IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1608 OF 2014

Hersheys India Pvt. Ltd. ...Petitioner

Versus

Kanti Beverages Pvt. Ltd. ...Respondent

Mr. Sarosh Bharucha, *a/w Khushi Dhanesha, Laleh Pandole, i/b Vashi & Vashi for the Petitioner.*

Mr. Vishal Kanade, *for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.
DATE : OCTOBER 7, 2025

Oral Judgement:

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an arbitral award dated April 4, 2014 erroneously passed by the Learned Arbitral Tribunal upholding every contention of the Petitioner on merits but concluding that a direction to make payment of Rs.75 lakhs to the Respondent would be appropriate and just. This has led to the Petitioner seeking an intervention of this Court to excise the last portion of the impugned award directing such payment.

2. Petitioner, Hersheys India Pvt. Ltd. was earlier a division of Godrej Industries Limited ("***Hersheys***") and had engaged the Respondent, Kanti Beverages Pvt. Ltd. (earlier Tristar Beverages Pvt. Ltd., "***Kanti***") to undertake contract manufacturing and packaging of beverages marketed under the brand name, '*Jumpin....*'. The range of products covered for contract manufacture and packaging were set out in and were pursuant to the terms of the Agreement dated December 11, 2004 ("***Agreement***"). The tenure of the agreement was three years and it was meant to run its course between December 7, 2004 and December 6, 2007.

3. Kanti claimed to be a pioneer in the bottled beverage industry with credentials of having worked for other large beverage manufacturers and brands such as Parle, Coca Cola, Frooti etc. and contended that Kanti had pioneered the PET hot-filling technology, which has been stolen by Hersheys in the course of the relationship, and therefore sought compensation. Such an allegation was incidental to the main contention, namely, that the Agreement stood extended by conduct of the parties for another five years, all the way until December 31, 2011.

4. It is seen from the record that the parties had a lot of discussions about the consideration payable under the Agreement towards the end of the three-year term of the Agreement. The Agreement entails a “take or pay arrangement” whereby Hersheys was required to ensure an offtake of at least 12 lakh litres of beverages per year. The amount payable by Hersheys to Kanti was Rs. 3.75 per litre for the first 12 lakh litres, Rs. 3.5 per litre for the next 3 lakh litres and thereafter Rs. 3 per litre for anything in excess.

5. A plain reading of the contract would also show that the contract was terminable with three months' notice. Towards the end of 2005-06, Kanti is said to have suffered losses to the extent of Rs. 45 lakhs and sought a renegotiated price with effect from January 1, 2007. Hersheys helped Kanti with financing for certain capital expenditures and engaged with Kanti to enable coverage of some costs so that the manufacture during the term of the Agreement would continue without being disrupted on account of complete absence of profitability. The parties also negotiated the terms on which they could potentially continue the relationship but talks appear to have failed, with the negotiations that stretched between March 2007 and August 2007 finally being called off towards the end of 2007 with a reminder from

Hersheys that the contract would run its course and would not be extended.

6. The intimation that the contract would not be extended was assailed as an illegal termination of the already extended contract, the contention of Kanti being that the contract had been extended until December 31, 2011. On November 8, 2007 Hersheys firmly replied to Kanti saying that the rates quoted by Kanti were not competitive at all and therefore, the Agreement would not stand extended beyond the scheduled expiry on December 6, 2007.

Impugned Award:

7. The aforesaid summary places the issues that were presented to the arbitral tribunal in a nutshell. Suffice it to say, the Learned Arbitral Tribunal has analyzed the provisions of the Agreement and the evidence led by the witnesses for the respective parties, to return the following firm findings:-

A) There had been no extension of contract at all between the parties and the Agreement was indeed scheduled to expire on December 6, 2007;

B) There was a modification in the discharge of consideration from a per litre basis to a basis linked to cost in the last year of the contract but such a rearrangement did not constitute a consent for an extension of the contract on such modified terms;

C) The provision of financial assistance in the last year of the contract to enable Kanti to incur certain expenditure on capital assets was in the nature of a friendly loan and financial support, but would not further the cause of treating the contract as having been extended;

D) No assured return had been guaranteed and there were no hidden terms to be implied from the evidence available to the arbitrator to indicate that there was any assurance beyond the stated provisions of the contract;

E) The modification in the manner of discharge of price was not meant to be a permanent modification and in fact, there is no industry practice, custom, or evidence to indicate that the modified consideration was for an extended contract beyond the contracted tenure;

F) Hersheys has performed, even in the last year of the Agreement, the minimum take or pay commitment of acquiring 12 lakh litres of beverages. Therefore, not acquiring anything further would not constitute a violation of the contract. In any case, Kanti was unable to perform and run the factory profitably beyond August 2007. There was no termination of the contract on the part of Hersheys, warranting any intervention;

G) The closure of the factory was not attributable to Hersheys and no damage needs to be assessed in this regard. Certain disputes, settlements and payment of penalties with the Food and Drug Administration of the State of Andhra Pradesh also was not to the account of Hersheys and therefore, no case was made out for any financial compensation of Kanti by Hersheys;

H) The closure of Kanti's factory from August 2007 to March 2008, or for that matter, closure beyond that period all the way until March 2010 and the amounts claimed therefor, were without basis and the claim for damages was not at all made out; and

I) Finally, certain inventory-based claims and the claims about the stealth of technology or the fact that Kanti was a pioneer with access to unique technology which was stolen by Hersheys had no basis.

8. However, in the teeth of such strong and clear firm findings returned by a review of the material on record, the Learned Arbitral Tribunal was pleased to take a sudden turn in the concluding portion of the award. The Learned Arbitral Tribunal, appreciated the exchange of emails between the parties to return the aforesaid findings. It took a firm view that it was a one way pleading by Kanti, with Hersheys not replying to the emails with confirmation, to hold that no negotiated renewal of the Agreement was effected and that there was no termination of the Agreement. Inexplicably, despite the foregoing, in the concluding portion of the Impugned Award, the absence of replies to certain emails of Kanti have been held by the Learned Arbitral Tribunal to have kept Kanti in the hope of a renewal, for which Kanti needs to be compensated by a sum of Rs.75 lakhs for the "inconvenience" caused and for the implied suggestion of hope for renewal by way of silence to the emails. Towards this end, the non-honouring of the implied hope has been compensated for an ad hoc figure of Rs. 75 lakhs, and that too

without any discussion on how the compensation amount was arrived at.

Analysis and Findings:

9. I have heard Mr. Sarosh Bharucha, Learned Advocate for Hersheys and Mr. Vishal Kanade, Learned Advocate for Kanti. With their assistance and written notes filed by them, I have examined the material on record.

10. On the face of it, it is apparent that the Learned Arbitral Tribunal has returned unexceptionable, clear and firm findings on the merits of the matter to hold that there was no agreement whatsoever to renew the Agreement beyond December 6, 2007 and no case for compensation or damages had been made out. Having arrived at such a finding, it is inexplicable that the Learned Arbitral Tribunal would think it fit to pick a number of Rs.75 lakhs virtually out the hat, to award it to Kanti as compensation for harbouring hope from the alleged silence in reaction to Kanti's emails. If the Learned Arbitral Tribunal was of the view that one party communicating to the other would constitute a contract with the other party remaining silent, the Learned Arbitral Tribunal ought to have found that the contract indeed stood renewed as canvassed on behalf of Kanti. However, the Learned Arbitral Tribunal,

and in my opinion rightly, took the view upon an assessment of the evidence that there is no basis to claim that the Agreement stood extended or that there was any decision to agree *ad idem* on the terms of the extension as purported by Kanti.

11. Having firmly held so in this manner, it would naturally follow that no case for compensation or damages could be made out. This too is an explicit finding by the Learned Arbitral Tribunal because of which the tribunal chose not to analyse the amounts claimed by way of damages by referring to evidence relating to capital expenditure said to have been incurred by Kanti in the hope that the factory would be kept running with an extension of the Agreement. The fact is that the minimum offtake was completed before the factory stopped operations, and the cessation took place before the scheduled expiry of the Agreement. This is why the Impugned Award returns the firm and plausible findings summarised above.

12. Upon the examination of the material on record, it is apparent that the parties indeed engaged about a potential extension of the Agreement, and the parties indeed talked to each other about the financial difficulties being faced by Kanti. To avoid disruption of supply, it is apparent that Kanti was given financial assistance in the last year of the contract. However, if there had been no firm agreed consent to

extend the Agreement beyond December 6, 2007, it would naturally follow that there could have been no other compensation even contemplated or much less, inference of any implied commitment or implied hope.

13. Kanti has not contested any of the findings in the Impugned Award as implausible – it has filed no challenge. In these circumstances, I am afraid that the concluding portion of the Impugned Award flies in the teeth of all the analysis contained throughout the award. That apart, there is no quantification as to how the figure of Rs.75 lakhs had been arrived at. Not only does the principle of having to compensate conflict with the rest of the award, there is no evidence analysed or any material relied upon to demonstrate how the Learned Arbitral Tribunal arrived at the figure of Rs.75 lakhs as being payable to Kanti and that too on the premise of Hersheys not having “honoured" the “implied commitment” which arose because of hope harboured by Kanti of an extension of the Agreement.

14. This component of the award is entirely unacceptable and shocks the conscience of the Court as to how the Learned Arbitral Tribunal could make a complete about-turn away from all the emphatic and plausible findings tendered. In these circumstances, a case has been made out for intervention by this Court under Section 34 of the Act.

Section 34 (2)(b)(ii) provides for setting aside an arbitral award if it is in conflict with the most basic notions of morality of justice. Equally, it is now trite law that if any offending portion of an arbitral award is capable of excision to remove the vulnerability of the award, and such excision would not undermine and erode the remaining portions of the award, the Section 34 Court could do so.

15. To my mind, the component of the Impugned Award directing that an amount of Rs.75 lakhs be paid like a consolation prize or an *ex gratia* payment, flies in the teeth of the rest of the eminently plausible findings in the Impugned Award, which on their own do not lend themselves to interference. It is noteworthy that Kanti has not challenged the findings in the Impugned Award as being implausible on merits and has been satisfied to just see if the Impugned Award would be upheld.

16. The element of the Impugned Award directing payment of Rs. 75 lakhs like a consolation prize or an ex gratia payment, in the teeth of every single contention of Kanti being rejected, is incapable of being upheld. Without meaning to add more length to this judgement, it would be only apt to say that by now it is trite law that if any portion of an arbitral award deserves to be set aside, the Section 34 Court could do so if it is completely severable and its contents are not inseparably

intertwined to the other components of the arbitral award found to be valid and legal.

17. The law on partial setting aside of portions of an arbitral award is now emphatically declared by a five-judge Constitutional Bench of the Supreme Court in ***Gayatri Balasamy***[1] –Part II of the majority judgement (*Per. Sanjiv Khanna, CJI* – paragraphs 33 to 36) and in the concurring contents of the separate judgement (*Per. K.V. Vishwanathan J* – paragraphs 142 to 152).

18. I have examined the Impugned Award from this perspective and I note that nothing in the component of the Impugned Award rendering a summary and ex gratia grant of compensation for harbouring hope of an extension of the Agreement, which is being set aside in this judgement, is inextricably interwoven and interconnected with the rest of the Impugned Award. In fact, it is because it is out of sync with the rest of the Impugned Award, that excision of this offending portion is found a meritorious means of sustaining the arbitral award. Such partial setting aside will have no bearing or impact on the other portions of the Impugned Award.

[1] *Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited* – 2025 INSC 605

19. Applying the aforesaid principles, it is apparent that setting aside this perverse component of the Impugned Award would not alter or vary any of the substantial portions of the Impugned Award. It is, in fact, this last element of directing an ad-hoc payment of Rs. 75 lakhs, *de hors* any evidence that renders the Impugned Award vulnerable. Once this element of the Impugned Award is excised, there is nothing to interfere with in the Impugned Award, which is otherwise eminently capable of being upheld and has even been embraced by Kanti.

20. For the aforesaid reasons, with the modification of deleting the direction to pay Rs.75 lakhs to Kanti as "compensation" for having harboured hope for an implied commitment, the Impugned Award is not interfered with.

21. The Petition is ***finally disposed of*** in the aforesaid terms. Interim Applications, if any, shall also stand disposed of.

22. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]