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IN THE HIGH COURT OF DELHI AT NEW DELH

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O.M.P. No.693/2009 & O.M.P. No.694/2009

Reserved on: November 30, 2009.

Pronounced on: December 4, 2009.

1. **O.M.P. No.693/2009**

SANDEEP KHANNA,
Sole Prop. of M/s. Kripa Overseas ...Petitioner

Through: Mr. D.K.Rustagi, Advocate with Mr.
Anuj Parkash, Advocate.

VERSUS

NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING
FEDERATION OF INDIA LTD.(NAFED) Respondents

Through: Mr. T.K.Ganju, Senior Advocate with
Mr.A.K.Thakur, Advocate and Mr.
R.K.Mishra, Advocate.

2. **O.M.P. No.694/2009**

RAJESH KHANNA
Prop. of Rital Impex ...Petitioner

Through: Mr. D.K.Rustagi, Advocate with Mr.
Anuj Parkash, Advocate.

VERSUS

NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING
FEDERATION OF INDIA LTD.(NAFED) Respondents

Through: Mr. T.K.Ganju, Senior Advocate with

Mr.A.K.Thakur, Advocate and Mr.
R.K.Mishra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT

VALMIKI J.MEHTA, J.

1. These are petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) challenging the Award dated 24.4.2009 passed by the sole Arbitrator.

2. By the impugned Award all that the Arbitrator has done is that he has given effect to a written settlement entered into between the parties which is dated 3.5.2007 and as modified by a subsequent order dated 4.4.2008 passed by this Court in a Criminal Writ Petition which was filed by one of the parties in a related matter seeking quashing of the FIR.

3. The facts, in brief, are that the respondent National Agricultural Cooperative Marketing Federation of India Limited (NAFED) advanced monies to two sole proprietorship concerns M/s. Rital Impex (sole proprietor: Mr.

Rajesh Khanna) and M/s. Kripa Overseas (sole proprietor: Mr. Sandeep Khanna). The advances which were given by the respondent to the proprietorship concerns were for procurement of dry fruits and other items and also for purchase/import of inter alia Heeng, iron scrap etc. A total sum of Rs.75 crores was advanced to M/s. Rital Impex and a sum of Rs.10 crores was advanced to M/s.Kripa Overseas. On account of default of the sole proprietorship concerns to repay the amounts to the respondent, disputes and differences arose pursuant to which different petitions under Arbitration & Conciliation Act, 1996 were filed in this Court. One of the petition which was filed, was by respondent under Section 9 of the Act seeking attachment with respect to certain properties which were mortgaged to the respondent as security for refund of the amounts. The other set of petitions were filed by the sole proprietorship concerns for the appointment of Arbitrators. In the petition under Section 9, an order of attachment was made with respect to certain properties and in the petitions for appointment of Arbitrator, two separate Arbitrators were appointed, namely, Justice D.P. Wadhwa (Retd.) and Justice Devinder Gupta (Retd.). The latter was appointed as the sole Arbitrator in the petition filed by M/s. Rital Impex and the former was appointed as the sole Arbitrator in the case filed by M/s. Kripa Overseas.

4. Criminal proceedings were also initiated by the respondent and FIR Nos. 474/06 and 223/07 were got registered for offences under Sections 406,420 read with Section 120B of IPC. In the meanwhile, talks of settlement were in progress and consequently, after exchange of a number of letters the proprietorship concerns on 3.5.07 forwarded to NAFED its proposal as regards the terms of settlement for all the pending disputes. Certain properties were also agreed to be kept as security/mortgage till repayment of the entire agreed amount. The family members of the sole proprietors Rajesh Khanna and Sandeep Khanna, who owned such properties ratified the terms of the settlement and agreed to be bound by the same. The terms of the settlement were accepted by NAFED and the parties thereafter entered into a deed of settlement on 3.5.2007. Pursuant to such settlement, when the criminal case was listed on 14.5.2007 in the Court of the Additional Sessions Judge, New Delhi where an application for grant of bail was pending, counsel for the parties and NAFED stated that compromise had taken place and consequently taking note of this development, the Additional Sessions Judge adjourned the application for bail with the direction that the applicants be not arrested in the meanwhile. To give effect to the settlement, two applications were filed in the Section 9 petition of NAFED . First application was for taking on record the terms of the settlement and the second application was for impleadment of the family members of Sh.

Rajesh Khanna and Sh. Sandeep Khanna. The Learned Single Judge allowed the application for impleadment and recorded that the settlement was duly signed by the parties and ratified by both the sole proprietors and their family members who had also given their individual guarantees and undertakings for implementation of the settlement. The Learned Single Judge consequently recorded that the arbitration proceedings had become redundant and the O.M.P. was disposed of with liberty to move an appropriate application seeking implementation of the terms of the compromise. It may be noted that neither any decree nor any Award was passed in terms of the settlement.

5. In the meanwhile, the proceedings before the Arbitrators were got adjourned sine die with liberty to the parties to apply for revival.

6. The sole proprietors, and the guarantors however, failed to honour their commitments of making the payment of the dues and the respondent opposed the prayer for grant of any further extension of time for payment by the petitioners. In this background an offer was made for slight modification in the manner of discharging the liability and consequently in the Criminal Writ Petition pending in the High Court the Learned Single Judge by order dated 24.3.2008 called upon the parties to file affidavits with respect to modification that the properties which were attached/mortgaged/pledged with NAFED can be sold by public auction, instead of the same being sold by the concerned parties.

Again there were developments, in that, affidavits which were filed were not proper and there were certain conditions stated in the affidavits, ultimately, appropriate affidavits withdrawing the conditions were filed and the interim protection granted in favour of the accused that they be not arrested was directed to be continued. In view of the express consent of the parties, the Learned Single Judge also directed that public auction shall take place of the properties and a retired Judge of this Court was appointed as Court Observer to oversee the public auction.

7. Since no final order had been passed giving shape to the terms of the settlement in the form of an Award, an application was filed in the disposed of OMP No.595/06 in which Justice D.P.Wadhwa (Retd.) was appointed as a sole Arbitrator with respect to the disputes with M/s. Kripa Overseas. The prayer in this application was for clubbing of the two references and termination of the mandate of Justice D.P. Wadhwa(Retd.) and for reference of the disputes to a common Arbitrator who would pass a common Award to effectuate the settlement in the form of an Award. The Learned Single Judge by the order dated 24.4.2008 directed that in the interest of justice, a common Award be passed and accordingly the application was allowed and that is how the impugned Award came to be passed by the sole Arbitrator Justice Devinder

Gupta (Retd.) after revival of the arbitration proceedings which were adjourned sine die.

8. Before the Arbitrator, two contentions/objections were raised by the petitioners. The first objection was that the settlement did not affect the counter claims which were filed by the sole proprietorship concerns and it was contended that the settlement should not be so read to mean that the counter claims have been withdrawn and adjusted in terms of the settlement as arrived at on 3.5.2007 and as modified in terms of the order dated 4.4.2008 passed by the Learned Single Judge of the High Court in the Writ Petitions(Criminal) No.461/07 and 785/07. The second objection was that no defaults have taken place and consequently, the proprietorship concerns were not liable to pay interest @ 15% on diminishing amounts as stated in the settlement but only 50% of the interest as payable. By the impugned Award, the Learned Arbitrator has held that the counter claims filed in the arbitration proceedings did not survive after the settlement was entered into between the parties on 3.5.2007 and as modified by the order dated 4.4.08 passed in the Criminal Writ Petitions. The Arbitrator also held that defaults were committed. Accordingly, by the impugned Award the Arbitrator has given effect to the settlement dated 3.5.2007 and as modified by the order dated 4.4.08 passed in the Criminal Writ Petitions.

9. Before me the counsel for the petitioners has urged three contentions. The first contention is that the impugned Award has wrongly granted interest @ 15% per annum in terms of the settlement dated 3.5.07 inasmuch as such interest was payable only if the defaults were committed and since no defaults were committed, the parties were entitled to the benefit of the waiver of interest to the extent of 50% in terms of the settlement, meaning thereby the interest did not run @ 15% per annum on the amounts as payable. The second contention which was raised was that the order dated 4.4.2008 passed in the Criminal Writ Petitions cannot be said to have amended the terms of the settlement dated 3.5.07 and it was also contended that the Arbitrator has wrongly recorded that none of the parties challenged the order dated 4.4.08 and which had become an integral part of the settlement dated 3.5.07. The third and the last contention which was canvassed was that the Learned Arbitrator has fallen into an error in holding that the counter claims were no longer alive and it was contended that the settlement dated 3.5.07 as modified by the order dated 4.4.08 did not bring the counter claims to an end.

10. Taking the last point first, the Arbitrator held that counter claims which were filed in the arbitration proceedings being prior in point of time than the settlement dated 3.5.07 merged in the settlement as arrived at on 3.5.07 and as per which settlement the sole proprietors admitted their liability to the

respondent to the tune of approximately Rs.63 crores. I do not find any fault whatsoever in this finding of the learned Arbitrator inasmuch as even before me it is not disputed that the settlement dated 3.5.07 was entered into between all the concerned parties. Once a settlement has been arrived at and in which it is categorically stated that the amounts are payable by the petitioners, its relatives etc., it does not lie in the mouth of the petitioner to contend that the counter claims survive. If that was so, a clear statement should have been made to that effect in the settlement dated 3.5.2007 and in fact even subsequently thereafter till 4.4.08 when the settlement was slightly modified when the sale of the properties were directed to take place through public auction and not by the parties themselves. This contention that the counter claims therefore survive is clearly misconceived and *mala fide* and deserves outright rejection. I may also note that the order dated 16.5.2007 passed in the joint application of the parties for recording the settlement also records that all the disputes which were referred to arbitration have been settled. All the disputes before the Arbitrators naturally would include the counter-claims. It is quite clear that the sole proprietors and the other related persons having taken the benefit of the settlement by not only postponing the repayment of the dues but getting the benefit of not being arrested are now seeking to blow hot and cold and avoid

their liability in terms of the settlement dated 3.5.07 and as modified by the order dated 4.4.08. This objection is therefore misconceived and hence rejected.

11. The second contention which was raised was that the Learned Arbitrator wrongly held that the order of 4.4.08 passed in the criminal proceedings cannot be said to have modified the terms of the settlement dated 3.5.07. Related with this plea it was further contended that the Arbitrator has wrongly recorded that none of the parties have challenged the fact that the order dated 4.4.08 is binding on the parties. So far as the latter aspect of the statement of fact recorded in the Award that the parties have not challenged the validity of the order dated 4.4.08, I feel that the said statement is clearly binding on the petitioner and the other related parties for the reason that the Award has been passed way back on 24.4.09 and copy of which Award was delivered to the parties on the same date, and, if the Award had wrongly recorded a fact that the parties did not challenge the order dated 4.4.08, then, it was incumbent upon the affected parties to immediately approach the Arbitrator seeking correction of the Award to that extent as soon as possible after the copy of the Award was received by them in view of the decision of the Supreme Court reported as *State of Maharashtra Vs. Ramdas Shrinivas Nayak (1982) 2 SCC 483* Admittedly this has not been done even till date and consequently this contention is clearly *mala fide* and misconceived. In any case on merits too, this argument does not

lie in the mouth of the petitioner because not only affidavits were filed by all the parties in the Criminal Writ Petitions, undertakings were also filed and the parties have in fact acted in furtherance of the order dated 4.4.08 passed in the Criminal Writ Petitions, and therefore, I am unable to understand as to how such a contention can even be raised by the petitioner. The order dated 4.4.2008 passed in the Criminal Writ Petition is therefore final as none of the parties had ever challenged the same. This objection therefore also fails and is rejected.

12. The last contention which was raised, and which was in fact the main contention of the petitioner, was that the Award wrongly records that defaults have been committed and consequently interest @ 15% per annum became payable. I may note that in terms of the settlement dated 3.5.07, in terms of Clause 5 thereof it was agreed that only 50% of the amount interest shall be charged and the rest would be waived and it was only on the defaults being committed that interest @ 15% per annum became payable on diminishing balance basis. What has been contended by the counsel for the petitioner is that the terms of payment as stated in the settlement dated 3.5.07 with respect to repayment are such that a default is committed only if the properties are first sold and after selling of the properties if the dues are not paid, only then can the defaults be said to have been committed. The counsel

for the petitioner has referred to clauses 2 to 4 of the settlement which are reproduced below:

“2. Rs.5 crores shall be paid within 30 days from the date permission is granted by the Hon’ble Court for sale of property being No.E-19, East of Kailash, New Delhi-110065. For that owner of this property shall give and undertaking before the court that upon disposal within 30 days Rs.5 Cr. Shall be paid to NAFED.

3. Rs.20Cr. shall be paid within next 60 days upon rising loan by mortgaging the property bearing No.A-13/B-1 and E-16/B-1, Mohan Co-Operative Industrial Estate, Mathura Road New Delhi-110044. For this purpose M/s. Rital Impex will provide copy of the sanctioned and release orders issued by the concerned bank along with an undertaking that aforesaid money will be paid to NAFED as per above admitted dates.

4. Payment of balance amount of Rs.18 Cr. Shall be paid after 90 days in three equated monthly instalments of Rs.6Cr. Each. The titled deed of property namely E-18 eat of Kailash New Delhi is already deposited with NAFED with an intention to create equitable mortgage and all the owners hereby confirm and ratify the creation of mortgage in favour of NAFED. The title deed of another property bearing number FA/B-1 Ext. Mohan Co-Operative Industrial Estate, Mathura Road, New Delhi has been lost we have applied for certified copy of the titled deed. Photocopy copy of this title deed of the said property is hereby enclosed with an intension to create mortgage to secure payment of outstanding amount payable to NAFED is terms of this offer. Original receipt of application for certified copy is enclosed herewith and we authorize NAFED to receive the certified copy directly from the concerned office and retain the said titled deed by way of equitable mortgage. It is also confirmed that these properties have not been mortgaged anywhere to any institution/persons by any of the owners of the properties and are free from all

encumbrances. Undertaking from the all property owners duly notarized are attached ANNEXURE-II.”

The counsel has more particularly relied upon the expression “upon disposal” as appearing in clause 2 as aforesaid. I may note that in fact there is also clause 1 of the settlement which states that the settlement amount has to be paid from the disposal of the properties. Though this clause has not been relied upon by the counsel for the petitioner, but I am dealing with the same anyhow, because, it is related to the argument as advanced by the counsel for the petitioner.

13. I am of the firm opinion that this contention that no defaults have been committed is clearly misconceived because a reading of the various clauses clearly show that one is the factum of payment within a time and the second is the manner by which repayment has to be made. The manner of repayment viz by the sale of the properties cannot be confused with the factum of the time of repayment. The time of repayment runs independently and disposal of the properties was only a manner and method of repayment of the dues as per the schedule of payment fixed. I do feel that the terms of the settlement have to be read in a practical way and which has been so done by the Arbitrator by holding that defaults have been committed in view of the non-payment of the instalments of Rs.5crores, 20 crores and 18crores within a period of 30 days, 60 days and 90 days as stated in the clauses 2 to 4 of the settlement dated 3.5.07. Any other interpretation would lead to an absurdity

because the same would mean that payment of the dues is indefinitely postponed depending upon the uncertain factors governing the sale of the immovable properties. In this regard I feel that there is one aspect which totally clinches the issue against the petitioners and which is that the petitioners themselves treated non-payment within the time as default inasmuch as they themselves regularly and repeatedly applied for extension of time and with respect to which requests for extension of time various orders were passed from time to time viz on 25.10.07 in Bail Application No.2339/2007 of Justice V.B. Gupta of this Court, an order dated 14.12.07 passed in I.A. No.5743/07 in O.M.P. No.291/06 by Justice Aruna Suresh of this Court and the order dated 3.1.08 passed by Justice Muralidhar in Bail Application No.2339/07, and which are some of the orders among others. If the contention of the petitioner was correct that it was only after sale of the properties would the issue of default arise, then, there was no reason why the petitioners applied and sought for repeated extensions of time. The petitioners, therefore, themselves have understood and acted upon the settlement in that the amounts became payable in terms of the time schedule fixed and which was not relatable to the sale of the immovable properties. How the parties act pursuant to a settlement is very much a factor for interpreting the settlement and so was held by the Supreme Court in the judgment reported as *Godhara Electricity Company Co. Ltd Vs.*

State of Gujarat (1975) 1SCC 199 This objection that defendants have not been committed default is therefore rejected.

14. I may note that I have considered the contentions and objections as raised by the petitioner in terms of the law as applicable under Section 34 that unless an Award is illegal, or is violative of the contractual provisions or is so perverse that it shocks the judicial conscience the Court will not interfere with an Award. I do not find any illegality or violation of the contractual provisions or any perversity in the Award in view of the discussion above. In the facts of this case even if two views are possible and the Arbitrator having adopted one, this Court will not interfere merely because the view as canvassed by the petitioners is another plausible view.

15. Objections are therefore wholly *mala fide* and misconceived because the object is to delay and defeat huge dues, which at present are to the tune of Rs.73 crores (approximately) and for recovery of which in terms of the impugned Award, an execution petition is already pending in this Court. The objections being OMP No.694/09 and 693/09 are therefore dismissed, with costs of Rs.50,000/- in each of the petitions.

16. Before I conclude, I may also state that a preliminary objection was raised by the respondent that the objections are barred by time inasmuch as the

Award was passed on 24.4.09 and parties received a copy of the Award on the same date as per the noting in the last page of the Award. Thus according to the respondent the limitation period expired after four months from 24.4.09 i.e. 24.8.09, and whereas these petitions have been filed only much later on 24.11.2009. It was also contended that even assuming that additional copies of the Award were taken later on as contended by the petitioner, yet the same cannot give additional period of limitation. I am of the view that this objection is well founded and the objections are clearly barred by time. The counsel for the petitioners has contended that some other objections against the impugned Award were filed in time but since they contained only a copy of the Award the same were therefore withdrawn. In my opinion this stand is clearly a misconceived stand, because, neither are such papers before me and nor can withdrawal of one set of objections and filing a fresh/new petition mean that the filing of the fresh set of objections are relatable to the filing of the old objection petition which was not pursued. The present set of objection petitions have to be seen as independent petitions as they have been filed for the first time only on 24.11.2009. It is not that the present petitions are the refiling of the so called old objection petitions which were filed earlier. I may reiterate that I have not been pointed out any fact in the present petition nor are any documents annexed with respect to older petitions which were filed. I may note that

though I could have dismissed the petitions on the ground being of time barred, but, since the petitions were exhaustively argued before me, I have thought it fit to dispose of the objections on merits also.

17. Accordingly, the objections are misconceived and are liable to be dismissed both on account of lack of any merits in the same and also on account of being barred by time and are so accordingly dismissed.

VALMIKI J.MEHTA, J

December 4, 2009

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