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

+ **O.M.P. (COMM) 34/2016**

PRAKASH INDUSTRIES LTD

..... Petitioner

Through Mr Dayan Krishnan, Senior Advocate
with Mr Rikky Gupta, Advocate.

versus

SPACE CAPITAL SERVICES LTD

..... Respondent

Through Mr Sudhir Nandrajog, Senior Advocate
with Mr Kirtiman Singh and Mr Waize Ali Noor,
Mr Prateek Dhanda and Mr Pranav Agarwal,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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21.11.2016

VIBHU BAKHRU, J

IA No. 1767/2016

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P. (COMM) 34/2016 & IA No. 1840/2016

3. Prakash Industries Limited (hereafter 'PIL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 15.10.2015 (hereafter 'the impugned award') made by the sole arbitrator, Justice S.K. Mahajan (Retired), a former Judge of this Court.

4. The parties had entered into a “lease agreement” dated 24.03.1993 whereby the respondent (hereafter the ‘SCSL’) had agreed to purchase “Waste Heat Recovery System” and lease the same to PIL on a monthly lease rental of ₹2,23,500/-. PIL’s obligations were also guaranteed by Mr Ved Prakash Agarwal, PIL’s Managing Director, who was arrayed as respondent No.2 before the Arbitrator. SCSL claimed that PIL had failed and neglected to perform its payment obligations and had also failed to return the leased plant on the expiry of the term of the lease.

5. Initially, the disputes between the parties were referred to Mr Ved Jain, Chartered Accountant. However, thereafter Mr R.K. Handoo, Advocate was appointed as the sole arbitrator. Mr R.K. Handoo entered the reference but resigned prior to conclusion of the arbitral proceedings. This led the parties to approach this Court for appointment of an arbitrator. By an order passed on 08.04.2010, Justice S.K. Mahajan (Retired), a former Judge of this Court, was appointed as the sole arbitrator to adjudicate the disputes between the parties.

6. Before the arbitral tribunal, SCSL claimed a sum of ₹41,17,000/- on account of lease rentals up to 23.03.1998. It claimed a further sum of ₹60,34,500/- by way of charges for use of the equipment till 01.06.2000 (i.e. till the date of filing of the statement of the claim). In addition, SCSL also claimed interest.

7. PIL disputed the aforesaid claims and also raised counter claims claiming that SCSL had breached the lease agreement by not carrying out the necessary repairs to the leased equipment. PIL claimed a sum of

₹8,89,11,360/- as losses suffered on account of low efficiency of the equipment in question (loss of power generation). It claimed a further sum of ₹2 crores as loss of business, reputation and goodwill. In addition, PIL also claimed ₹5 lakhs as litigation costs (counter claim No.3); ₹15 lakhs for modification/alteration/repairs of the equipment (counter claim No.4); ₹17,48,232 along with interest at the rate of 30% per annum on account of instalments paid after March, 1996. In aggregate, the PIL prayed for an award of ₹11,26,59,592/- (Rupees Eleven Crores Twenty Six Lakhs Fifty Nine Thousand and Five Hundred Ninty Two) along with interest at the rate of 30% from due date till actual date of realization.

Impugned Award

8. The Arbitrator accepted the claim of SCSL for lease rentals of ₹41,17,000/- upto 24.03.1998. The Arbitrator further awarded interest at the rate of 12% per annum on the said lease rent till 03.06.2000 (till the filing of the statement of claim). However, the Arbitrator rejected the claim for further lease rentals as he held that the same were beyond the scope of reference. He further observed that even if the said claim fell within the scope of reference, he would not allow the same because in terms of the lease agreement, SCSL was only entitled to lease rentals for the term of the lease agreement and thereafter was entitled only to residual value of the equipment -₹2 lacs.

9. The Arbitrator also awarded *pendente lite* interest at the rate of 12% per annum from 03.06.2000 till the date of making the award which was quantified at ₹72,92,940/-. In addition, SCSL was also awarded costs

quantified at ₹5,00,000/-. Thus, in aggregate, the Arbitrator awarded a sum of ₹1,31,80,360/- in favour of SCSL.

10. Insofar as the counter claims are concerned, the Arbitrator held that there was no evidence to substantiate the claim that PIL had suffered any loss on account of low efficiency of the equipment in question or that it had incurred any costs for repairs of the equipment/plant. The Arbitrator also observed that the plant in question was selected by PIL and PIL was also responsible for its maintenance. He concluded that in the circumstances, PIL could not raise any claim on account of any defect in the said plant.

11. He further rejected the counter-claims as barred by limitation.

Submissions

12. Mr Dayan Krishnan, Learned Senior Counsel appearing for the PIL assailed the impugned award on three grounds. First, he submitted that the impugned award was joint and several against PIL as well as Mr Ved Prakash Agarwal and this was plainly contrary to an order passed by the sole arbitrator (order passed by Mr R.K. Handoo, the sole arbitrator) on 13.07.2007. By the said order, the arbitrator had accepted the plea that there was no arbitration agreement between SCSL and Mr Ved Prakash Agarwal; and, consequently, had directed the deletion of the name of Mr Ved Prakash Agarwal as a party to the arbitral proceedings. Secondly, Mr Krishnan, submitted that the substantial portion of the award to the extent of approximately ₹72 lakhs comprised of interest. He submitted that the aforesaid figure had swelled up on account of delays caused, (i) due to substantial time spent in proceedings before the BIFR; (ii) in the arbitration

proceedings and (iii) in proceedings before the Court. He submitted that the Court must take a lenient view and not mulct PIL with interests for the time spent in litigation as PIL was not responsible for the same. Thirdly, he contended that the arbitral award was liable to set aside as the Arbitrator had not considered the counter-claims preferred by the PIL.

13. Mr Nandrajog, Learned Senior Counsel appearing for the SCSL countered the submissions advanced by Mr Krishnan. He submitted that since Mr Ved Prakash Agarwal had not filed a petition to set aside the impugned award, no grievance could be made by PIL on account of the impugned award operating against Mr Ved Prakash Agarwal. Nonetheless, he submitted that the respondent would have no objection if the impugned award to the extent that it is against Mr Ved Prakash Agarwal, is set aside and the respondent is permitted recourse against him in terms of the order dated 13.07.2007. He further submitted that the arbitrator had rightly exercised its discretion to award interests and no interference was warranted by this Court. Lastly, he submitted that the counter-claims had been duly considered by the arbitrator and the same were rejected.

Reasoning and Conclusion

14. I have heard the learned counsel for the parties.

15. There is much merit in Mr Krishnan's contention that impugned award could not be passed against Mr Ved Prakash Agarwal since his contention that he was not a party to the arbitral agreement had been accepted by the sole arbitrator, Mr R.K. Handoo. Mr Ved Prakash Agarwal had filed an application seeking deletion from the array of parties. It was

contended that Mr Ved Prakash Agarwal had signed the lease agreement on behalf of PIL in his capacity of being the Managing Director of PIL. It was further submitted that the guarantee deed signed by Mr Ved Prakash Agarwal in his individual capacity did not contain an arbitration clause and therefore, no arbitration proceedings could be initiated or continued against Mr Ved Prakash Agarwal as a guarantor. The submissions made on behalf of Mr Ved Prakash Agarwal had been duly recorded in the order dated 13.07.2007 passed by Mr R.K. Handoo and the relevant extract of the said order is reproduced below:-

“Sh. Rikky Gupta while making submissions on behalf of respondent No.2 invited my attention to page 16 of the compilation which is a lease agreement and the basis for arbitration wherein Sh. Ved Prakash, Managing Director, signed in the capacity of Managing Director of Respondent No.1 and the guarantee documents signed by Mr. Ved Prakash is independent to lease agreement. It is contended that the guarantee deed signed by him in his individual capacity does not have any arbitration clause hence on the basis of lease agreement containing the arbitration clause, arbitration proceedings cannot be initiated against Mr. Ved Prakash Agarwal as a guarantor. It is contended by Sh. Rikky Gupta that in arbitration proceedings the arbitrator cannot lift the corporate veil and bring in Sh. Ved Prakash Agarwal, Managing director within the purview of Arbitration merely because he has signed the agreement as Managing Director of respondent No.1. He stated that basic issue was whether guarantor can come within the fold of arbitration and that guarantor comes in picture only in the event, if the company does not discharge its liability i.e. consequent to the award, that the respondent No.2 herein submitted that in the event the award passed in the present proceedings is in favour of the claimant, and is against the respondent No.1 and respondent No.1 does not honour the same, respondent no.2

by virtue of the guarantee as well as undertaking will be bound discharge the obligations of respondent no.1 under the award. In other words if respondent no.1 does not discharge its obligation under the award, the award would be enforceable against respondent no.2 in the same manner in which the said award would have been enforceable against respondent no.1. Mr. Rikky Gupta emphasized that holding of arbitration proceedings against Mr. Ved Prakash would be lifting the corporate veil which can be done only on account of fraud, deceit or criminal misappropriation and this has been so held consistently by the various courts including the apex court.”

16. The arbitrator had accepted the aforesaid contentions and held as under:-

“(1) The deed of guarantee does not form part of the lease agreement dated 24-03-93 although it makes reference to the same. The said deed of guarantee is a separate document and the claimant is free to pursue its remedy against respondent no.2 after the award in terms of deed of guarantee and undertakings. The respondent no.1 being the company is a separate entity of respondent no.2 even though respondent no.1 is the managing director. The corporate veil the respondent no.1 need not be lifted as there is no allegation of fraud against respondent no.1 or respondent no.2.

As there is no arbitration agreement between the claimant and the respondent no.2, I see no reason why respondent no.2 should not be deleted from the array of parties. Therefore, the application filed by respondent no.2 deserves to be allowed and is hereby allowed. Steps should be taken by claimant to accordingly file amended memo or parties.”

17. Although the impugned award cannot be sustained in so far as Mr. Ved Prakash Agarwal is concerned, SCSL would still have the right to

proceed against Mr Ved Prakash Agarwal as a guarantor; this was also the contention advanced by the petitioner and Mr. Ved Prakash Agarwal before the arbitrator. In the aforesaid circumstances, the impugned award to the extent it operates against Mr Ved Prakash Agarwal is set aside and SCSL would be at liberty to proceed against Mr Ved Prakash Agarwal in accordance with law.

18. In so far as the award of interest is concerned, the arbitrator in his discretion has considered it fit to award interest at the rate of 12% per annum. Award of interest at such rate is neither perverse nor unreasonable. Award of interest at a reasonable rate is not amenable to challenge under Section 34(2) (b)(ii) of the Act because award of such interest cannot be considered to be opposed to Public Policy of India.

19. The contention that the arbitrator has not considered the counter claims preferred by PIL is also unmerited. The arbitrator had also specifically framed an issue - issue No.9 - as to whether the SCSL is entitled to any amount by way of counter claims. PIL had claimed a sum of ₹8,89,11,360 on account of alleged loss of power generation for the period from 01.08.1996 to 31.12.1997. It was PIL's case that there were snags in the equipment leased to by SCSL, which required to be rectified by effecting certain modifications and alterations. It was alleged that despite various assurances, SCSL had failed to effect such modifications. Further SCSL had also not responded to PIL's request seeking SCSL's consent for the same. PIL claimed that because of the inaction on the part of the SCSL, it had suffered loss of power generation and also loss of business, reputation and goodwill, which was quantified at ₹2,00,00,000/- (Two Crores). In addition,

PIL had claimed that it had carried out certain repairs at the cost of ₹15,00,000/- which was claimed by PIL. Further PIL had also claimed costs of litigation quantified at ₹5,00,000/- (Five Lakhs).

20. The arbitrator had considered the evidence on record and rejected the aforesaid claims. The arbitrator found that PIL had not raised any complaint regarding the equipment being defective in any of its letters sent to SCSL. PIL's claim that it had sent letters dated 05.11.1996 and 09.05.1997 calling upon SCSL to give its written consent, was also rejected as the arbitrator was of the view that the said letters had, in fact, not been sent and had been prepared only by way of an afterthought. The arbitrator based his conclusion on the fact that neither the complaint regarding equipment nor reference to the letters was found in other communications sent by PIL for re-scheduling the payment. The arbitrator also observed that the equipment in question was selected by the PIL and was supplied by BHEL as per the specifications provided by PIL. He further held that the claimant had nothing to do with either placing the order or identifying the equipment and therefore could not be held responsible for snags, if any, in the said equipment. The relevant extracts of the impugned award are reproduced below:-

“As already observed by me above, the plea about the equipment being defective was not raised in any of the letters written to the claimant by the respondent for either deferment of the lease rentals or for re-scheduling the leased instalments. All that has been stated in the letters written by the respondent to the claimant for its inability to pay lease rentals was that firstly, it was having financial crisis and, secondly, it was making efforts to generate money and for which it wanted the claimant to re-schedule the lease rentals. The letters referred to above alleged to have been

written by the respondent to the claimant, in my opinion, were not sent as has been observed by me earlier and they have been prepared by way of an afterthought. Had this been the position that the equipment was defective or permission was sought for repairing the equipment, the respondent would have so stated in its letters written in 1996 for re-scheduling the payment. Moreover the equipment, as observed above, was identified by the respondent itself and was supplied by BHEL as per the specifications provided by the respondent. The claimant had nothing to do with either in placing the order or identifying the equipment. It was only after the order was placed with BHEL that the agreement in question was entered into with the respondent for lease of the said equipments to the respondent. It is contended by Mr. Gupta that as the equipment was defective it did not work to its full capacity resulting in the electricity being not generated.

In terms of clause 4.4 of the agreement, it was the duty of the respondent to use and operate the equipment carefully and maintain the same in good working condition and repair it at its own cost and expenses in conformity with the instructions or operation manual given by the manufacturer. Firstly, except the statements made by these two witnesses about the defects in the system, there is no other evidence to prove the defects in machine, secondly even assuming that there was a defect, it was the duty of the respondent to repair it at his own cost and claimant was not concerned with the same. Moreover, as the equipment was selected by the respondent itself, it has no right to blame the claimant for any defect therein.

I am, therefore, not in agreement with the contention of the respondent that there was a defect in the system or any loss was suffered by the Respondent because of the alleged defect. I am, therefore, not in agreement with the contention of the respondent that there was a defect in the

system or any loss was suffered by the Respondent because of the alleged defect.

In any case the respondent has not placed on record any documents to show as to what was the extent of loss suffered by it. Even the vouchers, receipts and other documents have not been placed on record to justify that it had spent any amount for repair of the said equipment. Even assuming that the respondent has suffered the said loss, the claimant would not, in any case, be liable to pay to the respondent for such loss. The respondent having not thus proved any loss suffered by it or any amount spent by it on repair, it is not entitled to any amount by way of counter-claim. Even assuming that the claimant was entitled to any amount by way of counter-claim, the same, in my view, is clearly barred by time. The cause of action according to the respondent accrued to it in 1997-98 when the alleged defect was noticed and the respondent is alleged to have suffered losses but the claim was made only on 30.10.2006 when the counter-claim was filed. There is thus an inordinate delay in filing the counter-claim and it was much beyond the period prescribed under the Limitation Act. Counter-claim is, therefore, barred by time and is rejected.”

21. In view of the above, the contention that the counter claims have not been considered, cannot be accepted.

22. Although, the arbitrator does not seem to have discussed the issue as to loss of business, reputation and goodwill or the cost of litigation claimed by PIL, it is apparent that the said counter claims were rejected as arbitrator did not accept the contention that SCSL was in breach of the lease agreement. Further SCSL had clearly prevailed in its claims and, therefore, it is implicit that PIL's claim for cost of litigation stood rejected. The counter

claims were also rejected as being time barred and, therefore, further claims regarding lease rentals and interest also stood rejected.

23. In view of the above, no interference with the impugned award - except as indicated above - is warranted. The petition is, accordingly disposed of with the above observations.

NOVEMBER 21, 2016
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VIBHU BAKHRU, J

