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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 15.03.2024

+ **O.M.P. (COMM) 68/2023, I.A. 2892/2023, I.A. 15752/2023**

AKSH OPTIFIBRE LIMITED

..... Petitioner

Through: Mr. Vikas Goel, Mr. Ritesh Sharma
and Mr. Harmanbir Singh Sandhu,
Advs.

versus

NANTONG SIBER COMMUNICATION CO LTD..... Respondent

Through: Mr. Jitender Chaudhary, Ms. Shilpa
Chauhan and Mr. Rajbala, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition seeking setting aside of the Impugned Award dated 08.11.2022 passed by the learned Arbitral Tribunal titled as "*Nantong Siber Communication Co. Ltd. vs. Aksh Optifibre Limited*".
2. In the present case, the respondent is a Chinese manufacturer of optical fibre cable and had approached the arbitral tribunal seeking payment of \$194,336.91 along with interest at the rate of 24% per annum.
3. The respondent/claimant had relied upon seven invoices issued pursuant to the seven purchase orders and since the amounts were unpaid, the respondent invoked arbitration and filed the proceedings.
4. The sole arbitrator was appointed by the Hon'ble Supreme Court by the order dated 15.11.2021 in Arbitration Petition (C) No. 27/2021.



5. On 07.05.2022 the learned sole arbitrator framed six issues, which read as under:-

“I. Whether the arbitration proceedings are misconceived because there is no live dispute between the parties? [LIVE DISPUTE]

II. Whether the Claim, and hence, these proceedings are vitiated due to a lack of proper and legal authorization? [AUTHORIZATION]

III. Whether a composite arbitration proceeding, arising out of several independent transactions, each with a separate and independent arbitration clause, is unsustainable in law? [COMPOSITE PROCEEDING]

IV. Whether the Claimant is entitled to an award of \$194,336.91 in light of the admission of liability by the Respondent? [ENTITLEMENT]

V. Whether the Claimant is entitled to any interest on the amount, if any, awarded against Issue No.4? If yes, at what rate and for what period? [INTEREST] 53

VI. Whether the Respondent is obliged to make the payment only in the event of receiving the same from BSNL? [CONDITIONALITY]”.

6. Mr. Goel, learned counsel for the petitioner has restricted his arguments to findings on issue No. 1 and issue No. 5.

7. As regards issue No. 1, he states that there was no live dispute between the parties since the petitioner has admitted the amount due and payable to the respondent and has admitted the invoice. Hence, the arbitrator could not have proceeded with the arbitration.

8. In support, he has relied upon the judgment of **“Maruti Udyog Limited vs. Mahalaxmi Motors Ltd. & Anr.”** 2002 (61) DRJ 398 and



“Pearl Hosiery Mills, Ludhiana vs. Union of India and Anr.” 1978 SCC OnLine Delhi 120.

9. As regard issue No. 5 is concerned, Mr. Goel, learned counsel for the petitioner challenges the finding that the interest awarded be at the rate of 8% per annum on \$194,336.91 and states the same is contrary to the judgment of the Hon’ble Supreme Court in ***“Vedanta Limited vs. Shenzhen Shandong Nuclear Power Construction Company Limited”*** (2019) 11 SCC 465.

10. Mr. Chaudhary, learned counsel for the respondent opposes the same and argues in support of upholding the arbitral award.

11. I have heard the learned counsel for the parties.

12. In the present case, the learned arbitrator while deciding issue No. 1 has held that the petitioner delayed in making the payment to the respondent, which was not accepted by the respondent. Hence, this itself constituted a difference and dispute.

13. The learned arbitrator also held that the Hon’ble Supreme Court on 15.11.2021 referred for adjudication of disputes that have arisen between the parties clearly implying that there were disputes for which an arbitrator was required.

14. In the present case, merely statements by the petitioner that the petitioner are admitting the claims but not making the payment will not take the issue in controversy beyond “disputes” as contemplated between the parties.

15. The respondent has supplied goods for which payment has not been received. The respondent asked for payment and as per the purchase order, every payment was to be made within a period of 90 days. The notice



demanding payment is dated 07.02.2020, wherein the respondent demanded the amount due and payable within seven days from the receipt of that notice.

16. A combined reading of the aforesaid clearly shows that the finding of the arbitral tribunal that the amount due and payable to the petitioner as having not been paid and the delay not having been accepted by the respondent constitutes a difference and a dispute, is well placed. The Arbitral Tribunal has held as under:-

“23. The liability to make payment to the Claimant has thus been admitted by the Respondent in all its pleadings, written submissions and while presenting arguments. However, there is clearly a delay, and the Respondent has provided reasons for this: the non-payment by BSNL and the advent of COVID affecting their business. These have not been accepted by the Claimant as valid grounds to renege on their obligations under the contract, and such denial undoubtedly constitutes a difference and a dispute, on which an Issue has even been framed in these proceedings.

24. In addition, I am forced to advert to the order of the Supreme Court dated 15.11.2021, which specifically states that the prayers have been made by the Claimant "for appointment of an arbitrator in terms of the provisions of the Act for adjudication of the disputes that have arisen between the parties". The Court further records that "the Respondent submits that his client has no objection for appointment of an Arbitrator" implying that there are disputes for which an arbitrator is required. The Court thereafter proceeds to appoint me "to adjudicate the dispute between the parties". If there was any cavil with the fact that there was a dispute at all, the stage for that objection to have been taken was before the Supreme Court itself, rather than allowing the Court to proceed on a misapprehension that in fact



disputes needed to be resolved by an arbitrator.”

17. The para 3 of the judgment **“Pearl Hosiery Mills, Ludhiana vs.(supra)** reads as under:-

“3. Coming to the legal question and the nature of the misconception which seems to lead to the filing of such applications for stay, I think, it is useful to mention that an arbitration clause, even though it may be worded in the widest possible language, only allows differences and disputes relating to or arising out of or in connection with a contract to be referred to an arbitrator. It may well be said that the non-payment of price of goods is also a dispute or difference which should lead the matter to be referred to arbitration. However, the word 'Difference' or word 'Dispute' is not to be understood in this way when applying the law of arbitration. A dispute means that one party has a claim and the other party says for some specific reasons that this is not a correct claim. This is a dispute. A dispute of this type requires that there should be a statement or proposition made by one side and there should be denial or refutation of that proposition by the other side. Then only can there be a dispute. Under a contract for the supply of goods, the payment of price and the delivery of goods are concurrent conditions. This is the definition of a sale under the Sale of Goods Act. If goods have been delivered and price not paid this is not a dispute within the meaning I have just ascribed to the word 'Dispute'. A mere failure to pay the price is not a dispute. It is a mere non-performance of a specific term or condition of a contract. A dispute regarding the price could arise if, e.g., the purchaser says that goods are not of the proper quality and he refuses to pay the price, or he might say that goods have been delivered late, so, he would pay less price or he would hold up part of the price, or he might say "You have delivered the goods late, I have suffered loss, I would reduce the price by the amount of loss." If the purchaser makes any of these claims or similar



claims then there is a dispute. If no such position is taken, then there is no dispute.”

18. The para 3 to 6 of the judgment “**Maruti Udyog Limited (supra)**” reads as under:-

“3. It is settled law that the arbitration clause can be invoked only when there are differences and disputes with regard to certain payments on breach of obligations of the respective parties to the terms of the agreement. However wherever there is an admitted liability, the arbitration clause cannot be Invoked. The very connotation 'admitted liability' suggests that there are no disputes or differences with regard to the said admitted liability

4 The extracts of the letter dated 5th April, 1997, the minutes of the meeting and the filed by Mr. M.C. Mehta in his capacity as Managing Director of the defendant No. 1 company leave no manner of doubt that not only the defendant No. 1 had accepted the liability of 7.63 crores towards the plaintiff but also undertook to discharge the liability by making the payment through instalments.

5. What is material for the purpose of Section 8 of the Arbitration Act is that there should be existence of difference or disputes with regard to a particular liability arising out of the terms of the agreement. If the liability is acknowledged and admitted it does not come within the meaning and ambit of disputes and differences.

6. In view of the foregoing reasons the application under Section 8(1) of the Arbitration and Conciliation Act, 1996 cannot be allowed as arbitration clause is not invocable in respect of admitted liability.”

19. The above-reproduced judgments are distinguishable, as in both the cases applications were moved in pending suits, i.e an application under section 34 of the Indian Arbitration Act, 1940 for staying the suit was



moved in *Pearl Hosiery Mills (supra)* and an application under section 8 of the Arbitration and Conciliation Act, 1996 was moved in *Maruti Udyog Ltd.(supra)*. The said applications were rejected.

20. The suits in both the afore-mentioned cases were pending, thereby implying that the petitioner could take his claims to a logical conclusion in the ongoing proceedings of getting a money decree. In the present case, what the petitioner is urging is that since the petitioner has admitted all the claims of the respondent, respondent should rest with the admissions made by the petitioner and not proceed towards obtaining a decree. That cannot be. If that were the case, then there would be no question of appointment of any arbitrator in the first place. In addition, the learned counsel for the petitioner had also given its no-objection to the appointment of the arbitrator before the Hon'ble Supreme Court.

21. Most importantly, in my view the fact that the amounts were not being paid by the petitioner in the present case, despite demand, constitutes "*difference and dispute*" and hence is referable to arbitration.

22. As regard issue No. 5 is concerned, the respondent demanded interest at the rate of 24% per annum. The learned sole arbitrator after adjudication and relying upon various case laws granting interest at the rate of 8% on the amount of claim of \$194,336.91. Since there is delay in payment, I am of view that the learned arbitrator has correctly awarded interest at the rate of 8% per annum.

23. Mr. Goel, learned counsel for the petitioner relies on para 20 of the judgment "*Vedanta Limited vs. Shenzhen Shandong Nuclear Power Construction Company Limited*" (2019) 11 SCC 465 which reads as under:-



“20. The award has granted a uniform rate of 9% SI on both the INR and the EUR component. However, when the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates differ depending upon the currency. It is necessary for the Arbitral Tribunal to coordinate the choice of currency with the interest rate. A uniform rate of interest for INR and EUR would therefore not be justified. The rate of 9% interest on the INR component awarded by the Arbitral Tribunal will remain undisturbed. However, with respect to the EUR component, the award-debtor will be liable to pay interest at the LIBOR rate + 3 percentage points, prevailing on the date of the award.”

24. The said judgment is distinguishable as in that case the award had granted uniform rate of 9% simple interest on both INR and EUR component.

25. In the present case the arbitrator has only awarded interest at the rate of 8% on the amount of claim i.e. \$ 194,336.91 and not on the currency component.

26. Further, under the scope and power of section 34 of Arbitration and Conciliation Act, 1996 it is not within my jurisdiction to modify the rate of interest. Reliance is placed on the judgment of this court in FAO(OS) (COMM) 315/2019 titled **Anil Kumar Gupta v MCD and Anr.** dated 30.11.2023, which reads as under:-

*“6. Apart from the judgment of the Supreme Court in M. Hakeem, Dr. George also drew our attention to a recent decision rendered by the Supreme Court in **Larsen Airconditioning and Refrigeration Company vs Union of India & Ors.** where yet again a reduction of the rate of interest from 18% to 9% was described to be an “impermissible modification of the award”. We deem it apposite to*



extract the following passages from that decision:

“13. In the present case, given that the arbitration commenced in 1997, i.e., after the Act of 1996 came into force on 22.08.1996, the arbitrator, and the award passed by them, would be subject to this statute. Under the enactment, i.e. Section 31(7), the statutory rate of interest itself is contemplated at 18% per annum. Of course, this is in the event the award does not contain any direction towards the rate of interest. Therefore, there is little to no reason, for the High Court to have interfered with the arbitrator's finding on interest accrued and payable. Unlike in the case of the old Act, the court is powerless to modify the award and can only set aside partially, or wholly, an award on a finding that the conditions spelt out under Section 34 of the 1996 Act have been established. The scope of interference by the court, is well defined and delineated [refer to Associate Builders v. Delhi Development Authority¹¹ , Ssangyong Engineering Construction Co. Ltd v. National Highways Authority of India (NHAI)¹² and Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.¹³].

14. The reliance on Kalsi Construction Company (supra) by the respondent-state, is inapt, given that this court had exercised its Article 142 jurisdiction in light of three pertinent factors - the award had been passed 20 years prior, related to construction of a Paediatrics Centre in a medical institute, and that the parties in that case had left the matter to the discretion of the court. Similarly, in Oriental Structural Engineers (supra) this court held that since the contract stipulated interest entitlement on delayed payments, but contained no mention of the rate of interest applicable - the Tribunal ought to have applied the principles laid down in G.C. Roy (supra), and therefore, in exercise of Article 142, this court reduced the rate of interest awarded by the tribunal on the sum left unpaid.



The judgment in Municipal Corporation of Greater Mumbai (supra) no doubt discusses the inherent powers of the High Court as a superior court of record, but relates specifically to the jurisdiction to recall its own orders, and offers little assistance in the present dispute.

15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that “illegality must go to the root of the matter and cannot be of a trivial nature”; and that the tribunal “must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground” [ref : Associate Builders (supra)]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision¹⁴ which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in Project Director, National Highways No. 45E and 220 National Highways Authority of India v. M. Hakeem:

“42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state



that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”

16. In view of the foregoing discussion, the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, pendente lite and future interest. The 18% per annum rate of interest, as awarded by the arbitrator on 21.01.1999 (in Claim No. 9) is reinstated. The respondent-state is hereby directed to accordingly pay the dues within 8 weeks from the date of this judgment.

17. The present appeal, and pending application(s) if any, stand disposed of in the above terms, with no order as to costs.¶

10. Having noticed the rival submissions we at the outset find that undisputedly the petition under Section 34 had come to be finally disposed of on 12 December 2018. The application which came to be moved by and on behalf of the respondent was styled as being one of modification. In our considered opinion, once the petition had been finally disposed of, the only recourse available or open to the respondent was to petition for review. It becomes pertinent to note that the order of 08 August 2019 cannot possibly be construed



as being representative of the learned Judge exercising the review power. As we read the said order, we come to the firm conclusion that the same constitutes a decision reached on a de novo rehearing as opposed to the discovery of a patent error or mistake apparent on the face of the record. We are of the firm opinion that once a matter comes to be finally disposed of it cannot be re-opened except in accordance with a procedure which stands sanctioned in law. We, thus, come to the firm conclusion that the judgment rendered on 12 December 2018 could not have been re-opened in the manner that the learned Single Judge chose to adopt. The order of 08 August 2019 is thus liable to be set aside on this ground alone.

11. Proceeding then to the power to modulate the terms of an Award, we had in our detailed order dated 15 September 2023 taken note of the principles which came to be enunciated by the Supreme Court in M. Hakeem. The said judgment while explaining the extent of the setting aside power as conferred upon a court in terms of Section 34, has categorically held that a modification of the award would clearly not fall within the specie of “setting aside”. The Supreme Court in M. Hakeem had also taken notice of the shift in the statutory position and the departure from the power of variation and modification as it earlier existed in the Arbitration Act, 1940. It was on a consideration of the aforesaid aspects coupled with the language in which Section 34 stands couched which weighed upon the Supreme Court to hold that while considering a petition under Section 34 of the Act, a court could only set aside the award as opposed to a variation or modulation of the operative directions that may be framed by the AT.

12. By way of the order of 12 December 2018, it is this injunct which clearly appears to have been breached by the learned Single Judge. The legal position which prevails today clearly renders the aforesaid order unsustainable on this score alone. We find that the decision of the Supreme Court in M. Hakeem has been reiterated in terms of the judgment in Larsen Airconditioning. Larsen



Airconditioning was again a case where the Section 34 court had chosen to reduce the rate of interest as awarded by the AT. The Supreme Court had found this as constituting a sufficient ground to set aside the said judgment.”

27. Mr. Goel, learned counsel for the petitioner states there is a contradictory finding in para 23 and 52. Para 23 and 52 of the award read as under:-

“23. The liability to make payment to the Claimant has thus been admitted by the Respondent in all its pleadings, written submissions and while presenting arguments. However, there is clearly a delay, and the Respondent has provided reasons for this: the non-payment by BSNL and the advent of COVID affecting their business. These have not been accepted by the Claimant as valid grounds to renege on their obligations under the contract, and such denial undoubtedly constitutes a difference and a dispute, on which an Issue has even been framed in these proceedings.”

.....

“52. I must bear in mind that, as the Claimant has argued, BSNL is not a party to these proceedings, there is no clause in the contract which makes advertence to any back-to-back payments with BSNL, and in fact, the first time that BSNL is referred to by the Respondent is in its email dated 11.03.2019 [Page 70 / Claim]. None of these can have any bearing on the present proceedings, as the question that arises here is only one of liability of the Respondent, and not the reasons for the non-payment. It may be well be true that the non-payment by BSNL has led to the present default, and for that, the remedy the Respondent must pursue is elsewhere. It cannot be used as a reason to reject the very valid claims made in the present proceedings.”

28. He states that in para 52 the learned arbitrator has contradicted himself on the fact that the question which arises for determination is of



liability and not the reasons for non payment.

29. I am unable to agree, the award has to be read as a whole and one or two lines cannot be read in isolation. The arbitral tribunal had held that the petitioner sought time to make payment, the same was not accepted by the respondent and that constitutes a difference/dispute, which is, in my view, the correct interpretation.

30. In this view, the present petition is dismissed as being devoid of merit.

JASMEET SINGH, J

MARCH 15, 2024/NG

Click here to check corrigendum, if any