Vijay Kumar Garg Vs Punjab State Ind. Development Corpn. Ltd.

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Dec. 17, 2016

Acts Referred: Arbitration and Conciliation Act, 1996 - Section 34

Citation: (2017) 3 RAJ 45

Hon'ble Judges: Mr. Amit Rawal, J.

Bench: Single Bench

Advocate: Mr. Naresh Markanda, Senior Advocate with Ms. Kavita Markanda, Advocate, for the Appellant; Ms. Madhu Dayal, Advocate, for the Respondent No. 1

Final Decision: Allowed

Judgement

Amit Rawal , J. (Oral)â€”The appellant is aggrieved of the impugned order dated 15.11.2014, whereby the objections filed under Section 34 of

the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") for setting aside the Award dated 12.09.2011 have been dismissed, in

essence, the Award passed in favour of M/s Punjab State Industrial Development Corporation Ltd. (for short "PSIDC") has been upheld.

2. Mr. Naresh Markanda, learned Senior Counsel assisted by Ms. Kavita Markanda, learned counsel appearing on behalf of the appellant

submits, that a Collaboration Agreement dated 19.08.1986 was entered into between the appellant-Vijay Kumar Garg (hereinafter called "the

Collaborator") and the respondent(s)-PSIDC for manufacture of (i) D (-) Phenyl Glycine - 150 tons, (ii) D (-) Para Hydroxy Phenyl Glycine

Chloride Hydrochloride - 100 tons and (iii) D (-) Para Hydroxy Phenyl Glycine Dane"s Salt - 50 tons.

3. He submits that the Clause 26 in entirety envisaged that the Collaborator, after five years of the commencement of the commercial production,

shall buy back the equity shareholders, invested by the PSIDC. The Company came into commercial production on 01.07.1992 which fact is not

in dispute.

4. He further submits that on 21.11.1995, a foreign company by the name of M/s DSM Andeno BV Netherland joined the Company with a stake

of 14.12% share capital (30,72,580 shares). On 16.12.1996, a meeting of Board of Directors of the Company was held, wherein the approval

was granted to allot further 1,61,62,713 shares to the aforementioned newly inducted Company. The aforementioned, meeting of Board of

Directions was ratified in the Extraordinary General Meeting of the Company held on 12.05.1997. On 03.07.1997, an agreement was entered into

between M/s Alpha Drugs Indian Ltd., of which the appellant is the Collaborator, and the newly inducted Company, which became owner to the

extent of 50.72% shareholding. Resultantly the shareholding of the Company of the appellant fell to 6.49%, of the PSIDC to 8.69%.

5. He further submits that in view of the provisions of Clause 35 of the Agreement, the buy back clause ceased to exist as it envisaged that in case,

there is an induction in the capital, the clause would not come into force. However, the newly inducted Company i.e. M/s DSM Andeno BV

Netherland, backed out from its obligations by terminating the agreement arrived at between the parties.

6. The appellant-Collaborator did not buy back the shares despite there being a certain documents relied upon by other side. The PSIDC invoked

the arbitration clause containing the resolution of dispute through Arbitration.

7. This Court vide order dated 03.12.2007 appointed the sole Arbitrator and the Arbitrator by taking into consideration the Collaboration

Agreement dated 19.08.1986 passed the award in favour of the PSIDC. The same was assailed and resulting into, dismissal of the same, though,

as per the provisions of Clause 35 of the Collaboration Agreement ceased to exist, in essence, the PSIDC was/is estopped to stake the claim of 5

Lac equity shares.

8. However, before entering into reference by the Arbitrator, a company petition bearing No.89 of 2004 by invoking the provisions of Section 78,

100 to 104 of the Contract Act, 1956, was filed, seeking permission of this Court for approval of the reduction and share capital. This Court vide

order dated 03.12.2004 while rejecting the objections of PSIDC and other, allowed the petition by causing the publication in the newspaper.

There was a little clerical mistake in the order which was rectified vide order dated 14.01.2005 as owing to the inadvertence, instead of Annexure

P-6, Annexure P-4 was incorporated. The aforementioned order has attained finality.

9. He has also drawn the attention of this Court to identical order dated 05.02.2016 rendered in FAO-721-2014 titled as ""Naresh Bhandari

v. Punjab State Industrial Development Corporation Ltd. and others"" passed by this Court, involving the interpretation of buy back clause

by a Collaborator, thus, urges this Court for setting aside the Award and as well as the impugned order under challenge as all these factors are the

part and parcel of the record below.

10. Per contra, Ms. Madhu Dayal, learned counsel appearing on behalf of the respondent(s)-PSIDC, submits that the reduction in the share capital

and various other aspects, is only viz-a-viz the dispute of the Company and not that of a Collaborator as the Collaboration Agreement was in the

individual capacity of the Collaborator, namely, Vijay Kumar Garg. In this context, she has drawn the attention of this Court to the opening

paragraph of the Agreement which reads as under:-

THIS AGREEMENT is made at this 19 day of August in the year One Thousand Nine Hundred and Eighty Six BETWEEN the Punjab State

Industrial Corporation Ltd, a company Limited by shares registered under the Companies Act, 1956, having its Registered Office at SCO 54-56

Sector-17-A, Chandigarh (hereinafter called ""the CORPORATION""), which expression shall, unless repugnant to the context or meaning thereof

include the said CORPORATION, its successors and agreed assigns) of the One Part AND Shri Vijay Kumar Garg S/o Shri Hans Raj Garg

resident of House No.115 Sector 9, Chandigarh (hereinafter called ""the COLLABORATOR"", which expression shall, unless repugnant to the

context or meaning thereof include the said COLLABORATOR, his heirs, executors, administrators, representatives and agreed assigns) of the

other part.

WHEREAS the CORPORATION has received from Government of India a letter of intent No LI:474 (1984) dated the 30th May ,1986 for the

establishment in District Sangrur (Punjab) of a new unit for the manufacture of (i) D (-) Phenyl Glycine - 150 tons, (ii) D (-) Para Hydroxy Phenyl

Glycine Chloride Hydrochloride - 100 tons and (iii) D (-) Para Hydroxy Phenyl Glycine Dane''s Salt - 50 tons (hereinafter referred to as ""the

PROJECT"").

11. She inform that the order passed in FAO-721-2014 is pending for consideration in the Hon''ble Supreme Court.

12. She further submits that the reliance by this Court of the provisions of Section 56 of the Contract Act would not come into the rescue of the

appellant in view of the ratio decidendi culled out by the Hon''ble Supreme Court in ""Travancore Devaswom Board v. Thanath

International"" 2004 (13) SCC 44.

13. She further submits that the contract cannot be said to have ceased as the language of the provisions of Section 56 of the Contract Act is very

clear and unambiguous. It cannot be postulated as it was the Company which could not run, but buying back was the role of the Collaborator i.e.

in his individual capacity. The evidence qua non-performance of the obligation is conspicuously absent, in essence, there is no pleading to that

effect. The appellant are only relying upon the order passed in CP No.89 of 2004 which is not a sufficient requirement of law to wriggle out of their

liability. She submits that there had been a repeated assurance on behalf of the Collaborator to buy back the shareholding, it is, in this aspect of the

matter, the reference before the Arbitrator was sought in the year 1997 i.e. after five years of the commencement of the commercial production on

01.07.1992.

14. She further submits that the scope of interference in the award under Section 34 of the 1996 Act by the Court is very limited. The re-

appreciation of the evidence, even if the different opinion is required to be formed, is not permissible in view of the ratio decidendi culled out by the

Hon''ble Supreme Court in ""Navodaya Mass Entertainment Ltd. v. J.M. Combines"" (2015) 5 SCC 698. Neither the Objecting Court nor

this Court can sit in the arm chair of the Arbitrator and re-appreciate the evidence and treat the objections as an appeal. In fact the objections

were not falling within the realm of Section 34 of the 1996 Act as none of the grounds remotely substantiate the violation of a public policy, thus,

urges this Court for affirming the findings under challenge.

15. I have heard the learned counsel for the parties and appraised the paper book.

16. Shorn of the facts noticed above, much less, the contentions, before I could give my opinion, it would be apt to reproduce the relevant

paragraph of the order dated 03.12.2004 passed in CP No.89 of 2004 rectified vide order dated 14.01.2005. The relevant portion of the same

reads as under:-

Order dated 03.12.2004

In view of the above, the objections raised by the Objector PSIDC are found to be without any substance as it is bound by the memorandum and

articles of Association of the Company which includes the stipulation for reduction of capital subject to the provisions of Section 78, 80, 100 to

105 of the Act and other laws. The majority of the share holders amounting to 86.2 percent have approved the Resolution for reduction of share

capital. Therefore, the reduction in share capital. Therefore, the reduction in share capital as contained in resolution Annexure P-4 deserves to be

confirmed by the Court as there is no impediment to taking such a view.

The argument based on the judgment of the House of Lords in the case of British and American Trustee (supra) would not require any detailed

consideration because the aforementioned judgment rather supports the case of the petitioner-company rather than the objector PSIDC. In that

case also objections were raised by the one share holder opposing the prayer of the petitioner company for confirmation of special resolution

passed by the Board of Directors for reduction of its share capital. The Court of appeal has refused to confirm the resolution passed by the Board

of Directors as approved by the huge majority of the share holders. On appeal, the House of Lords reversed the view taken by the Court of

appeal. In his leading speech Lord Herschell L.C. observed as under:-

I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that

this was the intention of the legislature. The interests of creditors are not involved and I think it was the policy of the Legislature to entrust the

prescribed majority of the shareholders with the decision whether there should be a reduction of capital and if so, how it should be carried into

effect. The interest of the dissenting minority of the share holders (if there be such) are properly safeguarded by this : that the decision of the

majority can only prevail if it be confirmed by the Court. This is a complete answer to the argument ably urged by Mr. Romer at the Bar, that if all

the shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to

those of the majority.

There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most

narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or

inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.

The above para conclusively shows that the view of the House of Lords helps the case of the petitioner company, rather than advancing the case of

the objector PSIDC. It is further appropriate to mention that once there is power with the petitioner company to reduce the share capital under

Clause 71 of the Memorandum and Articles of Association of the Company there is no escape for the objector PSIDC to challenge the special

resolution of the company which has been duly approved by over-whelming majority of the share holders. Before the House of Lords there was a

specific statutory provisions empowering the company to effect the reduction of share capital which in the present case has been conferred on the

company by Clause 71 of the Memorandum and Articles of Association of the Company.

The judgment of Chancery Division recognises the jurisdiction of the Court to sanction any Scheme which is not unjust and inequitable after

providing for the protection of the creditors. Therefore, I do not propose to venture into detailed examination of the aforementioned-mentioned

judgments because prima facie the view taken therein does not in any manner render any assistance to the case of the objector PSIDC.

In view of the above, the reduction of share capital as contained in Annexure P.4 is confirmed and the objections raised by the objector PSIDC

are hereby dismissed. The minutes Annexure P.11 are also approved. A notice of the registration by the Registrar of Companies of this order and

the said minutes be duly notified by public notices in English Daily The Tribune, Hindi Daily Punjab Kesri and the Government official Gazette

within 14 days of the registration aforesaid.

Any person interested shall be at liberty to approach this Court in the above noted matter for any directions that may be necessary.

Order dated 14.01.2005

Learned counsel has pointed out that on account of mistake in the averment made in CP No.89 of 2004 describing Annexure P-6 and P-4, the

same mistake has occurred in order dated 03.12.2004. It is ordered that Annexure P-4 mentioned in the last para shall be read as Annexure P-6.

17. On perusal of the aforementioned observations, it leaves no manner of doubt that the respondent(s)-PSIDC was a party and had seriously

objected to granting an accord to the Company by invoking the provisions of Sections 78 and 100 to 104 of the Companies Act, whereby the

Company had sought the permission of this Court for approval of the reduction in share capital.

18. It would also be apt to reproduce the Clause Nos.26 and 35 of the Collaboration Agreement which reads thus:-

CLAUSE NO.26

26(a) The COLLABORATOR shall have the option to buy, at any time, the equity shareholding of the CORPORATION in the COMPANY.

However, upon the expiry of five years from the date of commencement of commercial production by the COMPANY, as referred to in Clause

25 herein above, the COLLABORATOR shall be bound to purchase the said equity of the CORPORATION in the COMPANY.

(b) The price to be paid shall be EITHER the amount paid by the CORPORATION for the acquisition of the said shares plus simple interest at the

rate equal to the lending rate of the IDBI, prevailing at the time of original purchase of shares by the PSIDC for a given area, calculated from the

date of payment by the CORPORATION for the shares in question to the date of payment of the sale price by the COLLABORATOR less

dividend, if any, received by the CORPORATION In respect of the said shares in the period OR the highest market value of the shares as

published by the Indian Stock Exchanges, where the COMPANYÃ¯Â¿Â½s shares are listed on the date of the exercise of its option to purchase by the

COLLABORATOR or the date on which the COLLABORATOR ought to purchase the shares held by the CORPORATION as provided in

clause al above whichever is higher.

(c) The CORPORATION shall be bound to sell its equity share-holdings in the COMPANY to the COLLABORATOR as aforesaid.

(d) The sale and purchase of the shares as aforesaid payment of price therefore and delivery of share-scrips and transfer deeds relative thereto,

shall be completed within one month of the exercise by the CORPORATION of its right to sell its shares in the COMPANY to the

COLLABORATOR and/or by the COLLABORATOR of its right to but the said shares from the CORPORATION.

(e) In the event the COLLABORATOR fails to purchase the equity shares of the CORPORATION in the COMPANY as provided in clause

26(a) above, the CORPORATION shall have the option of recommending one of its nominees to be appointed as Managing Director by the

Board of Directors and the said nominee of the CORPORATION, after being appointed shall continue as Managing Director so long as the

default on the part of the COLLABORATOR continues. Immediately upon the completion of the payment by the COLLABORATOR of the full

amount payable in respect of purchase of shares mentioned in clause 26 herein above, this clause will cease to be operative and the management of

the COMPANY will be carried on as before by a Managing Director who will be appointed by the Board of Directors in terms of clause 20 (a &

b).3

(f) Without prejudice to the provisions of clause 26(a) above, the CORPORATION shall also, in the event of the COLLABORATOR failing to

purchase the equity shares of the CORPORATION in the COMPANY as provided in clause 26(a) to (d) above, be entitled to sell its shares in

the COMPANY at the risk and cost of the COLLABORATOR either by public action or through recognised share-brokers of Stock Exchanges

where the shares are listed, by private negotiations.

(g) In the event the sale and purchase of shares is not completed in time as provided in clause 26(a) to (d) above, the total price to be paid by the

COLLABORATOR for the purchase of shares determined in terms thereof shall carry further interest @ 18% per annum from the date on which

the price was payable by the COLLABORATOR until and actual date of payment.

CLAUSE NO.35 PERIOD OF AGREEMENT

35. Subject to the provisions herein contained, this Agreement shall continue to remain in force and operational so long as the share-holding of

either of the parties thereto [including the nominee(s)] shall not fall BELOW 10% OF THE PAID UP equity capital of the COMPANY.

19. On reading of the aforementioned provisions in conjunction with the order of this Court, I am of the view that the Agreement itself envisages

that once there is reduction in the share capital below 10%, the Agreement ceases to exist. The order of granting the reduction of capital was

passed way back on 03.12.2004, whereas the award of the Arbitrator is at later point of time. The Arbitrator has not assigned any cogent or legal

reasons on this aspect, in essence, whether the Agreement particularly the buy back clause as ceased to exist or not, thus, in my view, the

objections were falling within the parameters of Section 34 of the 1996 Act being against the public policy.

20. There would have been some force in the submissions of Ms. Madhu Dayal, representing the respondent(S)-PSIDC, had the PSIDC been not

a party to the company petition bearing No.89 of 2004. This fact is not disputed in view of the extraction of the relevant portion, thus, in my view,

the provisions of Section 56 of the Contract Act, though relied by the previous order, would totally be otiose as the contract itself envisaged all the

eventualities. It is a settled law that if there is no ambiguity in the contract, then the Court should not take aid the provisions of law to form an

opinion. Even the language of the provisions of Clause 26 provides three expressions i.e. ''Collaborator'', ''Corporation'' and "Company''. Had the

word ''Company'' been not there, in my view, the prima facie liability should have been fastened upon Collaborator, in individual capacity. Be that

as it may, once the contract, if read in entirety, leaves no manner of doubt that there could be no eventuality in buying back shares as the share

capital in the Company had been reduced to 10%, thus, Agreement in view of clause, extracted above, ceased to exist.

21. This observation of mine shall not be construed that even Clause of the Arbitration would cease to exist. The party can always seek the

resolution of dispute, if the implementation and interpretation of the agreement is sought for. All these facts have not been taken care of by the

Objecting Court, therefore, in my view, the Award suffered from patent illegality as expression ""patent illegality"" has been brought within the

ambit/embrace of ''public policy'' as per the ratio decidendi culled out by the Hon''ble Supreme Court in ""National Highways Authority of India

v. Cementation India Ltd."" 2015 (3) RAJ 1.

22. The facts of the previous order passed in FAO-721-2014 relied upon by Mr. Naresh Markanda, which is under challenge, have not been

taken into consideration by me.

23. For the foregoing reasons, the award and as well as the impugned order under challenge are not sustainable and the same are hereby set aside

and accordingly, the appeal is allowed. 17.12.2016