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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 25.07.2017

Pronounced on: 22.08.2017

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+ O.M.P. 509/2011

KRISHAK BHARATI COOPERATIVE LTD. Petitioner

Through Ms.Surekha Raman, Adv.

versus

M/S. ALUTEC INC.

Respondent

Through Mr.Siddharth Bhatnagar, Mr.Prasanjit
Keswani and Ms.Perna Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for setting aside the Award dated 03.03.2011 of the learned Arbitrator.
2. Some of the brief facts are that the petitioner and the respondent entered into a Service Agreement on 25.11.1994 for carrying out Consultancy Services for the Due Diligence Process and Project Implementation activities for Engineering, Technological, Environmental, Economical, Financial and Legal Analysis of Target plants of M/s.Mulberry Phosphaate Inc., Piney Point Plant and Wingate Creek Mine in USA and two target plants in Russia, i.e. M/s Ackron Nitrous Phosphate Novgorod & M/s IRGIZ Chemical Complex, Balakova. As per the Service Agreement, the

petitioner in consultation with the respondent was to identify and appoint Expert Engineering, Environmental, Financial, Legal and Accounting Consultancy Services to support the project. The Service Agreement stipulated a total fee of US \$295250 for consultancy services to be provided by the respondent for due diligence in relation to the target plants both in USA and Russia. The Agreement also stipulated the reimbursable cost during the entire project session not exceeding US \$137850 (which was subsequently corrected to US \$127850) payable to the respondent.

3. Two amendments to the Agreement were agreed upon i.e. Amendment-I on April 03, 1995 regarding total reimbursable expenses and Amendment-II on 04.05.1995 again seeking break up of reimbursable expenses as per the terms of the Service Agreement. Sub-consultants in USA were appointed in consultation with the respondent on 28.01.1995. Tripartite Service Agreements were entered into amongst the petitioner, respondent and Sub-Consultants to whom a letter of intent was issued. The Sub-Consultants were appointed at an aggregate fee of US \$480000/- that was to be paid directly by the petitioner.

Regarding the target plants in Russia, pursuant to the discussions, the parties decided to enter into a separate Service Agreement on 31.03.1995 and a Side Letter on the same date stating that the appointment of sub-consultants was to be made by the respondent and payment of fees therein at an aggregate fees of US \$ 230000 was to be routed through the respondent. It is urged by the petitioner that as per the Side Letter dated 31.03.1995, the respondent was required to pass on the total amount to the expert sub-contractors and no amount could be retained by the respondent.

4. Disputes having arisen between the parties, the respondent approached this court by filing an arbitration application being Arbitration Appl. No. 109/1996 on 25.09.1996 under Section 11(6) of the Act for appointment of an arbitrator. On 15.05.1998 this court permitted the respondent to withdraw the said petition. Thereafter, the respondent's counsel vide letter dated 18.05.1998 requested the petitioner to give their consent for composition of an Arbitral Tribunal consisting of a sole arbitrator. As the petitioner expressed its inability, the respondent again approached this court for appointment of an arbitrator under Section 11(6) of the Act being Arbitration Application No. 236/1998. This court vide its order dated 17.09.2001 allowed the petition of the respondent and appointed the Arbitral Tribunal comprising Hon'ble Justice P.K. Bahri (Retd.) and Mr. Justice Jaspal Singh (Retd.). The learned Arbitrators appointed Hon'ble Justice T.P.S. Chawla (Retd.) as the Presiding Arbitrator. The learned Arbitral Tribunal framed two preliminary issues. The said Tribunal vide its award dated 18.08.2004 held that the arbitration clause in the agreement contemplated the appointment of a sole arbitrator and hence, the appointment of three arbitrators was not in accordance with the arbitration clause.

5. Accordingly, in view of the said Award, the respondent issued a notice on 16.09.2004 under Section 11(5) of the Act calling upon the petitioner to concur with the respondent in the appointment of a sole arbitrator. As the petitioner did not agree, another Arbitration application being Arbitration Appl. No. 2/2005 was filed before the Hon'ble Supreme Court under Section 2(1)(f) and Section 11(12) (a) of the Act for appointment of an arbitrator. The Supreme Court vide its order dated 17.03.2005 nominated the sole arbitrator.

6. The learned Arbitrator framed 14 issues. Essentially, the claim of the respondent was regarding unpaid dues on account of its fees under the Service Agreement, on account of the fees of the Russian Sub-Consultant under agreement dated 31.03.1995 and on account of unpaid reimbursable expenses.

7. The petitioner denied the claims of the respondent. It was the case of the petitioner that the claim of the respondent was barred by limitation.

It was pleaded by the petitioner that the respondent had failed to fulfill the terms of the agreement dated 25.11.1994 and hence, no part of the agreed fees of US \$295000 was payable to the respondent.

The petitioner also pleaded that there were shortcomings and deficiencies in the reports submitted by the sub-consultants pertaining to final due diligence report. It was contended that the respondent had failed to ensure performance by the sub-consultants in USA appointed on their recommendations which they were responsible to do and hence, failed to fulfill their obligations under the contract.

Regarding Russia it was the case of the petitioner that the Service Agreement dated 31.03.1995 became effective from 12.05.1995 when first down payment of 20% being US \$46000 was made to the respondent for onward transmission to the Russia Expert Sub-Consultants. The case of the petitioner is that as per the payment schedule, initial down payment of 20% was to be made to the respondent and balance was payable at the stages specified in the agreement but on the submission of the required receipts from the Sub-Consultant. It is stated that the respondent produced three receipts from the Russian Sub-Consultants for an aggregate amount of US \$20000 as against a figure of US \$ 92000 released for the Sub-Consultants in

Russia. As no proofs of release of full payment to the Russian Sub-Consultants were ever furnished by the respondent, there was non-compliance of the agreement by the respondent, and hence, no further payment could be made to the petitioner. It is further the case of the petitioner that the respondent miserably failed to submit any meaningful report regarding Russian part of the contract. Even sub-consultants did not complete their contract and hence, no payment was even otherwise payable to the Russian sub-consultants.

Similarly, regarding the reimbursable expenses payable to the respondent various pleas have been raised as to why they were not payable. In addition, the petitioner also filed their counter claim before the learned Arbitrator claiming refund of amounts under the Service agreement dated 25.11.1994 and Agreement 31.03.1995.

8. The sole Arbitrator has given his Award on 03.03.2011. The learned Arbitrator on the issue of limitation noted the sequence of events starting from the invocation of the arbitration by the respondent i.e. from 01.06.1996 and held that there was no delay and the claims are not barred by limitation. It also concluded that any pending proceedings before an earlier arbitral tribunal which did not possess the jurisdiction would give the respondent benefit under Section 14 of the Limitation Act as the respondent was prosecuting a remedy bona fide.

9. Regarding the work said to have been performed by the respondent, the issue related to the reports of the USA Plants and of the Russia Plants. As far as USA Plants is concerned, the Award notes that the documentary and oral evidence led in the matter leaves no matter of doubt that the entire work was complete and a final presentation was made to the Board of

Directors of the petitioner based on which a decision was taken not to go ahead with the acquisition. Hence, the Award concludes that the petitioner is pointing out deficiencies in the reports of USA only to avoid making payment of fees of the respondent and the respondent is entitled to the full fees regarding the work done in USA. Regarding the work in Russia, it notes that the respondent have submitted the second progress report for Russia meaning thereby that above 50% of the investigation was completed. The Award holds that out of the fees of US \$295000 payable to the respondent under the Agreement dated 25.11.1994, 2/3rd fees can be considered as the fee for the work done in USA which is payable in full and 1/3rd of the fee as the fee for the work done in Russia 60% of which is payable. Based on the same and taking into account the payment already made, an Award for US \$108667 was awarded to the respondent for unpaid fees.

Regarding the claim of the respondent for recovery of balance fees payable to the Russian sub-consultants in terms of the agreement dated 31.03.1995, the award notes that the petitioner was paid US \$92000 out of a total sum payable of US \$230000 for the sub-consultants. The award notes the contention of the petitioner that the respondent was obliged to produce the receipts for payments made to the sub-consultants. The learned Arbitrator rejects the said plea and holds that there was no obligation on the part of the respondent under agreement dated 31.03.1995 to produce the receipts of payments made to the sub-consultants. Despite holding that 60% of the work was completed regarding the Russian part, the award holds that the respondent has not produced any evidence to show that Russian sub-consultants claimed balance US \$ 138000 and hence disentitled the

respondent from claiming the said balance amount for the Russian Sub-Consultant.

10. On account of reimbursable expenses, an amount of US \$64401 was awarded being total of US\$173068. In addition, the award also grants simple interest @ 9% per annum from 14.09.1995 till date of payment and if such payment is not made within four months from the date of the Award, simple interest @ 12% per annum till the date of payment.

11. The counter claims of the petitioner were rejected.

12. I have heard learned counsel for the parties.

13. Learned counsel for the petitioner impugned the award and has submitted as follows:

(i) There were numerous deficiencies in the report regarding the USA Plants and Russian Plants that were submitted by the respondent. Hence, no payment was payable to the respondent for the same.

(ii) It is further urged that even if some amount was payable under the Agreement dated 25.11.1994, the learned Arbitrator has wrongly sought to apportion the fee payable to the respondent as 2/3rd for the USA component and 1/3rd for the Russian component. It is stated that this bifurcation is not provided in the Service Agreement. It has been stressed that where terms of the agreement are clear and unambiguous, recourse cannot be had to the principles of interpretation.

(iii) Regarding Russian Reports, it has been averred that US \$92,000 were released to the respondent for payment to the Russian Consultants. Despite request, receipts of only US \$20000 were filed showing that the respondent had paid US \$20000 to the sub-consultants. It is urged that in terms of the Service Agreement dated 31.03.1995 and the Side Letter of the same date, the

respondent was obliged to forward all payments receipts of the sub-consultants to the petitioner. As no such proofs were filed, no payments have been released and the petitioner was entitled to refund of the said amount of US \$ 92000.

(iv) It has been strongly urged that the Award of US \$ 64,401 for reimbursable expenses by the learned Arbitrator is entirely erroneous. It is pleaded that various documents in respect of reimbursable expenses which were required to be submitted in terms of the Agreement have not been submitted. Further, it is pleaded that the respondent was not entitled to any expenses towards rental and the learned Arbitrator has wrongly allowed US \$ 11,497 towards rent up to April 1995.

(v) It has been strongly urged that the petition is barred by limitation. It is urged that after the first arbitral tribunal held its appointment to be contrary to the arbitration agreement, the respondent again issued a notice on 16.09.2004 invoking the arbitration clause and adding more claims in addition to the claims that had been made in the first occasion when the arbitration clause was invoked in 1996. Hence, it is urged that on account of this act of fresh invocation, the entire claims of the respondent were barred by limitation and have wrongly been accepted by the learned arbitrator.

(vi) It is further urged that the learned arbitrator has wrongly granted interest @ 9% and @ 12% per annum. It is stated that the appropriate rate should have been libor rate as it is an award in US dollars. It is urged that the petitioner would suffer penalty on account of change in exchange rates and also the interest component. Reliance was placed on the judgment of the Division Bench of this court in the case of *MMTC vs. M/s. Albamar Company Ltd., 159 (2009) DLT 513* and the judgment of the Division Bench

of Punjab and Haryana High Court in the case of *M/s. C.L. Jain Woolen Mills vs. M/s. Mosenthals Wool Mohair S.A. (Pvt.) Ltd.*, *MANU/PH/3319/2013* to support her contention.

14. I may now deal with the submissions of learned counsel for the petitioner. The first two contentions are that no payments are payable to the respondent under Service Agreement dated 25.11.1994 on account of deficiency in the reports submitted and that there was no basis to bifurcate the contract as 2/3rd for USA and 1/3rd for Russia. A perusal of the Award of the learned Arbitrator would show that the Award records a finding of fact based on documentary and oral evidence that the entire work was completed pertaining to USA. The Award notes that presentation was made by the respondent to the Board of Directors of the petitioner based on which decision was taken by the petitioner not to go ahead with the acquisition. The Award notes that after a visit of the petitioner the final Due Diligence Report was submitted by the respondent in June 1995 which is evident from letter dated 26.6.1995 (Ex.CW1/78). The Award concludes that the final report of 13 volumes was submitted on 21.8.1995 (CW 1/119) and the final presentation was made on 13.09.1995. The learned Arbitrator noted that the petitioner has claimed some deficiencies in the report of the USA of the consultants who were experts in their fields. However, as the deficiencies were raised for the first time much after the final presentation and decision not to proceed with the acquisition was taken by the petitioner, the learned Arbitrator came to a conclusion that the deficiencies were being pointed out only to avoid making payment of fees. The Award also notes that the petitioner had written letters to the Sub-Consultants in USA on 17.11.1995 and a detailed reply had been sent by the said consultants pointing out that

there are no deficiencies. There was no response to these replies from the said consultants by the petitioners. Hence the Award concludes that as far as the work in USA is concerned there were no deficiencies.

As far as the Russia part is concerned, the Award notes that on 27.4.1995 the Progress Report No.1 was forwarded and was admittedly received by the petitioner. The 2nd Progress Report was received by the petitioner on 10.7.1995. The learned Arbitrator rejected the contention of the respondent that work in Russia was 100% complete. It noted that the second progress report had been submitted meaning thereby that 60% of the engineering, environmental, financial and project financing investigation was completed. The Award also notes that RW-1 Mr. H.P. Kataria had noted that for completion of due diligence process in Russia a team was to be deputed for review and discussion with the said consultants. It was the case of the respondent that no such team was deputed and hence final reports could not be prepared. The Award notes the affidavit filed in the High Court by the respondents where they have stated that final report was not submitted but an executive summary was submitted.

15. Keeping in view the above findings recorded by the learned Arbitrator, the award notes that a total fees of US \$295000/- was payable to the respondent in terms of the agreement dated 25.11.1994. The award concludes on facts that the entire due work relating to the American projects had been completed by the respondent. Keeping in view the extent of work in USA and Russia it holds that out of the fees of US \$ 295000/-, 2/3rd can be considered as fees of the work done by the respondent in USA and hence the full fees for USA would be payable to the respondents accordingly. Regarding the Russian component of the work, the award holds that 1/3rd of

the agreed fees can be attributed to the work done in Russia. Based on the documents and evidence on record, the award concludes that about 60% of the work in Russia can be said to have been completed. Hence, appropriate compensation to the respondent has been awarded for the Russian component of the work (i.e. 60% of 1/3rd)

16. Based on the above, the award grants US \$ 196667 on account of the work done in USA and US \$ 59000 on account of the work done for Russia being a total of US \$ 255667 as against the agreed fees of US \$ 295250. Keeping in view the fact that an amount of US \$ 147000 had already been paid, an award was passed in favour of the respondent for US \$ 108667 on this account.

17. The above findings recorded by the learned Arbitrator are plausible findings. The petitioner has not been able to show any grounds or basis, on the basis of which the findings recorded by the learned Arbitrator can be held to be vitiated. No evidence or document that has been ignored has been pleaded. The only objection raised by the petitioner was that there was no basis for splitting the fees payable to the respondent into 2/3rd and 1/3rd i.e. 2/3rd for the work done in America and 1/3rd for the work to be done in Russia. It was pleaded that no such clause of the agreement dated 25.11.1994 permits this action. In my view, the learned Arbitrator has based on facts and evidence on record used this formula for computing the dues payable to the respondent. The Award concludes that the USA part of the work was fully completed by the respondent. For Russia part, 60% of the work was done. Accordingly, it concludes that the respondent is entitled to US \$ 255667 out of the agreed figure of US \$ 295250. There is nothing illegal or arbitrary or

unreasonable about the methodology used to compute the dues payable to the respondent for the work done by the respondent.

18. In any case, interpretation of the contract is within the domain of the arbitrator. It is settled legal position that the court shall not ordinarily substitute its interpretation of the terms of the contract with the interpretation of the arbitrator. A reference may be had to the judgment of the Supreme Court in the case of *Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*, (2015) 5 SCC 739. The court held as follows:

“19. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

19. Similarly, the Supreme Court in *National Highways Authority of India vs. ITD. Cementation India Limited*, (2015) 14 SCC 21/(MANU /SC/0490/2015), held as follows:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

Keeping in view the above legal position and noting that the conclusions of the learned Arbitrator are plausible, there are no reasons to interfere in the findings regarding payment payable to the respondent on account of the fees to the respondent.

20. On the next plea of the petitioner that no amount is payable to the respondent on account of the Russian Sub-Consultants, the learned Arbitrator rejected the contention of the petitioner. The petitioner has vehemently argued that in terms of the Side Letter dated 31.3.1995 the entire payment of US \$230000 was to be paid to the Russian Sub-Consultants though routed through the respondent. No amount was to be retained by the respondent. Hence, it is claimed that proper receipts had to be given by the respondent for payments disbursed to the Sub-Consultants which have not been done.

By the Award the learned Arbitrator, however, notes that receipts were given to the petitioner. The Award also holds that the Sub-Consultants never disputed these receipts. It further holds that in any event there was no obligation on the part of the respondent under the agreement dated 31.3.1995 to produce receipts of payments made to Sub-Consultants.

21. It has been vehemently argued that the terms of the Side Letter dated 31.3.1995 have been ignored. The said letter reads as follows:-

“M/s Alutec Inc.,
Suite No.117,
5925 Imperial Parkway,
Mulberry Florida- 33860, USA

Attn. Mr.Asim Bose, Managing Director

Subject: Service Agreement with M/s Alutec Inc. for Due Diligence Investigation of Target Plants in Russia.

Dear Sir,

We refer to the Service Agreement entered into on between KRIBHCO and Alutec Inc. in respect of Due Diligence Investigation of the Target Plants in Russia. In this connection, we wish to reiterate our understanding as under notwithstanding the provision of said Service Agreement.

- (i) M/s.Alutec Inc. shall engage following pre-selected expert sub-contractors on a lump-sum fixed fee for Due Diligence Investigation as under:

S.No.	Description	Name	Fee (US\$)
1	Engineering Technology and Environmental Studies	M/s.Scientific Instt. Of Fertilizer & Insecticides	80,000
2	Economical, Financial & Accounting Services	M/s.Inoteku Progress	80,000/-
3	Legal Service	M/s.Sanctum	70,000/-
		Total	2,30,000/-

- (ii) All payments under said Service Agreement shall be released to M/s Alutec Inc. M/s. Alutec Inc. will pass on the total amount to the expert sub-contractors mentioned at Sl. Nos. 1, 2 & 3 above and no amount will be retained by M/s. Alutec Inc.

We request you to kindly sign the duplicate copy of this letter by way of your agreement with above and return the same to us.

Thanking
You,
Yours' faithfully
For Krishak Bharati Cooperative Limited.

(A.K.Mukhopadhyay)
Managing Director”

22. The learned Arbitrator held interpreting the said letter that there is no obligations upon the claimants either under the Agreement dated 3.3.1995 or in the said letter to produce receipts of payment made to Sub-Consultants.

23. A perusal of the said letter would show that there is no such clause that the respondent was obliged to submit receipts of payments received by the Sub-Consultants. Clause 3(ii) only requires that the payments under the Agreement will be released to the respondent which the respondent shall pass on to the Expert Sub Contractors and no amount shall be retained by the respondent. It cannot be said that it is implicit in this clause that a receipt from the Sub-Consultant is a mandatory requirement before release of money for the Sub-Contractor.

24. Hence, merely because the respondent did not produce receipts for payments made to Sub-Consultants would not mean that the petitioners were entitled to withhold the dues payable to the Sub-Consultants. In any case the learned Arbitrator has rejected the claim of the respondent for the balance amount in terms of the agreement dated 31.03.1995 of US \$ 230000.

As already noted above, the interpretation of terms of a contract are within the domain of an Arbitrator. Hence, there is no merit in the plea of the petitioner that the terms of the contract between the parties have been ignored by the learned Arbitrator while adjudicating this issue.

25. I will now deal with the contention of the petitioner regarding award of US \$ 64,401 on account of reimbursable expenses. The Award notes that as per the amended agreement, the respondent was entitled to US \$ 127850 on this count. It concludes on facts that the documents in support of invoices have been submitted by the respondent and concludes that US \$108000 are reimbursable under various admissible heads. It also notes that the petitioner has spent US \$ 27,526 in rupees towards expenses on behalf of the respondent which amount it holds is recoverable. In addition, it notes that rental would be admissible since it was on account of a camp office of the petitioner arranged by the petitioner in accordance with the service agreement. However this rental was payable only up to April, 1995 in view of the amendment in the Agreement on 31.03.1995. Out of the invoices of rental US \$ 17,000, the learned Arbitrator allowed US \$ 11,497/- being rental up to April 1995. The Award finally holds that out of expenses of US \$ 1,27,850/- as payable as per the agreement dated 25.11.1994, the respondent is entitled to only US \$ 1,19,497(i.e. US \$ 108000 + US \$11497). The Award further allows deduction from the above dues payable to the respondent on account of payments made by the petitioner of US \$ 27,570 and expenses incurred by the petitioner on behalf of the respondent of US \$ 27,526 being a total of US \$ 55,096. Hence, an Award of US \$ 64,401 (US \$ 1,19,497 – US\$55,096.14) are made in favour of the respondent.

26. These are findings of fact recorded by the learned Arbitrator. No plausible explanation or reason has been given as to why these findings of fact recorded by the learned Arbitrator may be set aside.

27. The settled legal position is that findings of fact recorded by the learned Arbitrator can be disturbed only on very limited grounds. Reference may be had to the judgment of the Supreme Court in the case of ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49*** where the Supreme Court held as follows:

“31.....The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In ***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons***, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In ***Kuldeep Singh v. Commr. of Police***, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a

claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.
.....”

Accordingly, there are no plausible grounds to quash the findings of the learned Arbitrator regarding reimbursable expenses payable to the respondent.

28. The next contention that has been raised by the learned counsel for the petitioner pertains to the contention that the claim of the respondent is barred by limitation. The stand is that the respondent invoked the arbitration clause on 1.6.1996. Litigation has ensued between the parties when the first arbitral tribunal was constituted which returned the finding that as per the arbitration clause only a Single Arbitrator is to be appointed to adjudicate the disputes between the parties. The grievance of the petitioner is that after the arbitral tribunal on 18.8.2004 held that it did not have jurisdiction under the arbitration clause as the said agreements contemplated the appointment of a sole Arbitrator, the respondent on 16.9.2004 again invoked the arbitration clause and added additional claims which were not raised in the earlier invocation on 1.6.1996. Hence, it was urged that the entire present claim filed by the respondent was barred by limitation as the date of invocation is 16.9.2004 and not 01.6.1996.

29. A perusal of the award would show that the learned Arbitrator has noted that the proceedings before an earlier Arbitral Tribunal which did not possess jurisdiction would entitle the respondents to the benefit of section 14 of the Limitation Act as they were prosecuting the said remedy in a bona fide manner. The claim of the respondent was held to be within limitation.

30. Section 21 of the Act reads as follows:-

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

31. Hence, the arbitration proceedings commenced on the first notice on 01.06.1996 when a request for dispute to be referred to arbitration was received by the respondent. The Award of the learned Arbitral Tribunal dated 18.08.2004 holding that arbitration is to be conducted by a sole arbitrator and not a tribunal of three Arbitrators was not a decision on merits. The mere sending of the superfluous notice a second time after the decision of the arbitral tribunal on 18.8.2004 by the respondent does not render the claim of the respondent as barred by limitation. In any case as rightly noted by the learned Arbitrator, Section 14 of the Limitation Act would also come to rescue of the respondent.

32. It is also an admitted fact that the additional claims which were added in the second notice dated 16.9.2004 sent by the respondent have been disallowed by the learned Arbitrator.

33. In view of the above, the plea of the claim of the respondent being barred by law is misplaced.

34. The last plea of the petitioner related to the Award of interest which has been awarded at 9% per annum from 14.9.1995 and subsequent to pronouncement of the award @ 12% per annum.

35. A Division Bench of this court in *MMTC. vs. M/s. Al Bamar Company Ltd. (supra)* on the issue of interest held as follows:-

“10. That leaves us with the issue with regard to the interest and in fact was the only issue seriously urged before us by the counsel for the appellant. As per the award, the respondent has been granted its claim of US Dollars 52,913.97 along with interest at International Lending Rate (LIBOR) of 7%. We are inclined to interfere with this part of the award and the judgment of the learned Single Judge whereby interest has been granted at 7%. We find that in international transactions interest at 7% is indeed on the higher side more so, when the appellant is already prejudiced by the increase in the value of the dollar as compared to the Indian rupee. Also, internationally, and of which we take judicial notice, that the LIBOR rate has fluctuated in the intervening period and is presently around 3%. From January, 2002, till 2009, the LIBOR rate has fluctuated from around 3% in 2002 to 6/7% during 2006-2007 and thereafter came down again to about 3% and even less. Therefore, considering the facts and circumstances of the case, and more particularly the trend in the reasoning in the recent judgments of the Hon’ble Supreme Court in reducing the interest granted in the award on account of passage of time from the date of passing of the award till the time the matter comes up in the court, we reduce the rate of interest as granted under the award from 7% to 3 ½% . The relevant judgments of the Supreme Court on this issue are the judgments of *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott*

International Inc. Vs. Burn Standard Co. Ltd.& ors 2006 (11) SCC 181, Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd. (2006) 7 SCC 700 and Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra, 2007 (2) SCC 720.”

36. The Punjab and Haryana High Court in *M/s. C. L.Jain Wollen Mills (Pvt.)Ltd. vs. M/s.Mosenthals Wool & Mohair S.A. (Pvt.) Ltd. (supra)* also noted that where payment is to be made in foreign exchange the appellant is already burdened by the sudden spurt in the value of dollar vis-à-vis the Indian rupees and interest rate of 3% was awarded based on LIBOR rate.

The Supreme Court in *Mcdermott International Inc. Vs. Burn Standard Co.Ltd. And Others, (2006)11 SCC 181* had noted as follows:-

“154. The power of the arbitrator to award interest for pre-award period, interest pendent lite and interest post-award period is not in dispute. Section 31(7)(a) provides that the arbitral tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made, i.e., pre-award period. This, however, is subject to the agreement as regard the rate of interest on unpaid sum between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the pre- award period would depend upon the facts and circumstances of each case. The arbitral tribunal in this behalf will have to exercise its discretion as regards (i) at what rate interest should be awarded; (ii) whether interest should be awarded on whole or part of the award money; and (iii) whether interest should be awarded for whole or any part of the pre-award period.”

37. The legal position that follows from the above is that when Award is given for payment of money the arbitral tribunal is free to award interest at such rate as it deems reasonable, unless otherwise agreed by the parties.

38. Keeping in view the judgment of the Division Bench of this court there is merit in the contention of learned counsel for the petitioner that the parties have entered into a contract in 1994. The dollar exchange rate at that time vis-à-vis Indian rupee was far less. At that time the dollar was fluctuating at around Rs.40 per dollar. Today a dollar is above Rs.60 per dollar. Hence, as the Award is in US dollars the liability of the petitioner would go up manifold. Accordingly, the interest rate as awarded by the learned Arbitrator is reduced to 6% Simple Interest for the period for which interest has been awarded i.e. w.e.f. 14.09.1995 till date of payment. All other terms of the Award shall remain unchanged.

39. Hence, the Award is upheld subject to modifications in the interest rate as stated above in paragraph 39. Petition is disposed of accordingly.

न्यायमेव जयते

(JAYANT NATH)
JUDGE

AUGUST 22, 2017
rb/n/v