ORDER OD–1

APO/150/2020
AP/171/2007
IA NO.GA/1/2020
GA/2/2020
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

UNION OF INDIA
VERSUS
RADHA CHEMICALS

BEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
THE HON’BLE JUSTICE RAJARSHI BHARADWAJ
DATE : 15TH JULY, 2022

APPEARANCE:

Ms. Aparna Banerjee, Advocate
. . . for the appellant
Mr. Partha Chakraborty, Advocate
Ms. Sharmistha China, Advocate
….for the respondent

The Court:- This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is directed against the order of the learned Single Judge dated 25th February, 2020 whereby objection filed under Section 34 of the Act at the instance of the appellant herein being AP/171/2007, has been dismissed and the award of the learned Arbitrator has been upheld.

Records reflect that the respondent had supplied various chemical compounds within the time frame fixed in the respective Letters of Orders. Learned Arbitrator has divided the same in three groups – (1) the supplies of chemical compounds against 27 number of Letters of Orders dated 12.11.1987 to 3.10.1989, the details of which are contained in Annexure-X of the Statement of Claim, (2) supplies of chemical compounds of various kinds between June, 1989 and September, 1989 against 31 numbers of Letters of Orders contained in Annexure-Y of the Statement of Claim and (3) supplies of chemical compounds between June, 1989 and October, 1989 against 31 Letters of Orders / Purchase Orders as per the details given in Annexure-Z to the Statement of Claim.

The plea of the respondent before the Arbitrator was that during the relevant time, it was the prevalent practice that suppliers/manufacturers were required to supply materials in terms of Letters of Orders first and after completion of the supply, Purchase Orders were to be issued by the appellant. It was the admitted position before the Arbitrator that the respondent had made the supply of the three groups, X, Y and Z (25 numbers + 31 numbers + 32 numbers i.e. 88 numbers of Letters of Orders), but the payments were not made. Record further reflects that on an application filed under Section 11 of the 1996 Act, the Arbitrator was appointed and the Arbitrator, after giving due opportunity of hearing and considering the materials produced by both the parties, by a detailed reasoned award, had reached to the conclusion that even after the supply of materials and submission of bills, the payments were not made. In the aforesaid background, the learned Arbitrator had awarded a sum of Rs.21,60,440/- in respect of the claim of the respondent for Letters of Orders / Purchase Orders contained in Annexures X, Y and Z of the Statement of Claim and had also awarded the interest at the rate of 14.4% on this amount from 3.2.1993 till 31.12.2000 and at the rate of 12% from 1.1.2001 till publication of the award i.e. 28.2.2007 and in case of future default of payment in compliance of the award further interest in terms of Section 31(7) of the Act from the date of publication of the award till payment.

Dissatisfied with the award, appellant had filed objection under Section 34 of the Act which was registered as AP/171/2007 and the learned Single Judge, after hearing both the parties and giving detailed reasons, has rejected the objection by the order dated 25.2.2020.

Submission of learned counsel for the appellant is that there was no concluded contract between the parties and that there was no agreement executed between them. Further submission is that the claim was barred by time and the respondent was not entitled to the benefit of Section 14 of the Limitation Act. In support of his submission, learned counsel for the appellant has placed reliance upon judgments of the Supreme Court in the matters of

Geo Miller And Company Private Limited v. Chairman, Rajasthan Vidut Utpadan Nigam Limited reported in (2020) 14 SCC 643 and *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Others* reported in (2008) 7 SCC 169. Further submission of learned counsel for the appellant is that the Arbitrator has not considered the terms of the Contract and as per clause 2401, there was a bar of awarding interest on the withheld amount, therefore, Section 31(7)(a) of the Act will be attracted and also the respondent will not be entitled to interest, in view of the judgment of the Supreme court in the matter of *Union of India v. Bright Power Projects (India) Private Limited* reported in (2015) 9 SCC 695. Learned counsel for the appellant has also submitted that the award is against the public policy and is liable to be set aside in terms of the judgment of the Supreme Court in the matter of *Associate Builders v. Delhi Development Authority* reported in (2015) 3 SCC 49.

Opposing the prayer, the learned counsel for the respondent has submitted that there was a concluded contract between the parties and that clause 2401 will not be attracted for the payment due but this clause is applicable in respect of the interest on deposit of security amount. He has also submitted that the scope of interference in this appeal is limited, and in this regard, he has placed reliance upon the judgments of the Supreme Court in the matters of *MMTC Limited v. Vedanta Limited* reported in (2019) 4 SCC 163 and *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited* reported in (2022) 1 SCC 131.

We have heard learned counsel for the parties and perused the records. This being an appeal under Section 37 of the Act, the appellant can not travel beyond the grounds specified under Section 34 of the Act. Even the Court competent to consider the objection under Section 34 of the Act can not examine the matter as a regular Court of Appeal but it is required to examine the objection within the four corners of the grounds which have been provided under Section 34 of the Act. Considering the limited scope of interference in an appeal under Section 37, Supreme Court in the matter of MMTC Limited (Supra) has held as under:-

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious to slow to disturb such concurrent findings."*

Hon'ble Supreme Court in the matter of *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* reported in (2019) 15 SCC 131 taking note of the position after the amendment in Section 34 in the year 2015 has held that even the public policy under Sections 34 or 48 of the Act would now mean a fundamental policy of Indian law. Considering the scope of policy, it is held that the public policy of India is now constricted to mean firstly that a domestic award is contrary to the fundamental policy of Indian law and secondly that such an award is against basic the notions of justice and morality as understood in paragraphs 36 to 39 of the judgement in the case of Associate Builders [(2015) 3 SCC 49] and in respect of domestic awards made in India, it has further been held that there must be a patent illegality appearing on the face of the record. It has also been held that mere contravention of the substantive law of India by itself is no longer a ground available to set aside an arbitral award. Considering the scope of interference on the ground of patent illegality, it is held that the patent illegality is the illegality which goes to the root of the matter meaning thereby every error of law committed by the arbitral Tribunal would not fall within the expression 'patent illegality'.

Having examine the present matter, in the light of the aforesaid scope of interference, we find that so far as the first ground of challenge is concerned about the existence of no-concluded contract, the arbitrator has conducted the proceeding on the basis of an order of this Court under Section 11 of the Arbitration and Conciliation Act, 1996. At the stage of deciding application under Section 11 of the Act, the issue of existence of arbitration agreement is duly looked into, hence that order concludes the issue. That apart, this argument has also been duly considered and rejected by the learned Single Judge in the order under challenge. The award also reflects that the Letters of Orders / Purchase Orders were issued by the appellant to the respondent and pursuant thereto the supplies were made by the respondent and thereafter the payments were withheld. Therefore, at this stage, it is not open to the appellant to content that no concluded contract exists between the parties.

So far as the second ground questioning the award of interest is concerned, it is noticed that neither before the arbitrator nor before the learned Single Judge, the appellant had raised any issue about award of interest in violation of clause 2401 of the Contract. Before this Court also, learned counsel for the appellant has failed to point out that the amount payable to the respondent was withheld in terms of clause 2401 and that the appellant in terms of the said clause had lien to retain the claim amount. No such plea or argument in this regard, raised earlier at any stage, has been pointed out. The arbitrator has the power to award interest, pre-award interest, interest pendent lite and interest post award period. Hon'ble Supreme Court in the matter of *McDermott International Inc. vs. Burn Standard Co. Ltd. and Others* reported in (2006) 11 SCC 181 has held that:

> "*154. The power of the arbitrator to award interest for pre-award period, interest pendente lite and interest post-award period is not in dispute. Section 31(7)(a) provides that the Arbitral Tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made i.e. pre-award period. This, however, is subject to the agreement as regards the rate of interest on unpaid sums between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the pre-award period would depend upon the facts and circumstances of each case. The Arbitral Tribunal in this behalf will have to exercise its*

> *discretion as regards (i) at what rate interest should be awarded; (ii) whether interest should be awarded on the whole or part of the award money; and (iii) whether interest should be awarded for the whole or any part of the pre-award period.*
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> *155. The 1996 Act provides for award of 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was up to the date of award as also the future interest at the rate of 18% per annum.*"

Hon'ble Supreme Court in the matter of *Hyder Consulting (UK) Limited vs. Governor, State of Orissa* reported in (2015) 2 SCC 189 has reiterated that the arbitral tribunal has been given the discretionary power to not only imposing interest, but also for determining the rate of interest that could be imposed from the date of cause of action to the date of award.

Hence, we find no ground to interfere in the interest awarded by the learned arbitrator.

Third objection raised by the counsel for the appellant is that the claim was barred by limitation. Having perused the record, we find that this issue has been considered by the Arbitrator as also by the learned Single Judge and has been held in favour of the respondent on finding that the claim was not barred by limitation. Learned Arbitrator has noted that the respondent was constantly pursuing for the due payment and the officials of the appellant had assured that the payment would be made. Though counsel for the appellant has raised the plea that no such assurance was given but nothing has been pointed out to show that such a finding recorded by the learned Arbitrator is a perverse finding and not based upon any evidence. Learned Single Judge has also considered this aspect of the matter and has noted that the respondent had filed the writ petition in the year 1993 and the same remained pending upto 2002. Learned Counsel for the appellant does not dispute that this writ petition was filed by the respondent for refund of the amount. Thereafter, recourse to Section 11 of the Act was taken and the Arbitration proceedings had commenced. That apart, the issue of limitation is a mixed version of fact and law and the same cannot be agitated unless factual findings recorded by the learned Arbitrator or the Court below are shown to be perverse or patently illegal.

In view of these, the appellant does not derive any benefit from the judgment of the Supreme Court in the matter of *Geo Miller & Co. Pvt. Ltd. (Supra)* and *Consolidated Engineering Enterprises (Supra)*.

Thus, we find no ground to interfere in this appeal. The appeal is found to be sans merit and, accordingly, dismissed.

The connected IAs stand disposed of.

(PRAKASH SHRIVASTAVA, C.J.)

(RAJARSHI BHARADWAJ, J.)

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