Pupil Tree Foundation vs Pearson India Education Services on 4 January, 2022

IN THE COURT OF THE LXXXVIII ADDL. CITY CIVIL & SESSIONS JUDGE (EXCLUSIVE COMMERCIAL COURT): BENGALURU CITY. (CCH-89)

Present: Sri. P.J. SOMASHEKARA, B.A.,LL.M, LXXXVIII Addl. City Civil & Sessions Judge Bengaluru City.

Dated this the 4th day of January 2022

Com.A.P.No.33/2020

Appellants: 1. Pupil Tree Foundation, A registered Trust, having its registered office at 4/5 Anantapur Road, Patelnagar, Bellari - 583 101.

2. Mr. Prabhu Jahagirdar, Aged about 50 years, S/o Sri. Lingaraj Bhupal Jahagirdar, CO Pupil Tree School, Talur Road, Sridharagadda Post, Ballari - 583 103.

3. Mrs. Sucharita Sriram Jahagirdar, Aged about 47 years, W/o Mr. Prabhu Jahagirdar, CO Pupil Tree School, Talur Road, Sridharagadda Post, Ballari - 583 103.

(By Sri. A.N., Advocate)

-vs-

Respondent: Pearson India Education Services Private Limited, (Formerly: Pearson Education Services Private Limited) A company incorporated under the provisions of Companies Act, 1956 having its office at Ground Floor,

Divyashree Chambers, A Wing, # 11, 'O' Shaughnessy Road, Langford Town, Bengaluru - 25.

(By Sri. Y.H., Advocate)

JUDGMENT

This is a suit filed by plaintiffs against the defendant under Sec.34 of the Arbitration and Conciliation Act and Rule 4 of the High Court of Karnataka, Arbitration (proceedings before the courts) Rules 2001 and sought for to set aside the directions in arbitral award dated 30.11.2019 passed by the sole arbitrator Hon'ble Justice Chinnappa, former Judge, High Court of Karnataka, in Arbitration Center directing them to pay a sum of Rs.8,40,22,056/- along with interest @ 14% p.a. from the date of award till its realization and to grant their counter claim by directing the defendant to pay a sum of Rs.3,09,60,000/- as liquidated damages along with interest @ 14% p.a. from the date of the award till its realization.

2. Brief facts of the petition are as under:

> The plaintiffs in their plaint have alleged that the defendant was appointed as the exclusive service provider to provide educational support services and school establishment services to and on behalf of the plaintiff No.1. The terms of the agreement was 20 years. The defendant as per the terms of clause 4 clause 1 of the agreement paid a sum of Rs.7,25,00,000/- as a refundable non interest bearing security deposit to secure its performance of its covenants and obligation under the agreement. The said deposit was utilized by the plaintiff No.1 to discharge its term loan with the bank. After receiving huge sum in the form of security deposit from the defendant, particularly after discharging the term loan with the bank and after rendering services to the plaintiff No.1 they started showing non cooperative attitude towards the defendant and failed to refund the security deposit in terms of the agreement, and failed to pay the annual service consideration to the defendant which it was entitled to receive as per the terms of clause 5 of the agreement for rendering services to the plaintiff No.1 institution and the said default amounted to breach of the terms of the agreement. They did not comply with the conditions stipulated in clause 7.4 of the agreement which started that the plaintiff No.1 school account would be operated jointly by two signatories of which one shall be the nominee of the plaintiff No.1 and other shall be the nominee of the defendant. The defendant alleged that since the nominee of the defendant was not provided with any instruments of signature or any instructions in relation with operation of the bank accounts since January 2014 it was assumed that the plaintiff No.1 was either unilaterally operating the said account or not using the said account for operation of the school which is a continuous breach of the agreement. The defendant issued a notice dated 21.04.2015 under a reminder notice dated 04.11.2015 to them, therein the defendant invoked clause 15.3 of the agreement and called upon them to remedy the breaches, since they failed to remedy their breaches, the defendant terminated the agreement vide notice dated 07.04.2016 and invoked arbitration clause vide notice dated 06.07.2016.

3. The plaintiffs in their plaint they further alleged that in view of the termination of the agreement for the reasons attributable, the defendant was entitled to claim their fund of the security deposit payment of annual service consideration and liquidated damages, the defendant as per the terms of

the agreement was entitled to receive interest @ 14% p.a. procuring from the execution date, till date of repayment. The defendant sought the relief of refund of the security deposit amounting to Rs.7,25,00,000/- along with interest @ 14% p.a. amounting to Rs.6,02,51,529/- and payment of outstanding annual service consideration amount of Rs.1,15,22,056/- as well as payment of liquidated damages amounting to Rs.5,38,27,138/-. The plaintiff No.1 was established vide trust deed dated 01.10.2001 as a non profit charitable trust with the objective to provide education support service, medical and other reliefs to the poor and needy people. The plaintiff No.2 and 3 are its managing trustee respectively and agreed amongst the parties to the trust deed that the funds and income of the trust would be solely utilized for achieving the said objects mentioned in the deed and the same cannot be distributed amongst the trustees. The defendant approached them with an offer to provide comprehensive services and to effectively operate the plaintiff No.1's school. The defendant offered to pay the plaintiff No.1 a substantial deposit to enable it to repay a significant portion of the loan and for securing the defendant's obligation to perform the agreement. The defendant promise to assist them to effect take over of the bank loan by a 3rd party on more attractive terms. The defendant vide email dated 24.08.2012 also enclosed a projected revenue stream that they should enter into an agreement with the defendant and as per the terms of clause 2, 3, 10, 11 Annexure B and Annexure C of the agreement, the entire operations of the school and in a particular, the operations linked to the education support services vest with the defendant. Consequently, they took steps to place various affairs of the plaintiff No.1's school to be managed by the defendant. Since the very beginning of the agreement, the defendant remained in persistent breach of its several obligations under the agreement including the failure to provide assistance and support services with regard to selection of teacher, staff and other personal as per the terms of the agreement, delay in procuring the school books and uniforms, disparity in salaries paid to staff/ teachers, failure to provide monthly lesson plans and work sheets in a timely manner, failure to properly conduct and manage the CET training and edexcel training, failure in making statutory compliance as obligated under the agreement, failed to grant timely approvals resulting in delay in making payments to the vendors and failure to comply with applicable laws including food safety and standards Act 2006 and right to education Act, 2009. Despite of repeated reminders given to the defendant to remedy its breaches in a timely manner vide various emails, letters and even in general counsel meetings which was attended by the representative of the defendant failed to rectify the same. The situation became aggravated in February 2014 when it was noticed that the defendant had misrepresented to the authorities regarding the number of the RTE seats available in the school in order to reduce the quota led to show cause notice being issued to the plaintiff No.1 by the block education officer asking the plaintiff No.1 to show cause as to why their school license should not be canceled.

4. The plaintiffs in their plaint they further alleged that they have called an emergent general council meeting and issued a notice dated 20.02.2014 to the Chairman of the defendant notifying their decision to reinstate the previous management which was earlier deputed to the defendant until such time, the defendant is able to demonstrate its capability stability competency as well as honest intention to work within the true spirit of the agreement. The defendant paid no heed to reply to the notice dated 20.02.2014 and abandoned their school and thereby abandoned the agreement. Due to breaches committed by the defendant, they were not liable to refund the security deposit along with the interest pay the annual service consideration and liquidated damages to the defendant. The

defendant was not entitled to claim security deposit as the said amount was deposited for securing its performance, since the defendant has categorically breached the terms of the agreement, it was not entitled for the same. Further even assuming without admitting the defendant was entitle for the receiving the said deposit, the said deposit has been adjusted out of the damages caused to the plaintiff No.1 for rendering a defective services. The defendant claim for payment of annual service consideration was barred by law of limitation. The defendant is not entitled to claim liquidated damages since the agreement was terminated due to the reasons attributable to them. On the said averments, they filed a counter claim before the tribunal and sought a relief for payment of liquidated damages amounting to Rs.3,09,60,000/- due to various breaches which caused by the defendant which resulted in termination of the agreement due to reasons attributable to the defendant. The defendant in response of the arbitral notice has been appeared and filed the objection, themselves and the defendant were led the evidence after hearing the arguments on both side, the arbitral tribunal passed the award. Feeling aggrieved by the said award, they filed the instant suit for the following grounds; a. The arbitral tribunal has erroneously directed to refund of security deposit on the sole consideration that the ways to issue such direction is the finding that there is a lack of clause for forfeiture of the security deposit. The findings are egregiously and manifestly erroneously considered by the arbitrator and failed to consider the express terms of the agreement.

b. The arbitrator has not considered the security deposit as per the terms of the agreement to secure the due performance by the defendant of its obligations as per the clause 4.1 of the agreement. In the backdrop the agreement provides for refund of security deposit only in the event that the agreement is terminated due to reasons attributable to the plaintiff No.1. In other words where the termination occurs due to the failure on the defendant's part to perform its obligations. The plaintiff No.1 does not have any obligation to refund the security deposit. c. The arbitral tribunal failed to consider the materials on record, as they are under the obligation to refund the security deposit except where the termination occurs for reasons attributable to them is also apparent from clause 15.8 of the agreement and the tribunal held that the termination of the agreement is for the reasons attributable to the defendant. In fact arbitral tribunal has expressly held that they are not in breach of the agreement as in para 27 of the award. In the light of the said findings and categorical contractual obligation, delineated it respectfully submitted that the impugned finding regarding want of contractual provisions for forfeiture and the consequential award directing to refund the security deposit amounting to Rs.7,25,00,000/- is wholly unsustainable and liable to be set aside.

d. The arbitrator has not taken into consideration about the settled law that even there is no clause in the contract as to forfeiture of the deposit, if the party commits the default in the performance of the contract that party is not entitled to have its money back in the event that money was paid as security for due fulfillment of its obligation under the contract. But the tribunal failed to recognize and apply the said principle. The impugned finding and award directing the refund of security deposit is liable to be interfered with on this ground also. The related finding of the tribunal in para 132 and 151 of the award are baseless. The arbitral tribunal held that mere omissions and commissions committed by the defendant in providing service does not deprive of its claim to recover the amount. Admittedly the defendant provided services for the academic year 2013-2014, the said finding is wholly untenable in view of the categorical contractual frame work depicted even

for the period mentioned that is 2013- 2014 the tribunal has expressly held that the defendant was in breach of its obligation in para 127 of the award. Para 121 of the award the tribunal has held from the very pleading of the respondent is clear that the respondent is alleged to have a security deposit, this is an admission on the part of the respondent that is liable to pay the amount of Rs.7,25,00,000/-. The finding is wholly untenable, the right of forfeiture depicted is an independent right vested with them as per clause 4.1, 15.6 and 15.8 of the agreement. The said right is not effected by the set for the recovery of the counter claim amount. The finding treating the plea of set of as an admission of liability to repay suffers from perversity. Therefore, the finding which given by the arbitral tribunal is liable to be set aside.

e. The arbitral tribunal has erroneously awarded the claim of annual service consideration in part by directing payment of Rs.1,15,22,056/- for the academic year 2013-2014 under the said period. At the outset the defendant claim in respect of the annual service consideration ought not to have been considered by the arbitral tribunal, since the said claim was barred by limitation and as per the terms of the agreement academic term is defined under clause 1.3 of the agreement which means the period of 3 to 4 months during which the school holds classes and academic year is defined under clause 1.4 of the agreement which means the period of 12 calendar months commencing from the 1 st day of calendar month during which the 1 st academic term commences and ending on the last day of the calendar month during which the last term of the academic year ends for which the tribunal has not taken into consideration the finding which given is illegal. f. The arbitral tribunal has not taken into consideration about clause 5 of the agreement, as per the said agreement, the defendant was entitled to receive fixed consideration at the beginning of every academic term within 15 business days from the beginning academic term fixed consideration for the first year was to be paid to the December on or before 15 th June 2013 and the defendant invoked the arbitration clause only on 06.07.2016 which was behind the period of limitation of 3 years prescribed under article 137 of the first schedule of the Limitation Act r/w Sec.21 and Sec.43 of the Arbitration and Conciliation Act, but the tribunal has not taken into consideration of these aspects while passing the award. Though the tribunal in para 46 of the award held that the claim for payment of annual service consideration is not barred by limitation which is against to the law. g. The tribunal findings and the reasons are misconceived as the claim for payment for annual service consideration for the year 2013-2014 ought to have been rejected as barred by limitation which is not taken into consideration by the tribunal and held the annual service consideration is not barred by limitation though the defendant is not entitled to receive payment of annual service consideration on merits as well as due to its failure to perform its obligations of rendering the educational support services and school establishment services in accordance with the agreement from the commencement date i.e. 23.11.2012. The tribunal has not taken into consideration about the satisfactory service which provided by the defendant during the academic period 2013-2014. So the finding which held by the termination resulted from the breach of the defendant is not taken into consideration. Though the defendant did not provide service for entirety of the academic year 2013-2014 the finding which given by the tribunal on this aspect is incorrect. The tribunal ought not to have allowed the claim for payment of annual service consideration and the award granting the claim for payment of annual service consideration is contrary to the tribunal own finding, perverse and same is liable for set aside.

h. The tribunal without considering their counter claim came to be rejected without applying its mind nor to address the key elements thereof but proceeded on a tangential line and addressed extraneous and irrelevant issues. Though they are entitled to recover the damages in the event the agreement was terminated on account of breach by the defendant which was not taken into consideration by the arbitral tribunal as per clause 15.5 of the agreement, though the tribunal held the defendant was in utter breach of the agreement.

I. The tribunal has proceeded to incorrectly assess the various materials and evidence provided by them to fortify the quantification of their counter claim, but the tribunal has not taken into consideration and without any reasons rejected their counter claim. The finding which given is irrelevant and illegal which required set aside.

j. The arbitral tribunal has erroneously held that they did not provide for 30 days notice to the defendant and rejected their counter claim and the finding on this aspect wholly contrary to the findings in para 136 of the award and which is contrary to its express finding and perversely holds and denied their counter claim by granting the claim which made by the defendant. k. The arbitral tribunal wrongly attached the liability to pay the claim to the extent granted as shown in the award which is wholly without basis and perverse and beyond the jurisdiction of the tribunal as the plain reading of the agreement which makes clear the obligation to pay annual service consideration under clause 5 and to refund the security deposit under clause 4.6 and 15.6 which are not taken into consideration by the tribunal. l. The arbitral tribunal illegally directed them to pay the amount as shown in the award is beyond the terms of the agreement which taken place in between them. Thus the tribunal has committed the jurisdictional error and prays for allow the petition.

5. In response of the summons, the defendant has been appeared and filed the statement of objection to the suit which filed by the plaintiffs stating that the petition which filed is not maintainable in law or on facts and the plaintiffs were not placed any materials nor made out any grounds that their claim comes within the purview of Sec.34 of the Arbitration and Conciliation Act nor placed that the award which passed comes within the ambit of Sec.34 of the Arbitration and Conciliation Act as the arbitral tribunal while passing the award has given well reasons and passed the award. So question of interference of this court does not arise and the re-appreciation of the evidence by this court does not arise and alleged that the para 1 to 3 need no reply and admitted the contents of para 4 and 5 to some extent and denied the other allegation which made in the same para that the arbitral tribunal has not taken into consideration about the materials which placed on record and further alleged the present petition is nothing but an attempt to mislead this court by quoting destroyed facts and events and further alleged that the contents of para 6 to 12 to the extent that the same are matters of record need no reply thereof.

6. The respondent in its objection statement has denied that the arbitral tribunal has rejected the claim of the plaintiffs on erroneous grounds without fully appreciating their case and passed the impugned order and this court interference is required to set aside the award and the arbitrator while passing the award has grossly erred and exceeded its jurisdiction by imposing liability for refund of security deposit and other payments upon the plaintiff No.2 and 3 in contravention to the service agreement dated 12.11.2012 and the amendment agreement dated 04.03.2013 and the

averments which made by the plaintiffs based upon the alleged grievance that the arbitrator exceed its jurisdiction by imposing liability for refund of security deposit and other payments for which not placed any materials to substantiate the same and the plaintiffs have not placed any materials nor made out any grounds that the award which passed by the sole arbitrator beyond the scope of agreement which taken place in between them and the award which passed by the sole arbitrator is not required for interference of this court and denied the para 15 to 24 of the plaint and the plaintiffs have to strict proof of the same and denied the award which passed by the arbitrator is erroneous failed to consider express terms of the contract agreement nor considered their obligations as per the clause of the agreement and denied that for want of proof that the contract agreement provided for refund of security deposit only in the event that the agreement is terminated due to reasons attributable to the petitioner No.1, since it was never in dispute that the payment of security deposit was not made in accordance with the contract agreement and neither the pleadings nor raised before the arbitrator regarding the capture which is a new plea which raised by the plaintiffs. In the instant suit even the plaintiffs have not addressed the said fact while canvassing arguments. In the absence of the same the award which passed cannot be held to be perverse as neither the arbitrator nor given any opportunity to revert or rebut the said facts as it is settled law new facts, disputes, plea which found non-mention before the arbitrator during the course of arbitral proceedings cannot be raised in a belated stage which is not permissible under law.

7. The defendant in its objection statement has denied para 25 to 31 and the plaintiffs have to strict proof of the same and denied that want of contractual provisions forfeiture and the consequent award directing the refund of security deposit amounting to Rs.7,25,00,000/- is unsustainable and liable to be set aside and the facts which pleaded on this aspect is illegal. When there is an obligation under the contract and the defendant being the service provider has to discharge its obligations under the contract agreement for the academic year 2013-2014, but the defendant failed to do the same and the respondent has also raised other objections which are pleaded in the objection statement and prays for dismiss the suit.

8. Both counsels were filed their written arguments. Heard the arguments on both sides.

9. The points that arise for consideration of this court are as under:

> 1) Whether the plaintiffs were made out any of the grounds which enumerated under Sec.34 of the Arbitration and Conciliation Act to set aside the award dated 30.11.2019 passed by the sole arbitrator in A.C.No.166/2018?
>
> 2) What order?

10. My answer to the above points are as under:

> Point No.1: In the Negative;
>
> Point No.2: As per final order, on the following;

REASONS

11. POINT NO.1: The defendant being the claimant and the plaintiffs being the respondent before the sole arbitrator, feeling aggrieved by the award which passed by the sole arbitrator in A.C.No.166/2018 were approached the court on the ground the defendant was appointed as the exclusive service provider to provide educational support services and school establishment services. The defendant as per the terms of clause 4.1 of the agreement paid Rs.7,25,00,000/- as refundable non interest bearing security deposit to secure its performance of its covenants and obligation under the agreement, but the defendant did not discharge its obligations and invoked clause 15.3 of the agreement and calling upon them to remedy the breaches and terminated the agreement vide notice dated 07.04.2014 and invoked the arbitration clause and filed CMP before Hon'ble High Court of Karnataka and the sole arbitrator has been appointed and who passed the award which is contrary to the terms and agreement which taken place in between them thereby the plaintiffs were filed the instant suit against the defendant and sought for to set aside the award which passed by the sole arbitrator dated 30.11.2019.

12. The learned counsel for the plaintiffs apart from written arguments has submitted that the plaintiff No.1 is the trust duly constituted under the laws of India having its Office at 4/5, Tolstoy House, Anantpur Road, Patil Nagar, Bellary. During the usual course of its business, the defendant has approached the plaintiffs and expressed its desire to appoint the defendant as its exclusive authorized service provider to provide education support services for and on its behalf and the defendant has been agreed for the same. Accordingly service agreement dated 23.11.2012 was entered in between the plaintiffs and the defendant and the defendant has been appointed as its exclusive service provider to provide educational support service under school establishment services for and on behalf of the trust. The defendant had assured to provide the services to the plaintiff No.1 trust as the object of the trust is to provide and supply all needed benefits and help to poor and needy people by supplying books, note books and stationary, school fees and cloths, hostel facilities and to provide medical and other relief to poor people. The plaintiff No.2 and 3 are highly qualified and they commenced highly successful professional careers with top business houses in Australia and India with an intention to provide educational infrastructure to rural areas in India. The plaintiffs have established Pupil Tree School in Bellary, thereafter established Pupil Tree High School and also college in the year 2008 and they have also obtained the loan of Rs.17 crores from SBI. Due to the intervention of the government and the courts prohibiting mine operation in Bellary, the plaintiffs were suffered financial loss and there was a drop in enrollments of the students it became unable to service the loan facilities availed from the bank by the plaintiff No.1 trust and the bank started pressurizing to make a good their defaults in repaying loans, during that time the defendant offerred to provide comprehensive services and effectively operate the school and any shortfall therein would be met by the defendant and promised that would ensure that the entire liability was taken over by a new lender on more attractive terms and the defendant has placed the express reliance and promise to assistance to take over the bank loan by 3rd party and its promise regarding the revenue streams and as per the agreement the entire portion of the school and in particular the operations linked to educational support services would vest with the defendant. The defendant has been appointed as an exclusive service provider to provide the education support service and school establishment services for and on behalf of the plaintiffs and the plaintiffs have

took the steps to procure the necessary requirements as suggested by the defendant for the academic year and ultimately council meeting was taken place on 20.02.2014, the plaintiffs took the note of the fraudulent conduct of the defendant and resolved to resume the control of the institutions and the defendant was devasted and thrown of all the operation of the plaintiff No.1 and Veerareddy was suspended and these facts were informed to the defendant and the defendant completely disengaged from them. Consequently the plaintiff No.1 suffered loss and unable to make timely payments of the loan amount to the bank resulting in the bank declaring the plaintiff No.1 as non performing account on 29.07.2013 which resulted not being in a position to raise any new loan. The letter issued by the defendant on 20.02.2014 to demonstrate capability, stability and competancy provide futile. The defendant sent a letter to remedy the breaches committed by the plaintiffs and the plaintiffs notified the defendant that the security deposit stood adjusted, the defendant instead of making any efforts for amicable resolution, issued a notice dated 06.07.2016 invoking the arbitration clause under the agreement and filed CMP No.196/2016 before the Hon'ble High Court of Karnataka and the said petition was came to be allowed and the sole arbitrator has been appointed and they were filed the objection statement before the arbitrator, but the arbitrator has not taken into consideration the counter claim which filed by the plaintiffs and passed the award which is beyond the agreement which taken place in between the plaintiffs and the defendant. Therefore it is just and necessary to interfere this court to set aside the award which passed by the sole arbitrator and prays for allow the suit and set aside the award which passed by the sole arbitrator.

13. The learned counsel for the defendant in his arguments has submitted the defendant was formerly known as M/s Pearson Education Services Pvt. Ltd. and the said limited has been merged with M/s Tutor Vista Global Pvt. Ltd. by virtue of the order passed by the Hon'ble High Court of Judicature, Madras in COP 240/2014. Thereafter the said M/s Tutor Vista Global Pvt. Ltd. has been changed its name from Tutor Vista Global Pvt. Ltd. The plaintiff No.1 is a trust duly constituted under the laws of India, during the usual course of business, the plaintiffs were approached the defendant and expressed their desire to appoint the defendant as their exclusive authorized service provider to provide educational support services for and on its behalf. The defendant has been agreed for the same, accordingly service agreement dated 23.11.2012 was entered in between them. Under the said agreement, the plaintiffs have been appointed the defendant as its exclusive service provider to provide educational support services and school establishment services for and on behalf of the trust. The plaintiffs have assured and represented to the defendant that they will not involve or interfere with the services of the defendant, believing the representations, assurance and promising prospects made by the plaintiffs, the defendant has executed the services agreement dated 23.11.2012 with the plaintiffs and by virtue of the agreement, the defendant was engaged by the plaintiffs to provide education support services to the school of the defendant including academic and operational support to the school and the agreement was for a duration of 20 years from the academic year 2013-2014. Prior to execution of the agreement, the defendant and the plaintiffs have made multiple discussions and meetings with respect to the commercials of the agreement and the commercial understanding on payment was carefully reflected in the agreement which taken place in between them and as per the agreement, the defendant has been agreed to pay to the 1st plaintiff a sum of Rs.7,25,00,000/- as a refundable non interest bearing security deposit to secure the performance of the defendant of its covenants and obligations as well as the provision of education support services in the manner provided under the agreement and it was agreed that in

case the 1 st plaintiff is unable to obtain the NOC from the SBI within 3 months, the 1st plaintiff is liable to refund the amount of Rs.1,25,00,000/- to the defendant within 5 business days and by virtue of the amendment to the agreement dated 04.02.2013 the mode of payment clause was modified and the defendant paid sum of Rs.7,25,00,000/- as security deposit to the plaintiff No.1 and both should discharge their obligations in terms of the agreement and amended agreement and the defendant has deposited with the plaintiff a sum of Rs.7,25,00,000/- as refundable non interest bearing security deposit. After the agreement in terms of the same the defendant started providing its services to the 1 st plaintiff and after receipt of huge money the plaintiffs cleared their term loan with the SBI and have had services from the defendant. The plaintiffs have started showing non-cooperative attitude and committed breach of the terms of the agreement, thereby the defendant got issued letter dated 21.04.2015 invoking clause 15.3 of the agreement calling upon the plaintiffs to remedy the breach, since no response was received from the plaintiffs in response of the letter dated 21.04.2015, thereby the defendant has issued a reminder by enclosing the earlier letter. In response of the same the plaintiffs got issued reply on 15.12.2015 by denying the contents of the letter and the plaintiffs were failed to remedy the breach in terms of the service agreement dated 23.11.2012 and the defendant got issued termination notice dated 07.04.2016 for which the plaintiffs have got reply dated 21.05.2016 denying the claim of the defendant and approached for amicable settlement to which was not settled thereby CMP has been filed before Hon'ble High Court of Karnataka and sole arbitrator was appointed. After considering the materials which placed, passed the award and the award which passed by the sole arbitrator is well reasoning. So interference of this court is not warranted and the grounds which alleged in the petition do not fall within the ambit of Sec.34 of the Arbitration and Conciliation Act and the award which passed by the sole arbitrator is in pursuance of the agreement clauses which taken place in between the plaintiffs and the defendant and prays for dismiss the suit.

14. The learned counsel for the plaintiff while canvassing his arguments has much argued the sole arbitrator erroneously directed refund of the security deposit only on the ground that the clauses of the agreement not empowers for forfeiting the security deposit and not taken into consideration about the clauses which appeared in the service agreement without considering the counter claim of the plaintiffs. Therefore, it is just and necessary for interference of this court to set aside the award which passed by the sole arbitrator. So, before considering the oral and documentary evidence as well as the arguments which advanced by both the counsels, it is just and necessary to consider the legal aspects first for the proper appreciation of the arguments which advanced by both counsels.

1. What is arbitration?

2. When court can interfere with arbitral award?

3. What is the scope of Court's power to interfere with the arbitral award?

4. What are the grounds are required to set aside the award?

5. Setting aside of arbitral award when permissible?

Let me decide one by one for proper appreciation of the materials on record. Thus this court drawn its attention on Sec.2(1)(a) of the Arbitration and Conciliation Act, 1996 which reads like this:

> 2(1)(a). The definition arbitration means any arbitration whether or not administered by permanent arbitral institution.
>
> Arbitration is a private dispute resolution mechanism agreed upon by the parties. Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties.
>
> Arbitration is a process of settlement extra curses curiae and the parties are at liberty to choose their judge. "The essence of arbitration without assistance or intervention of the court is settlement of dispute by a tribunal of the own choosing of the parties." Law of arbitration aids in implementation of arbitration agreement contract between the parties which remains a private adjudication by a forum consequently chosen by the parties and made on consequential reference.
>
> Now let me know when court can interfere with the arbitral award. Thus this court drawn its attention on Sec.34(43) of the Arbitration and Conciliation Act, 1996 which reads like this:
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> 43. Principles of interference with arbitral award:-
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> The principles of interference with an arbitral award under Sec.34(2) of the Act are as follows:
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> (1) An award, which is -
>
> (i) contrary to substantive provisions of law; or
>
> (ii) The provisions of Arbitration and Conciliation Act, 1996, or
>
> (ii) against the terms of the respective contract; or
>
> (iv) Patently illegal or
>
> (v) Prejudicial to the rights of the parties; is open to interference by the court under Sec.34(2) of the Act.
>
> (2) The award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian Law; or
>
> (b) the interest of India; or

(c) justice or morality.

(3) The award could also be set aside, if it is so unfair and unreasonable that it shocks the conscience of the court.

(4) It is open to the court to consider whether the award is against the specific terms of the contract and if so interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

So by virtue of the provision which stated above, the court can interfere with the arbitral award in the grounds which mentioned above.

Now let me know what is the scope of Court's power to interfere with the arbitral award? Thus this court drawn its attention on Sec.34(34) of the Arbitration and Conciliation Act which reads like this;

Scope of Court's power to interfere with the arbitral award:

The scope of the interference by the court's in regard to arbitral award is limited. Courts do not sit in appeal over the findings and decision of the arbitrator, nor can it reassess or re- appreciate evidence or examine the sufficiency or otherwise of the evidence.

So by virtue of the provision which stated supra, the scope of interference by the court in regard to the arbitral award is limited scope. The scope of interference under Sec.34 of the Act is limited in view of the judgment of the Hon'ble Supreme Court of India which reported in AIR 2003 SC 2629 in between Oil and Natural Gas Corporation Ltd., V/s Shah Pipes Ltd., and in the said judgment, their Lordship held that;

'an award can be set aside if it is contrary to fundamental policy of Indian Law, the interest of India, justice or morality, if it is patently illegal and unfair and unreasonable it shocks the conscience of the court'.

Now let me know what are the grounds are required to set aside the award which passed. Thus this court drawn its attention on Sec.34(18) of the Arbitration and Conciliation Act which reads like this:

18. Grounds to set aside award:- Under the new Act, 1996 misconduct of arbitrator is no ground to set aside an award but court may set aside an award in the following grounds:

(1) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

(2) falling such agreement, the composition of arbitral tribunal was not in accordance with the part I of the Act.

(3) if the arbitral proceeding was not in accordance with -

(a) the agreement of the parties.

(b) failing such agreement - the arbitral procedure was not in accordance with part I of the Act. However exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of part I of the Act from which parties cannot derogate;

(c) if the award passed by the arbitral tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

An award can be set aside, if it is against the public policy of India that is to so it is contrary to:

(1) fundamental policy of Indian law, (2) the interest of India, or (3) justice or morality , or (4) if it is patently illegal.

It could be challenged -

(a) as provided under Sec.13(5); and

(b) Sec. 16(6) of the Arbitration and conciliation Act. So the court can set aside the award, if the grounds found which stated supra.

So, if the petitioner is made out the grounds which stated supra, court can set aside the award. Now let me know about the setting aside of arbitral award when permissible. Thus this court drawn its attention on Sec.34(4) of the Arbitration and Conciliation Act, 1996

4. Setting aside of arbitral award when permissible:-

That the court can set aside the arbitral award under Sec.34(2) of the Arbitration and Conciliation Act if the party making the application furnishes the proof that:

(i) a party was under some incapacity

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for time being in force.

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or otherwise unable to present his case.

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrator or it contains visa decisions on matters behind the scope of the submission to arbitration.

(2) The court may set aside the award: (I) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

(b) falling such agreement, the composition of the arbitral tribunal was not in accordance with part-1 of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with part-1 of the Act.

However exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict within the provisions of part-1 of the Act from which the parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian Law;

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged-

(a) as provided under Sec.13(5); and

(b) Section 16(6) of the Act."

"B. Further held as follows in this case: (1) The impugned award requires to be set aside mainly on the grounds:

(I) There is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre- estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vii) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(viii) in certain contracts, it is impossible to asses the damages or prove the same. Such situation is taken care by section 73 and 74 of the Contract Act and in the present case by specific terms of the contract" - Oil and Natural Gas Corporation V Shah Pipes Ltd. (2003)5 SCC 705 : AIR 2003 SC 2629; see also Moona Abousher V M/s. Cholamandalam DBS Finance Ltd. AIR 2019 Mad 233.

The above provisions which referred above are very much clear when court can interfere with the arbitral award and what is the scope of court's power to interfere with the arbitral award and what are the grounds are required to be set aside the award as well as setting aside of arbitral award when permissible.

15. Apart from the legal aspects which referred above, it is necessary for reproduction of the claim and the counter claim which made by the parties for the proper appreciation of the arguments which advanced by both the counsels are reads like this:

CLAIM Sl.No. Particulars Amount - INR

1. Refund of security deposit Rs.7,25,00,000 amount

2. Outstanding annual services Rs.1,15,22,056 consideration (management fee)

4. Interest at 14% on the security Rs.6,02,51,529 deposit amount from the date of agreement till date 31.10.2018

5. Liquidated damages equal to 5 times the annual minimum contribution received by the respondent Total Rs.19,81,00,723 COUNTER CLAIM Wherefore, for the reasons stated herein above, the respondents above named crave leave and pray that this Hon'ble Tribunal be pleased to:

a) Dismiss the claim in its entirety;

b) Allow the counter claim of the respondents and direct the claimant to pay the respondents sum of Indian Rupees Three Crores Nine Lakhs Sixty Thousand (INR 3,09,60,000/-) towards damages on account of their pervasive and fundamental breaches of the argreement;

c) To restore the respondent's rights to the email server and website, www.pupiltreeschools.com and pursuant thereto, grant the respondents full and complete access and control to the same;

d) Grant costs of these proceedings to the respondents; and

e) pass such orders as this Hon'ble Tribunal may deem fit, in the facts and circumstances of the present case, in the interest of justice and equity.

keeping in mind not only the legal aspects but also claim of both the parties. Now let me know the grounds which are alleged in the plaint falls within Sec.34 of the Arbitration and Conciliation Act to set aside the award as sought by the plaintiff as the learned counsel for the plaintiff while canvassing his arguments has much argued that the award which passed by the sole arbitrator directing the plaintiff to refund the secuirty deposit to the defendant of Rs.7,25,00,000/- is erreneous.

So keeping in mind not only the legal aspects but also the claim of the both parties, now let met know the grounds which are alleged in the plaint falls within the purview of Sec.34 of the Arbitration and Conciliation Act to set aside the award as sought by the plaintiff, as the learned counsel for the plaintiff while canvassing his arguments has much argued that the award which passed by the sole arbitrator directing the plaintiffs to refund the security deposit of the defendant of Rs.7,25,00,000/- is erroneous.

16. It is an admitted fact neither the plaintiffs nor the defendant were not disputed about the service agreement which taken place in between the plaintiffs and the defendant on 23.11.2012. By virtue of the said agreement clause 4 is very much clear that the company has to pay refundable non interest of Rs.7,25,00,000/- for the proper appreciation of the clause which appeared in Ex.P.4 is necessary for reproduction which reads like this:

> 4. SECURITY DEPOSIT PAYABLE BY THE COMPANY 4.1 The company agrees and undertakes to place with the trust a sum of Rs.72,500,000/- as a refundable non-interest bearing secuirty deposit to secure the performance by the company of its covenants and obligations as well as the provison of the education support services in the manner provided for under this agreement ("Security Deposit").....

The above recitals which appeared in clause 4 of the service agreement reflects the company/ defendant has agreed to pay a sum of Rs.7,25,00,000/- as a refundable non interest security deposit to clear its performance and to discharge its obligations. So by virtue of the clause which referred above, it is clear the company/ defendant had paid Rs.7,25,00,000/- to the plaintiffs as refundable non interest security deposit.

17. The learned counsel for the plaintiffs while canvassing his arguments has much argued that the defendant not discharged its obligation in pursuance of service agreement, thereby the defendant is not entitled for refund of the security deposit, but where as the clause which referred above, nowhere reflects whenever the defendant has not discharged its obligation which empowers for forfeiting to the security deposit. If that is so the arguments advanced by the learned counsel for the plaintiffs would have accepted. That is the reason why the sole arbitrator while passing the award held that the service agreement not empowers for forfeiting security deposit. Mere omissions and commissions committed by the defendant in providing service does not deprive its claim to recover the security deposit. Therefore, the service agreement which taken place in between the plaintiffs and the defendant nowhere reflects the plaintiffs having the right to forfeit the security deposit which paid by the defendant. If that is so, the order which passed by the sole arbitrator is beyond the agreement which taken place in between the plaintiffs and the defendant, but nothing is appeared regarding forfeiting of the security deposit amount to accept the arguments which advanced by the learned counsel for the plaintiffs. Therefore, the arguments which advanced by the learned counsel for the plaintiffs on this aspect holds no water.

18. The learned counsel for the plaintiffs while canvassing his arguments has much argued that the sole arbitrator erroneously awarded the claim of annual service consideration for academic year 2013-2014, though it is barred by limitation by virtue of article 137 of the Limitation Act, but the sole arbitrator without considering barred claim of the defendant awarded annual service consideration (management fee for Rs.1,15,22,056/- with interest @ 14% p.a.). It is an admitted fact clause 5 of the service agreement is taken into consideration as the clause 5 of the service agreement is reflects for consideration payable to the company for services rendered, as the plaintiffs were agreed and undertaken for payment of annual service consideration to the defendant. Therefore it is necessary to reproduce the clause 5.1 , 5.2 and 5.3 of the service agreement for the proper appreciation which reads like this:

> 5.1 Considering the nature as well as complexities of the education support services coupled with the fact that the efforts required for providing the education support services is directly proportional to the number of students in the school, the trust agrees and undertakes to pay the company and the company has agreed to the following annual consideration from the academic year 2013-14 onwards for term of

the contract ("Annual Services Consideratoin").

5.2 For the academic year 2012-13, the trust agrees to pay the company an amount of Rs.2,000,000/- as ocnsideratoin. However, in case the excess of balance fee receivables for the academic year 2012-13 over operating expenses and repayment obligations for loan on school buses as detailed in annexure F (including the consideraiton pauable to the company) for rest of the academic year 2012- 13 is less than this amount, the company agrees to take a reduction in consideratoin payable to it to the extent of such shortfall. In case operaitng expenses and repayemnt obligations for loan on school buses as detailed in annexure F exceed the fee receivables during rest of the academic year 2012-13, the turst shall bring in the required funds to make good the shortfall.

5.3 The annual management services consideration shall be paid by the trust in the manner provided for in this agreement.

The above clauses are very much clear the plaintiffs have been agreed to pay the annual service consideration to the defendant that is the reason why the sole arbitrator after considering the materials on record found that the plaintiffs are liable to pay annual service consideration for the academic year 2012-2013 for Rs.1,15,22,056/- that is the management fee and the plaintiffs have not made out any of the grounds which are enumerated under Sec.34 of the Arbitration and Conciliation Act to set aside the award which passed by the sole arbitrator. Therefore, the arguments which advanced by the learned counsel for the plaintiffs on this aspect holds no water.

19. The learned counsel for the plaintiffs while canvassing his arguments has much argued that the sole arbitrator has granted the relief, though it is barred by limitation for which the learned counsel for the defendant while canvassing his arguments has submitted the claim which made by the defendant is not barred by limitation, that is the reason why the sole arbitrator after considering the materials on record awarded the relief. It is an admitted fact the sole arbitrator has been appointed and the arbitration proceedings has been initiated and the sole arbitrator after considering the materials on record passed the award directing the plaintiffs to pay an amount of Rs.8,40,22,056/- being the refund of defendant non interest bearing deposit of Rs.7,25,00,000/- and the annual service consideration (management fee) for one year of Rs.1,15,22,056/-. Now the question arises whether the claim which made by the defendant before the sole arbitrator is barred by limitation. Thus this court drawn its attention on Sec.21 of the Arbitration and Conciliation Act which reads like this:

21. Commencement of arbitral proceedings.--

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

The above provision is very much clear the arbitral proceedings in respect of a particular dispute commenced on the day on which a request for that dispute to be referred to the arbitration is received by the defendant. The materials on record reflects the agreement was terminated on 07.04.2016 as per Ex.P.9 and the plaintiffs have replied as per Ex.P.10 dated 21.05.2016 and thereafter as per Ex.P.11 dated 06.07.2016 proposed the name of the arbitrator and the defendant sent a reply as per Ex.P.12 on 06.07.2016 on the ground that they have already invoked the dispute resolution under clause 17 of the service agreement. So it can be inferred that the agreement was terminated by the said reply and the service agreement which taken place in between the plaintiff and the defendants was in existence as on the date of issuance of arbitration notice and the dispute has been arisen in the year 2016 and invoked the arbitration clause in pursuance of the service agreement and appointed the sole arbitrator as per the orders passed by the Hon'ble High Court of Karnataka in CMP No.196/2016 on 26.09.2018. Therefore, the claim which made by the defendant was not time barred which is within the limitation. Therefore, the arguments which advanced by the learned counsel for the plaintiffs on this aspect holds no water.

20. The learned counsel for the defendant while canvassing his arguments has rightly submitted that the sole arbitrator has been appointed in pursuance of the order passed by the Hon'ble High Court of Karnataka in CMP No.196/2016 and the claim which made by the defendant is not barred by limitation in view of Sec.21 of the Arbitration and Conciliation Act and the said counsel has drawn the court attention on the judgment of the Hon'ble Supreme Court which reported in 2012(12) SCC 581 in between State of Goa Vs Praveen Enterprises. On careful perusal of the said judgment in the said judgment their lordship held that Sec.21 of the Arbitration and Conciliation Act determined the date of commencement of arbitration proceedings for deciding whether the claims are barred by limitation or not and any claim made beyond the period of limitation prescribed would be barred by limitation and the arbitral tribunal will have to reject the such claims as barred by limitation and the relevant date for limitation is date of notice issued seeking reference to arbitration. Admittedly the plaintiffs have not disputed the notice which issued by the defendant which are on record reflects the claim which made by the defendant is not barred by limitation. Therefore, the judgment which relied by the learned counsel for the defendant is directly applicable to the case on hand. Therefore, the arguments which advanced by the learned counsel for the plaintiffs regarding the claim of the defendant is barred by limitation holds no water.

21. The learned counsel for the plaintiffs while canvassing his arguments has submitted that though the plaintiffs have sought for counter claim, but the sole arbitrator has not taken into consideration, as the plaintiffs have sustain financial loss and caused reputation to the institution due to the non performance of the defendant in pursuance of the service agreement, thereby the defendant is liable to pay the liquidated damages which was not taken into consideration by the sole arbitrator. It is an admitted fact the plaintiffs were also sought for counter claim which referred above and the sole arbitrator while considering not only the claim of the defendant, but also counter claim of the plaintiffs, held that the plaintiffs are not entitled the relief as sought in the counter claim by recording the reasons. So, the plaintiffs have not made out any of the grounds which enumerated under Sec.34 of the Arbitration and Conciliation Act to set aside the award passed by the sole arbitrator. Therefore, the arguments which advanced by the learned counsel for the plaintiffs on this aspect holds no water.

22. The learned counsel for the defendant has rightly submitted the plaintiffs have not established to claim liquidated damages thereby sole arbitrator after taken into consideration of not only oral but also documentary evidence on record and rejected the claim of the plaintiffs and drawn the court attention on the judgment of the Hon'ble Supreme Court which reported in 2015(4) SCC 136. On perusal of the said judgment in the said judgment their lordship held that damage or loss is sine-qua-non for payment of compensation for breach of contract even under Sec.74 of the Indian Contract Act, proof of laws or damage is not dispensed with under Sec.74 of the Indian Contract Act and where a damage or loss is difficult or impossible to prove court is empowered to award liquidated amount named in the contract, if it is genuine pre-estimate of damage or reasonable compensation for the said loss or damage, but nothing is established to substantiate the same. Therefore, the principles which are laid down in the said judgment is applicable to the case on hand.

23. The learned counsel for the plaintiffs has much argued that the plaintiffs were sought for counter claim for the damages which caused by the defendant due to non performance of its obligation in pursuance of the service agreement, but the tribunal has not taken into consideration not only the oral evidence but also documentary evidence on record. It is an admitted fact the plaintiffs were sought for damages of Rs.3,09,60,000/- due to the financial breaches which committed by the defendant for which the tribunal has held that the plaintiffs are not entitled the damages as sought for, though the plaintiffs were challenged the said finding of the sole arbitrator on the ground that the sole arbitrator had not taken into consideration of the materials on record, but the plaintiffs were utterly failed to bring the case within the purview of Sec.34 of the Arbitration and Conciliation Act to set aside the award. Therefore, the arguments which advanced by the learned counsel for the plaintiffs on this aspect holds no water.

24. It is an admitted fact the plaintiffs were sought for damages on the ground that the defendant has breached the service agreement which taken place in between the plaintiffs and the defendant. On the other hand, the learned counsel for the defendant while canvassing his arguments has submitted the plaintiffs have not made out any damages which alleged. So question of considering the counter claim which sought by the plaintiffs does not arise nor modification of the award or remand back to the tribunal does not arise, since the plaintiffs have not made out any of the grounds which enumerated under Sec.34 of the Arbitration and Conciliation Act and the said counsel has drawn the court attention on the judgment of Hon'ble Supreme Court which reported in 2021 SCC Online SC 473 in between Project Director, National Highways, No.458 and 220 NHAI V/s M. Hakim & Anr. On perusal of the said judgment in the said judgment their lordship held that the court cannot correct the errors of the arbitrators it can only quash the award leaving the parties free to begin the arbitration again if it is desired and held Sec.34 of the Arbitration and Conciliation Act empowers the court either to set aside or allow the suit and interference that an order made under Sec.34 of the Arbitration and Conciliation Act and as per Sec.37 of the Arbitration and Conciliation Act is concerned it cannot be disputed that such interference under Sec.37 cannot travel beyond the restrictions laid down under Sec.34 of the Arbitration and Conciliation Act and the court cannot undertake an independent assessment of the merits of the award, it must only ascertain that the exercise of power by the court under Sec.34 of the Arbitration and Conciliation Act and court should not exceed the scope of Sec.34 of the Arbitration and Conciliation Act. So looking from any angle the plaintiffs have not made out any of the grounds which enumerated under Sec.34 of the Arbitration

and Conciliation Act to set aside the award which passed by the sole arbitrator and the judgment which relied by the learned counsel for the defendant is applicable to the case on hand. Hence, I am of the opinion that the point No.1 is answered as Negative.

25. POINT NO.2: In view of my answer to point No.1 as stated above, I proceed to pass the following;

ORDER

The petition under Sec.34 of the Arbitration and Conciliation Act and Rule 4 of the High Court of Karnataka, Arbitration (proceedings before the courts) Rules 2001 filed by the plaintiffs is hereby dismissed.

No order as to costs.

(Dictated to the Stenographer, transcript thereof corrected by me and then pronounced in the open court on this the 4th day of January, 2022) (P.J. Somashekara) LXXXVIII Addl. City Civil & Sessions Judge, (Exclusive Commercial Court), Bengaluru City