

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

+ O.M.P. No.298/2002 & I.A. No.7760/2006

GYAN CHAND Petitioner
Through: Ms. Nav Ratin Chaudhary, Adv.

versus

INDIA LEASE DEVELOPMENT LTD. & ORS.
..... Respondents
Through: Mr. Nitin Soni, Adv. for R-1.
Mr. Satpal Singh, Adv. for R-3.

WITH

O.M.P. No.299/2002

SUKHBIR SINGH Petitioner
Through: Mr. Satpal Singh, Adv.

versus

INDIA LEASE DEVELOPMENT LTD. & ORS.
..... Respondents
Through: Mr. Nitin Soni, Adv. for R-1.
Ms. Nav Ratin Chaudhary, Adv. for R-3.

% Reserved on : October 29, 2009
Date of Decision : November 05 , 2009

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J :

1. O.M.P. Nos.298 and 299 of 2002 have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') for setting aside the same Award dated 12th June, 2002 passed by Sh. Suryakant Singla, sole Arbitrator. It is pertinent to

mention that both the petitioners are alleged guarantors under a Vehicle Lease Agreement (hereinafter referred to as 'Lease Agreement') dated 30th November, 1996 by virtue of which a monetary loan was advanced by the respondent finance company.

2. Ms. Nav Ratin Chaudhary, learned counsel for the petitioner in O.M.P. No.298 of 2002 submitted that the Lease Agreement dated 30th November, 1996 had been tampered with. In this connection, Ms. Chaudhary referred to the arbitration clause contained in the photocopy of the said Lease Agreement wherein it was stated that disputes between the parties shall be referred to sole Arbitration of Sh. Suryakant Singla and in the event of his refusal, neglect, death, incapability to act as an Arbitrator, the matter shall stand referred once again to the sole Arbitration of Sh. Suryakant Singla, Advocate. She pointed out that in the reply affidavit filed in this court by the respondent-claimant, it was stated that as Sh. Abhinav Vashisht was unable to adjudicate the disputes, they were referred to Sh. Suryakant Singla, Advocate for adjudication as an Arbitrator. She also referred to the Award wherein it had been stated by the Arbitrator that, "*the claimant company referred the disputes that had arisen between them and the respondents to me, as the other named Arbitrator Shri Abhinav Vashisht had expressed his inability to act as an Arbitrator.*" She stated that the respondent-claimant had neither filed the letters appointing the first or the second Arbitrator nor Mr. Vashisht's refusal to act as an Arbitrator.

3. Ms. Chaudhary further stated that even though the Arbitrator in his Award had observed that there was no blank in the aforesaid Lease Agreement, the photocopy of the said Lease Agreement produced by the respondent had a blank in clause No.20 of the said Lease Agreement.

4. She also submitted that the principles of natural justice had been violated in the present case as no notice had been served upon the petitioner by the Arbitrator. In this connection, she drew my attention to the Award passed by the learned Arbitrator wherein in para 2 it had been observed by the Arbitrator that, *“the notice of the dispute having been referred to was sent to both the respondents by registered post acknowledgment”*. She pointed out that as there were three respondents to the arbitration proceeding and the present petitioner was respondent No.3 before the Arbitrator, no notice had been issued to the present petitioner by the learned Arbitrator. She also submitted that even though the Arbitrator had observed that the petitioner on 15th March, 2002 had refused to accept notice, there was neither any witness present nor any one from the postal department had been examined by the learned Arbitrator.

5. Ms. Chaudhary also submitted that fifteen day's prior notice to arbitrate under Clause 38 (c) of the aforesaid Lease Agreement, had not been served upon the petitioner by the respondent.

6. Ms. Chaudhary further submitted that the Arbitrator failed to

appreciate that the claims filed by the respondent-claimant were barred by limitation inasmuch as the first default of repayment had occurred in May, 1997. In this connection, she drew my attention to Clause 22 of the Lease Agreement as well as ledger extract of the beneficiary of the loan agreement. In this connection, Ms. Chaudhary placed reliance upon a judgment of the Apex Court in ***Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*** reported in ***AIR 1994 Supreme Court 1615*** wherein it was held as under :-

“12. Therefore, the period of limitation for commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.”

7. She lastly submitted that the interest awarded by the learned Arbitrator was excessive inasmuch as the Arbitrator had awarded future interest @ 24 per cent per annum from the date of Award.

8. Mr. Satpal Singh, learned counsel for the petitioner in O.M.P. No.299 of 2002 made some additional submissions.

9. He stated that since the arbitration clause provided for appointment of two Arbitrators, the said Clause was violative of Section 10 of Act, 1996 inasmuch as it prohibited appointment of even number of Arbitrators.

10. Mr. Satpal Singh submitted that as the Lease Agreement had admittedly been terminated by the respondent-claimant, the arbitration clause ceased to exist and the matter could not be referred to arbitration.

11. He further stated that as the respondent-claimant had not disclosed as to what action they had taken against the principal borrower, the respondent-claimant could not maintain an arbitration petition against the guarantors.

12. Mr. Satpal Singh additionally submitted that the principles of natural justice had been violated in the present case as the Arbitrator had given no date for petitioner's evidence.

13. He lastly submitted that the respondent-claimant had made no claim with regard to the interest and, therefore, the learned Arbitrator could not have awarded any amount as interest.

14. On the other hand, Mr. Nitin Soni, learned counsel for respondent No.1 contended that in Ms. Chaudhary's petition, the petitioner's actual objection was not that the Lease Agreement had been tampered with but that the disputes should have been referred to an arbitral tribunal comprising two named Arbitrators, namely, Sh. Suryakant Singla and Sh. Abhinav Vashisht.

15. Mr. Soni further stated that since the present case was an old one, the original arbitration agreement was not available. He contended that both the learned Arbitrator in the impugned Award as well as the

respondent in the reply to the objection petition had erroneously stated that the matter was first referred to Sh. Abhinav Vashisht and upon his refusal, the matter was referred to Sh. Suryakant Singla. He stated that this mistake occurred because in a number of other lease agreements executed by respondent-claimant, a finance company, Sh. Abhinav Vashisht was the first named Arbitrator and in the event of his refusal or his neglect to act, Sh. Suryakant Singla was the alternate Arbitrator.

16. Mr. Soni next submitted that there was no violation of the principles of natural justice as the learned Arbitrator had issued a notice to the petitioner. He stated that reference to issuance of two notices by the Arbitrator pertained to order dated 4th February, 2002 whereas the petitioner was served by way of notice dated 15th March, 2002. In this connection, he referred to order sheet and the notice dated 15th March, 2002 as well as the report of refusal on the envelope at page 46 of the arbitral record as well as the accompanying blank acknowledgment card received back by the learned Arbitrator. He further stated that even subsequent to 15th March, 2002, the learned Arbitrator had issued a notice to the petitioner informing him of the next date of hearing of 20th May, 2002. In this connection, he referred to the said letter as well as UPC receipt placed on record by the learned Arbitrator.

17. As far as the notice to arbitrate under Clause 38 (c) of the Lease Agreement was concerned, Mr. Soni stated that such a notice had been sent on 15th December, 2001 by way of registered AD post. In this connection, he placed reliance on the record of Journal of uninsured

registered letters posted, certified by the Department of Post.

18. Mr. Soni lastly submitted that the claim filed by the respondent-claimant was not barred by limitation as the loan under the Lease Agreement had to be repaid by October, 1999 and the reference to arbitration in the present cases had been made in February, 2002, i.e., within the three year's limitation period. Mr. Soni also stated that arbitration proceedings were initiated by the respondent only as a measure of last resort and, therefore, it cannot be said that the same was barred by limitation.

19. Having heard the parties, I am of the view that a typographical mistake in the Lease Agreement's arbitration clause, (by providing for repeated reference of disputes to Sh. Suryakant Singla) would not render the entire Lease Agreement as void especially when none of the petitioners have raised any dispute with regard to the amounts due and payable under the said Lease Agreement.

20. In fact in the claim statement filed by the respondent-claimant before the Arbitrator, the claimant had taken a categorical stand that the matter had to be referred to sole arbitration of Sh. Suryakant Singla, Advocate. Paragraph 8 of the claim petition filed by the respondent-claimant is reproduced herein below :-

“8. That under Clause 38 of the said Agreement, the Respondents and the Claimant Company had mutually agreed to refer all the disputes arising from the above mentioned agreement to the sole arbitration of Shri Suryakant Singla, Advocate, Delhi.”

21. Moreover in the objection petition, the petitioner's objection was with regard to the constitution of the arbitral tribunal and not to the applicability of the dispute resolution mechanism. In this connection, I may refer to paragraphs 1 and 2 of the objection petition filed by the petitioner in O.M.P. No.298 of 2002 which are reproduced herein below :-

"1. That the respondent no. 1 has not acted in accordance with the alleged agreement Ex. P.W.2/1, in terms of which the alleged dispute between the parties was referred for decision to the Sole Arbitrator. Admittedly, the dispute between the parties was required to be referred to the two named Arbitrators namely Shri Suryakant Singla and Shri Abhinav Vashisht out of whom, the later mentioned Arbitrator is alleged to have expressed his inability to act as such (kindly refer to para 2 of the Award dated 12.6.2002 which is annexed herewith as Annexure A).

2. That assuming, though not admitting that Shri Abhinav Vashisht has refused to act as Arbitrator, the respondent no. 1 ought to have taken recourse to the process of the Court for appointment of another Arbitrator in his place, which has admittedly, not been done. Hence, the unilateral reference to Shri Suryakant Singla – respondent no. 4 herein to act as Sole Arbitrator, is illegal and cannot be acted upon. Consequently, the Award dated 12.6.2002 is rendered illegal and void. The impugned Award is in violation of Section 11 of the Arbitration and Conciliation Act."

22. I am also in agreement with Mr. Soni's arguments that references in the Award and the reply affidavit before this court to Sh. Abhinav Vashisht was a consequence of a number of similar lease agreements

executed between the respondent-claimant and other third parties in which alternative Arbitrators were named.

23. In this context, I may refer to the arbitral record which had been mistakenly filed in O.M.P. No.299 of 2002 wherein the first named Arbitrator was Sh. Abhinav Vashisht and in the event of his refusal, death, neglect, inability or incapability to act as an Arbitrator, Sh. Suryakant Singla was to be the Arbitrator. Clause 6 of the lease Agreement dated 21st June, 1996 with a third party reads as under :-

“Clause VI – (a) All disputes, differences, and/or claims, arising out of this HIRE PURCHASE AGREEMENT, shall be settled by arbitration, in accordance with the provisions of the INDIAN ARBITRATION ACT 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of Shri Abhinav Vashisht, Advocate, Delhi or in case of his death, refusal, neglect, inability or incapability to act as an arbitrator to the sole arbitration of Shri Suryakant Singla, Advocate, Delhi. The reference to the arbitrators shall be within the CLAUSES, TERMS AND CONDITIONS of this Agreement. The award given by the Arbitrator shall be final and binding on all the Parties concerned.”

24. I am of the opinion that a minor blank in the Lease Agreement would not render the same void. Consequently, the petitioners’ objection with regard to the Lease Agreement being a forged or tampered document is a baseless one.

25. I am also of the opinion that there was no violation of the principles of natural justice in the present case as notice to arbitrate under Clause 38 (c) had been issued by the respondent-claimant on 15th

December, 2001 and the journal of unregistered letters had been produced by the respondent-claimant before the Arbitrator and this court.

26. From a perusal of the arbitral record, I find that Ms. Chaudhary's client had refused to accept the notice issued by the Arbitrator as is apparent from the endorsement on the envelope by an independent body like the Department of Posts. In any event, in view of the receipt confirming despatch of notice issued by the Arbitrator, it has to be presumed under Section 114 of the Indian Evidence Act and Section 27 of the General Clauses Act that the petitioner had been served with the Arbitrator's notice. I may also mention that when the Arbitrator's Award was sent by UPC by the learned Arbitrator, the petitioner received the same as would be apparent from the fact that the petitioner filed his objections within the statutory period of limitation.

27. Since in my opinion, the petitioners had deliberately not appeared before the Arbitrator, it cannot be said that the Arbitrator should have given a date for petitioners' evidence. Accordingly, the petitioners' plea of violation of principles of natural justice is rejected.

28. Supreme Court in ***Panchu Gopal Bose***'s case (supra) has only reiterated that limitation in arbitration proceedings is akin to limitation in other civil proceedings like suits. However, I am of the opinion that the respondent-claimant's claims are not barred by limitation as defaults in repayment are a continuing cause of action and the

respondent-claimant had invoked the arbitration clause within three years from the date on which the entire loan had to be repaid by the petitioners. I am also of the view that the respondent-claimant did not have to first pursue the principal borrower and then only proceed to take action against the petitioners-guarantors as sought to be canvassed by Sh. Satpal Singh. In law, the creditor has the option to sue the principal borrower or the guarantors jointly and/or severally.

29. I am further of the view that the arbitration clause did not cease to exist or operate just because the Lease Agreement had been terminated by the respondent-claimant prior to the initiation of the arbitration. In fact, the arbitration clause is a dispute resolution mechanism which always survives the termination so that all disputes post- termination can be resolved and adjudicated upon in accordance with the agreed mechanism.

30. In my opinion, Section 10 of the Act, 1996 does not have any application to the facts of the present case as the present dispute resolution mechanism does not provide for appointment of two arbitrators. On the contrary as explained herein above, the arbitral agreement only provides for appointment of a sole arbitrator.

31. However, I find that the learned Arbitrator has awarded future post-award interest @ 24 per cent per annum on a sum of Rs.12,43,850/- but recently the Hon'ble Supreme Court in the case of ***State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt.***

Ltd. reported in **2009 (8) SCALE 753** has held as under :-

“36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendent lite interest and future interest upto date of payment.”

32. Consequently, keeping in view the current rate of interest, I deem it appropriate to reduce the rate of interest from 24 per cent per annum to 9 per cent per annum simple interest from the date of the Award upto the date of payment.

33. Accordingly, O.M.P. Nos.298 and 299 of 2002 are disposed of and the impugned Award is made rule of the Court except with the modification with regard to the rate of interest. Registry is directed to prepare a decree in terms thereof.

MANMOHAN, J.

NOVEMBER 05, 2009
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