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

% *Date of Decision: 24.05.2024*

\+ **FAO(OS) (COMM) 101/2024 and CM Nos.31320/2024 & 31321/2024**

AKSH OPTIFIBRE LIMITED ..... Appellant

Through: Mr Vikas Goel, Mr Ritesh Sharma, Mr Harmanbir Singh Sandhu and Ms Anisha Dahiya, Advocates.

versus

NANTONG SIBER COMMUNICATION CO. LTD. ..... Respondent

Through: Mr Jitender Chaudhary and Ms Shilpa, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE DHARMESH SHARMA

VIBHU BAKHRU, J. (*Oral*)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 15.03.2024 (hereafter *the impugned judgment*) rendered by the learned Single Judge of this Court in OMP (COMM) 68/2023 captioned *Aksh Optifibre Ltd. v. Nantong Siber Communication Co. Limited.* The appellant had filed the said application under Section 34 of the A&C Act impugning an arbitral award dated 08.11.2022 (hereafter *the impugned award*) passed by the learned Arbitral Tribunal comprising of a sole arbitrator (hereafter *the Arbitral Tribunal*).

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with certain purchase orders placed by the appellant on the respondent company. There is no dispute that the respondent company had, after receiving the said purchase orders, delivered the goods and had also raised the invoices for the same.

3. The appellant contends that the said goods were in turn supplied to Bharat Sanchar Nigam Limited (*BSNL*). However, the payments from BSNL were not forthcoming. It is the appellant's case that it had apprised the respondent that the goods purchased by it were for manufacturing of optical fiber cable to be supplied to BSNL. The appellant also claimed that it had informed the respondent that there was a delay in receipt of payments from BSNL and the same had resulted in the delay of payments to the respondent.

4. The respondent invoked the arbitration agreement between the parties by issuing a notice requesting for appointment of an arbitrator. It also approached the Supreme Court under Section 11(6) of the A&C Act for appointment of an arbitrator to resolve the disputes.

5. By an order dated 15.11.2021 passed by the Supreme Court in Arbitration Petition (C) No. 27/2021, the Supreme Court appointed a sole arbitrator to adjudicate the disputes between the parties.

6. The Arbitral Tribunal had found in favour of the respondent and had awarded a sum of USD 194,336.91 along with interest at the rate of 8% per annum from the due dates of the invoices as set out in paragraph 4 of the impugned award. The relevant portion of paragraph 4 of the impugned

award and the dispositive portion of the impugned award is set out below:

"4 The undisputed facts leading to the present dispute are as follows:

xxx xxx xxx

(vi) It is an admitted fact that the Respondent defaulted in making payment of an amount of $194336.91 to the Claimant as per the Invoices of the Purchase Orders. The details of the invoices and the amount unpaid by the Respondent are as follows:

S.No.	Date of Invoice	Details of Invoice	Amount due as per Invoice ($)	Date on which payment becomes due (i.e. date of Bill of Lading)	Date on which credit period expires (i.e. 90 days from Bill of Lading)
A	B	C	D	E	F
1.	26.06.2018	AOL-18-3	43322.37	02.07.2018	18.10.2018
2.	20.07.2018	AOL-18-4	35653.20	26.07.2018	24.10.2018
3.	25.07.2018	AOL-18-5	23269.23	01.08.2018	30.10.2018
4.	09.09.2018	AOL-18-7	21934.73	15.09.2018	14.12.2018
5.	21.07.2018	AOL-18-8	31378.16	23.09.2018	22.12.2018
6.	12.10.2018	AOL-18-9	212255.96	16.10.2018	14.01.2019
7.	18.10.2018	AOL-18-10	28023.26	22.10.2018	20.01.2019
	Total Amt. Payable		**204836.91**		
	(Less)Payment Received		10,500		

	on 26.06.2020			
	Balance Pending	194336.91		

xxx xxx xxx

50. In the present case, though the Invoices have not been fully paid since 2018, the interests of the Respondent also need to be balanced. There is one Invoice (AOL-18-6) for which the Claimant has stated that no interest will be claimed, but I do not find any similar waiver by the Claimant of any of the Invoices which are the subject matter of these proceedings. The Respondent does not dispute the quality of the Claimant's products supplied and has also admitted its liability towards the amounts due which has resulted in a payment to the Claimant of an instalment of $10,500 on 26.06.2020. Therefore, I deem it appropriate to award an interest of 8% p.a. on the amount of claim i.e. $194336.91 from the respective due dates of the Invoices (As Per Column E of the Table in Para 4 above) till the date of actual payment."

7. The appellant has confined the challenge to the impugned award on two grounds. First, that the impugned award is liable to be set aside on the ground that the Arbitral Tribunal did not have any jurisdiction to render the award. According to the appellant, there was no arbitrable dispute as it had admitted its liability to pay for the goods supplied. Therefore, the Arbitral Tribunal did not have any jurisdiction to enter on the reference. Second, that the interest at the rate of 8% per annum offends the public policy of India and therefore, the impugned award is liable to be set aside.

8. The learned counsel appearing for the appellant also contended that there is an inherent inconsistency in the impugned award. He referred to

paragraphs 23 and 52 of the impugned award to canvas the said challenge. He submitted that, on one hand, the Arbitral Tribunal has held that the reason why the payments were not accepted by the respondent itself was a question of dispute. On the other hand, the Arbitral Tribunal had held that the only question that arose was one of liability and not the reasons for non-payment. He submitted that the findings were inconsistent and also brought into focus that there was, in fact, no dispute between the parties.

9. He contended that non-payment of an admitted liability could not be considered as a dispute and therefore, the recourse to arbitration was not available. He submitted that in these circumstances, the only remedy available to the respondent would be to file a suit.

10. Insofar as the rate of interest is concerned, the learned counsel appearing for the appellant relied on the decision of the Supreme Court in ***Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited: (2019) 11 SCC 465*** and submitted that the rate of interest has been awarded without considering the economic reality of the currency in which the award was rendered – US dollars.

11. We have heard the learned counsel for the appellant.

12. The contention that the impugned award is liable to the set aside as there was no dispute between the parties is insubstantial. The fact that the appellant had failed and neglected to pay the amount admittedly payable to the respondent is clearly a dispute. Thus, the respondents could not be faulted in availing of its remedies. The contention that it was not open for

the appellant to invoke arbitration and the only remedy available was to file a suit is also insubstantial.

13. The non-payment of an admitted liability is clearly an actionable claim and in view of the arbitration agreement between the parties (which is not disputed), the respondent was well within its right to invoke the arbitration agreement to institute its claim.

14. The learned counsel for the appellant relied on the decision of the Supreme Court in ***Union of India v. Birla Cotton Spinning and Weaving Mills Limited: (1964) 2 SCR 599*** in support of his contention. The reliance on the said decision is misplaced. The said decision was rendered in the context of Section 34 of the Arbitration Act, 1940 (hereafter *the 1940 Act*).

15. The appellant in the said case (Union of India) had sought to refer the disputes to arbitration in a suit instituted by the respondent. In the said context, the Supreme Court held that there was no dispute since the liability was admitted. Section 34 of the 1940 Act contains provisions for stay of the proceedings if the court is satisfied that there was no sufficient reason why the matter should not be referred in accordance with the arbitration agreement. Section 34 of the 1940 Act is set out below:

> "**34. Power to stay legal proceedings where there is an arbitration agreement**. – Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time before filing a written statement or taking any other steps

> in proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority, may make an order staying the proceedings."

16. There has been a material change in the language of the A&C Act. Section 8(1) of the A&C Act provides for reference of "parties to arbitration" and not the dispute.

17. In any view of the matter, the said decision has no relevance as in the present case, the arbitral proceedings have culminated in the impugned award. This is not a case where a court is called upon to consider the question of referring the disputes or parties to arbitration. The only question that fell for consideration before the learned Single Judge was whether the impugned award falls foul of the public policy of India and was, therefore, liable to be set aside under Section 34(2)(b)(ii) of the A&C Act.

18. We find no merit in the contention that the impugned award is in conflict with the public policy of India.

19. The contention that there is an inherent inconsistency in the impugned award is also unmerited. The relevant extract of Paragraphs 23 and 52 of the impugned award – which according to the appellant are inconsistent – is set out below:

> "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."
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> xxxx xxxx xxxx xxxx
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> "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."

20. It is apparent from a meaningful reading of the aforesaid paragraphs that there is no inconsistency. In paragraph 23 of the impugned award the Arbitral Tribunal had expressed the view that respondent's denial to accept that the appellant could renege from its liability would itself be a dispute. The appellant had claimed that it had not made payments as it had not received payments from BSNL and this was not accepted by the respondent. Thus, clearly, giving rise to a dispute.

21. In paragraph 52 of the impugned award, the Arbitral Tribunal held that BSNL was not a party to the contract between the appellant and the respondent and there was no clause in the contract that provided that the payments to the respondent would be contingent on receipt of payments from BSNL. Accordingly, the Arbitral Tribunal rejected the defense raised by the appellant that it would be liable to pay the respondent only on receipt of payments from BSNL. In one sense, paragraph 23 of the impugned award records the disputes and paragraph 52 of the impugned award is dispositive of the said dispute.

22. We find no merit in the appellant's contention that the impugned award is in conflict with the public policy of India as the Arbitral Tribunal had awarded interest at an unreasonably high rate.

23. First of all, it is relevant to note that the impugned award was rendered in an International Commercial Arbitration as defined under Section 2(1)(f) of the A&C Act. The said impugned award is not amenable to challenge under Section 34 (2A) of the A&C Act on the ground of patent illegality. Thus, the only ground urged by the appellant is that award of interest at the rate of 8% per annum falls foul of the public policy of India.

24. The explanations to Section 34(2)(b) of the A&C Act set out the brief contours of the scope of challenge under the ground of conflict with the public policy of India. The same are set out below:

> "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
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> (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.
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> 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."

25. It is now well settled that the fundamental policy of Indian law does not refer to violation of any statute but the fundamental principles on which Indian law is founded. Any difference or controversy as to the rate of interest clearly falls outside the scope of challenge on the ground of conflict with the public policy of India. Unless it is evident that the rate of interest awarded is so perverse and so unreasonable so as to shock the conscience of the Court, no interference on this ground would be warranted.

26. In the present case, we are unable to accept that the rate of interest at the rate of 8% per annum (even though on an award in US dollars) is so unreasonable and perverse so as to shock the conscience of the Court.

27. The reliance placed by the appellant on the decision of the Supreme Court in ***Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited*** (*supra*) is also misplaced. In the said case, the Supreme Court had considered an arbitral award in two separate currencies but carried the same rate of interest. It is in that context that the

Court found the same rate of interest in currencies that operate in different fiscal regimes was inapposite. The said principle is not applicable in the facts of the present case. More importantly, the decision in ***Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited*** (*supra*) was rendered under Article 142 of the Constitution of India. This has also been explained by a Coordinate Bench of this Court in ***Pradeep Vinod Construction Co. v. Union of India: 2022 SCC OnLine Del 4937***. The relevant extract of the said judgment is set out below:

> "**40.** Therefore, the sense one gets is that when the Supreme Court finds the interest rate is usurious or not in line with the prevailing economic conditions and therefore ceases to be compensatory in nature, it could interfere by exercising powers under Article 142 of the Constitution. However, no such power exists in this Court, under Section 37 of the 1996 Act."

28. In view of the above, we find no infirmity with the impugned award. The learned Single Judge has rightly rejected the appellant's challenge in this regard.

29. The appeal is dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

DHARMESH SHARMA, J

MAY 24, 2024
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