**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**Dated : 23.02.2021**

**CORAM**

**THE HONOURABLE Ms. JUSTICE P.T. ASHA**

**O.P.No.361 of 2018**

Kothari Industrial Corporation Limited
Rep. by its Chairman,
Mr.Pradip D.Kothari,
No.114, Nungambakkam High Road,
Kothari Building, 4th Floor,
Chennai – 600 034 ... Petitioner

Vs.

1.M/s.Southern Petrochemicals Industries Corporation Limited
Rep. by its General Manager (Legal)
Mr.R.Venkata Krishnan,
No.88, Mount Road, Guindy,
Chennai – 600 032

2.The Sole Arbitrator,
Justice F.M.Ibrahim Kalifulla ... Respondents

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**Prayer**: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 30.09.2017 passed by the second respondent in the arbitration case No.5 and allow the counter claim of the petitioner against the 1st respondent.

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| For Petitioner | : | Mr.T.Mahendran |
| For Respondent 1 | : | Mrs.Nalini Chidambaram<br>Senior Counsel<br>for Mrs.C.Uma |

**ORDER**

The respondent before the arbitrator has filed this petition to set aside the arbitral award dated 30.09.2017 passed by the learned arbitrator. The basis on which the parties have referred their disputes to arbitration is briefly narrated herein below.

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2. The petitioner herein was running a Caustic Soda Unit which came to be purchased by the respondent herein. Initially the parties



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had entered into an agreement of sale dated 05.07.1987. The Tamil Nadu Electricity Board had given tariff concession which was subsequently withdrawn. The Electricity Board had issued a letter dated 06.10.1988 to the petitioner demanding a sum of Rs.82,77,622.88 as reimbursement of concession from 5/82 to 11/85 as the concession stood revoked. The petitioner challenged the said demand by filing W.P.No.12017 of 1988 on the file of this Court. The said Writ was dismissed. The 1st respondent had also challenged the order passed in the Writ Petition by filing a Writ appeal. The Writ Appeal also went against the petitioner and the 1st respondent and they had also challenged the order of the Division Bench before the Hon'ble Supreme Court in C.A.Nos.9748 and 9750 of 2003 respectively. The dispute that was placed for consideration of the arbitrator was whether the amount claimed by the Tamil Nadu Electricity Board, which is inclusive of surcharge was payable by the petitioner or the 1st respondent in view of the agreement between the parties.



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3. During the pendency of the proceedings on 15.06.1989 the sale deed in respect of the Caustic Soda Unit was executed by the petitioner in favour of the 1st respondent. During the pendency of the Writ Proceedings on 01.07.1991 the 1st respondent had executed an undertaking in favour of the Tamil Nadu Electricity Board undertaking that in the event of the Court cases ultimately being decided in favour of the Board and in the event the Board is not given recourse by the Courts for recovering the claims arising out of the Court cases from the petitioner then the 1st respondent had agreed to pay the claim arising out of these writs. This undertaking was given since the 1st respondent had applied to the Board for transfer of power quota given to the Fertilizer complex at Tuticorin (SC No.15) to their Chloro Alkali plant at Manali (SC No.1294) belonging to the petitioner which was taken over by the 1st respondent at Manali. It is also stated that pending the Writ Appeal, on the direction of this Court the petitioner had deposited a sum of Rs.1,00,00,000/- in two

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installments of Rs.50,00,000/- each, on 05.06.1995 and 20.06.1995 as an interim measure.

4. On 24.12.2001, after the dismissal of the Writ Appeal, the Superintending Engineer, TNEB raised a demand on the 1st respondent for a sum of Rs.2,31,36,995.25/- after giving credit to the sum of Rs.1,00,00,000/- paid by the respondent. The payments were to be made on or before 31.12.2001, failing which disconnection was threatened.

5. Meanwhile, in the year 2002, the Tamil Nadu Petroproducts Limited, hereinafter referred to as TPL, had purchased the Caustic Soda Unit from the respondent. Fearing disconnection TPL had paid the sum of Rs.2,31,36,995/- together with belated payment surcharge on 18.09.2002 without prejudice to the payment being adjusted based on the outcome of the pending dispute. Thereafter, it appears that TPL had addressed a letter to the 1st respondent to reimburse the sum



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of Rs.2,31,38,945/- vide letter dated 09.02.2016. In the said letter, TPL would state that the above amount was paid on behalf of the 1st respondent and since TPL had no privity of contract with the petitioner it was the duty of the 1st respondent to reimburse the said sum to TPL with interest at 12%.

6. In response, the 1st respondent vide letter dated 23.02.2016 had informed TPL that arbitration proceedings have been initiated and requested them to await the result of the arbitral proceedings. Legal notice dated 25.02.2016 was issued by the 1st respondent to the petitioner calling upon them to pay the sum of Rs.2,31,38,995/- which was remitted by TPL to the TNEB. Thereafter, by a letter dated 06.09.2016 the 1st respondent had also invoked the arbitration clause in the agreement of sale dated 25.07.1987 for referring the disputes to arbitration and appointed the Hon'ble Mr.Justice Doraisamy Raju (Retd) as the sole arbitrator.

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7. In the reply notice, the petitioner had referred to the undertaking dated 01.07.1991 given by the 1st respondent to the TNEB taking full responsibility for paying the claim arising under the Writ Petition. In the light of this categoric undertaking, there was no dispute existing between the parties and therefore the request was without any basis. The petitioner had also stated that the 1st respondent having sold the Caustic Soda Unit to TPL they were not entitled to file any petition as their rights had been transferred.

8. The 1st respondent thereafter filed O.P.No.833 of 2016 seeking appointment of an arbitrator to arbitrate the dispute between the parties. The petitioner had filed a counter affidavit inter alia contending that the 1st respondent after giving a specific undertaking dated 01.07.1991 to the TNEB taking on the responsibility of paying the claims cannot now make a claim against the petitioner. The petitioner had also submitted that there was no arbitral agreement since the sale agreement dated 25.07.1987, in which the arbitral clause



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was incorporated had come to an end on the execution of the sale deed on 15.06.1989. They had also raised the plea of limitation.

9. However, by order dated 06.01.2017, the Hon'ble Chief Justice was pleased to appoint Hon'ble Mr.Justice F.M.Ibrahim Kalifulla (Retd), Honourable Supreme Court as the arbitrator. Both the parties had submitted their claim statement and statement of defense. The parties did not adduce oral evidence but the 1st respondent had filed Ex.C.1 to Ex.C.26 in support of their claim.

10. The learned arbitrator had framed issues and had ultimately come to the conclusion that the petitioner was liable to pay a sum of Rs.2,31,36,995.25 together with interest at 6% from 18.09.2002 till the date of its payment. This award is the subject matter of challenge before this Court under Section 34 of the Arbitration and Conciliation Act.

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11. The petitioner has challenged the award on the following grounds.

i)The arbitral proceedings was not maintainable since the arbitration clause which was incorporated in the agreement of sale dated 25.17.1987 had come to an end on the execution of the sale deed on 15.06.1989. Therefore, the entire proceedings is without any legal basis

ii)The claim is barred by limitation in as much as the claim ought to have been filed within three years from the date of demand i.e., 24.12.2001 when the demand had been made by the Superintending Engineer, TNEB.

iii)There is no agreement for grant of interest and therefore the award of interest was wrong and therefore the petitioner was not liable to reimburse the 1st respondent herein.

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12. Mr.T.Mahendran, learned counsel appearing on behalf of the petitioner would draw the attention of the Court to the sale



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agreement dated 25.07.1987 with particular reference to clause 2 (a), clause 10 (a), clause 11 (b), 14 (b) etc,. He would contend that after the execution of the sale deed all rights granted under the agreement of sale ceased to be in operation. Therefore, the finding of the learned arbitrator in this regard was uncalled for. The next ground of attack is limitation. The case of the petitioner is that the limitation would start form the date on which the demand has been made, namely, in the year 2001 and therefore according to the petitioner the arbitral proceedings ought to have commenced by 2006.

13. Mrs.Nalini Chidambaram, learned senior counsel appearing for the respondent would contend that the learned arbitrator had discussed this at length in his order and this Court sitting in Section 34 cannot reappreciate the same. Further, even in the Section 11, petition the Hon'ble Chief Justice had discussed this point which was canvassed before him as well. The learned senior counsel appearing for the respondent would contend that the cause of action of making



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the payment had arisen only when the proceedings under the Writ Jurisdiction had ended against the petitioner and the 1st respondent and the liability to pay had arisen.

14. The learned arbitrator had discussed this issue at length in his award and had come to the conclusion that the claim was not barred by limitation. In addition to this, there was no dispute between the petitioner and the 1st respondent at that relevant point of time since both of them had challenged the demand of TNEB.

15. The question of paying would come into existence only after the demand had been made and the petitioner became liable to pay the sum as undertaken by them in the agreement. Once again the learned arbitrator has examined the evidence on record and come to the conclusion that the claim is not barred by limitation and this Court cannot re-appreciate the evidence which is now settled by the plethora of judgements on this issue.



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16. The scope of interference under Section 34 has been limited to the grounds set out therein and if the award suffers from a patent illegality. However, in the instant case the arbitrator has considered the submissions and the evidence and thereafter passed the award. The third and final ground on which the petitioner had questioned the award was that the learned arbitrator had awarded interest when there was no agreement between the parties to pay the interest. This issue which is raised before the learned arbitrator has been discussed at length in paragraph nos.53 and 54 of the award and the arbitrator has given a speaking award. That apart, Section 31 (7) (a) of the Arbitration and Conciliation Act provides that in case there is no contrary agreement between the parties the arbitral tribunal was well within its power to include interest on such awards as it deems reasonable.

17. In view of the above the petitioner has not made out any



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case to set aside the award under Section 34 of the Arbitration and Conciliation Act. Consequently, the Original Petition is dismissed confirming the award passed by the learned arbitrator. No costs.

**23.02.2021**

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**P.T. ASHA. J,**

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