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

Date of decision: 12th November, 2018

\+ **O.M.P. (COMM) 491/2016**

SWARUP GROUP OF INDUSTRIES & ANR ..... Petitioners

Through: Mr. Mohit Chaudhary & Ms. Shrishti Gupta, Advocates (M-9810663997).

versus

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA ..... Respondent

Through: Mr. Aaditya Vijay Kumar, Ms. Akshita Katoch, Advocates (M-8384024970) with Mr. Anurag Tiwari, Law officer.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. **(Oral)**

1. The present petition has been filed challenging the award dated 31st December, 2013 by which the Ld. Sole Arbitrator has directed the Petitioners herein to pay to the Claimant a sum of Rs.92,88,46,688/-. The award is brief and is set out herein below:

> *"1. During the meetings held on 29th June, 2012 and 9th October, 2012, Mr. Guruswarup Srivastava (Respondent No.2 and owner of Respondent No1) appearing before the Tribunal admitted in categorical terms that the total amount payable by him to the Claimant towards principal and interest as on the date of Statement of Claim 11th May, 2007 was Rs.197,13,46,688/-.*
>
> *2. The Tribunal made an Interim Award by consent on 3rd December, 2008 by which a sum of Rs. 104.25 crores was awarded against the Respondents in favour of the Claimant. The Tribunal is informed that the said*

Interim Award is under execution under Execution Petition No.581 of 2010 before the Bombay High Court.

3. At the meeting held on 4th July, 2013 the parties agreed to sign Consent Terms and seek an award in terms thereof. It was agreed by the Respondents that a sum of Rs.197,13,46,688/- was due and payable by the Respondent to the Claimant as on the date of Statement of Claim, viz. 11th May, 2007. In view of the categorical admission made by the Respondents the Tribunal forwarded draft terms of the final award for finalizing the Consent Terms by the parties. The Respondents, however, did not give their suggestions to the draft consent terms. Hence, a meeting was again called on 20th December, 2013.

4. The Tribunal's experience with the Respondents was that every time the Respondents would engage a new Advocate, who would have no knowledge of whatever had been agreed in the earlier meetings, causing considerable delay in the conduct of arbitral proceedings. On 20th December, 2013 also the Respondent did not appear personally, but was represented by Mr. Imran Ali, Advocate, who was not fully instructed. Despite categorical admission before the Tribunal, on two occasions by the Respondent appearing personally and seeking an award, Mr. Imran Ali appearing on behalf of the Respondents submitted that his clients was not be in a position to agree to any Award and the Tribunal may proceed with arbitration.

5. The Tribunal considers such conduct on the part of Respondents as reprehensible. After having categorically admitted at the meetings held on 29th June, 2012 and 9th October, 2012, going back on their admission cannot be accepted. Merely because the Tribunal gave an opportunity to the Respondents to make suggestions with the regard to the exact wordings of the consent Award, the Respondents are *not entitled to go back on their admission through an Advocate with incorrect instructions. This only sets the arbitral proceedings at naught. In the result, the Tribunal is of the view that the Respondents should be called upon to pay to the Claimant the admitted balance amount of Rs. 92,88,46,688/- after adjusting the amount of Rs. 104,25,00,000/- being the amount payable under the Interim Award dated 3rd December, 2008 .*

Hence the Tribunal makes the following Award:-

1. The Respondents are liable for and are directed to pay the Claimant the amount of Rs.92,88,46,688/- being the difference between the total amount payable (Rs.197,13,46,688/-) and amount directed to be paid under the Interim Award dated 3rd December, 2008 (Rs. 104,25,00,000/-).

2. Under the Agreements dated 26th March, 2004 and 24th April, 2004 the

Respondents are liable to pay interest on outstanding amount at the rate of 10% per, annum: The Respondents shall pay simple interest on the aforesaid amount of Rs.92,88,46,688/- at the rate of 10% per annum from the date of the Statement of Claim (11th May, 2007) until payment or realization.

3. The Respondents shall also pay the Claimant a sum of Rs.10,00,000/- towards costs."

2. The background of this award is that proceedings were initiated pursuant to MOUs dated 24th April, 2004 and 26th March, 2004 between the Respondent and the Petitioners. The Ld. Sole Arbitrator – Justice B.N. Srikrishna (Retd.) had passed an interim award in the following terms on 3rd December, 2008:

"(a) The Respondent shall transfer absolutely to the Claimant the area of 45745 sq. ft. in Mega Mall, Goregaon, Mumbai already mortgaged to the Claimant. The parties agree that its valuation is

Rs.68.85 crores.

(b) The Respondent shall further transfer built up area of 3283 sq. ft. in the same premises (the documents of which have already been handed over to the claimant by the Respondent), at the agreed valuation of Rs.4.58 crores.

(c) The total area thus transferred to the Claimant shall be 49028 sq. ft. for an agreed value of Rs.73.43 crores.

(d) Upon transfer of the aforesaid area of 49028 sq. ft. in the said premises by the Respondent to the Claimant, the Respondent's liability to the extent of Rs.73.43 crores shall be set off against the admitted liability of the Respondent of Rs.104.25 crores.

e) The respondent shall be responsible to get the aforesaid areas transferred to the claimant by appropriate registered documents within a period of two months from today.

f) The Respondent shall pay the balance amount of Rs.30.82 crores to the claimant either by payment of cash or by transferring property or other valued security of equivalent value acceptable to the Claimant, which shall also be done within a period of two months from today.

g) Upon the above steps in clauses (a), (b) (e) and (f) hereinabove being taken by the Respondent within the period stipulated, the claimant shall set off the sum of Rs. 104.25 crores against the Principal amount due from the respondent.

h) The issue as to whether the Respondent is liable to pay any further amount to the Claimant by way of principal and/or interest shall be determined in the Arbitral proceedings and be subject to the final Award therein.

i) Upon the Respondent complying with its obligations enumerated in clause (a), (b), (c) and (f) hereinabove, the Claimant shall address a letter to the Respondent will copy to the CBI or other *investigating agency, admitting that its claim has been satisfied to the extent of Rs. 104.25 crores.*

j) The Respondent shall be at liberty to contend and establish in the arbitral proceedings that the valuation of the property transferred as stated in clause (a) and (b) hereinabove at Rs.73.43 crores is lesser by 10% than the market value,

k) Upon transfer of the aforesaid property mentioned hereinabove in clause (a) to the Claimant as absolute owner the mortgage thereupon shall cease to exist.

l) If the Respondent desires to transfer any other properties in Andheri to the Claimant for discharge of the balance 30.82 crores, the order of the Arbitral Tribunal dated May, 2007 shall not come in its way.

m) Both parties shall co-operate with each other to ensure that transfer of the properties as mentioned above takes place without any hindrance or difficulty.

n) The attempt of the Respondent to clear a part of its dues to the Claimant, pending final award, is very much appreciated,

o) In case the Respondent fails to carry out its above obligations within the period stipulated hereinabove, or if the Respondent informs the Claimant in writing of its inability to do so before the stipulated period of two months, the Respondent shall forthwith become liable to pay Rs. 104.25 crores to the Claimant and the Claimant shall be at liberty to execute this Interim Award."

3. The said interim award, by which Rs.104.25 crores was awarded to the Respondent is the subject matter of execution proceedings before the Bombay High Court. Subsequently, the proceedings before the Ld. Sole Arbitrator continued. On 29th June, 2012, the Ld. Sole Arbitrator records that Mr. Guruswarup Srivastava who is Petitioner No.2 herein, and the proprietor of the Petitioner No. 1 firm, i.e. Respondent No.2 in the arbitral proceedings had agreed that he was willing to transfer and convey valuable property in

Mega Mall, Goregaon, Mumbai towards satisfaction of total claim of Rs.197.13 crores. Para 1 of the minutes dated 29th June, 2012 is relevant and is set out herein below:

> *"…**<u>After lengthy discussions, Mr. Guruswarup Srivastava, Respondent No.2 and the owner of Respondent No.1, agrees and admits, that the total amount payable by him to the Claimant towards principal and interest as on the date of Statement of Claim dated 11th May, 2007 would come to Rs.197,13,46,688</u>**.*
> *By the Interim Award dated 3rd December, 2008, made by consent of the parties, it was agreed that the Respondent shall pay a sum of Rs. 104.25 crores in the manner indicated in the said Award. The aforesaid a mount has not been fully paid and is the subject matter of an Execution Petition before Bombay High Court.*
> *Mr Srivastava states that he is willing to transfer and convey valuable property in Mega Mall, Goregaon, Mumbai after obtaining clear and marketable title for these properties towards satisfaction of the total claim of Rs. 197.13 crores. "*

Thereafter, on 9th October, 2012, the Ld. Sole Arbitrator has again recorded the admission of Mr. Srivastava. The Ld. Sole Arbitrator had recorded that the parties had arrived at a settlement, the terms whereof were to be filed.

4. In the impugned award, the Ld. Sole Arbitrator has categorically recorded that despite having agreed to the liability being Rs.197.13 crores, the Petitioners began avoiding the proceedings and due to change of counsels repeatedly, no instructions were being given to finalize the settlement. Accordingly, the Ld. Sole Arbitrator proceeded to pass the award as per the admissions by Mr. Srivastava which had been recorded on earlier occasions.

5. Mr. Mohit Chaudhary, Ld. Counsel appearing for the Petitioner submits that the admissions made by Mr. Srivastava during the course of arbitral proceedings are in the nature of admissions during conciliation proceedings, and hence cannot be taken into consideration. He further submits that no settlement is valid until and unless all the parties append their signatures to the said settlement.

6. The Ld. Counsel for the Respondent on the other hand submits that in the interim award wherein Rs.104.25 crores was awarded in the favour of Respondent – NAFED in the execution proceedings before the Bombay High Court, it has been revealed that despite having agreed to transfer absolutely the property in Mega Mall, Goregaon, Mumbai, the Petitioners went ahead and mortgaged the said property for a sum of Rs.16 crores, after the attachment orders were passed.

7. Be that as it may, the question that arises is as to whether the Ld. Sole Arbitrator is entitled to rely upon admissions made during the course of hearing by the parties. Insofar as the minutes which were recorded by the Ld. Arbitrator are concerned, the minutes dated 29th June, 2012 are extremely relevant. In the said minutes, the admission of Mr. Srivastava is clear and categorical that the amount payable by him to the Claimant towards principal and interest, as on the date of statement of claim, is Rs.197.13 crores. This admission is without any qualification or condition. Only the mode of recovery of this money was the issue, which was thereafter discussed. The Mega Mall in Goregaon, Mumbai was the subject matter of these minutes, only in order to ensure recovery of the admitted amount. The admission is not conditional on the sale of the Mega Mall property or the valuation thereof.

8. It is the settled position in law that any party is bound by admissions made before any Tribunal or Court. The Arbitral Tribunal, being seized of all the disputes between the parties, has clearly taken note of the admission made by Mr. Srivastava, whereby he has agreed to make the payment of Rs.197.13 crores. The manner in which the payment is to be made is not the subject matter of this petition. The question is whether the Ld. Sole Arbitrator can rely on this admission. Any admission made by parties, either in pleadings, or in documents or otherwise, is admissible. This is more so in arbitration proceedings, where the Ld. Sole Arbitrator is directly dealing with the disputes and also with the parties who appear before him. These are not merely conciliation proceedings but are also adjudicatory in nature and in any adjudicatory proceedings, admissions are admissible. A Division Bench of this Court in ***Nimbus Communications v Prasar Bharati and Anr., FAO (OS) 369/2015, Decided on 5th April, 2016*** upheld the findings of the Arbitrator, which had been based on the admissions of the Appellant in the said case. The Court held as under:

> *"41. In contending that the interim award was an award based on default on non-compliance of the order under Section 17 of the Arbitration and Conciliation Act, 1996, we find that Nimbus India is taking advantage of indulgence granted to it by the Tribunal on two prior occasions. The applications under Section 17 and the application for passing an interim award were heard together. In the order dated May 06, 2014 the Tribunal has recorded in categorical terms that it was a fit case to pass an interim award, but for the time being was granting an opportunity to Nimbus India to furnish a bank guarantee. Subsequently, the application was further heard. The Tribunal again recorded that it was a fit case to pass*

an interim award but made a direction to Nimbus India to deposit the amount. In the said order it was recorded that if the direction is not complied with, an interim award would follow. Therefore, the interim award is based on the finding that Nimbus India had made decisive admissions. Those admissions have not been denied even when the appeal was heard. The Tribunal also recorded that the counter claim was yet to be established. In doing so, the Tribunal only followed the law laid down by this Court in the decision in Numero Uno's case (supra).”

9. Similar is the view taken by a Division Bench of the Madras High Court in ***Gammon India Ltd. v Sankaranarayana Construction Pvt. Ltd. (OSA No. 112/2010), Decided on 30th November, 2011***. The Court held as under:

> *“15...Now we have to consider that whether the interim award has been passed on admission and whether the statement given by the Appellant/Petitioner in the claim statement is clear, unambiguous and unequivocal admission? The Tribunal has right to pass an interim award on admission made by the Appellant/Petitioner by invoking Order XII Rule 6 of C.P.C., because as already stated that it is a discretion of the Arbitrator to follow the procedural law, if both the parties are not agreed. Hence we are of the opinion that the learned single Judge has rightly held that the arbitral Tribunal has a right to pass an award on the basis of the admission by invoking Order XII Rule 6 of C.P.C. So it does not warrant any interference.”*

10. In view thereof, there is no merit in this petition and same is dismissed.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 12, 2018/*Rahul*