegations had been denied by the claimant. Then, under such circumstances, the duty was cast upon the respondent to prove those allegations but he has utterly failed to do so. Under such circumstances, the act of the respondent in forfeiting the Performance Security of Rs.50 lacks without firstly giving him show-cause notice or affording him adequate opportunity of being heard is totally illegal and against the Principles of Natural Justice. Consequently, the said order is liable to be set aside. Ordered accordingly.



FINDING

In view of the aforesaid discussions, both the issues are decided in favour of the claimant.

Hence, the result is that the claimant is forthwith entitled to the amount of Rs. Fifty lacs i.e. the Performance Security which had been furnished by him to the respondent.

Interest

The claimant is also entitled to interest @8% p.a. upon the said amount of Rupees Fifty Lacs w.e.f. 04.03.2015 i.e. the date of order of the Hon'ble High Court appointing the undersigned as the Arbitrator to adjudicate the disputes between the parties till the date of recovery. However, 60 days time is granted to the respondent to make the payment. And in case the amount is not paid within the said period of 60 days, then, the respondent shall be liable to pay interest @10% with effect from the date of the Award."

18. A petition under Section 34 of the A&C Act was filed by the respondent assailing the aforesaid arbitral award. The said petition came to be allowed *vide* the impugned order dated 28.04.2022. The reasons which impelled the learned District Judge to set aside the arbitral award as recorded in Paragraphs 21 and 23 of the impugned judgment are as under :-

- i. The reasoning and interpretation of the terms of the License Deed by the learned arbitrator goes beyond the purview of the Agreement between the parties and tantamount to re-writing the terms of the Contract. It is observed in the impugned judgment that the respondent could not be cast with the obligation to conclusively prove the allegations against the appellant. (Para 21 of the impugned judgment)



- ii. The performance security was liable to be forfeited on account of supplying of sub-standard, spurious medicines and also on account of other reasons as contemplated under Clause 3 of the License Deed.

19. According to the impugned judgment, the award results in re-writing of the Clause 3 of the License Deed (a) by holding that a duty was cast upon the respondent to conclusively prove the allegations against the appellant; (b) by holding that the performance security could not have been forfeited without giving a show cause notice to the appellant. The impugned order further holds the very fact that a penalty of ₹5331/- had been imposed by the respondent on the appellant was by itself sufficient to justify the forfeiture of the performance security. With regard to this penalty of ₹5331, it was held in the award as under :-

“.....The imposition of penalty of Rs. 5331/- by the petitioner on the respondent and the factum of respondent even having paid the said penalty of Rs. 5331/- pursuant to report of the Monitoring Committee of Pharmacology Department of the petitioner/AIIMS is an admitted case of both the parties and the Ld. Arbitrator has also referred to the said penalty on page 20 of the impugned award and the said fact itself was sufficient to justify the forfeiture of Performance Security by the petitioner as per Clause 3 of the License Deed executed between the parties.”

20. Being aggrieved by the impugned order, the appellant has filed the present appeal under Section 37 of the A&C Act.

SUBMISSIONS OF RESPECTIVE COUNSEL

21. It is the case of the appellant that it did not breach the License Deed's terms, and the respondent wrongfully forfeited the ₹50 Lakh bank guarantee. As per the appellant, the allegations of not providing prescribed medicines



are baseless, as the medicines sold were from a list approved by the respondent's Monitoring Committee and thus equivalent to the prescribed ones.

22. Additionally, the appellant claims that a fine of ₹5,331/- was unjustly imposed based on unverified complaints, which was paid under pressure. The appellant had responded satisfactorily to all show-cause notices, and no further action was taken, closing the matter. The appellant also points out that the penalty as imposed by the respondent, was paid under protest, and after payment of the penalty no other action was taken during the license period, which indicates the respondent had no serious grievances.

23. The appellant further accuses the respondent of misleading the Court by falsely alleging criminal involvement by the co-owners. The appellant also contends that after penalizing it in February 2013, the respondent allowed it to continue operations, and therefore, there was no occasion to take further action. The appellant submits that the Ld. District Judge failed to consider these points when setting aside the award.

24. The appellant submits that it is impermissible under Section 34 of the A&C Act, 1996, for the Court to interfere with or substitute its own interpretation for that of the arbitrator. In this regard, the appellant relies upon *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*¹ and *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*².

25. The appellant also relies upon *Associate Builders v. Delhi Development Authority*³, *Swan Gold Mining Ltd v. Hindustan Copper*

¹(2012) 5 SCC 306

²(2010) 11 SCC 296

³(2015) 3 SCC 49



*Ltd*⁴, and *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*⁵, to assert that a court should only overturn an arbitral award if it is entirely unsupported by evidence or irrationally disregards key evidence. The appellant maintains that the award in this case was based on a comprehensive consideration of all aspects of the matter and warrants no interference.

26. The appellant also contends that the forfeiture of the ₹50 Lakh Performance Guarantee was executed without issuing a show-cause notice or providing the appellant an opportunity to defend, thus breaching principles of natural justice. The Arbitrator, taking this into account, ruled in favour of the appellant and ordered the return of the guarantee. The appellant argues that the Learned District Judge failed to acknowledge that issuing a show-cause notice before punitive action is a fundamental principle of natural justice and aligns with Indian public policy.

27. It was also submitted that the forfeiture of the Performance Bank Guarantee is in the nature of a penalty, and under Sections 73 and 74 of the Indian Contract Act, such a penalty cannot be enforced unless actual loss is proved.

28. On the other hand, the respondent submits that Clause 3 of the License Deed clearly outlines the conditions under which the Performance Guarantee can be forfeited, including if the appellant violates any terms of the Licence Deed or supplies substituted medicines. As per the respondent, in the current case, the appellant was found to have violated these conditions, especially by supplying substituted medicines. The respondent

⁴ (2015) 5 SCC 739

⁵ (2019) 15 SCC 131



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points that the arbitral award dated 11.03.2020 disregarded these violations, thereby resulting in a fundamental error in the Award.

29. The respondent further avers that during the appellant's tenure, the respondent received several complaints from various sources, including patients, the general public, and even Delhi Police Crime Branch. The complaints included allegations of non-availability of prescribed medicines, the supply of substituted medicines, misbehaviour by pharmacy staff, tampering with the complaint box, and even illegal activities by the co-owners of the appellant, including transportation of banned drugs. The respondent submits that the respondent's internal Monitoring Committee investigated these complaints and confirmed that the appellant was indeed supplying substituted medicines, which was a violation of Clause 10 of the License Deed.

30. It is further submitted that throughout the tenure of the License Deed, the appellant was issued multiple notices (e.g., dated 16.08.2012, 16.10.2012, 12.03.2013, among others) regarding these violations. Penalty was imposed on the appellant for breaching the terms of the Deed. The appellant paid the same without disputing it, which the respondent argues amounts to an acknowledgment of their violations. Consequently, the appellant's violations and acceptance of fine led to the termination of the License Deed and refusal to extend it for further period.

31. The respondent terminated the License Deed on 21.11.2013 due to the appellant's repeated violations, and communicated the decision to the appellant through a letter dated 18.11.2013. Despite the termination, the appellant did not vacate the premises until 07.12.2013, in breach of Clause 36 of the License Deed.



32. The respondent submits that the impugned award re-writes the License Agreement by introducing a requirement of prior notice before forfeiture of the Performance Guarantee.

REASONING AND CONCLUSION

33. It is one of the basic tenets while exercising jurisdiction under Section 34 of the A&C Act that (i) appreciation of facts is the sole domain of the Arbitral Tribunal and the Court would be loathe to disturb factual findings unless the same are *ex-facie* perverse; (ii) the Court would defer to the arbitral tribunal's interpretation of the terms of the Contract, as long as the view taken by the Arbitral Tribunal is a possible one, even if an alternative view seems more plausible. In *Dyna Technologies Private Limited v. Crompton Greaves Limited*⁶, the Apex Court held as under –

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

⁶(2019) 20 SCC 1



25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

(Emphasis Supplied)

34. In the present case, the award renders factual findings to the effect that the allegations on the basis of which the performance security has been sought to be forfeited by taking recourse to the Clause 3 of the License Agreement, were (i) “mere unsubstantiated allegations” and “without any proof against the claimant”; (ii) only in the context of certain complaint/s, a penalty was imposed on the appellant/claimant which was duly paid; (iii) in the arbitral proceedings, the respondent had failed to prove the allegations against the appellant; and (iv) the respondent did not even give a show cause notice or provide any opportunity of hearing to the appellant prior to forfeiting the performance security of ₹50 Lakhs.

35. Having rendered the aforesaid factual findings, the Arbitral Tribunal concluded that there was no basis for forfeiting the performance guarantee amount. It was also noticed that the respondent’s own show cause notices did not culminate in any finding/order which justifies the forfeiture of the performance guarantee of ₹50 Lakhs. Whenever complaint against the appellant was found to be actionable, suitable penalty was imposed on the appellant, which had already been duly paid.



36. In the above circumstances, the Arbitral Tribunal directed refund of the forfeited performance guarantee amount with interest at the rate of 8% per annum in favour of the appellant.

37. It can be seen that the arbitral award is premised on purely factual findings, which brook no interference in proceedings under Section 34 and 37 of the A&C Act.

38. The impugned order, while noting the legal position that finding of facts could not be reopened in proceedings under Section 34 of the A&C Act, yet comes to the conclusion that forfeiture of the performance guarantee was justified. This conclusion was reached on the basis that the agreement between the parties did not impose a duty upon the respondent to prove its allegations against the appellant. The impugned judgment holds that by reading this requirement into Clause 3 of the Agreement between the parties, the said agreement has been re-written.

39. The above reasoning/ conclusion in the impugned judgment is clearly perverse. The forfeiture of the performance guarantee would be permissible only if there is a factual justification for the same and existence of the circumstances enumerated in Clause 3 of the License Agreement, is established. Such forfeiture cannot be at the mere *ipse dixit* or at the arbitrary whims of the respondent. Necessarily, there has to be a demonstrable factual basis for coming to the conclusion that forfeiture of the performance guarantee is warranted.

40. The Arbitral Tribunal having rendered a finding of fact to the effect that the respondent was unable to prove the relevant allegations against the appellant which formed the basis for forfeiture of the performance guarantee, such forfeiture is necessarily required to be set aside.



41. The Arbitral Tribunal while coming to the aforesaid conclusion did not read any fresh requirement into the relevant contractual clause (Clause 3 of the License Agreement) but merely rendered a finding based on the appreciation of material and evidence on record.

42. The impugned order also rightly notices that certain complaint/s were found actionable against the appellant culminated in a penalty being imposed on the appellant. However, the impugned order grievously errs in holding that the imposition of penalty of ₹5331 /- was by itself sufficient to justify the forfeiture of performance security of ₹50 Lakhs in terms of Clause 3 of the License Agreement. The said conclusion drawn is contrary to well established principles of law. As held by the Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority and Another***⁷, forfeiture of earnest money or performance security must be predicated on proof of actual loss being shown. The relevant observations in ***Kailash Nath Associates*** (supra) are as under :-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be

⁷ 2015 SCC OnLine SC 19



awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded....”

(emphasis supplied)

43. In the present case, the order/communication dated 17.12.2013, although refers to financial loss on account “wastage of precious man hours”, fails to disclose the extent thereof. Also, importantly, whenever the respondent deemed it fit to impose a penalty on the appellant, the quantum thereof was determined by the respondent itself and the same was also duly paid by the appellant.

44. As such, in the absence of financial loss being established, it was impermissible to forfeit the performance guarantee of ₹50 Lakhs. The



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conclusion in the impugned judgment that just because of penalty of ₹5331/- was levied on a previous occasion, the same would serve as a justification for forfeiting the performance guarantee ₹50 Lakhs, is completely antithetical to the dicta laid by the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority and Another* (supra) and followed in the catena of judgments. The fact that the respondent itself had previously quantified the penalty that was required to be imposed on the appellant for violating License conditions, is demonstrative of the fact that the forfeiture of performance security of ₹50 Lakhs, has no nexus with any actual loss.

45. In the circumstances, the impugned order is set aside. This Court finds no basis to interfere with the impugned arbitral award in exercise of jurisdiction under Section 34 and 37 of the A&C Act.

46. The present petition is, accordingly, allowed in the aforesaid terms.

SACHIN DATTA, J

VIBHU BAKHRU, J

OCTOBER 01, 2024

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