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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 25.05.2023

+ O.M.P. (COMM) 487/2019

DCM LTD.

..... Petitioner

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Mukesh Gupta, Mr. Aman Gupta and Ms. Pratishtha Malhotra, Advocates (Mobile No. 8826729170).

versus

M/S. AGGARWAL DEVELOPERS PVT. LTD.

& ORS.

..... Respondents

Through: Mr. Sanjay Manchanda, Mr. Manjit Moorjani, Advocates for R-1, 2 (Mobile No. 9810137294).
Mr. P.S. Bindra, Senior Advocate with Mr. Bhuvneshwar Tyagi, Advocate for R-3.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner challenges an award dated 12.07.2019, passed by a learned sole arbitrator, adjudicating

disputes between the parties under agreements dated 27.11.1993 and 13.12.1994 [“the Agreements”].

2. The Agreements were for acquiring, transfer and sale of land in Mangar, Delhi-Haryana Border and in Village Chakkarpur, District Gurgaon, Haryana. The detailed terms of the Agreements need not detain us as the question raised by Mr. Rakesh Tikku, learned Senior Counsel for the petitioner, is confined to one point – whether the learned arbitrator has correctly found that the petitioner had waived a claim for interest upon an amount of Rs. 8.05 crores due from respondent No.1.

3. The learned arbitrator formulated the following three issues for his consideration:-

“Points to be determined

19. The learned counsel on both sides stated and submitted that the question of interest was the only issue which requires determination by this Tribunal. In this context and the basis of the arguments advanced by the learned Counsel for the parties, it is essentially to be determined as to:-

(i) Whether ADPL was under a liability to refund the amounts advanced to it by DCM along with interest thereon?

(ii) If so, has the interest been waived on account of the letter dated 09.11.2005 and the two letters dated 20.03.2006?

(iii) If not waived, at what rate and till what date(s) the interest is to be paid by ADPL to DCM?”

4. On issue No (i), the learned arbitrator found in favour of the petitioner that respondent No.1 was liable to refund an amount of Rs. 8.05 cores alongwith interest thereupon @ 18% per annum. However, the petitioner was found disentitled to an award in these terms, on the

basis of a finding against it on issue No (ii). The learned arbitrator found that interest had been waived by the petitioner by virtue of a letter dated 09.11.2005, addressed to a director of respondent No.1 (arrayed as respondent No.2 to this petition) by Dr. Vinay Bharat Ram, who was then the Chairman and Managing Director of the petitioner-company.

5. Mr. Tiku submits that the aforesaid conclusion of the learned arbitrator is patently illegal and based on a complete misreading of the evidence of Dr. Vinay Bharat Ram, who was examined as CW-3. He submits that the petitioner, in its pleadings before the learned arbitrator, and Dr. Vinay Bharat Ram, in his affidavit by way of examination-in-chief, had unequivocally denied the aforesaid letter. According to Mr. Tiku, the burden of proof on the question of waiver ought to have been placed upon the respondents, who failed to establish it to any plausible degree of satisfaction. Mr. Tiku submits that the cross-examination of Dr. Vinay Bharat Ram does not bear out an unequivocal admission so as to constitute waiver on the part of the petitioner.

6. Mr. Sanjay Manchanda, learned counsel for respondent Nos. 1 and 2 and Mr. P.S. Bindra, learned Senior Counsel for respondent No. 3, submit that the aforesaid contentions are beyond the scope of consideration under Section 34 of the Act, as they call for re-appreciation of evidence. They point out that the petitioner did not take a categorical position in pleadings that the letter dated 09.11.2005 relied upon by the respondents was forged or fabricated, and neither was such a position taken in the examination-in-chief of Dr. Vinay

Bharat Ram. To the contrary, they submit that the cross-examination of Dr. Vinay Bharat Ram bears out the conclusion recorded by the learned arbitrator.

7. Having heard learned counsel for parties, I am of the view that the impugned award does not call for interference in the limited scope afforded by Section 34 of the Act. The case of the respondents with regard to waiver turns upon a letter dated 09.11.2005, addressed by the Chairman and Managing Director of the petitioner to a Director of respondent No.1. The communication has been reproduced in paragraph 27 of the award as follows:-

“Dt. 9th Nov. '05

Dear Ramesh Ji,

As agreed, I am authorizing Sh. Ashwani Singhal, the bearer of this letter, to meet you personally and collect from you the amount of Rupees Six Crores Five Lacs towards full and final settlement of our account in respect of Manger and Chattarpur agreements between DCM ltd. and your company.

Kindly square off this transaction before this financial yearend.

With warm regards

Yours truly,

Sd/-

Vinay Bharat Ram”

8. The aforesaid communication was referred to in the reply filed by the respondents in the arbitral proceedings, to support their contention of waiver of interest. It appears from the documents on record that it was thereafter produced in the arbitral proceedings on 12.05.2008, when the purported signatory – Dr. Vinay Bharat Ram was present. In the rejoinder filed by the petitioner on 06.11.2008, the

letter dated 09.11.2005 and the proceedings before the tribunal on 12.05.2008 have been described in the following terms:-

“It is denied that the parties mutually agreed that the principal amount which was advanced to the respondent No.1 should be returned. It is further denied that the Respondents shall also pay an amount of Rs. Sixty lacs towards agreement in respect of Mangar Land. It is denied that as per the understanding reached between Sh. Vinay Bharatram and the respondent No. 2, a letter dated 09.11.2005 was written by Mr. Vinay Bharatram, wherein he requested for the refund of Rs. 6.05 crores towards full and final settlement of accounts between the Claimant company and the respondent No. 1. No such understanding was ever reached between Mr. Vinay Bharatram and Mr. Ramesh Chandra Aggarwal. Mr. Vinay Bharatram never wrote any letter dated 09.11.2005 for and on behalf of the Claimant and/or on his personal behalf to the Respondents agreeing for a refund of Rs. 6.05 crores in full and final settlement of accounts between the parties. The letter dated 09.11.2005 is not admitted. The Claimant had filed an application for production of the original letter dated 09.11.2005 and some other original letters. Copies of which had been filed by the Respondent before the Hon’ble Arbitration Tribunal. The fact with regard to the production of the originals of the said letters was discussed by the parties before this Ld. Tribunal during its hearing on 02.05.2008. With consent of the parties, a hearing date was fixed on 12.05.2008 for inspection of the original letters by Mr. Vinay Bharat Ram and some Directors/officers of the Claimant. During the hearing on 12.05.2008 the Respondent’s counsel had produced two letters one of which was dated 09.11.2005 and other letter was dated 20.03.2006.

Similarly, as regards the letter of 09.11.2005, Dr. Vinay Bharat Ram had inspected the original of the same and stated that he was not in a position to either state whether he had signed or not signed the letter. This was particularly because he said that he did not sign such important letters unless they were typed on his letter heads and further that the format of the letter was not the one that he adopted for writing such letters. For example, he

*stated that he would not mention the date as 'Dt'. He also stated that he did not recall signing such a letter. The original letter dated 09.11.2005 was marked Exbt. 'B' and was initiated by the Arbitration Tribunal."*¹

9. Dr. Vinay Bharat Ram thereafter filed his evidence by way of an affidavit dated 19.02.2010. In the examination-in-chief, Dr. Vinay Bharat Ram denied having written the letter dated 09.11.2005 to the respondents, requesting the refund of Rs.6.05 crores towards full and final settlement of accounts between the petitioner and respondent No.1, on behalf of the petitioner or on his own behalf. As far as the proceedings on 12.05.2008 are concerned, Dr. Vinay Bharat Ram stated as follows:-

*"7. The deponent submits that at no point of time during the said meetings the parties mutually agreed that the principal amount which was advanced to the respondent No. 1 should be returned. The Claimant had never agreed to pay an amount of Rs. Sixty lacs towards agreement in respect of Mangar Land. **I state that I never reached any understanding with respondent No. 2, Sh. Ramesh Chandra Agarwal in this regard. I state that I never wrote letter dated 09.11.2005 to the respondents, wherein I had requested for the refund of Rs. 6.05 crores towards full and final settlement of accounts between the Claimant company and the respondent No. 1 as is been alleged by the respondents. No such understanding was ever reached between me and Mr. Ramesh Chandra Aggarwal. I never wrote any letter dated 09.11.2005 for and on behalf of the Claimant and/or on my personal behalf to the Respondents agreeing for a refund of Rs. 6.05 cores in full and final settlement of accounts between the parties. The letter dated 09.11.2005 is not admitted. That I never wrote any letter dated 09.11.2005 for and on behalf of the Claimant and/or on my personal behalf to the respondents agreeing for the refund of Rs. 6.05 crores in full and final settlement of accounts between the parties.***

¹ Emphasis supplied.

8. *I state that during the hearing 12.05.2008, the respondents counsel had produced the original of an alleged letter dated 09.11.2005 purported to have been written and signed by me. The said alleged letter is addressed to Respondent No. 2 as "Rameshji". For the first time I had seen the original of the said letter. After inspecting the original of the same I had stated that I was not in a position to state whether I had signed or not signed the letter. I had stated so because I do not sign such important letters unless they were typed on company's letter heads or on my personal letter heads. Further the format of the alleged letter dated 09.11.2005 was not the one that I adopt for writing such letters. For example, I do not mention that date as 'Dt'. I stated that I do not recall signing such a letter. Even at the time of the signing and filing the present affidavit, I do not recollect signing any alleged letter dated 09.11.2005."²*

10. Dr. Vinay Bharat Ram was produced for cross-examination on 06.05.2011. He tendered the aforesaid affidavit in examination-in-chief. The relevant contents of his cross-examination are reproduced below:-

"Qn. No. 1 I draw your attention to paragraph 7 of your affidavit dated 19.2.2010 wherein you have stated that letter dated 9.11.2005 is not admitted. Your attention is also invited to the minutes of the proceedings of 12th May, 2008 where it is recorded that "As regards the letter dated 9th November, 2005, Dr. Vinay Bharat Ram has inspected the original of the same and says that he is not in a position to state whether he has signed or not signed the letter." It is further recorded in the minutes that Dr. Vinay Bharat Ram states that he does not recall signing such a letter. My question to you is whether the original letter dated 9.11.2005, which has been seen by you in the proceedings today, bears your signatures or not?"

Ans. By looking at this document which is the letter of 9.11.2005, of which I have the original in my hand now, I say that the signatures on this document resembles my signatures.

² Emphasis supplied.

(Volunteered: They would have been my signatures if the contents of the letter had been credible)

Qn. No. 2 Please clarify what you mean by the word 'credible'

Ans. **The contents of the letter and the language used therein do not typify the language I use for such kind of a letter.** As for example, I would not write "Dt" For the word "Date". Also, I do not sign blank sheets of paper nor do I sign a letter which is not on my letter head or the letter heads of one of the Companies in which I hold shares. **(Volunteered: The document is of 2005 and is too recent for my memory to be hazy about it.)**³

11. The learned arbitrator has dealt with the effect of this letter in paragraphs 28 to 30 of the impugned award in the following terms:-

"28. On reading the said document, it is apparently addressed to Mr Ramesh Chandra Agarwal of ADPL and has apparently been issued by Dr Vinay Bharat Ram. The latter, in his affidavits by way of evidence or in the course of cross-examination has not specifically denied his signature. He has only raised doubts about his signature on the said document on account of the alleged 'credibility' of the said document. It must be remembered that he has also categorically stated that he does not sign blank sheets of paper. He has also not stated, and it is also not the case of DCM that his signatures had been obtained on a blank sheet of paper by ADPL and the same was misused by ADPL. On the other hand, he has stated that the signature on the letter dated 09.11.2005 is similar to his signature. It is clear from these circumstances that DCM has been unable to establish, and the onus was on them, that the letter dated 09.11.2005 which has been produced by ADPL is a false, fabricated or forged document. In all likelihood and probability, the said letter dated 09.11.2005 was signed by Dr Vinay Bharat Ram. The content of the letter may have been drafted by someone else but it was voluntarily signed by Dr Vinay Bharat Ram.

29. This being the position and since his signatures have admittedly not been obtained in blank papers, the contents of the

³ Emphasis supplied.

letter dated 09.11.2005, albeit not typically in his style of writing, have to be attributed to Dr Vinay Bharat Ram. They clearly indicate that the amount of Rs 6.05 crores had been settled between him and Mr Ramesh Chandra Agarwal of ADPL towards full and final settlement of their account in respect of the said Agreements between DCM and ADPL.

30. From the schedule of payments made by ADPL to DCM as indicated in paragraph 13 above, it is evident that a sum of Rs 2 crores had been refunded by 02.07.1996 out of the total advanced amount of Rs 8.05 crores. This left a balance of Rs 6.05 crores. This is the very sum which is mentioned in the letter dated 09.11.2005. It is further evident from the table of payments set out in paragraph 13 hereinabove that after 09.11.2005, ADPL cleared the balance amount of Rs 6.05 crores through 13 payments beginning from 15.02.2006 and ending on 20.03.2006. On the latter date, the final payment of Rs 15 lacs was made.”

12. The learned arbitrator has, thereafter, rejected the contention of the petitioner that the signatory was not authorised to waive the aforesaid claim on behalf of the petitioner. It is noted that he was earlier the Chairman and Managing Director of the petitioner-company and was its Chief Executive Officer. The learned arbitrator has also dealt with the contentions of the parties with regard to the accounts maintained by the petitioner, in which the aforesaid sum is shown to be recoverable “with interest” before 1999, but not after. The conclusion on this aspect is contained in paragraphs 40 and 41 of the award in the following terms:-

“40. Considering the rival contentions on this aspect, it is clear that initially DCM did consider that the amount of Rs 8.05 was recoverable from ADPL 'with interest'. In 1996, the recoverable amount came down to Rs. 6.05 crore on account of refund of a sum of Rs 2 crore. Even the balance figure of Rs 6.05 was shown to be recoverable 'with interest' in 1997 and 1998. Thereafter, from 1999 onwards, only the principal amount of Rs 6.05 crore was shown as

recoverable and not the interest amount. The explanation offered by DCM for dropping the provisioning for interest, because it did not expect ADPL to pay interest, in fact, supports the plea of ADPL that interest had been waived by DCM and that this arrangement had been ultimately formalised in the letter of 09.11.2005 of Dr Vinay Bharat Ram. The fact that DCM did not expect that ADPL would pay interest but would, in all likelihood, refund the balance sum of Rs 6.05, indicates that, in the circumstances, DCM would be content to receive the sum of Rs 6.05 crore to close the account with ADPL even if it did not receive any interest.

41. In this backdrop, it is evident that the letter of 09.11.2005 represents the thinking, understanding and commercial expediency of the management of DCM. For this reason also, it is difficult to agree with the submission of the learned counsel for DCM that the said letter of Dr Vinay Bharat Ram, who was the Chairman and Managing Director of DCM, was without the authority of DCM.”

13. Having regard to the cross-examination of Dr. Vinay Bharat Ram reproduced above, I do not find the conclusion of the learned arbitrator to be implausible, as suggested by Mr. Tiku. The learned arbitrator noted that Dr. Vinay Bharat Ram has not denied his signature but, in fact, stated that the signature on the document resembles his signature. The elaboration in answer to question No.2 is that the language used in the letter dated 09.11.2005 is not the language normally used by him. However, looking to the cross-examination as a whole, the conclusions in the impugned award cannot be said to be so perverse or fanciful as to invite the interference of this Court under Section 34 of the Act. The appreciation of evidence is a matter within the domain of the learned arbitrator, who is the sole judge of the quality and quantity of evidence. Interference of the Court under Section 34 of the Act is permitted only if the conclusions are so implausible that no reasonable person could have

reached them. Reference may be made in this connection to the judgments of the Supreme Court *inter alia* in *Associate Builders vs. DDA*⁴, *Ssangyong Engg. & Construction Co. Ltd. vs. NHAI*⁵ and *PSA SICAL Terminals (P) Ltd. vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*⁶. The petitioner has been unable to make out a case that meets this high standard.

14. Mr. Tiku submitted that the learned arbitrator ought to have read the cross-examination in the light of the pleadings of the parties and the examination-in-chief of Dr. Vinay Bharat Ram. To my mind, the purpose of cross-examination is to challenge the veracity of the case made out by the opposite party, so as to elicit the true state of affairs. To rely upon the pleadings or examination-in-chief, even in the light of cross-examination which brings out a contrary picture, would render the process of oral evidence futile. In any event, as stated above, the task of appreciation of evidence, is well within the province of the learned arbitrator. I am, therefore, unable to accept this submission.

15. Mr. Tiku lastly submitted that the respondents having asserted waiver, it was incumbent upon them to discharge the burden of proof in this regard. This submission also does not commend to me in the facts and circumstances of this case, where the fact of waiver is found to have been proved on the basis of a communication addressed by the petitioner to the respondents. The learned arbitrator finds on evidence that the document is credible, not doubtful or fraudulent. In fact, this

⁴ (2015) 3 SCC 49, paragraphs 31 to 33 and 52.

⁵ (2019) 15 SCC 131, paragraphs 38 to 40.

⁶ 2021 SCC OnLine SC 508, paragraphs 41 to 45.

conclusion has been reached on the basis of the evidence of the petitioner's own witness.

16. In view of the aforesaid conclusions, I do not find occasion to interfere with the impugned award.

17. The petition is, therefore, dismissed.

PRATEEK JALAN, J

May 25, 2023

'vp/udit'/

