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

\+ O.M.P. (COMM) 45/2024 & I.A. 1591/2024

INTEX TECHNOLOGIES INDIA LIMITED .....Petitioner

Through: Mr. Amandeep Singh, Mr. Pradeep Desodya and Mr. Manu Pratap Singh, Advs.

versus

RINCOR ENERGY S.A. .....Respondent

Through: Mr. Debesh Panda and Mr. Udbhav Gady, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

O R D E R

% 10.07.2024

I.A. 1590/2024

1. This is an application filed under Section 34 (3) of the Arbitration and Conciliation Act, 1996 seeking condonation of delay of 24 days in filing the petition and 5 months 1 day, wherein the petitioner was pursuing his remedy before the District Court, Saket.

2. Mr. Panda, learned counsel for the respondent states that he objects to the allowing of this application but since the matter is being heard and being decided on merit, he is agreeable to that option without prejudice to his rights.

3. For the said reasons and without prejudice to the rights of the respondent, the application is allowed and the petition is taken up for hearing.

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4. Mr. Singh, learned counsel for the petitioner states that in the present case, the petitioner was required to remit a sum of $1,75,600/- to the

respondent in terms of a settlement agreement dated 12.09.2019.

5. By virtue of a letter dated 03.12.2019, the respondent agreed not to charge any interest incase the entire payment was made immediately. However, the petitioner made the entire payment of $1,75,600/- only in August 2021, pursuant to the direction of this court.

6. The petitioner is challenging the arbitral award dated 28.02.2023 wherein the following interest component to the petitioner is granted:-

> *"77. In view of the above discussion and conclusions, it is held that on Point Nos. 1 to 5, the Claimant has proved its claim. Accordingly, the following sums are hereby awarded to the Claimant, which are payable by the Respondent Intex:*
>
> *(a) Intex shall pay US $ 52, 150/- to the Claimant;*
>
> *(b) Intex shall pay, and Claimant is held entitled to payment interest, pendente lite and of future interest, at the rate of 6% p.a. from 05.08.2021 till date of payment p.a. on the sum of US $ 52, 150/- till date of realization. Intex is correspondingly held liable to pay such interest;*
>
> *(c) Intex shall pay the following as costs to the Claimant:*
>
> > *(i) The costs of arbitration, i.e payment of tribunal's fees shall be borne by Intex. This includes Intex's share of the fee, as well as the share of fee paid by Claimant.*
> >
> > *(ii) The costs incurred by the Claimant in approaching the court, under Section 9- which are quantified at = 1,00,000/;*
>
> *(c) Incidental costs, quantified at = 25,000/-;*
>
> *(d) Interest on costs, i.e. aggregate of (a) to (d) above, @6 % per annum, from the date of award till date of payment."*

7. Mr. Singh, learned counsel for the petitioner raises the present challenge on two grounds being (i) on 03.12.2019 the petitioner has already waived off the interest portion and (ii) the interest granted is contrary to the provisions of Foreign Exchange Management Act, 1999 (FEMA) being beyond Libor + 100 BPS.

8. As regard the letter dated 03.12.2019 is concerned, the sole arbitrator after going through the entire pleadings and appreciation of documents has come to the following finding:-

> *"61. In the facts of this case, the letter of 3 December, 2019 by the Claimant did not amount to waiver of contract, for the simple reason that having gone to great lengths in re-defining the terms of their relationship, through the settlement agreement, under which interest was payable, the Claimant cannot by any stretch of the imagination have been understood to have abandoned its right to receive such interest. As can be seen by Section 63- and, more particularly, the illustrations appended thereto (see f.n. 11 above) unless the parties act on an offer, the question of waiver in the field of contract does not arise. The position, possibly could have been different if the amount had been indeed paid to the Claimant, immediately, as sought by it. However, that event did not occur; the Claimant had to wait for almost an indefinite period, to receive the amount. The amount was in fact paid, after the commencement of arbitration proceedings. For the above reasons, it is held that there was no waiver of the Claimant's rights; nor was there any novation of the settlement agreement, or contract, which resulted in absolving Intex of its obligation to pay interest. Point No. 1 is held*

against the respondent/Intex and in favour of the Claimant."

9. Once the arbitrator has duly appreciated the documents, the pleadings of the parties and has come to a finding which is neither perverse nor in contravention of the public policy, this court under section 34 of the Arbitration and Conciliation Act, 1996 cannot re-appreciate the evidence and interfere with the said finding. The Hon'ble Supreme Court in *PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin, 2021 SCC OnLine SC 508* in this regard has held as under:-

> *"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 reappreciate 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."

10. While exercising powers under section 34 of the Arbitration and Conciliation Act, 1996, the courts have only a small window for interference. The courts have time and time again held that re-appreciation and re-evaluation of evidence is outside the scope of section 34 of the Arbitration and Conciliation Act, 1996. In view of the same, the argument pertaining to letter dated 03.12.2019 does not hold any ground.

11. Further, with regard to the second objection of the petitioner, the learned Arbitrator in paragraph 65 of the award observed as under:-

> *"65. As far as the argument with respect to the bona fides of Intex, stressed upon repeatedly in its pleadings, such as the statement of defence and submissions may not made on its behalf, the tribunal notices that considerable emphasis is placed upon inferences to be drawn for from the email correspondence between Intex and its banker. The Claimant points out -correctly so - that several emails have not been fully disclosed. Certain portions of emails appear to have not been placed on record. This has prevented the tribunal from deriving a complete picture about what actually transpired. **Importantly Intex has not placed on record any correspondence with the RBI with respect to the all-important aspect of MTT**. **Indeed, even the relevant circulars of the RBI necessary to decide whether Intex had actually complied with its terms have not been placed on record.** As a matter of fact, even emails with its bankers for the period October 2020 to April 2021, have not been placed on the record.*
>
> *..*

67. There can be no doubt that the banker-Yes Bank in the present case-being a merchant banker was acting on behalf of the Respondent Intex. In that sense, the banker is the agent of Intex. Under the ordinary law acts of an agent, are attributable to that of the principal who is to be held liable therefor (See Section 226 of the Contract Act. Even if that that consideration is kept aside, there is nothing on the record indicative of the fact that Yes Bank acted contrary to the advice or instructions of Intex. The emails placed on record at best show that in some instances, Yes Bank insisted on supply of documents by Intex which had been sought for earlier. However, what has not been placed on record are MTT transaction forms and whether they were complete and all the particulars at the earliest point of time when they were submitted. ***No table statement in this regard has been placed on the record, vis-a-vis the correspondence with the RBI. Nor did Intex make any effort to produce anyone from the RBI by summoning witnesses.****"*

(Emphasis Supplied)

12. Therefore, the argument sought to be raised before the court today has not been placed on record before the learned arbitrator. The learned arbitrator has held that nothing has been placed on record including the relevant RBI circulars relied on by the petitioner or correspondences with RBI to show contraventions as alleged. It is a settled principle in law that pleas not raised before the arbitral tribunal cannot be raised in the proceedings under section 34 of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court in *UOI v. Susaka Pvt. Ltd and Ors, (*2018) 2 SCC 182 has held as under:-

"27. If a plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be

precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case."

13. Additionally, the present petition also does not carry any ground of similar nature with respect to contravention of FEMA regulations, except a bald averment that the award is contrary to the public policy. It is settled principle in law that a party cannot go beyond pleadings. A vague averment of this nature cannot come to rescue of the petitioner in a petition under section 34 of the Arbitration and Conciliation Act, 1996 when the scope of interference of the court is limited and the same cannot be exercised in a causal manner.

14. For the said reasons, the petition is without merit and is dismissed.

JASMEET SINGH, J

JULY 10, 2024/NG
(Corrected and released on 19.07.2024)

Click here to check corrigendum, if any