

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision : 17.11.2011

+ **FAO (OS) No. 351 of 2011**

EARTHTECH ENTERPRISES LTD Appellant
Through: Mr. Manish Gandhi, Mr. Satinder Kapur &
Mr. Aman Yadav, Advocates.

Versus

**NATIONAL AGRICULTURAL CO-OPERATIVE
MARKETING FEDERATION OF INDIA LTD** Respondent
Through: Mr. A.K. Thakur, Mr. Chanchal Kumar &
Mr. Sayad Aqib Ali, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers
may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be
reported in the Digest? No

SANJAY KISHAN KAUL, J. (Oral)

1. A Memorandum of Understanding (for short 'MoU') was entered into between the appellant and the respondent on 16.10.2003 followed up with an addendum signed on 12.2.2004 qua High Seas Sale contracts for importing various materials. The material to be imported was to be sold on High Seas Sale basis against 100

per cent payment for full value of the material plus (+) other costs and expenses, bank charges, interest and service charges, etc. The material sold after import was to stand hypothecated/pledged in favour of the respondent till payment of dues.

2. The aforesaid arrangement worked satisfactorily initially but from July, 2005, it is alleged that the appellant lifted the material so imported and sold the same without payment resulting in large sums of money due to the respondent. Suffice to say, for the decision of the present appeal, that it is the say of the respondent that the appellant even issued post dated cheques amounting to ₹250.00 crore, which were also dishonoured. The disputes could not be resolved and the matter is pending in arbitration before Justice Jaspal Singh (Retd.) as the sole arbitrator.
3. The respondent filed an application before the Court under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act'), which was registered as OMP No.558/2007. It was pleaded in the application that the respondent had already laid a claim of ₹3,04,14,69,002.00 plus (+) interest against the appellant before the arbitrator (there is a counter claim of the appellant). It was alleged that the appellant may not be able to pay the amounts if a decree was to be passed and keeping in mind the factum of the dishonoured cheques, the appellant should be called upon to furnish security. The relevant prayers are extracted hereinbelow:

“a. Direct Respondent No.1 to provide adequate security to the extent of outstanding balance towards the Petitioner, in the form of bank guarantee or property security or any other tangible security;

b. Direct Respondent No.1 to disclose all their assets,

moveable as well as immoveable, and after such disclosure attach those properties;”

4. In the proceedings before the learned single Judge, the appellant was called upon to file a list of immovable properties. The affidavit filed showed it had no immovable properties. The OMP was disposed of vide order dated 23.4.2009. The relevant paragraphs read as under:

“7. During pendency of this petition, the respondent was asked to file a list of its immovable properties and the respondent in the affidavit filed that it had no immovable property. This Court cannot enter into the merits of the matter and decide as to what amount was likely to be awarded in favour of the petitioner. Suffice it to say that there is no denial of the fact that respondent had issued PDC worth Rs.250 crore. These cheques were issued by the respondent after considering its liability towards the petitioner. Had there been no liability of the respondent towards the petitioner the respondent would not have issued these cheques. There is no denial of the fact that the petitioner had been acting as financier to the respondent and the petitioner had opened a Letter of Credit on behalf of the respondent for importing the material. This material/stock was to be sold on high seas sale basis and the money was to be transferred to the petitioner. Prima facie there is a gross breach of the contract by the respondent and the petitioner seems to have a good case before the Arbitrator.

8. Looking into the financial condition portrayed by the respondent and the fact that the petitioner has discovered that the respondent had diverted large sums of money to respondent no.2 I consider that it is necessary that respondent no. 1 should be asked to give adequate security to ensure that if an award is passed, it does not become a paper award. I, therefore direct the respondent to provide security to the tune of Rs.200 crore for the claim of petitioner either in the form of bank guarantee or property security within a period of 30 days to the satisfaction of Registrar General of this Court.”

5. It is, thus, apparent that a *prima facie* finding was reached qua the claim for security made by the respondent and, thus, the appellant was required to provide security to the tune of ₹200.00 crore for the claim of the respondent in the form of a bank guarantee or property security.
6. The appellant aggrieved by this order filed FAO (OS) No.213/2009. On 22.5.2009, the following order was passed on the appeal:

“FAO (OS) 213/2009

At the request of counsel for the appellant, list this matter on 1st July, 2009 to obtain instruction to secure the amount of Rs.90 crores as a pre-condition of issuance of notice in this appeal.”

7. The appellant thereafter reported back saying that it had no assets and was, thus, not in a position to even secure the amount of ₹90.00 crore referred to in the order dated 22.5.2009. Thus, on 1.7.2009, the following order was passed by the Division Bench:

“This appeal challenges the order of the learned Single Judge dated 23rd April, 2009 by which in an application made by the respondent under Section 9, the learned Single Judge had directed the security of Rs.200 crores which was the figure of the bounced cheques issued by the appellant to the respondent. The learned Single Judge has noted here that the factual situation of issuing PDC's worth Rs.250 crores had not been denied by the appellant. The learned counsel for the appellant on the last date of hearing i.e. 22nd May, 2009 had pointed out the figures which according to him were owing to it from the respondent. After hearing the learned counsel, it emerged that at least a sum of Rs.90 crores was totally undeniable, hence the following order was passed:-

“At the request of counsel for the appellant, list this matter on 1st July, 2009 to obtain instructions to secure the amount of Rs.90 crores as a pre-condition of issuance of notice in

this appeal.”

The learned counsel for the appellant has further not complied with the order and states that his client is unable to do so. In light of the above, since the learned Single Judge has based his finding on the cheques, the issuance of which have not been denied by the appellant and the fact that even the amount, which is undisputed according to the appellant, has not been secured by the appellant, we find no cause to interfere with the order of the learned Single Judge. Accordingly, the appeal is dismissed and stands disposed of.”

8. We may clarify that a reading of the aforesaid order shows that what had persuaded the Court to pass the order on 1.7.2009 qua the sum of ₹90.00 crore was the pointing out of some figures by the counsel for the appellant. The order dated 1.7.2009, however, records that the figures pointed out “which according to him were owing to it from the respondent” suggesting that the figure was relatable to the amounts due from the respondent to the appellant in view of a counter claim. The finding of the Division Bench, however, was that after hearing learned counsel a sum of ₹90.00 crore was “totally undeniable”. Since the appellant failed to comply with even the condition for providing security for ₹90.00 crore no cause was found to interfere with the order of the learned single Judge, which was predicated on the bounced cheques, the amount not being secured by the appellant.
9. It is thereafter that the respondent filed an application before the arbitrator seeking a dual prayer of striking off the defence and in the alternative an award on admission. This application has been decided by the learned arbitrator on 24.1.2011. In so far as the plea of striking off the defence is concerned, in the absence of any provisions in the said Act, learned arbitrator has found no ground

to grant such a relief. However, as far as the aspect of interim award was concerned, on the discussion of the material placed before the learned arbitrator including the correspondence *inter se* the parties, it was found that there were no unequivocal and clear admissions on the basis of which an interim award could be passed on such admissions alone. The learned arbitrator thereafter proceeded to consider the alternative plea of an interim award, at least, to the tune of ₹90.00 crore, as prayed for by the appellant.

10. In respect of the aforesaid, the arbitrator found that there was no such admission of the appellant recorded before the learned single Judge and the finding was based on consideration of material before him which naturally were *prima facie* in nature as it was an application under Section 9 of the said Act. However, while proceeding to consider the two orders of the Division Bench referred to above, the arbitrator found that there was clear and unambiguous finding of the amount of ₹90.00 crore being due to the respondent from the appellant and, thus, passed an interim award in those terms for a sum of ₹90.00 crore. The arbitrator has laid emphasis on the fact that the observations of the Division Bench showed that at least a sum of ₹90.00 crore was “totally undeniable” and the said amount was undisputed.
11. The appellant aggrieved by the interim award filed OMP No.276/2011, which has been dismissed vide impugned order dated 8.4.2011. The order of the learned single Judge has examined two aspects. The first arises out of a plea of the appellant that there was no valid agreement between the parties on account of the respondent having filed complaints resulting in

criminal cases on the ground that the MoU was obtained under fraud. It was, however, found that such an agreement is voidable at the instance of the party, who has been defrauded and does not make the agreement *void ab initio*. The respondent had not sought to avoid the agreement but has proceeded on the basis of MoU, apart from the plea that the arbitration clause was liable to be treated as an independent agreement apart from other terms of the contract.

12. The aforesaid finding has not been assailed by learned counsel for the appellant before us.
13. The learned single Judge has also found that the findings of the arbitrator based on the order of the Division Bench that the amount of ₹90.00 crore was “totally undeniable” could form the basis of an interim award. It is this part of the impugned order which is assailed by learned counsel for the appellant.
14. Learned counsel for the appellant has sought to emphasise that a bare reading of the pleadings before the arbitrator would show that the claims made by the respondent have been specifically denied by the appellant. We have perused the pleadings and this is borne out from the record. Learned counsel, thus, submits that there is no unequivocal, unambiguous and clear admission which could have formed a part of a decree based on admission which has given rise to the interim award. Learned counsel in support of his contention has referred to the Division Bench judgement of this Court in Vijaya Myne Vs. Satya Bhushan Kaura 142 (2007) DLT 483 (DB) where it was observed in para 12 as under:

“12. It is not necessary to burden this judgement by extracting from the aforesaid authoritative pronouncement as the learned single Judge has accomplished this exercise

with prudence and dexterity. Purpose would be served by summarizing the legal position which is that the purpose and objective in enacting the provision like Order 12 Rule 6, CPC is to enable the Court to pronounce the judgement on admission when the admissions are sufficient to entitle the plaintiff to get the decree, inasmuch as such a provision is enacted to render speedy judgements and save the parties from going through the rigmarole of a protracted trial. The admissions can be in the pleadings or otherwise, namely in documents, correspondence, etc. These can be oral or in writing. The admissions can even be constructive admissions and need not be specific or expressive which can be inferred from the vague and evasive denial in the written statement while answering specific pleas raised by the plaintiff. The admissions can even be inferred from the facts and circumstances of the case. No doubt, for this purpose, the Court has to scrutinize the pleadings in their detail and has to come to the conclusion that the admissions are unequivocal, unqualified and unambiguous. In the process, the Court is also required to ignore vague, evasive and unspecific denials as well as inconsistent pleas taken in the written statement and replies. Even a contrary stand taken while arguing the matter would be required to be ignored.”

15. Learned counsel has emphasized that it is during the course of argument that a plea advanced by the counsel for the appellant was noticed. In this behalf learned counsel submits that if the observations referred to aforesaid are taken note of even a contrary stand taken while arguing a matter was required to be ignored unless there is unequivocal, unqualified and unambiguous admission.
16. Learned counsel further submits that there are really no admissions even in the judicial proceedings as what was pointed out to the Division Bench were certain facts and figures from which the Division Bench formed an opinion that ₹90.00 crore was undisputably due. The same was a finding recorded by the

Division Bench which was in the context of an application filed by the respondent for furnishing of security under Section 9 of the said Act. These observations, thus, can at best be said to be *prima facie* finding of the Court for purposes of passing of an order for furnishing security and cannot, thus, give rise to an interim award on an admission.

17. Learned counsel for the respondent, on the other hand, has vehemently contended that the observations of the Division bench must be understood in their true intent and spirit and it is only when the Division Bench found that ₹90.00 crore were due did it pass the order on 22.5.2009 (the first date of hearing) and on the failure of the appellant to deposit the amount dismissed the appeal vide order dated 1.7.2009 where also the factum of this amount, at least, being outstanding has been noticed.
18. In our considered view, there is no doubt that there are bounced cheques of huge amounts and large outstandings stated to be due to the respondent. The appellant has even failed to provide any security as per the order passed by the learned single Judge of this Court and affirmed by the Division Bench. The appellant has to bear the natural consequences, if any, of the said orders. The moot point, however, remains as to whether the observations by the Court qua the stand of the parties in judicial proceedings arising in respect of interlocutory applications can form the basis of an interim award akin to a decree on admission. We find that the answer to this question has to be in the negative.
19. The respondent was desirous of having security from the appellant so that a favourable award ought not to remain a paper decree. It is in this context that a security was sought from the

appellant. The learned single Judge favourably considered this request in terms of order dated 23.4.2009 while directing the appellant to furnish security to the tune of ₹200.00 crore. The appellant expressed its inability to furnish such security which is also obvious from the same order as it showed that it had no immovable property. The appeal proceedings before the Division Bench on 22.5.2009 records that the Division Bench wanted the appellant to give, at least, a reduced security amount of ₹90.00 crore but even that was not found feasible by the appellant which resulted in the order dated 1.7.2009, the consequences of which have to be borne by the appellant.

20. We, however, find that these are findings arrived at by the Court on submissions of the parties in the context of the claim of the respondent and the counter claim of the appellant for purposes of furnishing security or not to furnish security. These observations/findings cannot be categorized as admissions of the appellant in pleadings or recording of admissions in a statement of a party in a court which could form a part of judicial proceedings and result in an award/decreed on admissions. An incorrect principle in law, in our considered view, cannot be laid merely because the facts of the case show that *prima facie* there are huge outstandings to the respondent with the appellant expressing inability to pay any amount. The plea of the respondent that the award may result only in a paper decree does not really advance the case of the respondent apart from the fact that the position today is no different as the appellant does not have any assets which have been disclosed nor has the respondent been able to locate any assets from which any recovery can be

made from the appellant.

21. We, thus, find that the impugned order of the learned single Judge dated 8.4.2011 dismissing the objections to the interim award dated 24.1.2011 cannot be sustained and the interim award dated 24.1.2011 is also accordingly set aside along with the impugned order.
22. At this stage learned counsel for the respondent points out that the appellant is delaying the arbitral proceedings by now taking the stand that it is not in a position to pay the fee of the arbitrator since the matter has reached the stage of recording of evidence. Learned counsel for the appellant assures and undertakes to this Court that no such objection will be taken, the fee of the arbitrator will be paid and all co-operation would be rendered to conclude the arbitral proceedings. The application filed by the appellant for termination of proceedings before the arbitrator is also undertaken to be withdrawn.
23. The amount deposited before the learned single Judge from the sale of movable assets of the appellant are also permitted to be withdrawn by the respondent subject to the final award to be passed by the arbitrator.
24. Since the arbitral proceedings have been going on for quite some time, i.e., about five (5) years, learned counsels for the parties assure that the parties will fully co-operate with the arbitrator for expeditious recording of evidence and final argument. We request the arbitral tribunal to endeavour to conclude the proceedings at the earliest and preferably within six (6) months from the date of communication of this order.
25. The appeal is accordingly allowed in the aforesaid terms leaving

the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

NOVEMBER 17, 2011
b'nesh

RAJIV SHAKDHER, J.