

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL JURISDICTION**

**COMMERCIAL APPEAL NO. 574 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 987 OF 2018**

Anmol Steel Processors Private Limited
(Formerly known as Anmol Steel & Infra
Pvt. Limited), having its registered office
at Plot No. D-15, M.I.D.C. Industrial Area,
Taloja, Navi Mumbai and having its
administrative office at 101, Joshi Chamber,
Ahmedabad Street, Carnac Bunder, Masjid (E),
Mumbai – 400 009 through its Director Amar D. Shah ... Appellant

Versus

Colour Roof (India) Limited, having its
registered office at B-1/1, Mayur Ma Krupa
CHS Ltd., Off Gokhale School, Simpoli Road,
Borivali (W), Mumbai 400 092. ... Respondent

Mr. J. P. Sen, Senior Advocate a/w Mr. Kezer Kharawala and Mr. Pradosh Patil
i/by M/s. Lex Juris for the Appellant.
Mr. Chetan Kapadia a/w Mr. Rohan Agrawal, Ms. Sakina Ruhawala i/by
M/s.Consulta Juris for the Respondent.

**CORAM: R. D. DHANUKA AND
R. N. LADDHA, JJ.**

**RESERVED ON : 13th DECEMBER, 2021
PRONOUNCED ON : 19th JANUARY, 2022**

JUDGMENT (*Per R.D. Dhanuka, J.*) :-

. The appellant has filed this Appeal under Section 37 of the
Arbitration and Conciliation Act, 1996 impugning the judgment dated 5th

September, 2019 passed by the learned Single Judge, dismissing the Commercial Arbitration Petition No. 987 of 2018 impugning the Arbitral Award dated 9th June, 2018 passed by the learned arbitrator.

2. The appellant was the original claimant in the arbitral proceedings and the original petitioner in commercial arbitration petition whereas the respondent herein was the original respondent in the arbitral proceeding and also respondent in the commercial arbitration petition. For the sake of convenience, the parties are described as per their original status in the statement of claim before the learned arbitrator.

Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. It is the case of the claimant that on 30th October, 2020 offer was sent to the respondent for supply of steel material by the claimant. The claimant accordingly supplied the steel material to the respondent as per various purchase orders and as per the said offer. On 20th July, 2011, the respondent vide their email addressed to the claimant acknowledged the debt and admitted the liability to the extent of 15 lakhs allegedly due and payable to the claimant. According to the claimant, the steel material supplied to the respondent as per purchase order was amounting to approximately Rs.25

crores.

4. It is the case of the claimant that vide an email dated 5th January, 2012, the respondent acknowledged the debt and admitted the liability to the extent of Rs.1.5 lakhs allegedly due and payable to the claimant. The respondent paid an amount of Rs.3,74,30,757/- in trenches which were appropriated by the claimant against the old outstanding invoices on FIFO basis.

5. It is the case of the claimant that during the period between 2013-14, the respondent paid an amount of Rs.75 lakhs in installments which was appropriated by the claimant against old invoices on FIFO basis. It is the case of the claimant that on 30th June, 2013, the respondent issued a cheque for Rs.50 lakhs by way of part consideration for steel material supplied to them. On 30th July, 2013, the cheque issued by the respondent returned dishonored due to insufficient funds. On 29th August, 2013, the claimant issued a notice to the respondent and its Directors. In the year 2013, the claimant filed a Criminal complaint bearing No. 1154/SS/2013 under Section 138 of the Negotiable Instrument Act, 1881 in the Court of Learned Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai. On 27th July, 2015,

the respondent filed a Criminal Writ Petition bearing No. 2462 of 2015 in this Court.

6. On 5th February, 2014, 25th July, 2015 and 28th July, 2015, the respondent paid an amount of Rs.50 lakhs against the dishonored cheque in the said proceedings filed by the claimant under Section 138 of Negotiable Instrument Act. The said complaint was withdrawn by the claimant.

7. On 29th January, 2015, the claimant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956 calling upon the respondent to pay an amount of Rs.7,01,17,241.72/- towards principal and interest. On 11th March, 2015, the claimant filed a Company Petition bearing No. 465 of 2015 before this Court *inter-alia* praying for winding-up of the respondent-company.

8. On 25th May, 2015, the parties hold a meeting. It is the case of the claimant that the respondent has unequivocally admitted a sum of Rs.2,22,49,067/- as due and payable by them to the claimant as on 31st March, 2015. On 22nd November, 2015, this Court by consent of parties referred the entire dispute to the arbitration. During the period between 2016-17, both the parties entered upon the reference. The arbitral

proceedings accordingly commenced. The claimant examined four witnesses who were cross-examined by the learned counsel for the respondent. The respondent examined three witnesses. Both the parties made oral submissions. On 9th June, 2018, the learned arbitrator made an award rejecting claims made by the claimant on the ground of limitation except part of the claim in the sum of Rs.3,68,005/- with interest thereon from the date of award until payment and/or realization. On 15th June, 2018, the learned arbitrator forwarded an amended arbitral award. Being aggrieved by the said order dated 9th June, 2018 and amended award dated 15th June, 2018, the claimant filed Commercial Arbitration Petition No. 987 of 2018 under Section 34 of the Arbitration and Conciliation Act, 1996.

9. A learned Single Judge of this Court delivered a judgment on 5th September, 2019 dismissing the said Commercial Arbitration Petition No. 987 of 2018. The respondent also filed a Commercial Arbitration Petition No. 1081 of 2018 for different reliefs which petition was not pressed by the claimant before the learned Single Judge and thus the same was dismissed as withdrawn. Being aggrieved by the said judgment dated 5th September, 2019, the claimant filed this appeal.

10. Mr. J. P. Sen, learned senior counsel for the claimant invited our attention to various documents annexed to the compilation filed along with Commercial Appeal and also tendered a compilation of judgments in support of his submission. He also invited our attention to certain findings rendered by the learned Arbitrator and also various paragraphs of the judgments rendered by the learned single Judge. He submits that the claimant had supplied steel products to the respondent pursuant to offer dated 30th October, 2010 and had raised various invoices in respect thereof. The last invoice was raised on 2nd June, 2011. He submits that by an email dated 20th July, 2011, the respondent acknowledged that approximately Rs.15 crores were due and payable to the claimant and proposed time line for discharging the balance outstanding. By another email dated 5th January, 2012, the respondent undertook to pay Rs.1.5 crores to the claimant against their alleged outstanding dues.

11. It is submitted that during the financial year 2012-2013, the respondent paid the claimant a sum of Rs.3,74,30,757/- which was appropriated by the claimant against the pending invoices to the extent of Rs.2,59,89,564/- and interest at the rate of 21% p.a. to the tune of Rs.1,38,41,185/-. During the financial year 2013-2014, the respondent paid

the claimant a sum of Rs.76 lakhs out of which Rs.51,61,477/- was appropriated towards the principal value of the earliest pending invoices and a sum of Rs.22,17,306/- was appropriated towards interest at the rate of 21% p.a. He submits that the sum of Rs.7,01,17,241.72 ps. consisting of Rs.3,97,64,459/- and interest at the rate of 21% p.a. Rs.3,03,52,783/- was outstanding.

12. It is submitted by the learned senior counsel that on 30th June, 2013, the respondent issued a cheque of Rs.50 lakhs as part payment towards the material supplied to the claimant. However, the said cheque was dishonored when presented on 30th July, 2013. The claimant filed a criminal complaint under section 138 of the Negotiable Instruments Act, 1881 in the Court of the learned Metropolitan Magistrate, 6th Court, Mazgaon against the respondent. The respondent thereafter issued three cheques i.e. on 5th February, 2014, 25th July, 2015 and 28th July, 2015, in aggregate sum of Rs.50 lakhs, the value of the dishonored cheque. The said criminal complaint was accordingly withdrawn by the claimant filed under section 138 of the Negotiable Instruments Act, 1881.

13. It is submitted by the learned senior counsel that there was a joint

meeting held between the parties on 25th May, 2015 when the representatives of the respondent admitted that a sum of Rs.2,22,49,067/- was due and payable by the respondent to the claimant. On 31st March, 2016, the parties agreed to reconcile their accounts in view of the claimant's position that the amount due was in fact far larger. By an order dated 29th November, 2016, the disputes and difference between the parties were referred to arbitration. The said company petition was thus disposed of.

14. It is submitted by the learned senior counsel that the last invoice by which the claim was brought by the claimant was on 2nd July, 2011. The company petition was filed on 11th March, 2015. The reference to arbitration was by an order dated 29th November, 2016. Learned senior counsel placed reliance on email dated 28th July, 2011 addressed by the respondent to the claimant and email dated 5th January, 2012 addressed by the respondent to the claimant. He vehemently urged that a sum of Rs.3,74,30,757/- during the financial year 2012-2013 and aggregating to Rs.76 lakhs during the financial year 2013-2014 was made by the respondent to the claimant. He submits that the said cheque in the sum of Rs.50 lakhs was dishonored on 30th July, 2013. The respondent had thereafter paid a sum of Rs.50 lakhs vide three cheques dated 5th February, 2014, 25th July, 2015 and 28th July,

2015 aggregating to Rs.50 lakhs. He also placed reliance on the Minutes of the Meeting held on 25th May, 2015 between the parties.

15. Learned senior counsel placed reliance on sections 18 and 19 of the Limitation Act, 1963 and submitted that in view of the acknowledgment of liability by the respondent to the claimant and in view of various part payments, the period of limitation was extended and thus the entire claim was within the period of limitation. Learned Arbitrator however disregarded the email dated 28th July, 2011 on the basis that it was more than three years prior to filing of the company petition in March, 2015 and that it was of doubtful probative value on account of discrepancy of admission in the email of Rs.15 crores and in the books of accounts of the claimant which showed Rs.9.75 crores as being due and payable.

16. It is submitted by the learned senior counsel that the said email dated 5th January, 2012 contained an admission by the respondent that he would pay a sum of Rs.1.50 crores to the claimant within few days. The learned arbitrator however held that the said acknowledgment was of no avail on the basis that it was of more than three years prior to filing of the company petition. He submits that the learned Arbitrator erroneously held that the

payments made from time to time by the respondent to the claimant were held not to extend the period of limitation on the ground that those payments had been appropriated towards the earlier invoices and not the 37 invoices on the basis of which the claim had been constituted. He submits that the learned arbitrator erroneously held that the respondent while making payment had not effected any appropriation, but the claimant having appropriated the sums paid against the specific invoices and not generally against the amounts due must be held for appropriation / adjustment.

17. It is submitted by the learned senior counsel that the findings of the learned Arbitrator that the Minutes of the Meeting held on 25th May, 2015 was of no assistance to the claimant on the basis that it contained no unequivocal admission of Rs.2,22,49,067/- due from the respondent to the claimant is erroneous. He submitted that part payment of the debt is made by cheque, written in the handwriting of the person liable to pay the debt. This evidence, both of fact of payment and of acknowledgment are within the meaning of section 18 of the Indian Limitation Act. Thus, a fresh period of limitation is liable to be computed from the time when the cheque was handed over to the creditor. He submits that even the dishonored cheque would constitute such an admission of liability.

18. It is submitted by the learned senior counsel that the acknowledgment does not have to be for exact amount payable by the respondent to the claimant. As long as it constitutes an admission of existing jural relationship, the Court or Tribunal is entitled to consider all other material on record to determine the promised amount due. He submits that the period spent in prosecuting the winding up petition bonafidely has to be excluded for the purpose of determining whether the claim was within time or not.

19. It is submitted by the learned senior counsel that each of the cheques issued by the respondent would constitute an acknowledgment in writing. The appropriation of Rs.50 lakhs towards specific invoices by the claimant would not preclude the claimant to contend extension of limitation for all the invoices. He submits that the cheque that was dishonored dated 30th June, 2013 was well within the period of limitation in respect of the claimant's entire claim and each of the invoices on which it was based.

20. It is submitted by the learned senior counsel that the Minutes of the Meeting held on 25th May, 2015 recording acknowledgment of liability by

the respondent extended period of limitation for further three years. The claimant in any event had already filed a winding up petition bearing No.465 of 2015 on 11th March, 2015. The period that elapsed between the filing of the winding up petition and referral of disputes to arbitration is liable to be excluded. The whole claim of the claimant was thus within the period of limitation. Learned single Judge ought to have interfered with the arbitral award.

21. Learned senior counsel for the appellant tendered written arguments and also a compilation of following judgments:-

- (a) The Judgment of Supreme Court in case of ***Jiwanlal Achariya v/s. Rameshwarlal Agarwal, (1967) 1 SCR 190.***
- (b) The Judgment of Calcutta High Court in case of ***Prafulla Chandra Nag v/s. Jatindra Nath Kar, I.L.R. 1938 Cal 3200.***
- (c) The Judgment of Andhra Pradesh High Court in case of ***Thava Subrahmanyam v/s. Chenna Venkataratnam, 1955 SCC OnLine AP 103.***
- (d) The Judgment of Madhya Pradesh High Court in case of ***Gorilal Baldeodas v/s. Ramjeelal Bhuralal, 1960 SCC OnLine MP 124.***
- (e) The Judgment of Patna High Court in case of ***Rajpati Prasad v/s. Kaushalya Kuer and Ors., 1980 SCC OnLine Pat 107.***
- (f) The Judgment of Gujarat High Court in case of ***Hindustan Apparel Industries v/s. Fair Deal Corporation, New Delhi, 2000 SCC OnLine Guj 137.***

- (g) The Judgment of Delhi High Court in case of ***Bhushan Steel and Strips Ltd. v/s. Bhartiya Loha Udyog (P.) Ltd., 2010 SCC OnLine Del 581.***
- (h) The Judgment of Supreme Court in case of ***Food Corporation of India v/s. Assam State Cooperative Marketing and Consumer Federation Ltd. and Ors., (2004) 12 SCC 360.***
- (i) The Judgment of Kerala High Court in case of ***P. D. Pillai v/s. Mrs. Kaliyanikutty Amma and Ors., 1994 SCC OnLine Ker 146.***
- (j) The Judgment of this Court in case of ***Maharashtra State Farming Corporation Ltd. v/s. Belapur Sugar and Allied Industries Ltd., 2004 (3) Mh. L. J. 414.***
- (k) An unreported Judgment delivered on dated 23rd October, 2017 by the Supreme Court in case of ***Kanyalal Rewachand Mirani v/s. M/s. Trans – Fabpower India Pvt. Ltd.*** in Diary No(s). 14198 of 2017.
- (l) The Judgment of this Court in case of ***Chintaman Dhundiraj v/s. Sadguru Narayan Maharaj Datta Sansthana and Ors., 1956 SCC OnLine Bom 61.***

22. Mr. Chetan Kapadia, learned counsel for the respondent on the other hand also tendered written arguments along with a compilation of judgments. It is submitted that the arbitration agreement was arrived at between the parties on 22nd November, 2016 read with order dated 29th November, 2016 and thus the arbitral proceedings commenced on 22nd November, 2016. The goods were supplied by the claimant to the

respondent during the period between April, 2011 to June, 2011. Out of the several invoices raised, 38 invoices were outstanding, each of which provided for a credit period of 45 days. It is submitted that the first alleged acknowledgment was dated 20th July, 2011 and the last alleged acknowledgment was dated on 25th May 2015 after a gap of more than three years between them. The second alleged acknowledgment dated 25th May, 2015 thus would not extend the period of limitation which has already expired.

23. It is submitted by the learned counsel that purchase orders were issued during the period 16th March, 2011 to 25th March, 2011. He submits that during the period 28th April, 2011 to 2nd June, 2011 the goods / material were sold and delivered by the claimant to the respondent under various invoices raised by the claimant. The claimant had claimed payment under 38 invoices out of 183 invoices which were due and payable by the respondent according to the claimant. He submits that the said 45 days credit period as per the last due invoice expired on 17th July, 2011. Cause of action started after expiry of 45 days from the date of each invoice.

24. Learned counsel submits that in paragraph 7 of the statement of

claim, the claimant admitted that part of the payment of Rs.3,74,30,757/- made by the respondent to the claimant was adjusted towards the principle and partly adjusted towards the interest by them during the period between 2012-2013. He submits that admittedly these invoices against which those part payments were adjusted by the claimant did not form part of the claims made by the claimant in the statement of claim before the learned Arbitrator.

25. It is submitted that on 30th June, 2013, the respondent had issued a cheque of Rs.50 lakhs towards part payments. The said cheque was however, returned dishonored. The said amount was paid in three installments by the respondent to the claimant. The claimant adjusted the said amount of Rs.50 lakhs fully towards the invoice nos.078, 082 and 083 and partly towards invoice no.840. He submits that the invoice nos.078, 082 and 083 did not form part of the statement of claim.

26. It is submitted by the learned counsel that during the period 2013-2014, the respondent had made payment of Rs.76 lakhs to the claimant. In the statement of claim, the claimant partly adjusted the said amount towards principle and partly towards interest. The invoices against each of these part payments that were adjusted did not form part of the claim made by the

claimant in the statement of claim. He submits that on 18th July, 2014, the three years period of limitation expired. He submits that when the issue was referred to arbitration by the orders dated 22nd November, 2016 and 29th November, 2016, all questions including that of limitation were kept open. Learned counsel invited our attention to some of the paragraphs of the statement of claim dated 25th December, 2016 filed by the claimant contending that 38 invoices to the tune of Rs.3,74,25,675/- were due and payable by the respondent. It was alleged in the statement of claim that the respondent had made part payment to the claimant, thereby acknowledging the debt. It was alleged that the respondent had addressed emails thereby acknowledging the debt payable to the claimant.

27. Learned counsel for the respondent invited our attention to some of the averments from the statement of defense filed by the respondent and also from the counter claim contending that the claims made by the claimant were barred by law of limitation. The claimant had adjusted part payments made by the respondent towards the invoices which did not form part of the statement of claim before the learned Arbitrator. The emails allegedly acknowledging debt would not extend the period of limitation.

28. It is submitted that though the claimant had sought to rely upon the emails dated 20th July, 2011 and 5th January, 2012 alleged to have been sent by the respondent allegedly acknowledging its liability towards payment due to the claimant, these emails had neither been pleaded and not even a whisper had been made in that regard in the statement of claim. These emails were produced for the first time at the stage of filing affidavit of evidence of the first witness of the claimant. Learned counsel for the respondent submits that the claim of the claimant is governed by Article 15 of the Limitation Act, 1963 which provides that the period of limitation for price of the goods sold and delivered commences after expiry of fixed period of credit which is three years after the period of credit expires. The period of limitation expired at the end of 45 days of each invoice much prior to the parties referring their dispute to arbitration on 22nd November, 2016. The claim of the claimant was thus barred by law of limitation. In the statement of claim, the claimant has not pleaded extension of limitation in the reply to the counter claim filed by the respondent during the arbitral proceedings.

29. It is submitted by the learned counsel that the claimant in its statement of claim has clearly admitted that all part payments made by the

respondent were in fact adjusted and appropriated towards various invoices which did not form part of the claim filed by the claimant before the learned Arbitrator. He submits that the respondent had issued cheques on 5th February, 2014, dated 25th July, 2015 and 28th July, 2015 against the cheque of Rs.50 lakhs dated 30th June, 2013 which was returned dishonored. He submits that the witness examined by the respondent Mr. Jubin Thakkar had deposed that the said cheque for Rs.50 lakhs which was issued as a security deposit as prescribed under the purchase order and not towards any liability.

30. It is submitted that the said amount of Rs.50 lakhs was subsequently paid because the mother of Jubin Thakkar (RW-3) was aged and had to defend the proceedings under Section 138 of the Negotiable Instruments Act, 1881 and was finding difficulties. He submits that even if the said amount of Rs.50 lakhs was to be construed as an acknowledgment within the meaning of section 19 of the Limitation Act, 1963, the same could only be extended to the benefit of invoice no.084, outstanding in the sum of Rs.1,57,830/- and nothing more.

31. It is submitted by the learned counsel for the respondent that the witness (RW-3) examined by the respondent had deposed in his evidence

that the email dated 20th July, 2011 was in fact under duress because of anti-social elements engaged by the claimant. He submits that the email mentioned the amount of Rs.15 crores which was due and payable by the respondent to the claimant, whereas as on 20th July, 2011 even according to the ledger statement of the claimant, the amount of Rs.9 crores approximately was payable by the respondent. No reliance thus on the said email which was sent under duress could be placed by the claimant. He submits that even if the said emails dated 20th July, 2011 and 6th January, 2012 could be considered as acknowledgement of liability, the period of limitation could extend only up to 21st July, 2014 or 6th January, 2015 which is well prior to the commencement of the arbitral proceedings i.e. on 22nd November, 2016 and thus the claims in any event were already barred by law of limitation much prior to the date of commencement of the arbitral proceedings.

32. Learned counsel placed reliance on Section 60 of the Contract Act and submitted that the claimant having elected to adjust Rs.50 lakhs payment against four invoices i.e. three invoices fully and 4th invoice partly and not having made any claim in respect of those three invoices which were adjusted partly in the arbitral proceedings cannot be allowed to

contend that part payment of Rs.50 lakhs by cheque which was dishonored would save limitation in respect of all the invoices. It is submitted that the learned Arbitrator has rightly relied upon section 60 of the Contract Act while accepting the plea of limitation raised by the respondent and rejecting the claims made by the claimant on the ground of limitation. He submits that even before the learned single Judge, the claimant did not raise any such argument.

33. It is submitted that the learned Arbitrator has rightly rendered a finding that out of 38 invoices only one invoice bearing no.084 having outstanding liability of Rs.3,68,005/- was payable by the respondent to the claimant. He submits that cheque having been dishonored cannot be considered in isolation but has to be considered along with subsequent acts. The said payment of Rs.50 lakhs made by the respondent to the claimant represented the payment of the earlier amount of Rs.50 lakhs which were paid and were subject matter of the proceedings under section 138 of the Negotiable Instruments Act.

34. Learned counsel invited our attention to the statement of defense and more particularly to the submissions made in paragraph 21 and submitted

that the respondent did not dispute the appropriation made by the claimant of the said payment of Rs.50 lakhs against three old invoices fully and one invoice partly. He submits that 38 invoices which were subject matter of the proceedings before the learned Arbitration caused 38 separate causes of action. The claimant having elected and taken benefit of appropriation and having saved limitation in respect of earlier four invoices is estopped from taking inconsistent pleas. Till the election of appropriation / adjustment, the claimant could have adjusted part payment against each invoice however, the claimant having adjusted part payment only against four invoices, it is now not open to the claimant to suggest that the cheque when handed over represented acknowledgment of liability towards payment under 38 invoices. The arguments now advanced by the claimant are contrary to the stated case of the claimant in the arbitral proceedings.

35. Learned Arbitrator and the learned single Judge considered the effect of part payment against four invoices. He invited our attention to the findings rendered by the learned Arbitrator in paragraphs 25 and 38 of the arbitral award. He submits that the learned Arbitrator after considering the adjustment made by the claimant of the said part payment of Rs.50 lakhs against three invoices fully and against one invoice partly allowed the claim

in respect of the said partly invoice by rejecting the plea of limitation in respect of the said partly paid invoice raised by the claimant. Both the parties have led oral evidence before the learned Arbitrator. The claimant had failed to prove that the claims made by various invoices which were the subject matter of the arbitral proceedings were within the period of limitation. Learned counsel tendered a copy of the company petition filed by the claimant before the Company Court and relied upon the averments made in paragraph 18 and 27 thereof.

36. It is submitted by the learned counsel that the scope and extent of judicial scrutiny under section 34 of the Arbitration Act is narrow. He submits that the extent of judgment scrutiny and the scope of interference under Section 37 of the Arbitration Act is narrower than scope under Section 34 of the said Act. Learned counsel for the respondent relied upon the following judgments: -

- (a) The Judgment of Supreme Court in case of ***MMTC Limited v/s. Vedanta Limited, (2019) 4 SCC 163.***
- (b) The Judgment of this Court delivered on 13th October, 1939 in Civil Revision Application No. 241 of 1939 in case of ***Atmaram V. Kirtikar v/s. Lalji Lakhamshi and Ors.***
- (c) The Judgment of Allahabad High Court in case of ***Abdul***

Aziz v/s. Munna Lal and Ors., 1921 SCC OnLine ALL 110.

- (d) The Judgment of Allahabad High Court in case of ***(Firm) Puttu Lal Kunji Lal v/s. (Firm) B. Jagannath, 1934 SCC OnLine All 383.***
- (e) The Judgment delivered on 11th October, 2018 by this Court in case of ***Fermenta Biotech Limited v/s. K. R. Patel*** in Arbitration Petition No. 545 of 2017.

37. It is submitted that appreciation of evidence and the application of law by the learned Arbitrator cannot be termed as patent illegality. Learned Arbitrator has relied upon Article 113 of the Limitation Act for deciding the controversy. The view taken by the learned Arbitrator is a plausible view. Learned single Judge thus rightly did not interfere with the findings on the issue of limitation rendered by the learned Arbitrator. It is submitted that the learned single Judge has rightly observed that the terminus *ad quem* in respect of the disputes forming subject matter of the arbitral proceedings was date of reference of arbitration i.e. 22nd November, 2016.

38. It is submitted that merely because the company petition is filed by the claimant cannot be a ground for extension of limitation. Learned Arbitrator having rendered a finding of fact which being not perverse, no interference was permissible with the said finding of fact under section 34 of the Arbitration Act and thus rightly not interfered with by the learned

single Judge. In this appeal under section 37 of the Arbitration Act, this Court cannot re-enquire into the merits of the entire case. Neither there is patent illegality nor any error apparent on the face of record in the impugned award or in the impugned judgment rendered by the learned single Judge.

39. Mr. Sen, learned senior counsel for the claimant submits that the respondent has not disputed that the cheque of Rs.50 lakhs issued by the respondent was towards part payment in respect of the claim made by the claimant arising out of the goods sold and delivered and thus the said cheque having been dishonored would extend the period of limitation in respect of all pending invoices. He submits that this issue was specifically urged by the claimant before the learned Arbitrator and also before the learned single Judge.

REASONS AND CONCLUSION

40. A short question that arises for consideration of this Court is whether the claimant having exercised the option under section 60 of the Indian Contract Act by adjusting the payment of Rs.50 lakhs towards four earlier invoices, three invoices fully adjusted and one invoice partly adjusted and not having made the claim in respect of those three fully paid invoices is

estopped from raising the plea that the cheque of Rs.50 lakhs issued by the respondent towards part payment having been dishonored, would amount to acknowledgment of liability in respect of all the outstanding invoices on the date of commencement of the arbitral proceedings or not.

41. It would be beneficial to refer to the plea of the claimant raised in the statement of claim before the learned Arbitrator to appreciate as to how the claimant has adjusted the said amount of Rs.50 lakhs against the pending invoices of the claimant against the respondent to determine the issue of limitation. In paragraph 5 of the statement of claim, it is averred by the claimant that the claimant had raised various invoices from time to time in respect of the supply of steel materials to the respondent during the course of business. The said purchase orders and the said invoices amounted to the written contracts between the parties. As per the terms and conditions of the sale, the respondent had agreed to pay the consideration amount against the goods received by them within 45 days from the date of invoice and further agreed to pay to the claimant 21% monthly compounding interest thereon for the delayed payment.

42. A perusal of one of the purchase orders which is identical clearly

indicates that it was one of the terms of the invoice that the respondent was liable to make payment under the invoices within 45 days by post dated cheques from the date of receipt of materials. A perusal of the said sample invoices would indicate that the respondent was liable to pay interest in case of delayed payment beyond 45 days credit period. In para 6 the statement of claim, the claimant gave the details of the invoices which remained outstanding according to the claimant annexed as Exhibits C-1 to C-38. In paragraph 7 of the statement of claim, it was averred by the claimant that the respondent paid a sum of Rs.3,74,30,757/- in installments in the financial year 2012-2013 to the claimant which was appropriated by the claimant against the principle amount of few invoices of Rs.2,51,89,564/- and 21% agreed rate of interest amounting to Rs.1,38,41,158/-.

43. According to the claimant, a sum of Rs.4,48,22,112/- was outstanding amount towards principal amount as on 31st March, 2013 for the material sold and delivered by the claimant to the respondent. In paragraph 8 of the statement of claim, it was averred that in the financial year 2013-2014, the respondent had paid a sum of Rs.76 lakhs in installments to the claimant which was appropriated against the principle amount against the few invoices of Rs.51,68,477/- and 21% agreed rate of interest amounting to

Rs.22,70,306/- thereon. It was further averred that as such the principal amount of Rs.3,97,64,459/- together with 21% agreed rate of interest amounting to Rs.3,03,52,783/- i.e. total amounting to Rs.7,01,17,241.72 was outstanding from 28th April, 2011 to 31st December, 2014 against those invoices.

44. In paragraph 9 of the statement of claim, it was averred that against the said liability, the respondent had issued cheque dated 30th June, 2013 of Rs.50 lakhs for part consideration for the material supplied by the claimant to the respondent with an assurance that the cheque would be honored on its presentation. The said cheque had been issued in favour of the claimant by the respondent against the legal debt and liability. The said cheque however was dishonored on presentation with the remark 'stop payment' vide bank memo of HDFC Bank Ltd. The claimant admittedly proceeded under Section 138 of the Negotiable Instruments Act against the respondent before the learned Metropolitan Magistrate, 6th Court, Mazgaon (Sewree), Mumbai. The said proceedings however were withdrawn as per the order dated 27th July, 2015 passed by this Court in Criminal Writ Petition No.2462 of 2015 filed by the respondent.

45. It is further averred in paragraph 20 of the statement of claim that an amount of Rs.50 lakhs paid by the respondent in lieu of the earlier dishonored cheque was adjusted against the following invoices and 21% monthly compoundable interest thereon:

Sr. No.	Invoices	Date	Adjusted bill Amount of Rs.
1	078	27/04/2011	5,48,837.00
2	082	27/04/2011	5,32,152.00
3	083	28/04/2011	10,51,006.00
4	084	28/04/2011	3,68,005.00

46. In paragraph 26 of the statement of claim, it was averred by the claimant that the cause of action arose to file the statement of claim when the respondent made last payment of Rs.16 lakhs to the claimant on 28th July 2015. However the respondent failed in clearing the entire liability and as such the cause of action for filing the statement of claim was still continuing and that the statement of claim was filed within the period of limitation.

47. In the statement of defense and the counter claim filed by the respondent, the respondent raised the plea of limitation in respect of the claims filed by the claimant. In paragraph 20 of the written statement, it was

averred by the respondent that in the said Criminal Complaint bearing No.1154/SS/2013, full and final settlement amount of Rs.50 lakhs was paid by the respondent which the respondent was entitled to recover towards defective materials. It is apparent that the claimant did not make any mention of any other dues payable by the respondent. In the written statement to the counter claim, it was averred by the claimant that the counter claim filed by the respondent was barred by law of limitation. The claimant denied that the respondent had made payment of Rs.50 lakhs to the claimant in lieu of dishonored cheque. The claimant examined few witnesses.

48. Learned Arbitrator referred to some part of the oral evidence led by the claimant in paragraph 25 of the arbitral award and held that the witness examined by the claimant admitted that as the payments were received from the respondent, they were adjusted against the earliest outstanding invoices. The working had been done on FIFO basis (First In First Out). Whenever payment was received, on that particular date the claimant would calculate what was the total outstanding amount including interest. The amount so received was then subtracted from such outstanding amount. Paragraph 6 the statement of claim proceeded on the basis that the amounts were

adjusted against the earlier invoices.

49. One of the witness of the respondent was asked a question by the claimant's advocate "would it be correct to say that the invoices at serial nos.2 to 38 are outstanding?" All these make it clear that the claimant did not appropriate / adjust any payment received from the respondent towards those 37 invoices, which are at serial nos.2 to 38 of the table at paragraph 6 of the statement of claim. Learned Arbitrator accordingly recorded a finding that it stands to reason that the payments made by the respondent from time to time did not extend the period of limitation for those 37 invoices under section 19 of the Limitation Act. Thus, except for item no.1 of the table in paragraph 6 of the statement of claim, the claims contained in items nos.2 to 38 of the said paragraphs are time barred.

50. A perusal of the statement of claim indicates that the only averment regarding period of limitation is found in paragraph 26 of the statement of claim alleging that the cause of action arose to file the statement of claim. The respondent made last payment of Rs.16 lakhs. Even according to the claimant, the claimant was entitled to interest at the rate of 21% monthly compoundable interest on principle amount from 20th January, 2011 to 20th

December, 2016. It is thus clear that even according to the claimant the cause of action arose for payment of interest as well as principle amount after expiry of 45 days from the date of each invoice. The last invoice is dated 2nd June, 2011, the alleged part payment of Rs.16 lakhs on 28th July, 2015 thus would not extend the period of limitation. It is clear that the entire claim had already become barred by law of limitation prior to 28th July, 2015 and was not a legally enforceable debt as on 28th July, 2015.

51. Learned single Judge in the impugned judgment dated 5th September, 2019 considered the issue of limitation in detail and has rightly held that the supplies were payable respectively at the expiry of 45 days of each individual notice. The arbitration agreement was arrived at between the parties on 22nd November, 2016 and accordingly the *terminus ad quem* in respect of the claim in the arbitration was 22nd November, 2016. It is with reference to that date the bar of limitation has to be construed. Learned single Judge also held that there was no dispute that the last acknowledgment before 25th May, 2015 came on 5th January, 2012. It was thus not made before expiration of the prescribed limitation period for the suit or application, as the case may be.

52. Learned single Judge rightly held that if according to the claimant itself, adjustment was made towards a particular outstanding invoice, that payment cannot enure to the benefit of claimant so as to extend the period of limitation for other outstanding invoices. This clearly appears to be a possible view or a view which a fair or judiciously minded person would take. No challenge to the award can be entertained on this basis within the parameters of the grounds of challenge available under section 34 of the Arbitration Act. In our view, the arbitral proceedings in this case commenced when both the parties agreed to refer their disputes to arbitration on 22nd November, 2016 in the company petition. The cause of action has to be within the period of three years prior to the date of commencement of the arbitral proceedings. A perusal of the record clearly indicates that the cause of action in this case was much prior to three years prior to the date of commencement of the arbitral proceedings i.e. 22nd November, 2016.

53. Under section 18 of the Limitation Act, 1963, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed only where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of

liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability. It is thus clear that the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit. In our view, since the limitation for filing a suit or arbitration proceedings for recovery of the outstanding invoices had already expired much prior to the period of three years prior to the date of commencement of the arbitral proceedings, limitation would not revive under section 18 of the Limitation Act even if there is any part payment or acknowledgment of liability after expiry of the period of limitation. Fresh limitation would arise only during subsistence of the claim i.e. within the period of limitation, if any part payment is made or liability is acknowledged and not after the claim already having become time barred.

54. Admittedly in this case, the claim was for recovery of the price of the goods sold and delivered to be paid after expiry of the period of credit. Article 15 of Part-II of the Limitation Act is applicable which provides for the period of three years when the period of credit expires. Admittedly, in this case the respondent was granted 45 days credit period for making payment of each invoice. The claimant though urged before this Court

vehemently that the respondent having issued a cheque of Rs.50 lakhs, which was dishonored, the entire outstanding claim under various invoices stood revived on the ground that there was fresh period of limitation under section 18 of the Limitation Act, the claimant having exercised the option under section 60 of the Indian Contract Act, no such inconsistent plea can be permitted.

55. Under section 60 of the Indian Contract Act, where the debtor has omitted to intimate and there are no settled circumstances undertaking the debt to be applied, the creditor may apply at his discretion to any lawful debt actually due and payable to him from the creditor, whether is regular or is not barred by law in force for the time being as to the limits of the suit. In this case, admittedly the respondent did not intimate the claimant that the said sum of Rs.50 lakhs was made towards any particular invoice or was by way of part payment towards all the outstanding invoices on the date of such part payment.

56. At this stage, it would be apposite to refer to section 61 of the Indian Contract Act which provides that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in

order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably. In our view, since the claimant in this case has invoked section 60 of the Indian Contract Act, 1872, section 61 of the Indian Contract Act cannot be invoked.

57. We shall now deal with the judgments referred to and relied upon by both the parties in the later part of this judgment. In our view, the judgment of the Hon'ble Supreme Court in case of ***Jiwanlal Achariya (supra)*** would not assist the case of the claimant. In that case, the Supreme Court held that where the payment by cheque is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. In our view, the facts before the Hon'ble Supreme Court's in that case were totally different and are distinguishable in the facts of this case.

58. In so far as the judgment of the Calcutta High Court in case of ***Prafulla Chandra Nag (supra)*** is concerned, this case will also not assist the case of the claimant on the ground that the claimant had appropriated the said amount of Rs.50 lakhs towards four invoices by exercising option

under Section 60 of the Indian Contract Act. The judgment of Andhra Pradesh High Court in case of ***Thava Subrahmanyam (supra)***, judgment of Madhya Pradesh High Court in case of ***Gorilal Baldeodas (supra)***, judgment of Patna High Court in case of ***Rajpati Prasad (supra)*** and judgment of Delhi High Court in case of ***Bhushan Steel and Strips Ltd. (supra)*** are also distinguishable in the facts of this case for the same reason.

59. In so far as the judgment of full Bench of Gujarat High Court in case of ***Hindustan Apparel Industries Vs. Fair Deal Corporation, New Delhi*** (supra) is concerned, it is held that the payment by cheque which is dishonored would amount to acknowledgment of a debt and a liability. By necessary consequence there will be saving of limitation as envisaged by Section 18 of the Limitation Act. In our view, this judgment also would not assist the case of the claimant on the ground that the claimant had appropriated the said amount of Rs.50 lakhs by exercising option under Section 60 of the Indian Contract Act against four particular invoices and not against all pending invoices.

60. In so far as the judgment of the Hon'ble Supreme Court in case of ***Food Corporation of India (supra)*** relied upon by the learned senior

counsel for the claimant is concerned, the said judgment would not apply on the ground that the facts before the Hon'ble Supreme Court were totally different. Limitation was extended in that matter in view of letters exchanged between the parties acknowledging the liability.

61. In so far as the judgment of Kerala High Court in case of **P. D. Pillai (supra)** relied upon by the learned senior counsel for the claimant is concerned, there is no dispute about the propositions of law laid down by the Kerala High Court in the said judgment. The said judgment however, would not assist the case of the claimant. It is held by the Kerala High Court that when an acknowledgment relates to the part of the claim which is not specified, it would be available as an acknowledgment to save limitation under Section 18 of the Limitation Act. In this case, however though the respondent had not specified that the said payment of Rs.50 lakhs was as part payment against all outstanding invoices, the claimant chose to exercise option under Section 60 of the Indian Contract Act and thus the said judgment would not assist the case of the claimant on this ground itself.

62. In so far as the judgment of this Court in case of **Maharashtra State Farming Corporation Ltd. (supra)** is concerned, this Court in the said

judgment has held that the petitioner had pursued the winding up petition diligently, the time taken in prosecuting the proceedings needs to be excluded while directing to pursue civil remedy available in law. In this case, the parties had agreed to refer their disputes to arbitration in the said company petition. The claim of the claimant in this case was already barred by law of limitation and thus the said judgment would not assist the case of the claimant.

63. This Court in case of ***Atmaram V. Kirtikar (supra)*** has held that the starting point of time is the date of the delivery of the goods, and although the cause of action is for the price of all the goods delivered, the Court is bound to check various items which constitute that cause of action and to apply section 52 to deliveries which took place more than three years before the filing of the suit. In our view, the said judgment relied upon by the learned counsel for the respondent would assist the case of the respondent. In our view, there would be separate cause of action in respect of each invoice commencing after expiry of 45 days from the date of invoice.

64. The Hon'ble Supreme Court in case of ***MMTC Limited v/s. Vedanta Limited (supra)*** has held that 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. 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. In our view, the principles of law laid down by the Hon'ble Supreme Court in case of *MMTC Limited v/s. Vedanta Limited (supra)* would apply to the facts of this case. The power under Section 37 are narrower than the powers under Section 34 of the Arbitration Act which are already narrow. Learned Arbitrator has rendered various findings of facts on the issue of limitation after considering the pleadings, documents and oral evidence. Neither there was any perversity in the impugned award nor any patent illegality therein. Learned Single Judge rightly did not interfere with the impugned award. No case is made out for interference with the impugned award and the judgment rendered by the learned Single Judge in this appeal filed under Section 37 of the Arbitration Act. In our view, the appeal is totally devoid of merit and is accordingly dismissed. No order as to costs.

[R. N. LADDHA, J.]

[R. D. DHANUKA, J.]