

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.05.2017

+ **O.M.P. (COMM) 350/2016**

COSMO FERRITES LTD.

..... Petitioner

Versus

PRAGYA ELECTRONICS PVT. LTD & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Rohit Bhalla with Mr Anshuman Sood.
For the Respondents : Mr Rohit Goel and Mr Gaurav Singh.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'CFL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') challenging the arbitral award dated 13.04.2016 (hereafter 'the impugned award') made by the arbitral tribunal constituted by the sole arbitrator, Justice V. P. Bhatnagar (Retired). CFL's challenge to the impugned award is limited to the extent that the arbitral tribunal has not awarded pre-award interest (pre-reference and *pendente lite*) on the amounts awarded in favour of CFL for Soft Ferrites (hereafter 'the goods') supplied by CFL to the respondent no. 1 (hereafter 'PEPL').

2. CFL is stated to be a leading manufacturer of Manganese Zinc Soft Ferrites in India. CFL entered into a non-exclusive distributorship agreement dated 01.04.2005 (hereafter 'the Agreement') with PEPL. Subsequently, the parties entered into annual agreements for the years 2007, 2008 and 2009. In terms of the Agreement, PEPL placed purchase orders on CFL for supply of goods, which in turn were sold by PEPL to its customers.

3. It is CFL's case that it supplied goods to PEPL against various purchase orders and raised invoices accordingly. CFL claimed that PEPL had failed and neglected to make payments against the invoices for sums aggregating ₹54,14,934/-, which became due and payable. PEPL had issued nine cheques - four cheques dated 30.06.2009 and the remaining five dated 07.07.2009 - aggregating ₹33,19,514/- as part payment for goods supplied; however, the said cheques were dishonoured on presentation. Whilst, CFL claimed that the said cheques were issued by PEPL in discharge of its liability, PEPL had disputed the same. According to PEPL, the said cheques were issued at the instance of CFL only as a security for any payment that may become due. In addition to the claim for unpaid invoices, CFL also raised claims for non-supply of 'C' Forms and the consequent liability of sales tax. However, other disputes are not relevant for deciding the controversy raised in the present petition.

4. The arbitral tribunal found that PEPL had placed purchase orders for the goods in question. CFL had supplied goods against the aforesaid purchase orders and had raised invoices for the same. The arbitral tribunal had also taken note of an e-mail dated 10.07.2009 sent by CFL to PEPL, which was placed on record by PEPL. The said e-mail recorded that a total

sum of ₹54,14,934/- was outstanding against supply of goods made till 30.06.2009. Undisputedly, PEPL had received the said e-mail (the e-mail was placed on record by PEPL). However, the contents of this e-mail had not been denied in contemporaneous correspondence. After considering the evidence and material on record, the arbitral tribunal concluded that a sum of ₹54,14,934/- was recoverable by CFL from PEPL against its outstanding dues. However, the arbitral tribunal also held that PEPL was entitled to credit for sum (pertaining to two items) aggregating ₹13,19,713/-, ₹1,14,279/- was payable to PEPL on account of commission payable for certain sales made to M/s COILS in the month of June 2009 and a further sum of ₹12,05,434/- as 'turnover discount' on sales from April 2009 to June 2009. PEPL was also held entitled to credit for ₹4,02,798/- on account of commission payable to PEPL on sales upto 28.08.2009. After giving credit for the aforesaid sums, the arbitral tribunal held that a net amount of ₹36,92,423/- was recoverable by CFL.

5. Although, the arbitral tribunal found that CFL was entitled to recover the aforesaid amount, it rejected CFL's claim for interest at the rate of 12.25% p.a. on the said awarded sum.

Submissions

6. Mr Bhalla, learned counsel appearing for CFL referred to Clause 5.2 of the Agreement, which stipulates that CFL would be at liberty to charge interest at its discretion, at a rate not exceeding 14% p.a. for the delay in making payment of its bills. He also referred to the sample invoice placed on record, which also indicated that interest at the rate of 24% p.a. would be charged on overdue amount. He contended that in terms of the

Agreement between the parties, CFL was entitled to charge interest at the rate of 24% p.a. but had restricted its claim to 12.25% p.a. He also referred to the notice dated 17.03.2010 sent to PEPL whereby CFL had demanded a payment of ₹54,14,934/- along with interest at the rate of 24% p.a. He submitted that in terms of the Agreement, the invoice raised and the notice served on PEPL, CFL was entitled to interest on the unpaid invoices.

7. He referred to the decisions of the Supreme Court in the *State of Haryana and Ors. v. S. L. Arora And Company: (2010) 3 SCC 690* and *Union of India v. Bright Power Projects (India) (P) Ltd.: (2015) 9 SCC 695* in support of his contention that the arbitral tribunal was bound to award interest in terms of the Agreement between the parties. He also referred to the decision of a Coordinate Bench of this Court in *Union of India v. N. K. Garg & Co.: (2015) 224 DLT 668* in support of his contention that non-payment of interest on illegal detention of money could not be justified.

8. Mr Goel, the learned counsel appearing for PEPL submitted that the respondents have also preferred an application under Section 34 of the Act challenging the impugned award, which is pending consideration before the Additional District Judge. He submitted that no amount was payable to CFL. Mr Goel opposed the present petition on, essentially, two grounds. First, that the present petition was filed beyond the period as specified under Section 34(3) of the Act; and second, that the decision to reject the claim of interest was not opposed to the public policy of India and thus not amenable to challenge under Section 34(2)(b) of the Act.

Reasoning & Conclusion

9. The first and foremost issue to be addressed is whether the present petition has been filed beyond the period as specified under Section 34(3) of the Act. In this regard it is seen that the impugned award was published on 13.04.2016 and CFL claims that it received the award on 16.04.2016. CFL has also produced postal receipts evidencing the above. The present petition was filed on 12.07.2016; thus, the filing of the petition was well within the period of three months as specified under Section 34(3) of the Act. Certain objections were raised by the Registry which were also cured within the period prescribed. The statement of truth annexed with the petition was affirmed on 27.07.2016. However, that would be necessary for re-filing the petition after curing the defects pointed out by the Registry. Thus, the contention that the petition is not maintainable, as having been filed beyond the period as specified under Section 34(3) of the Act, is bereft of any merit and is accordingly, rejected.

10. The principal issue to be addressed is whether the decision of the arbitral tribunal to reject CFL's claim for interest is sustainable. It is trite law that the arbitral tribunal cannot ignore the terms of the agreement between the parties. Section 28(3) of the Act mandates that the arbitral tribunal must decide in accordance with the contract between the parties. (See: *Indian Hume Pipe Company Limited v. State of Rajasthan: (2009) 10 SCC 187*).

11. In the present case, there is no dispute that the Agreement expressly provided for interest on delayed payments. Clause 5.2 of the Agreement is material and reads as under:-

“5.2 In case there is a delay in making payment of the Seller's bill beyond the agreed due date, the Seller

shall be at liberty to charge at its discretion, interest at the rate not exceeding 14% p.a. on the outstanding amount for such number of days for which such payment is delayed.”

12. The arbitral tribunal has not found the aforesaid clause to be invalid or inapplicable. The arbitral tribunal has also not indicated any reason as to why the aforesaid clause ought to be ignored. The arbitral tribunal is bound to make award in terms of the Agreement between the parties and there is no indication as to why the arbitral tribunal has rejected CFL’s claim for interest.

13. In the case of *S. L. Arora (supra)*, the Supreme Court had expressly held as under:-

“24.2 The authority of the Arbitral Tribunals to award interest under Section 31(7)(a) is subject to the contract between the parties and the contract will prevail over the provisions of Section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The Arbitral Tribunals cannot ignore the contract between the parties, while dealing with or awarding pre-award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract.”

[underlining for emphasis]

14. The aforesaid decision was overruled by the Supreme Court in its later decision in *Hyder Consulting (UK) Ltd. v. Governor, State of Orissa: (2015) 2 SCC 189*, albeit, only to the extent that interest under Section 31(7)(b) of the Act would also be payable on any interest included in the sum awarded under Section 31(7)(a) of the Act. However, the view that contractual stipulations as to interest cannot be ignored by the arbitral tribunal is good law and the decision of the Supreme Court in *S. L. Arora (supra)* continues to be a binding precedent.

15. Having stated the above, it is also necessary to observe that the arbitral tribunal would still have the discretion to award interest in cases where the contract is silent. However, such discretion would have to be exercised objectively keeping in view, the facts of the case.

16. In cases where the contract expressly provides that interest would be payable on sums withheld, the arbitral tribunal would be bound to award the same unless there are good reasons to not to do so.

17. In the present case, the impugned award does not indicate any reason as to why CFL's claim for interest has been rejected. The arbitral tribunal has dealt with CFL's claim for interest in the impugned award, in the following words:-

“70. In the totality of the facts and circumstances of the case discussed above, I am inclined to hold that no interest be allowed to the Claimant on the sum of Rs.36,92,423/- upto the date of this Award and for one month thereafter to enable the Respondents to pay the above amount. In case of failure, the Respondents shall pay interest @ 12.25% p.a. till the date of actual payment. This rate is reasonable in view of clause 5.2 of Exh.C-2/R-6 and further keeping in view the fact that

the Respondents have claimed interest @ 18% p.a. in their counter claim. Issue No.7 is decided accordingly.”

18. This Court is hardpressed to find any discernable reason from the facts and circumstances, as discussed in the impugned award, as to why interest on the amount awarded has been denied to CFL. The arbitral tribunal has also ignored the provisions of the Agreement, which expressly entitles CFL to claim interest not exceeding the rate of 14% p.a. for any delay in payment.

19. The learned counsel for PEPL had contended that there was no delay on its part as CFL had failed to reconcile the accounts. However, this Court finds no finding to the aforesaid effect in the impugned award. Undoubtedly, the arbitral tribunal could - if evidence and material on record so indicated - return a finding that there is no delay on the part of PEPL and, therefore, no interest was payable in terms of the invoices/Clause 5.2 of the Agreement. However, no such conclusion has been drawn by the arbitral tribunal.

20. In view of the above, the petition is liable to be allowed and the impugned award is liable to be set aside to the extent of rejection of CFL’s claim for interest at the rate of 12.25% p.a. from the date of invoices till the date of the impugned award.

21. Before concluding, this Court would also like to clarify that this court has limited the examination to the challenge laid by CFL and this decision would not preclude or prejudice PEPL from pursuing its petition to challenge the impugned award under Section 34 of the Act.

22. In view of the above, the impugned award is set aside to the extent as indicated above. The petition is, accordingly, disposed of.

23. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 25, 2017
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