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

ARBITRATION PETITION NO.874 OF 2015

John Distilleries Pvt. Limited … Petitioner
Versus
The Brihan Maharashtra Sugar
Syndicate Limited … Respondent

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Mr. Aditya Bapat I/b Mr. N.V. Khaladkar for the Petitioner.
Mr. B.N. Poojari, Sristhi Poojari and Nidhi Bangera for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 14 JANUARY 2019

(Oral Judgement)

. Heard learned counsel for the parties. This arbitration petition challenges an award passed by a Sole Arbitrator in a reference between the parties arising out an agreement dated 1 March 2007. The agreement was for manufacturing of the Petitioner's liquor products.

2 The Petitioner has been engaged in the business of manufacturing, blending and bottling of Indian Made Foreign Liquor (IMFL). On or about 1 March 2007, an agreement was entered into between the Petitioner (who was the respondent to the reference) and the Respondent (who was the claimant before the arbitral forum) *inter alia* engaging the services of the Respondent for manufacture, on priority basis, of various liquor products of the Petitioner in the State of Maharashtra. The agreement contained

schedules providing for matters such as specifications of the products as well as names of the brands, products covered under the agreement for sharing of revenues and sums payable by the Petitioner to the Respondent for manufacture of the products. The relevant schedule, Schedule IV, provided the rate of Rs.30/- per case of product (excluding 90/60 ml size) *inter alia* for the brand "Original Choice Whisky". It was the Respondent's case before the arbitral forum that in a meeting held on 29 July, 2008 at Hotel Le Meridian, Pune between the representatives of the parties, it was agreed that these bottling charges would be increased by Rs.10/- per case (containing 9 bulk litres of liquor). The claimant claimed to have sent an e-mail along with a letter requesting the Petitioner to confirm the minutes of this meeting. It was submitted that though there was no response in writing to this communication, the Respondent, with consent from the Petitioner, went on adjusting from a jointly operated account payments towards bottling charges at the rate of Rs.40/- per case (i.e. with an addition of Rs.10/- per case). It was the Petitioner's case that as of November, 2009, a sum of Rs.40,46,165.87 was due and payable by the Petitioner to the Respondent after the payments adjusted as above. Correspondence in this behalf ensued between the parties, where the Respondent reiterated its demand for the unpaid sum from time to time. It was the Respondent's case that a meeting thereafter was held between the parties on 22 January 2009 at the Respondent's office at Pune, whereat the Petitioner's representative confirmed the amount of Rs.40,46,165.87 as due and payable by the Petitioner to the Respondent and agreed to pay the same in four installments. It was submitted that no payment, however, was made by the Petitioner. Accordingly, a legal notice dated 8 February 2010 was sent to the Petitioner for recovery of the sum and thereafter the

present reference was filed. In his impugned award, the learned sole arbitrator held that the Respondent had proved the agreement dated 1 March 2007 as also its variation on 29 July 2008, by which the bottling charges were revised from Rs.30/- per case to Rs.40/- per case. The arbitrator held that the Petitioner had failed to pay the agreed amount and as a result, awarded a sum of Rs.64,08,685.82, comprising of principal amount of Rs.40,46,165.87 and balance interest. This award has been challenged in the present arbitration petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act").

3 Learned Counsel for the Petitioner submits that the manufacturing agreement between the parties could not have been amended orally in view of clause 32 thereof, which provided for change or alteration of any term of the agreement only if both parties to the agreement consented to such change or alteration in writing. Learned Counsel submits that it was, accordingly, not open to the parties to amend or alter the original agreement by any oral agreement, and even if any such oral agreement was made, the same would be void. Learned counsel submits that inspite of this ground being specifically raised in the written arguments submitted by Petitioner, the learned arbitrator did not consider this aspect and erroneously decided the matter on the basis that the oral agreement had the effect on modifying the written agreement between the parties. Learned Counsel submits that the arbitrator's finding in this behalf is contrary to the express terms of the contract between the parties, and thus contains a patent illegality. Learned Counsel relies on the judgment of the Supreme Court of UK in the case of **Rock Advertising Limited Vs. MWB**

Business Exchange Centres Limited[1] in support of his submissions. Learned counsel, secondly, submits that the arbitrator's finding is based on no evidence. It is submitted that the amount of Rs.40,46,165.87 was said to be charges towards TCS and VAT dues. It is submitted that this amount was awarded despite there being no evidence of any TCS and VAT dues.

4 The learned arbitrator *inter alia* came to a finding that the oral agreement between the parties in the meeting held at Hotel Le Meridian, Pune on 29 July 2008 between senior executives of the parties, including the Chairman of the Petitioner, was proved by oral and documentary evidence led by the parties. The arbitrator held that the Respondent's witness (CW-3) had deposed to this meeting, which was personally attended by him along with others. The learned arbitrator believed in his testimony and held that in the meeting, the Petitioner had agreed to a revision of bottling charges. The learned arbitrator observed that the Petitioner, for its part, did not examine its Chairman or its Director, both of whom were present in the meeting held on 29 July 2008 and that, in the premises, an adverse inference could be drawn against it. The arbitrator also observed that the testimony of the Petitioner's witness (R.W.1) showed that from 1 August 2008 to 17 December 2009, the Petitioner had never objected to the Respondent raising bills at the enhanced rate as also debiting the designated bank account towards such additional bottling charges. The learned arbitrator noted that this account was being operated jointly by the representatives of the parties and it was improbable that the Petitioner did not know about the debits in the account towards bottling charges at revised rate. The learned arbitrator, in the premises,

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held that there was a consensus between the parties insofar as the revision of the bottling charges was concerned.

5 The learned arbitrator's view in this behalf is clearly a possible view, which is supported by evidence. It does not suggest a finding based on no evidence. As long as there is some evidence to sustain a finding, the challenge court under Section 34 of the Act does not interfere with the award. Sufficiency of evidence is something for the aribitral forum alone to rule on.

6 Learned counsel for the Petitioner, however, relies on the principle of law discussed in the English judgment in **Rock Advertising Limited** (supra). Learned Counsel submits that 'no oral modification' clauses, such as clause 32 in the present agreement, which are commonly included in written agreements, are legally enforceable; the parties must be held to their bargain as to the form of variation agreed to by them in the original contract. In **Rock Advertising Limited**, learned Judges of the Supreme Court of UK appear to have considered the subject as a matter in principle. The question framed was whether a contractual provision requiring specified formalities to be observed for a variation should be given effect to as a matter of law or not. The learned Judges held that the principle of “party autonomy” could not be extended so as to allow the parties to override their intention originally expressed in the contract; Party autonomy operated upto the point when the contract was made, but thereafter only to the extent that the contract allowed. The learned Judges referred to in this behalf the advantages of the common law's flexibility about formal validity and yet held that 'no oral modification' clauses were

required to be honored, discussing the rationale behind including such clauses. The learned Judges held that there was no mischief in such 'no oral modification' clauses nor did they frustrate or contravene any policy of the law. It is one thing to say that 'no oral modification' clause, such as what we are concerned with in the present case, is by itself enforceable and should be ordinarily honoured, but quite another to say that the parties having not only made a variation in a manner different from the one agreed to, but having acted in pursuance of such variation, the party objecting to such variation later would be precluded by its conduct from relying on a 'no oral modification' clause included in the original contract. There is no contradiction between the two propositions; both may well hold good. (In our case, the oral agreement was consistently acted upon by the parties for a long period of time.) Besides, whatever view the court may take of a no oral modification clause generally or in the particular case we are concerned with, the mandate of the challenge court under Section 34 of the Act is to see whether the view taken by the arbitrator, even if it be on a question of law or its application to the facts of the case, is a possible view or view which a fair and judiciously minded person could well take. As the evidence before the arbitrator stood, which is briefly referred to above, the view taken by the learned arbitrator on this point could well be said to be a possible view. It is supported by evidence; it does not take into account any irrelevant or non-germane material or disregard any relevant or germane material. The view must in that case pass muster under Section 34 of the Act.

7 Insofar as the second ground of attack, namely, the ground of lack of evidence of any damage on account of TCS and VAT dues is concerned, it is

pertinent to note that what was claimed in the reference by the Respondent herein was bottling charges not paid by the Petitioner. The amount of Rs.40,46,165.87 was claimed to be due at the foot of the account. Though in the course of its narration, the Respondent did refer to the amount as resulting into non-payment of dues of TCS and VAT into Government treasury within the stipulated period, it is not its case that what was claimed was damages towards such TCS and VAT dues. What was claimed in the correspondence was that the amount of Rs.40,46,165.87 would have mainly corresponded to TCS and VAT dues. In other words, the assertion was that the amount majorly represented TCS and VAT dues, and not what was claimed was either TCS or VAT charges or any amount on account thereof. Anyway, it is obvious that the whole claim considered by the learned arbitrator proceeded on the footing that it was the amount due at the foot of the account. The learned arbitrator considered in this behalf the evidence of alteration of the agreement on 29 July 2008, debiting of the bank account without any demur on the part of the Petitioner towards additional bottling charges, the minutes of meeting between the parties held on 22 January 2010 and correspondence addressed by the Respondent to the Petitioner in pursuance thereof, to come to his conclusion on the quantum of dues payable by the Petitioner. All this material supports the arbitrator's finding on the quantum of the dues. It is not as though the finding is without evidence.

8 The challenge to the impugned award, thus, has no merit. The Arbitration Petition is accordingly dismissed.

(S.C. GUPTE, J.)