(2016) 07 BOM CK 0063

BOMBAY HIGH COURT

Case No: Appeal No.272 of 2016 In Arbitration Petition No.1104 of 2012.

Royal Palms (India) Private Limited A Company incorporated under the Companies Act, 1956 having its Registered Office at Survey No.169, C.T.C. No.1627, Aarey Milk Colony, Goregaon (East) Mumbai - 400 065 - Appellant (Orig.Petitioner) @HASH Neeta Jignesh P — APPELLANT

Vs

RESPONDENT

Date of Decision: July 12, 2016

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, Section 37

Citation: (2016) 6 MhLJ 214 : (2017) 3 RAJ 131

Hon'ble Judges: Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench: Division Bench

Advocate: Mr. Mustafa Doctor Sr. Advocate, Mr. Rohan (Claimant) Pinto, Mr. Nimay Dave I/b M/s. Mulla and Mulla Craigie Blunt and Caroe, Advocates, for the Appellant; Mr. Vishwajeet Sawant, Ms. Rutuja Joshi, Mr. Siddharth Kanade I/b ALMT Legal, for the Respondent

Final Decision: Dismissed

Judgement

Anoop V. Mohta, J.(Oral) - Admit. By consent of learned counsel for parties, heard for final disposal at the stage of admission.

The appellant-original petitioner has filed this appeal being aggrieved by Judgment and order dated 6 May 2016 passed by the learned Single Judge whereby the appellants'' petition challenging the award has been dismissed. That resulted into maintaining the Award passed by the learned Arbitrator.

2. The dates and sequence of events are as under : From November 2006 to October 2008 the respondents supplied various kinds of materials such as pipes (RCC Hume pipes, PVT/GL/M.S.pipes) pipe fittings (elbows, tees,bends, barrel, nipples, rubber gaskets)flanges, valves and couplings of various types and sizes to the appellants in respect of a development that the appellants were undertaking at village Marol Maroshi, Borivali, Mumbai. The appellant placed purchased orders on the respondent after the confirmation of the quotations. It is undisputed that during this period the appellant paid the respondent an amount of Rs. 1,44,04,592.50 (Rupees One crore Forty Four lakhs Four thousand five hundred and ninety two and fifty paise only) towards goods purchased. The respondent claimed an amount Rs. 61,36,187/- in respect of Bill Nos.1233, 1266, 1271, 1278, 1285, 1294,1298 and 901 (Exhibit C-8,C-11, C-13 to C-18 respectively). On 20 June 2009 a notice was issued by the respondents to the appellant under section 433 and 434 of the Companies Act, 1956 claiming the outstanding amount along with the interest. On 7 July 2009, the appellant resisted the notice. The appellant denied that any amounts were due or payable to the respondent and stated that no such materials/goods under the bills were ever received by the appellant. The appellant also stated that the respondent''s claim was false and fabricated and in connivance with an employee of the appellant. On 20 July 2009, the respondent denied it.

3. In September 2009 the respondent filed a Company Petition in this Court being Company Petition No.802 of 2009 for winding up the appellant company in view of the alleged outstanding amount. On 2 August 2010 by an order passed in the Company Petition, by consent of parties, the disputes and differences between the parties were referred to an arbitration.

4. On 4 January 2011 the respondent filed their statement of claim before the Arbitrator for the sum of Rs. 61,36,187/- along with interest calculated thereon at the rate of 30% per annum aggregating to Rs. 1,04,89,584/-with further interest thereon @ 18% per annum. The respondent described the unpaid bills as Exhibits C-8, C-11, C-13 to C-18 and filed the same in a separate compilation of documents accompanying the Statement of claim. On 23rd February 2011, the appellant resisted and denied the claim of the respondent and filed their statement of defence contending that the orders for the goods under the alleged unpaid bill had never been placed by the appellant and never received the goods from the respondent. The entire claim was set up on the basis of forged and fabricated documents. The appellants also averred that criminal proceedings have been initiated against the respondent in this regard. On 2nd March 2011, the respondent filed her response to the appellant''s written statement. On the basis of the pleadings filed before the learned Arbitrator the learned Arbitrator framed the points for determination. The relevant Issue (vii) is reproduced herein below:

"vii. Whether the respondent failed to pay Rs. 61,36,187/- for materials duly supplied by the claimant under unpaid Bills 1 to 8 (at Exh C-8 colly) C-11 (colly, C-13 colly to

C-18 colly) and the claimant is entitled to payment."

5. The learned Arbitrator has passed the reasoned Award directing the appellant to pay to the respondent an amount of Rs. 61,36,187/- along with interest @ 12% per annum from the date of the delivery of the goods/materials till the date of the award and 10% per annum from the date of the award till payment. The learned Arbitrator has also imposed costs of Rs. 3,00,000/-on the appellants. The aggregate amount of the invoices Exh C-11 colly to C-18 colly is Rs. 35,78,454/-. It is not in dispute. But that was not the only documents relied upon by the respondent-claimant.

6. The appellants filed Arbitration Petition No.1104 of 2012 before this Court to impugn the Arbitrator''s award. On 30 October 2012 the respondent filed her Affidavit in reply to the Arbitration Petition. On 6th May 2015 Arbitration Petition was dismissed by the Court. The learned senior counsel appearing for the appellant mainly contended that the documents though exhibited and marked were wrongly relied upon for passing the Award. Therefore, the amount awarded for Rs. 61,36,187/- on that basis is beyond the claim made by the respondent-original-Claimant. It is unacceptable submission.

7. Admittedly, no such ground/plea was raised before the learned Single Judge. No such ground is even raised before this Court in the appeal memo. No contra evidence was lead before the Arbitrator. After considering the rival contentions we noted that the unpaid bills documents through (Exhibit C-8 colly,C-11 to C-18) have been duly exhibited after hearing the parties. These exhibits include the purchase order, invoices and the respondent''s ledger account, statement of account and the various correspondences. The statutory notices apart from the Affidavit-in-reply including criminal complaints filed by the respondent against the claimants before police are also part of the Exhibits.

8. It is not the case that there is no supportive evidence on record of the respondent-claimant. The reasoned Award is based upon it. The learned Arbitrator though has granted an opportunity at the relevant time, yet no witness/witnesses were examined by the appellant in defence. There is no dispute that the burden lies on the person one who makes specific allegations and/or averments. It should be supported by material particulars. The claimant has discharged its burden. No relevant witness was examined revolving around the allegation of forgery and fabrication. The adverse inference is therefore, rightly drawn against the appellant.

9. It is a settled law that the learned Arbitrator need to proceed with the matter based upon the evidence led and placed in support of the rival contentions. As noted above, the learned Arbitrator in the present matter, in the background and by referring the documents (Exhibits) has assessed the evidence, material and has passed the reasoned award. Therefore, the specific submission though raised and though not agitated before the learned Single Judge and for the reasons so

recorded by the learned Arbitrator, as well as, by the learned Single Judge, we are not inclined to interfere with the Award and the judgment.

10. Furthermore, it is not a case of transaction of a short period. The transactions were long standing. The claims revolving around the invoices and purchase orders and related documents, which have been duly exhibited after hearing both the parties. The existence of documents as exhibited by the Arbitrator is not in dispute.

11. Admittedly, the appellant could have examined the best person in support of its defence submissions. In the case through the examination-in-chief or in cross-examination even the allegations of forgery and/or no signature of father could have been proved or disproved, before the Arbitral Tribunal. The record though asked for by the respondent-Claimant, was also not produced by the appellant on the ground that those documents/record were destroyed in fire. We are thus not inclined to re-appreciate the reasons and/or the exhibited documents on record that resulted into passing of the Award and the Judgment.

12. This Court, on 5 July 2016 in Appeal (Lodging) No.201 of 2016 in Arbitration Petition No.898 of 2015 Jawaharlal Nehru Port Trust v. Ornate Multi Model Carriers Pvt. Ltd. held that non traverse of the facts clearly makes applicable the doctrine of implied admission as would flow from Section 58 of the Evidence Act. Further, it is also not a case that the appellant has placed on record any evidence to the contrary. Thus it is a case where the principles as contained in Section 58 of the Indian Evidence Act would get clearly attracted being one of the basic rules of evidence.

13. Both the learned counsel even referred to the reasons given by the learned Single Judge. We have gone through the same. On hearing both the parties, we have also noted that the learned Single Judge has rightly observed and recorded that this is not a case where the Court under section 34 of the Act is required to re-appreciate the evidence and/or interfere with such findings on facts. We have also noted that there is no perversity and/or illegality that we should interfere with the Award or the Judgment passed by learned Single Judge confirming the same by referring to the positions of law and the Judgments cited by the rival parties. We are also in agreement with regard to the issues so decided and the reasons given by the learned Single Judge distinguishing other Judgments of the appellant. There is no perversity or any illegality. The findings are within the frame of law and the record.

14. Therefore, taking an over all view of the matter, and the Judgment of this Court dated 14 March 2016 in Appeal (Lodging) No.31 of 2016 Coram: Anoop V. Mohta & S.C. Gupte, JJ) in **Indian Oil Corporation Ltd v. Artson Engineering Ltd. 2016 (3) Mh.L.J.**whereby it is recorded the power and scope of Appellate Bench while deciding the Appeal under section 37 of the Arbitration Act.

"17. The Apex Court in the case of **M/s. Chebrolu Enterprises v. Andhra Pradesh Backward Class Co-operative Finance Corporation Ltd reported in 2015 (2) Scale 207**, recently reiterated and reinforced that the principle that unless case of

perversity and/or error on the face of the record and/or any issue of jurisdiction is raised which goes to the root of the matter and/or any Award and/or order is contrary to the agreed terms and conditions, no interference is called for by the learned Judge as well as the Appellate Court in the finding of facts. In para 20 of the judgment, the Apex Court has observed thus:

20. &#65533; This Court or even the Appellate Court would not look into the findings of facts unless they are perverse."

15. That considering the power and scope of the Appellate Court, no case made to accept the appellant''s appeal.

16. Appeal is dismissed. No costs.