#F-6A

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

\+ CS(OS) 2447/2000 & I.A. 12332/2008

FITTYDENT INTERNATIONAL GmbH

..... Plaintiff

Through Mr. Mayank Bughani with
Mr. Saurabh Mishra, Advocates

versus

BRAWN LABORATORIES LTD. ..... Defendant

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. B.K. Dash, Advocate.

% Date of Decision : MAY 11, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present suit has been filed under Section 49 of Arbitration and Conciliation Act, 1996 (hereinafter referred to "Act, 1996") for enforcement of a foreign arbitral Award dated 24th March, 2000 passed by Ms. Jenny W.T. Power, sole Arbitrator appointed by the International Court of Arbitration.

2. Briefly stated the relevant facts of this case are that on 20th May, 1994 a Licence Agreement to manufacture and sell plaintiff's denture cleansing tablets and adhesive powder was entered into between the plaintiff and defendant.

3. On 25th April, 1996, plaintiff terminated the Licence Agreement on the ground that the defendant had failed to start commercial production and also failed to increase the sale and use of aforesaid products in India.

4. Since disputes arose between the parties, plaintiff submitted a request for arbitration to ICC International Court of Arbitration (in short "ICC") claiming US$ 175,000 along with interest and costs.

5. On 18th February, 1998, ICC appointed Ms. Jenny W.T. Power as the sole Arbitrator.

6. On 27th July, 1998, defendant filed a suit being Suit No. 1568/1998 before this Court seeking a declaration and injunction to stay the arbitral proceedings on the ground that no valid arbitration agreement existed between the plaintiff and defendant.

7. On 23rd July, 1999, the aforesaid suit filed by defendant titled as ***M/s. Brawn Laboratories Limited Vs. Fittydent International Gmbh***

and Anr. reported in ***85(2000) DLT 204*** was dismissed by a learned Single Judge of this Court. The relevant observations of the learned Single Judge are reproduced hereinbelow:-

> *"Moreover, a sea-change has been made in the law of arbitration after the passing of the Arbitration and Conciliation Act, 1996. Under Section 5 of the Arbitration and Conciliation Act no Judicial Authority shall intervene in the proceedings except where so provided in the Act. Moreover, while under the old Arbitration Act, a question relating to the jurisdiction of the Arbitrator could not be decided by him except when it was referred to him as a specific question of law, under Section 16 of the new Arbitration Act, the Arbitral Tribunal has the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement, and for that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. It is, therefore, clear that even assuming for the sake of arguments that the agreement dated 20.5.1994 between the parties was illegal and non est, the same shall not on its own render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same. It is, therefore, for the Arbitrator to decide as to whether the arbitration agreement between the parties still survives even assuming that the agreement dated 20.5.1994 was rendered invalid because of non-approval of the Government of India. In my opinion, this Court will not interfere in the proceedings before the Arbitrator and it will be open for the plaintiff to take all such pleas before the Arbitrator as it may be advised to take and have a decision thereon.*
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> *In my opinion, the plaintiff has not been able to make out any case for the grant of any relief in his application for injunction and this Court will not interfere with the proceedings before the Arbitrator. In my opinion, the suit by the plaintiff is also misconceived and is barred by the provisions of Section 16 of the Arbitration and Conciliation Act. While, therefore, dismissing the application of the plaintiff for the grant of injunction, I allow the application of defendant No. 1 under Order 7 Rule 11 and dismiss the suit with no order as to costs."*

8. Even in the appeal filed by the defendant, the Division Bench did not stay the arbitral proceedings. The relevant portion of the

Division Bench's order dated 3rd November, 1999 passed in RFA(OS) 46/1999 is reproduced hereinbelow :

> *"We have heard counsel for the parties on the question of stay of arbitration proceedings. The main ground raised by the appellant against the arbitration proceedings is about the existence and validity of the arbitration agreement. The learned Single Judge has decided this aspect against the appellant. Further, we note that the arbitration proceedings had already commenced and resulted in an interim award dated 18th June, 1999. The learned counsel for the respondent has also drawn our attention to Section 48 of the Arbitration and Conciliation Act, 1996. It is submitted that on the basis of the said Section, it will always be open to the appellant to challenge the agreement at the time of enforcement of the award by raising objection regarding existence and validity of the arbitration agreement. It is also submitted by learned counsel for the respondent that the parties have agreed that the arbitration in the present case is to proceed as per the International Chamber of Commerce Arbitration Rules and as per the agreement between the parties, the parties are governed by the Austrian law. Keeping all these aspects in view we are not inclined to stay the arbitration proceedings. This application is accordingly dismissed."*

9. In the meantime, the Arbitrator had been repeatedly adjourning the matter at defendant's request. However, on 24th March, 2000, the Arbitrator passed the impugned Award.

10. I.A. No. 12332/2008 has been filed by defendant under Section 48 of Act, 1996 challenging the impugned Award on various grounds. In essence, the challenge is that enforcement of the impugned Award would be contrary to public policy of India and the subject matter of the difference is not capable of settlement by arbitration under the law of India.

11. Mr. Sandeep Sethi, learned senior counsel for defendant states that the impugned Award is founded upon a License Agreement dated 20th May, 1994 which inter alia states as under:-

> *"18.5 Government Approvals. This Agreement is subject to requisite approval of the Government of India and/or Reserve bank of India, as the case may be."*

12. Mr. Sethi submits that the said provision makes the Agreement between the parties a contingent Agreement, the contingency being approval of the Government of India and/or the Reserve Bank of India. According to Mr. Sethi, the said approvals were never granted, even though the Award admits that the Government approval was mandatory. Mr. Sethi further submits that the contingency having not been satisfied, the Agreement was void and all rights and obligations founded on the said Agreement came to an end. In this connection, Mr. Sethi places reliance upon judgments of the Supreme Court in the cases of ***K.R.C.S. Balakrishna Chetty & Sons & Co. Vs. The State of Madras*** reported in ***AIR 1961 SC 1152***, ***M.V. Shankar Bhat & Anr. Vs. Claude Pinto Since (Deceased) by Lrs. & Ors.*** reported in ***(2003) 4 SCC 86*** and ***HPA International Vs. Bhagwandas Fateh Chand Daswani & Ors.*** reported in ***AIR 2004 SC 3858***.

13. Mr. Sethi further submits that the impugned Award acknowledges in para 14 that the plaintiff did not transfer technical know-how as regards the adhesive powder. However, despite the

aforesaid finding, Mr. Sethi states that the Award perversely directs payment of the entire consideration under the Agreement, i.e. US$ 175,000.00. This according to him, is clearly opposed to justice and morality.

14. Mr. Sethi also places reliance upon para 7.1.2 of the License Agreement, according to which, license fee was payable after two weeks from the date of commercial production. Since the Award in para 6 acknowledges that the defendant never started commercial production, Mr. Sethi submits that no cause of action arose to pay any license fee much less the awarded sum of US$ 175,000.00.

15. Mr. Sethi lastly submits that the interest rate of 8.5% and representation costs awarded by the Arbitrator is usurious and excessive.

16. On the other hand, Mr. Mayank Bughani, learned counsel for plaintiff submits that under the Agreement executed between the parties, it was the defendant's obligation to secure all necessary Government permits/licenses and registrations. He states that the Agreement between the parties is governed by the Austrian Law and the learned Arbitrator has reached a conclusion that the obligation under the Austrian Law has not been met by the defendant as it had itself asked the authorities to keep the foreign collaboration approval in abeyance.

17. Mr. Bughani further submits that in accordance with Clauses 7.1 and 7.1.1 of the Agreement, the consideration of US$ 175,000.00 was to be paid, "*in consideration for the transfer of technical know-how, information, assistance and grant of licence"* without any further differentiation of cleansing tablet or adhesive powder. According to him, technical know-how as defined in Clause 1.1 of the Agreement included but was not limited to transfer of technical know-how regarding manufacturing process.

18. Mr. Bughani also drew my attention to Clause 8.1 of the Agreement which clearly records that the defendant had prior to execution of the Agreement reviewed the background information including all the technical know-how in possession of the plaintiff concerning the product.

19. Mr. Bughani further submits that the issue whether the cause of action had arisen for recovery of license fee or not is beyond the scope of jurisdiction of this Court while considering the present proceedings filed under Sections 48 and 49 of Act, 1996. He submits that the defendant having failed to prove its case before the Arbitrator and subsequently having failed to seek relief under the remedy available to it under Section 595 of Code of Civil Procedure of Austrian Law cannot now be allowed to raise such grounds in the present application.

20. Mr. Bughani lastly submits that the rate of interest awarded by the Arbitrator is fair and reasonable especially keeping in view the fact that the defendant has not paid the outstanding amount under the Agreement for the past ten years and the plaintiff has spent huge amounts on litigation.

21. In my opinion, a Court can refuse enforcement of a foreign award only if the conditions precedent in Section 48 of Act, 1996 are satisfied. In ***Lesotho Highlands Development Authority Vs. Impregilo SpA and others*** reported in ***2005 UK HL 43***, it has been held that arbitrators do not exceed their powers simply by making a mistake. In ***Burchell Vs. Marsh*** reported in ***58 U.S. 344 (1855)***, the United States Supreme Court has held that if an award is within submissions and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

22. In the present instance, Clause 3.2 of the Agreement executed between the parties clearly records defendant's obligations as under:-

> *"3.2. Secure all necessary governmental permits, licenses and registrations required in connection with the*

manufacture and marketing of the Product in the Territory."

23. Consequently, under the Agreement, defendant undertook upon itself to secure all necessary Government permits as well as licenses and it cannot now take shelter of its own failure to secure such permission. Defendant's own letter dated 28th June, 1994 requesting Secretariat for Industrial Assistance (hereinafter referred to as "SIA") to keep its approval in abeyance, shows that defendant itself did not pursue the application. The relevant portion of the said letter reads as under:-

"……..We are in the process of analyzing the new developments with regards to composition of the products, suitability for the market in India. Hence, our request for approval of the Agreement with regards to transfer of technical know how, may kindly be kept in abeyance till such time as we revert back to you……"

24. In my opinion, a party itself in breach, cannot claim benefit of its own wrong. In none of the cases cited by Mr. Sethi, the party that took the defence of contingency of Agreement had committed any default/breach of the Agreement. Moreover, all the authorities cited by Mr. Sethi are with regard to the Specific Relief Act and are therefore, not apposite to the facts of the present case.

25. In the impugned Award, the Arbitrator after analysing the entire evidence on record has come to a finding of fact that defendant has breached its contractual obligation by failing to secure SIA approval

under the Agreement in accordance with Clauses 18.5 and 3.2. The relevant discussion in the impugned Award is reproduced hereinbelow:-

> *"3. On the basis of the evidence submitted, the Sole Arbitrator concludes that Brawn breached its contractual obligation to secure SIA approval of the License Agreement according to Article 18.5 and Article 3.2 of the License Agreement and failed to promote and increase the sale and use of the Products in India in violation of Article 3.1 of the License Agreement.*
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> *4. The Sole Arbitrator does not have to decide whether – according to Brawn's assertions, the letter of the Indian government dated September 1, 1998 (enclosure 1 to Respondent's letter dated September, 11, 1998) or according to Respondent's alleged notification letter dated August 27, 1994 (Annex A to Respondent's submission dated April 16, 1999), the receipt of which Claimant denies – SIA approval was never granted of – according to the testimony of Mr. Schmitt and Ms. Cong – no problems with the SIA ever occurred or were notified to Fittydent.*
>
> *5. On the basis of the evidence submitted, the Sole Arbitrator is convinced that in any case Brawn did not pursue the SIA application in good faith as required by Austrian law and, hence, that the approval can be deemed to have been granted.*
>
> *6. Regarding Respondent's initial application dated March 25, 1994 (Annex 2 to Respondent's submission dated April 6, 1998), Claimant has submitted a legal opinion according to which Brawn's plain paper application was incomplete (Claimant's Exhibit C35). Brawn's holding that the SIA approval was denied on the merits and that the requested information could be provided by applicants by other means than filling out the SIA form is not substantiated by Respondent. Weight regarding the incorrectness of Brawn's assertion is also given by the Sole Arbitrator to Brawn's failure to respond to Claimant's Request for Production of Documents dated February 9, 1999 concerning the SIA*

application and respective correspondence with the Indian authorities.

7. Regarding Brawn's alleged follow-up contacts with the SIA, Brawn's submissions likewise lack any sufficient specification. Under Austrian law, Brawn was bound to the obligation to secure governmental approval of the License Agreement until final rejection of the approval regardless of the duration of the proceedings. The Sole Arbitrator has no reason to conclude that such a final decision of the SIA on the merits with reference to the defectiveness of the know-how supplied by Fittydent or with reference to an invalid choice-of-law clause has been rendered by the SIA as alleged by Respondent.

8. According to the SIA form, as affirmed by the legal opinion submitted by Claimant (Claimant's Exhibit C36), only public interests but not defects of the know-how were considered relevant in SIA proceedings and an exception to the Indian choice-of –law requirement could have been obtained. The need for technology would have justified a departure from the standard conditions.

9. Further weight for the unfoundedness of Brawn's position is given by the Sole Arbitrator to the fact that Brawn also failed to respond to Claimant's second Request for Production of Documents dated April 23, 1999 concerning respective correspondence with the SIA. Brawn merely submitted a letter to the SIA dated August 17, 1998 (Annex B to Respondent's submission dated May 13, 1999) from which the Sole Arbitrator can only conclude that Brawn had either withdrawn its initial application for approval or its request to keep its application in abeyance, both of which would have violated the duty to pursue the application until final rejection in good faith.

10. In particular, Brawn's letter to the SIA dated June 28, 1994, in which Brawn requested the SIA to keep its request for approval of the License Agreement in abeyance (Annex A to Respondent's submission dated June 28, 1994), clearly contradicted Article 8.1 of the license Agreement according to which Brawn was to

carry the risk of the suitability of the Products for the Indian market rather than Fittydent.

26. In my opinion, the view of the arbitral Tribunal is a plausible view and in any event, the same cannot be interfered with in proceedings filed under Section 48 of the Act, 1996.

27. Though Mr. Sethi has tried to contend that the impugned Award was opposed to public policy, I am of the view the concept of public policy has to be narrowly construed, that is to say violative of fundamental policy of law of India. Neither the Court nor a party can import its own individual beliefs about the "justice of the case", and then to try and fit its predilections into the public-policy-ground. In my opinion, an expansive construction of the concept of public policy would vitiate the New York Convention's basic intent of removing obstacles to enforcement.

28. In fact, the Supreme Court of India in ***Renusagar Power Co. Ltd. Vs. General Electric Co.*** reported in ***AIR 1994 SC 860*** has observed as under:

"66. .....This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must

necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

(emphasis supplied)

29. The aforesaid principle of law has been followed in the following judgments:-

i) ***Smita Conductors Ltd. Vs. Euro Alloys Ltd.*** reported in ***(2001) 7 SCC 728;***

ii) ***Transocean Shipping Agency (P) Ltd. Vs. Black Sea Shipping & Ors.*** reported in ***(1998) 2 SCC 281;***

iii) ***Alcatel India Limited & Anr. Vs. Koshika Telecom Limited & Ors.*** reported in ***2004 (3) Arb. L.R. 107 (Delhi).***

30. In the present case the defence that technical know-how of adhesive powder was not transferred, has been considered by the learned Arbitrator. The relevant portion of the impugned Award reads as under:-

"14. As regards the adhesive powder, it is undisputed by the Parties that Fittydent has not transferred technical know-how specifically for the manufacturing of the adhesive powder following the conclusion of the License Agreement. By letter dated June 20, 1994 Fittydent informed Brawn that it could deliver the adhesive powder in bulk and that the filling and packing could be done in India so that the price would be competitive (Annex B to Respondent's submission dated April 6, 1998). This was affirmed in the Parties' meeting in New Delhi on May 16, 1995 by mutual agreement (Claimant's Exhibit C8).

15. Notwithstanding the above, the Sole Arbitrator rules that Respondent is obliged to pay to Claimant the lumpsum of US$175,000.00 in full.

16. The Sole Arbitrator expressly acknowledges that according to Article 1.2 of the License Agreement, the term "Products" means and includes the cleansing tablets and the adhesive powder.

17. The Sole Arbitrator further notes that, according to Article 7.1 of the License Agreement, the lumpsum was to be paid – without any further differentiation – for the technical know-how, information, assistance and grant of the license for both Products.

18. On the basis of the License Agreement entire framework and the parties' submissions, the Sole Arbitrator is, however, satisfied that the lumpsum of US$175,000.00 was to be paid regardless of whether a further transfer of know-how specifically for the manufacturing of the adhesive powder actually took place or should have taken place under the terms of the License Agreement.

19. According to Article 1.1of the License Agreement, the term "technical know-how" was broadly defined as including "the existing patented and unpatented technological knowledge and inventions, trade name, trade marks, trade secrets, formulae, manufacturing processes and methods for the manufacture of the products or use in production". Accordingly, by definition the know-how transfer for which the lumpsum was to be paid in consideration included but was not limited to the transfer of know-how regarding the manufacturing process.

20. According to Article 8.1 of the License Agreement which referred to the cleansing tablets and the adhesive powder, Respodnent "ha[d] thoroughly reviewed and analyzed the composition of the product and the suitability for the market. It ha[d] also reviewed the background information and virtually all of the technical know-how in the possession of the Licensor concerning the product" (emphasis supplied).

21. The Sole Arbitrator is satisfied that Fittydent had indeed developed valuable know-how regarding the adhesive powder justifying the compensation of development costs under the license Agreement. As Mr. Wiesbauer testified and Mr. Graner confirmed, Fittydent had developed a very special formula for the production of adhesive powder suitable for tropic climatic conditions which could be considered valuable know-how for the manufacturing of adhesive powder in countries like India justifying a demand for partial compensation of the development costs.

22. The Sole Arbitrator further belileves that, in accordance with both Mr. Hoeveler's and Mr. Schmitty's testimony, the lumpsum of US$175,000.00 covered the transfer of specific technical know-how for the production of the cleansing tablets but was not intended to cover technical know-how specifically relating to the production of adhesive powder. As affirmed by Mr. Graner, no particular technical know-how regarding the manufacturing of adhesive powder needed to be transferred. As power in general, the adhesive powder could be produced merely by mixing the ingredients. The lumpsum was to be paid for the transfer of the right in the formula of the adhesive powder as such.

23. If Respondent for whatever reason did not contemplate to manufacture the adhesive powder although it had agreed to pay US$175,000.00 for Fittydent's technical know-how and technical assistance for the manufacturing of both Products, from the Sole Arbitrator's point of view this cannot be to the disadvantage of Claimant. That the formula for the adhesive powder, contrary to Article 8.1 of the License Agreement, was not existent, was not proven by Respondent. If Fittydent was not prepared to fulfil its contractual obligations under the License Agreement as regards the adhesive powder, Brawn could have demanded a reduction of the unified lumpsum to be paid for the Fittydent package of Products governed by the License Agreement or could have made full payment of the lumpsum conditioned upon receipt of a workable

formula for the adhesive powder which is not purported or in any way proven by Brawn.

31. Upon a reading of the aforesaid portion of the Award, I cannot conclude that the impugned Award is contrary to justice and morality.

32. Moreover, it was not the defendant's case before the Arbitrator that it had ever claimed reduction of the total consideration payable under the Agreement on account of technical know-how relating to adhesive powder. In any event, for determination of such an issue, evidence should have been led by the defendant before the Arbitrator—which defendant failed to lead in the present case.

33. In any event, the same being a question of fact is beyond the scope of this Court while dealing with proceedings filed under Sections 48 and 49 of the Act, 1996.

34. As far as the plea that no cause of action arose to pay any licence fee is concerned, I am of the view that this ground is clearly outside the scope of limited grounds available to the defendant under Section 48 of the Act, 1996. Even otherwise, I find that the Arbitrator has reached a conclusion on facts that plaintiff had supplied the technical know-how and had granted the licence to the defendant. Consequently, the Award cannot be set aside on this ground also.

35. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 2% per annum simple interest. The Supreme Court in ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority and Ors.*** reported in ***(2005) 6 SCC 678; McDermott International Inc.***'s case (supra) and ***Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd.*** reported in ***(2006) 7 SCC 700*** has reduced the rate of interest. Consequently, keeping in view the aforesaid judgments and the rate of interest prevalent internationally at the relevant time, I reduce the rate of interest to 2% per annum simple interest for all the periods mentioned in the Award including upto the date of actual payment.

36. Accordingly, IA No. 12332/2008 filed by the defendant being devoid of merits, is dismissed and the petition stands disposed of but with no order as to costs. Impugned Award with the aforesaid modification in rate of interest is declared to be enforceable and executable as a decree of this Court. Defendant is directed to pay the entire awarded amount to the plaintiff within a period of twelve weeks from today, failing which plaintiff shall be at liberty to either file appropriate proceedings in accordance with law or seek revival of the present proceedings.

MANMOHAN,J.

MAY 11, 2010
rn/js