IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16th December, 2011
Decision on: 24th February 2012

O.M.P. 267/2005

CYBERNETICS NETWORK PVT. LTD. ..... Petitioner
Through: Mr. Rajeev K. Virmani, Senior Advocate with Ms. Mukta Dutta, Advocate.

Versus

BISQUARE TECHNOLOGIES PVT. LTD. ..... Respondent
Through: Mr. Vivek Sood, Advocate.

O.M.P. 282/2005

BISQUARE TECHNOLOGIES PVT. LTD ..... Petitioner
Through: Mr. Vivek Sood, Advocate.

Versus

CYBERNETICS NETWORK PVT. LTD. ..... Respondent
Through: Mr. Rajeev K. Virmani, Senior Advocate with Ms. Mukta Dutta, Advocates.

O.M.P. 283/2005

RAMENDRA SINGH BAONI ..... Petitioner
Through: Mr. Vivek Sood, Advocate.

Versus

CYBERNETICS NETWORK PVT. LTD. ..... Respondent
Through: Mr. Rajeev K. Virmani, Senior Advocate with Ms. Mukta Dutta, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
24.02.2012

1. These three petitions have been filed under Section 34 of the Arbitration

and Conciliation Act, 1996 against the same Award dated 14th March 2005 passed by the learned sole Arbitrator whereby the claim of Cybernetics Network Pvt. Ltd. ('CNPL') was allowed and the Respondent Bisquare Technologies Pvt. Ltd. ('Bisquare') was held liable to pay CNPL Rs.98.77,672/- together with interest @ 9% from 30th March 2002 till the date of the Award and interest @ 18% per annum from the date of the Award till the date of payment. CNPL was awarded costs of Rs.5,00,000/-. The counter claims of Bisquare and Mr. Ramendra Singh Baoni (hereinafter Mr. Baoni) were rejected.

2. Aggrieved to the extent that some of its claims have been rejected, CNPL has filed O.M.P. No. 267 of 2005. Against the rejection of the respective counter claims Bisquare has filed O.M.P. No.282 of 2005 and Mr. Baoni has filed O.M.P. No.283 of 2005.

Background Facts

3. CNPL is a company incorporated under the Companies Act, 1956 claiming to have expertise in the marketing of products in the field of multimedia home entertainment. Bisquare, also a company incorporated under the Companies Act, is carrying on the business of technology development and research in the field of information technology, multimedia, telecommunications, and direct-to-home transmissions of television signals with its associated hardware design and embedded software development. Mr. Baoni is the Promoter and Director of Bisquare.

4. CNPL states that the parties met during October/November 1999 when Mr. Baoni claimed to have been engaged in the business of technology development and research and made representations inter alia that he had designed, developed, proved and tested a proprietary set top box ('STB') which was Digital Video Broadcasting ('DVB') compliant and was ready for

commercial exploitation. It is further stated by CNPL that Mr. Baoni demonstrated an STB by claiming *inter alia* that it was a proprietary STB developed and designed by him and that he had all the deliverables ready for commercial production of such STBs. It is stated that Mr. Baoni represented to CNPL that he was in the process of developing STBs for direct to home ('DTH') and terrestrial reception and dissemination of digital satellite signals. Mr. Baoni offered to transfer exclusive rights in the intellectual property and proprietary technology in STBs to a company to be promoted by Mr. Pradeep Jain of CNPL for commercial exploitation of the said technology or any other technology to be developed in future. Mr. Baoni stated that he needed to consult with one Mr. Baid, the other promoter and Director of Bisquare Consultants Pvt. Ltd. ('BCPL') so as to ensure smooth transition and stated that he required funds for that purpose as well.

The MOU

5. CNPL states that acting upon the aforesaid representations, CNPL and Bisquare entered into a Memorandum of Understanding ('MOU') on 17th January 2000 whereby CNPL was to subscribe 30% of the issued and subscribed equity capital of Bisquare and Bisquare was to subscribe to 30% of the issued and subscribed equity capital of CNPL. It was agreed that if the change in equity of either company due to the issue of sweat equity to the staff occurred/took place, the share of each in the other could not fall below 26% of the issued and subscribed capital of each company. Each company had a right to exit from their respective shareholding in the other company subject to the company holding the shares offering the right of first refusal to the remaining shareholders. In terms of the MOU, CNPL and Bisquare were to identify through mutual consent, the technology/products to be designed for CNPL. Bisquare was to provide CNPL the product concept which was capable of generating business for CNPL provided that the technology developed by Bisquare and transferred to CNPL would be upgraded, adopted, assimilated

and modified, serviced by Bisquare which would render all technical help for its absorption, assimilation and manufacturing by CNPL as per the TSSA. CNPL would be free to source designs / technologies / products from other sources or design houses if they were found to be more cost effective or technically superior with prior approval of Bisquare. Under Clause 4.5, Bisquare agreed to transfer the technology developed by it for the manufacture of STB to CNPL. CNPL agreed to purchase the said technology on exclusive basis as per the TSSA. CNPL was to deploy resources and investments as per the agreed project plan for each product to be marketed by CNPL. All development activities undertaken by Bisquare would be with the prior approval and authorisation of CNPL. Mr. Baoni, the main Promoter and Director of Bisquare was to exclusively associate with and work for Bisquare and was to transfer, sell, assign, pledge, mortgage, charge or otherwise encumber all or any part of the equity share capital held by him in Bisquare. Further, till the time the equity participation of CNPL in Bisquare continued, Mr. Baoni would be the Managing Director of Bisquare. Likewise Mr. Pradeep Jain, the Promoter and Director of CNPL was not to transfer any part of the equity share capital held in CNPL by him or through his spouse or minor/dependant, children or through a company, firm, association or persons, body of individuals during the continuance of the MOU share holdings of CNPL and Bisquare. Clause 12 was a good faith clause which enjoined the parties to render all co-operation and assistance to the other party and to do all things to give effect to the letter spirit of the MOU.

6. In terms of the MOU, Bisquare and Mr. Baoni required CNPL to pay Bisquare Rs. 17.37 lakhs for acquiring 19,300 equity shares of a face value of Rs.10 each in Bisquare. The amount consisted of a sum of Rs. 15.44 lakhs as share premium demanded by Bisquare and Mr. Baoni. CNPL states that it paid the entire sum of Rs. 17.37 lakhs during January and March 2000.

Relevant clauses of the TSAA

7. CNPL, Bisquare and Mr. Baoni executed a separate Technology Sale and Support Agreement ('TSSA') on 1st April 2000. In para 3 of the preamble Bisquare represented to have designed, developed, tested and proved the current STB based on Essential Platform as a proprietary technology owning all intellectual property rights in it. 'Current STB' meant a specific type, i.e. Direct-to-Operator ('DTO') category of STB. Essential Platform meant DVB-S complaint Digital STB based on Integra 1000 chip set from LSI Logic. The software was developed on PSOS+. Bisquare agreed, subject to the terms and conditions set out in the TSSA to sell outright to CNPL all intellectual property rights in the STB as also to provide technical assistance and upgrades as was sufficient to enable CNPL to commercially produce and market the STB and thereby achieve its business objectives as set out in the TSSA.

8. The following definitions contained in the TSSA are relevant for the purposes of the case:

> "**Commercial Operations Date—**means, in relation to Current STBs, that date on which CNPL sells the first lot of not less than one thousand DTO's to any customer, and means, in relation to Future STBs, that date on which CNPL sells the first lot of not less than one thousand of each of DTH or STB(T), as the case may be.
>
> **Current STB**—means DTO.
>
> **Deliverables**—means in relation to each of the STB and in accordance with the provisions hereof, all design features, Technical Specification, performance specifications, bills of quantities, detailed schematics, gerber files, hardware design documents, software design documents, all source codes, all hard and soft copies of user manuals and all software for the Flash ROM and all Source Codes pertaining to the software for the Flash ROM and includes Technical Information as also a list of at least one recommended vendor with the capability to supply at competitive prices consistent with quality standards, each of the parts comprising the STB.
>
> **Delivery Schedule—**means the time within which BSQ shall have

the obligation to deliver all Intellectual Property Rights in respect of each of the STBs mutually agreed between the parties.

DTO—means that category of STB as permits direct-to-operator reception and dissemination of digital satellite signals.

DTH—means that category of STB as permits direct-to-home reception of digital satellite signals.

Essential Performance Specifications—means the essential performance specification of each of the STB duly disclosed by BSQ to CNPL and as set forth in Annexure-A hereto.

STB—means collectively all and individually each of the following categories of proprietary Set Top Boxes:

(a) DTO;
(b) DTH; and
(c) STB(T),

each being based on the Essential Platform and in either event, having the Essential Performance Specifications and includes all Upgrades.

Upgrade—means such improvements and upgrades in the Essential Performance Specifications within the limits of the Essential Platform as BSQ hereafter undertake to provide at the requirement of CNPL to enable CNPL to effectively service its customer's needs and compete in the market. BSQ shall provide to CNPL such Upgrades as CNPL may request at all times within 84 months of the Commercial Operations Date.

Warranties—means the representations and warranties in relation to the performance and characteristics of STB made by BSQ to CNPL as better set forth in Article 4.1, 4.2 and, to the extent applicable to BSQ, Article 11 hereof."

9. Clauses 3.2.1 and 3.2.2 of the TSSA read as under:

"**3.2.1** In consideration of the mutual covenants, promises and premises herein contained and in consideration of the purchase by it of the Intellectual Property Rights, the receipt of the Deliverables with its associated Technical Information, and the benefits of Technical Assistance and Support, CNPL shall tender and pay to BSQ, the consideration therefor in the aggregate sum of Rs.115 lac (Rupees One Hundred Fifteen Lacs Only) for the current STB (the "Consideration") in accordance hereunder:

a. Rs. 15 lacs at the date of execution hereof;
b. Rs. 50 lacs on the delivery of deliverables;
c. Rs. 20 lacs on completion of pilot production;
d. Rs. 30 lacs on approval by three customers.

3.2.2 The payment for the Future STBs shall be on the basis of the Cost, which is estimated to be about Rs. 135 lacs to be finalised and confirmed at the stage of initiation of development of Future STBs as mentioned in clause 3.8."

10. Clause 4.4 relating to warranties reads as under:

"**4.4**. Without restricting the rights or ability of CNPL to claim damages on any basis available to it, in the event that any of the Warranties prove to be untrue or misleading or are breached, as the case may be, BSQ and Promoter shall pay to CNPL on demand the amount necessary to put CNPL into the position which would have existed if the said Warranties had been true and not misleading or not broken, as the case may be, together with all costs and expenses incurred by CNPL as a result of such breach."

11. Article 11.2 contains additional warranties and indemnification and reads as under:

"**11.2** BSQ and Promoter shall indemnify, defend and hold harmless CNPL and each of the respective directors and officers of CNPL from and against any and all losses which may be incurred or suffered by any such party and which may arise out of or result from:
(a) any breach of any Warranties, obligations, covenants or agreement of BSQ contained in this Agreement;
(b) any third party claims for loss or damage of whatever description caused to such or any other third party as a result of the activities of BSQ or its employees pursuant to its obligations hereunder: and
(c) any and all actions, suits, proceedings, claims, judgments, costs, expenses, including incurred in enforcing this indemnity."

CNPL's Case

12. CNPL states that it paid Bisquare, at the instance of Mr. Baoni, a sum of Rs.1,01,82,000/-. A further payment of Rs.21,60,000/- was made towards

technology transfer fee in July 2000. It is stated that this was wrongfully and illegally termed as 'design and development charges for pilot production of the current STB'. CNPL further states that when in April 2000 the pilot production of the current STB commenced, under the direct supervision of Bisquare and Mr. Baoni, it transpired that Bisquare and Mr. Baoni had played a fraud and that their various representations to CNPL about possessing the technology and complete "deliverables" for the commercial production of DVB compliant STBs were false. CNPL states that Bisquare and Mr. Baoni totally failed and neglected to perform their obligations under the MOU and TSSA despite receiving substantial sums of money from CNPL. They lacked the necessary capability, competence, ability and intention to perform their obligations under the MOU and TSSA. The pilot production of the 38 STBs could be completed in August 2000 after repeated hits and trials and when they were sent for field test, it was discovered that they could not achieve the required performance.

13. CNPL states that pursuant to the TSSA, CNPL set up production facilities at No.462, Udyog Vihar, Phase-V, Gurgaon in July 2000 employing the requisite number of persons and arranging other infrastructures for that purpose. At the instance of Bisquare and Mr. Baoni, CNPL placed an order for MPEG Test System at a cost of US $ 34,350/- for which it paid Rs.4,58,321/- as an advance and TV Test Transmitter DVB-C, DVB-S and DVB-T at a cost of Euro 54,561/- and for which CNPL paid an advance of Rs.6,13,834.63. CNPL further states that on the *bona fide* belief that Bisquare and Mr. Baoni would be able to commercially build the current STB, it accepted an order from TV Today for 3800 current STBs which were to be delivered by October 2000. Based on the order of TV Today, Bisquare and Mr. Baoni required the Petitioner to import/procure further raw materials for the commercial production of the current STBs. CNPL states that it was surprised when Bisquare and Mr. Baoni informed that the commercial

production of the STB would not commence till the STBs produced during pilot production were tested on the testing equipments for DVB compliance. Further, Bisquare and Mr. Baoni informed CNPL that the STBs were to be tested on the equipments which they had required CNPL to import by misrepresenting them to be the equipment required for manufacturing. On enquiry, CNPL found that the testing equipment that was ordered to be imported from Tektronik Inc. USA Kohde & Schruaz Grabil Co. K.G., Germany were required by technology developers and not the commercial producers of STBs, who were to manufacture STBs based on fully developed, proven, tested and commercially sound STBs. CNPL was informed by Bisquare and Mr. Baoni that commercial production of current STBs could commence after testing and rectification of the defects that would take three months and that DVB compliance would be certified thereafter. As a result, the CNPL informed TV Today that the STBs would be delayed by a few months. This was not accepted by TV Today, which cancelled the contract with CNPL. This caused a grave embarrassment and loss of reputation in the limited market of current STBs. CNPL demanded that Bisquare and Mr. Baoni return the money paid to them and recover losses. They further informed CNPL that they were looking for a suitable buyer, who would acquire the technology in the current STB along with various raw materials that have been procured. However, no suitable buyer could be traced by them. CNPL, in order to mitigate its losses, terminated the lease of the factory taken on rent and returned its possession to the landlord.

14. CNPL states that Bisquare and Mr. Baoni also required it to procure the PSOS software, which had transpired later, and was required for development of STB technology and not for its commercial production. CNPL paid Bisquare and Mr. Baoni during the period July to December 2000 a sum of Rs.82,50,000/- which was kept by them as share application money, without issuing any shares. A matching contribution had to be made by Mr. Baoni in

the equity of Bisquare so as to keep the equity participation of Mr. Baoni and his group at 70:30. This also was not done. At an urgent meeting of Bisquare held on 24th December 2001, CNPL noticed that the sum of Rs. 82.50 lacs paid by CNPL was misappropriated as share application money and instead of allotting shares, Bisquare and Mr. Baoni had dishonestly sought to adjust the same against certain purported non-existent dues of Bisquare. CNPL asked Bisquare and Mr. Baoni to rectify the accounts and also raised the issue at the AGM. However, they failed to do so.

15. CNPL states that the sum total of the aforementioned amount i.e. Rs.17.37 lacs paid by CNPL towards share capital of Bisquare, the sum of Rs.82.50 lacs paid as share application money, the sum of Rs.1,01,82,000 towards technology transfer fee and the sum of Rs.21.60 lacs paid by CNPL towards technology assistance charges worked out to the aggregate of Rs.2,23,29,000. Apart from above, CNPL also claims to have incurred expenses in setting up the facility at Gurgaon. This included rent and incidental charges of the factory at Rs.8,88,629/-, raw material cost for pilot production of 38 STBs at Rs.14,07,547/-, the amount paid for raw material at port for TV Today order at Rs.67,70,697/-, cost of software/licensing fee at Rs.16,77,672/-, advance paid against testing equipment and raw materials at Rs.39,18,821/- and overheads and various other expenses at Rs.50,17,147/- worked out to the aggregate of Rs.1,96,80,513/-. The sum total worked out to Rs.4,20,09,513/-. CNPL had also become liable to pay custom duties, penalties, demurrage and detention charges in respect of the raw materials imported at the behest of Bisquare and Mr. Baoni.

16. CNPL sent them a notice on 30th March 2002 followed by a further notice dated 23rd April 2002, invoking the arbitration clause. In their reply dated 13th May 2002, Bisquare and Mr. Baoni rejected CNPL's claims. Thereafter Arb. Petition No. 125 of 2002 was filed by CNPL in this Court. By an order dated

30th September 2003, this Court appointed Justice G.B. Patnaik, former Chief Justice of India, as the sole Arbitrator.

Issues framed by the Arbitrator

17. CNPL in its statement of claim dated 24th November 2003 before the learned Arbitrator claiming *inter alia* a sum of Rs.4,20,09,513/- together with interest, both *pendente lite* and future. Bisquare and Mr. Baoni jointly filed their replies and counter claims. On the basis of the pleadings, the learned Arbitrator framed, on 21st February 2004, the following issues:

> "1.Was there any wrongful inducement by the Respondent No. 2 to the Claimant for entering into the MOU and did Respondent No.2 deliberately concealed or withheld from the Claimant vital materials, as alleged in the Claim Statement?
>
> 2. Has there been any breach of the terms and conditions of MOU dated 17.01.2000 and/or Technology Agreement dated 01.04.2000 by the Respondent?
>
> 3. Has there been any breach of the aforesaid two agreements, namely, 17.01.2000 and 01.04.2000 by the Claimant?
>
> 4. Was the Set Top Boxes Technology supplied by Respondent No. 1 to the Claimant was in any way defective and not of DVB Compliant as well as commercially unviable?
>
> 5. Has there been any failure on the part of the Respondent No. 1 to transfer and deliver to the Claimant the Deliverables, Technology Information, Technical Support, Intellectual Property Rights, Technology for commercially viable DVB compliant Set Top Box in terms of the Technology Agreement?
>
> 6. Is the Claimant entitled to compensation from the Respondent on account of breach on the part of the Respondent as per the Terms and Conditions of the Agreement?
>
> 7. Is the Claimant in any way responsible for delay in the procurement of components and equipments and whether the Claimant himself abandoned the project of manufacturing Set Top Boxes and if so, is the Respondent entitled to compensation from the Claimant on that score? Whether the Respondent is entitled to

get compensation from the Claimant in respect of the Counter Claim made, and if so what is the amount involved therein?

8. Is the Claimant is entitled to any interest and if so at what rate & from what date?"

18. On behalf of CNPL, Mr. Rakesh Sharma, Mr. Ravi Sharma and Mr. Sanjiv Kainth were examined. Mr. Baoni was the witness for the Respondents.

Findings of the Arbitrator

19. As regards Issue No.1, the learned Arbitrator held that the STB technology supplied by Bisquare to CNPL was "undoubtedly defective and was neither DVB compliant nor was it commercially viable." Issue No.2 was answered in the affirmative and Issue No.3 in the negative. Issue Nos.4 and 5 were answered in favour of CNPL. It was held that Bisquare had failed to transfer and deliver to CNPL the deliverables, technical information and the technology of the commercially viable DVB compliant STB in terms of the Technology Agreement. On the question of compensation under Issue No.6, it was held that:

(a) CNPL was entitled to refund of the sum of Rs.82.50 lacs towards share application money.

(b) CNPL's claim for refund of Rs.1,01,82,000 towards technology transfer fee, the claim for refund of Rs.21.60 lacs paid as assistance charges, the claim towards expenditure for setting up the facility at Gurgaon for pilot production included rent and incidental charges of the factory at Rs.8,88,629/-, raw material cost for pilot production of 38 STBs at Rs.14,07,547/-, the amount paid for raw material at port for TV Today order at Rs.67,70,697/-, advance paid against testing equipment and raw materials at Rs.39,18,821/- and overheads and various other expenses at Rs.50,17,147/- and the claim for refund of the sum of Rs.17.37 lacs were all rejected.

(c) CNPL was held entitled to refund of Rs.16,77,672/- towards price of the PSOS software.

20. Thus, in all CNPL was held entitled to be paid by Bisquare and Mr. Baoni a sum of Rs.98,77,672/-. In respect of Issue No.8, it was held that CNPL would be paid the principal awarded amount together with interest at 9% per annum from 30th March 2002 till the date of the Award and post-Award interest at 18% p.a. till the date of payment as well as costs of Rs.5,00,000/-. Issue No.7 relating to the counter claims of Bisquare and Mr. Baoni in the sum of Rs.15,14,27,908/- was rejected by holding that there was a breach of the terms and conditions by Bisquare and not by CNPL and that no supporting material was available for the assertions made in the counter claims.

21. This Court has heard the submissions of Mr. Rajeev K. Virmani, Senior counsel appearing on behalf of CNPL and Mr. Vivek Sood, learned advocate appearing on behalf of Bisquare and Mr. Baoni.

Scope of the present proceedings

22. The scope of the powers of the Court under Section 34 of the Act to interfere with an award has been explained by the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705***. The Supreme Court held that "a patently illegal award is required to be set at naught, otherwise it would promote injustice" and proceeded to explain (SCC, p. 727):

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such

award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar case 1994 Supp (1) SCC 644* it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

(*a*) fundamental policy of Indian law; or

(*b*) the interest of India; or

(*c*) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

23. The legal position was crystallized in the later decision in ***Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63*** thus (SCC, p. 78):

"18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(*i*) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(*ii*) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(*iii*) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(*iv*) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(*v*) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(*vi*) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(*vii*) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

False representations by Bisquare and Mr. Baoni

24. Having noted the settled legal position as regards the scope of interference under Section 34 of the Act, the Court proceeds to consider the submissions of the parties. The grievance of the CNPL is that despite the learned Arbitrator holding in its favour on the main issues, he declined to award it the refund of the sums paid by it to Bisquare and Mr. Baoni towards share capital in Bisquare, technology transfer fee, technology assistance charges, the raw material costs, pilot production, rent and other facilities to set up the factory and the advance payment against other overheads and various other expenses. CNPL urges that under Article 4.4 of the TSSA, in the event the warranties of Bisquare and Mr. Baoni proving to be untrue or misleading or are breached they were to pay CNPL on demand "the amount necessary to put CNPL into the position which would have existed if the said Warranties had been true and not misleading or broken together will all costs and expenses incurred by CNPL as a result of such breach." The contention is that with the learned Arbitrator having found Bisquare and Mr. Baoni to be in breach of the terms and conditions of the MOU and the TSSA, he ought to have required them to

compensate CNPL for the losses suffered by it as a result thereof. Reliance is also place on Article 11 of the TSSA whereby in the event of their being in breach of the agreement, Bisquare and Mr. Baoni were required to indemnify CNPL the losses suffered by it. Likewise, the learned Arbitrator having accepted the plea of CNPL that Bisquare and Mr. Baoni lacked the basic infrastructure or the technology to develop an STB for commercial purpose and that they had made a false representation, ought to have held CNPL entitled to the refund of Rs.17.37 lacs particularly when no technology had in fact been transferred to CNPL. Moreover, technical assistance was expected to be provided to CNPL by the Respondents not only till the date of commercial operation but thereafter till the procedure for commercial production of STB was streamlined. Likewise, the claim for the costs incurred by CNPL in setting up the factory and procuring the raw material for the pilot production should not have been rejected.

25. On the other hand, it is sought to be contended on behalf of Bisquare and Mr. Baoni that the liability if any was that of Bisquare and not of Mr. Baoni. The prototype STB was in fact approved. It is maintained that technology was in fact provided to CNPL as acknowledged by it for 2001-02 by the letter dated 21st December 2001 to CNPL by Bisquare and Mr. Baoni was in fact an afterthought. There is an admission that 38 STBs had in fact been manufactured. It is submitted that the alleged representation was stated to have been made to Mr. Pradeep Jain who failed to enter the witness box. The evidence of Mr. Sanjiv Kainth was not corroborated and ought not to have been believed. It was the CNPL which abandoned the manufacture of STBs and there was no omission by Bisquare or Mr. Baoni in that regard. There was a mutual agreed business plan in terms of which CNPL was to invest Rs.5.3 crores in the design business. Clause 5.2 of the MOU was silent about the consequence of non-issue of shares. Reliance is placed on the decision in ***Juwarsingh v. State of Madhya Pradesh 1981 SCC (Cri) 357*** to urge that the

evidence of Mr. Kainth ought not to have been relied upon. Reliance was also placed on the decision in ***Ramji Dayawala & Sons (P.) Ltd. v. Invest Import AIR 1981 SC 2085*** and ***Food Corporation of India v. Chandu Construction (2007) 4 SCC 697***.

26. The first issue which was considered by the learned Arbitrator was about the representations made by Bisquare and Mr. Baoni on the basis of which the MOU and TSSA were executed. The case of CNPL specifically was that despite knowing that they failed to possess the requisite technology and know-how for commercially developing the STBs, Bisquare and Mr. Baoni dishonestly and fraudulently induced CNPL into parting with money. In the reply to the statement of claim, the assertions made on behalf of Bisquare and Mr. Baoni *inter alia* were as under:

> "In nutshell, the respondent company has provided the claimant, in terms of the Agreement, STB Technology with was tested, DVB compliant, found to be of excellent standards and the same has been appreciated widely in the market."
>
> "The STB technology developed by the respondent no. 1 was tested and ready for commercial exploitation and was DVB compliant. It is submitted that customization is part of technical assistance as it is specific to the requirements of every customer at a given time and depends upon several factors. It is denied as false that the respondent no. 2 allured the claimant/its promoter/ director to invest in the venture of respondent no. 2. It is denied as false that the respondent no. 2 offered to sell other technologies to be developed."
>
> "It is being dishonestly and falsely sought to be projected in the para under reply as well as the statement of claim, as if it was the res no. 2 who had personally given representations etc. regarding the STB Technology."
>
> "It is respectfully submitted that the STB Technology was demonstrated by the respondent no.1 through a prototype Set Top Box developed by the respondent no. 1 based on Integra 1000 chip set from LSI Logic."

> "During the course of the presentations, the prototypes of the STBs were even demonstrated by the respondent company to the claimant to their entire satisfaction. Moreover, the STB technology was widely appreciate."

27. The above assertions were found by the learned Arbitrator to be not substantiated by the evidence on record. In arriving at the said conclusion the learned Arbitrator referred to the documents placed on record in the form of e-mails exchanged between the parties and the evidence of Mr. Kainth, Mr. Ravi Sharma and Mr. Baoni.

28. Learned counsel for the parties have extensively referred to the evidence on record. The reply statement filed by Bisquare and Mr. Baoni before the learned Arbitrator contained the admission that the STB technology demonstrated by Bisquare "was a prototype Set Top Box developed by Bisquare on Integra 1000 chipset developed by LSI logic." Mr. Sanjiv Kainth confirmed in his affidavit by way of evidence as under:

> "20. In October/November 1999 when Mr. Ramendra S. Baoni gave a presentation as well as demonstration to the Claimant, I was also present with him. Mr. Ramendra S. Baoni demonstrated Manufacturing Kit MK 1000 given to them by LSI Logic and represented the same to be the design developed by him. Mr. Ramendra S. Baoni was hopeful of having an agreement with the Claimant and had planned that once the agreement was in place, Mr. Ramendra S. Baoni would require the Claimant to purchase the test equipment as well as RTOS (PSOS) compatible with Integra 1000 chip set and then the Respondents would be able to develop a set top box based on Integra 1000 chipset with its software development platform in due course of time using the test equipment and RTOS to be procured by the Claimant. This, however, could not take place till the time I was associated with the Claimant and the Respondents as the test equipment referred to above was not available with the Respondents. The Claimant had purchased PSOS and given to the Respondents based on the Respondents requirements."

29. There was no cross-examination of Mr. Kainth on the above aspect. Mr.

Baoni in his cross-examination confirmed that Bisquare had acquired two MK reference design kits of LSI logic. The assertions of Mr. Baoni that he had never represented that the technology developed was DVB compliant was contrary to the express warranties in the TSSA. In fact Annexure-A to the TSSA sets out the features as well as essential performance specifications of DTO. The first feature specified is that the STB is "DVB/MPEG 2 compliant." Mr. Kainth further states in his evidence that "the Respondents had sent the same manufacturing kit MK 1000 to Zee TV also, which was seen by Zee TV on their digital satellite transmission using MPEG 2 standard of compression as this was a manufacturing kit, it could receive the transmission". It was further categorically stated by him that "Bisquare Technologies Private Limited could not design and develop a Set Top Box from the software development platform SDP 1000 of LSI logic based on Integra 1000 chipset as it did not have the requisite infrastructure, for example, test equipment referred to above and RTOS (PSOS)."

30. The attempt by the learned counsel for Bisquare and Mr. Baoni to discredit the evidence of Mr. Kainth by relying on the decision in ***Juwaharsingh v. State of Madhya Pradesh*** (supra) is a desperate attempt that should fail. That decision was in the context of a criminal case and is plainly distinguishable on facts. Mr. Kainth was a person employed by Bisquare during the period 1st February 2000 to 14th May 2000 and had specifically dealt with CNPL on the STB matters. He was fully in the know of what transpired. His uncontroverted evidence was fatal the case of Bisquare and Mr. Baoni. He stated thus:

> "27. I state that during the period of my employment with the companies under the management and control of Shri Ramendra S. Baoni:
>
> a) they could not develop a set top box based on Integra 1000 chipset from LSI Logic. Even a lab prototype of STB could not be produced.

b) they did not have the requisite test equipment and RTOS to carry out the development of STB based on Integra 1000 chipset.

c) Shri Ramendra S. Baoni or the companies under his management never outsourced development of STB based on Integra 1000 chipset.

d) the question of testing any STB or technology in STB by Shri Ramendra S. Baoni or companies under his management for compliance with Digital Video Broadcasting Standards (DVB) never arose."

31. In fact while dealing with Issue No.4, the learned Arbitrator observed:

> "the fact that while the evidence of Mr. R.S. Baoni relies on the fact that his man Mr. Sanjiv Kainth had been deputed for assisting the Claimant with the Pilot production, but the evidence of Mr. Sanjiv Kainth himself goes against the case of the Respondent and categorically establishes the fact that they do not have full-fledged tested developed technology, as claimed by the Respondent during discussions with Mr. Pradeep Jain, the Claimant."
>
> "Relying upon the evidence of Mr. Ravi Sharma, whose testimony has not been impeached in any manner and evidence of Mr. Sanjiv Kainth and other documents referred in course of my discussions, I hold that the STB Technology supplied by Respondent No.1 to the Claimant was undoubtedly defective and was neither DVB Compliant nor was it commercially viable."

32. Consequently, the conclusion of the learned Arbitrator that "even the documents do not reveal that the Respondent No.1 (Bisquare) did possess all the required machineries for testing the so called technology they have for the manufacture of Set Top Boxes and its commercial exploitation" cannot be faulted.

33. However, the further finding of the learned Arbitrator to the effect that "in view of several documents, particularly E-mails from different sources and even the E-mails, alleged to have been sent by Mr. Ravi Sharma, it is difficult for me to come to the conclusion that the Respondent No. 2 did not in fact

have any technology of his own for manufacture of Set Top Boxes", is contrary to what emerges from those very documents. In other words, the finding to suggest that Mr. Baoni did have some technology to manufacture STBs is contrary to the evidence on record and to the express terms of the MOU and TSSA which clearly stated that he held the technology for DVB compliant STBs that could be commercially produced. There was no evidence to indicate that Mr. Baoni did possess at any time such technology as was represented by him.

34. The learned Arbitrator appears to have accepted the plea of Bisquare and Mr. Baoni that the failure to examine Mr. Pradeep Jain who was present during the negotiation with Mr. Baoni was fatal to the plea of CNPL that there was wrongful inducement of CNPL by Mr. Baoni to enter into the MOU and TSAA. The e-mails of Mr. Ravi Sharma dated 1st March 2000 to Mr. Gupta provide details on the progress of project talks of a presentation made by Mr. Baoni to BPL and Motorola. They also mention that Mr. Kainth had gone to Chennai for a demo. What appears to have been missed by the learned Arbitrator is that the STB used in these demonstrations, as pointed out by Mr. Kainth, was based on a reference design from LSI logic. It was in fact based on the MK 1000 chipset. The E-mails from Mr. Jason Buyers from the USA and the report of Zee TV all referred to this one prototype which was not based on the technology developed by Mr. Baoni. It is surprising that the learned Arbitrator has, in coming to the above conclusion, overlooked the evidence of Mr. Kainth which in fact he refers to in the earlier portion of the Award. The non-examination of Mr. Pradeep Jain cannot wipe away the clear and cogent evidence of the three witnesses examined on behalf of CNPL i.e. Mr. Kainth, Mr. Rakesh Sharma and Mr. Ravi Sharma. On the other hand, the fact that Mr. Kainth was not cross-examined should have been sufficient to disbelieve the defence of Bisquare and Mr. Baoni.

35. Bisquare and Mr. Baoni asserted in their defence that they had successfully completed the pilot project for production of 38 STBs. However, in his cross-examination, Mr. Baoni was unable to produce any proof that the pilot STBs were tested. His answers were at best vague and ambiguous. He stated that "the pilot production of STB had not taken place under Bisquare supervision or instructions" and also that "I do not think the pilot production had taken place within Cybernetics Network factory." There was no evidence that could have persuaded the learned Arbitrator to conclude that Mr. Baoni did in fact possess the technology to commercially produce DVB complaint STBs. The evidence on record proves the case of CNPL that Bisquare and Mr. Baoni falsely induced it to enter into the MOU and TSSA. The very basis of the MOU was that Mr. Baoni had developed a fully tested DVB compliant technology for manufacturing STB on commercial basis. The evidence clearly showed that he had not developed any such technology and had thus made a false representation in that behalf to CNPL.

36. Consequently, that portion of the impugned Award in relation to the second part of Issue No.1 where it is held that there is only "some misrepresentation" on the part of Mr. Baoni and further that there has been "no wrongful inducement by Mr. Baoni to CNPL for entering into the agreement" are held to be based on no evidence, contrary to the express provisions of the contract and therefore patently illegal. The impugned Award to that extent is unsustainable in law.

Erroneous rejection of some of CNPL's claims by the Arbitrator

37. The above finding of the learned Arbitrator appears to have been the foundation for the further decision not to allow some of the claims of CNPL. This part of the impugned Award is contrary to the evidence on record. In fact, while discussing Issue Nos.2 and 3, the learned Arbitrator observed:

> "Mr. Baoni also agreed in his cross examination that Cybernetics

paid Rs.17,37,000/- towards holding 30% Equity in the company of Respondent No.1 at a premium of Rs.80/- per share. The M.O.U. is completely silent with regard to charge of premium by the Respondent No.1 for the shares held by the Claimant. The documents produced in course of the arbitral proceedings by the Respondent No.1 or Respondent No.2 do not indicate that the claimant knew about the so called premium has been charged for the shares held by the Claimant in Respondent's company. This act of charging premium to the Claimant for holding shares to the extent of 30% of Equity in Bisquare, constitutes a violation to the terms of Agreement of Clause 2.1 of the M.O.U. It has been also established on record that between July to November 2000 the Claimant paid Rs.82.50 Lakhs towards the Share Application Money."

"In terms of Clause 2.1 the Respondents were required to contribute 70% which workout at Rs.192.50 lakhs, but in fact that contribution had not been made. It is interesting to note that though the Claimant paid Rs.82.50 lakhs as Share Application Money, the Respondents not only did not issue shares and adjusted a sum of Rs.15 lakhs from the same without even intimating to the Claimant, which the Claimant knew on receipt of notice of the Annual General Meeting in December 2001. This act of the Respondent on the face appears to me to be a breach of the terms of Agreement between the parties in the Memorandum of Understanding."

"According to Respondent since Rs.82.5 Lakhs was subscribed by the Claimant and they were further required to pay a sum of Rs.15 lakhs towards their 30% Equity in the Bisquare Technologies and they had not paid the same, the Respondents were entitled to adjust the same and such act does not constitute infraction of the terms of M.O.U. It is difficult for me to accept this contention, once the Respondents admit that the Claimant paid Rs.82.5 lakhs as Share Application Money. I also do not find any force in the submission of the Respondent that in the design business it was only the Claimant who was required to make payment and not the Respondents." (Q to Q Page 65 to be confirmed)

"I am persuaded to hold that there has been an infraction of the terms and conditions of the M.O.U. by the Respondent and not by the Claimant."

38. While discussing Issue No.5, the learned Arbitrator noticed the contradiction in the evidence of Mr. Baoni and the fact that he had not been able to produce any proof of handing over of documents of deliverables to CNPL. It was then concluded that "the Respondents have not handed over to the claimant the deliverables, technical information and the technology of the commercial DVB compliant STB in terms of the Technology Agreement." It was further concluded as under:

> "The evidence of Mr. Sanjiv Kainth in this context appears to be more plausible that PSOS is unquestionably required by the technology developer for development of the S.T.B. technology and they being in possession of that software the Respondent could not have claimed to have developed the STB technology of DVB Compliant, as asserted in S.T.B. technology itself. In the aforesaid premises I answer the Issue No.5 in favour of the Claimant and against Respondent No.1 and hold that there has been failure on its part to transfer and deliver to the Claimant the deliverables, technical information, technology for commercially viable D.V.B. Compliant S.T.B. in terms of the technology agreement."

39. Yet, the learned Arbitrator declined to direct refund of the payments made by CNPL to Bisquare and Mr. Baoni on the ground that the case of CNPL, that Bisquare and Mr. Baoni did not have any technology of their own was only "partially true", because, "the Respondents did have some technology, which might not be a tested technology of DVB compliant" and since they had partly started the manufacturing process of STBs as pilot production "with the technical assistance" rendered by the Respondents. What was missed by the learned Arbitrator was the fact that the MOU and the TSSA was based on the assertions made by Bisquare and Mr. Baoni that they possessed technology to commercially produce STBs that were DVB complaint. Once that representation was found to be untrue the very basis of the MOU and TSSA disappeared. There was no question of CNPL parting with money just for any technology for STBs. It was specifically for a technology for commercially producing DVB complaint STBs. The only conclusion that could have been

drawn in the circumstances was that the representation was a fraudulent one.

40. Likewise, the evidence produced by CNPL substantiated its case of failure on the part of Bisquare to effect technology transfer and falsely inducing CNPL into parting with the technical assistance fee. Again, on the ground that "the Respondent did have some technology" it was held that these amounts could not be ordered to be refunded. For the reasons explained hereinabove the denial of these amounts to the CNPL in the impugned Award was not justified. In doing so the learned Arbitrator appears to have completely overlooked the evidence on record.

41. While the amount of Rs.16,77,672/- for PSOS software has been directed to be refunded to CNPL, the refund of the amount incurred in the pilot production of 38 STBs was denied. Under Section 73 of the Contract Act, CNPL was entitled to restitution upon the finding by the learned Arbitrator of breach of contract by Bisquare and Mr. Baoni. This has been recently reiterated by the Supreme Court in ***Phool Chand v. Union of India (2011) 10 SCC 300***. CNPL was entitled to be restituted to the position it was in prior to the MOU and the TSSA. The claim of CNPL even in regard to the expenditure incurred by it in the pilot project as well as renting out the factory at Gurgaon including the costs of the raw materials and import were required to be allowed.

42. As regards establishing proof of having incurred costs, the learned Arbitrator observed that "the claimant has been able to establish the factum of payment made towards testing equipments and raw materials as well as towards overheads, as claimed." However, the claim for compensation and damages was denied on the ground that there was an "absence of any positive case and proof of negligence on the part of the Respondents." Since fraud unravels everything, nothing more was required to be proved to sustain the

claims of CNPL.

43. As regards of the rejection of the counter claims of Bisquare and Mr. Baoni, indeed nothing has been produced in regard to sustain a counter claim for an exorbitant sum of over Rs. 15 crores. The claim for the unpaid consideration for transfer of technology or technical support and assistance against CNPL had to fail in light of the clear finding that Bisquare and Mr. Baoni were in breach of the MOU and TSSA. Their case that CNPL was to invest more monies in the design business was not supported by any cogent evidence. In the circumstances, the impugned Award to the extent it rejects the counter claims of Bisquare and Mr. Baoni does not call for interference.

Resultant position

44. The result is that the impugned Award is upheld to the extent it has allowed the claims of CNPL. Thus the following claims of CNPL as allowed by the impugned Award are upheld:

(i) Refund of the sum of Rs.82.50 lakh towards share application money.

(ii) Refund of Rs.16,77,672/- towards price of the PSOS software.

(iii) Interest on the aforementioned sums at 9% p.a. *pendente lite.*

(iv) Post award interest at 18% p.a. till date of payment.

(v) Costs of Rs. 5,00,000.

45. The rejection by the impugned Award of the counter claims of Bisquare and Mr. Baoni is upheld.

46. The impugned Award to the extent it has rejected the other claims of CNPL as set out in paras 54 e & f of CNPL's statement of claim is set aside. These are CNPL's claim for refund of Rs.1,01,82,000 towards technology transfer fee, the claim for refund of Rs.21.60 lakh paid as technology assistance charges, the expenditure for setting up the facility at Gurgaon for

pilot production including a claim for Rs.8,88,629 towards rent and incidental charges of the factory, claim for Rs. 14,07,547 towards raw material cost for pilot production of 38 STBs, claim for a sum of Rs.67,70,697 being the amount paid for raw material at port for TV Today order, claim for Rs.39,18,821 being the advance paid against testing equipment and raw materials, claim for Rs.50,17,147 towards overheads and various other expenses and the claim for refund of the sum of Rs.17.37 lakh paid by CNPL towards share capital to Bisquare and Mr. Baoni.

Scope of Section 34(4) of the Act

47. The next question that arises is whether the above claims as mentioned in para 44 that have been erroneously rejected by the learned Arbitrator can be allowed by this Court in exercise of its powers under Section 34(4) of the Act?

48. Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either "adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award". This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so.

49. In ***Union of India v. Arctic India 2007(4) Arb LR 524 (Bom)***, a learned Single Judge of the Bombay High Court opined that the Court can modify the Award even if there is no express provision in the Act permitting it. The Court followed the decision of the Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy (2007) 2 SCC 720***. A similar view has been taken by a learned Single Judge of this Court in ***Union of India v. Modern Laminators 2008 (3) Arb LR 489 (Del)***. There the question was whether in

light of the arbitrator having failed to decide the counter claim of the respondent in that case the Court could itself decide the counter claim. After discussing the case law, the Court concluded that it could modify the award but only to a limited extent. It held (Arb LR, p. 496):

> "Such modification of award will be a species of 'setting aside' only and would be 'setting aside to a limited extent'. However, if the courts were to find that they cannot within the confines of interference permissible or on the material before the arbitrator are unable to modify and if the same would include further fact finding or adjudication of intricate questions of law, the parties ought to be left to the forum of their choice i.e. to be relegated under Section 34(4) of the Act to further arbitration or other civil remedies."

50. However, none of the above decisions categorically hold that where certain claims have been erroneously rejected by the Arbitrator, the Court can in exercise of its powers under Section 34(4) of the Act itself decide those claims. The Allahabad High Court has in ***Managing Director v. Asha Talwar 2009 (5) ALJ 397***, held that while exercising the powers to set aside an Award under Section 34 of the Act, the Court does not have the jurisdiction to grant the original relief which was prayed for before the Arbitrator. The Allahabad High Court referred to the decision of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181***, where it was observed (SCC @ p. 208):

> "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.**" (emphasis supplied).

51. The view of the Allahabad High Court in ***Managing Director v. Asha***

Talwar appears to be consistent with the scheme of the Act, and in particular Section 34 thereof which is a departure from the scheme of Section 16 of the 1940 Act which perhaps gave the Court a wider amplitude of powers. Under Section 34(2) of the Act, the Court is empowered to set aside an arbitral award on the grounds specified therein. The remand to the Arbitrator under Section 34(4) is to a limited extent of requiring the Arbitral Tribunal "to eliminate the grounds for setting aside the arbitral award". There is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34 (4) of the Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act. Accordingly, this Court declines to itself decide the claims of CNPL that have been wrongly rejected by the learned Arbitrator.

Consequential directions

52. Consequently, as regards the above items of claims of the CNPL which have been rejected by the impugned Award, and which rejection is held to be erroneous, this Court holds that it will be open to the CNPL to approach the learned Arbitrator to decide those claims in accordance with law and pass a fresh Award.

53. O.M.P. Nos. 282 and 283 of 2005 are dismissed and O.M.P. No. 267 of 2005 is disposed of in the above terms with costs of Rs.30,000/- which will be paid by Bisquare and Mr. Baoni in equal halves to CNPL, within four weeks.

S. MURALIDHAR, J.

February 24, 2012
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