

- “a) The Respondent shall pay to the Claimant, a sum of Rs. 3,00,00,000/- (Rupees. Three Crores Only) together with interest thereon at the rate of 7.5% per annum from the date of the said MOU viz. 31 May 2005 till payment.*
- b) In addition to the aforesaid interest, the Respondent shall pay to the Claimant further interest as specified hereunder:-*

- (i) Interest at the rate of 7.5% per annum on Rs. 1,90,92,968.79 from 19 April 2005 till payment.*
- (ii) Interest at the rate of 7.5% per annum on Rs. 9,00,000/- from 31 April 2005 till payment.*
- (iii) Interest at the rate of 7.5% per annum on Rs. 3,04,753/- from 29 August 2005 till payment.*
- (iv) Interest at the rate of 7.5% per annum on Rs. 9,03,500.00 from 31 September 2006 till payment.*
- (v) Interest at the rate of 7.5% per annum on Rs. 21,031/- from 10 October till payment.*
- (vi) Interest at the rate of 7.5% per annum on rs. 80,00,000/- from 23 April 2005 till payment.*
- c) The Respondent shall pay to the Claimant, interest on the sum of Rs. 1,30,00,000/- at the rate of 12% per annum from 7 September 2006 till 1 July 2014.*
- (d) The Respondent shall also pay to the Claimant, interest on the sum of Rs. 1,30,00,000/- at the rate of 5.5% from 1 July 2014 till 30 April 2015.*
- (e) The Respondent shall pay to the Claimant, costs of these arbitral proceedings fixed at Rs. 15,00,000/- (Rupees Fifteen Lakhs only)."*

2. Briefly the facts are :

Petitioner is a company incorporated under the Companies Act, 1956. The respondent-a partnership firm duly registered under the Indian Partnership Act is engaged in the business of real estate development.

3. A memorandum of understanding (for short “**MOU**”) dated 31 January 2005 came to be entered between the petitioner and the respondent under which the petitioner agreed to grant development rights, of an immovable property admeasuring 17856.61 sq. meters bearing Gut No.1/1 (part), 1/6 (part), 1/7 (part), of Village Chitalsar, Manpada, Thane, to the respondent on the terms and conditions as set out in the MOU. The relevant terms of the MOU are clause I(p), Clause III(a) to (g), Clause 2, Clause 4, Clause 5, Clause 6, Clause 7, Clause 8, Clause 10 which are extracted in paragraph 4 of the Award. In short these conditions were that the petitioner will settle with and/or pay off the claims of the Central Bank of India, settle the disputes in Suit no.435 of 2001 with one Bombay Fiber and that it will also procure and control the management of Hind Dyes & Manufacturing Co. Pvt. Ltd. (for short ‘Hind Dyes’) by acquiring its entire share capital. By taking all these actions, the petitioners were to procure a clear and marketable title, free from all encumbrances in respect of a sub-lease areas in his favour.

4. In clause 4 of the MOU it was agreed between the parties that for obtaining development rights in respect of the premises, respondent will pay to the petitioner a sum of Rs. 8,65,00,000/- in

two installments of Rs. 3,00,00,000/- and Rs. 5,65,00,000/-. In clause 5 it was agreed that an amount of Rs. 3,00,00,000/- would remain deposited with the escrow agent namely M/s Little & Co. Advocates and Solicitors for the petitioner, (for short 'the escrow agent'), who would hold the said amount and invest the same in fixed deposit for 45 days with a Nationalised bank. Escrow agent was also granted an authority to spend the said amounts as more particularly set out in the said clause, *inter alia* for the purpose of making payments on behalf of petitioner to Central Bank of India in reimbursement of the amounts paid to Maharashtra State Financial Corporation (for short 'MFSC'), for settlement of dues of the remaining workers as also the secured claims of the Central Bank of India, for settling litigation filed by Hind Dyes etc. for procuring a confirmation and no objection from Hind Dyes.

5. The respondent handed over to the escrow agent an amount of Rs. 3,00,00,000/- as agreed between the parties in clause 4(a) of the MOU. On 16 March 2005, the escrow agent informed the then advocates of the respondents M/s Kirit N. Damania & Co. about the proposed settlement by the respondent with Central Bank of India and Hind Dyes. In pursuance thereto the escrow agent paid the amount of Rs. 1,90,92,968.79 to Central Bank of India on 19 April

2005 in full and final settlement of the dues, discharging the liability of the petitioner for securing release of the said property mortgaged with Central Bank of India.

6. Thereafter, the escrow agent by its letter dated 23 April 2005 informed advocates for the respondent that the petitioner had secured control and management of Hind Dyes and consequent thereto had also received the original title deeds of the property and the share certificates of Hind Dyes. It was also informed that sum of Rs.9,00,000/- was released by escrow agent in favour of its clients, the petitioner, for settlement of the labour dues, since the petitioner had also confirmed the settlement being reached with Hind dyes workers Union. In this regard, the escrow agent also paid a sum of Rs. 80,00,000/- to the share holders of Hind Dyes towards purchase price of the shares and for securing control and management of the said company. The Central Bank of India on 28 August 2006 issued a No Dues Certificate that the petitioner had settled their liabilities under a compromise and there were no outstanding dues with the bank on the petitioner's account.

7. On 6 September 2006 a meeting was held between the parties and their advocates, wherein it was agreed that the respondent

would make a further payment of sum of Rs. 1,30,00,000/- from out of the balance consideration, on various terms and conditions that were agreed between the parties in the said meeting. On 7 September 2006 advocates for the respondent addressed a letter to the escrow agent enclosing a cheque of Rs. 1,30,00,000/- and recorded the terms and conditions that were agreed upon between the parties in the said meeting. Also by a letter dated 7 September 2006 of the petitioner addressed to the advocates for the respondent copies of the No Dues Certificates received from the MSFC, letter dated 1 September 2005 received from Sarv Shramik Sangh (Workers Union) confirming payment of gratuity to the workers and No Dues Certificate dated 20 December 2004 received from Maharashtra State Electricity Board came to be forwarded.

8. On 11 June 2007, the escrow agent informed the advocate for the respondent that despite best efforts, the disputes between the previous share holders of Hind Dyes could not be settled and that the status quo had continued. It was also informed that the amount of Rs. 1,30,00,000/-, which was deposited by the respondent was available with the escrow agent as the shareholders of the Hind Dyes had refused to accept the said amount. It was also informed that all the original share certificates were also lying in escrow with them. The

escrow agent informed that further steps would be taken after receiving instructions from the parties in regard to the further course of action.

9. It appears that nothing substantial happened for quite some time although some correspondence was exchanged between the advocates for both the parties. The escrow agent addressed a letter dated 11 March 2014 to the advocate for the respondent and sought to refund the amount of Rs. 1,30,00,000/- that was paid/deposited by the respondent on 7 September 2006, towards acquisition of the shares of Hind dyes, as the petitioner was unable to complete the said transaction.

10. As the validity of the cheque of Rs. 1,30,00,000/- as forwarded by the escrow agent to the advocate for the respondent had expired, as the respondent did not encash the same, the escrow agent by its letter dated 30 June 2014 informed the advocates for the respondent that if nothing was heard from the respondent, the escrow agent would invest the said amount and hold the same on behalf of the respondent and would return the said amount to the respondent as and when required by the respondent, subject to deduction of escrow fees of 1% on the amount invested. Thereafter, by letter dated 20

March 2015, the new advocates for the respondent (M/s. Dhruv Liladhar & Co.) called upon the escrow agent to refund the said amount of Rs. 3,00,00,000/- and Rs. 1,30,00,000/- paid by the respondent under the said MOU, together with interest thereon, contending that the petitioner had failed, neglected and defaulted in discharging its obligations under the MOU.

11. The Escrow agent by its letter dated 10 April 2015 addressed to the advocates for the respondent, disputed its liability to pay interest while expressing its willingness to refund the amount of Rs. 1,30,00,000/- alongwith interest accrued thereon since June 2014. As regards the refund of Rs. 3,00,00,000/-, the escrow agent stated that from the said amount a sum of Rs. 2,92,22,252.79 was already utilised in the year 2006 and only balance of Rs. 7,77,747.21 was available with them. The details in regard to the utilization were informed to the advocate for the respondent. The escrow agent also recorded that as the transaction between the parties had not taken, the escrow agent would deal with the balance sum, in accordance with the instructions of the parties. The respondent thereafter accepted the payment of Rs. 1,36,00,850/- from the escrow agent without prejudice to its claims. However, as the refund cheque was not encashed by the respondent, the escrow agent invested this

amount in the interest bearing account at the rate of 7.5% per annum for the period from 1 July 2014 till 30 April 2015.

12. Thereafter, the respondent by its advocate's letter dated 22 June 2015, addressed to the petitioner terminated the said MOU *interalia* contending that the petitioner was unable to comply with the conditions contained in the said MOU and the transaction as contemplated therein did not materialize. The petitioner was called upon to refund the amount of Rs.3,00,00,000/- alongwith interest at the rate of 18% per annum. Further, the interest on the amount of Rs. 1,30,00,000/- at the rate of 18% per annum from 7 September 2006 till 1 July 2014 was also claimed.

13. As disputes had arisen between the parties, the respondent invoked the arbitration agreement as contained in the said MOU. The respondent approached this court in an application filed under Section 11. This court appointed the sole arbitrator to adjudicate the disputes between the parties.

14. The respondent filed a statement of claim making the following prayers:-

a) That this Hon'ble Tribunal be pleased to order and

direct the Respondent to pay to the Claimant the following:

- i. An amount of Rs. 3,00,00,000/- (Rupees Three Crores) together with interest thereon at the rate of 18% p.a. from 31st January, 2005 till payment and/or realisation;*
 - ii. Interest at 18% p.a. on the said sum of Rs. 1,30,00,000/- from 7th September 2006 to 1st July 2014; and*
 - iii. Interest at the rate of 11.5% p.a. on the said sum of Rs. 1,30,00,000/- from 1st July 2014 till 30th April 2015;*
- b) That the Respondents be ordered and directed to pay the costs of the reference and the arbitral proceedings; and*
- c) For such further and other reliefs as the nature and circumstances of the case may require and as this Hon'ble Tribunal deems fit".*

15. The petitioner defended the claim by filing its statement of defence. The principal bone of contention of the petitioner was that the respondent's claim was barred by limitation and secondly that the claim suffered from non-joinder of necessary party namely the escrow agent, apart from other defences as taken to contend that the respondent was not entitled to its claim as pleaded in the statement of claim. The parties laid their evidence. The learned arbitrator by the

impugned award has allowed the claims of the respondent as noted above.

16. Learned counsel for the petitioner in assailing the impugned award referring to clause 5,6,7,8 and 10 of the MOU contended that the claim as made by the respondent was barred by limitation and the findings as referred by the arbitral tribunal in that regard should be held to be perverse. This inasmuch as the amounts which were paid by the respondent as far back in 2005-2006 were being claimed by the respondents in the year 2015 on the ground that the MOU came to be terminated by the respondents by the letter of the respondent's advocate dated 22 June 2015. Learned counsel for the petitioner submits that the learned arbitrator has completely overlooked the primary condition as contended in clause 8 of the MOU in as much as the MOU stood automatically terminated on 30 April 2005 after the expiry of the period of three months as mentioned in the said clause. Thus, the invocation of the arbitration agreement by the respondent on 14 July 2015, was required to be held as hopelessly time barred. Referring to the meeting held on 6 September 2006 between the parties, although it was held that the amount of Rs. 1,30,00,000/- was paid by the respondent in consequence of the said meeting, however it cannot be said that

merely for this reason, the claim as made by the respondent was within limitation. He submitted that the learned arbitrator ought to have held that the MOU stood terminated as per the agreement between the parties as contained in clause 8.

17. The next contention as urged by learned counsel for the petitioner is that the escrow agent in the facts of the case was certainly a necessary party. This more particularly as the escrow agent was acting on behalf of both the parties and had accordingly received the amount under the MOU as also had made payments to the third parties. Learned counsel for the petitioner submits that the petitioner had categorically urged before the sole arbitrator that the respondent's claim ought to have failed on the non-joinder of the escrow agent as a party to the arbitral proceedings. He submits that the reasoning of the learned arbitrator in that regard rejecting such contention as urged by the petitioner as recorded in paragraph-24 of the award, be held as perverse.

18. Learned counsel for the petitioner next submitted that the impugned award also is required to be held illegal considering the interest which has been awarded in granting the claims as made by the respondent. It is submitted that no interest was payable on the

amount of Rs. 3,00,00,000/-. In awarding the interest, the learned arbitrator was acting beyond the scope of reference as the respondent had neither prayed in the statement of claim nor an issue in that regard was framed. It is contended that even the MOU had provided for interest on 45 days on the amount of Rs. 3,00,00,000/- considering clause 8 of the MOU. Learned counsel for the petitioner has not argued on any other grounds.

19. On the other hand, learned counsel for the respondent in supporting the award would contend that the award does not call for any interference within the limited grounds as available under Section 34 of the Act. It is submitted that admittedly, the petitioner could not complete the transaction as agreed in the MOU, hence the amounts which were parted on behalf of the respondent were required to be refunded to the respondent alongwith interest as claimed in the statement of claim. It is submitted that the learned sole arbitrator in allowing the claim and awarding interest has not only adhered and confined himself to the terms and conditions of the MOU but also has awarded interest on the said amount as permissible in law.

20. Learned counsel for the respondent has submitted that it is an established factual position on record that the parties had clearly

given a go-by to clause 8 of the MOU and the parties continued to act upon the MOU so as to complete the transaction. It is submitted that this was clear as also amplified from the fact that on 7 September 2006 in pursuance of the meeting held between the parties on 6 September 2006, an amount of Rs. 1,30,00,000/- came to be paid by the respondent and was deposited with the escrow agent. In supporting this contention that the claim as made by the respondent was within limitation, a reference is made to the letter dated 11 March 2014 of the escrow agent forwarding a refund of Rs. 1,30,00,000/- and informing the respondent that the petitioner was unable to comply the transaction under the MOU. It is submitted that the contention as urged on behalf of the petitioner in regard to the respondent's claim being barred by limitation was absolutely vague. In this context, the court's attention is drawn to paragraph-2 and 10 of the statement of defence of the petitioner. It is submitted that the sole arbitrator has appropriately taken into consideration all the facts, that after 1 May 2005, that is, after the period of 45 days as agreed in clause 8 of the MOU, the parties had acted upon the MOU. Supporting this contention, my attention is drawn to the correspondence on record and more particularly letters of the escrow agent dated 11 June 2007, 24 October 2008, 24 December 2008, 5 January 2009 and 11 March 2014 addressed to the advocates for the

respondent. Learned counsel for the respondent has also referred the letters dated 22 June 2015 of the respondent's advocate to the petitioner and the letter dated 14 June 2015, invoking arbitration.

21. Learned senior counsel for the respondent, however on instructions, has submitted that in regard to the relief granted in terms of paragraph-36 (c) of the award, the respondent is ready to accept interest at the rate 7.5% and in regard to paragraph-36 (d) of the award, the respondent is ready to forgo their interest.

Reasons and conclusions:-

22. On the above backdrop, I have heard learned counsel for the parties and also I have perused impugned award and the record.

23. At the outset, it needs to be noted that there are two basic issues which are urged by the learned counsel for the petitioner. Firstly, that the claim as made by the petitioner is barred by limitation and secondly that the claim ought to have been rejected for non-joinder of escrow agent, which according to the petitioner was a necessary party. To appreciate these contentions, it would be appropriate to note the points framed for determination by learned arbitrator as recorded in paragraph-21, which reads thus;

“(1) Whether the Respondent proves that the claim is barred by limitation?

(2) Whether the Respondent proves that the claim suffers from non-joinder of necessary party?

(3) Whether the Respondent proves that the transaction in relation to Rs. 1,30,00,000/- is a separate distinct transaction from the transaction under the MOU dated 31st January, 2005?

(4) Whether the Claimant proves that it is entitled to a refund of the sum of Rs. 3,00,00,000/- from the Respondent?

(5) Whether the Claimant proves that it is entitled to interest on the said sum of Rs. 3,00,00,000/- at the rate of 18% per annum or any other rate on and from 31st January 2015 till payment and/or realization?

(6) Whether the Claimant proves that it is entitled to interest on the said sum of Rs. 1,30,00,000/- at the rate of 18% per annum or any other rate with effect from 7 September, 2006 till 1st July 2014 and at the rate of 11.5% per annum from 1st July 2008 till 30th April 2015.

(7) What costs?

(8) What reliefs/Award?”

24. Learned arbitrator in paragraph-25 has categorically recorded that the petitioner did not press for point no. 3 (supra) meaning thereby that the amount of Rs. 1,30,00,000/- which was paid on 7 September 2006 by the respondent to the escrow agent was in

furtherance and part and parcel of the said MOU. Perusal of the reasoning as set out by the learned arbitrator on the issue of limitation, in my opinion, would require complete acceptance as there is no perversity in this findings. In this context the relevant clause in the MOU is clause 8 is required to be noted, where under the parties have agreed as follows:-

“8. EMERALD will procure the aforesaid settlements with Central Bank of India and HIND DYES within a period of three months from the date hereof i.e. on or before 30th April 2005 and in the event of Emerald not succeeding in bringing about settlement with the said parties this Memorandum of Understanding shall automatically stand terminated, in which even M/S LITTLE & CO. will return to Mittal the said sum of Rs. 3,00,00,000/- (Rupees Three Crores only) without deducting any amount there from and without claiming any lien thereon and M/s Little & Co. shall also pay over to Mittal such interest as shall have been earned on the said sum of Rs. 3,00,00,000/- (Rupees Three Crores only) as the same shall be deposited by M/s Little & Co. in Fixed Deposit for a period of 45 months with a Nationalised Bank.”

25. It is quite clear that clause 8 of the MOU was not acted upon in as much as in consequence of a meeting which was held between the parties on 6 September 2006, the Respondent had made a further

payment of Rs. 1,30,00,000/- as deposited with the escrow agent. The petitioner had taken a clear position before the arbitral tribunal that this amount as deposited with the respondent was under the MOU. The petitioner in this regard contended that the payment of Rs. 1,30,00,000/- had resulted in extension of time limit in clause 6(b) namely to settle and get 'no objection' from Hind Dyes. The petitioner at no point of time and even when the escrow agent, who was the petitioner's advocate addressed a letter dated 11 June 2007 to the advocate for the respondent, took a position that the MOU stood determined by operation of clause 8. In fact, as observed by the learned arbitrator, the parties even after the period specified under clause 8 had expired intended to take further steps to complete the transaction, which was evident from the letters dated 24 October 2008, 24 December 2008 and 5 January 2009. It is also clear that for the first time on 11 March 2014, the petitioner through the escrow agent sought to refund the amount of Rs. 1,30,00,000/- which was deposited by the respondent for acquisition of shares of Hind Dyes. Learned arbitrator has correctly observed that none of the correspondence entered between the parties would go to show that the petitioner considered clause 8 to be sacrosanct and/or time was considered to be essence of the contract. In fact, it appears that the settlement with the Central Bank of India and Hind Dyes itself was

brought after three months from the date of the MOU, whereby an amount of Rs. 1,90,92.968.79 was paid by the escrow agent in settling these claims. Further, the Central Bank of India itself issued a No Dues Certificate on 20 August 2006. It is after all these settlements, further amount of Rs.1,30,00,000/- came to be deposited by the respondent with the escrow agent.

26. Learned arbitrator in paragraph-25 to 28 has recorded findings that in these facts and circumstances, the claim as made by the respondent was well within limitation. It also needs to be observed that in fact the MOU was terminated by the respondent by its advocate's letter dated 14 July 2015. Accordingly, I do not find any substance in the contention as urged by the petitioner that learned arbitrator ought to have held the respondent's claim as time barred. In any event, learned senior counsel for the respondent is correct in pointing out the pleadings of the petition are vague on the limitation by referring to paragraph-2 and 10 of the statement of defence. In my opinion, the learned arbitrator, appropriately considering and appreciating the factual matrix, has rightly rejected the contention of the petitioner on limitation.

27. Insofar as the next issue that the claim as made by the respondent ought to have failed for non-joinder of the escrow agent,

as a necessary party in the arbitral proceedings, in my opinion, this contention of the petitioner has also been rightly rejected by the learned arbitrator. Perusal of the MOU clearly indicates that the same was entered into between the petitioner and the respondent. The escrow agent was neither a party to the arbitration agreement nor a party to the transaction under the MOU. The escrow agent was purely acting in a manner as provided under the MOU. The escrow agent could have never been a necessary party to the arbitral proceedings and/or bound by the arbitration agreement, in the absence of any privity to any of the parties as rightly held by the learned arbitrator.

28. In regard to the interest as awarded by the learned arbitrator, it can be seen that in respect of all the claims except in operative clause (c) and (d) of the award, interest at the rate of 7.5% has been awarded. In this context, it needs to be observed that in Clause 10(b) of the agreement, the parties had agreed for payment of interest at the rate 15% per annum, in the event of the petitioner making a default in obtaining a sub-lease and for the refund of Rs.3,00,00,000/-. The learned arbitrator has awarded a reasonable rate of interest at the rate. 7.5%.

29. Further, the respondents have made a concession in foregoing award of interest at the rate 12% as awarded by the arbitrator in paragraph-36(b) of the award by agreeing to accept interest at the rate of 7.5%. Also the respondents have agreed not to claim any interest as awarded by arbitrator tribunal in paragraph-36(d), which was granted at 5.5% on Rs. 1,30,00,000/-for the period from 1 July 2014 till 30 April 2015.

30. In the above circumstances, I do not find any ground as made out by the petitioner, for the award to be held to be perverse or in any manner in contravention with the fundamental policy of Indian law or against the basic notions of morality and justice. The petition is accordingly dismissed. No costs.

[G.S. KULKARNI, J.]