Has Filed Written Arguments On ... vs From 17.10.2008 Until 23.03.2016 on 18 October, 2021

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Com.A.S.No.35/2018

IN THE COURT OF LXXXII ADDL.CITY CIVIL & SESSIONS JUDGE, AT BENGALURU (CCH.83)

This the 18th DAY OF OCTOBER 2021

PRESENT:
SRI.DEVARAJA BHAT.M., B.COM, LL.B.,
LXXXII ADDL.CITY CIVIL & SESSIONS JUDGE,
BENGALURU.

Com.AS.No.35/2018

BETWEEN:

BPL Limited,
A Company
incorporated under
the Companies Act,
1956, having its
Corporate Office at
No.64, Church Street,
Bengaluru - 560 001,
represented by its
Authorised Signatory,
Mr. Shailesh Mudaliar.

: PLAINTIFF.

(Represented by M/s
Dhananjay Joshi
Associates -
Advocates.)

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AND

Reach Distributors
(India) Private
Limited, 603, Ansal
Krsna II, Adugodi,
Hosur Road, Bengaluru
- 560 040, represented
by its Managing

Director, Mr. Ricky
Gosain.

: DEFENDANT

(Represented by Sri.
ALMT Legal -Advocates)

Date of Institution of the suit	12.02.2018
Nature of the suit (suit on pronote, declaration & Possession, Suit for injunction etc.)	suit for Petition for setting aside Arbitral Award
Date of commencement of recording of evidence	- Nil -
Date on which judgment was pronounced	18.10.2021
Date of First Management Hearing	Case - Not held -
Time taken for disposal from the date of conclusion of arguments	44 days

Total Duration	Year/s	Month/s	Day/s
	03	08	06

(DEVARAJA BHAT.M),
LXXXII Addl. City Civil & Sessions Judge,
Bengaluru.

JUDGMENT

This is a Petition filed by the Plaintiff under Section 34 of the Arbitration & Conciliation Act, 1996 for setting aside the Arbitral Award dated 16.11.2017 passed by the learned Sole Arbitrator.

2. The Plaintiff "BPL Limited" had invoked the Arbitration Agreement and preferred certain Claims against "Reach Distributors (India) Private Limited" the Defendant.

3. The Brief facts leading to the case are as follows:-

The Plaintiff is engaged in the manufacture and sale of consumer products, such as television, refrigerators, washing machines etc., as well as medical devices, home automation and lighting solutions from past more than five decades, that Com.A.S.No.35/2018 the BPL brand has come to be recoginsed in the consumer products segment, that the Plaintiff has registered several of its trademarks and is presently the registered owner of more than 80 registered trademarks, in 2008 , on the Defendant's request by and under a Trademark License Agreement on 17.10.2008, executed in favour of the the Defendant, the Plaintiff granted a limited fee-bearing revocable licence to the Defendant to use the Plaintiff's trademarks, that the Defendant exploited the Licence granted by the Plaintiff by procuring unbranded consumer products from Original Equipment Manufactureres, and after ascertaining that they met the Plaintiff's specifications and quality, the Agreement dated 30.01.2009 was quite comprehensive, it is clearly identified the specific Trademarks, in respect of which the Defendant was being granted the limited licence, the agreement dated 30.01.2009 was valid for a term of five years from 01.02.2009 and expired on 31.02.2014, that the Defendant made a few ad-hoc payments of the license fee to the the Plaintiff, that the Plaintiff was negotiating a business relationship with the online giant, Flipkart for the promotion and sales of its consumer products, that the Plaintiff was directly negotiating with Original Equipment Manufactures in China for manufacturing and supplying the products, that the Plaintiff renewed the licence on the same terms and conditions as per an agreement dated 26.02.2015 for a period of two years, that Com.A.S.No.35/2018 the Defendant was simply not able to cope with the demands of the transactions with Flipkart, that the Defendant seemed to continue to rely on its personal relationships with third-party vendors and manufacturers,that the Plaintiff chose to be a bit lenient with the Defendant, the entire senior management team of the Plaintiff including chairman and Managing Director went to China to negotiate and set up a supply chain for delivery of consumer products required by the Plaintiff, that the Plaintiff realised to the Defendant was procuring products from dubious suppliers and trying to pass them off as if they were compliance with the Plaintiff specifications, that the Plaintiff issued a Notice dated 23.03.2016 to the Defendant, that the Plaintiff terminated the Trade License Agreement dated 26.02.2015, and called upon the Defendant to cease and desist from using or in any manner exploiting the Plaintiff's trademarks as the Plaintiff has terminated the license, that the Plaintiff approached Hon'ble High Court of Karnataka under Section 11 (6) of the Arbitration nad Conciliation Act, 1996, that by its Order dated 07.10.2016, the Hon'ble High Court constituted the Arbitral Tribunal comprised of a Sole Arbitrator, that the Plaintiff filed its claims in the Arbitral Tribunal, interalia, for recovery of unpaid licence fees for compensation for infringement of its trademarks by the Defendant, that the Defendant files its objections and also raised a counter-claim against the Plaintiff, that the Learned Com.A.S.No.35/2018 Arbitrator has passed the Impugned Award and he has rejected the Plaintiff's claim as well as defendants Counter-claims.

4. Being aggrieved by the said Arbitral Award, the Plaintiff has challenged the same on several grounds, which will be discussed later in the body of the Judgment.

5. The Defendant has filed a detailed Statement of Objections on 05.06.2018 and he prayed to dismiss the said application.

6. The records of the Arbitral Tribunal is secured. Further, the Advocate for the Plaintiff also filed Paper Books in 4 Volumes. I have heard the arguments of the Advocate for the Plaintiff and the arguments of the Learned Senior Counsel Sri. Arvind Kamath on behalf of the Defendant. The Advocate for the Plaintiff has filed Written Arguments on 17.02.2021. The Advocate for the Defendant has filed Written Arguments on 15.04.2021.

7. Based on the above contentions of both parties, following Points arise for my consideration:-

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1. Whether there are grounds to set aside the Impugned Award under Section 34 of the Arbitration & Conciliation Act?

2. What Order?

8. My findings on the above points are as follows:-

Point No.1:- In the Negative.

Point No.2:- As per the final Order for the following reasons.

REASONS

9. Point No.1: - The Plaintiff has preferred a Claim Petition before the Learned Arbitrator for the following reliefs:-

(a) Directing the Respondent (i.e., the present Defendant) to pay the Claimant a licence fee at the rate of 3.5% of the Net Sales value of the Claimant's products invoiced by the Respondent from 17.10.2008 until 23.03.2016, together with interest on such amount(s) at the rate of 18% per annum from the date when the fee fell due until actual payment.

(b) Directing the Respondent to pay the Claimant compensation for the continued use and exploitation of its trademark for the period beyond 23.03.2016 by way of an amount equivalent to 53.5% of the Net Sales value of the Com.A.S.No.35/2018 Claimant's products invoiced by the Respondent from 24.03.2016 until actual cessation of such sales by the Respondent.

(c) Directing the Respondent to bare and pay the entire costs of the Arbitral proceedings, including all actual costs borne by the Claimant, and

(d) Pass such further and other Orders and / or directions as this tribunal may deemed fit and proper in the facts and circumstances of the case.

10. The Defendant has preferred Counter Claim before the Learned Arbitrator.

11. The Learned Arbitrator has rejected the claims of the Plaintiff and dismissed the Counter Claim of the Defendant in the Impugned Award. It is to be noted that the Defendant has not challenged the rejection of the Counter Claim.

12. The Plaintiff has challenged the said Impugned Award in this proceeding. The Hon'ble High Court in the Judgment dated 17.04.2021 in Com.A.P.No.25/2021 (Union of India vs. M/s Warsaw Engineers) (which is relied on by the Com.A.S.No.35/2018 Learned Advocate for the Plaintiff), has laid down certain guidelines/principles about the writing of Judgments in a Petition filed under Section 34 of the Arbitration & Conciliation Act. Keeping in my mind the said guidelines, I now propose to examine each and every ground urged by the Plaintiff specifically with reference to the submissions made by both Advocates.

13. In order to appreciate the same, it is better to arrange the only relevant documents produced by both parties with reference to the contentions and evidence adduced by both parties before the Learned Arbitrator, in a chronological manner, with the findings of the Learned Arbitrator.

14. The first license is at Ex.P.2/R.1 dated 17.10.2008, and it was replaced by Ex.P.3/R.2 dated 30.01.2009. Ex.R.3 is an Email exchanged between the Claimant and Respondent dated 19.05.2009. Ex.R.4 is a copy of the Tax Invoice No. RTX/09- 10/97 dated 15.07.2009. Ex.R.6 is another E-mail correspondence between Claimant's representative of the Respondent dated 10.06.2010. The Learned Arbitrator has held that as far as furnishing of sale figures on regular basis is concerned, Annexure-C to the Ex.P.3 mentions that the basis for license fee calculation shall be as per the audited sales figures Com.A.S.No.35/2018 on monthly basis, that the material placed on record by both the sides goes to indicate that the Defendant made several payments in advance and the Plaintiff has also accepted the said advance payments as could be seen from Ex.R.6.

15. Ex.R.5 is another E-mail correspondence between Claimant's representative of the Respondent dated 11.10.2010. The Learned Arbitrator has held that as far as the supply of defective goods is concerned, it as coming in the evidence of RW-1 that at the suggestion of the Chairman of the Claimant Company, i.e., present Plaintiff, the Respondent/Defendant agreed to receive the LCD TVs through BTVL and the said goods were found to be defective and this was conveyed by the Defendant to the Plaintiff as per Ex.R.5.

16. Ex.R.7 is another E-mail correspondence between Claimant's representative of the Respondent dated 12.07.2011. Ex.R.8 is another E-mail correspondence between Claimant's representative of the Respondent dated 03.10.2011. The Learned Arbitrator has held that Ex.R.7 & Ex.R.8 go to show that

the Defendant has submitted the quarterly review analysis to the Plaintiff and festival planning performance, that in view of the Plaintiff having not disputed these correspondence, it Com.A.S.No.35/2018 cannot now complain that the Defendant did not submit the sales turnover on a monthly basis.

17. It is to be noted that the Ex.P.3 Agreement was expired on 30.01.2014. Next license agreement was entered into is the Ex.P.4/R.10 dated 26.02.2015. Ex.R.9 is another E-mail correspondence between Claimant's representative of the Respondent dated 12.05.2015.

18. Ex.R.11 is another E-mail correspondence between Claimant's representative of the Respondent dated 21.05.2015. The Learned Arbitrator has held that in the light of the pleadings and evidence on record, the parties shifted their transaction to a different nature when the Plaintiff decided to launch BPL Products on the portals of Flipkart, as could be seen from Ex.R.11.

19. In Ex.P.8/R.15, the notice dated 23.03.2016, the license granted under Ex.P.4 was terminated.

20. By considering all these facts, I now propose to answer the grounds urged by the Plaintiff.

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21. The First ground is that the Impugned Award is arbitrary, whimsical and wholly contrary to the facts and evidence on record.

21.a. The Defendant has contended that the reasoning of the learned arbitrator is issue-wise and with specific reference to the evidence on record, that the learned Arbitrator has further also referred to the law on the point, in light of rival contentions and evidence, before arriving at the respective findings.

21.b. This ground being a general ground, the same will be discussed later, after discussing about all other specific grounds.

22. The Second ground is that a bare reading of the Impugned Award will establish that the Sole Arbitrator has drawn up the Impugned Award in a casual manner superficially dealing with the points in issue and merely on the basis of random documents and stray sentences elicited from the notes of evidence.

22.a. The Defendant has contended that the said ground is merely jargon without making out any clear and categorical Com.A.S.No.35/2018 grounds to impugn the award of the learned arbitrator, that the Plaintiff has miserably failed to establish as to how the award is contrary to public policy in accordance with law.

22.b. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the

decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

23. The Third ground is that the Learned Arbitrator has erred in concluding that the Defendant did not commit any default of its several obligations under the Trademarks License Agreements including payment of the monthly license fee on a monthly basis, for furnishing audited sales reports on a monthly basis etc., Com.A.S.No.35/2018

23.a. The Defendant has contended that the Plaintiff has made a blanket statement impugning the finding without providing specifics as to how the same is contrary to law, that the issue regarding payment of license fee has been elaborately dealt at Para No. 60 to 82 of the Award, by referring Ex.R.36/ Certified Statement of Chartered Accountant regarding payment of License fee made by the Defendant to hold that the Defendant has paid a sum of Rs. 4,50,04,499/- to the Plaintiff towards license fee, that by referring Ex.R.16 & 17/ Statement of Accounts to hold that the same have not been disputed by the Plaintiff, that the Defendant had in fact submitted quarterly sales reports as per Ex.R.7 & 8, that the Learned Arbitrator interpreted the terms of Ex.P.3 & 4 to decide the said issue and after appreciating the contention of the Defendant that the parties had by mutual agreement, adopted a different method of payment of license fee, whereby the Defendant would make payments on ad-hoc basis at the request of the Plaintiff and held that Ex.R-6 & R.24/ E-mail communications between the parties and by referring Section 28 (3) of the Arbitration and Conciliation Act, by looking into the trade practice between the parties for the purpose of ascertaining the conduct of the parties about oral agreement in addition to the written agreement, that at Para No. 70 it is held that the Defendant has established that the Plaintiff did not insists on payment of Com.A.S.No.35/2018 license fee on a monthly basis and that the parties gave a go- bye to the same.

23.b. The Tribunal dealt with the liability of payment of license fees under each of the Agreement. In that, the Tribunal held, that under the First Agreement, as admitted at Paragraph No.7 of the Claim Statement, the said Agreement did not contain the required terms and hence the Second Agreement was executed and therefore the terms of the First Agreement need not be gone into.

23.c. The Arbitral Tribunal considered whether there was any balance license fee payable under the Second Agreement dated 30.01.2019 till its expiry on 30.01.2014. On appreciating the evidence on record, the Tribunal held that the total fees paid by the Defendant is Rs. 4,50,04,499/- leaving a balance of Rs. 66,61,208.52. It was further held that since the Arbitration Notice was issued on 23.03.2016, taking into consideration Section 21 of the Act, all claims made for the period three years prior thereto are barred by limitation. Reckoning the balance amount payable from 26.03.2016 (being the date of Notice of Arbitration) till 30.01.2014 (being the expiry of the Second Agreement), the Arbitral Tribunal held that the total outstanding, including interest at 18% per annum is Rs.

Com.A.S.No.35/2018 1,23,35,638.50. It was held that since the Defendant has already paid Rs. 4,50,04,499/-, there is no question of any balance fee or unpaid interest.

23.d. It was held that with respect to license fee payable after the expiry of the Second Agreement on 30.01.2014 till the execution of the Third Agreement on 26.02.2015, there was no subsisting Agreement and hence, there being no arbitration agreement, as such, the claims for the said period cannot be adjudicated, as regards the Third Agreement, the Arbitral Tribunal accepted the contention of the Defendant that under the said Agreement, there is no provision for payment of license fees and that the parties shifted to the trading model from the license fee model as evidenced from the terms of the said Agreement. As such it was held that under the Third Agreement, no license fee was payable by the Defendant. Hence the claim of the Plaintiff was rejected on these grounds.

23.e. As discussed by me earlier, by referring various documents, more particularly, Ex.R.7 & Ex.R.8, the Learned Arbitrator has held that since the Plaintiff has not disputed the said correspondence, it cannot now complain that the Defendant did not submit the sales turnover on a monthly basis. The said finding of the Learned Arbitrator is not contrary Com.A.S.No.35/2018 to the conduct and contentions of the parties in the e-mail exchanged between the parties and hence, it is not contrary to public policy. There is no patent illegality or perversity in the impugned award. Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Hence, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

24. The Fourth ground is that the Learned Arbitrator has erred in concluding that the Defendant was not liable to provide after sales support services and spare parts in respect of the goods sold by the Defendant.

24.a. The Defendant has contended that the learned Arbitrator has answered at Para No. 91 & 92 to hold that as per Clause 12.1 of Ex.P.3, it is BTVL or any other nominee of the Plaintiff which is required to provide after sales service and that plain reading of the agreements would disclose that there was no obligation on the Defendant to provide after sale service, that admittedly the Defendant agreed to provide after sale services, which was being done by the Defendant from 30.01.2009 being the date of execution of Ex.P.3 and that the terms of the agreement and understanding between the parties Com.A.S.No.35/2018 stood modified on account of the conduct of the parties, that Ex.P.4 does not make provision for payment of after sales services by the Defendant, on the other hand Clause 9 of Ex.P.4 makes it clear that BTVL or its nominee is responsible for providing after sales support, and provision for spare parts, that from the terms of agreement it cannot be said that the Defendant was obligated to provide after sale services.

24.b. The learned Advocate for the Defendant has argued that the learned Arbitrator held that Clause 12.1 casts an obligation on BTVL to provide after sales service and not on the Defendant and hence there can be no breach where there is no obligation, that the learned Arbitrator has held that the Third Agreement does not speak of any after sales service and as per Clause 9 there of, BTVL or its nominee shall provide the license, that as regards warranty, the Third Agreement specifically

provides that the warranty concludes on expiry of the Agreement which is on 23.03.2017, and in view of the fact that the Plaintiff terminated the Agreement on 23.03.2016, there is no obligation to provide any warranty after termination.

24.c. The said arguments of the Learned Advocate for the Defendant cannot be ruled out after referring the Arbitral Records and the findings of the Learned Arbitrator in the Com.A.S.No.35/2018 impugned award. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

25. The Fifth ground is that the Learned Arbitrator has erred in concluding that the Defendant was not liable to indemnify the Plaintiff from claims that may arise on account of defective goods sold by the Defendant.

25.a. The Defendant has contended that the Clause providing for a limited warranty which expires on 23.03.2017 being one year from the termination of Ex.P.4, which as per the case of the Plaintiff was terminated by Notice dated 23.03.2016, that the warranty Clause also having lapsed and the Defendant is not obliged to provide warranty.

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25.b. The finding in respect of the said aspect is not attacked by the Plaintiff that the same is contrary to public policy or that the same is a patent illegality. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

26. The Sixth Ground is that the Learned Arbitrator has erred in concluding that the Defendant was not liable to compensate the Plaintiff for infringement of its registered Trademark by affixing the same on products sold by the Defendant even during the period when the Defendant was not licensed by the Plaintiff to use its Trademarks.

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26.a. The Defendant has contended that at Para No. 83 to 92 of the Award it is held that there was no provision for payment of licence fees on and from the execution of Ex.P.4 since the parties had changed the licence fee model to a trading model after the Plaintiff began listing its products on Flipkart, that there is no question of the Defendant compensating the Plaintiff in this regard.

26.b. The finding in respect of the said aspect is not attacked by the Plaintiff that the same is contrary to public policy or that the same is a patent illegality. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

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27. The Seventh ground is that the Learned Arbitrator has erred in concluding that a portion of the Plaintiff claims is barred by limitation.

27.a. The learned Advocate for the Plaintiff has argued that Section 19 of the Limitation Act stipulates that afresh period of limitation is to be computed from the date of receipt of payment on account of any debt, that undisputed the Defendant did not pay the license fee under the licensee agreement but made intermittent ad-hoc payments, that the Plaintiff maintained a running account and adjusted all such payments towards the earliest amount owed by the Defendant.

27.b. The Defendant has contended that the learned arbitrator has arrived at the said finding after taking into consideration of the date of cause of action in respect of the relief claimed to hold that all claims relating to the period prior to 3 years from the date of reference of the disputes to arbitration in terms of Section 21 of the Arbitration and Conciliation Act, are barred by limitation at Para No. 95 & 96.

27.c. On scrutiny of the findings of the Learned Arbitrator in respect of the issue of limitation, the same cannot be considered as perverse. Further, the finding in respect of the Com.A.S.No.35/2018 said aspect is not attacked by the Plaintiff that the same is contrary to public policy or that the same is a patent illegality. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

28. The Eighth ground is that the Learned Arbitrator has erred in consideration an infringement of a Trademark as 'use in a vaccum period', that the law does not provide for any vaccum period and any unauthorised use of a registered trademark is an infringement meriting prosecution and liability to pay compensation, that the learned arbitrator has erred in granting prayers (c) and (d) of the counter-claim in favour of the Defendant.

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28.a. The Defendant has contended that the learned arbitrator has not arrived at any conclusion regarding the infringement of the trademark as alleged by the Plaintiff, that the reference to the vaccum period was with respect to the fact that there was no agreement is existence from 31.01.2014 till 26.02.2015 and there was no agreement, much less an arbitration agreement granting mandate to the learned arbitrator to adjudicate on dispute, that in the absence on any agreement , the learned arbitrator has no power to adjudicate any claims pertaining to the said period.

28.b. The learned Advocate for the Plaintiff has argued that Section 29 and 102 of the Trademarks Act, 1999, stipulate that the use of a registered Trademark by a person not authorised by its owner to so use, amounts to an offence, that nowhere does the Trademarks Act, or any other law relating to intellectual property rights contemplate the use of a Trademark or any other intellectual property within a 'vacuum period' without the authority of the owner of such Trademark or intellectual property. He draws my attention to Para No. 90 of the Award, wherein the learned Arbitrator has held that though the Defendant used the Plaintiff's Trademark during the period between 30.01.2014 and 24.02.2015, there was no agreement in existence and that this period was a vacuum period and the Com.A.S.No.35/2018 Defendant does not have to pay any licence fee for the use of the Plaintiff's Trademarks during such a vacuum period.

28.c. The learned Advocate for the Defendant has argued that the learned Arbitrator has held that from the expiry of the Second Agreement on 30.01.2014 till the execution of the Third Agreement on 25.02.2015, there is vacuum period without any agreement, that as per the Third Agreement, there is no provision for payment of license fee as it existed in the Second Agreement, that there was no royalty model under the Third Agreement as it were for the Second Agreement, and hence the question of providing royalty for the use of the Trademark of the Plaintiff was held by the learned Arbitrator to be unsustainable. He has further argued that based on the terms of the Agreement between the parties, the Trademark practice followed, the documentary and oral evidence the learned Arbitrator dismissed the Claims of the Plaintiff attributing appropriate reasons.

28.d. The finding in respect of the said aspect is not attacked by the Plaintiff that the same is contrary to public policy or that the same is a patent illegality. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising Com.A.S.No.35/2018 power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by

the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

29. The Ninth ground is that the Impugned Award is bad in law and untenable as the learned Arbitrator has based his conclusions on suppositions contrary to settled rules of evidence.

29.a. The Defendant has contended that the learned arbitrator has arrived at findings, after thorough examination of the evidence on record, and the law applicable to the facts and circumstances, that he has dealt with each of the contentions and issues of the parties and has provided unambiguous reasons in support of the findings.

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29.b. It is to be noted that the Plaintiff has neither pleaded nor established that the award is in conflict with public policy of India or it is in contravention with the fundamental policy of Indian law or it is conflict with the most basic notions of morality for justice. The learned Advocate for the Defendant has argued that the Plaintiff has treated the challenge to the award as an appeal. He has drawn my attention to the cause title, wherein the Plaintiff is shown as 'Appellant' and the Defendant is shown as 'Respondent', that this Petition is filed as an appeal under Section 34 of the Arbitration & Conciliation Act. He has argued that all the grounds stated in Para No. 5 of the Petition are in the tenor of appeal and that by an in correct understanding of the scope of Section 34, the Plaintiff has converted the challenge to the award into an appeal by questioning the various factual finding and conclusions on merits and such understanding of the Plaintiff is contrary to law and the challenge to the award is beyond the permissible scope.

29.c. The finding in respect of the said aspect is not attacked by the Plaintiff that the same is contrary to public policy or that the same is a patent illegality. In fact, this ground is in the nature of a ground to be urged in an appeal. The position in law is well settled that this court while exercising Com.A.S.No.35/2018 power under Section 34 of the Act does not sit as a court of appeal. The nature of proceedings under Section 34 of the Act is summary in nature as held in the decision reported in (2019) - S.C.C. Online - S.C. - 1244 = (2019) 9 - S.C.C. - 462 (Canara Nidhi Limited vs. M. Shashikala). Hence, this ground is not available for the Plaintiff under Sub-section (2) and Sub-section (2-A) of Section 34 of the Arbitration & Conciliation Act. Thus, the challenge flanked by the Plaintiff calling for the setting aside of arbitral award on this ground is thwarted and rejected.

30. The scope of this court is limited with regard to Section 34 of the Act. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/arbitral tribunal are ordinarily not amenable to interference under Section 34 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this court, is absolutely necessary. The arbitrator is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 of the Act. The Hon'ble High Court of Delhi in the decision reported in Com.A.S.No.35/2018 2015 - S.C.C. OnLine - Del - 13192 (P.C.L. Suncon (JV) vs. NHAI), in Paragraph No. 24 has held as follows :-

> "24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost."

31. The Hon'ble Supreme Court in the decision reported in (2006) 11 - S.C.C. - 181 (McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.), has held as follows :-

> Com.A.S.No.35/2018 "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness.

Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

32. Thus, it is observed and held that the arbitral award is not marred by any patent illegality, as there is no contravention of the substantive law of India, which would result in the death knell of an arbitral award. It is also observed that there is no patent illegality in the arbitral award, which must go to the root of the matter. The arbitral award is also a well reasoned and a speaking award. The arbitral award is also held to not be in contravention of Section 28(3) of the Act, which pertains to the terms of the contract, trade usages applicable to the nature of contract and substance of dispute.

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33. Further, as per Rule 4 (c) of the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001, the Arbitrator should be joined as Respondent in this proceedings. Since the Plaintiff has not made the Learned Arbitrator as a party to the proceedings, this Petition is liable to be dismissed on the said ground also.

34. As far as reliance placed by the Learned Advocate for the Plaintiff on the recent judgment of the Hon'ble Apex Court reported in 2021 - S.C.C. Online - S.C. - 508 (PSA Sical Terminals Pvt. Ltd. vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others) is concerned, the Hon'ble

Apex Court has held that a decision, which is perverse, though may not be a ground for challenge under public policy of India, however, the same can certainly amount to a patent illegality appearing on the face of the award. The Hon'ble Apex Court has further held 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.

35. In my humble opinion, it cannot be said, in the present matter, that finding recorded by the Learned Arbitrator is based Com.A.S.No.35/2018 on no evidence or it has ignored vital evidence before arriving at the decision. A bare perusal of the award passed by the Learned Arbitrator shows that evidence of both the parties have been considered in detail and the Learned Arbitrator has taken into account each and every submissions advanced by the parties before him, including appreciation of evidence in proper manner before arriving at the decision to pass the impugned award and as such, the judgment cited by the Learned Counsel for the Petitioner, is of little assistance to him.

36. For the said aspect, I wish to refer a recent decision of the Hon'ble Apex Court reported in (2021) 3 - S.C.C. - 308 (Anglo American Metallurgical Coal Pty. Ltd. vs. MMTC Limited), wherein it has laid down the parameters of judicial review and Courts have been permitted to interfere only if there is a ground of patent illegality or violation of fundamental policy of Indian law and if a possible view is based on oral and documentary evidence led in the case, which cannot be characterized as being either perverse or being based on no evidence and as such, no interference is permissible. The relevant portion of the judgment is reproduced hereunder:-

> "48. Given the parameters of judicial review laid down in Associate Builders, it is obvious that Com.A.S.No.35/2018 neither the ground of fundamental policy of Indian law, nor the ground of patent illegality, have been made out in the facts of this case, given the fact that the majority award is certainly a possible view based on the oral and documentary evidence led in the case, which cannot be characterized as being either perverse or being based on no evidence."

37. Therefore, I answer this Point in Negative.

38. Point No. 2 :- Therefore, I proceed to pass the following Order.

ORDER The Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, is dismissed.

The Arbitral Award dated 16.11.2017 is hereby upheld.

The Plaintiff shall pay the cost of this proceeding to the Defendant.

Office is directed to return the arbitral records to the Arbitration Center after the appeal period is over.

The Office is directed to send copy of this judgment to both parties to their Com.A.S.No.35/2018 email ID as required under Order XX Rule 1 of the Civil Procedure Code as amended under Section 16 of the Commercial Courts Act.

(Dictated to the Stenographer typed by her, corrected and then pronounced by me in open Court on this the 18th day of October 2021.).

(DEVARAJA BHAT.M), LXXXII Addl. City Civil & Sessions Judge, Bengaluru.

35 Com.A.S.No.35/2018 The Judgment is pronounced in Open Court. The operative portion of the said Judgment is as follows :-

> ORDER The Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, is dismissed.
>
> The Arbitral Award dated 16.11.2017 is hereby upheld.

36 Com.A.S.No.35/2018 The Plaintiff shall pay the cost of this proceeding to the Defendant.

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     Office  is directed    to
return the arbitral records to
the Arbitration Center after
the appeal period is over.

   The Office is directed to
send copy of this judgment to
both parties to their email ID
as required under Order XX
Rule 1 of the Civil Procedure
Code   as   amended     under
Section 16 of the Commercial
Courts Act.

     (vide  my    separate   detailed
  Judgment dated 18.10.2021 ).

      (Typed to my dictation)



      LXXXII ACC&SJ, B'LURU.
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