

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

% **Judgment reserved on: 26th July, 2016**
Judgment pronounced on: 2nd August, 2016

+ **Arb. P. No.655/2015**

VICTORY ELECTRICALS LTD. Petitioner
Through Mr.Sumesh Dhawan, Adv.

versus

GE CAPITAL SERVICES INDIA Respondent
Through Ms.Deepika V. Marwaha, Adv. with
Ms.Worthing Kasar & Ms.Raunika
Johar, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. M/s Victory Electricals Ltd. – the petitioner has filed the petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) for an appointment of a sole Arbitrator to adjudicate the disputes between the parties.
2. The prayer in the present petition is strongly opposed by the respondent who has challenged the maintainability of the present proceedings on the following grounds:
 - i) The purported alleged dispute is not an arbitrable dispute within the ambit of arbitration clause i.e. Clause 18 of the MLA dated 28th April, 2011, and beyond contractual obligations of the parties.
 - ii) The purported dispute is not a live claim qua the respondent-lender.

- iii) The purported dispute qua which the petitioner is asking for referring the same for arbitration is not relating to the loan agreement and is with respect to a third party action taken against the petitioner allegedly.
 - iv) Alleged counter claim against the respondent-Company is just an excuse to avoid its own liability by the petitioner, as decreed by the Arbitrator and upheld by this Court.
3. The case of the respondent is as under:
- i) In the year 2011, the petitioner and Victory Transformers & Switchgears Ltd., together as borrower(s), had approached through its promoters Mr. V.V. Naidu and Mr. Mahendra Vaddeneni, with a request for finance facility. The loan facility of Rs. 25 crores was sanctioned in favour of the borrower(s) to be divided equally between the two Companies. The said facility was to be disbursed in tranches by the respondent on compliance with the conditions by borrower(s) that had been laid down in the loan agreement. The first tranche of Rs. 3 crores was released in favour of the petitioner in May, 2011 on its written request for drawdown. Both the companies together as borrower were liable to fulfill the obligations under the loan agreement, but soon after availing the loan facility, the borrower started committing default with dishonest intention and breached all its obligations, including of getting NOC's from the banks who had first charge on the assets that were to be charged in favour of the respondent as per the Master Loan Agreement (MLA). The petitioner and M/s Victory Transformers & Switchgears had failed to do so, therefore arbitration clause was invoked and reference notice was

issued for arbitration and eventually after all the delaying tactics adopted by the borrower, the award for Rs. 2,48,47,540.04/- with 12% interest per annum from the date of reference was passed on 3rd October, 2013.

- ii) The respondent had filed a petition under Section 9 of the Act, being OMP No. 687/2012, during the pendency of the arbitration proceedings wherein the petitioner as per the directions of this Court had filed an affidavit dated 30th November, 2012, which stated that the petitioner herein as well as other borrower had receivables due from State Electricity Boards of Rs. 7,88,30,843.71/- as on that day. The said petition was disposed of by this Court with directions to the borrower/petitioner on 5th December, 2012-
 - a) To create charge qua 127.3216 acres of land in revenue district of Tirunelveli, which was never complied with by the petitioner.
 - b) The receivables from State Electric Boards would be made available to meet respondent's due, which was also not done by the petitioner despite of the correspondence exchanged between GE Capital Services India, the respondent (petitioner in the said petition) and the petitioner (respondent No.1 therein).
- iii) The said order was never complied, but it is apparent that the receivables worth Rs. 8 Crores were there for the petitioner to use for its business purposes and at no stage of the proceedings, the petitioner claimed any business loss.

- iv) Consultancy and negotiations notice was issued on 22nd December, 2011 and as the dispute had arisen, reference notice for arbitration was also issued on 13th January, 2012. There were consultations and negotiations between the parties after the issuance of the first notice and the reference notice.

4. It is also the case of the respondent that there was no request for the second drawdown as per the terms and conditions of the Master Loan Agreement. It is further submitted that Clause 1.1(h) of the MLA defines drawdown as *"Drawdown" means, save as otherwise provided herein, an advance (as from time to time reduced by repayment) made or to be made by the lender hereunder in accordance with the provisions of Clause 2 (The Facility) below.*" As per Clause 3.2 of the MLA, there has to be the fulfillment of condition precedent as per Clause 3.1 of the MLA before such request can be made. Secondly, a drawdown request means a notice is to be sent by the lender to the borrower in the form set out in Annexure-II of the MLA (as has been submitted by the petitioner for the first tranche dated 18th May, 2011). No such drawdown request was ever received by the respondent-Company nor it is stipulated anywhere in the MLA that the second or third tranche of the MLA had to be used for the purchase of any equipment or establishing a Letter of Credit for its supplier in China by the petitioner. The petitioner cannot put the blame of its inaction or failure to do the business correctly on the respondent when there was no such agreement between the parties. The respondent-Company is not liable for the alleged failure of third party business transactions of the petitioner.

5. It is not disputed by the petitioner that earlier the award was passed against the petitioner for more than Rs.2 crores and the same has attained the finality. The said award amount is not paid by the petitioner to the respondent.

6. Due to the disputes between the parties, the respondent invoked the arbitration clause in accordance with the MLA between the parties on 13th January, 2012. The respondent appointed Ms. Justice Rekha Sharma (Retd.) as the sole Arbitrator in the matter. The arbitration proceedings commenced in the month of October-November, 2012 and continued till 8th July, 2013, when the arguments were concluded by the parties and the matter was reserved for award.

7. Before publishing the award, the petitioner ascertained the quantum of loss incurred and filed an application dated 1st July, 2013 under Order 8 Rule 6A CPC seeking leave of the Arbitral Tribunal to file its counter claim against the respondent claiming the losses suffered by the petitioner due to non-disbursal of the balance amount by the respondent. But the sole Arbitrator passed an award dated 3rd October, 2013 and an amended award dated 10th October, 2013 in favour of the respondent, without considering the counter-claim filed by the petitioner.

8. Aggrieved by the said award dated 10th October, 2013, the petitioner along with others filed a petition on 21st January, 2014, under Section 34 of the Act being O.M.P. No. 55/2014 before this Court for setting aside the said award passed by the Arbitrator. The said OMP was disposed of. The petitioner then filed an appeal under Section 37 of the Act being FAO (OS) No. 273/2015 against the order dated 21st April, 2015.

9. On 20th May, 2015, the Division Bench of this Court disposed of the said appeal with certain observations. On the basis of the said order, on 8th September, 2015 the petitioner sent a legal notice to the respondent for the appointment of a sole Arbitrator.

10. It is submitted on behalf of the petitioner that the petitioner sought further release of second tranche of funds of USD 6,57,000 by sending an e-mail dated 19th May, 2011, which were to be utilized for establishing a letter of credit for import of Impulse Voltage Generator and Resonant Frequency Generator in favour of its supplier in China. It was within the knowledge of the respondent that the petitioner had given an advance of USD 73,000 (then equivalent to Rs.33,91,956/-) for purchasing the equipment and the funds, which were to be provided by the respondent, were for the utilization of securing the balance amount. The respondent despite being in knowledge of the order placed by the petitioner for purchase of the equipment failed to disburse the balance amount.

11. As the respondent did not disburse the said amount in favour of the petitioner, therefore, the petitioner suffered the consequence of (i) forfeiture of advance money of USD 73,000 so paid and (ii) the petitioner was unable to fulfill its supply commitments to its customers. As a result of the forfeiture, the petitioner suffered a loss of cash earnings to the tune of Rs.2,72,86,000/- along with the loss of customers due to unavailability of the testing equipment resulting in non-fulfillment of obligations, which in turn led to loss of profits, loss of opportunity costs and loss of business finally resulting in erosion of net worth of the petitioner-Company and on 12th December, 2011, in spite of the non-disbursal of balance loan amount, the respondent sent a legal notice to the petitioner, amongst others, terminating the MLA

entered into between the parties. The petitioner paid an amount of Rs.80,77,366/- to the respondent from 22nd June, 2011 to 2nd February, 2012 and was unable to make further payments to the respondent as its supply of materials could not be achieved for absence of Impulse Voltage Generator and Resonant Frequency Generator.

12. It is submitted by the petitioner that in terms of the liberty granted by the Division Bench of this Court vide its order dated 20th May, 2015, the petitioner in terms of Clause 18 of the MLA issued the statutory legal notice dated 8th September, 2015 under Section 11 of the Act calling upon the respondent to appoint the sole Arbitrator. It is stated that the said legal notice was delivered at the office of the respondent on 11th September, 2015 however, till date the petitioner has neither received any reply of the said notice nor the respondent has appointed the sole Arbitrator.

13. In a nut shell, the case of the petitioner is that the Division Bench, vide its order dated 20th May, 2015 granted liberty to the petitioner to arbitrate its disputes before the Arbitrator. Learned counsel for the petitioner has referred the relevant extract of the order dated 20th May, 2015, which has been reproduced as under:

"5. The fact of the matter is that the purported claim based on the forfeiture of March 2013 is a 'future dispute'. It is a future dispute in the sense that at the time when the parties went in for arbitration, this dispute did not exist. It arose subsequently. Therefore, it is open to the appellant to seek arbitration of this dispute also in terms of the arbitration clause between the parties. The refusal to take on record the counter-claim by the learned Arbitrator would not come in the way of the appellant seeking resolution of this dispute. Insofar as the learned Arbitrator is concerned, we are of the view that the

decision taken was correct that the counter-claim was filed at a highly belated stage and, in fact, the hard copy was received after the award had been made and in that sense the learned arbitrator had become functus officio. But this would not, as pointed out above, come in the way of the appellant to seek arbitration with regard to the purported cause of action which was the subject matter of the counter-claim in terms of the arbitration clause."

14. Admittedly, the petitioner has also not complied with the award dated 3rd October, 2013 of Rs.2,48,47,540.04/- along with the interest of 12% per annum from the date of entering upon the reference till realization, with cost quantified at Rs.1 lakh passed against it, despite of the award being upheld in the Section 34 of the Act proceedings and by the Division Bench of this Court in FAO (OS) No.273/2015 on 20th May, 2015. The petitioner's reply during the hearing in the present petition is that the petitioner-Company is under the process of BIFR and therefore, the said amount is now to be recovered by the respondent as per procedure and as per law. The claims of the petitioner are on the basis of the cause of action that arose in March, 2013 being the future dispute which did not exist earlier.

15. There may be merit in the submission of the respondent as alleged but the final conclusion cannot be drawn while deciding the present petition. In fact, it has to be determined by the Arbitral Tribunal as the petitioner has filed the present petition on the premise that, vide the following order of the Division Bench, they got the right to refer the "purported dispute" as per para 4 of the order dated 20th May, 2015:

"4. We have examined the impugned order and also heard the learned counsel for respondent. The fact that the counter-claim was not taken up for resolution by the learned arbitrator can in no way impinge upon the validity of the award which had been pronounced on 03.10.2013,

as amended by the subsequent award of 10.10.2013. In all other respects, we do not find any reason to interfere with the impugned order or the award.”

16. As for the earlier award passed in favour of the respondent is concerned, the same has already been upheld and has attained the finality between the parties. The respondent is not entitled to enforce the same as per the law.

17. Counsel for the petitioner in support of his submission has referred the decision of this Court in **Reckitt Benckiser (India) Limited v. Landmark Builders Private Limited**, Arbitration case No. 44/2011 decided on 2nd April, 2013 in para 14, the Chief Justice of Punjab & Haryana High Court, has held as under:

“14. After taking into consideration the ratio of all the aforesaid cases, no doubt, the position can be summed up by stating that when the arbitration clause is invoked and the disputes are referred, it would mean those disputes which were existing at the time of invoking the arbitration clause and would not include future disputes. Whenever such future disputes arise, the arbitration clause can be invoked again. At the same time, when the Arbitral Tribunal is already constituted and is seized of the disputes which were referred, whenever future disputes arise, the parties are at liberty to go before the same Tribunal for such disputes as well.”

18. With regard to another submission of the learned counsel for respondent that the claims of the petitioner are time barred and thus, the same are now not arbitrable as the said purported claims on the basis of forfeiture of the amount by the third party, the petitioner has no cause of action once the disputes between the parties have already been determined, there is no merit in the said submission of the respondent. However, in case the order passed by the Division Bench as well as per the settled law on this aspect, it has now become a

mixed question of law and fact and it is to be postponed for determination by the Arbitral Tribunal and it may be possible that the respondent may be able to demolish the case on the plea of limitation but final opinion cannot be expressed in view of the peculiar circumstances of the present case.

19. Thus, this Court is not inclined to refuse the prayer made in the petition particularly in view of the order passed by the Division Bench. However, the liberty is granted to the respondent to raise all the pleas as taken in the present matter as per law before the Arbitral Tribunal.

20. Therefore, the prayer is allowed and the same sole Arbitrator i.e. Ms. Justice Rekha Sharma (Retd.) is appointed to adjudicate the disputes as raised by the parties. The other terms and conditions would remain the same when the previous appointment was made.

21. The parties to appear before the Arbitrator on 30th August, 2016 at 5.30 pm for directions. Copy of the order be given *dasti* under the signatures of Court Master to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

22. The present petition is accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

AUGUST 02, 2016