

(2018) 05 RAJ CK 0217

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No.6353, 6352 of 2016, Civil Writ Petition No.659 of 2017

M/s. Rajasthan Medical Services Corporation @APPELLANT@Hash M/s. Shivek Labs Limited

Date of Decision : 10-05-2018

Acts Referred:

Arbitration and Conciliation Act, 1966 — Section 11, 11(6), 19(1), 19(3), 28(3), 28(1)(a), 31, 31(3), 34, 34(2)(ii), 34(2)(b), 34(2)(a)(v), 34(a)(iv), 37
Contract Act, 1872 — Section 73

Citation : (2018) 05 RAJ CK 0217

Hon'ble Judges : MOHAMMAD RAFIQ, J;ALOK SHARMA, J

Bench : Division Bench

Advocate : Rajendra Prasad, Alok Garg, M.M. Ranjan

Final Decision : Disposed Off

Judgement

Alok Sharma,J

Under challenge is the judgment dated 28-9-2016 passed by the Commercial Court (Additional District Judge No.1, Jaipur Metropolitan City, Jaipur)

dismissing by a common order two objections i.e. No.18/2016 and No.15/2016 filed by the appellant under Section 34 of the Arbitration and

Conciliation Act, 1996 (hereafter "the Act of 1996") against a common award dated 29-6-2015 pursuant to two independent references by the

High Court i.e. one in S.B. Arbitration Application No.71/2012 pertaining to disputes arising out of acceptance/ letter of notification of award

regarding NIT dated 2-6-2011 pertaining to the supply of drugs and medicines for the year 2011-12 and the other S.B. Arbitration Application

No.72/2012, to other disputes arising out of other letters of acceptance dated 1-5-2012 and 21-5-2012 pertaining to NIT dated 13-1-2012.

The facts of the case that the appellant floated a Notice Inviting Tender (NIT)

bearing No.F.01(01) RMSCL/ Procurement/ 2012/ 01 dated 13-1-2012 for the year 2012-13 for supply of drugs and medicines. The respondent company was found the most competitive bidder in respect of 11 drugs/ medicines and resultantly two letters of acceptance, i.e. one, No.1059 dated 1-5-2012 and the other No.1344 dated 21-5-2012 in regard thereto were issued. Under the contract so formed the respondent company was obliged, as prescribed in the underlying NIT, to furnish performance bank guarantees (PBG) at 5% contract value of the letters of acceptance. In respect of acceptance letter dated 1-5-2012 the respondent company furnished a PBG for Rs.38,57,600/-. But in respect of the acceptance letter dated 21-5-2012 it did not submit the requisite PBG for Rs.1,83,69,610/-.

In fact it refused to do vide letters dated 25-5-2012 and 7-7-2012 for reason which it perceived to be relevant i.e. certain amounts of money allegedly due to it by the appellant in respect of supply of drugs and medicines for the year 2011-12 under NIT No.F.1(4)/ RMSCL/ TENDER/ 2011/01 dated 2-6-2011 remaining unpaid.

The respondent company was in the circumstances considered by the appellant to be in breach of conditions of the NIT No. No.F.01(01) RMSCL/ Procurement/ 2012/ 01 for supplies of drugs and medicines in the the year 2012-13. Resultantly the contract under acceptance letters dated 1-5-2012 and 21-5-2012 for the supply of drugs and medicines was terminated. Consequences as set out in the conditions of the contract in issue, such as forfeiture of PBG of Rs.38,57,600/-, of earnest money of Rs.5 lacs, risk and purchase of the drugs not supplied with consequence of resultant liability on the respondent company and blacklisting.

Aside of the dispute as aforesaid relating to NIT No.F.01(01) RMSCL/ Procurement/ 2012/ 01 dated 2-6-2011 for the year 2012-13 and the following acceptance letters dated 1-5-2012 and 21-5-2012, in a previous contract between the appellant company and the respondent company also relating to supply of drugs and medicines but for the previous financial year 2011-12 (embedded in tender No.F.1(4)/ RMSCL/ Tender/ 2011/01 dated 2-6-2011 a dispute was festering on the one hand about moneys short paid and allegedly due to the respondent company for supplies made. On the other hand the appellant was claiming its entitlement for liquidated damages under conditions of supply of the drugs and medicines in issue for reason of supplies in

issue being delayed beyond the delivery schedule/sâ?"45 days from the date of the purchase order. The respondent company's case was that it had supplied drugs and medicines worth Rs.36,31,40,930/- (following the letter of acceptance/ notification of award dated 3-8-2011) under multiple purchase orders (PO)/ Notification of Award (NOA) but paid only Rs.28,39,36,570/- as a result of which an amount of Rs.7,92,14,360/- remained unpaid. This dispute came to a head with the termination of the respondent company's contract for supply of drugs and medicines for FY 2012-13 under the subsequent contract.

In the circumstances, the respondent company filed two separate applications under Section 11 of the Arbitration and Conciliation Act, 1996

(hereinafter â??Act of 1996â??). One, SB Arbitration Application No.71/2012 (in respect of tender No.F.1(4)/ RMSCL/TENDER/ 2011/01 dated 2-

6-2011Â for the supplies of drugs and medicines in the FY 2011-12) and the other, No.72/2012 (in respect of tender No. F.01 (01) RMSCL/

Procurement/ 2012/ 01 for similar supplies in the FY 2012-13). This court vide order dated 11-9-2013 referred the disputes in SB Arbitration

Application No.71/2012 to the Sole Arbitrator. So was referred to the Sole Arbitrator the dispute in SB Arbitration Application No.72/2012 also by

order dated 11-9-2013. The Sole Arbitrator in both separate references however was Mr. Y.R. Meena, Ex. Chief Justice Gujarat High Court.

Pursuant to the aforesaid two separate references, the respondent company filed two distinct and separate claim petitions. In the one relating to the

contract for FY 2012-13, claims were laid under three heads. The first related to release of the PBG for an amount of Rs.38,57,600/- along with

interest thereon at the rate of 24% per annum effective 20-9-2012 (date of forfeiture) till 14-12-2013 (filing of the claim) and future and pendent lite

interest @ 24% per annum payable till realization. The second related to impugning the risk and purchase resorted to by the appellant company qua

the drugs and medicines to be supplied by the respondent company under tender for the year 2012-13, in respect of which acceptance letters dated 1-

5-2012 and 21-5-2012 were issued. It was submitted that the risk and purchase clause could not have been invoked by the appellant for reason of the

alleged breach subsequent to the acceptance letter dated 21-5-2012 as non submission of performance bank guarantee for Rs.1,83,69,610/was due to

the reason of non release of the pending due amount aggregating to Rs.11 crores odd on account of principle toward unpaid price of goods supplied in

the FY 2011-12 and interest. It was further submitted that even otherwise the amounts demanded from the respondent company under the risk and

purchase were wholly excessive and arbitrary, inasmuch as the appellant did not purchase the drugs and medicines in issue from the open market at

the lowest price they were available at. Purchases were contrarily made at exorbitant prices from the Rajasthan Drugs and Pharmaceuticals Ltd.

(RDPL) and the demand of the appellant company for the difference was thus not sustainable. The third claim of the respondent company pertained

to the right to be refunded the security deposit of Rs.5 lakhs for the tender in response to the NIT for the year 2012-13 forfeited for failure to adhere

to the terms of acceptance letter dated 21-5-2012.

In defence to the claims, the appellant stated that the PBG of Rs.38,57,600/- was invoked as the precondition for commencement of the supplies of

drugs and medicines contracted for being supplied in AY 2012-13 were not satisfied inasmuch as the PBG of Rs.1,83,69,610/- pursuant to the letter of

acceptance dated 21-5-2012 mandated by the terms and conditions of the relevant NIT was not furnished and consequently the respondent company

committed a breach for reason of which contracted supplies were not made. Reference was made to bid condition clause 13.7 of the NIT dated 13-

12012 which stated that the contract for supply of drugs and medicines would stand terminated for breach and resultantly aside of risk and purchase to

the bidder's account, the defaulting bidder would be made liable to suffer forfeiture of security amount amongst other various multiple consequences.

It was submitted that reasons set out by the respondent company in not furnishing the requisite PBG of Rs.1,83,69,610/- prior to commencement of

supply of contracted drugs and medicines under the letters of acceptance dated 21-5-2012 were false, without substance, a mere pretence and a clear

after thought to escape the consequence of its breach. It was submitted that in fact vide letter dated 31-5-2012 the respondent company following its

bid and its acceptance after depositing PBG of Rs.38,57,600/- had undertaken to deposit the PBG of Rs.1,83,69,610/- following acceptance letter

dated 21-5-2012 within a period of four weeks. Such false assertion of the respondent company's reasons for not furnishing the PBG following

acceptance of its highest bid pursuant to NIT F.01(01)/RMSCL/ Procurement/ 2012/01 dated 13-1-2012 were of no avail.

With regard to claim No.2, the appellant submitted that the breach of the agreement to supply drugs and medicines by the respondent company

following the acceptance letters dated 1-5-2012 and 21-5-2012 relating to NIT dated 13-1-2012 was only attributable to the respondent itself. And

faced with its obstinate denial to furnish the PBG of Rs.1,83,69,610/- and resultant non execution of contract and commencement of supply of drugs of

medicines despite being the successful bidder, the state government's scheme of free drugs and medicines to the targeted needy population was in

danger of being disrupted at huge cost to public interest and loss of the government's goodwill. In the circumstances the appellant had no option except

to invoke condition 13.7 of the NIT and purchase the drugs and medicines in issue at the respondent company's risk and cost from RDPL (A

Government Owned Company) as per the appellant's operating policy to deal with situations such as the one it faced. It was submitted that the

respondent company was thus liable to pay the appellant the differential excessive price paid to RDPL for drugs/ medicines in issue. With regard to

claim No.3 it was submitted that the earnest money forfeiture was an inevitable consequence of the respondent company's breach and no case for

refund thereof was made out.

The appellant also filed its counter claim to the claim petition stating that having invoked the risk and purchase clause under the NIT dated 13-1-2012

for reason of the respondent company's breach. An additional amount of Rs.8,74,10,503/- was expended in the purchase of drugs and medicines

in issue which the respondent company was liable to reimburse. It was submitted that after adjusting for various amounts finally due to the respondent

company for supply of contracted drugs and medicines for FY 2011-12 under the earlier NIT dated 2-6-2011, an amount of Rs.Â Rs.6,20,69,043/was

a sum found recoverable from it. Interest for 13 months till the filing of the reply/ counter claim aggregating to Rs.1,13,63,365/- on the amount due

found as aforesaid (Rs.6,20,69,043/-) was also claimed. The appellant also claimed Rs.11,41,907/- as interest on delayed encashment of 6 Bank

Guarantees relating to breach of the terms and conditions of NIT dated 3-6-2011 accepted vide the appellant's letter dated 3-8-2011.

The respondent company also filed anotherâ?"a second claim petition before the arbitrator pursuant to the reference by the court in S.B. Arbitration

Application No.72/2012 also decided on 11-9-2013. This related to tender No.F.1(04) TMSCL/ Tender/ 2011/ 01 dated 2-6-2011 for supply of drugs

and medicines for the FY 2011-12 where also the respondentcompany being the lowest bidder was awarded a contract under the appellantâ??s

acceptance letter dated 3-8-2011. It was stated that thereupon the appellant placed thirteen notifications of award (NOA)/ purchase orders on the

respondent company on different dates for supply of various contracted drugs and medicines. The contracted drugs and medicines were to be

supplied. In value thus aggregating to Rs.36,31,40,930/- were made albeit with some delays over the notified delivery schedules. The respondent-

companyâ??s claim before the Arbitrator was that all due payment for supplies made were not released as per Clause-17 of the relevant tender

condition, and an amount of Rs.7,92,14,360/- remained due which was recoverable with 24% p.a. interest from the date due till the date of payment.

The second claim of the respondent-company in respect of the contract under NIT dated 2-6-2011 was that albeit the tender indeed provided for

liquidated damages on account of delays over the scheduled period for supply of contracted drugs and medicines, yet for supplies only with marginal

delay, liquidated damages of Rs.1,30,18,177/- were unjustifiably levied. It was submitted that in fact some delays in supplies against various purchase

orders were also occasioned by the failure of the appellant to release timely payment as per clause 17 of the NIT leading to working capital problems

for the respondent company. It was further submitted that even otherwise in view of the huge quantity of supplies required to be made, much in

excess of the contracted supplies, liquidated damages for short delays were not leviable and should not have been levied.

For its third claim in respect of disputes arising out of contract following NIT dated 2-6-2011 the respondent company submitted that subsequent to

supplies of drugs and medicines pursuant to various NOAs/ purchase orders placed with reference to NIT dated 2-6-2011, vide letter dated 12-3-2012

the appellant was required to release the bank guarantees furnished as performance security but it failed to do so. Instead the said bank guarantees

were illegally invoked vide letter dated 6-9-2012 to the Punjab National Bank wrongly alleging default and breach of terms of the contract on its part.

The said amount were thus liable to be refunded with interest. The respondent company's fourth claim before the Arbitrator was for releasing the

amount of Rs.5 lacsâ?"earnest money forfeited under letter dated 20-9-2012. Interest @ 24% from 5-8-2011 till 14-12-2013 (Rs.2,83,397/-) with future

and pendente lite interest also @ 24% was also claimed thereon. It was further submitted that the appellant's order dated 20-9-2012 blacklisting the

respondent company for alleged breach of contract resulting from NIT dated 13-1-2012 being accepted was challenged in SBCWP No.17893/2012.

Vide order dated 5-3-2014 the order of blacklisting was set aside. On the aforesaid claims, the respondent company prayed that the claims as made be allowed.

In reply to these claims relating to NIT dated 2-6-2011 the appellant submitted that payments for drugs and medicines supplied under various NOAs/

purchase orders following acceptance of the respondent company's bid under NIT dated 26-2011 were timely made as per the terms of the contract,

i.e. subsequent to receipt of goods as per the NOAs/ POs, accompanied by requisite positive lab test reports from empanelled labs as provided for in the

condition of the supply. It was stated that of the aggregate supply of drugs and medicines to an extent of Rs.35,51,76,326/- payment of

Rs.33,05,87,269/was made and/ or adjusted only Rs.1,57,98,127/- remained due to the respondent company for supplies under NIT dated 2-6-2011.,

which amount however was also not liable to be paid but appropriated towards dues recoverable from the respondent company on account of the risk

and purchase clause having been invoked for breach of another contract by the respondent company. It was submitted that a sum of Rs.8,74,10,503/-

was recoverable from the respondent company on account of differential costs arising from the risk and purchase clause in NIT dated 13-1-2012 as

the respondent company had failed to furnish the requisite performance bank guarantee following letter of acceptance dated 21-5-2012 pursuant to the

respondent company's bid. And after appropriating amounts thus due nothing was payable to the respondent company for supplies of drugs and

medicines under NIT dated 2-6-2011 and letter of acceptance dated 3-8-2011. Contrarily amounts were due and recoverable from the respondent

company.

The appellant further submitted that the order of blacklisting of the respondent

company passed on 20-9-2012 was consequent to the terms of tender dated 13-1-2012, as the respondent company failed to furnish the requisite PBG following the letter of acceptance dated 21-5-2012. The resultant breach in the supply of contracted drugs and medicines being to the respondent company's account, aside of the risk and purchase clause being invoked the respondent company was also blacklisted. And albeit the High court in SBCWP No.17893/2012 vide order dated 5-3-2014 had set aside the order dated 20-9-2012 blacklisting the respondent company, the appellant was left free to take permissible action including blacklisting afresh for breach of contract but in compliance with the principles of natural justice.

Counter claims were also set up against the respondent company though they were a duplication of counter claims in the arbitration proceedings

following reference No.2/2013 under SB Arbitration Application No.71/2012 (relating to NIT dated 2-6-2011).

The sole arbitrator albeit common was thus seized of two separate claim petitions under independent references (71/2012 and 72/2012) made by this

court vide order dated 11-9-2013 (i.e. claims 1/2013 and 2/2013). Separate replies and counter claims thereto were filed. Issues though at times

intermingled were separately framed in the two proceedings before the Arbitrator as under:-

3. In Arbitration claim petition No. 2 of 2013 (Tender No. 1), following issues were framed:-

(1) Whether, the claimant is entitled to receive a Principal amount of Rs.7,92,14,360/- towards supplies of medicines made to and received by the respondent?

(2) Whether, the respondent's invoking the claimant's bank guarantees for Rs.76,12,721/- submitted for Tender No. 1 towards claimant's

performance security deposit, on mere averments of default, when the claimant has already performed the contract, was legal?

(3) Whether, the respondents could have adjusted the amount of the performance security deposit of Rs.1,83,69,610/- for the tender No. 2 from the

outstanding dues of the claimant in the tender No. 1?

(4) Whether, the respondent was obliged to make timely payment in accordance with Schedule of payment in agreement?

(4)-(5) whether, the respondent could have levied penalty/ liquidated damages

of Rs 1,83,08,039/- on the claimant despite non payment wards supplied goods and delayed partial payments the claimant? Non-claimant.

(6) whether, the respondents were justified in obtaining supplies of medicines in tender No. 2 of amount Rs. 8,74,10,503/- from RDPL/ KAPL at much

higher prices for Tender No. 2 without comparing prices and quotations from the person quoted the lowest prices and without calling a fresh tender.Â

And whether the respondents could have deducted the said amount from the outstanding dues claimant in tender No.1?

(7) whether, the respondent is entitled to withhold the claimant's earnest money deposit of Rs.5,00,000/- of tender No. 1 especially under the

circumstances that the claimant had furnished performance security deposit and fulfilled supplies?

(8) whether, the claimant company entitled damages recoverable the respondent to the tune of Rs.50 crores, which the claimant suffered due to its

blacklisting by the respondents corporation as a result of which the claimant company could not participate and execute government tender from 20-9-

2012 till 05th March, 2014 (approximately for one and half year)?

(9) Whether, the claimant is entitled to receive interest at the rate of 24% on the outstanding principal amount of Rs.7,92,14,360/- and on claimant's

earnest money deposit of Rs.5,00,000/- from the date it became due till recovery?

In claim petition No. 1/2013 (Tender No. 2) the following issues were framed:-

(1) Whether, the respondent is liable to release illegally forfeited bank guarantee of sum of Rs. 38,57,600/- to the claimant?

(2) Whether, the respondents were justified in obtaining supplies of medicines in Tender No. 2 of amount of Rs.8,74,10,503/- from other suppliers at

much higher price for tender No. 2 without comparing prices and quotations from lowest placed bidders and without calling a fresh tender. And

whether the respondents could have deducted the said amount from the outstanding dues of claimant in tender No. 1?

(3) Whether, the respondent is entitled to withhold the claimant's earnest money deposit of Rs.5,00,000/- under tender No. 2?

(4) Whether, the claimant company is entitled to damages recoverable from the respondent to the tune of Rs.50 Crores which the claimant suffered

due to its blacklisting by the respondents corporation as a result of which the

claimant company could not participate and execute the government tenders from 20-9-2012 till 5th March, 2014?

(5) whether, due to non-release of payments towards supplies under tender No.1 by the respondent the claimant could not fulfill supplies under tender

No. 2 and blacklisted as such suffered losses to the tune of Rs. 55 crores (20 Crore damages; 10 crore business loss. 25 crores reputation loss?

(6) Whether, the claimant is entitled to receive 24% on the legally forfeited bank guarantee for a sum of Rs.38,57,600/from the date of forfeiture that is

20-9-2012 till recovery?

(7) Whether, the respondent could have adjusted the amount of performance security deposit of Rs.1,83,69,610/for tender No. 2 from the outstanding

dues of the claimant in the tender No. 1.

(8) Whether, RMSCL having right to recover difference amount of Rs.6,20,69,043/- (after deduction of balance payment payable to claimant and

security deposit pertaining to year, 2011-12) from claimant, which spent by RMSCL for undertaking risk purchase?

(9) whether, RMSCL is entitled to recover the interest from claimant on amount which remains unpaid by claimant to the respondent, as the RMSCL

had invoked the clause of purchase on risk and cost, the total amount recoverable from supplier against risk and cost has been calculated at

Rs.8,74,10,503/-?

(10) whether. performance of contract having no relation with payment in another contract?

(11) whether, RMSCL having right to recover LD, penalty etc according to tender conditions as provided in contract Act, 1872 and Section 28,

Arbitration And Conciliation?

A common award however in respect of the two references, then came to be passed on 29-6-2015. Two separate sets of objections each thereto

under Section 34 of the Act of 1996 were filed by the appellant as also by the respondent company. (In total four objections). All the four objections

were jointly dismissed without being disaggregated, by the Commercial Court on 28-9-2016.

These two appeals under Section 37 of the Act of 1996 have thus been filed by the appellant? the objector before the District Judge, and the non

claimant before the Arbitrator.

SUBMISSIONS:

Mr. Rajendra Prasad, AAG appearing with Mr. Alok Garg on behalf of the appellant submitted that the award dated 29-6-2015 is on the face of it

liable to be quashed and set aside as it is joint/ common in respect of two separate and independent arbitration proceedings on two separate claim

petitions under two separate and independent references made by this court in SB Arbitration Applications No.71/2012 and 72/2012 vide separate

orders albeit both dated 11-9-2013. Mr. Rajendra Prasad submitted that the two NITs, one dated 2-6-2011 and the other 13-1-2012 in respect of

which separate references were made were wholly distinct and unrelated to each other, even though they both pertained to supply of drugs and

medicines. Separate claims, replies and counter claims were filed with regard thereto. It was submitted that the respondent company itself in its

rejoinder to reply to the counter claims of the appellant admitted that the two tenders for supply of drugs and medicines were independent and

unrelated to each other. Yet the Arbitrator acted contrary to the agreed procedure for the two arbitration proceedings in passing a joint/ common

award. It was submitted that issues in two references/ claims were to be determined on the basis of their respective pleadings and evidences. Such

evidences could not be intermingled as they were by the arbitrator in passing the award dated 29-6-2015. It was submitted that the trial court despite

objections on this count under Section 34 of the Act of 1996 erred in upholding the impugned award cursorily, without giving out any legally justifiable

reason for its conclusion.

Mr. Rajendra Prasad further submitted that the impugned award dated 29-6-2015 aside of being vitiated for illegality of procedure as the parties had

not agreed to the passing of a common award in two separate arbitration references/ proceedings, it is also liable to be set aside as being contrary to

Section 34(2)(b) of the Act of 1996 being in conflict with the public policy of India on multiple counts. Not the least for being vitiated by absence of a

judicial approach but also having been passed de hors any concern for the terms of the underlying contract but also substantive law of India including

the Act of 1996 itself which mandates passing of a reasoned award. Mr. Rajendra Prasad submitted that the Arbitrator framed and decided issues for

the purported losses and damages suffered by the respondent albeit they were not a matter of any claim before him in the claim petition. Nor any evidence of breach of contract by appellant or loss suffered laid before him. The award dated 29-6-2015 is also bereft of any consideration of the relevant terms and conditions of the tender/ agreements which were relevant to the adjudication of claims. Nor was the defence of the appellant considered. The award was thus in the cross hair of Section 28(3) of the Act of 1996. Attention of the court was drawn to clause 17(8) of the NIT dated 2-6-2011 read with clause 13.4 and clause 13.7 thereof, where delivery of the drugs and medicines was to be made within 45 days from the date of the purchase order. And subsequent to the period of 45 days, liquidated damages were liable to be levied as per percentage of POs and period of delay set subject to the maximum limit of 10% of the value of the purchase order. Mr. Rajendra Prasad submitted that yet, despite noting and admitting the delay in the scheduled delivery in the course of various supplies, the Arbitrator has yet peremptorily held levy of liquidated damages as unsustainable. Evidence of delay in supply of drugs and medicines over the scheduled delivery period was overlooked even though not denied by the respondent company.

Similarly clause 13.6 of the NIT dated 13-1-2012 provided that in the event the successful bidder failed to make the contracted supply within the stipulated time, the ordering authority would inter alia be at liberty to cancel/ terminate the contract and resort to purchase of drugs and medicines in respect of which default was occasioned at the risk and cost of the defaulter. And such purchase could be made from any other open market source or from any other tenderor, who might have quoted a higher rate. And the differential amount expended in such purchase was recoverable in full from the defaulting successful bidder. Clause 13.7 of the tender provided that the order placed on the successful bidder would stand cancelled after expiry of the delivery period and forfeiture of security deposit would follow aside of other consequences such as blacklisting, and disqualification from participating in future tenders with the Tender Inviting Authority/ Ordering Authority. Referring to clause 19.9 of the tender, Mr. Rajendra Prasad submitted that it provided that any expenditure incurred by the department for purchase of drugs and medicines in excess of the price payable under

the contract was recoverable from the security deposit or any other money due to the supplier on any count including due under another contract. Mr.

Rajendra Prasad submitted that aforesaid conditions of the NIT and after the acceptance of the bid of the respondent company constituting an

agreement between the appellant and the respondent company were casually overlooked by the Arbitrator in passing the impugned award dated 29-6-

2015. That was contrary to the mandate of Section 28(1)(a) as also 28(3) of the Act of 1996 and entails a ground under Section 31(3) of the Act of

1996 for setting aside the award.

Mr. Rajendra Prasad submitted that payments by the department pursuant to supply of drugs under tender No.1 (NIT dated 2-6-2011) were made

subject to receipt of invoices alongwith analytical report within a period of thirty days following when due as provided under the conditions of the

supply. However in situations where the respondent company failed to supply the drugs and medicines with reference to a particular purchase order

or invoices were without the required analytical report from approved laboratories, payments were not made till full compliances necessary therefor

were made. It was submitted that in fact at no point of time during currency of the supply of drugs and medicines under the agreement following NIT

dated 2-6-2011 any objection was raised by the respondent company with regard to alleged late payments. It was submitted that the Arbitrator

however on a simplistic arithmetic calculations based on value of goods supplied and the payment made without reckoning for adjustments founded in

the contract between the parties on account of liquidated damages and other dues for whatever reasons including dues relating to other contract

(clause 13.6), directed payment of Rs.7,92,14,360/- to the respondent company. In so doing the Arbitrator did not reckon for the liquidated damages to

an extent of Rs.1,30,18,177/- for delayed supplies under NIT dated 2-6-2011, which were leviable in terms of clause 17.8 thereof. The impugned

award thus is contrary to specific terms and condition of the agreement between the claimant and the department, in contravention of Section 28(3) of

the Act of 1996 and therefore liable to be set aside.

Mr. Rajendra Prasad further submitted that the bank guarantees aggregating to Rs.76,12,721/- against various NOAs/ POs were encashed as the said

amount was recoverable from the respondent company by the appellant in terms

of clause 19(9)(a) of the condition of the tender which provided that damages suffered by the order placing authority (appellant) for reason of breach of the contract by the supplier (respondent company) could be recovered from the security deposit or any other money due to it. It was submitted that the Arbitrator in directing refund of the amount of bank guarantee encashed failed to take into consideration the said clause of the tender (condition of the contract) and the award dated 29-6-2015 is thus contrary to the terms of the agreement on this count, and is liable to be set aside. Mr. Rajendra Prasad submitted that all due amounts to the respondent company as remained after contractually permissible adjustment for supplies made was similarly adjusted under clause 19(9)(a) of the NIT dated 13-12-2012.

Mr. Rajendra Prasad submitted that finding of the Arbitrator on issue No.2 "in claim petition No.2/2013, as to whether the claimant was entitled to

refund of amounts under bank guarantees aggregating to Rs.76,12,721/- which were encashed is also contrary to Arbitrator's own finding that

there was delay in supply of drugs and medicines with reference to delivery schedules. He reiterated that clause 17(8) of the tender provided for levy

of liquidated damages. He submitted that the Arbitrator in holding that there was no justification to encash the BGs for Rs.76,12,721/- has

overlooked the terms and conditions of the NIT dated 2-6-2011 rendering his award on this count, as also elsewhere, incompatible with the conditions

of supplies of the drugs and medicines and again in the cross hair of Section 28(3) of the Act of 1996. Mr. Rajendra Prasad emphatically submitted

that the entire award is non speaking and perfunctory in contravention of Section 31(3) of the Act of 1996. By way of stark illustration he pointed out

that the finding of the Arbitrator on issue No.4 which was under:-

"Issue No.4, whether the respondent was obliged to make timely payments in accordance with the schedule of payments in agreement?"

To this the Arbitrator's award was that "the answer is obvious that when there is an agreement to supply the medicines against purchase order,

payment is delayed and not paid in full, the respondent is also at fault in delay for supply of drugs".

Mr. Rajendra Prasad submitted neither was there any evidence as to the appellant's delay in making due payment, nor any finding as to delay with

reference to the period and yet the award on issue No.4 was cryptically passed, premised on the appellant's alleged delay in making the due payment

in the course of supplies by the respondent company.

Mr. Rajendra Prasad further submitted that the Arbitrator's finding on issue No.5 is also wholly unsustainable, inasmuch as while issue No.5

framed was whether the respondent could have levied penalty/ liquidated damages of Rs.1,30,18,177/- on the claimant despite non payment

towards supplied goods and delayed partial payments to the claimant, he concluded as under:-

As I have already stated above, that one who wants justice should come with clean hands. There is no dispute on the facts that the payments are

not paid as per scheduled and not only that the payments are not made in full even on the completion of contract and supplied of all medicines the

payment of Rs.7,92,14,360/- was outstanding towards the respondent RMSCL. In the interest of justice when payment was not made timely nor

payment was made in full from where the supplier claimant can supply the medicines.

Mr. Rajendra Prasad submitted that again the finding of delayed payment of supply of medicines, recorded in the Arbitrator's conclusion on issue

No.5, are knee jerk without any evidence and shockingly perverse in a manner mocking the statutory law. The Arbitrator also failed to apply his mind

to the defence of the appellant that in fact the falsity of the defence of the respondent company stood proved from its own act of non furnishing of

PBGs of Rs.38,57,600/- against the letter of acceptance dated 1-5-2012 and its own letter dated 31-5-2012 when while depositing a PBG of

Rs.38,57,600/- it undertook to later deposit PBG of Rs.1,83,69,610/-.

Mr. Rajendra Prasad submitted that the award dated 29-6-2015 is vitiated by the arbitrator's gross non application of mind, and his ipse dixit which flies

in the face of the necessity of judicial approach in passing the award. The evident flaw renders the award in conflict with public policy and makes

liable to be set aside. The District Judge failed to appreciate this aspect of the matter agitated in objections under Section 34 of the Act of 1996 before

him. Mr. Rajendra Prasad prayed that hence this appeal be allowed, the impugned award in issue, as also the order dated 28-9-2016 passed by the

Commercial Court refusing to interfere therewith under Section 34 of the Act of

1996 be quashed and set aside.

Mr. M.M.Ranjan appearing with Mr.Daulat Sharma on behalf of the respondent company submitted that neither Section 34 nor 37 of the Act of 1996

empower the court to address the findings of the Arbitrator either on fact and/ or law as in an appeal. Re-appreciation and reweighing the evidences is

impermissible in such proceedings. The award is appropriate in the over all facts of the case and justice has been rendered. No ground within the

scope of Section 34 of the Act of 1996 are made out. Mr. M.M. Ranjan then submitted that albeit the award dated 29-6-2015 is joint/ common to

claims/ counter claims under two separate references, it deals separately with the two. It was only for convenience of adjudication. No prejudice from

such an award has been caused to the appellants. In the alternative, Mr. M.M. Ranjan submitted that the award dated 29-6-2015 be upheld at least

qua any of the two claim petitions. Mr. M.M. Ranjan further submitted that objections with regard to the award dated 29-6-2015 being vitiated for

reason of no evidence having been produced before the

Arbitrator is wholly unsustainable in view of the fact that as per proceedings before the Arbitrator, on 9-8-2014, both the parties had agreed not to

produce any evidence oral or documentary. The claims/ counter claims were to be decided on the documents on record. It was submitted that there is

no force in the objection of the appellant that compensation of Rs.2 crores was wrongly awarded for blacklisting without any supporting evidence of

damages. Mr. M.M. Ranjan submitted that the claim for compensation was raised by the respondent company in reply to the counter claim by the

appellant in claim No.2/2013. And in awarding compensation of Rs. 2 crores the Arbitrator was not bound by the law of evidence as provided for in

Section 19(1) of the Act of 1996, but only required to act in the interest of justice, as he has done.

Mr.M.M. Ranjan submitted that hence no interference is called for either with the impugned judgment of the Commercial court dated 28-9-2016

dismissing the objections to the award or with the award dated 29-6-2015 itself.

Heard counsel for the parties and perused the impugned award dated 29-6-2015.

Admittedly two separate references were made under SB Arbitration Applications No.71/2012 and 72/2012 in regard two separate and independent

contracts following NIT dated 36-2011 and NIT dated 13-1-2012. Two separate

claim petitions being No.1/2013 and 2/2013 were then filed by the respondent company, before the Sole Arbitrator. Separate replies thereto and counter claims were filed by the appellant. The record of proceedings before the Arbitrator evidences that the two claim petitions were first dealt with separately and proceedings in regard thereto separately drawn from time to time. Issues also were separately struck in each on the claim petitions/ replies thereto and the counter claim. The arbitration proceedings do not reflect any order of consolidation of the two proceedings, if at all any such order could at all be passed by the Arbitrator. In fact the Arbitrator has no power to consolidate two references independently made to him. It is trite that an Arbitrator is a private adjudicator of the disputes in a contract between the parties as distinct from a court which exercises the sovereign power to adjudicate disputes. An Arbitrator's authority derives ONLY from the arbitration clause in the relevant contract under which he is appointed, no matter he is so appointed by the Nominee of the Chief Justice under Section 11(6) of the Act of 1996. Disputes qua a contract have to be decided by the Arbitrator so appointed with reference only to the specific terms and conditions of a contract and substantive law applicable to the dispute in issue. No factor extraneous to the underlying contract, except the relevant substantive law can be taken into consideration by the Arbitrator. Section 28(1)(a) and 28(3) of the Act of 1996 so provide. Within that broad scope of Section 28(1)(a) and 28(3) of the Act of 1996, an award has to be passed purely on pleadings before an Arbitrator, on issues framed thereon and evidences and material laid before him in a given case. An Arbitrator has no inherent power which he can seek to invoke for the purported convenience either for himself or for disposal of two separate claims arising from the separate references to him. To so do, as has been done in the instant case, is contrary to Section 34(a)(iv) of the Act of 1996 which states that an arbitral award may be set aside in the event the arbitral procedure was not in accordance with the agreement of the parties. Nothing has been brought to the notice of this court nor was it before the District Court to show that the parties to the arbitration agreement had agreed that disputes between them arising from two different contracts could be decided by a common arbitration on which could be passed a joint award. Contrarily it is on record that separate claim petitions had been filed on

the two separate references sought by the respondent company and they were so contested. The arbitrator drew separate proceedings thereon. Thus even the circumstances and conduct of the appellant and the respondent company militate against an agreement by implication between appellant and the respondent company for making a joint/ common award in respect of two separate claim petition/s filed on two distinct references to the Arbitrator.

AsideÂ of impermissibility in law and contract between the parties at hand of an arbitrator consolidating two separate claim petitions before him in respect of independent contracts, it is not difficult to visualize that intermingling of two claims/ defence thereto and different issues struck thereon and respective evidences can only lead a very confusing incomprehensible and hence unsustainable award. And even though the objection with regard to the illegality of procedure adopted by the Arbitrator and resultant consequence of the award liable to be set aside was taken before the District Court in the objection to the award dated 29-6-2015 filed under Section 34(2)(a)(v) of the Act of 1996, it has been cursorily rejected by the court. It is indeed true that Section 19(3) of the Act of 1996 states that failing an agreement between the parties to agree on the procedure to be followed by the Arbitral Tribunal, it may conduct proceedings in the manner as deemed appropriate. But even that power cannot be construed as the power to pass a joint/ common award by the arbitrator in respect of two separate claim petitions on two separate references themselves arising out of two different/ separate contracts. This even if parties to the two contracts be identical.

In the case of IGH Ariff v. Bengal Silk Mills Ltd. [AIR (36) 1949 Calcutta 350] it was held that where there were separate suits, separate arbitration agreements and separate orders of reference by Court, it was illegal for the umpire to make one single consolidated award. An award so passed was liable to be quashed and set aside on objections thereto being filed. No doubt the aforesaid case related to the Arbitration Act, 1940, yet the principle enunciated attracts to arbitration under the Act of 1996. More so as setting aside of such award for procedural illegality is provided for under Section 34(2)(a)(v) of the Act of 1996. Further in any event in respect of the Act of 1996 itself, in the case of Duro Felguera SA Vs. Gangavaram Port Limited [(2017)9 SCC 729] the Apex Court held that when there were six

arbitration agreements and each agreement contained a provision for arbitration, even while the arbitrator could be same to adjudicate the disputes arising in each of the six agreements, there had to be six tribunals—one/ each pertaining to each agreement. The passing of a common/ joint award in separate references for adjudication of disputes arising in each of them was thus clearly negated.

In this view of the matter we are of the considered view that joint/ common award dated 29-6-2015 in respect of two different claim petitions on

separate references pertaining to two independent contracts entails the award dated 29-6-2015 being liable to be quashed and set aside.

Before addressing the sustainability of the award dated 29-6-2015 on merits, it would be appropriate to reproduce the relevant conditions of the two

contracts. They are as under:-

Tender-1, NIT dated 2-6-2011

13.5. If supplies are not fully completed in 45 days from the date of the Purchase Order, the provisions of liquidated damages of Tender conditions will

come into force. The supplier shall suffer forfeiture of the Security Deposit too. The Supplier should supply the drugs at the Warehouse specified in

the Purchase Order and if the drugs supplied at a designated places other than those specified in the Purchase Order, transports charges will be

recovered from the supplier.

13.7 If the tenderer fails to execute the supply within the stipulated time, the ordering authority is at liberty to make alternative purchase of the items

of drugs and medicines for which the Purchase Orders have been placed from any other sources or in the open market or from any other tenderer

who might have quoted higher rates at the risk and the cost of the supplier and in such cases the Ordering Authority / Tender inviting authority has

every right to recover the cost and impose penalty as mentioned in Clause 19, apart from terminating the contract for the default.

13.8 The order stands cancelled after the expiration of delivery period, and if the extension is not granted with or without liquidated damages. Apart

from risk / alternate purchase action, the tenderer shall also suffer forfeiture of the Security Deposit and shall invite other penal action like blacklisting

/ disqualification from participating in present and future tenders of Tender Inviting Authority / ordering authority.

17.8 (i) If the supplier requires an extension of time for completion of contractual supply, on account of occurrence of any hindrance he shall apply in

writing for extension on occurrence of hindrance but not after the stipulated date of completion of supply.

(ii) The purchase officer may extend the delivery period with or without liquidated damages in case they are satisfied that the delay in the supply of goods is on account of hindrances. Reasons shall be recorded.

(iii) Extension in delivery period-Â In case of extension in the delivery period with liquidated damages the recovery shall be made on the basis of

following percentage of value of stores which the tenderer has failed to supply:-

(a) Delay upto one forth period of the prescribed delivery period; 2.5%

(b) Delay exceeding one fourth but not exceeding half of the prescribed delivery period; 5%

(c) Delay exceeding half but not exceeding three fourth of the prescribed delivery period; 7.5%

(d) Delay exceeding three fourth of the prescribed delivery period; 10%

Note: Fraction of a day in reckoning period of delay in supplies shall be eliminated if it is less than half a day. The maximum amount of liquidated damages shall be 10%

19.9 (a) In the event of making ALTERNATIVE PURCHASE, as specified in Clause 13.6, Clause 15.9 and in Clause 16.3 the supplier will be

imposed penalty apart from forfeiture of Security Deposit. The excess expenditure over and above contracted process incurred by the ordering

authority in making such purchases from any other sources or from the open market or from any other tenderer who has quoted higher rates and other

losses sustained in the process, shall be recovered from the Security Deposit or from any other money due and become due to the supplier and in the

event of such amount being insufficient, the balance will be recovered personally from the supplier.

Tender II- NIT dated 13-1-2012

13.1 Purchase orders alongwith the delivery destinations will be placed on the successful tenderer at the discretion of the Ordering Authority. Drugs

and Medicines will be supplied at 33 Districts Head Quarters of Rajasthan (CM&HO & Medical Colleges Store).

13.7 If the tenderer fails to execute the supply within the stipulated time, the ordering authority is at liberty to make alternative purchase of the items

of drugs and medicines for which the Purchase Orders have been placed from any other sources or in the open market or from any other tenderer

who might have quoted higher rates at the risk and the cost of the supplier and in such cases the Ordering authority / Tender inviting authority has

every right to recover the cost and impose penalty as mentioned in clause 19, apart from terminating the contract for the default.

13.6 If the supplier fails to execute at least 50% of the quantity mentioned in single purchase order and such part supply continues for three

consecutive purchase orders, then the supplier will be ineligible to participate in any of the tenders for particular items of drugs / medicines for a period

of one year immediately succeeding year in which supplier has been placed Purchase Order.

16.3 In the event of the samples of the Drugs and medicines supplied failing quality tests or found to be not as per specification the ordering authority

is at liberty to make alternative purchase of items of drugs and medicines for which the Purchase Orders have been placed from any other sources or

from the open market or from any other tenderer who might have quoted higher rates at the risk and the cost of the supplier and in such cases the

ordering authority has every right to recover the cost and impose penalty as mentioned in Clause 19.

We are also of the view that the award dated 29-6-2015 is vitiated for reason of the arbitrator overlooking the mandate of Section 28(1)(a) and 28(3)

of the Act of 1996. The arbitrator has circumvented and completely overlooked clause 17(8)(iii), clause 18(a) and clause 13(6) of the agreement for

supply of drugs and medicines between the parties and denied the appellant the contractual right to levy liquidated damages for admitted delayed

supplies beyond the scheduled period for such supplies. The arbitrator has also taken a view incompatible with the agreement between the appellant

and the respondent company pertaining to the supply of drugs and medicines relating to NIT dated 13-1-2012 in holding that the appellant was not

entitled to the differential price as obtained between the drugs and medicines which the respondent was to supply yet did not and the price paid for the

very same drugs by the appellant on purchase from the open market under the risk and purchase clause. The arbitrator overlooked the terms of the

contract between the parties and then passing an award in dispute. This evidences a complete absence of judicial approach rendering the award liable

to be set aside both for reason of Section 28(3) of the Act of 1996 as also for falling foul of adherence to public policy as has been enunciated by the

Apex Court in the case of Associate Builders vs. Delhi Development Authority [(2015)3 SCC 49].

Further Section 31(3) of the Act of 1996 mandates that an award has to be a reasoned one, unless parties agree to the contrary. Admittedly the

parties in the instant case did not agree that the awards on the disputes referred to the Arbitrator in the two claim petitions before him be unreasoned

ones. The award dated 29-6-2015 on issue No.1 in claim petition arising from reference on the contractual dispute flowing from NIT dated 26-2011

and its acceptance on 3-8-2011 by the appellant evidences that the Arbitrator has directed the appellant to pay Rs.7,92,14,360/- to the respondent

company on a simplistic arithmetical calculation of value of goods supplied, payments made and remainder due wholly overlooking the contractual right

of the appellant under clause 19(9)(a) to adjust amounts due against the respondent company on any other count/ contract. The award on issue No.2

holding that the appellant wrongly invoked the bank guarantees of Rs.76,12,721/ furnished by the respondent company and directing refund of the

amounts so appropriated is cryptic and unreasoned. So is the award on the alleged illegality of the earnest money of Rs.5 lacs overlooking the

adjustments claimed by the appellant for reason of the respondent company's breach.

It is indeed true that in the order sheet of the arbitration proceedings of 9-8-2014 both in reference No.1/2013 and 2/2013, it has been recorded that

both the parties agreed not to file any evidence or affidavit in support of their case. That however did not entitle the Arbitrator to pass the award

incompatible to the condition of the supply of drugs and medicines and documentary evidence on record. The case at hand is not one of impugning

findings or re-appreciation and reweighing of evidence. The award is patently illegal vitiated as it is by gross non application of mind and rendered

contrary to the necessary judicious approach warranted in all adjudications including by private adjudicators. Such a situation has been held by the

Apex Court in Associate Builders (supra) as being opposed to the fundamental field of Indian law. We are of the considered view that the award

dated 29-6-2015 is therefore unsustainable.

Further when an Arbitrator is required by Section 31(3) of the act of 1996 to pass a reasoned award, he is under a statutory obligation to make evident

his intellectual faculties employed in reaching conclusions, on the material before him. This alone would satisfy the statutory requirement under the

Act of 1996 to pass a reasoned award. This requirement of award being reasoned embedded in law is to ensure the purity of the arbitral process, as

reasons are the process of the mind which distinguish truth from falsehood and which enable deduction of conclusion from facts on record. The

requirement of giving reasons guarantees a fair and legitimate consideration of the dispute by the Arbitrator. In the case of Som Dutt Builders Vs.

State of Kerala [(2009)10 SCC 259] the Apex Court in the context of Section 31(3) of the Act of 1996 held that lack of reasons in support of an

award renders it unsustainable. It was held by the Apex Court that even mere noting of submission of parties or even references to documents is no

substitute for the reason an arbitrator is statutorily obliged to give for his award. It is indeed true that the Arbitrator is not expected to write a judgment

like a court, yet in terms of Section 31(3) of the Act of 1996 he is under obligation to make clear as to how he has come to a finding. In arriving at a

conclusion, the Arbitrator is thus under an obligation while passing award to set out his view on the complete evidence before him and should

succinctly explain how in the light of material on record he has reached to a given conclusion. The giving of reasons is also a sine qua non of the

judicial approach even otherwise mandatory under the public policy ground referred to in Section 34(2)(ii) of the Act of 1996. In Associate Builders

(supra) the Apex court has clearly held that "judicial approach is a component of a public policy" (para 28). The reasons given out by the

Arbitrator in his award alone can enable the court deduce whether he has fairly addressed the controversy in issue and that has considered all relevant

material on record. An arbitrator's ipse dixit cannot be equated with a reasoned award and an award which is not supported by reasons is liable to be

set aside in exercise of powers of the court both under Section 34 and subsequently, where warranted the District Court having failed to so do under

Section 37 of the Act of 1996. This is the situation which obtains in the impugned award dated 29-6-2015 as is evident from a bare perusal thereof. It is

wholly unreasoned without reference to any terms and conditions of the underlying two agreements or even a piece of documentary evidence. Such

an award is bad and unsustainable under Section 31 of the Act of 1996. Besides as earlier held the impugned Award is also in the cross hair of

Sections 28(1)(a), 28(3) and 34(2)(a)(v) of the Act of 1996.

We are also of the considered view that the award dated 29-6-2015 is liable to be set aside for reason of the award being based on a matter beyond

the scope of claims submitted. In the instant case the respondent company had admittedly not claimed in its claim petitions following the references by

the High Court in Arbitration Applications No.71/2012 and 72/2012 any damages on account of its blacklisting by the appellant's order dated 20-9-

2012, which was later on set aside by the high court vide order dated 5-3-2014 in SBCWP No.17893/2012. Nor any other loss on any count was

pleaded in the claim petitions. Yet the Arbitrator has allowed compensation of Rs.2 crores to the claimant, on this count without any pleadings,

evidence of the appellant's breach of contract with reference to its terms and conditions. There can be no award of damages under Section 73 of the

Contract Act, 1872 without finding breach of contract. Yet in the instant case damages of Rs.2 crores has been awarded by the Arbitrator without

any finding of breach of contract by the appellant. The award on this count is thus vitiated by an error apparent on the face of record and is contrary

to the substantive law in force in India i.e. Section 73 of the Contract Act. It was thus liable to be set aside on objections, thereagainst under Section

34 of the Act of 1996 which were negated by the Commercial Court under its judgment dated 28-9-2016. The Commercial Court wrongly failed to do

so and failed to exercise its jurisdiction in not so doing.

For the aforesaid reasons, the judgment dated 28-9-2016 by the Commercial Court as also the award dated 29-6-2015 deserve to be quashed and set

aside. They are so.

The appeals are allowed.

In view of the judgment dated 28-9-2016 and the award dated 29-6-2015 being quashed and set aside as above, writ petition (659/2017) filed by the

appellant is rendered infructuous. It is accordingly disposed of.