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

ARBITRATION PETITION NO. 939 OF 2016
WITH
NOTICE OF MOTION NO. 2512 OF 2016
IN
ARBITRATION PETITION NO. 939 OF 2016

The Bombay Dyeing And Manufacturing Co.Ltd.
A company incorporated under the provisions of the Indian Companies Act, 1866 having its registered office at Neville House, J.N. Heredia Marg, Ballard Estate, Mumbai and having its administrative office at Wadia International Centre, Pandurang Budhkar Marg, Mumbai – 400 025 **...Petitioner (Original Respondent)**

Versus

M/s. I.R. Enterprises
A partnership Firm registered under the Partnership Act, having address at Gala No. 8, Grit Residency, Building D Wing, Ghatkopar, Mankhurd Link Road, Mumbai – 400 043, through its Partners, Mr. M. Idris Islam Shelk/R/D/Singh **...Respondent (Orig. Defendant)**

Ms. Tanmayi Rajadhakshya, a/w Ms. Rujuta Patil, i/b Negandhi Shah & Himaytullah, for the Petitioner.

Mr. Dinesh Jain, Pravesh Gupta, for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 18th November 2016

JUDGMENT :

1. By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the Petitioner (original Respondent) has impugned the Arbitral Award dated 22nd June 2015 passed by the learned Arbitrator directing the Petitioner to pay to the Respondent an amount of Rs. 53,74,118/- together with interest at the rate of 12 percent per annum from 1st June 2008 till payment and/or realization, and further directing the Petitioner to pay Rs. 3,00,000/- towards the costs of the arbitration and rejecting the counterclaims made by the Petitioner. Some of the relevant facts for the purpose of deciding this Petition are as under :-

2. The Petitioner had awarded the contract to the Respondent some time in the year 2008 in relation to mass excavation of the earth on its work site containing of the terms and conditions mentioned in the work order issued by the Petitioner in favour of the Respondent on 18th January 2008.

3. On 19th February 2008, the Respondent submitted its Running Account Bill No. 1 for an amount of Rs. 1,85,13,558/- for the work done under the said work order. On 3rd March 2008, the Petitioner issued a cheque in favour of the Respondent for a sum of Rs. 1,15,89,478/- in respect of the Running Account Bill No. 1.

4. The Respondent thereafter submitted various other Running Account Bills to the Petitioner for payment of the work done. The Petitioner made various payments from time to time to the Respondent. It was the case of the Respondent that on 30th May 2008 the work awarded to the Respondent was completed. It was the case of the Petitioner that during the period between 18th January 2008 and 30th May 2008, the

Petitioner had deducted amount of Rs. 39,73,294.85 and Rs. 14,00,824.95 from the Running Account Bills of the Respondent as retention amount and hold money aggregating to Rs. 53,79,119/-.

5. It was the case of the Respondent that since the Petitioner did not make payment of the legitimate dues of the Respondent, the Respondent issued notice upon the Petitioner for making payment and invoking arbitration agreement. The said notice was replied by the Petitioner vide letter dated 28th April 2011 and denied the allegations made by the Respondent. The Petitioner suggested the name of another arbitrator.

6. In the month of April 2011, the Respondent filed a winding up Petition against the Petitioner for non-payment of the alleged unpaid dues. The matter was thereafter referred to arbitration. On 3rd January 2012, the Respondent filed a statement of claim before the learned Arbitration. The Petitioner filed statement of defence and counterclaim on 9th March 2012. The Respondent filed a Reply to the counterclaim and Rejoinder

to the Reply to the statement of claim on 12th April 2012. The Petitioner filed Sur-Rejoinder before the learned Arbitrator on 18th June 2012. Both the parties led oral evidence and also filed written submissions before the learned Arbitrator.

7. On 22nd June 2015, the learned Arbitrator allowed the claims made by the Respondent to the extent of Rs. 53,74,118/- with interest at the rate of 12 percent per annum from 1st June 2008 till payment and/or realization and directed the Petitioner to pay Rs. 3,00,000/- towards the costs of arbitration. The learned Arbitrator rejected the counterclaim made by the Petitioner. This Arbitral Award dated 22nd June 2015 is impugned by the Petitioner in this Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996.

8. Ms. Rajadhakshya, the learned Counsel for the Petitioner submits that the claim for refund of retention money made by the Respondent was contrary to clause 1.10 of the contract which provided that 5% amount of then value of work

done towards Retention will be deducted from each R.A. Bills & the same shall be released after the Virtual completion as certified by the Project Manager.

9. It is submitted that since the Respondent had not applied for issuance of Virtual Completion Certificate from the Project Manager, the Respondent could not have made claim for return of the retention amount under clause 1.10 of the contract.

10. The learned Counsel placed reliance on the Judgment of the Supreme Court in case of ***Rashtriya Chemicals and Fertilizers Limited Versus Chowgule Brothers & Ors***.[1] and in particular paragraph 20 in support of the submission that the learned Arbitrator could not have allowed the claim for return of the retention amount in view of the Respondent not producing the copy of the Virtual Completion Certificate. The claim under Running Account Bill No. 1 i.e. for retention amount was barred by law of limitation. She submits that admittedly the first running bill was submitted by the

1 **(2010)8 SCC 563**

Respondent on 19th February 2008. The Petitioner had made payment of Rs. 1,15,89,478/- in respect of the said Running Account Bill No. 1 on 3rd March 2008. The Respondent had invoked the arbitration agreement on 29th March 2011. She submits that since the Respondent had invoked arbitration on 29th March 2011, the claim in respect of the Running Account Bill No. 1 was *ex facie* barred by law of limitation.

11. The learned Counsel for the Respondent on the other hand placed reliance upon the findings of facts recorded by the learned Arbitrator in the impugned Award. He submits that there was dispute between the parties as to whether the work was actually completed by the Respondent or not. The Petitioner contended before the learned Arbitrator that the work was not fully completed by the Respondent and part of work was defective which though required rectification was not carried out by the Respondent. He submits that the question of obtaining any Virtual Completion Certificate, therefore, did not arise.

12. Insofar as the issue of limitation is concerned, it is submitted by the learned Counsel for the Respondent that the learned Arbitrator has dealt with this issue in paragraph 5.38 and 5.39 of the impugned Award and has held that since there was part payment made by the Petitioner to the Respondent on 31st March 2008, invocation of the Arbitration Agreement by the Respondent on 29th March 2011 was within the time prescribed under the Limitation Act, 1963 and thus, the claim was not barred by law of limitation. It is submitted by the learned Counsel that this Court cannot re-appreciate the evidence considered by the learned Arbitrator and cannot interfere with the findings of facts recorded by the learned Arbitrator, which are not perverse.

13. Insofar as the first submission of the learned Counsel for the Petitioner that the claim for return of the retention amount allowed by the learned Arbitrator was contrary to the terms of contract and more particularly clause 1.10 thereof is concerned, the learned Counsel for the Petitioner does not dispute that it was the case of the Petitioner before the

learned Arbitrator that the work was not completed by the Respondent. The Petitioner had deducted various amounts towards the retention money, which was liable to be returned after the Virtual Completion Certificate as certified by the Project Manager.

14. The learned Arbitrator has discussed this issue in detail in the impugned Award and more particularly in paragraph 5.29 to 5.33 and has held that the Petitioner in this case has failed to prove that the work carried out by the Respondent was defective and thus, could not have withheld the payment of retention money on a mere ground that a Virtual Completion Certificate has not been granted by the Project Manager. It is held that the Project Manager was an agency appointed by the Petitioner itself and once the dispute was before Authority, the Petitioner either through the Project Manager or otherwise must be in a position to establish that the work was not done in accordance with the contract or that there were deficiency which the Petitioner had failed to do so in this case.

15. It is held that in such circumstances, the Petitioner cannot withheld the retention money payable to the Respondent. The learned Arbitrator held that reading clause 1.10 of the contract in other way would lead to unjust enrichment of the Petitioner whereby the Petitioner would withheld the amounts payable to the Respondent without having proved that the work was not done satisfactorily and also without having proved any loss or damage to the Petitioner.

16. In my view, the learned Arbitrator has interpreted clause 1.10 of the contract and has rightly held that since the issue as to whether the work was completed or not was disputed by the Petitioner, the Petitioner could not have raised the issue of non-production of Virtual Completion Certificate by the Respondent for not returning the retention money paid by the Respondent. The interpretation of the learned Arbitrator is the correct interpretation.

17. In my view, since the Petitioner had disputed that the work was completed by the Respondent, the

Respondent in such a situation could not have applied for Virtual Completion Certificate from the Project Manager appointed by the Petitioner. It is not in dispute that the dispute had already arisen between the parties before invoking the arbitration agreement by the Respondent. The dispute thus, could be adjudicated upon only by the learned Arbitrator.

18. In my view, the objection raised by the Petitioner that claim for return of retention money is contrary to clause 1.10 of the contract itself is totally misconceived and is untenable. Once the issue as to whether the work was at all completed by the Respondent or not was raised by the Petitioner before the learned Arbitrator. The question of the Project Manager of the Petitioner issuing any Virtual Completion Certificate before invocation of the Arbitration Agreement did not arise. It is not the case of the Petitioner that the Project Manager of the Petitioner had wrongly refused to issue Virtual Completion Certificate or that if the Respondent would have applied for issuance of Virtual Completion Certificate, the Project Manager of the Petitioner could have issued such

certificate. In my view, there is thus, no substance in the submissions made by the learned Counsel for the Petitioner.

19. Insofar as the reliance on the Judgment of the Supreme Court in case of ***Rashtriya Chemicals and Fertilizers Limited*** (supra) by the learned Counsel for the Petitioner is concerned, there is no dispute about the proposition laid down by the Supreme Court in the said Judgment that an Arbitrator cannot decide contrary to the terms of the contract entered into between the parties. However, in this case, since the Petitioner itself had raised the dispute that the work was not completed by the Respondent, the question of the Project Manager of the Petitioner issuing any Virtual Completion Certificate did not arise.

20. Insofar as the issue of limitation raised by the learned Counsel for the Petitioner in respect of the claim arising of the Running Account Bill No. 1 is concerned, a perusal of the Award, indicates that the Running Account Bill No. 1 for Rs. 1,85,13,558/- was submitted by the Respondent on 19th

February 2008. The Petitioner had made payment of Rs. 1,15,89,478/- in respect of the said Running Account Bill No. 1 on 3rd February 2008. A perusal of paragraph 5.38 of the impugned Award indicates that the learned Arbitrator has rendered a finding that an amount of Rs. 9,15,603/- which was deducted towards five percent retention money would be payable only after completion of work and not before. It is held that the cause of action for claiming the amount deducted towards the retention money could arise only after the work had been completed. It is further held that further part payment was made by the Petitioner to the Respondent on 31st March 2008 whereas the Arbitration Agreement was invoked on 29th March 2011 and thus, claim was within the period of limitation.

21. The learned Counsel for the Petitioner fairly admitted that no ground of challenge in the Arbitration Petition filed by the Petitioner is raised that no part payment was made by the Petitioner to the Respondent on 31st March 2008. A perusal of the Arbitration Petition and more particularly, the ground of challenge clearly indicates that no such ground has

been raised by the Petitioner in the Arbitration Petition. In my view, since part payment was made by the Petitioner to the Respondent on 29th March 2011 before expiring of period of limitation, the cause of action for invoking Arbitration Agreement was further extended by three years. It is not the case of the Petitioner that the part payment was made by the Petitioner to the Respondent after expiry of three years from the date when the said amount was due to be paid to the Respondent. In my view, there is thus, no substance in the submission of the learned Counsel for the Petitioner that the claim in respect of the Running Account Bill No. 1 was barred by law of limitation.

22. The learned Arbitrator has considered the issue of limitation in detail in paragraph 5.38 of the impugned Award. I do not find any infirmity in the findings of the learned Arbitrator on the issue of limitation raised by the Petitioner.

23. No other submissions are advanced by the learned Counsel for the Petitioner and thus, this Court has dealt

with the only submissions made before this Court in the earlier paragraphs of this judgment.

24. In my view, the interpretation of the terms of the contract of the learned Arbitrator, even if, is considered as possible interpretation, the same cannot be substituted by the another interpretation by this Court under Section 34 of the Arbitration and Conciliation Act, 1996. The findings of facts rendered by the learned Arbitration in the impugned Award being not perverse cannot be interfered with by this Court under Section 34 of the Arbitration and Conciliation Act, 1996. The evidence considered by the learned Arbitrator in the impugned Award cannot be re-appreciated. This Court cannot re-appreciate the evidence considered by the learned Arbitrator in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

25. In my view, the Petition is totally devoid of merits. I therefore, pass the following order.

(a) Arbitration Petition No. 939 of 2016 is dismissed.

(b) In view of dismissal of the Arbitration Petition, Notice of Motion No. 2512 of 2016 does not survive and is accordingly, dismissed.

(c) There shall be no order as to costs.

[R.D. DHANUKA, J.]