

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	25.09.2019
Judgment pronounced on	04.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P.No.517 of 2016
and
A.No.3007 of 2017

Vedanta Limited
successor-in-interest of
the erstwhile Sterlite Industries (India) Ltd,
SIPCOT Industrial Complex,
Madurai Bypass Road, T.V.Puram,
P.O. Tuticorin,
Tamil Nadu – 628 002. ... Petitioner

Vs.

Masyc Projects Pvt. Ltd.,
20, Community Centre,
Mayapuri Phase I,
New Delhi – 110 064 ... Respondent

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 08.03.2016 passed by the Arbitrator.

For Petitioner : Mr.Rahul Balaji

For Respondent : Mr.Tarun Sharma
for Mr.Abrar Abdullah and
Ms.Akanksha Kapur

ORDER

The Petitioner is the Respondent in the Arbitration Proceedings. By Arbitral Award dated 08.03.2016(the Award), the Petitioner was directed to pay a sum of Rs.81,90,326/- to the Respondent herein with interest thereon at 24% per annum from 27.06.2009 till the date of Award and at 18% per annum thereon from the date of Award till the date of realization. In addition, the Petitioner was directed to pay sums of Rs.1,73,678/- and Rs.2,58,005/- with similar stipulations with regard to payment of interest as indicated above. The said Award is challenged in this proceeding.

2.The Petitioner issued a Letter of Intent dated 18.01.2007 to the Respondent for Design, Manufacture, Supply, Fabrication, Erection, Testing and Commissioning of various conveyors including the related Civil, Electrical and Instrumentation work of the copper concentrate warehouse at Tuticorin, Tamil Nadu for a total sale consideration of Rs.7,22,88,414/-. Subsequently, a Purchase Order dated 18.02.2007 (the

Purchase Order) and two Work Orders dated 13.03.2007 were issued by the Petitioner to the Respondent. Out of the above, the Purchase Order was in respect of the design, manufacture, supply and fabrication of the conveyors and related equipments for the copper concentrate warehouse of the Petitioner. The terms of payment under the Purchase Order specified that 10% would be paid as advance on submission of an advance bank guarantee, 5% on approval of general arrangement drawings, 75% on receipt of material at the Petitioner's site, 5% on completion of supplies against the submission of performance bank guarantee and the final 5% on completion of erection and commissioning against submission of a performance bank guarantee.

3.The Work Order bearing No.322001160 dated 13.03.2007(the Civil Work Order) was issued in respect of the civil work relating to the above mentioned project. The second Work Order bearing No.322001163 dated 13.03.2007(the Erection and Commissioning Work Order) was in respect of erection and commissioning of the supplied copper concentrate conveyor system. It is the admitted position that the supply of equipments was completed fully. As regards civil work also, it is the common case of both parties that civil work was completed. However, as regards erection and commissioning work, both parties admitted that erection work was completed but disagree with regard to

whether the conveyor system was duly commissioned or not. In specific, the case of the Respondent herein is that the conveyor system was duly commissioned in the year 2008 but the Petitioner contends that only "cold commissioning" was done but not "on load" commissioning. According to the Respondent, the Petitioner released an aggregate sum of Rs.5,75,05,154/- towards supply of material and withheld an amount of Rs.81,90,326/-. As regards civil work, the case of the Respondent is that the Petitioner released an amount of Rs.61,61,250/- as against the total amount payable of Rs.63,34,928/- leaving an outstanding balance amount of Rs.1,73,678/-. In view of the inability of the parties to resolve the said dispute amicably, the arbitration clause was invoked by notice dated 20.06.2009. In the said Arbitration proceedings, the Respondent herein made 8 claims, which include claims for unpaid invoices, interest and outstanding payment of Rs.2,85,005/- for the revamping work done on the material handling system of the Petitioner. The Petitioner filed its reply and counter claim, wherein a sum of Rs.53,10,470.88 was counter claimed in respect of the supply of a 1300 meter long conveyor belt for the pipe conveyor; a sum of Rs.4,60,067/- as liquidated damages; and a sum of Rs.3,92,42,067/- as the risk purchase compensation for engaging a 3rd party warehouse from September 2007 to store the copper concentrate. Thus, in the aggregate, the Petitioner made a counter claim for a sum of Rs.4,50,12,605/- with interest thereon at 18% per annum.

4.In the said Arbitration Proceedings, both parties adduced both oral and documentary evidence. The Respondent herein adduced evidence through C.W.1 to C.W.3 and exhibited 162 documents which were marked as Ex.C-1 to Ex.C-162. Likewise, the Petitioner herein examined 4 witnesses R.W.1 to R.W.4 and exhibited 9 documents which were marked as Ex.R-1 to Ex.R-9. The learned Arbitrator framed 6 issues and pronounced the Award dated 08.03.2016, whereby the claims of the Respondent in respect of unpaid invoices was allowed with interest at 24% per annum in the pre-reference period as well as pendente lite and at 18% per annum from the date of Award till the date of realisation. All the counter claims were rejected as barred by limitation. The said Award is challenged herein by the Respondent in the Arbitration Proceedings.

5.I heard the learned counsel for the Petitioner and the learned counsel for the Respondent.

6.The learned counsel for the Petitioner submitted that the contract for the Supply, Erection, Commissioning and Testing of the conveyor system was a composite contract, which was broken down into one purchase order and two work orders for tax efficiency purposes. He further submitted that the said contract was awarded on turnkey basis. In order to establish that it is a composite contract, he referred to Clause 1.4 of the contract which defines the contract's scope as under:

"1.4.'The contract scope' shall mean the design, engineering, procurement of materials, fabrication and manufacturing, Inspection & testing, Painting, Packing, marking, loading, transit Insurance, transport, unloading at SIIL site as set out in Annexure-I (but not limited to)of this contract. Seller shall be responsible for successful commissioning of the entire conveying system and hence shall supply other related items necessary for the commissioning but not explicitly mentioned in the annexure-I attached herewith."

He also referred to Clause 1.7 which defines cold commissioning as under:

"1.7 'Cold commissioning' or Mechanical completion shall mean the date on which the said system is erected, mechanically and electrically, tested and ready in all respects for conveying the copper concrete."

He also referred to Clause 22, which imposes an obligation on the Respondent to provide practical training to the Petitioner's personnel with regard to the operation and maintenance of the conveyor system after the said plant is fully functional; and Clause 26, which is the risk purchase clause, and enables the Petitioner, in the event of failure by the Respondent to execute the contract as per the terms thereof, to: (a) continue the contract after imposing liquidated damages; or (b) engage any other agency without terminating the contract so as to complete the remaining work at the risk and cost of the Respondent; or (c) cancel the

contract and get the remaining work done by any other agencies at the risk and cost of the Respondent. According to the learned counsel for the Petitioner, in this case, the Petitioner opted for the 2nd option of engaging another agency, without terminating the contract, so as to complete the balance work at the risk and cost of the Respondent.

7.The learned counsel for the Petitioner also referred to the erection and commissioning agreement. In particular, he referred to the defined term "commissioning" at Clause 1.10 thereof, which reads as under:

"1.10. Commissioning means the phase beginning with the successful demonstration of the conveying system carrying out the intended purpose to the satisfaction of the buyer."

By referring to the said clause, he emphasized that parties agreed that commissioning is achieved only when the Respondent successfully demonstrates the working of the conveyor system to the satisfaction of the Petitioner. He further submitted that the dispute in this case largely revolves around the failure of the Respondent to commission the conveyor system in such a manner as to fulfill the intended purposes of the said conveyor system to the satisfaction of the Petitioner.

8.In order to substantiate this submission, the learned counsel for the Petitioner referred to the Minutes of the Meeting held on 10.06.2008(Ex. C-125) between the representatives of the Petitioner and the Respondent. In specific, he pointed out that it is recorded in the said minutes of meeting as under:

“Sterlite asked for continuous trial of pipe conveyor, belt conveyor, minimum 24 hours. After that they will take over the system.”

He pointed out that the said minutes of meeting was signed by one representative, namely, the General Manager(Purchase) of the Respondent and two representatives of the Petitioner. He, thereafter, referred to the communications on various dates in June 2008, after the minutes of the said meeting, so as to demonstrate that “on load tests” were conducted for about one hour to one hour 15 minutes and that the documents disclose that none of the load tests were carried out for a continuous period of 24 hours as agreed to in the minutes of meeting dated 10.06.2008. He also referred to the minutes of meeting dated 23.06.2008[Ex.C-133] to point out that some rectification work was admittedly pending even as of 23.06.2008. Thereafter, he submitted that the statements in the letter dated 30.06.2008 to the effect that the plant was ready and commissioned as of 05.05.2007 and that the load commissioning had been deferred for reasons not attributable to the

Respondent is false. He also submitted that the letter dated 16.05.2008 [Ex. C-95], which was strongly relied upon by the learned Arbitrator, did not deal with "on load testing" as is evident from the said document and the subsequent communications in June 2008 relating to such "on load tests". He, thereafter, referred to the letter dated 08.10.2008 with regard to the damaged pipe conveyor belt and the replacement thereof. This was followed by references to the e-mails exchanged between the parties in April 2009 with regard to the meeting that took place between 7th and 9th of April 2009. In this regard, he pointed out that the Petitioner had prepared the draft minutes of the said meeting, wherein it is stated that the Respondent would rectify the technical problems so as to commission the system successfully, whereas the Respondent in its draft minutes wrongly referred to it as re-commissioning and not commissioning. He also referred to the cross examination of C.W.1 and, in particular, to the answers to questions 5,6, & 7 so as to establish that the Respondent had not executed any pipe conveyor system previously. He also referred to the answers to questions 52 to 54 by C.W.1, wherein C.W.1 admitted that joint load tests were conducted after the minutes of meeting held on 10.06.2008 and that the said load trials were not conducted for a continuous minimum period of 24 hours. With specific reference to the answer to question 55, he pointed out that the witness admitted that the successful commissioning of a conveyor system is recorded after a trial

run is conducted on an "on load" basis. He also referred to the cross examination of C.W.3 and, in particular, to the answers to questions 3,6,7,8,9 and 13 with regard to the alleged completion certificate dated 05.07.2008. By relying on the answers of C.W.3, he submitted that it is clear that the said document dated 05.07.2008 is not a completion certificate.

9.He, thereafter, referred to the Award of the learned Arbitrator and pointed out that the learned Arbitrator concurred with the contention of the Petitioner that the project is a turnkey project covering three orders relating to supply, civil work and erection and commissioning. He, thereafter, referred to the finding with regard to the e-mail dated 15.05.2008[Ex.C-94] from the Respondent to the Petitioner and pointed out that the learned Arbitrator committed a patent illegality in relying upon this e-mail so as to conclude that the plant had been successfully commissioned as of May 2008. In this regard, he pointed out that the said e-mail itself records that the pipe conveyor and other equipments are being operated regularly on "no load" basis and that the said e-mail further records that the Petitioner should arrange for the load so that the conveyor can be put on the load. He also pointed out that the learned Arbitrator also relied heavily upon the letter dated 16.05.2008, which is an unsigned document that relates to the handing over of the equipments

specified therein. In specific, he pointed out that it is clear from the list of equipments that the pipe conveyor is not one of the equipments mentioned therein. In effect, his submission was that the learned Arbitrator relied upon irrelevant evidence in order to conclude at paragraph 10(b) of the Award that "these two documents unerringly establish that the Respondent (Petitioner herein) did not find anything wrong in the material handling system erected and commissioned by the Claimant(Respondent herein)". With regard to the counter claim, he submitted that it was erroneously rejected on the ground of limitation. He also referred to Exs.R-1, R-2, R-5 and R-9 to establish that the Petitioner was constrained to replace the defective guide rollers by issuing a work order to a third party which, in turn, supplied the said guide rollers and commissioned the system by charging the Petitioner for the same. In a nutshell, his submissions were that the contract provides for commissioning by the Respondent so as to be fit for the intended purpose to the satisfaction of the Petitioner. This requirement was not fulfilled. He further submitted that irrelevant evidence, namely, Exhibits C-94 and C-95 were relied upon and that the minutes of meeting dated 10.06.2008(Ex.C-125) with regard to the agreement between the parties on 24 hours continuous load test was disregarded. For these reasons, he submitted that the Award was liable to be set aside.

10. In response and to the contrary, the learned counsel for the first Respondent submitted that each contract is separate. He pointed out that the supply contract provides for a bank guarantee towards the advance payment of 10% and also for a performance bank guarantee in respect of the supplies. Accordingly, he submitted that the said performance bank guarantee could have been encashed, if the supply was actually defective, whereas he pointed out that the said performance bank guarantee was not encashed at any time during its validity. According to the learned counsel for the Respondent, the non-encashment of the performance bank guarantee indicates that there is no defect in the belt. With regard to the contention that the plant was not duly commissioned on an "on load" basis, he submitted that the said argument was raised for the first time on 27.07.2013. In particular, he pointed out that the said contention was not raised even in the lawyer's notice issued in June 2008.

11. With regard to the payment of interest at 24% per annum, he pointed out that the Respondent is registered as a Small Scale Industrial Undertaking as per the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (the 1993 Act). Consequently, he submitted that in spite of the repeal and replacement of the said enactment by the Micro, Small and Medium Enterprises

Development Act, 2006 (the MSMED Act), the registration of the Respondent as a Small Scale Industrial Undertaking under the 1993 Act is saved under the savings clause in Section 32 of the MSMED Act and that, therefore, the Respondent is entitled to all benefits under the MSMED Act, including in respect of the payment of interest at the rate of 24% per annum. Therefore, he submitted that there is no infirmity or grounds for interference with the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

12. The records were examined and the oral submissions of both sides were considered carefully. The main question that arises for consideration in this case is whether the Award is liable to be interfered with on any of the recognized grounds under Section 34 of the Arbitration Act. Upon consideration of the oral submissions, it is clear that the primary ground of challenge relates to the reliance by the learned Arbitrator on allegedly irrelevant evidence and the disregarding of allegedly vital evidence. Therefore, this issue is required to be closely examined with reference to the Award. The said contention of the learned counsel for the Petitioner is largely based on the reliance placed on Ex.C-94 and Ex.C-95 by the learned Arbitrator. On examining Ex.C-94 and Ex.C-95, it is clear that the said documents evidence that the conveyor system has been duly operated by the Petitioner, albeit on a "no load"

basis. Therefore, it cannot be said that the said evidence is irrelevant. It is also clear from the subsequent correspondence between the parties that "on load" trials were conducted, thereafter, in June 2008 after the meeting held on 10.06.2008(Ex.C-125) . Therefore, the inference of the learned Arbitrator that the said Ex.C-94 and Ex.C-95 unerringly establish that the the Petitioner herein did not find anything wrong in the material handling system erected and commissioned by the Respondent is not correct. Nevertheless, the question arises as to the consequences of the inference drawn by the learned Arbitrator. From the evidence on record, it is clear that about 7 load tests were carried out in June 2008 and the documents pertaining thereto disclose that all the load tests were carried out successfully. The said documents were also considered by the learned Arbitrator as seen at paragraph 10(b) of the Award at pages 325 and 326 of Volume 1 and the learned Arbitrator records that no evidence was provided by the first Respondent's witnesses, including RW4, as to the manner in which the load tests were not satisfactory. As regards the contention that Ex.C-125, namely, the minutes of meeting dated 10.06.2008 was disregarded, the Award discloses at paragraph 10(d) that the learned Arbitrator examined the said document but concluded that the parties did not pursue a trial run continuously for 24 hours on an "on load" basis. In this connection, it is also relevant to note that there is no contemporaneous document on record to the effect that the Respondent

failed to commission the conveyor system to the satisfaction of the Petitioner by not carrying out an "on load" trial run for a continuous period of 24 hours. In this factual context, the above inference of the learned Arbitrator is based on a fair reading of the relevant documents and, therefore, it cannot be said that the learned Arbitrator disregarded vital evidence. Thus, the said contentions of the learned counsel for the Petitioner to the effect that the learned Arbitrator relied on irrelevant evidence or disregarded vital evidence is rejected.

13. With regard to the damage to the belt that occurred on 14.02.2008, the learned Arbitrator relied upon the answer of R.W.2 to question No.10 and recorded that R.W.2 admitted that the damage to the conveyor belt could be due to faulty maintenance. He further examined the letter of the third party, namely, Modtech and concluded that the said letter with regard to the alleged modifications carried out by Modtech was not provided to the Respondent herein. By appraising the evidence on record, the learned Arbitrator concluded that the tear to the belt may be due to faulty maintenance. Once again, the said conclusion is based on a reasonable appraisal of the evidence on record and does not warrant interference on any of the recognized grounds for interference with an arbitral award. The conclusion that the counter claims of the Petitioner are barred by limitation is, once again, an inference drawn on the basis of a

reasonable appraisal of the evidence so as to conclude that the date of filing of the statement of defence and counter claim is the relevant date and that the counter claim is barred by limitation when the said date is reckoned. From a legal perspective, this conclusion is in conformity with principles laid down in **State of Goa Vs. Praveen Enterprises (2012) 12 SCC 581** with regard to the limitation period for counter claims. Therefore, this conclusion does not warrant interference under Section 34 of the Arbitration Act.

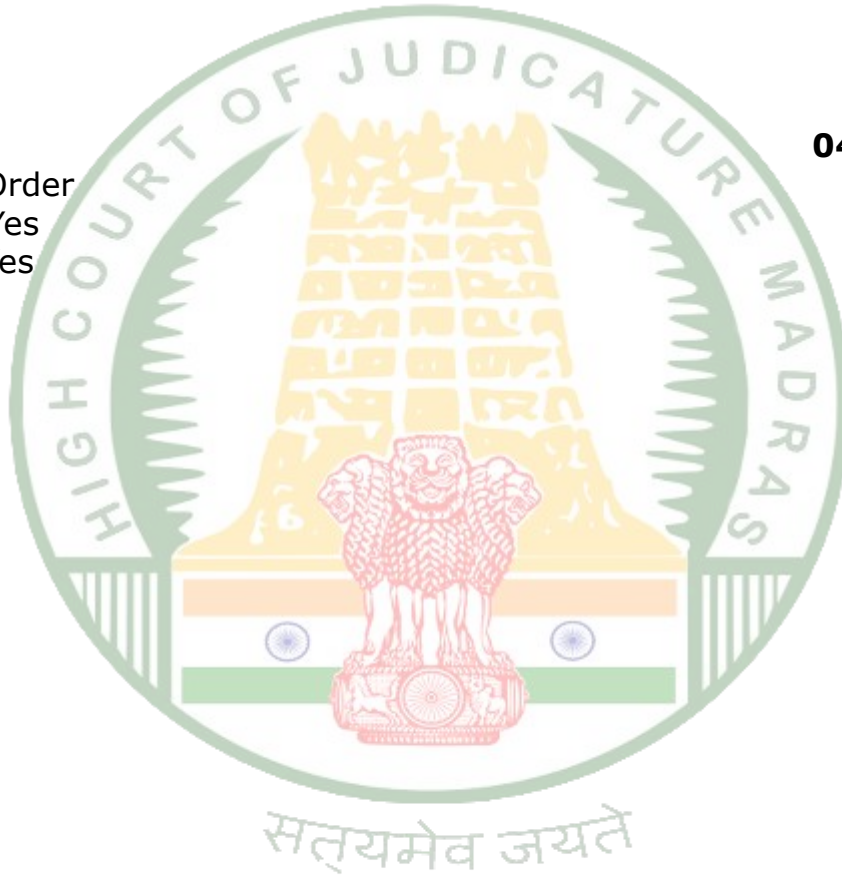
14. The last issue is with regard to payment of interest. The learned Arbitrator concluded, in this regard, that the Respondent is not entitled to interest under the 1993 Act or the MSMED Act. In this connection, the learned counsel for the first Respondent relied upon the the Entrepreneurs Memorandum filed under the 1993 Act so as to contend that the Petitioner would be entitled to interest at the rate prescribed in the 1993 Act. However, upon appraisal of evidence, the learned Arbitrator rejected the contention. On examining the 1993 Act, I find that a "supplier" is defined therein, inter alia, as "an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State..." In the absence of evidence with regard to such permanent registration certificate, this submission of the learned counsel for the first Respondent

cannot be countenanced in this proceeding. After rejecting the contention on interest, the learned Arbitrator awarded interest up to the date of Award (i.e. pre-reference and pendente lite) at 24% per annum on the basis that the transaction between the parties is of commercial nature. The said conclusion of the learned Arbitrator is arbitrary and unreasonable in as much as no objective benchmark or standard was applied to conclude that the Respondent is entitled to interest at 24% per annum during the above said period. On the contrary, if the prime lending/base rate of the State Bank of India from 27.06.2009 to the date of Award(08.03.2016) is considered as a reasonable benchmark in this regard and the context of a business to business commercial transaction is kept in mind, the Respondent would only be entitled to interest at 14% per annum. Accordingly, as per the law laid down by the Hon'ble Supreme Court in **Sayeed Ahmed vs. State of UP (2009) 12 SCC 26** and **Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa (2015) 2 SCC 189** mandating that the rate of interest should be reasonable under Section 31(7)(a) of the Arbitration Act, the Award in respect of rate of interest is revised to 14% per annum during the pre-reference period and the pendente lite period. As regards the post-Award period, in light of the stipulation of 18% per annum as the default rate of interest under the law applicable to this dispute, the Award is not liable to be interfered with in this regard.

15.In the result, the Petition to set aside the Arbitral Award is dismissed subject to the re-fixation of interest at 14% per annum from 27.06.2009 up to the date of Award on the sums awarded in the Award. Consequently, the connected application is closed.

Speaking Order
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Internet : Yes
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SENTHILKUMAR RAMAMOORTHY, J.
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