



2024:DHC:1407



\$~ 21& 22

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

+ **O.M.P. (COMM) 89/2023, I.A. 3724/2023**

AXIS BANK LTD

..... Petitioner

Through: Mr. Ritin Rai, Sr. Adv. with
Mr. Arjun Garg, Mr. Aakash
Nandolia, Ms. Sagun Srivastava,
Mr. Dayal Singla Advs.

versus

UV ASSETS RECONSTRUCTION CO

..... Respondent

Through: Mr. Dhruv Dewan, Mr. Y.
Sharma, Advs.

+ **O.M.P. (COMM) 119/2023, I.A. 6031/2023**

UV ASSET RECONSTRUCTION COMPANY LTD Petitioner

Through: Mr. Dhruv Dewan, Mr. Y. Sharma,
Advs.

versus

AXIS BANK LTD

..... Respondent

Through: Mr. Ritin Rai, Sr. Adv. with
Mr. Arjun Garg, Mr. Aakash
Nandolia, Ms. Sagun Srivastava,
Mr. Dayal Singla Advs.

%

Date of Decision: 13th February, 2024.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (ORAL)

O.M.P. (COMM) 89/2023

Signature Not Verified

Digitally Signed
By: PALLAV VERMA
Signing Date: 23.02.2024
10:37:51

O.M.P. (COMM) 89/2023 & O.M.P. (COMM) 119/2023

Page 1 of 18



1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (herein referred to as “*the A&C Act*”) challenging the impugned arbitral award dated 19.02.2022 passed by the learned arbitrator in the Case Ref No. DAC/3547D/1 2-21.
2. The Petitioner is a bank that had assigned the account of Agro Dutch Industries Limited (ADIL) (‘Borrower’) to the Respondent by way of an agreement dated 26.09.2014. As per the said Assignment Agreement, the Petitioner *inter alia* assigned in favour of the Respondent, all its rights, title, interest in the financing documents, and all agreements, deeds, and documents related thereto *inter alia* the Borrower.
3. A sum of INR 4.55 crores (approx.) (‘Aggregate ECGC Amount’) was received by the Petitioner from Export Credit Guarantee Corporation of India Limited (‘ECGC’). Such Aggregate ECGC Amount was received by the Petitioner towards the claim made by it in respect of the packing credit facilities which had been availed by the Borrower from the Petitioner and in respect of which the Petitioner had availed a Whole Turnover packing Credit Guarantee from ECGC.
4. Through subsequent communications, it was discovered by the Respondent that although the said amount had been received by the Petitioner from ECGC on 28.09.2013, an amount of INR 3,89,05,457/ (‘ECGC Claim Amount’) was appropriated towards the dues of the Borrower by the Respondent on 30.09.2014 i.e., after the Cut-off Date.



5. The Respondent sought the payment of the ECGC Claim Amount from the Petitioner under the Assignment Agreement and the same was refused by the Petitioner leading to the commencement of the arbitration proceedings between the parties.
6. The Learned Sole Arbitrator decided the claims vide award dated 19.12.2022 and awarded the Respondent an amount of Rs.3,89,05,457/- together with interest at the rate of 12% from the date of the Award till the date of payment/realization.

SUBMISSIONS OF THE PARTIES

7. Learned counsel for the petitioner submitted that the impugned award is vitiated by non-consideration of the facts and is covered under section 34(b)(ii), Explanation I- (iii) as also u/s 34(2) since the impugned award is in conflict with the public policy, basic notions of justice and is vitiated by patent illegality appearing on the face of the award.
8. Learned counsel has submitted that the language of section 60(5) of the Insolvency Bankruptcy Code, 2016 (*IBC for short*) is very wide and would encompass any question of law or facts that arise in relation to the IBC proceedings. It is further submitted that the question with regards to ECGC money was squarely raised before the NCLT, hence, the arbitration proceedings could not have continued.
9. Learned counsel has further submitted that the arbitral proceeding was not maintainable as it caused prejudice to the rights of the petitioner bank against whom the same recovery is sought by the committee of creditors in the IBC proceedings. Learned counsel has



also submitted that the Learned arbitrator failed to consider the averment made with respect to Section 60(5)(c) of the IBC, 2016.

10. Learned counsel for the petitioner submitted that the claim ought to have been made by the respondent within 3 years of when the cause of action accrued on 26.09.2014 when the assignment agreement was executed or within three years of 30.09.2014 when the said monies were transferred by the respondent to the loan account of ADIL, and the claim was barred by time.
11. *Per contra*, the learned counsel for the respondent submitted that the Petitioner has failed to establish as to how any of the grounds advanced by it to question and set aside the award fall within the ambit of the limited grounds available under Section 34(2) of the A&C Act. Learned counsel further submitted that the present Petition lacks the averments in this respect as the Petitioner has predominantly attempted to take up issues that are not relevant in respect of a Petition filed under Section 34 of the Act.
12. Learned counsel for the respondent submitted that the Petitioner has failed to discharge the burden of establishing as to how the interpretation rendered by the Arbitral Tribunal in respect of the relevant clauses of the Assignment Agreement in relation to the Cut-Off Date and Due Diligence is vitiated by non-consideration of the facts, and/or is in conflict with the public policy/basic notions of justice and/or is vitiated by patent illegality appearing on face of the award.



13. Learned counsel for the respondent submitted that the learned Arbitral Tribunal has dealt with the arguments raised by the Petitioner on Section 60(5) (c) of the IBC Code in detail wherein it was, inter alia, clearly recorded as under:

(i) The Petitioner was not able to show any provision of the Insolvency and Bankruptcy Code, 2016 (IBC Code) where under NCLT has jurisdiction to adjudicate the inter se dispute between the Petitioner and the Respondent with respect to the ECGC Claim Amount, and accordingly, the question of keeping the arbitration in abeyance does not arise.

(ii) The award in the arbitration between the Petitioner and the Respondent would decide which of the two would retain the ECGC Claim Amount. If any other party, which is not participating in the arbitration, has any claim for the ECGC Claim Amount, any award in the arbitration between the Petitioner and the Respondent would not bind the said party and that party would remain free to agitate its remedies there for, whether against the Petitioner or against the Respondent, and nothing observed in the Award would affect or prejudice the rights of the said party.”

14. Learned counsel for the respondent further submitted that the Petitioner has failed to file any application under Section 33 of the A&C Act in order to redress its alleged (and misconceived) grievance with respect to the point on maintainability of the arbitration proceedings.
15. Learned counsel for the respondent also submitted that the finding recorded by the Learned Arbitral Tribunal that the cause of action in favour of the Respondent arose on learning of the ECGC Claim Amount during the 10th meeting of the CoC and on the Petitioner



denying payment thereof to the Respondent, does not fall within any of the available grounds under Section 34 (2) of the Act. It is submitted that the view of the learned Arbitrator is correct and no exception can be taken to the same much less in the present proceedings.

ANALYSIS AND CONCLUSION

16. Before delving into the facts and observations of the arbitrator, it would be appropriate to discuss the law laid down by the apex court with respect to the scope of challenge under section 34 of the A&C Act. The Section 34 of the A&C Act reads as under:

“(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

*(2) An arbitral award may be set aside by the Court only if--
(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]--*

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

*(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or



(v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

1[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

2[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33,



from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

3[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.] ”

17. It is clear from the plain reading of the above proviso that the scope and ambit of challenging the arbitral award is limited. This principle is succinctly outlined in numerous cases. The Supreme Court in ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin***, 2021 SCC OnLine SC 508, inter-alia held that:

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappraise the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act.



The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.”

18. Further, in **MMTC Limited v. Vedanta Limited**, 1 (2019) 4 SCC 163, it was inter-alia held as under:

“11.As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) ...”

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.”



14....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.”

19. In ***Associate Builders v. DDA***, (2015) 3 SCC 49, wherein it was inter-alia held that:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

20. In ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum***, (2022) 4 SCC 463 it was inter-alia held that:

“45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.”

21. It is important to remember that the position with respect to the limited interference of the courts has changed slightly in light of the 2015 Amendment to Section 34 of the A&C Act. The scope of violating Indian public policy has been expanded to include fraud or



corruption in the award-making process, violating Sections 75 or 81 of the Act, violating the fundamental policy of Indian law, and going against the most fundamental ideas of justice or morality as a result of the addition of Explanation 1 to Section 34(2). Furthermore, Section 34 now contains sub-section (2-A), which states that in the event of domestic arbitrations, patent illegality appearing on the face of the verdict also constitutes a breach of Indian public policy. The aforementioned caveat stipulates that an award cannot be annulled just due to a misapplication of the law or a change in the value of the evidence or a divergent perspective is possible.

22. In the light of the above said legal proposition it is now necessary to refer to the findings of the learned arbitrator, to find out that whether there any grounds exist to set aside the award.
23. The Ld. Arbitrator framed the following issues:
 - A. *What is the effect if any, of the respondent being required by the ECGC to not credit the amount reimbursed by ECGC to the borrower's account till the amount due from the borrower is realized or written off? OPPr*
 - B. *Whether as per the terms of the contract between the parties, the respondent is liable to pay to the claimant the net amount received by the respondent from ECGC and which was not credited by the respondent to the account of the borrower till assignment by the respondent of the debt owed by the borrower to the respondent in favour of the claimant, for the reason of requirement of ECGC? OPCL*
 - C. *Whether the respondent, if liable under the terms of its contract with the claimant, to pay the amount reimbursed by ECGC to the claimant, is absolved from the said liability owing to the claimant in spite of having carried out due diligence having not raised the said aspect prior to signing*



- the agreement? OPr*
- D. *Whether the claim is barred by time? OPr*
- E. *What is the effect if any of the application filed in NCLT, Chandigarh qua the same monies in the Corporate Insolvency Resolution Process with respect to the borrower? OPr*
- F. *If any monies are found due from the respondent to the claimant, whether the claimant is entitled to any interest thereon, and if so, at what rate and for what period? OPCL*
- G. *Relief*

24. The learned arbitrator has dealt with all the above mentioned issues after examining all the documents available on record. With respect to Issue A&B, the learned arbitrator has correctly held that

“Though the Assignment Agreement, as aforesaid is of assignment by the respondent of three loan accounts to the claimant, i.e of ADIL and two others and does not give separate consideration agreed to be paid and paid by the claimant for each of the three loan accounts and mentions only the consolidated consideration paid by the claimant to the respondent for all the 3 loan accounts, but the respondent in its letter dated 22.09.2014 to ECGC, while informing ECGC of assignment of the loan account of ADIL to the claimant, stated the said assignment to be for a consideration of Rs. 4 crores. What troubles me is, that the claimant has paid a consideration of Rs.4 crores only for acquiring the loan account of ADIL and is now seeking to recover 3.89 crores, reducing the consideration paid by the claimant for acquiring the loan account of ADIL to Rs.11 lakhs only. If the claim of the claimant for interest were also to be allowed, the claimant would end up recovering more than has paid for acquiring the loan account and would end up acquiring the loan account of ADIL for free. I am conscious that an ARC may end up recovering more from the borrower than the consideration paid to the bank for acquiring the loan account. However the present is not a case of ARC recovering from the securities of the borrower and which the bank for various reasons did not desire to. The present is a case of the claimant as ARC recovering from the respondent i.e. the bank what was already with



the bank prior to the assignment but which the bank had not credited to the loan account. I have wondered whether the said consideration / factor should lead me to a different finding. However I am acting as an arbitrator and an arbitrator, it has recently been reiterated in Indian Oil Corporation Vs. Shri Ganesh Petroleum Rajgurunagar (2022) 4 sec 463, has to act in terms of the contract and cannot act contrary to the contract. Once I have held that according to the contract the monies belong to the claimant, for consideration aforesaid I cannot hold otherwise. In State of MP Vs. Sew Construction Ltd. 2022 sec Online SC 1606, Supreme Court held that in administration of contract there is no place for discretion and any argument of discretion is to be rejected. In view thereof, notwithstanding my aforesaid conundrum, I hold that the claimant, in accordance with the Assignment Agreement is entitled to recover from the respondent, the ECGC monies though received by the respondent on 28.09.2013 prior to the cut-off date but admittedly credited by the respondent to the account of ADIL on 30.09.2014 i.e. after the cut-off date.”

25. Further, with respect to the issues C&D, the learned arbitrator held that:

“for negligence to constitute an estoppel it is necessary to imply the existence of some duty which the party against whom estoppel is alleged owes to the other party. It was further held that before a plea of estoppel on the ground of negligence can be upheld, negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it but must be the proximate or real cause of that result. Here, save for the provision in the Assignment Agreement of due diligence, no other duty owed by the claimant is pleaded or argued. On the contrary the respondent though required under the Assignment Agreement to handover to the claimant documents aforesaid, did not handover the same and in light thereof I am unable to uphold the plea of estoppel since the default was contributed to by the respondent. The respondent cannot on the one hand not disclose what was required to be disclosed and on the other hand plead estoppel



against the claimant.....the cause of action for recovery of ECGC monies credited by respondent to the account of ADIL on 30.09.2014 would accrue to the claimant on learning of the same during the meeting of CoC and on the respondent denying payment thereof to the claimant. Counted therefrom, the claim is admittedly within time.”

26. With respect to the issue E, the learned Arbitrator has rightly held as under:

“the award in this arbitration would be as to whether the said monies are to be in the pocket of the claimant or in the pocket of the respondent. If any other party, which is not participating in this arbitration, has any claim for the said monies, any award in this arbitration would not bind the said party and that party would remain free to agitate its remedies therefor, whether against the claimant or against the respondent, and nothing observed in this award would affect or prejudice the rights of the said party.”

27. With respect to issue F and its finding of the learned arbitrator, it would be appropriate to deal with it in **O.M.P. (COMM) 119/2023** as the respondent in the said petition has predominantly challenged the issue of payable interest prior to the date of the award. Also in regard to issue G, no consideration is required.
28. Learned arbitrator has adjudicated on the basic premises that arbitration is creature of agreement between the parties and not based on the equity. The parties were free to formulate the terms and conditions of the agreement, taking into account their commercials. The petitioner herein is a bank and expected to have acted with due diligence. In view of the discussion made herein above it can be concluded that the learned arbitrator has acted in accordance with



law and the arbitral award does not affect the public policy of India or any other law of India. The findings of the sole arbitrator are totally based on the merits of the case and in accordance with the settled principles of law laid down by the apex court in the catena of judgments.

29. This court at the stage of challenge under section 34 has to only *prima facie* see if there is a patent illegality in the impugned award which shocks the conscience of the court. Further, this court cannot appraise the evidence or merits in a challenge under section 34 of the A&C Act. The mere fact that another reasonable conclusion can be drawn from the case's merits does not give the power to this court to interfere with the arbitral award. The award passed by the learned arbitrator is found to be correct and in accordance with the law.
30. Therefore, the present petition is dismissed along with the pending applications.

O.M.P. (COMM) 119/2023

31. The present petition has been filed on behalf of the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (herein referred to as "*the A&C Act*") challenging the impugned arbitral award dated 19.02.2022 passed by the learned arbitrator in the Case Ref No. DAC/3547D/1 2-21.
32. The facts of the present case are the same as in **O.M.P. (COMM) 89/2023** and hence they are not repeated herein for the sake of brevity.
33. Learned counsel for the petitioner had submitted that way of the instant Petition, the petitioner seeks to only assail the Ld. Tribunal's



conclusion that the Petitioner is not entitled to any interest prior to the date of the Award i.e., with respect to Issue F.

34. Learned counsel for the petitioner had submitted that the arbitral award does not provide pre-award interest to the Petitioner, which is in violation of Section 34(2)(b)(ii) of the A&C Act. It was also submitted that it is in contravention with the fundamental policy of Indian law as provided in Explanation 1 (ii) to Section 34(2)(b)(ii) of the Act, and further, it is in conflict with the most basic notions of morality or justice as provided in Explanation 1 (iii) to Section 34(2)(b)(ii); and Section 34(2A) of the Act as it is vitiated by patent illegality appearing on the face of the Award.
35. *Per contra*, the learned counsel for the respondent submitted that the rate of interest that was agreed to between the parties was in Clause 2.2.6 of the Assignment Agreement. The said clause is read as under:
- “In the event of delay on the part of a party in making payments to the other party as contemplated in this agreement (including by way of indemnity), such party shall without prejudice to the rights of the other party under this agreement pay the defaulted amounts together with simple interest thereon at the rate of 12% per annum computed from the date of on which such amounts become due and payable till the date of actual payment”*
36. Further, it was submitted that from the date of the award, till the date of payment, interest at the rate of 2% higher than the current rate of interest is payable, as provided in section 31 (7)(b) of the A&C Act.
37. Having perused the available record and the arbitral award, the learned arbitrator has correctly dealt with Issue F i.e., with respect to the interest payable prior to the date of award. The learned arbitrator



has rightly **recorded** that since the petitioner had agreed to "pass on" all economic benefits pertaining to the loan, including all realizations and recoveries made after the cut-off date of 18.9.2020 to the respondent as per clause 1.1 (f) of the Assignment Agreement, there was no delay caused by petitioner in passing on the said monies to the claimant for the said clause 2.2.6 to be attracted. It cannot be said that the petitioner delayed passing on of the ECGC monies to the respondent, for the petitioner to become liable for interest in terms of clause 2.2.6 supra. The clause 2.2.6 reads as under:

"In the event of delay on the part of a party in making payments to the other party as contemplated in this agreement (including by way of indemnity), such party shall without prejudice to the rights of the other party under this agreement pay the defaulted amounts together with simple interest thereon at the rate of 12% per annum computed from the date of on which such amounts become due and payable till the date of actual payment"

38. This court finds the following observation of the learned arbitrator in accordance with law:

"reasons aforesaid I do not find the claimant to be entitled to interest on Rs.3.89 crores, from the cut-off date of 18.09.2014 or even from the date when the claimant first made a demand on the respondent therefor or from the date the respondent refused payment. The refusal of the respondent is found bonafide, though has not withstood the test of adjudication in this arbitration."

39. Taking into consideration the discussion made hereinabove, it can be concluded that this court at the stage of challenge under section 34



2024:DHC:1407



has to only *prima facie* see if there is patent illegality in the impugned award. Further, this court cannot appraise the evidence or merits in a challenge under section 34 of the A&C Act. The mere fact that another reasonable conclusion can be drawn from the case's merits does not give rise to interference with the contested arbitral award. The award passed by the learned arbitrator is found to be in accordance with the law.

40. Therefore, the present petition is dismissed along with the pending applications.

DINESH KUMAR SHARMA, J

FEBRUARY 13, 2024

Pallavi/ht