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

\+ **FAO(OS)No.127/2017 & CM Nos.15267, 15269/2017**

% *Date of decision : 6th February, 2018*

SWARUP GROUP OF INDUSTRIES & ANR ..... Appellants

Through : *Mr. Mohit Chaudhary, Mr. Kunal Sachdeva and Ms. Garima Sharma, Advs.*

versus

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

Through : *Mr. Aaditya Vijay Kumar, Ms. Akshita Katoch and Mr. Pranay Kapur, Advs.*

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM No. 15269/2017 *(Condonation of delay)*

1. Heard.
2. For the reasons stated, delay in filing the appeal is condoned.
3. This application is allowed.

FAO(OS) 127/2017

1. By way of the instant appeal, the appellant assails an order dated 15th November, 2016 passed by the learned Single Judge

allowing IA No. 6466/2016 filed by the respondent National Agricultural Cooperative Marketing Federation of India *('NAFED' hereafter*) in OMP 267/2014. This application was filed by NAFED seeking clarification that the notice issued by the learned Single Judge by the order dated 5th February, 2015 in OMP 267/2014 (*a petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging the final Award passed by an Arbitrator on 31st December, 2013*) was restricted to the challenge to such final Award and not to an interim award made on 3rd December, 2008 by the Arbitral Tribunal.

2. We have heard Mr. Mohit Chaudhary, learned counsel for the appellant as well as Mr. Aaditya Vijay Kumar, learned counsel for the respondent on this appeal.

3. It appears that disputes arose between the parties with regard to the memorandums of understanding dated 26th March, 2004 and 24th April, 2004. This resulted in initiation of arbitral proceedings before *Justice B.N. Srikrishna (Retd.)* as the sole arbitrator.

4. NAFED filed a statement of claim on 6th November, 2006 *inter alia* seeking recovery of an amount of Rs.148.71 crores, apart from deceleration of ownership interest in several properties belonging to the appellant no.2 or/his family members/companies as well as other properties purchased by the appellant no.1 after the date of the first MOU i.e. 24th April, 2004. NAFED also claimed an amount of Rs.46 crores towards interest and service charges as well as interest from the date of the claim till date of the award.

5. A separate claim in respect of the MOU dated 26th March, 2004 was filed by NAFED for Rs.76,13,659/- towards the principal amount; Rs.74,85,995/- towards interest; damages quantified at Rs.1,08,52,607/-; *pendente lite* and post award interest till realisation of payments.

6. An application came to be filed before the Arbitral Tribunal by the appellant herein dated 10th November, 2008 couched as an "*application for passing an interim Award*". On this application, a consent interim award resulted on 3rd December, 2008 which reads as follows :

> *"INTERIM AWARD*
>
> *By the application dated 10th November, 2008, the respondent accepted its liability or and agreed to pay off a sum of Rs. 104.25 crores in discharge of its liability towards the Claimant, subject to certain conditions of its liability towards the Claimant, subject to certain conditions stipulated in the said applications.*
>
> *The claimant filed its response on 22nd November, 2008 accepting the offer with certain counter suggestions.*
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> *I have heard Mr. Jiminder Lal, learned counsel for the* ***Claimant****, and Mr. M.G. Gawde, learned counsel for the* ***Respondent*** *as well as Mr. Guruswarup Srivastava,* ***Proprietor of the Respondent****, who is personally present.* ***They requested that an interim Award be made as agreed****.*

After hearing them, the following ***interim Award is made by consent of both parties****.*

1. *The respondent shall pay a sum of Rs. 104.25 crores to the claimant in the following manner:*

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 clause (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 responsible 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 12th May, 2007 shall not come in its say.

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.*

p) Crores to the Claimant and the Claimant shall be at liberty to execute this interim award."

(Emphasis by us)

No objections were filed to this interim Award which has therefore attained finality.

7. It is also not disputed that the appellant did not comply with the terms of the interim consent Award dated 3rd December, 2008 necessitating NAFED to file Execution Petition No. 581/2010 before the Bombay High Court. The appellants were duly served with notice of this execution petition and participated in those proceedings by filing applications as well as chamber summons etc. We are informed by Mr.Aaditya Vijay Kumar, learned counsel for the respondent that in these proceedings, certain properties of the appellant stand attached by the sheriff and the execution petition is still pending.

8. It appears that in the meantime, the respondent filed an application under Section 33 of the Arbitration & Conciliation Act with regard to the final Award dated 31st December, 2013. By an order dated 18th December, 2014, the learned Arbitrator held that in the final Award dated 31st December, 2013, interest of Rs.92,88,46,688/- had erroneously been awarded instead of Rs.1,97,13,46,688/-. The enhancement was because of the fact that the amount of the interim Award did not contemplate interest on the part liability which the appellant had consented to pay. It is also not

disputed that the respondent had made a substantive claim for award of interest. It is obvious that so far as interest on the liability of the appellant is concerned, the same had to be computed on the total amount found due and payable by the appellant. The amount awarded by way of the interim Award would obviously form part of the principal on which the appellant would be liable to pay interest as awarded by the final Award.

9. As noted above, the arbitration proceedings culminated in a final award dated 31st December, 2013. This Award came to be challenged by the appellant by way of OMP 267/2014 by the appellant being a petition under Section 34 of the Arbitration & Conciliation Act, 1996. By an order dated 5th February, 2015, notice was issued thereon by the learned Single Judge.

10. The respondent promptly filed IA No. 6466/2016 in OMP 267/2014 for clarification that the issuance of notice on 5th February, 2015 was restricted to the final award and that it did not relate to the interim Award. This application was contested by the appellant and was allowed by the order dated 15th November, 2016 by the learned Single Judge *inter alia* for the following reasons :

> *(i)* The appellant had unequivocally agreed before the Arbitral Tribunal to pay the amount of Rs.104.25 crores and also set out the modalities of the manner in which the payment would be effected resulting in the passing of the interim Award dated 3rd December, 2008.

(ii) The interim Award was a consent Award based on the invitation of the appellant itself.

(iii) The appellant accepted the interim Award and never challenged the same within the time prescribed by Section 34(3) of the Arbitration & Conciliation Act, 1996.

(iv) The order dated 18th February, 2014 did not make any variation to the interim Award dated 3rd December, 2008 and did not provide a fresh cause of action to the appellant to challenge the same. This order merely determines the interest liability of the appellant.

(v) The attention of the court was not drawn to the above facts while issuing the notice by the order dated 5th February, 2015. The learned Single Judge therefore clarified that the notice which was issued on 5th February, 2015 was restricted to the final award dated 31st December, 2013.

11. Before us, Mr. Mohit Chaudhary, learned counsel has staunchly contended that the order dated 18th February, 2014 quantifying the interest liability of the appellant tantamounted to modification of the interim order dated 3rd December, 2008 and therefore, limitation for laying a challenge to the interim Award dated 3rd December, 2008, would commence afresh in favour of the appellant from 18th February, 2014. In our view, this submission is to be noted only for the sake of

rejection. We have noted above that the only liability which was quantified by way of the interim Award dated 3rd December, 2008 was premised on the consent of the appellant. The appellant had no grievance thereto which is manifested from the fact that no challenge has been laid to the fixation of this liability for a long period of six years.

12. The clarification by way of an order dated 18th February, 2014 was only with regard to the claim of the respondent of interest on the liability of the appellant which crystallized only on 31st December, 2013 when the final award was passed.

13. It has been further submitted by Mr. Mohit Chaudhary, learned counsel for the appellant placing reliance on decisions of learned Single Judges of this court reported at ***2015 IX AD (Delhi) 301 National Highway Authority of India v. M/s Prakash Atlanta JV*** and the ***decision dated 10th July, 2017 in FAO (OS) 286/2017 Union of India v. Ved Prakash Mittal & Sons.*** that by application of the doctrine of merger, the interim award dated 3rd December, 2008 would merge with the final Award dated 31st December, 2013 and this entitled the appellant to lay challenge to the interim Award as well as while filing objections under Section 34 of the Arbitration & Conciliation Act, 1996 to the final award. This submission is completely misplaced inasmuch as it fails to take into consideration the provisions of Section 2(c) of the Arbitration & Conciliation Act which define the expression "*arbitral award*" to "*include the interim award*". Clearly, the appellant had available the remedy of filing

objections to the interim award under Section 34 of the enactment, which it did not choose to exercise at that time. Section 34(3) provides the statutory period of limitation for such a challenge.

14. The view we have taken, is fortified by the judgment of a Division Bench of this court in ***202 (2013) DLT Jhang Cooperative Group Housing Society Ltd. v. PT. Munshi Ram and Associates Pvt. Ltd.*** wherein a similar submission was rejected by the Division Bench in the following terms :

> *"10. The learned Senior Counsel for the appellant has pointed out that the interim award itself stipulates that the interim award is without prejudice to the respective contentions of the parties, as stated in their pleadings and in the final award the arbitrator has mentioned that the interim award may be read in conjunction with the final award as the said interim award is part and parcel of this award too. The learned Senior Counsel thus submits that since the interim award is part of the final award, the same could be challenged along with the final award within the limitation prescribed for challenging the final award.*
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> *11. **We find no merit in the submission of the learned Senior Counsel for the appellant and are in agreement with the reasoning and finding of the learned Single Judge in the impugned judgment. The interim award is an award as defined under Section 2 (1) (c) of the Arbitration Act and thus a recourse to a court against the said award had to be made within the period of three months or the condonable period of 30 days as stipulated in Section."***

15. In view thereof, the challenge made by way of the present appeal to the order dated 18th February, 2014 is devoid of any legal merit.

We find no merit in this appeal which is hereby dismissed.

<u>CM No.15267/2017 *(Stay)*</u>

16. In view of the order passed in the appeal, this application does not survive for adjudication and is hereby dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 06, 2018/kr