

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Pronounced on: 13th March, 2023

+ O.M.P. (COMM) 376/2020

AMAZING RESEARCH LABORATORIES LTD.

Through its authorized representative,

Corporate office at:

B 9 & 10, Laxmi Towers,

L.S.C., Block C, Saraswati Vihar,

New Delhi-110034

..... Petitioner

Through: Mr. Siddharth Aggarwal, Advocate.

versus

KRISHNA PHARMA

(Through its Sole Proprietor),

Mr. C.K. Velmurugan,

New No. # 8-A (Old No. # 24),

Jayalakshmipuram, 1st Street,

Nungambakkam, Chennai-600034.

..... Respondent

Through: Mr. A. Selvin Raja & Ms. Nikita

Kumari, Advocates.

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "Act, 1996"*) has been filed on behalf of the petitioner for setting aside the Award dated 19.11.2019 passed by the Sole Arbitrator.

2. The **facts in brief** are that the Claimant Company i.e., the petitioner herein, is engaged in the business of manufacturing and selling a large variety of pharmaceutical formulations in the form of Tablets, Capsules, Dry Syrups etc., and is carrying on the business of outsourcing and

distribution of such products. The respondent, a proprietorship firm in which Mr. C.K. Velmurugan is a Proprietor, entered into a Distributor on Consignee Agency Basis Agreement dated 28.12.2007 with the validity of two years w.e.f. 01.04.2008 to 31.03.2010. The Agreement was renewed *vide* Agreement dated 01.04.2010 upto 31.03.2012.

3. The parties after about seven months of expiry of previous Agreement, entered into a fresh Distributor on Consignee Agency Basis Agreement dated 12.11.2012 for a period of three years which was renewed *vide* Agreement dated 22.05.2015 for another three years. The petitioner supplied pharmaceutical products which were sold in the market by the Respondent to the Distributors, Stockiest, Retailers from 01.04.2008 to 16.05.2016 under the written and verbal Orders of the respondent.

4. However, since beginning despite assurances, the respondent delayed making complete payments or made short payments against the products duly supplied by the petitioner in violation of the terms and conditions of the four Agreements.

5. The petitioner maintained a running ledger account commencing from 01.04.2007 to 31.03.2018 showing a sum of Rs. 2,64,99,670/- as outstanding and payable as on 26.09.2016 after adjustment of the part payments received from the respondent.

6. The petitioner sent a Balance Confirmation Letter on 24.04.2016 for the sum of Rs. 3,08,69,493/-(including interest) in response to which the respondent unequivocally admitted its liability for the sum of Rs. 2,53,89,777/-. The respondent reiterated the admission of its liability for the sum of Rs. 2,57,62,616/- in response to the second Balance

Confirmation Letter dated 31.08.2016 sent by the petitioner for the sum of Rs. 3,24,76,073/- . In response to the third Balance Confirmation Letter dated 22.04.2017 for a sum of Rs. 2,64,99,671/-, the respondent again admitted its liability for the said amount. However, after the last balance confirmation, neither any pharmaceutical products were supplied to the respondent, nor any payment was received by the petitioner despite several visits, letters and telephonic calls made to the respondent. Legal Notice dated 27.06.2017 was served upon the respondent to which it responded vide Reply dated 18.07.2017, admitting its liability for the sum of Rs. 1,64,73,786/-. The petitioner reiterated the outstanding dues in its rejoinder to the reply. Despite not disputing the outstanding liability, the respondent failed to make any payment.

7. Aggrieved, the petitioner served a Notice of Invocation dated 28.11.2017 in terms of Clause 21 of the Agreement dated 12.11.2012 and appointed Mr. Dharam Chandra Jain as the Sole Arbitrator.

8. The respondent vide its Reply dated 05.12.2017 rejected the proposal of the petitioner for the appointment of the sole arbitrator. Consequently, the petitioner filed Arbitration Petition No. 28/2018 under Section 11(5) of the Act, 1996 which was allowed vide Order dated 05.04.2018 and the parties were directed to appear before the Delhi International Arbitration Centre on 24.04.2018 for appointment of the Sole Arbitrator as per the rules of Delhi International Arbitration Centre.

9. The petitioner filed its Statement of Claim for the sum of Rs. 3,38,32,695/- before the appointed Arbitrator. The respondent in its Statement of Defence, took an objection to the appointment of the Sole Arbitrator. However, it admitted its liability of Rs. 1,64,73,786/- as

outstanding and payable as per its Book of Accounts.

10. The Sole Arbitrator rejected the objection to his appointment and proceeded with the claim. The respondent after a few dates, stopped appearing and was proceeded *ex parte*. The Ld. Arbitrator awarded a sum of Rs. 28,92,620/- along with interest @ 9% per annum from 01.11.2016 till its realization along with cost of the proceedings vide the impugned Award dated 19.11.2019.

11. **The Award rejecting the part claim in the sum of Rs 2,36,07,051/- and partially allowing it in the sum of Rs 28,92,620/- has been challenged by the petitioner** on the ground that the Sole Arbitrator has erroneously not awarded the entire sum of Rs. 2,64,99,671/- despite the unequivocal admission of liability by the respondent and no serious challenge to the documents filed by the Petitioner. So much so, the respondent after filing its reply to the Statement of Claim failed to appear after a few hearings and was proceeded *ex parte*. No documents or evidence was filed to controvert the Claim of the petitioner. The Sole Arbitrator has erroneously concluded that sales during the period from 12.11.2012 to 31.03.2018 under the Agreement amounted to Rs. 1,29,53,722/-, against which a sum of Rs. 1,00,61,102/- was paid by the respondent leaving an outstanding balance of Rs. 28,92,620/-. The other outstanding payments pertained to earlier Distribution Agreement and were not the subject matter of this arbitration. Accordingly, Rs. 28,92,620/- along with interest at 9% p.a. from 01.11.2016 till its actual realization, has been awarded to the Petitioner.

12. The ground of challenge is that the Sole Arbitrator has erroneously confined itself to the time frame as provided in the Agreement dated

12.11.2012 and renewed Agreement dated 22.05.2015 especially when the Claim amount is admitted by the respondent and it had chosen not to contest the Claim. The impugned Award is asserted to be contrary to Public Policy of Indian law, justice and morality and patently illegal. It is so unfair and unreasonable that it shocks the conscience of this Court and is liable to be set aside. The petitioner has relied upon the decision of the Apex Court in Commissioner of Wealth Tax, Amritsar vs. Suresh Seth (1981) 2 SCC 790 to assert that where there is repetition of facts or omissions of the same kind as that for which the action is brought, the cause of action is continuing.

13. It is further asserted that the error of law has been committed by the Arbitrator on the face of record. Moreover, the Application under Order XII Rule 6 of the Code of Civil Procedure, 1908 filed by the petitioner seeking a Decree for the admitted sum of Rs. 1,64,73,786/- was never decided by the Sole Arbitrator. It is asserted that the Sole Arbitrator has acted in violation of principles of natural justice and the impugned Award is liable to be set aside.

14. Though no response or reply has been filed on behalf of the respondent in the present proceedings, **the Statement of Defence was filed before the Sole Arbitrator** wherein it was denied that any short payment/delayed payment has been made to the Claimant/petitioner. It was asserted that no dues are pending and the demanded amount made by the Claimant/petitioner was untenable. Though it was denied that there was existing debit balance of Rs.2,64,99,671/- but outstanding amount of Rs.1,64,73,786/- was admitted. The respondent however, challenged the appointment of the Arbitrator by the Delhi International Arbitration

Centre on the ground that it was not served with any prior Notice and sought clarification regarding the Authorized Signatory who had signed Notice dated 27.06.2017 that was sent on behalf of the Claimant/petitioner.

15. **The petitioner in its Written Submissions** has argued that no plea was raised by the respondent before the Sole Arbitrator that it had no jurisdiction to try the dispute or that it exceeded its scope of authority. The parties were in fact at *ad idem* that the disputes were to be adjudicated through Arbitration. Reliance has been placed on Govind Rubber Ltd. vs. Louids Dreyfus Commodities Asia P. Ltd. MANU/SC/1209/2014 and Trimex International FZE Ltd. vs. Vedanta Aluminium Ltd MANU/SC/0057/2010.

16. Further, Section 16 of the Act, 1996 lays down that the respondent has to raise an objection in regard to the jurisdiction of the Arbitrator at the earliest and if no objection is raised, then it is deemed to be waived under Section 4 of the Act, 1996. Reliance has been placed on the decisions in MSP Infrastructure Ltd. vs. MP Road Devl Corp Ltd. MANU/SC/1144/2014, Quippo Construction Equipment Ltd. vs. Janardan Nirman Pvt. Ltd. MANU/SC/0421/2020, SN Malhotra & Sons vs. Airport Authority of India MANU/DE/0527/2008 & Mcdermott International Inc. vs. Burn Standard Co. Ltd. MANU/SC/8177/2006.

17. It is further asserted that the impugned Award suffers from patent illegality in ignoring the admissions of the respondent on record and other relevant and vital material. The sole Arbitrator has erroneously assumed that the money received by the petitioner during the period 12.01.2012 to 31.03.2018 to the tune of Rs. 1,00,61,102/- was limited to the sales made

during the said period. The amounts due to the petitioner from the respondent even if prior to 12.11.2012 were liable to be settled first and denial of the same is against the principle of appropriation of dues as provided under Sections 59, 60 and 61 of the Indian Contract Act, 1872 as explained in the decisions in Hindustan Zinc Ltd. vs. Friends Coal Carbonisation (2006) 4 SCC 445 and Garimella Suryanarayana vs. Gada Venkataramana Rao AIR 1953 Mad 458.

18. The impugned Award is claimed to have been made on conjectures, surmises and assumptions, which is liable to be set aside for which the petitioner has drawn support from the decisions in Shiel Trade Venture Private Limited vs. Samsung India Electronics Pvt. Ltd. MANU/DE/2218/2019 and Motilal Oswal Securities Ltd. vs. Rakshak Kapoor & Ors. MANU/DE/4025/2019.

19. **Learned counsel on behalf of the respondent**, on the other hand, has argued that there is no error apparent on the face of the record and the scope of arbitration was limited to the disputes from 2012 to 2018, which has been rightly determined by the Id. Sole Arbitrator. There is no merit in the Objections under Section 34 of the Act, 1996 and is liable to be dismissed.

20. **Submissions heard.**

21. The **first aspect** under challenge is the *jurisdiction* of the learned Arbitrator to adjudicate in the present matter on the ground that no Notice of Invocation was served.

I. Notice of Invocation of Arbitration under Section 21 of A&C Act, 1996

22. It was claimed that no Notice of Invocation of Arbitration was ever

served upon the respondent and in the absence of Notice of Invocation, the assumption of jurisdiction by the learned Arbitrator was *non-est* and invalid.

23. In this regard, reference may be made to Clause 21 of the Agreement dated 12.11.2011 which reads as under:

“Any difference or dispute arising out of or in relation to anything contained herein shall be referred to arbitration. The Arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The place of arbitration shall be Delhi”

24. It clearly stipulates adjudication of any disputes that may arise between the parties in the execution of the Contract is amenable for resolution through arbitration.

25. In M/s Anacon Process Control Private Limited v. Gammon India Limited 2016 SCC OnLine Bom 10076, the Bombay High Court observed that in order to invoke arbitration, Notice under Section 21 of the Act, 1996 is a *sine qua non* for commencement of arbitration proceedings.

26. The appellant had sent a Notice of Invocation dated 28.11.2017 to the learned Arbitrator with a copy marked to the respondent. A reply dated 05.12.2017 was admittedly given to by the respondent to the Notice of Invocation. The service of Notice of Invocation is not only established but is admitted by the respondent.

27. Further, when the respondent did not agree to the name of the nominated arbitrator, the proceedings under Section 11 of the A & C Act, 1996 were initiated by the petitioner *vide* Arbitration Petition bearing no. Arb.P. 28/2018 wherein the respondent submitted that it had no objection

if an Arbitrator was appointed for adjudicating the disputes that had arisen between the parties.

28. Not only had the respondent been duly served with the Notice of Invocation but also, in the proceedings under Section 11 of the A & C Act, 1996, but he had conceded to referral of the disputes to the Arbitrator.

29. The other question is whether a Notice which is not directly addressed to the respondent, can be considered as compliance under Section 21 of the A&C Act, 1996. This aspect came for consideration in Prasar Bharti Vs. Multi Channel (India) Ltd, 2005 Supp Arb LR 245, where the Notice of Invocation under Section 21 was addressed to Director General who is the appointing body, and a copy was endorsed to the respondent. It was observed that the object of giving a Notice of Invocation is essentially to put the other party to Notice that there are disputes which the party intends to refer to Arbitration. This is to enable the other party to resolve the disputes, if possible, and/or to agree on the Arbitrator in terms of the Clause in their Agreement. The Notice as described above was held to be sufficient compliance of the requirements under Section 21 as information regarding the dispute and the invocation of arbitration had been conveyed to the other party even if the Notice was not directly addressed to them.

30. Even though the Notice was sent to respondent through CC, the respondent through the copy of the Notice was made aware of the intention of the petitioner to resolve their dispute through arbitration. The respondent gave a reply to the Notice and even conceded to appointment of Arbitrator in the proceedings under S.11 of the Act, 1996. Hence, the

requirement of service of Notice under Section 21 of the A&C Act, 1996 had been duly complied with and the arbitration has been validly invoked in accordance with the provisions of law.

II. Scope of Reference and Admission of Liability:

31. The petitioner had filed a Claim for the sum of Rs.2,64,99,671/- before the learned Arbitrator but his Claim was allowed only for the sum of Rs.28,92,620/-.

32. The relevant paragraph of the impugned Award reads as under :

“According to the documents (Ex. CW-1/E4,E5) filed by the Claimant, the sales relating to the period 12.11.2012 to 31.03.2018 were to the tune of Rs. 1,29,53,722/- (One crore twenty-nine lakh fifty three thousand seven hundred and twenty-two only) and the receipt during that period were of Rs. 1,00,61,102/- (One crore sixty one thousand one hundred and two only). The outstanding balance thus is only Rs. 28,92,620/- (Twenty-eight lakh ninety-two thousand six hundred twenty only). No other document was pressed by the claimant in support of its claim.”

33. The findings of the learned Arbitrator rejecting the part claim for the sum of Rs.2,36,07,051/- has been challenged by the petitioner on the ground that there was unequivocal admission by the respondent in the three Balance Confirmation Letters which has been ignored and overlooked by the learned Arbitrator while adjudicating upon the amount due to the appellant. It is contended that the respondent has chosen not to contest the proceedings before the learned Arbitrator and there was no challenge to the ledger accounts and books of accounts produced by the appellant. Despite the unchallenged and uncontroverted evidence as well as the admission of the liability by the respondent, the learned Arbitrator has ignored the evidence and wrongly denied the entire claim of the

appellant. The cause of action was continuing in nature and it firstly arose on 28.12.2007 when the parties first entered into the Distributorship Agreement which was continued by subsequent execution of various Agreements from time to time. It is claimed that the cause of action is continuing and subsisting and the respondent has failed to pay the outstanding amount. The appellant had examined six witnesses to prove the relevant documents despite which the same have been ignored, over looked and discarded by the learned Arbitrator while passing the impugned Award dated 19.11.2019.

34. The basic challenge to the Award is that the Distributorship Agreements were in continuation since 2007 and the ledger account was also prepared accordingly. The finding of the learned Arbitrator that the Contract period was from 12.11.2012 till 31.03.2018 was erroneous.

35. Section 28 (1) (a) and (3) of the AC Act, 1996 creates an obligation on the Arbitrators to determine the disputes in accordance with the law of the land and the terms of the contract between the parties, It reads as follows-

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

.--(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction”.

36. In Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49, the Apex court in reference to Section 28 (3) of the Act, 1996

and observed that determination of claims in contravention of the terms of the Contract would be regarded as patent illegality.

37. What thus, needs to be examined is whether the determination of claim and consequent apportionment of the due amount has been done in accordance with the provisions of the Contract Act.

38. **The first aspect for consideration** is whether the Agreement dated 12.11.2012 is in continuation of Agreement of 2007 or whether the liability incurred under the Contract dated 12.11.2012 (subsequently renewed vide Agreement dated 22.05.2015), is independent of the contract liability under the previous Agreement which expired in March, 2012.

39. The record shows that there was an Agreement initially in 2007 which was renewed up to 31.03.2012. Thereafter, after a gap of about seven months, the parties entered into a fresh Agreement dated 12.11.2012 for three years which was renewed on 22.05.2015 till 31.03.2018. The Ld. Arbitrator has correctly concluded that the Agreement dated 12.11.2012 was not in continuation of the previous Agreement of 2007 and also that there was no Arbitration Clause in the earlier Agreement and the disputes were to be confined to the present Agreements.

40. The petitioner is aggrieved by the rejection of its part claim in the sum of Rs.2,36,07,051/- on the premise that this amount pertained to the earlier Agreement valid from 01.04.2008 to 31.03.2012 and was not covered under the present Agreement from 12.11.2012 till 31.03.2018. It is argued that the determination of liability has not been appreciated in the correct perspective. There was no dispute raised in regard to previous Agreement and respondent nowhere denied its outstanding liability under

the previous Agreement which was infact admitted and acknowledged in the three confirmation Letters as mentioned above. In response to the third letter dated 22.04.2017 it was confirmed that as per their Books of Accounts the outstanding balance was Rs.2,64,99,671/- as on 31.03.2017.

41. Further, there is no denial by the respondents in their Reply dated 18.07.2017 to the Legal Notice dated 27.06.2017 issued by the appellant about the outstanding liability. The stand taken by the respondent was:

“4. I am entered into agreement with you on 12.11.2012 for supplying your products, which was valid until 31.03.2015 and was renewed again on 22.05.2015 with validity till 30.03.2018.

5. I deny that there exists a debit balance of Rs.2,64,99,671/- due from me as mentioned in your notice that is outstanding in my account. As per my accounts the amount outstanding is Rs.1,64,73,786/-.

6. From the inception of this distributor relationship, I state that accounts were regularly tallied year-to-year, and no discrepancies were notice till the date of your notice, even though the account was a running account, as admitted by you in your notice, therefore this is a clear indication that such discrepancies were not noticed earlier, as such discrepancies did not exist.

7. I state that I am not clear about the identity of the “Authorised Signatory”, who has signed your letter and request that his/her identity be disclosed transparently.”

42. The Respondent also did not dispute that a running ledger Account was being maintained by the parties since the inception of Distributor Agreement in 2007 with periodical reconciliation. The only reservation expressed in the Reply by the respondent was that there seems to be some apparent discrepancy in the accounts being maintained by the appellant as

according to its Accounts the outstanding liability was of Rs.1,64,73,786/-. No objection was taken by the respondent that the dues claimed did not pertain to the present Distribution Agreement of 2012 or that the accounting was not being done in continuum. It would be apposite to refer to Section 25 (3) of the Contract Act, 1872 reads as under:

“S.25-An agreement made without consideration is void, unless-

(1)....

(2)....

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.”

43. In the light of admissions in the Confirmation Letters and Reply to Legal Notice, any plea of limitation that could possibly be taken, is taken care by Section 23(3) of the Contract Act which states that any subsequent admission of the due amount even if barred by limitation, would constitute a fresh Agreement.

44. Coming back to the ledger accounts, they prove a debit balance of Rs. 2,64,99,671/-. To repel the challenge to the ledger accounts, the petitioner examined two witnesses; CW1 Mr. Binod Kumar Yadav, Authorized Representative and CW2 Mr. Deepak Goyal, Deputy Manager Accounts Department of the Claimant Company who duly proved the ledger accounts. Neither was their testimony challenged nor any Ledger accounts were produced by the Respondent to explain the alleged discrepancy in the Accounts. In fact, no evidence whatsoever has been led

by the respondents and the claim of the petitioner has not only been admitted by respondent but also not controverted by Respondent in any manner.

45. Ld. Arbitrator while having appreciated the Claim of the petitioner for determination of liability, has fallen into error to appreciate and apply the law pertaining to apportionment of funds in ledger accounts. It would thus, be relevant to first understand the ledger accounts and how the money is to be apportioned to the entries reflected in the ledger account.

46. The Ledger account maintained by the petitioner was a “*running and non-mutual account*” as has been explained in the case of Renganathan vs Saravana Store 2018 SCC OnLine Mad 5897. In case of a running and non mutual account between the buyer and seller, when goods are delivered by the seller to the buyer, the value of the goods is debited in the debit column and when amounts are paid by the buyer to the seller, they are entered in the credit column. The difference is continuously struck in the column for balance. In such a case, when the buyer defaults to make balance payment, the seller's action is not for the price of goods sold and delivered, but for the balance due at the foot of an account. The account is running as the amounts received are credited and the amounts still due is reflected as debit. Essentially, it is non mutual because the amounts being adjusted are those payable by one party. Mutual account implies that the credit – debit account is of both the parties.

47. The accounts being maintained being running and non-mutual, the manner of apportionment of money in running accounts has been

explained in Section 59, 60 and 61 of the Contract Act, 1872. They read as under :

“S.59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

S.60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

S.61. Application of payment where neither party appropriates.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally.”

48. The underlying principles of apportionment as contained in above sections according to Pollock & Mulla, *Indian Contract Act, 12th Edition*, is that when several debts are due and owing to one person, any payment made by the debtor either with an express intimation or under circumstances from which an intimation may be implied, must be applied to the discharge of the debt in the manner intimated or which can be implied from the circumstances. **Mulla** proceeds to observe that “*where several distinct debts are owed by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the*

debts that he pleases, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor”.

49. The Rule of Appropriation of money was summed up by Mr. Justice T.L. Venkatarama Aiyar (as he then was) in the Full Bench decision of the Madras High Court in Marimella Suryanarayana vs. Venkataraman Rao (AIR 1953 Madras 458). His Lordship stated:

"The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in such manner as he decides and if the creditor accepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in 'Clayton's case' (1861) 1 Mar.572: 35E.R. 781 and it is embodied in Section 59, Contract Act. But when the debtor has not himself made any appropriation, the right devolves on the creditor who can exercise it at any time, vide 'Cory Bros. & Co. vs. Owners of the Turkish Steamship 'Mecca', (1897) A.C. 286; and even at the time of the trial : Vide 'Symore vs. Picket', (1905) 1 K.B. 715. That is Section 60, Contract Act. It is only when there is no appropriation either by the debtor or the creditor that the Court appropriates the payments as provided in Section 61, Contract Act."

50. In the case of Anmol Steel Processors Private Limited vs Colour Roof (India) Limited (MANU/MH/0167/2022) the Bombay High Court analysed Section 60 and 61 of the Indian Contracts Act and observed:

“55. Under section 60 of the Indian Contract Act, where the debtor has omitted to intimate and there are no settled circumstances undertaking the debt to be applied, the creditor may apply at his discretion to any lawful debt actually due and payable to him from the creditor, whether is regular or is not

barred by law in force for the time being as to the limits of the suit”

“56. At this stage, it would be apposite to refer to section 61 of the Indian Contract Act which provides that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.”

51. Thus, to summarize where a debtor, owing several distinct debts to one person, makes a payment indicating that the payment is to be applied to the discharge of some particular debt, the payment must be applied accordingly in terms of S.59 of the Contract Act. However, where the debtor omits to so intimate, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits, according to S.60. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by limitation in terms of Section 61 of the Contract Act.

52. In the present case, there is neither any averment nor any evidence that the respondent while making payments to the appellant in terms of the Contract ever indicated the manner of apportionment. When neither party specifies the manner of apportionment, then the amount has to be first adjusted towards earlier debts irrespective of limitation as indicated by Section 61 Contract Act. Thus, the money which was continuously being received from the respondent was to be apportioned to the previous amounts that were due in the earlier Agreements as has been reflected in

the ledger accounts. The amount as due in 2018 was the claimed amount of Rs.2,64,99,671/-.

53. The learned Arbitrator while was correct in observing that the arbitration had been invoked pursuant to the Contract of 12.11.2012 renewed in 2015, but he overlooked the statutory provisions under Contract Act for apportionment of money received from the Respondent from time to time. Rather the documents of Respondent especially the confirmation letters and also the Reply to the Legal Notice, not only reflect his own admissions of the outstanding liability but also that the apportionment of money was done in accordance with Section 61 of the Contract Act.

III. Award suffers from patent illegality as is based on no evidence and in contravention of substantive Law:

54. Section 28(1) (a) of the A&C Act, 1996 mandates the arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India.

55. Section 28 (1) (a) and (3) of the AC Act, 1996, which reads as follows-

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

.--(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

56. Hence, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, it necessarily suffers from patent illegality and has to be set aside.

57. The Ld. Arbitrator, in the present case has not only based his findings overlooking the admissions of the respondent coupled with no evidence being led by the respondent but has completely overlooked the statutory provisions of the Contracts Act, 1996 which is a substantive law applicable in the present proceedings. It is also evident that the admission/acknowledgement of the outstanding dues was in reference to the two Agreements dated 12.11.2012 and 31.03.2015. Therefore, the conclusions arrived at by the learned Arbitrator that the claim did not pertain to the two Agreements under which the arbitration had been invoked is based on non-appreciation of the evidence and ignoring the admissions which were on record and also in contravention of the statutory provisions of law.

58. It is pertinent to refer to the case of Ssangyong Engineering and Construction Co. Ltd. (2019)15 SCC 131 wherein it was observed that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Patent illegality and perversity was summed up to mean:

“(a) it is so unfair and unreasonable that it shocks the conscience of the court

(b) the award which is on the face of it, patently in violation of statutory provisions cannot be said to be in public interest

(c) disregarding orders passed by the superior courts (d) award is against the specific terms of contract which can be

expressed or implied usages of the trade applicable to the transaction

(e) decision is arrived at without any evidence or on the evidence which is unreliable

(f) any term of agreement, which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power and is patently illegal or prejudicial to the rights of the parties.”

59. In Hindustan Zinc Limited vs Friends Coal Carbonisation, (2006) 4 SCC 445, clarified that it is open to the court to consider whether an Award is against the specific terms of contract, and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

60. The impugned Award, therefore, suffers from patent illegality as it has been made in contravention of the statutory provisions and principles of law in regard to appreciation of evidence/ admissions made by the parties.

61. The conundrum which now arises is whether there can be partial setting aside of the Award or would it amount to modification of Award and has to be necessarily set aside in toto leaving the parties for a fresh round of arbitration, if so advised.

62. The said question had been engaging attention of the Courts and divergent views have been taken by the Courts. The question came up for consideration before Full Bench of Bombay High Court in the case of R.S. Jiwani (M/S.) Vs. Ircon International Ltd., 2009 SCC OnLine Bom 2021 wherein some claims were allowed while some were rejected. The Full

Bench observed as under:

“36 ...Could there be a greater perversity of justice to a party which has succeeded before the Arbitral Tribunal as well as in the court of law but still does not get a relief. Is that what is contemplated and was the purpose of introduction of the Act of 1996. An Act which was to provide expeditious effective resolution of disputes free of court interference would merely become ineffective statute. Would not the canon of civil jurisprudence with the very object of the Arbitration Act, 1996 stand undermined by such an approach. The effective and expeditious disposal by recourse to the provisions of the 1996 Act would stand completely frustrated if submissions of the respondent are accepted. Partial challenge to an award is permissible then why not partial setting aside of an award. In a given case, a party may be satisfied with major part of the award but is still entitled to challenge a limited part of the award. It is obligatory on the court to deal with such a petition under section 34(1)(2) of the Act. We may further take an example where the Arbitral Tribunal has allowed more than one claim in favour of the claimant and one of such claim is barred by time while all others are within time and can be lawfully allowed in favour of the claimant. The court while examining the challenge to the award could easily sever the time barred claim which is hit by law of limitation. To say that it is mandatory for the court without exception to set aside an award as a whole and to restart the arbitral proceeding all over again would be unjust, unfair, inequitable and would not in any way meet the ends of justice.”

63. It was further observed that such an interpretation that the Award has to be set aside in its entirety is bound to cause greater hardship, inconvenience and even injustice to some extent to the parties. To compel the parties, particularly a party who had succeeded to undergo the arbitral process all over again does not appear to be in conformity with the scheme of the Act. The provisions of Section 34 are quite *pari materia* to

the provisions of Article 34 of the Model Law except that the proviso and explanation have been added to Section 34(2)(iv). The attempt under the Model Law and the Indian Law appears to circumscribe the jurisdiction of the court to set aside an award. There is nothing in the provisions of the Act and for that matter absolutely nothing in the Model Law which can debar the court from applying the principle of severability provided it is otherwise called for in the facts and circumstances of the case and in accordance with law. The courts will not get into the merits of the dispute. Thus, the interpretation which should be accepted by the court should be the one which will tilt in favour of the Model Laws, scheme of the Act and the objects sought to be achieved by the Act of 1996.

64. In the case of R.S. Jiwani (supra.), it was held that it is difficult to prescribe legal panacea which, with regard to the applicability of the principle of severability can be applied uniformly to all cases. The judicial discretion vested in the court in terms of the provisions of Section 34 of the A&C Act, 1996 was held to take within its ambit, power to set aside an award partly or wholly depending on the facts and circumstances of the given case and it was held that the same is not intended to be whittled down or to divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the court. Moreso, the proviso to section 34(2)(a)(iv) has to be read *ejusdem generis* to the main section, as in cases falling in that category, there would be an absolute duty on the court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal.

65. In R.S. Jiwani (M/S.) (supra) a reference was made to the decision of the Apex Court of India in NHAI vs. M. Hakeem (2021) 9 SCC 1 wherein it was observed as under:

"Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."

66. It thus settled the law and held that the court does not possess the power to modify an arbitral award while hearing a challenge under Section 34 of the Act.

67. However, in R.S. Jiwani (M/S.) (supra) it was observed that the observations were in regard to modification and not to the partial setting aside of the Award. It was thus, concluded that the Court, while exercising power under Section 34 of the A&C Act, 1996, can set aside an Award partly, depending upon the facts and circumstances of the case.

68. In this context, reference was made to the judgment of the Supreme Court in the case of J.G. Engineers Pvt. Ltd. Vs. Union of India and another (2011) 5 SCC 758. (23) wherein the doctrine of severability was invoked and it was held that when the Award deals with several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the

Award to that extent.

69. The Bombay High Court in the recent judgement of National Highway Authority of India v. The Additional Commissioner, Nagpur 2022 SCC OnLine Bom 1688 noted the aspect of grave inconvenience highlighted in the aforesaid Full Bench judgement of Bombay High Court in the case of R.S. Jiwani (M/S.) (supra) and observed that if parties are required to go for arbitration afresh in its entirety on every occasion, even when the arbitral award is only partly set aside, that the arbitral award is found liable to be set aside on some issues, it would lead to multiple rounds of litigation, going against the very purpose of alternative dispute redressal mechanisms like arbitration. The claimants would be forced to pursue numerous rounds of proceedings before the arbitrator and Courts, which cannot be countenanced, thereby indicating that the contention raised in this regard on behalf of the appellants is unsustainable. Thus, following the principle of severability of claims it was held that the Award may be set aside partially.

70. In the present case, the respondent has not contested the matter before the Id. Arbitrator and has also not challenged the impugned Award. So much so there is an admission of liability by the respondent. In these circumstances, to drive the parties to Arbitrate the entire dispute afresh despite admissions would indeed be extreme harshness which is not in accordance with the ethos of arbitration.

71. This aspect of setting aside of partial Award may also be viewed in the context of section 31(6) of the Act, 1996 which permits the passing of an interim award by the Arbitral Tribunal on any matter with respect to which it may make a final award. S.2(c) of the Act, 1996 clearly provides

that the term "arbitral award" includes an interim award which can be challenged under Section 34 of the Act and not under Section 37 of the Act.

72. The Division Bench of the Madras High Court in the judgment of Gammon India Ltd. v. Sankaranarayan Construction (Bangalore) Pvt. Ltd., 2009 SCC OnLine Mad 2261 , has upheld the power of the Tribunal to pass interim award qua admitted liability vis-à-vis Order XII Rule 6 of C.P.C.

73. Division Bench of Delhi High Court in the case of Numero Uno International Ltd. v. Prasar Bharti (2008) 1 Arb LR 446 (Delhi) observed that there is no reason why the payment of what is admittedly due, should await the determination of other disputes which may take years before they are finally resolved. Similar are the observations made by this Court in the case of Nimbus Communications Ltd. v. Prasar Bharati, FAO(OS) 369/2015 decided on 05th April, 2016 by this Court.

74. Applying the aforesaid principles to the present case, as already noted above, the respondent has admitted its liability to the tune of Rs. 1,64,73,786/- out of which only a sum of Rs. 28,92,620/- has been awarded. The Award is fully justified in the circumstances and admissions and if the respondent was aggrieved, it was at liberty to challenge it under S.34 of the Act. The award of this partial amount can also be considered as interim Award and need not be set aside in the given circumstances.

Conclusion:

75. In the light of above discussion, it is held that the impugned Award suffers from patent illegality to the extent of rejection of Claim for Rs.

Rs.2,36,07,051/- out of the total Claim of Rs.2,64,99,671/- (excluding interest) and is hereby set aside. The parties are at liberty to take appropriate remedy or initiate the arbitration proceedings afresh as per law. No order as to costs is made in the given circumstances.

**(NEENA BANSAL KRISHNA)
JUDGE**

MARCH 13, 2023
S.Sharma/pa/va

