2024:DHC:8134

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

% ***Reserved on: 8th July, 2024***
Pronounced on: 21st October, 2024

\+ **O.M.P. (COMM) 228/2019**

1. NARESH KUMAR BAJAJ
S/o Late Sh. Girdhari Lal Bajaj
R/o 56, Model Town, Ghaziabad
Uttar Pradesh-201001

2. ASHWINI KUMAR BAJAJ
S/o Mr. Naresh Kumar Bajaj
R/o 56 Model Town, Ghaziabad
Uttar Pradesh-201001

3. VIKRAM KUMAR BAJAJ
S/o Mr. Naresh Kumar Bajaj
R/o 56 Model Town, Ghaziabad
Uttar Pradesh-201001 ..... Petitioners

Through: Mr. Dhruv Mehta, Senior Advocate with Mr. Anubhav Ray, Ms. Gayatri Verma and Mr. Abhishek, Advocates.

versus

BUNGE INDIA PVT. LTD.
Registered Office:
601C & 601D, 6th Floor,
The Capital, C-70, G-Block, Bandra Kurla Complex,
Bandra (East), Mumbai, Maharashtra-40051
Email ID: care@bungeindia.com ..... Respondent

Through: Mr. Saket Singh, Senior. Advocate with Mr. Sameer Patel, Advocate.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The Petition under Section 34 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as the* "Act"*)* has been filed on behalf of the petitioners, to challenge the Arbitral Nil Award dated 15.02.2019, delivered on 01.03.2019.

2. ***Briefly stated***, the petitioners/claimants in the Arbitral Award were promoter Directors of the Company Amrit Bansapati Company Limited *(hereinafter referred to as 'ABCL')* having its manufacturing unit at Chandigarh Road, Rajpura, District Patiala. The petitioners entered into a *Non-Compete Agreement* dated 10.02.2012 *(hereinafter referred to as '**NCA**')* read with *Business Transfer Agreement* dated 21.12.2011 *(hereinafter referred to as '**BTA**')*, which may collectively be referred to as 'the Agreements'. The petitioner Nos. 1, 2 and 3 received a sum of Rs.17,00,00,000/-, Rs.15,00,00,000/- and Rs.15,00,00,000/- respectively from the respondent as Non-Compete Fee under the NCA, by virtue of which the entire edible oil business of ABCL, a going concern on an 'as is where is' basis, was transferred as a whole to the respondent, for a total consideration of Rs.220,00,00,000/-.

3. After the execution of the Agreements, Notices for Indirect Tax enquiries and demands were issued. Although in the terms of the NCA read with the BTA, all Taxes except Direct Taxes were agreed to be the responsibility of the respondent, it breached the Agreements by refusing to shoulder the responsibility under the Notice despite their undertakings in the Agreements.

4. The petitioners being the named recipients of the Non-Compete fee, had no option but to challenge the Assessment Order dated 08.05.2015. The learned Assessing Officer, Central Excise Commissionerate, Chandigarh-II, directed the deposit of a sum of Rs.9,68,50,000/- as Service Tax and interest/penalty *qua* the total amounts received by them under the NCA *('Assessment Order').*The amount was deposited by the petitioners while stating that the responsibility and the costs if incurred in defending the Assessment Order, ought to be borne by the respondents in terms of the Agreements.

5. Since the dispute arose in regard to the interpretation of the terms of the Agreements, the petitioners initiated Arbitration proceedings seeking a finding on the interpretation of the Agreements, to determine the contractual obligations *viz* indirect tax (service tax) liability and for the payment of damages constituted as costs incurred by the petitioner in defending the Assessment Order, which as per the Agreements, was entirely the responsibility of the respondent.

6. On 01.01.2018, the Assessment Order was quashed by the learned CESTAT, Chandigarh. After a year, the learned Arbitral Tribunal passed a *Nil Award* on 15.02.2019, on the sole ground that in view of the demand itself having been quashed, the exercise of adjudicating upon the Claims of the petitioners had become '*academic'*.

7. The petitioner has claimed that the years of diligent prosecution including the huge costs that were borne by the petitioner, to achieve the outcome of quashing of the Assessment Order which the respondent had undertaken to shoulder, were turned to dust on an extraneous consideration without appreciating the very terms of the reference to the Arbitral Tribunal.

The non-consideration of the terms of the reference of the petitioners' Claims and the documents filed therein, has resulted in an unjust and patently illegal Award, which is squarely against the rule of law and Public Policy of India.

8. *The impugned Award is thus, challenged* on the ground that the Award is based on *extraneous consideration*. The reference to the learned Arbitral Tribunal was for determination of contractually agreed liability to pay indirect taxes as per the terms of NCA read with BTA. The Tribunal blindsided the contractual provisions and elected not to adjudicate the dispute on the terms of the Agreement, which was the scope of reference. The observations of the learned Tribunal that the interpretation of the Agreement was no longer required in view of the *Order* dated 01.01.2018 of CESTAT, was extraneous to the terms of reference. The Tribunal failed to appreciate that the question of chargeability of Service Tax was not before the Tribunal and the decision of the CESTAT had no bearing to the contractual understanding between the parties as to who should shoulder the indirect taxes.

9. The impugned Award records in paragraph 12 that *"neither the claimants nor the respondent is liable to pay service tax with respect to the amounts paid to the claimants under the NCA"* and in so observing, the Tribunal exceeded its scope of reference. The impugned Award is in *contravention of the Fundamental Policy of Indian law* and has caused undue enrichment of the respondent on account of the failure by the Arbitral Tribunal, to adjudicate the real Claims between the parties. Consequently, the petitioners have been rendered remediless. The legitimate claims made by the petitioners with regard to the costs of defending and challenging the

demand of Service Tax has been ignored; had the petitioners not challenged the demand of Service Tax, it would have resulted in confirmation of the demand for Service Tax on the Non-Compete Fee. Had this happened in terms of the Agreement, the respondent would have been liable to shoulder the Service Tax liability or the petitioner would have been entitled to collect the same from the respondent.

10. It is further claimed that the learned Tribunal has erroneously ignored to adjudicate the primary issue referred under the Arbitration wherein vitiating the impugned Award as *it defies the basic notions of justice.* The ends of justice, equity under the Act has also not been met since after hearing the matter at length instead of deciding the contractual dispute referred to it, it has erroneously abdicated itself from deciding the issue so as to the interpretation of the terms of the Agreement as well as on Costs and Damages, basing its decision on the Order of CESTAT.

11. The petitioners' Application under Order 23 Rule 3 CPC categorically stated that although, *prayer "b"* (of the Statement of Claim) with regard to the Service Tax liability did not survive in view of the Order of CESTAT dated 01.01.2018, but as additional ongoing cost was incurred by the petitioners in defending the claim for Service Tax and payment of interest on loan for pre-deposit, the aforesaid claims of Damages under prayer "*d*" (Claim 3) and prayer "*c*" (Claim 2), survived. The Application was simply to supplement the said Claims for costs towards the cost of litigation in defending and challenging the Service Tax liability and the interest paid on the loan taken for pre-deposit and no new damages of costs apart from those made in the Statement of Claim, were claimed. The learned Arbitral Tribunal did not even venture into adjudicating whether or not respondent

was contractually obligated to bear indirect taxes, which was the primary dispute between the parties. It erroneously erred in dismissing the Claims of the petitioners by passing a NIL Award. The impugned Award is in direct conflict with the settled principles of law and is against the public policy of India.

12. Further, the Tribunal erroneously held that no details or evidence was furnished by the petitioners in support of its supplemented Claims though sought under the Applications under Section 23(3) of the Act. The learned Arbitral Tribunal glossed over the detailed break-ups of the costs incurred by the petitioners along with the corresponding Invoices/supporting documents that were placed on record, which substantiated beyond doubt, the authenticity of the costs incurred by them. The parties had agreed that since the detailed evidence was led in the Arbitration arising out of the same cause of action/transaction in the BTA, oral evidence need not be recorded in the proceedings and that the matter be decided on the basis of material placed on record. The learned Tribunal itself had passed the Procedural Order contained in the *e-mail* dated 29.10.2016 noting that no oral evidence needs to be led in the matter. Therefore, admittedly the Tribunal ought to have decided the disputes on the basis of documents filed during the course of the arguments. The impugned Award is, therefore, not only *ex facie* illegal but also is in conflict with the basic notion of justice as despite details and supporting documents being available on the record, the Tribunal failed to appreciate or even record the same.

13. The Application under Section 23(3) of the Act has been erroneously dismissed despite the fact that it was filed well during the pendency of the arbitral proceedings as well as before passing of the Arbitral Award. The

learned Tribunal even held a hearing on the said Applications and took written synopsis. The Applications have been dismissed on the sole ground that *"the claimants have not established by evidence the fact that the amounts claimed represented the expenses incurred in pursuing the proceedings relating to Service Tax matter."* Such finding is *in gross violation of the principles of natural justice*, inasmuch as the evidence on the Application and the Claims made therein could be led when such Application/pleading was allowed and taken on record.

14. In the end, it is submitted that the Tribunal has failed to consider the relevant evidence comprising of supporting documents. The detailed description of the cost incurred has been ignored and the Tribunal has relied on extraneous circumstances to deny the arbitral the claim of the petitioners. The Application filed under Section 23(3) of the Act has also been rejected without adjudicating the claims of the petitioner. The petitioners have thus, sought setting aside of the *Arbitral Award dated 25.02.2019*.

15. ***The respondent in the detailed Reply*** has denied all the statements, submissions and allegations raised by the petitioners in the Petition. *Preliminary submissions* have been made that the Petition has been filed *beyond the period of limitation* as prescribed under Section 34(3) of the Act.

16. It is denied that the Award was delivered on 01.03.2019 as has been claimed by the petitioners. It is submitted that the learned Arbitrator *vide* e-mail dated 16.02.2019, had informed the counsels on behalf of the petitioners and respondent that the Arbitral Award has been finalised and signed and the parties could obtain the copy of the same from the Office of the learned Arbitrator. The unsigned copy of the Arbitral Award was annexed with the e-mail. Therefore, in terms of Section 34(3) of the Act, the

Petition was required to be filed on or before 18.05.2019 i.e. within three months from the date on which the petitioners received the original Copy of the Award. However, this Petition has been filed on 25.05.2019, without furnishing any sufficient cause which prevented the petitioners to file the Petition within the period of limitation and therefore, the present Petition is liable to be dismissed *in limine.*

17. The respondent has further asserted that the Arbitration Award is just, fair and reasonable and the Petition is devoid of any merits. No basis for setting aside the Arbitral Award has been disclosed in the Petition, which could satisfy the grounds as set out in Section 34(2) of the Act.

18. The respondent has admitted entering into a BTA dated 21.12.2011 and NCA dated 10.02.2012 with the petitioners. It is asserted that the learned Tribunal has rightly taken into consideration the Order dated 01.01.2018 of CESTAT, which had allowed the Appeal filed by the petitioners challenging the assessment Orders dated 08.05.2015, passed by the Assessing Officer, Central Excise Commissionerate, Chandigarh-II, directing the petitioners to pay the assessed service tax along with penalty and interest to the tune of INR 9,68,50,00,/- pursuant to the execution of the Non-Compete Agreement. *The CESTAT had held that Service Tax is not leviable in respect of the transaction entered into between the parties*. As levy of Service Tax was the sole reason for initiation of the Arbitration against the respondent and it is conclusively held that the petitioners are not liable for any Service Tax, the petitioners suffered no damnification. The Tribunal after coming to the conclusion that no evidence has been led by the petitioners to establish their Claim, rightly dismissed the Application under Section 23(3) of the Act, filed by the petitioners.

19. The respondents have asserted that in the first instance, the Arbitration was admitted on the wrong premise and the Application under Section 23(3) was also based on the same premise that the respondent was liable to pay the Service Tax as levied by the Assessing Officer. The petitioners without proving their Claim in the Application under Section 23(3), merely based the same on erroneous pre-supposition that the petitioners have exercised prudence and have undergone the hardship in getting the Order from CESTAT. The Assessment Orders had not been made on account of any act or omission on the part of the respondent and were in no manner responsible under those Assessment Orders. The sole responsibility to defend those Notices was of the petitioners. The respondent cannot be saddled with the alleged cost incurred by the petitioners in defending the Notices. The Application under Section 23(3) of the Act, 1996 has been dismissed by the Tribunal by taking into consideration the petitioners' conduct in filing these Applications, after the hearing in respect of the Arbitration stood concluded on 16.05.2017 and the matter had been reserved by the Tribunal for Orders. The Application under Section 23(3) of the Act, 1996 contained unsubstantiated Claims without obtaining the leave of the Tribunal, to either file the Applications or to lead the evidence in support thereof, which in any event could not have been done as the hearing was concluded and the Award had been reserved. The respondent objected to the filing of these Applications by writing a *Letter dated 10.11.2017* and *18.05.2018* to the learned Tribunal, on the ground that the same had been filed at a belated stage when the arguments in the matter stood concluded and that the petitioners be directed to refrain from filing such Applications.

20. The respondent has asserted that the petitioners have put forth a false case that the respondent was under a contractual obligation under the BTA and NCA, to bear all direct taxes and costs pertaining to them including the Service Tax Liability. Admittedly, the petitioners had received the consideration (on which Service Tax was levied erroneously) under the Non-Compete Agreement and not the BTA. The petitioners have failed to establish that the respondents had any contractual liability to bear the Service Tax Liability. The petitioners have deliberately refused to acknowledge that the rights and obligations of the parties, were governed by the two Agreements and that these two Agreements were independent; the terms of BTA could not be read into Non-Compete Agreement. Had the parties contemplated that the Service Tax obligation would be on the respondent; it would have been so expressly provided in the Non-Compete Agreement. There is no such stipulation regarding the obligation to pay tax in the Non-Compete Agreement. The petitioners are not entitled to re-agitate the same submissions before the Tribunal in view of the CESTAT Order holding that no Service Tax was payable, and the interpretation of the BTA and the NCA was not required.

21. The respondent has summarised in its Reply and submissions before the Tribunal that as per the provisions of BTA and NCA, there was no liability of the respondent, to bear the Service Tax Liability. The petitioners, by way of the present Petition, has sought to reagitate the merits of the case without establishing the applicability of any of the grounds provided under Section 34(2) of the Act, to challenge the Award. It is thus, contended that the Petition is liable to be rejected.

22. ***On merits***, it is stated that the Claim of the petitioners that the Award is based on *'extraneous consideration'* i.e. the *CESTAT Order* or that the Tribunal abdicated itself of passing a Nil Award, is patently incorrect. The cause of action arose solely when the Assessment Order were issued in the name of the petitioners directing them to pay Service Tax. The petitioners initiated the Arbitration against the respondent on the erroneous assumption that the liability to pay the Service Tax was that of the respondent.

23. The **petitioners had made the Claims as under:**-

(a) a sum of Rs.9,68,50,000/- along with interest in respect of the purported service tax liability levied on the petitioners under the provisions of the Finance Act, 1994 by the Assessing Officer;

(b) a sum of Rs.36,60,750/- as damaged toward pre-deposit amount for filing three separate appeals before the CESTAT;

(c) a sum of Rs.3,49,076/- as damages towards interest on loan/overdraft facilities obtained by the petitioners for payment of Pre-Deposit Amount;

(d) damages on account of litigation cost and/or other ancillary costs incurred by the petitioners in defending and challenging the Service Tax Liability; and

(e) cost incurred by the petitioners in the arbitration proceedings.

24. The respondents have submitted that it is evident from the reliefs claimed that they emerged on account of issuance of Assessment Orders and all other impugned Claims arose therefrom.

25. The respondent in its ***Statement of Defence*** in addition to setting out the correct facts had stated that *"further as mentioned hereunder it was an*

agreed position between the claimants and the respondent that the Non-Compete Agreement would not attract Service Tax under the prevailing laws as on 12.02.2012 (i.e., the date of execution of the Non-Compete Agreement) and therefore, there was no question of any understanding between the parties to incorporate any provisions for payment of service tax in the Non-Compete Agreement. Assuming but not admitting that the Service Tax Liability existed, the respondent had also stated that there was no Notification issued by the Central Government under the Finance Act, in terms of which the purported Service Tax on the Non-Compete Agreement would be payable by the respondent instead of the petitioners.

26. Furthermore, the respondent has specifically averred in the Statement of Defence that the invocation of Arbitration by the petitioners was improper and unsustainable as there existed *no cause of action*. The petitioners had thus written Letter dated 01.06.2013 to Superintendent (Preventive) Central Excise Commissionerate, Chandigarh-II that prior to 01.06.2012, the Service Tax was not leviable on the amounts charged as Non-Compete Fees since the same was received on 10.02.2012 by the petitioners. This contention of the petitioner, has been upheld in the *CESTAT Order*. The defence taken by the respondent was that *"it was agreed position between the claimants and the respondent that the Non-Compete Agreement would not attract the service tax under the prevailing laws as on 12.02.2012."* This was taken into consideration in the *CESTAT Order* and therefore, the Order was significant to be considered while adjudicating the Claims by the Arbitrator. The petitioner had falsely claimed in the Rejoinder that the respondent was liable to pay Service Tax on account of the demand raised by the Tax authorities. However, since no tax was leviable on the Non-Compete Agreement, the

petitioners had erroneously claimed in its Rejoinder that as per the terms of the BTA and NCA, the respondent is liable to pay the Service Tax Liability and that the demand pertaining to the same, had been crystalised. The Tribunal in view of the submissions put forth by the respondent, was entitled to reject the Claim of the petitioners by relying upon the *CESTAT Order*. The basic genesis of the Claim was the Assessment Order, which was finally adjudicated by the Order of the CESTAT. The petitioners cannot rely on the Assessment Orders to raise their purported claims and then conveniently seek the *CESTAT Order* to be ignored. The duplicitous conduct of the petitioners is apparent from the fact that despite the Assessment Order given by the CESTAT on 01.01.2018, the petitioners did not initially disclose this *CESTAT Order* to the Tribunal. It is only the respondent who *vide* its e-mail dated 15.02.2018, forwarded the copy of the Order to the Tribunal.

27. The respondent has asserted that the question of chargeability of the Service Tax on NCA and the liability of the parties to pay tax was the foremost issue before the Tribunal, which got ascertained and determined in the *CESTAT Order*, on which reliance has been rightly placed by the Tribunal. The petitioners had only sought the determination about which party is liable to pay the Service Tax but there was no reason for the Tribunal to render any finding on the interpretation of BTA or NCA or *de hors* the applicability of Service Tax on the Non-Compete Agreement. When the finding had already been returned that no Service Tax was leviable, where was the question of adjudicating about the party which was liable to pay the same. The Tribunal, therefore, rightly held in the Award that "*Thus, the entire dispute relating to the liability to pay service tax has become academic*." In the given circumstances, it cannot be claimed that the

Arbitral Tribunal abdicated itself of passing a *Nil Award*. Once the Service Tax Liability itself did not survive, the claims put forth by the petitioners also did not survive and there was nothing left for the Tribunal, to decide as has been rightly observed by the learned Tribunal.

28. The petitioners themselves in the brief Note filed in support of the Application under Section 23(3) of the Act, 1996 before the Tribunal, had stated that in view of the *CESTAT Order*, claimed for payment of Service Tax Liability by the respondent and Claim No. 2, the claim for payment of pre-deposit amount, did not survive. The petitioners, therefore, cannot now assail the Award of the Tribunal on the ground that the *CESTAT Order* is beyond the scope of reference of the dispute.

29. It is further asserted that the petitioners have erroneously sought setting aside of the Arbitral Award on the ground that the Application under Section 23(3) of the Act, 1996 had been dismissed without assigning any reasons. The Applications were devoid of merit and had been opposed by the respondents. The learned Tribunal while dismissing these Applications had observed that the claimants had not established by evidence that the amounts claimed represented the expenses incurred in pursuing the proceedings relating to the Service Tax matter. While assailing these observations, the petitioners are deliberately ignoring the settled position of law that the Arbitrator is the ultimate master of the quality and quantity of the evidence to be relied when he delivers the Arbitral Award. The petitioners cannot now assail the Tribunal finding by requiring this Court to re-assess or re-appreciate the documents furnished by the petitioners before the Tribunal.

30. Without prejudice, it is further claimed that the Applications under Section 23(3) were not maintainable on account of there being no Service Tax Liability. The petitioners who had been given an opportunity by the Arbitral Tribunal, decided not to prove the contents of the supporting documents relied by the petitioners, in the said Applications. Mere production of documents before the Tribunal does not prove the authenticity of the contents of the documents and does not *ipso facto* become the proof of the fact stated therein. The authenticity of the documents so furnished, could not have been presumed by the Tribunal. None of the procedural Orders passed by the Tribunal mentioned that the petitioners were not required to prove their Claims, which would have been contrary to the law of evidence.

31. Further, the Application under Section 23(3) of the Act, 1996 was filed by the petitioners *vide* e-mail dated 15.06.2018. The matter was heard at length thereafter by the Tribunal on 28.07.2018 and on 31.07.2018, when it was recorded that the parties have been heard at length. Nothing precluded the counsel for the petitioners to seek leave of the Tribunal on any of these aspects to prove the contents of the documents filed along with the Applications. The petitioners themselves stated in Paragraph 7 (K) of the Petition that "*evidence on an application or the Claims stated therein can only be led when such Applications were allowed to be taken on record*." The petitioners, therefore, acknowledged that they themselves were required to seek leave of the Tribunal, to bring these Applications on record.

32. In fact, by filing Applications under Section 23(3), the petitioners had sought to supplement the Claim Nos. 2, 3 and 4 of the Statement of Claim, i.e. interest paid by the petitioners in respect of the loan/overdraft facilities

obtained by the petitioners for the Pre-Deposit Amount, the litigation and other incidental costs purportedly incurred in challenging the Assessment Orders and Costs incurred in the Arbitral proceedings.

33. Further, the petitioners themselves in their brief notes, filed in support of their Applications under Section 23(3) of the Act, had stated that the Claim Nos. 1 and 2 do not survive. The bare perusal of the Applications would indicate that they were vague, uncorroborated and without any proof of the petitioners' right or entitlement to make such Claims. Furthermore, these Applications under Section 23(3) had been filed without obtaining the leave of the Tribunal, after the completion of final arguments.

34. The respondent has further asserted that as per the terms of BTA and Non-Compete Agreement, it was not liable to bear the Service Tax liability. The BTA is a '*Slump Sale'* as defined under Section 2 (42C) of the Income Tax Act, 1961. The '*Acquired Business*' had been purchased by paying a lump sum consideration and no individual value had been assigned to the assets or liabilities. Although, the Non-Compete Agreement formed part of the 'Transaction Documents' as listed in Schedule 14 of the BTA, it was a completely separate and independent document governed by and enforceable as per its own provisions. It is a comprehensive document in itself and as per *Clause 7.1*, constituted an entire Agreement between the parties. *Clauses 1.1* and *11* of the NCA read with *Clauses 24.7* and *3.4* of the BTA, makes it evident that there was no understanding and/or contractual Agreement between the parties, under either of these Agreements to fasten any liability on the respondent to pay the impugned Claim/Service Tax.

35. Likewise, *Clause 24.7* of the BTA, does not fasten any obligation or liability to pay the Service Tax. Assuming though not admitting that the terms of Non-Compete Agreement can be construed as petitioners providing 'taxable service' to the respondent, it was a liability of the Service Provider i.e. the petitioners in this case. It is agreed position between the petitioners and the respondent that Non-Compete Agreement shall not attract Service Tax under the prevailing laws as on 12.02.2012 and therefore, there was no question between the parties to incorporate any payment of Service Tax in the NCA and/or BTA. It is, therefore, asserted that the grounds taken by the petitioners under Section 34 of the Act are without any merit or tenable and the Petition is liable to be rejected.

36. ***The petitioners in the Rejoinder***, have explained that the Petition under S.34 of the Act,1996 has been filed within limitation. It is explained that even as per the respondent's own submission, the e-mail dated 16.02.2019 sent by the learned Tribunal, contained an unsigned copy of the Arbitral Award as an attachment with instructions to the parties, to collect the signed copy from his Office. The signed copy was collected on behalf of the petitioners on 01.03.2019. The Petition was filed on 21.05.2019 and the Objections were removed and the Petition refiled on 25.05.2019. Therefore, the Petition was filed within the period of limitation. All other averments made in the Reply, had been denied and the contentions made in the Petition, were reaffirmed.

37. ***Learned counsel for the petitioners, in the course of arguments***, detailed about the NCA and BTA that were entered into between the parties and also detailed about the learned Assessing Officer, passed and crystalising the Assessment Order dated 08.05.2015 levying the Service Tax

Liability in the sum of Rs. 9,68,50,000/- along with interest on the petitioners, which was challenged before the CESTAT and eventually, the petitioners met their success when the CESTAT in its Order dated 01.01.2018, decided in favour of the petitioners that no Service Tax was liable to be imposed on the NCA.

38. The learned Arbitral Tribunal consequently rendered a NIL Award, which has been challenged on the ground as has already been detailed in the Petition, but may be summed up as under:

(i) T*hat the Tribunal travelled beyond the scope of reference of the Impugned Award*

(ii) *The Award has been made on extraneous considerations and is without jurisdiction*

(iii) *The Tribunal abdicated adjudication of the disputes and gave no finding on the question of contractual liability of one or the other party under the Contracts.*

39. The Award is against the legal principles and the contract between the parties. It is perverse as it overlooks the Claims of the petitioners that the Applications under Section 23(3) of the Act, have been dismissed without application of mind. The Tribunal has disregarded its own prior Order and ignored the material evidence on record. No opportunity was granted to the petitioners, to adduce evidence on supplementary Claims, which is violative of principles of natural justice. The Award led to be undue enrichment of the respondent.

40. Learned counsel for the petitioners has argued that only issue before the Tribunal, was: "*who was liable to pay the Service Tax*?" The Claims clearly disclosed the cause of action; in fact the Petition under Section 16 of

the Act was filed for the respondent to assert that the Claims of the petitioners were pre-mature, but the same was dismissed by the learned Tribunal.

41. ***The petitioners themselves had stated in its Written Submissions*** that the Claim to have become non-existent, but still continued to assert that they were entitled to the remaining Claims. The Tribunal vide its Order dated 26.10.2017 had clearly observed that no evidence was required. To now assert that the Applicant did not choose to lead the supportive evidence, is factually incorrect. Two Applications under Section 23(3) of the Act, 196 were filed by the petitioners and the arguments were addressed by both the parties. The rejection of the Application under Section 23(3) is erroneous as it could not have been dismissed outrightly without deciding it on merits.

42. Learned counsel for the petitioners had submitted that the final arguments had got concluded on 04.05.2017 while the first Application under Section 23(3) was filed on 26.10.2017 and the other Application under Section 23(3) was filed on 09.04.2018. The *CESTAT Order* came on 01.01.2018. Vide Procedural Order dated 29.07.2018, the arguments were concluded and the Order was reserved by the Tribunal. The petitioners in the written arguments had given details of the costs in the sum of Rs.87,49,602/- as legal costs and Rs.3,41,000/- as the incidental costs. It is argued that the Award suffers from patent illegality and has been made without considering the merits of the Claims of the petitioners and is, therefore, liable to be set-aside.

43. The Petitioner has placed reliance on *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* (2012) 5 SCC 306 and *State Trading Corporation of India Ltd. v. Dalmia Cement (Bharat) Ltd.* ILR 1993 Delhi 181 to submit

that Indirect Tax burden can be shifted by the parties to the contract *vide* the NCA read with the BTA and Litigation costs on behalf of actual beneficiary, can be reimbursed. Further, the Petitioner asserted that a levy is crystallised the moment demand is raised till it is set aside by a Court; reliance for the same is placed on *The Kedarnath Jute Mfg. Co. Ltd. v. The Commissioner of Income Tax (Central) Calcutta* (1972) 3 SCC 252.

44. The Petitioner further asserts that Declaratory relief may be granted and the Ld. Tribunal was bound to interpret relevant clauses of the Contract. Reliance for the same is placed on *Deccan Paper Mills Company Limited v. Regency Mahavir Properties and others* (2021) 4 SCC 786; *The Fertilizer Corporation of India v. Chemical Construction Corporation* (1973) 75 Bom LR 335.

45. It is further asserted that Impugned Award neglects to consider relevant clauses of Contracts and therefore is beyond jurisdiction. Reliance for the same is placed on *Bharat Coking Coal Ltd. v. Annapurna Construction* (2003) 8 SCC 1543 and *MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd.* (2004) 9 SCC 619.

46. The Petitioner has also submitted that Impugned Award is in contravention of settled legal principles and *de hors* the contracts between the parties, against the fundamental policy of Indian law, suffers from patent illegality and ignores its own previous orders and materials furnished and available on record. Reliance for the same is placed on *Hindustan Zinc Limited v. Friends Coal Carbonization* (2006) 4 SCC 445; *Associate Builders v. DDA* (2015) 3 SCC 49; and *Ssanyong Engineering & Construction Co. Ltd. v. NHAI* (2019) 15 SCC 131.

47. Lastly, the Petitioner submits that the petition is not barred by limitation as Delivery of signed Arbitral Award to a 'Party' on 01.03.2019, Petition was filed on 21.05.2019 and re-filed on 27.05.2019 after removing objections. Reliance is placed on *Benarsi Krishna Committee & Ors. v. Karmyogi Shelters Pvt. Ltd.* (2012) 9 SCC 496.

48. ***Learned counsel for the respondent had given written submissions*** wherein essentially, the same grounds as detailed in the Reply, were re-affirmed. It was argued on behalf of the respondent that the learned Tribunal has rightly given a NIL Award after the CESTAT Order, as the findings on Claim Nos. 1 and 2 would have been academic. The CESTAT Order decided that no Service Tax Liability was leviable and therefore, the question of determining who was liable to pay the Service Tax became redundant. Even otherwise, the Service Tax became leviable only after 01.07.2012 while the parties had entered into the NCA prior to the said date and there was no question of levying any Service Tax, consequently there could not have been any Clause incorporated in the Agreements to fasten the liability of such tax on either party. After receiving Notice from the Assessing Officer, the petitioners had approached the respondent for Pre-Deposit but because it was not in a position to do so, the deposit was made by the petitioners. However, the petitioners invoked the Arbitration in order to determine who was liable for the tax. The CESTAT Appeal was simultaneously filed. Pre-emptive Arbitration had been initiated which in the light of the Order of CESTAT, became academic, as observed rightly by the learned Arbitral Tribunal. There was no statutory/contractual obligations on the respondent to pay the legal expenses, bank loans etc, which have been claimed by the petitioners. The Clauses of the BTA and the NCA invoked

by the petitioners, were in regard to the costs of transaction under the Agreement and not in respect of any litigation. The respondent is, therefore, not entitled to pay any costs as claimed by the petitioners. In the end, it is submitted that the Award does not suffer from any illegality or nor is it made in breach of fundamental policy of India and is, therefore, liable to be dismissed.

49. The Respondent has placed reliance on *Associate Builders* (supra); *State of Goa v. Praveen Enterprises* (2012) 12 SCC 581; and *Ssanyong Engineering & Construction Co. Ltd. v. NHAI* 2019 SCC OnLine SC 677 to assert that disregarding binding effect of the judgment of the superior court is violative of fundamental policy of Indian Law. It was further asserted that for an arbitral award to be illegal, the issue must go to the root of the matters and must shock the conscience of the Courts.

50. Further, the respondent asserted that it is a settled practice of courts to not pronounce upon matters which are only of an academic interest. Reliance is placed on *P.H. Pandian v. P. Veldurai & Anr.* (2013) 14 SCC 685; *Harsharan Verma v. Charan Singh & Ors.* (1985) 1 SCC 162; *Central Areca Nut & Cocoa Marketing & Processing Cooperative Ltd. v. State of Karnataka & Ors.* (1997) 8 SCC 31; *K.N. Rajakumar v. V. Nagarajan and Ors.* (2022) 4 SCC 617. Reliance was also placed on *Life Insurance Corporation of India and Anr. v. Ram Pal Singhy Bisen* (2010) 4 SCC 491 to assert that mere filing or exhibiting of a document does not dispense with its proof.

51. **Submissions heard and the record along with the written submissions perused.**

52. A 'Nil' Award has been given by the learned Arbitrator. A Show Cause Notice dated 22.10.2014 was issued by the Ld. Principal Commissionerate, Chandigarh-II and subsequently Assessment Order was passed on 08.05.2015 levying the service tax on the petitioners on the NCA.

53. The petitioners have asserted that they are not liable to pay the amount towards the Service Tax as claimed by the Notice and, in fact, after the BTA and NCA, the liability if any arose under these two Agreements, it was the sole responsibility of the respondent. This was also specifically provided in the NCA, that there is no Service Tax leviable from July, 2012.

54. It is contended that because the Assessment Order dated 08.05.2015 of service tax had been issued wrongly in the name of the petitioners which the respondent refused to defend, they were left with no option but to challenge the same before CESTAT and also sought adjudication about who was liable to pay the Service Tax by way of Arbitration.

55. Admittedly, CESTAT *vide* its Order 01.01.2018 has held that the service tax was not leviable on NCA *inter se* the parties. Once the service tax liability itself was quashed, there was nothing that survived in respect of the two Claims i.e., Claim Nos. 1 and 2 which were in regard to the payment of the service tax, for which Notice had been served on the petitioners.

56. The petitioners in their Written Arguments have also conceded that the Claim Nos. 1 and 2 had become nugatory in view of the Order of the CESTAT. The only claim which according to the petitioners survived before the learned Arbitrator, was the expenses incurred by the petitioners in getting the loan for depositing the amount before the CESTAT for their Appeal to be heard, the ligation costs and damages for interest paid on Overdraft Facility.

57. Likewise, the petitioners have also claimed that they had incurred expenses in initiating and defending the arbitration proceedings for which also, they are entitled to costs and, therefore, the learned Arbitrator fell in error in giving the 'Nil' Award.

58. The *core argument of the Petitioners is that they had sought a Declaratory finding as to* **on whom the liability of any tax that may get imposed in future would lie**, but this question has been left unanswered.

59. The *first aspect* which is agitated is that the Show Cause Notice and Assessment Order for payment of Service Tax in the sum of Rs. 9,68,50,000/- had been served upon the petitioners. The parties had specifically agreed in their NCA that there is no service tax leviable on the said Agreement. In case the Notice got issued in the name of the petitioners, it is for the petitioners to have defended the same in which they were successful.

60. It was a Notice/Order issued for payment of service tax on the premise that NCA attracted the service tax. The Notice may have been found to be not sustainable by CESTAT, but in no way can the respondent be held responsible for the costs incurred by the petitioners in defending the said Notice/Order before the CESTAT. The overhead costs, expenses and interest on the overdraft to garner money for pre Appeal deposit may have been borne by the petitioners as the Notice was in their name, and under no law can the incurred expenses be fastened on the respondent.

61. Furthermore, the specific challenge was to the Notice/Order *vide* which the Service Tax was sought to be imposed upon the petitioners, which was not leviable in the first instance. In view of erroneous Notice in the name of the Petitioners, it was only they who had to defend themselves from

imposition of the Service Tax. The costs incurred for challenging. The Notices was specific to the petitioners and they cannot transpose their liability on the respondents.

62. It cannot be overlooked that in the Agreements, in was specifically mentioned that the service Tax is not leviable on NCA fees. For the erroneous acts of the third party, the respondent can definitely not be held liable for the costs incurred in defending the Notices before CESTAT.

63. In the written arguments and otherwise as well, the petitioners have themselves stated that the Claim Nos. 1 and 2 did not survive. If the Claim Nos. 1 and 2 regarding the recovery of the Service Tax proposed to be imposed on NCA fees and incidental expenses itself did not survive as was held to be not imposable, the question of expenses incurred by the petitioners in defending the said Demand Notice proposing to impose the Service Tax, cannot be fastened on the respondent.

64. There is no denying that the parties could have contracted in regard to which party would be liable for any taxes that may get imposed in regard to the Agreements between the parties, but Petitioners have not been able to show any such clause providing that any liability, whether rightly or wrongly sought to be imposed, shall be the responsibility or indemnified by the Respondent.

65. *The learned Arbitral Tribunal was thus, right in giving the 'Nil' Award.*

66. The petitioners have also claimed that *the costs of the arbitration proceedings which it had initiated for determination of the liability of which to pay the impeding tax demand.* However, the respondent cannot be held responsible in any manner for the initiation of Arbitration, as it was not any

of its acts which led to issue of Notices against the petitioners. In fact, the respondent had even filed an Application under Section 16 of the Act to assert that the arbitration had been invoked prematurely, though the same got dismissed by the learned Arbitrator. The arbitration proceedings were not at the behest or at the instance of the respondent and, therefore, no costs can be recovered from the respondent.

67. Furthermore, whether the costs are to be granted or not for the arbitration proceedings, was a subject matter before the learned Arbitrator. The learned Arbitrator has not chosen to award the costs to the petitioners in his discretion and the same cannot be questioned before this Court in a Petition under Section 34 of the Act.

68. The objections of the petitioners that the Tribunal travelled beyond the scope of reference of the impugned Award or that it was made on extraneous considerations and the same is without jurisdiction, are not tenable. Likewise, the Claim that the *Tribunal abdicated adjudication of the disputes* and gave no finding on the question of contractual liability of one or the other party under the contract is also *not tenable*. Whether the service tax on NCA is leviable or not falls within the jurisdiction of CESTAT, which got decided by the CESTAT as not liable to be imposed on the NCA fees. Before the learned Arbitrator, the petitioners had sought avoidance of payment of the Service Tax on the ground that liability if any, is that of the respondent. Therefore, it cannot be said that the Tribunal committed any error on the face of record by relying on the Order of the CESTAT quashing the Demand Notice. Once the demand itself was held to be not sustainable, the question of who is liable to pay this purported/ proposed Service Tax became *academic*, as rightly observed bt the Arbitral Tribunal.

69. The scope of a challenge under Section 34 of the Act, 1996 is limited to the grounds stipulated therein as held in *MMTC Limited v. Vedanta Ltd,* (2019) 4 SCC 163. Comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in *Associate Builders vs. DDA*, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of *ONGC v. Saw Pipes*, 2003 (5) SCC 705 to determine the contours of Public Policy wherein an award can be set aside if it is violative of '*The fundamental policy of Indian law'*, '*The interest of India'*, '*Justice or morality*' or leads to a '*Patent Illegality'*. For an award to be in line with the '*The fundamental policy of Indian law'*, the Tribunal should have adopted a judicial approach which implies that the award must be fair reasonable and objective. This grounds requires an Arbitral Tribunal to deliver a reasoned award which is substantiated on evidence.

70. The ground of '*patent illegality*' is applied when there is a contravention of the substantive law of India, the Arbitration Act or the rules applicable to the substance of the dispute. In *Hindustan Zinc Limited vs Friends Coal Carbonisation*, (2006) 4 SCC 445, The Hon'ble Apex Court referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an award is against the specific terms of contract, and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India. Though the Supreme court in *State of Chhattisgarh & Anr. vs. SAL Udyog Pvt. Ltd.* (2022) 2 SCC 275 as well, held that an award in blatant disregard of the express terms of the agreement suffers from patent illegality, the court had also made a reference to *Associate Builders* (supra) wherein it was observed that the term "patent illegality" does not apply to every legal mistake made by the arbitral

tribunal. Furthermore, the term "patent illegality" does not apply to legal violations that are unrelated to matters of public policy or interest.

71. In the light of aforesaid discussion, it is evident that the grounds agitated by the petitioners, do not fall in either of the categories of patent illegality or fundamental breach of Indian Law.

Conclusion:

72. The scope of interference under Section 34 of the Act being limited, there is no merit in the present Petition under Section 34 of the Act, 1996 which is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 21, 2024/RS