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

COMPANY APPLICATION (LODGING) NO.796 OF 2016
IN
COMPANY PETITION NO.276 OF 2015

WITH
COMPANY PETITION NO.276 OF 2015

Fairmacs Shipping & Transport Services Pvt. Ltd. ...Applicant
V/s.

Shahi Shipping Limited
(formerly SKS Logistics Limited) ...Respondent

WITH
CHAMBER SUMMONS NO.1819 OF 2016
IN
EXECUTION APPLICATION NO.261 OF 2015
IN
APPEAL (LODGING) NO.162 OF 2013
IN
ARBITRATION PETITION NO.489 OF 2012
IN
AWARD DATED 13TH JANUARY, 2012

Shahi Shipping Limited
(formerly SKS Logistics Limited) ...Applicant
...Ori.Respdt.

IN THE MATTER BETWEEN :

Fairmacs Shipping & Transport Services Pvt. Ltd. ...Petitioner
V/s.

Shahi Shipping Limited
(formerly SKS Logistics Limited) ...Respondent

Mr.Rahul Narichania, Senior Counsel with Mr.Sunilkumar V.

Neelambaran and Ms.Smriti Jha i/b Mulla & Mulla & C. B. & C. for the Applicant / Petitioner.

Mr.Ankit Lohia with Ms.Jyoti Ghag and Mr.Ganesh Ambekar i/b M/s.Thakore Jariwala for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 22TH FEBRUARY, 2017.

P.C. :-

1. By the Company Application (Lodging) No.796 of 2016, the applicant (original petitioner in Company Petition No.276 of 2015) seeks an order and direction that the Commissioner for Taking Accounts or any other officer of this Court to calculate amounts due and payable to the applicant under an award dated 2nd December, 2011 and under the order dated 2nd December, 2014 passed by this Court and to direct the respondent to make payment of the amounts in installments as per the order dated 27th October, 2016 passed by the Division Bench of this Court in Appeal (Lodging) No.348 of 2016 and upon the respondent failing to comply with the order to make payment as may be calculated by the Commissioner for Taking Accounts to order admission of the company petition.

2. By Chamber Summons No.1819 of 2016 filed by the applicant (original respondent in Company Petition No.276 of 2015), the applicant has applied for setting aside the order dated 2nd December, 2014 passed by this Court in Execution Application (Lodging) No.1112 of 2014 in Appeal (Lodging) No.162 of 2013 in Arbitration Petition No.489 of 2012 in the award dated 13th January, 2012, by which this Court has held that the calculation of interest on the amount of costs in Column “g” of the execution application was correct and directed that the execution shall proceed in terms of the

execution application. By an administrative order passed by the Hon'ble Chief Justice, Chamber Summons No.1819 of 2016 is clubbed along with Company Application (Lodging) No.796 of 2016 and were heard together and are being disposed of this common order. Some of the relevant facts for the purpose of these proceedings are as under :

3. The dispute between the parties were referred to an Arbitral Tribunal. The applicant in the company application was the claimant, whereas the respondent to the company application was the respondent in the arbitral proceedings. By an award dated 2nd December, 2011, the Arbitral Tribunal directed that the applicant would be entitled to receive from the respondent a sum of Rs.89,24,046.34. By an order dated 12th January, 2012, the Arbitral Tribunal clarified the said award dated 2nd December, 2011 and reduced the award amount of Rs.89,24,046.34 to Rs.52,44,046.34. Arbitral Tribunal also held that the applicant would be entitled to interest at the rate of 12% p.a. from the date of the award till payment. It was however, clarified that no interest would be payable on the sum of Rs.4,08,428.34 which amount was itself an interest amount. The Arbitral Tribunal held that the applicant having succeeded was entitled to the costs of Rs.30,00,000/- and directed the respondent to pay the said amount to the applicant. The relevant paragraphs of the award are extracted as under :-

“47. Accordingly there will be an Award in favour of the Claimant and against the Respondent (a) Under the 1st claim for a sum of Rs.408428.34 p. (b) Under the 2nd claim for a sum of Rs.503912/- (c) Under the 4th claim for a sum of Rs.22,57,245/- (e)

Under the 7th claim for a sum of Rs.41,36,561/-. As admitted by Mr.Narichania Respondent would be entitled to a credit of Rs.20,62,000/-. The Claimants would thus be entitled to receive from the Respondent a sum of Rs.8924046.34 p.

48. On the amounts awarded, the Claimant would be entitled to interest at the rate of 12% per annum from the date of the Award till payment. It is however clarified that no interest would be payable on the sum of Rs.408428.34 p. which itself is an interest amount.

49. The Claimant having succeeded is entitled to costs. Both parties have forwarded their statement of costs. In our view, the Claimant is entitled to a cost of Rs.30,00,000/-. The Respondent is directed to pay these costs to the Claimant.”

4. Being aggrieved by the said award rendered by the Arbitral Tribunal, the respondent herein filed Arbitration Petition (489 of 2012) before this Court. By an order dated 25th February, 2013, this Court dismissed the said arbitration petition filed by the respondent. On 12th March, 2014, the Division Bench of this Court dismissed the appeal filed by the respondent against the order dated 25th February, 2013 passed by the learned single Judge of this Court. The Special Leave Petition (31100 of 2014) filed by the respondent against the said order dated 12th March,2014 passed by the Division Bench of this Court came to be dismissed. The applicant thereafter called upon the

respondent to make payment due under the said arbitral award. In the said letter dated 12th April, 2012, the applicant calculated the amount receivables by the applicant from the respondent under the said award dated 2nd December, 2011 under various heads. The applicant also claimed interest in the sum of Rs.1,29,205.48 ps. on the awarded amount of costs of Rs.30,00,000/- in the impugned award. The applicant sent a reminder on 12th July, 2012, calling upon the respondent to pay a sum of Rs.88,18,515/- , which was inclusive of interest till the date of the said reminder.

5. The applicant by its advocate's letter dated 20th December, 2014 issued a statutory notice under sections 433 and 434 of the Companies Act, 1956, calling upon the respondent to pay a sum of Rs.1,16,66,253.71 ps. with further interest thereon. In the said statutory notice also the applicant demanded interest at the rate of 18% p.a. on the costs of Rs.30,00,000/- awarded by the Arbitral Tribunal. There was no response to the said statutory notice.

6. On 28th January, 2015, the applicant filed Company Petition (276 of 2015) against the respondent, *inter-alia* praying for winding up of the respondent under the provisions of the Companies Act, 1956. In the particulars of claim in the said company petition, the applicant claimed an amount of Rs.1,17,82,884.91, which was inclusive of interest on costs at the rate of 18% p.a. on Rs.30,00,000/- from the date of award i.e. 2nd December, 2011 till the date of the statutory notice dated 20th December, 2014 and further interest on costs at the rate of 18% p.a. from 21st December, 2014 till 27th January, 2015 and claimed further interest at the rate of 18% p.a. on the interest of costs claimed in the said particulars of claim from the

date of filing of the company petition till payment. The respondent filed an affidavit in reply to the said company petition and opposed the company petition. The respondent did not dispute quantification of the amount claimed by the applicant in the particulars of claim in the said affidavit in reply. The applicant denied the allegations made in the affidavit in reply filed by the respondent.

7. By an order dated 30th August, 2016 passed by this Court in the said Company Petition No.276 of 2015, this Court directed the respondent to deposit a sum of Rs.1,17,82,849.91 within a period of six weeks from the date of the said order and made it clear that in the event of the respondent failing to deposit the said amount on or before 13th October, 2016, the petition shall stand admitted and shall be advertised. This Court also granted liberty to the applicant to withdraw the amount if deposited towards the sum awarded and interest thereon and directed that the company petition in that event shall stand dismissed.

8. It is the case of the applicant that tabular statement of principal and interest calculated upto 30th August, 2016 was tendered by the applicant before the learned single Judge of this Court on 30th August, 2016 and a copy thereof was given to the respondent during the hearing on 30th August, 2016 specifying the rate of interest applied by the applicant. The applicant thereafter applied for execution of the said arbitral award before this Court (Execution Application No.261 of 2015) In the said execution application, the office of the Prothonotary & Senior Master raised an objection insofar as the claim for interest on the arbitration costs claimed by the applicant is concerned. The applicant therefore, filed a Chamber

Summons (944 of 2015) before this Court. It was the case of the applicant that the costs of arbitration was actually incurred by the applicant. The respondent had refused to pay its share of the arbitration fees payable to the Arbitral Tribunal, which was ultimately contributed by the respondent. The said amount was thus paid by the applicant on behalf of the respondent to the Arbitral Tribunal.

9. The applicant had initially claimed interest at the rate of 12% p.a. on the amount of costs which was subsequently corrected as 18% p.a. The respondent did not appear before this Court when the chamber summons was heard. In the said chamber summons also, the applicant had demanded interest at the rate of 18% p.a. on the costs of Rs.30,00,000/- awarded by the learned Arbitrator from the date of the award till payment. By an order dated 2nd December, 2014, the learned Chamber Judge held that the calculation of interest *inter-alia* on the amount of costs in Column “g” of the execution application claimed by the applicant was correct and directed that the execution shall proceed in terms of the execution application. This order of the learned Chamber Judge passed on 2nd December, 2014 is sought to be recalled by the respondent in Chamber Summons No.1819 of 2016.

10. Mr.Narichania, learned senior counsel appearing for the applicant invited my attention to the arbitral award dated 2nd December, 2011 and would submit that in paragraph 47 of the said award, the learned Arbitrator has awarded various amounts. He submits that the respondent had not paid the contribution of its arbitration fees to the Arbitral Tribunal and thus the applicant was required to pay the contribution of the respondent towards the

arbitration fees to the Arbitral Tribunal. He submits that the applicant had claimed entire amount with interest before the Arbitral Tribunal including the arbitration costs. It is submitted that in paragraph 48 of the said arbitral award, the Arbitral Tribunal declared that the applicant would be entitled to interest at the rate of 12% p.a. from the date of the award till payment. He submits that the only clarification made by the Arbitral Tribunal in the said award was that no interest would be payable on Rs.40,828.34 which itself was an interest amount. He submits that the Arbitral Tribunal has awarded costs of Rs.30,00,000/- in favour of the applicant and had directed the respondent to pay the said amount to the applicant.

11. It is submitted by the learned senior counsel that the entire award was challenged by the respondent under section 34 of the Arbitration & Conciliation Act, 1996 before this Court. He submits that admittedly the said arbitration petition filed by the respondent came to be dismissed. The appeal filed by the respondent against the order of the learned single Judge and the Special Leave Petition filed by the respondent against the order of the Division Bench of this Court also came to be dismissed.

12. Learned senior counsel for the applicant invited my attention to the execution application and would submit that the applicant had claimed interest at the rate of 18% p.a. also on the arbitration costs of Rs.30,00,000/- awarded by the Arbitral Tribunal. He submits that the respondent did not appear before the learned Chamber Judge in the chamber summons filed by the applicant. He submits that the learned single Judge of this Court rightly allowed the said chamber summons and has rightly held that the calculation of

interest *inter-alia* on the amount of costs in Column “g” of the execution application was correct.

13. Learned senior counsel for the applicant also invited my attention to the order passed by the Division Bench of this Court on 27th October, 2016 in Appeal (Lodging) No.348 of 2016. He submits that this Court recorded the statement made by the applicant herein that the total amount payable along with accrued interest in terms of the award is about Rs.87,00,000/-. The Division Bench of this Court also recorded the statement made by the respondent herein that it was agreeable to pay the balance amount along with accrued interest in installments with all sincerity without fail. The Division Bench thus allowed the respondent herein to pay the balance amount along with future interest in nine monthly equal installments commencing from 1st December, 2016. This Court also directed the respondent to file an undertaking by way of affidavit agreeing to the said terms within two weeks from the date of the the said order and further provided that in the event of the default of any of the two installments, the respondent herein was ceased to have benefit of the said order. Learned senior counsel also invited my attention to the calculations submitted by the applicant before the Division Bench which include the interest also on the costs of Rs.30,00,000/- awarded by the Arbitral Tribunal at the rate of 18% p.a. from the date of award. He also invited my attention to the subsequent correspondence between the applicant and the respondent through respective advocates on the quantification of the claim. He submits that the stand of the respondent now that the final amount payable to the applicant by the respondent under the said order of the Division Bench dated 27th October, 2016 would be at Rs.60,16,562.85 ps. is contrary to the undertaking rendered by the

respondent before the Division Bench and also contrary to the order passed by the Division Bench. He submits that the amount claimed by the applicant before the Division Bench and also in the execution application was not disputed by the respondent.

14. It is submitted by the learned senior counsel that since the award is silent insofar as the interest on the arbitration costs is concerned which arbitration costs is awarded in the said arbitral award, in view of the unamended section 31(7)(b) of the Arbitration & Conciliation Act, 1996, the interest at the rate of 18% p.a. from the date of the award of the arbitration costs till the date of payment will have to be considered. He submits that under section 31(8) of the Arbitration & Conciliation Act, 1996, the Arbitral Tribunal is empowered to award costs of the arbitration relating to fees and expenses of the Arbitrators and witnesses, legal fees and expenses, any administrative fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the arbitral award. He submits that the claim of interest at the rate of 18% p.a. on the arbitration costs awarded by the Arbitral Tribunal is thus valid, justified and proper.

15. Without prejudice to the aforesaid submissions, it is submitted by the learned senior counsel for the applicant before the Division Bench of this Court that the applicant had already made a statement that the total amount payable along with accrued interest in terms of the award would be about Rs.87,00,000/-. The said statement was not disputed by the respondent before the Division Bench of this Court. The Division Bench recorded the statement made by the respondent that the said amount along with accrued

interest in installments would be paid by the respondent with all sincerity without fail. The Division Bench granted nine monthly equal installments to the respondent to pay the said amount commencing from 1st December, 2016. He submits that the Division Bench also directed that the respondent to file an undertaking by way of an affidavit agreeing to the said statement. The respondent never applied for clarification of the said order dated 27th October, 2016 at any point of time, nor disputed that the respondent had agreed to pay the balance amount along with accrued interest in installments before the Division Bench of this Court.

16. The applicant immediately vide its advocate's letter dated 3rd December, 2016 disputed the tabular statement of principal and interest forwarded by the respondent through its advocate on 30th November, 2016 and clarified that the balance amount due to the applicant as on 1st December, 2016 was Rs.88,30,318/- , which was payable by the respondent to the applicant in nine monthly equal installments commencing from 1st December, 2016. It is submitted by the learned senior counsel that in any event the respondent having agreed to pay the amount before the Division Bench, which was brought to the notice of the Division Bench by the applicant, the respondent cannot be allowed to resile from the said statement and undertaking which the respondent was directed to file before this Court and to deposit the lesser amount. He submits that the respondent is in breach of the order passed by the Division Bench of this Court and has committed contempt of the said order.

17. Insofar as the chamber summons filed by the respondent is concerned, it is submitted by the learned senior counsel that this

Court cannot set aside the order passed by the learned single Judge of this Court in the earlier chamber summons filed by the applicant. There is gross delay in filing this chamber summons, which is not explained by the respondent. The respondent cannot be allowed to refuse to pay the amount as awarded under the said arbitral award and under the order passed by the Division Bench of this Court. He submits that the respondent is applying dilatory tactics. He submits that the execution application filed by the applicant was settled by the office. No objection was raised by the respondent when the decree was settled by the office.

18. Mr. Lohia, learned counsel appearing for the respondent on the other hand invited my attention to the issues framed by the Arbitral Tribunal in paragraph (11) of the arbitral award dated 2nd December, 2011 and more particularly issue nos. 13 to 16. It is submitted by the learned counsel that the applicant had not claimed interest on the arbitration cost and thus question of the Arbitral Tribunal awarding any interest on the arbitration cost did not arise.

19. Learned counsel appearing for the respondent invited my attention to paragraphs 47 to 49 of the arbitral award dated 2nd December, 2011 and would submit that the Arbitral Tribunal has allowed the principal amount in paragraph 47 of the arbitral award and has awarded interest at the rate of 12% per annum thereof from the date of the award till payment in paragraph 48 of the award. He submits that insofar as award of arbitral cost in the sum of Rs.30,00,000/- by the Arbitral Tribunal is concerned, the said claim is independently allowed in paragraph 49 of the arbitral award. He submits that it is thus clear that there was no interest awarded by the

Arbitral Tribunal on the arbitral cost of Rs.30,00,000/- awarded by the Arbitral Tribunal in the said arbitral award dated 2nd December, 2011. It is submitted that the calculation of the applicant claiming interest on arbitration cost from the date of the award till payment is contrary to the said award dated 2nd December, 2011 and thus the respondent is not liable to pay any interest.

20. It is submitted by the learned counsel that clause 31(7)(b) of the Arbitration and Conciliation Act, 1996 would not be attracted to the said arbitral award dated 2nd December, 2011. He submits that the Arbitral Tribunal has provided interest on the principal amount awarded in paragraph 47 and thus the interest at the rate of 18% or at any other rate cannot be read in the impugned award which is not granted by the Arbitral Tribunal. He submits that there is no dispute on the proposition that the Arbitral Tribunal has power to award interest for delay or any part of the period between which the cause of action arises or on the date on which the award is rendered. He however submits that insofar as claim for payment of arbitration cost is concerned, the Arbitral Tribunal has decided the said claim for the first time in the arbitral award and more particularly in paragraph 49 of the said award. He submits that if the Arbitral Tribunal would have awarded interest on the arbitration cost of Rs.30,00,000/-, the said amount would have been included in paragraph 47 itself or in the alternative the learned Arbitrator would have directed the payment of arbitration cost also with future interest in the arbitral award made by the Arbitral Tribunal.

21. It is submitted by the learned counsel that the applicant itself had claimed interest initially at the rate of 12% per annum in the

execution proceedings and subsequently amended the said execution application and demanded interest at the rate of 18%. He submits that the office had raised an objection about the calculation of the applicant made in the execution application and more particularly demanding interest on the arbitration cost.

22. Insofar as order of deposit made by the learned Single Judge of this court in company petition filed by the applicant is concerned, it is submitted by the learned counsel for the respondent that the respondent did not agree to deposit pursuant to the said order passed by the learned Single Judge and being aggrieved, filed an appeal before this court. He submits that insofar as the first order passed by the Division Bench directing the respondent to deposit a sum of Rs.50,00,000/- is concerned, the said amount was in any event less than the awarded sum. The deposit of the said amount by the respondent thus cannot be considered as admission of the correctness of the calculation made by the applicant before the Division Bench. He submits that the respondent did not accept the statement made by the applicant about the amount due to the applicant by the respondent. He submits that the respondent also did not accept the amount mentioned in the statement annexed to the company petition by the applicant. He submits that since the company court was considering the claim made by the applicant above the statutory limit of Rs.1,00,000/- provided in the Companies Act, 1956, the respondent did not think it necessary to deny the correctness exact amount claimed by the applicant.

23. It is submitted by the learned counsel that since the respondent had shown its readiness and willingness to settle the

disputes amicably between the parties before the Division Bench of this court, the respondent did not submit any other calculation before the Division Bench which according to the respondent was a correct calculation. He submits that after disposal of the appeal by the Division Bench, the respondent calculated the amount and informed the applicant the correct principal amount with interest payable to the applicant by the respondent at Rs.60,16,562.85 ps. and forwarded 10 cheques of various amounts totalling to Rs.60,16,562.85 ps. to the applicant in compliance with the order passed by the Division Bench. He submits that the respondent has not committed any contempt of court as canvassed by the learned senior counsel for the applicant.

24. Without prejudice to the rights and contentions raised aforesaid, it is submitted by the learned counsel that once this court decides the issue as to whether the respondent is liable to pay any interest in arbitration cost of Rs.30,00,000/- awarded by the Arbitral Tribunal to the applicant, the computation of the exact amount payable to the applicant by the respondent can be left to the Commissioner for Taking Accounts as prayed by the applicant in this company application.

25. Mr. Narichania, learned senior counsel for the applicant in rejoinder submits that this court cannot decide contrary to the decision of the Division Bench dated 27th October, 2016 in Appeal (Lodging) No.348 of 2016 in which this court recorded the statement of the applicant that the total amount payable along with accrued interest in terms of award would be about Rs.87,00,000/- and also the agreement of the respondent to pay the said amount in installments. He submits that though the Division Bench had directed the

respondent to file an undertaking by way of affidavit before this court, according to the said terms recorded in the order within two weeks from the date of the said order, the applicant has not been served with a copy of any undertaking by way of affidavit if filed by the respondent in compliance with the said order dated 26th October, 2016.

26. Learned senior counsel for the applicant submits that the respondent had impugned the order passed by the learned Single Judge in Company Petition No.276 of 2015 only the ground of jurisdiction and did not object to the amount claimed by the applicant in the company petition. He submits that the quantification of the claim made by the applicant was neither challenged by the respondent in the affidavit in reply filed before the learned Single Judge nor in the ground of appeal filed before the Division Bench. It is submitted by the learned senior counsel that even if this court considers the claim of the applicant crystalized by the said order dated 27th October,2016 passed by the Division Bench in Appeal (Lodging) No.348 of 2016, which the respondent had agreed to pay the said amount, the respondent did not pay the said amount but had paid only a sum of Rs.60,16,562.85 ps. He submits that the respondent has deliberately and willfully violated the order passed by the Division Bench by not paying the amount as directed by the Division Bench of this court nor has filed the undertaking before this court though directed.

REASONS AND CONCLUSIONS :

27. It is not in dispute that the dispute between the parties was

referred to arbitration. The Arbitral Tribunal made an award on 2nd December, 2011. In paragraph 47 of the said arbitral award the applicant was awarded principal amount in respect of claim nos. 1, 2, 4 and 7. The said claim was quantified at Rs.89,24,046.34 ps. In paragraph 48 of the arbitral award, the Arbitral Tribunal awarded interest at the rate of 12% per annum from the date of the award till payment of the amounts awarded. In the same paragraph, the Arbitral Tribunal clarified that no interest would be payable on the sum of Rs.4,08,428.34 ps. which itself was an interest amount. In paragraph 49 of the arbitral award, the Arbitral Tribunal awarded arbitration cost in the sum of Rs.30,00,000/- in favour of the applicant and directed the respondent to pay the said amount to the applicant. It is not in dispute that the said arbitral award was upheld before the learned Single Judge, the Division Bench of this court and also before the Supreme Court.

28. Since the respondent did not pay the awarded amount, the applicant filed company petition (261 of 2015). In the statutory notice dated 20th December, 2014 issued by the applicant, the applicant had claimed various amounts including interest also on the cost of Rs.30,00,000/- awarded by the Arbitral Tribunal. Though the said notice was received by the respondent, there was no response to the said notice by the respondent. The Company Court by an order dated 30th August, 2016 directed the respondent to deposit a sum of Rs.1,17,82,849.91 ps as condition precedent for not admitting the company petition. In the said order, it was made clear that if the amount was deposited, the applicant was at liberty to withdraw the said amount and in that event, the company petition to stand dismissed. In the said company petition, the applicant had claimed

interest at the rate of 18% p.a. on the arbitration cost. There was no dispute raised by the respondent in the affidavit in reply filed before learned Company Judge in respect of the amount claimed by the applicant.

29. Before the Division Bench, the respondent did not challenge the quantification of the claim made by the applicant in the company petition. The Division Bench recorded the statement made by the applicant that a total amount payable along with accrued interest on the terms of the award would be about Rs.87,00,000/-. The respondent herein suggested a period of three years for making payment of the amount payable along with accrued interest to the applicant.

30. The Division Bench of this court recorded that since the respondent herein was agreeable to pay the balance amount along with accrued interest in installments with all sincerity without fail, the Division Bench allowed the respondent to pay the balance amount along with future interest to be accrued in 9 equal monthly installments commencing from 1st December, 2016 directly to the applicant herein. The Division Bench also directed the respondent to file an undertaking by way of affidavit agreeing to the terms recorded in the said order within two weeks from the date of the said order. It was made clear that on failure of deposit of any of the two installments, the applicant shall cease to have the benefit of the said order. This court permitted the applicant to withdraw Rs.50,00,000/- deposited by the respondent and directed that the said amount shall be taken towards the principal amount and the installments would be worked for the balance principal amount and the accrued interest on

the outstanding (reducing) balance of the principal amount.

31. It is not in dispute that the applicant had filed the execution application in which the applicant had initially claimed interest at the rate of 12% per annum on the arbitration cost. The said application was subsequently amended by the applicant and the interest at the rate of 18% p.a. from the arbitration cost was claimed. The said execution application appeared before the Chamber Judge of this court on 2nd December, 2014. By an order dated 2nd December, 2014 passed by the learned Chamber Judge, it was held that the calculation of interest on the amount of cost in column (g) was correct. It was directed that the execution shall proceed in terms of the execution application. The respondent did not file any appeal against the said order dated 2nd December, 2014 but has chosen to file Chamber Summons (1819 of 2016) *inter-alia* praying for setting aside the said order dated 2nd December, 2014 and has applied for condonation of delay.

32. A perusal of the affidavit in support of the chamber summons indicates that except prayer for condonation of delay in filing the chamber summons, the respondent has not explained the gross delay in filing chamber summons for setting aside the said order dated 2nd December, 2014. It is clear that the said chamber summons is filed on 13th December, 2016 i.e. much after the order of the Division Bench and after the applicant calling upon the respondent to pay in compliance with the order passed by the Division Bench. A perusal of the affidavit in support of the chamber summons clearly indicates that it is not the case of the respondent that the respondent had not made any statement before the Division

Bench for making payment of the amount mentioned in the order. The respondent also did not apply for speaking to the minutes of the order passed by the Division Bench on 30th August, 2016. It is not the case of the respondent that the respondent had suggested any other amount due and payable by the respondent to the applicant as per arbitral award rendered by the arbitral tribunal.

33. None of the statement of calculation filed by the applicant before the learned Company Judge or in the execution application or before the Division Bench of this court came to be disputed by the respondent. A perusal of the record indicates that the respondent did not file any undertaking before the Division Bench though directed in the said order. In my *prima-facie* view the respondent has thus willfully committed breach of the order passed by the Division Bench and has committed of the said order. The respondent is not ready to pay the balance amount to the applicant even at this stage.

34. In my view since the award is silent on the payment of cost of Rs.30,00,000/- to be made by the respondent to the applicant, in view of section 31(7)(b), interest at the rate of 18% per annum will have to be considered on payment of cost. Be that as it may, the parties have agreed before the Division Bench of this court that the amount payable by the respondent to the applicant would be about Rs.87,00,000/- which was to be paid in installments by the respondent to the applicant. The respondent has deliberately not paid the balance amount due and payable by the respondent to the applicant. In my view the respondent was thus liable to pay to the applicant a sum of Rs.88,18,515/-.

35. The above matters were placed on board for directions before this Court on 16th February, 2017 to ascertain whether any undertaking was filed by the respondent before the Division Bench in compliance with the order dated 27th October, 2016. Learned counsel for the respondent made a statement that no such undertaking was filed before the Division Bench of this Court within the time prescribed in the said order dated 27th October, 2016 or otherwise. It is thus clear beyond reasonable doubt that the respondent has not complied with the order passed by the Division Bench on 27th October, 2016. In my *prima-facie* view the respondent has deliberately and willfully committed violation of the order passed by the Division Bench on 27th October, 2016 by not filing an undertaking before this Court.

36. In my view, the respondent has not complied with the conditional order passed by the Division Bench on 27th October, 2016 and has paid only part of the amount to the applicant. The said order passed by the Division Bench clearly provides that on failure to deposit any of the two installments as indicated in the said order, the respondent herein was ceased to have a benefit of the said order. In my view, since the respondent has committed default to pay the entire amount, the conditional order passed by the learned single Judge on 30th August, 2016 in Company Petition No.276 of 2015 stands restored. The company petition thus stands admitted and the petition is required to be advertised.

37. Insofar as the submission of the learned counsel for the respondent that no interest was provided by the Arbitral Tribunal on the awarded costs and if the Arbitral Tribunal wanted to award any interest on the arbitration costs, the said sum ought to have been

incorporated in the arbitral award itself is concerned, in my view, there is no substance in this submission of the learned counsel for the respondent. In my view, since the arbitral award is silent on the amount of arbitration costs and admittedly since the claim for interest is not rejected specifically by the Arbitral Tribunal in the said award, under section 31(7)(b) of the Arbitration & Conciliation Act, 1996, interest at the rate of 18% p.a. on the payment of arbitration costs will have to be considered from the date of the award on the said amount of Rs.30,00,000/- till payment.

38. In my view, since the breach committed by the respondent is *ex-facie* clear, this Court is not required to direct the Commissioner for Taking Accounts or any other officer of this Court to calculate the amounts due and payable to the applicant under the award dated 2nd December, 2011 and the order dated 2nd December, 2014 and to direct the respondent to make payment of the amounts in installments. In view of the default committed by the respondent, the consequences provided in the order dated 30th August, 2016 read with the order dated 27th October, 2016 would follow.

39. Insofar as the Chamber Summons filed by the respondent (1819 of 2016) *inter-alia* praying for setting aside of the order passed by the learned Chamber Judge on 2nd December, 2014 is concerned, it is clear that the said order was passed by the Chamber Judge on 2nd December, 2014. The respondent however, has filed the chamber summons only on 13rd December, 2016 i.e. only after the Division Bench of this Court disposed of the said appeal filed by the respondent. It is clear that the said chamber summons filed by the respondent was with an intention to delay the payment required to be

made by the respondent inspite of the undertaking recorded by the Division Bench of this Court. A perusal of the affidavit in support of the chamber summons indicates that the respondent has not explained gross delay in filing the chamber summons at all. In my view, in view of the statement made and the undertaking given before the Division Bench of this Court by the respondent, the chamber summons belatedly filed by the respondent is thoroughly misconceived and thus deserves to be dismissed.

40. I therefore, pass the following order :-

a). The Company Petition No.276 of 2015 stands admitted and shall be advertised in two local newspapers, namely (i) Free Press Journal (in English) and Navshakti (in Marathi) as also in the Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

b). The company petition is made returnable on 10th April, 2017. The petitioner shall deposit Rs.10,000/- towards publication charges with the Prothonotary & Senior Master, under intimation to the Company Registrar, within three weeks from the date of this order, failing which the petition shall stand dismissed for the non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

c). The service of the petition under Rule 28 of the Companies (Court) Rules, 1959 shall be deemed to have been waived.

d). The Company Application (Lodging) No.796 of 2016 and the Chamber Summons No.1819 of 2016 are disposed of in aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)

41. At this stage, learned counsel appearing for the respondent seeks stay of the order of publication of the petition passed by this Court for a period of two weeks from today. It is vehemently opposed by Mr.Narichania, learned senior counsel for the applicant (original petitioner). Since this Court is of the view that the respondent has *prima-facie* committed contempt of the order dated 27th October, 2016 passed by this Court and in view of the fact that the respondent is not willing to deposit / pay the balance amount even at this stage, I am not inclined to accept the request of the learned counsel for the respondent to grant stay of the order of publication. The application for stay is rejected.

(R.D. DHANUKA, J.)