IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 377 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO. 389 OF 2023

Alkem Laboratories Limited ...Applicant/ Petitioner

Versus

Issar Pharmaceuticals Pvt. Limited ...Respondent

Mr. Darius Khambata, Senior Counsel, Mr. Chetan Kapadia, Senior Counsel, Ms. Sreenandini M. Mr. Arun Siwach, Ms. Priyanka Mitra and Mr. Karan Khetani i/by Cyril Amarchand Mangaldas for the Petitioner.

Mr. Sharan Jagtiani, Senior Counsel a/w Mr. Rohil Bandekar, Ms. Madhavi Nalluri, Mr. Hitesh Kharat, Mr. Suraj S. Ghogare i/by Suraj S. Ghogare for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 5 February 2024

ORDER :

1. By this Interim Application, the Applicant/Petitioner has sought unconditional stay on the impugned Award dated 9th June 2023 passed by the learned Arbitrator.

2. Mr. Khambata, the learned Senior Counsel appearing for the Applicant has submitted that the impugned Award suffers from perversity as well as being patently illegal and presently he restricts his arguments on the findings of the learned Arbitrator on damages.

3. Mr. Khambata has submitted that the learned Arbitrator has in the impugned Award noted that the claim of damages of the Claimant/Respondent herein was for short purchase of vials of MELGAIN. The Claimant had not based its claim on price. The learned Arbitrator has held at paragraph H(2)(p) that the practical relevance of distinction is that rules on damages do not apply to a claim for the price e.g. the seller need only to prove that the price is due according to the terms of the particular contract and there is no need for him to prove any actual loss suffered by him, as a result of the buyer's failure to pay. The whole concept of remoteness of damage is therefore, irrelevant in the case of a claim of price.

4. The learned Arbitrator has held in paragraph H(2)(p)

of the impugned Award as under :-

> "*(i) Evidently, the claim in the arbitration is one for damages for breach of contract by Respondent. It is not a claim for the price of goods under a contract. According to the Tribunal, the alternative case sought to be made out by Claimant as being one of specific performance of obligations of the past and therefore falling under Article 54 of the Limitation Act, 1963, is not valid. It has been set out herein above that the case made out by Claimant against Respondent in the Statement of Claim arose out of a breach of an obligation under the said agreement namely the breach of the allegation to purchase the obligation of the minimum purchase clause in the said agreement. Breach of duty is wrong. The requirement of a wrong in a claim for damages.*
>
> *(ii) In the present case, Claimant has not claimed money as due and payable to Claimant under the terms of the contract which Respondent had agreed to pay. Claimant's monetary claim expressly arises out of the breach of the obligation by Respondent to purchase minimum quantity of the product MELGAIN each year from the year 2007.*"

5. Thus, the impugned Award proceeds on the basis that the Claimant's claim is one for damages and not for price.

6. Mr. Khambata submitted that inspite of the learned Arbitrator observing that the Respondent/Claimant has a claim of damages failed to consider any proof of loss suffered by the Claimant while awarding the claim. He has submitted that the learned Arbitrator has on the contrary measured the damages allegedly caused to the Claimant/Respondent by taking price of 5 ml and 2 ml vials of MELGAIN for the relevant years and this is apparent from the tabular statement at paragraph 25 of the impugned Award.

7. The learned Arbitrator though concluding that the Claimant was entitled to the claim for damages for the failure to purchase the Minimum Purchase Volume ("**MPV**") of product MELGAIN in the year 2011-12, did not apply the legal requirement of "proof of loss" while awarding the Claimant's claim for damages. The Marketing and Distribution Agreement ("**MDA**") entered into between the Petitioner and the Respondent on 21st

February 2007 did not provide for liquidated damages. Therefore, an Award of unliquidated damages could only have been made based on assessment of actual loss or injury caused to the party suffering the alleged breach under the terms of the MDA. This had not been proved by the Claimant and in view of which the awarding of such claim for the year 2011-12 suffers from patent illegality.

8. Mr. Khambata has submitted that the learned Arbitrator failed to consider the burden of proof to show proof of loss was on the Claimant, who had miserably failed to discharge it. He has placed reliance on the written submissions filed by the Petitioner before the learned Arbitrator at paragraphs 11.3 to 11.5 (pages 2360-2363 : Volume XI of the Compilation of Documents). He has submitted that this is further evident from the charts placed on record by the Claimant Witness No. 1 (CW-1) in his Affidavit of Evidence (page 585; Volume III of the Compilation of Documents).

9. Mr. Khambata has submitted that except for 12,317 units, the Claimant did not even manufacture the balance deficit

units. The Claimant only manufactured units of MELGAIN upon receiving orders from the Petitioner. Hence, the alleged deficit in the MPV were merely future goods as provided for under Section 2(6) and 6 of the Sale of Goods Act, 1930 for which there was never any sale and for which the Claimant could never have been awarded the price thereof.

10. Mr. Khambata has submitted that though the learned Arbitrator had observed that the claim was one of the damages, the learned Arbitrator has in awarding the claim of the Claimant awards the amount as price. This is despite concluding that the claim of price was not made out. He has submitted that the learned Arbitrator has used the measure of "least financial exposure" and "strict obligations" to award the claim of price as according to the learned Arbitrator, "total price payable for 2 ml and 5 ml" vials were to be considered for the year allowed i.e. 2011-12.

11. Mr. Khambata has submitted that the operative part of the Award read with the tabular form at paragraph 25 of the

Award is solely based on the price payable for the MPV under the contract for the years 2011-12, which were allowed. He has submitted that the learned Arbitrator has not even taken into consideration, the cost which would have been incurred by the Claimant for manufacturing the product MELGAIN and which necessarily would have to be deducted from the price payable by the Petitioner. He has referred to several places in the impugned Award wherein the learned Arbitrator has consistently held that this was a claim for damages and that the Respondent/Claimant is entitled to claim for damages suffered. Thus, he has submitted that there are contradictory findings apart from the findings being contrary to settled law.

12. Mr. Khambata has submitted that according to the settled law, the proof of actual loss is *sine qua non* in a claim for damages. Although this proposition was extensively argued before the learned Arbitrator and specifically pleaded in the written submissions filed by Petitioner, the learned Arbitrator has acted contrary to law in awarding the claim of damages without there being proof of actual loss.

13. Mr. Khambata has referred to decisions of the Supreme Court in this context. He has submitted in **Anil Gautam Jain Vs. Hindustan Petroleum Corporation Limited**[1], this Court found patent illegality in an Award which awarded damages when there was no evidence to prove damages.

14. Mr. Khambata has placed reliance upon the decision of the learned Single Judge of this Court in **Jackie Kakubhai Shroff Vs. Ratnam Sudesh Iyer**[2], wherein this Court had granted unconditional stay of the Award by *prima facie* finding that the Respondent did not lead any evidence to prove the damages and more particularly, the liquidated damages.

15. Mr. Khambata has submitted that in the light of the settled principles of law holding that an arbitral Award, awarding damages without any evidence on damages suffered or proof of loss, is patently illegal and hence, the impugned Award is liable to be unconditionally stayed.

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1 **2018 SCC OnLine Bom 917**

2 **2018 SCC OnLine Bom 21214**

16. Mr. Jagtiani, the learned Senior Counsel appearing for the Claimant has submitted that under Clause 1 of the MDA, which is the definition clause, the expression “price schedule” has been defined to mean the schedule of prices for the product MELGAIN as agreed by the parties, in writing, from time to time with the current price schedule having been set out in Annexure B to the MDA. Further, the MDA is in respect of the product MELGAIN which was to be produced and made available in roll on bottles of either 2 ml or 5 ml. The price of a MELGAIN roll on bottle of 2 ml would be priced in the first year at 128 per pack and a MELGAIN roll on bottle of 5 ml would be priced in the first year at 284 per pack. The product price is stated to be in Annexure C of the MDA for the first year and which shall increase at the rate of 10% every two years. The purchase orders were to be placed by the Petitioner on the Claimant and was to be in multiples of 20,000 vials for 2 ml pack and in multiples of 8000 vials for further 5 ml packs. Further, it is an admitted position that Clause 3 of the MDA provides for “Minimum Purchase Volumes” and that the said minimum volumes are set forth in Annexure C of the MDA. The parties have agreed that at the end of the first year from the date of MDA, the

Respondent shall purchase the minimum quantities set forth in Annexure C.

17. Mr. Jagtiani has submitted that the quantities of the product MELGAIN to be purchased for each year is an admitted position. For the year 2011-12, it comes to 8,29,000 units. Total units actually purchased by the Petitioner for this year is 2,88,000 units. The shortfall is 5,41,000 units. On the principle of least financial burden to the Respondent, the shortfall has to be split into 40,000 units of 5 ml and 5,00,000 units of 2 ml. This amounts to Rs. 5,99,70,000/- in respect of 5 ml and Rs. 1,09,46,800/- for 2 ml. Thus, total amount due to Respondent/Claimant as principal amount of Rs. 7,09,16,800/- which has been awarded.

18. Mr. Jagtiani has submitted that the MDA is an exclusive contract under which the Respondent was appointed as "exclusive/sole Marketing, Distribution and Sales agency for MELGAIN" in accordance with the terms and conditions of the MDA. This is expressly provided for in Clause 2.1 of the MDA. He has submitted that under Clause 13.1 of the MDA, it is provided

that during the tenure of the MDA, the Claimant shall not, directly or indirectly in any manner, market, sell and/or distribute any product that competes with MELGAIN.

19. Mr. Jagtiani has submitted that the present case is not an ordinary case for sale of goods under which the purchaser has failed to fulfill his obligation to purchase and the seller is in a position to dispose of/sell the goods in the market which the purchaser failed to buy. In the present case, the Claimant having been appointed as the "exclusive/sole Marketing, Distribution and Sales agency for MELGAIN" in accordance with the terms and conditions of the MDA, the consequence being that the Claimant could not during the term of the MDA manufacture and proceed to market and/or sell and/or distribute the product MELGAIN.

20. Further, the Claimant was obliged under the terms of the MDA to manufacture MELGAIN which has to be sold to the Respondent only (subject to some quantities to be delivered to USV Limited under a separate Agreement).

21. Mr. Jagtiani has submitted that if the Claimant manufactured the product MELGAIN in the face of a breach to purchase the MPV in any year by the Petitioner and then proceeded to market and/or sale and/or distribute the same for a price, the Claimant would be in breach of the terms of the MDA and would be disabled itself in law from being granted relief such as specific performance.

22. Mr. Jagtiani has submitted that the learned Arbitrator has expressly observed in paragraph I of the Award at pages 187-188 of the Arbitration Petition that the present case is not an ordinary case for sale of goods under which the purchaser has failed to fulfill his obligation to purchase and the seller is in a position to dispose of / sell the goods in the market which the purchaser failed to buy.

23. Accordingly, the learned Arbitrator has been held that the analogy of an ordinary sale/purchase agreement of the goods and principles of law in that regard would not be applicable in the present case. The Petitioner's contention that the Claimant was, if

at all, entitled to nothing more than the profit that the Claimant would have earned and not the price of the purchased quantities of MELGAIN by the Petitioner under the terms of the MDA was rejected.

24. Mr. Jagtiani has submitted that another aspect which had been raised by the Petitioner herein is that it was an admitted position that the Claimant had a contract with USV Limited for commercial exploitation by USV Limited in the same territory and Clause 2.5 of the MDA, *inter alia* provided that the Claimant expressly reserved its right to supply 2 ml vials to USV Limited. Therefore, it was open for the Claimant to supply 2 ml vials to USV Limited. The learned Arbitrator has dealt with the submissions by arriving at a finding that the burden of proving that the Claimant could assert a right and compel USV Limited to purchase the said unpurchased 2 ml vials of MELGAIN rested upon the Petitioner. The Petitioner had not brought on record anything to show or prove that the Claimant had a right to compel USV Limited to purchase the said unpurchased 2 ml vials of MELGAIN and USV Limited was obliged to purchase the said unpurchased 2 ml vials of

MELGAIN, which the Petitioner herein had failed to purchase. That in absence of material on record in this arbitration, it was not possible to come to a conclusion that the Claimant could have imposed an obligation upon USV Limited to purchase the 2 ml vials of MELGAIN, which the Petitioner had failed to purchase in any year. This contention raised by the Petitioner herein in the alternative was rejected.

25. Mr. Jagtiani has referred to the decision of the learned Single Judge of this Court in **Kishor Shah & Ors. Vs. Urban Infrastructure Trustees Ltd. & Ors.**[3], wherein this Court has held in the facts of that case that this is hardly the kind of exceptional, unique and compelling case required for an unconditional stay of a money award or decree. There can be no unconditional stay. To meet that standard, the impugned award or decree must be shown without any great convolutions to be facially perverse and untenable. It is not enough to show that this or that finding presents discomfort to the losing party.

3 **2020 SCC OnLine Bom 4098**

26. Mr. Jagtiani has referred to the decision of the Supreme Court in **Gemini Bay Transcription Private Limited Vs. Integrated Sales Service Limited & Anr.**[4], at paragraph 78, wherein the Supreme Court has held that such 'guesstimates' are not a stranger to the law of damages in the U.S. and other common law tradition nations has been established very early on in a judgment of Ashutosh Mookerjee, J. reported as **Frederick Thomas Kingsley v. The Secretary of State for India**[5].

27. Mr. Jagtiani has submitted that in the present case, the learned Arbitrator was fully entitled to estimate the damages caused to the Claimant in the Award. He has submitted that this does not fall within an exceptional, unique, compelling case requiring an unconditional stay of a money Award or Decree.

28. Mr. Jagtiani has further relied upon a recent decision of the learned Single Judge of this Court dated 5th April 2023 in **Maharashtra State Electricity Distribution Company Limited**

4 **(2022)1 SCC 753**

5 **AIR 1923 Cal 49**

(MSEDCL) Vs. Cobra Instalaciones Y Services, S.A.[6], wherein the learned Single Judge has held that unless there is a strong *prima facie* case, which would be satisfying the test of it being an exceptional and overwhelmingly compelling case for grant of unconditional stay of the impugned arbitral Award, the same cannot be granted.

29. Mr. Jagtiani has further referred to the Supreme Court decision in **Toyo Engineering Corporation & Anr. Vs. Indian Oil Corporation Limited**[7] and **Manish Vs. Godawari Marathawada Irrigation Development Corporation**[8], wherein the Supreme Court has held that the Award being a monetary decree, there should be 100% deposit, with the Respondent being entitled to withdraw the amount deposited upon furnishing solemn security to the satisfaction of this Court.

30. Mr. Jagtiani has accordingly, submitted that the Petitioner herein is required to deposit the awarded amount under

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6 **IAL-25262-22-CARBP-39-22 Order dated 5.04.2023**

7 **2021 SCC OnLine SC 3455**

8 **2018 SCC OnLine SC 3863**

the impugned Award which necessarily would be a condition for grant of stay of the impugned Award.

31. Having considered the submissions, in my *prima facie* view, this is one such exceptional, unique and compelling case requiring an unconditional stay of the money award or decree.

32. The impugned Award has inspite of observing at several places that the claim of the Claimant is one of a claim for damages and not for price has gone on to measure damages on the price payable for the product MELGAIN as per the Minimum Purchase Volumes ("**MPV**") under Annexure C read with Clause 2.1 of the MDA.

33. It is settled law that for a claim for damages, there must be proof of actual loss which is *sine qua non* for such claim. The learned Arbitrator in my *prima facie* view has acted contrary to the settled law in not considering whether there was proof of actual loss in granting the claim for damages. This determination was essential given the finding that the Claimant's claim is one for

damages and not for price. On the contrary, the learned Arbitrator has proceeded on the premise that the MDA being an exclusive agreement under which the Claimant has been appointed as "exclusive/sole Marketing, Distribution and Sales Agency for MELGAIN" by the Petitioner could not have directly or indirectly in any manner, marketed, sold and/or distributed any product to any other party, as this would have resulted in breach of the terms of MDA.

34. The learned Arbitrator has by treating the MDA as a unique contract overlooked the settled law viz. for grant of the claim for the damages, it would not be necessary for the Claimant to prove actual loss or damages. Presuming that the learned Arbitrator was correct in measuring damages on the basis of price of MPV set out in Annexure C read with Clause 3.1 of the MDA, there is a fundamental flaw in the computation of damages arrived at. There is a failure to take into account the cost of manufacturing as well as of manpower which would necessarily have to be accounted for and deducted from the Award of total price for balance of 2 ml and 5 ml vials of MELGAIN. In other

words, without there being manufacture of the product, the Claimant has been awarded the full price of MELGAIN.

35. Mr. Jagtiani has in fact referred to an email dated 22nd May 2013 wherein for the year 2013 though there were no purchase orders from the Petitioner and inspite of which for the months of February, March, April and May of that year, men, material and machinery were kept idle by the Claimant for four months or more and for which payment was required to be made. Thus, it is the Claimant's own contention that there was manpower required to be kept at the Claimant's factory premises for carrying out the manufacturing of the product MELGAIN and hence, their cost was necessarily a factor to be taken into account and to be deducted from the damages awarded.

36. In my *prima facie* view, the impugned Award suffers from perversity as well as patent illegalities. The learned Arbitrator has given a go bye to the settled law laid with regard to the claim of damages for which actual loss is required to be proved. Further this Court in **Anil Gautam Jain** (supra) has found there to be

patent illegality in an Award which awarded damages, when there was no evidence to prove damages. Further, the learned Single Judge of this Court in **Jackie Kakubhai Shroff** (supra) has granted unconditional stay of the Award where the impugned Award *prima facie* indicated that the Respondent did not lead any evidence to prove the damages and more particularly, liquidated damages. Although an attempt was made by Mr. Jagtiani to distinguish this decision on the ground that in that case there was no pleading before the learned Arbitrator on behalf of the Respondent therein alleging that claim of damages was not under Section 73 of the Contract Act and was in the nature of liquidated damages, whereas in the present case, this is not the position. I do not find any merit in this distinction as the present case as well as in that case, the Claimant had not lead any evidence to prove damages. Further, in the present case, it is an undisputed position that the claim is one of unliquidated damages falling under Section 73 of the Contract Act, which necessarily requires actual proof of loss.

37. Thus, I am not inclined in the present case to impose a conditional stay on the impugned Award, mindful of the fact of the

Supreme Court in respect of arbitral awards which amount to a money decree has directed 100% deposit. I find this to be an exceptional, unique and compelling case for an unconditional stay of the impugned Award.

38. Thus, the impugned Award dated 9th June 2023 is stayed without any deposit.

39. Interim Application is accordingly, made absolute in terms of prayer clause (a).

40. Hearing of the Arbitration Petition is expedited. There shall be no order as to costs.

[R.I. CHAGLA J.]