* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 18.02.2019
% ***Pronounced on : 28.02.2019***

\+ **FAO (OS)(COMM) No.26/2019**

SWARUP GROUP OF INDUSTRIES & ANR ..... Appellants
Through: Mr.Mohit Chaudhary & Ms.Garima Sharma, Advocates

versus

NATIONAL AGRICULTURAL CO OPERATIVE MARKETING FEDERATION OF INDIA LTD ..... Respondent
Through: Mr.Aaditya Vijay Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The unsuccessful petitioner in a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") challenges the dismissal of its petition in the present appeal, under Section 37.

2. The award, dated 31-12-2013 directed the appellant to pay to the claimant (hereafter "NAFED") a sum of ₹92,88,46,688/-. The award reads as follows:

> *"1. During the meetings held on 29th June, 2012 and 9th October, 2012, Mr. Guruswarup Srivastava (Respondent No. 2 and owner of Respondent No. 1) 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."*

3. The facts are that arbitral proceedings were initiated pursuant to MOUs dated 24th April, 2004 and 26th March, 2004 between the appellant and NAFED. A Sole Arbitrator 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."*

4. The interim award, for ₹104.25 crores is the subject matter of execution proceedings before the Bombay High Court. The proceedings before the Tribunal, however continued. On 29-12-2012, the sole arbitrator recorded that Mr. Guruswarup Srivastava who is the second appellant, (and the proprietor of the first appellant firm) had agreed that he was willing to transfer and convey valuable property in Mega Mall, Goregaon, Mumbai towards satisfaction of total claim of ₹ 197.13 crores. The minutes dated 29th June, 2012 of the arbitration proceeding is relevant and is extracted below:

"...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.

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."

On 9-10-2012, the tribunal again recorded Mr. Srivastava’s admission. The tribunal had recorded that the parties had arrived at a settlement, the terms of which were to be filed.

5. In the impugned award, the tribunal recorded that despite having agreed to the liability being ₹197.13 crores, the appellant began avoiding the proceedings and due to change of counsels repeatedly, no instructions were being given to finalize the settlement. Accordingly, the tribunal proceeded to pass the award as per the admissions by Mr. Srivastava which had been recorded on earlier occasions.

6. Before the learned single judge, it was contended that 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. It was also argued that no settlement is valid until and unless all the parties append their signatures to the said settlement. Reference was made to Section 31 of the Act in support of this argument. NAFED however argued that in the interim award where ₹104.25 crores was awarded in the favour of 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 ₹16 crores, after the attachment orders were passed.

7. The learned single judge rejected the appellant's petition stating that the record clearly showed that binding admissions were made and that the minutes dated 29th June, 2012 recorded the admission of Mr. Srivastava in 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 ₹197.13 crores. It was held that

> *"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. The single judge further held that

> a. *"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."*

9. It is argued that neither the appellant nor NAFED ever drew or signed any written settlement agreement. The proposal and conditional acceptance were never preceded with the mandatory provision of Section 73, of the tribunal formulating the terms of settlement. Most importantly, neither the appellant nor NAFED requested the tribunal to pass an award on the basis of any alleged settlement agreement. It was argued the mandatory provisions bound the tribunal; despite noting that proposal was subject to certain conditions stipulated in the said application, the arbitrator nevertheless directed the appellant to comply with interim award for ₹104.25 crores.

10. It was also argued that single Judge failed to appreciate that the so-called award is not an award but merely a record of proceedings. In case, the arbitrator was acting as a Conciliator and bringing about a settlement between the parties then he was mandatorily required to follow the procedure set out under Section 31 of the Arbitration and Conciliation Act. Even for the purposes of Section 30(2) of the Act, the Arbitrator had to record the settlement in the manner envisaged in section 73 of the Act. In the absence of a proposal for settlement made by the appellants to NAFED, in terms of which settlement had to be drawn up by the Conciliator and signed by the parties, there could be no consent award much less any interim consent award.

11. The record would show that the tribunal routinely recorded proceedings and characterized them as "minutes"; however whenever the tribunal made any procedural directions, a separate <u>procedural order</u> was made. Now, the appellant's arguments with respect to the tenability of the earlier interim award, in the opinion of this court, are beyond the scope of

these proceedings; significantly it did not challenge that award and is contesting the execution proceedings.

12. As regards the contention that by reason of Sections 31 and 73 of the Act, the conciliation settlement had to be reduced in writing, failing which the tribunal had to proceed on the merits and adjudicate the dispute is concerned, the court finds the argument insubstantial. The minutes of meeting would show that the appellant's liability was admitted on its behalf unequivocally, on 29th June, 2012 and 9th October, 2012. The draft terms of the award were also indicated. However the appellant's representative, Mr. Srivastava took adjournments. Subsequently, too Mr. Srivastava was present in various meetings. The arbitration proceedings were held on various dates; even on 4th July, 2013, he was present. Subsequently, two procedural orders were made on different dates. In these circumstances, when the tribunal held its sitting, on 20th December, 2013, Mr. Srivastava (the second appellant) expressed his inability to consent to the final terms of the award.

13. This court is of the opinion that given that Mr. Srivastava never questioned the recording of minutes of 29-06-2012 and 9-10-2012, both of which recorded his admission of liability, the subsequent second thought did not amount to resiling his admission. Very significantly, the appellant nowhere contested the accuracy of the statements recorded, by way of admission; rather only their last lawyer wrote to the tribunal, saying that the appellant could not agree to a consent award. Having once admitted the liability and not questioned the recording of minutes (or disputed it in a legally known manner, such as filing an affidavit disputing the factum of admission) the appellant could not claim that there was no consent to the terms, i.e. the admission. In these circumstances, the tribunal was justified

in proceeding to straightaway act on the admission and drawing the impugned award.

14. This court is of the opinion that the tribunal – having regard to the nature of the proceedings conducted by it, did not carry on any conciliation activities; rather the admissions were made <u>in the course of arbitration proceedings.</u> These were sufficient to draw the final award.

15. For the foregoing reasons, this court holds that the appeal lacks merit; it is dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

FEBRUARY 28, 2019