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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 37/2012

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Judgment dated 02.02.2012

BALJIT SINGH MALIK

..... Petitioner

Through : Mr. Sanjay K. Shandilya, Adv.

versus

HARICHINTAN SINGH MALIK

..... Respondent

Through : Mr. Ashish Dholakia, Mr. Akash Kakkar
and Ms. Anang Jamir, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Petitioner has filed the present objections under Section 34 of Arbitration and Conciliation Act, 1996, assailing the Award dated 10.10.2011 passed by the sole Arbitrator.
2. The facts of the case, as set out by the petitioner are that a suit for partition was filed by the respondent in this Court pertaining to property bearing no.4, Bhagwan Das Road, New Delhi, which was decreed on 30.5.2008 in terms of a settlement arrived at between the parties during Mediation. During the years 2006-2007 petitioner took a loan of Rs.30.00 lakhs from the respondent. On 17.12.2007, a Loan Agreement was executed by which it was agreed between the parties that the entire loan amount would be repaid within one week from the payment of share of sale proceeds to the petitioner. On 08.12.2007 a promissory note was executed by the petitioner for Rs.30.00 lakhs. It was also agreed that in case there would be a dispute between the parties the matter would be referred to the named Arbitrator, Mr. Arvind Nigam, Senior Advocate, in terms of Clause 7 of the Loan Agreement. Clause 7 of the Loan

Agreement reads as under:

“7. The parties hereto agree that any dispute arising under this agreement shall be referred to the sole arbitration of Mr.Arvind Nigam, Advocate. If for any reason Mr. Arvind Nigam, Advocate is unable to act as the sole arbitrator, the parties agree that the sole arbitrator shall be appointed by Mr. Arvind Nigam, Advocate, and such appointment shall be binding on the Parties. The arbitration proceedings shall be in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Delhi. The courts in Delhi shall have exclusive jurisdiction.”

3. As per the present objections, the property bearing no.4, Bhagwan Das Road, New Delhi was sold on 8.6.2010 by a registered sale deed. On 9.6.2010 the respondent wrote a letter to the petitioner calling upon the petitioner to make the payment of loan in terms of Loan Agreement. Since the respondent failed to repay the loan amount, on 2.9.2010 the respondent invoked the arbitration clause and requested Mr.Arvind K. Nigam, Senior Advocate, the named Arbitrator in the loan agreement, to enter upon reference.
4. The first submission of learned counsel for the petitioner is that the appointment of a sole Arbitrator, Mr.Sudhanshu Batra, Senior Advocate, was illegal as after entering upon reference, Mr.Arvind Nigam, Senior Advocate, could not have appointed another Arbitrator without consulting the parties. It is further submitted that once Mr.Arvind Nigam had withdrawn himself as an Arbitrator the appointment of Mr.Sudhanshu Batra is not as per law. Elaborating his arguments further Mr.Shandilya submits that parties had appointed Mr.Arvind Nigam, Senior Advocate, as the sole Arbitrator in terms of Loan Agreement signed and executed by the parties. Counsel further submits that as per Clause 7 of the Loan Agreement dated 17.12.2007 Mr. Arvind Nigam, Senior Advocate, was to act as the sole Arbitrator and in case Mr. Nigam was unable to act as an

Arbitrator for any reason he was to appoint another Arbitrator. Counsel further submits that a bare reading of the communication dated 2.12.2010, issued by the Arbitrator to counsel for the respondent and the petitioner, would show that Mr. Nigam had called upon the petitioner to appear before him, however, by a subsequent communication dated 10.1.2011, issued by Mr. Nigam to counsel for the respondent and petitioner, Mr. Nigam expressed his inability to act as the sole Arbitrator in the matter and, thus, appointed Mr. Sudhanshu Batra, Senior Advocate, as the Sole Arbitrator in the matter. Counsel next submits that once Mr. Arvind Nigam had entered upon reference in the matter he could have recused himself but he could not have appointed another Arbitrator in terms of Clause 7 of the Loan Agreement. It is thus contended by counsel for the petitioner that the entire proceedings before Sh.S. Batra are void.

5. The next objection raised by learned counsel for the petitioner is that no proper notice was issued to the petitioner before he was proceeded *ex parte*. It is further submitted that the petitioner was proceeded *ex parte* even before the statement of claim was filed by the respondent. Thus, the Arbitrator has acted against the principles of natural justice and hence the Award is against the public policy of India. In support of his plea that the Arbitrator has not served petitioner in accordance with law counsel for the petitioner has relied upon ***Surinder Kumar & Bros. v. Union of India***, reported at 1994 (1) Arbitration Law Reporter 16, more particularly para 11, wherein a Single Judge of this Court has held that Rule 17 of Order V of the Code stipulates that on refusal to accept service of notice, the summons should have been affixed at the last known address of the petitioner.
6. The third objection raised by learned counsel for the petitioner is that the sole Arbitrator erred in awarding interest on the principal amount in

favour of the respondent from the year 2007 instead of from one week after 8.6.2010 as set out in the document which was the very basis of the case of the respondent. Mr. Shandilya submits that the Loan Agreement dated 17.12.1007 categorically states that the sum of Rs.30.00 lakhs, advanced by the petitioner to the respondent, would carry no interest in case loan amount was repaid by the respondent to the petitioner within seven days of execution of the Sale Deed and in case the petitioner fails to repay the said amount within the stipulated time only then the interest could have been levied from that date onwards.

7. Per contra, learned counsel for the respondent at the very outset submits that Mr.Arvind Nigam, Senior Advocate, did not formally enter upon reference. Counsel further submits that since the petitioner failed to repay the loan amount in terms of the loan agreement despite a communication dated 9.6.2010 having been issued by the respondent to the petitioner, the respondent addressed a communication dated 4.9.2010 to Mr.Arvind Nigam, the named Arbitrator, a copy of which was also marked to the petitioner. Counsel for the respondent has drawn the attention of the Court to the communication dated 2.12.2010, addressed by Mr.Arvind Nigam to counsel for the respondent and to the petitioner, copy of which has been placed on record to show that the petitioner had made a telephonic call to Mr.Arvind Nigam informing Mr.Nigam that petitioner had requested his counsel to get in touch with Mr.Nigam but since neither the petitioner nor his counsel, Mr.Mriza Masaud / Mr.Ali Mirza, Advocates, contacted Mr.Nigam, by a communication dated 10.1.2011, addressed to counsel for the respondent and the petitioner, Mr.Nigam expressed his inability to act as an Arbitrator and nominated and appointed Mr.Sudhanshu Batra, Senior Advocate, as the sole Arbitrator.

8. It is submitted by Mr.Dholakia, counsel for the respondent, that

Mr.Arvind Nigam did not enter upon reference, which is evident from a bare reading of the communications dated 2.12.2010 and 10.1.2011, copies of which have been filed on record.

9. As far as the service is concerned, learned counsel for the respondent submits that petitioner has been evading service intentionally. Mr.Dholakia submits that it is only after the first communication dated 4.9.2010 addressed by respondent to Mr.Arvind Nigam, Senior Advocate, a copy of which was also sent to the petitioner and duly acknowledged by the petitioner, the petitioner made a telephonic call to Mr.Arvind Nigam, which would show that the petitioner was aware about the arbitration proceedings and also that the address mentioned in the said communication was correct. Counsel for the respondent has drawn the attention of the Court to the order passed by learned Arbitrator on 5.2.2011 to show that the learned Arbitrator entered upon reference vide his communication dated 18.1.2011. In the said order, the learned Arbitrator has observed that a copy of the communication dated 18.1.2011 was sent to the petitioner herein at the address appearing in the Loan Agreement, however, the same was returned by the Postal Department with the remark 'left'. Thereafter the same communication was again sent to the petitioner herein at F-35, South Extension-I, New Delhi, and also at Kasauli address by Speed Post Acknowledgement Due, however, the acknowledgment due card had not been returned. In the interest of justice, the Arbitrator sent a copy of the order dated 5.2.2011 to the petitioner by Speed Post for the next date of hearing. Counsel has also drawn the attention of the Court to the order dated 12.3.2011 passed by learned Arbitrator wherein the Arbitrator has noted that the letter dated 18.1.2011 was sent to the petitioner herein at South Extension address and at the Kasauli address by Speed Post. The Arbitrator has also noted that the

Speed Post tracking record indicates that the said letter was duly served upon the petitioner herein on 9.2.2011 at the South Extension address and the letter sent at Kasauli address was received back with the remark 'refused'. Mr. Dholakia submits that the Arbitrator having satisfied that petitioner herein was duly served, proceeded *ex parte* against the petitioner herein. Mr.Dholaiika further submits that in the order dated 8.4.2011 passed by learned Arbitrator the Arbitrator has observed that the claimant respondent herein has filed the statement of claim along with copies of documents and the original courier and postal receipts indicating dispatch of the same to the petitioner herein. Even at that stage, petitioner decided not to appear in the matter.

10. Mr. Dholakia has drawn the attention of the Court to the Award dated 10.10.2011 passed by learned Arbitrator wherein it has been observed by the learned Arbitrator that copies of all the orders were sent to the petitioner herein by courier, however, the petitioner has chosen not to appear on any of the dates. In support of his plea that petitioner herein has intentionally not appeared before the Arbitrator, learned counsel for the respondent submits that respondent has instituted a civil suit, being Suit No.1368/2011, against the petitioner herein and in the said suit petitioner herein was impleaded as defendant no.2. Counsel next submits that the address mentioned in the memo of parties of the suit is the same as in the present matter and the petitioner (defendant no.2 in the said suit) also appeared before the Joint Registrar on 11.8.2011, which would show that the South Extension address is the correct address of the petitioner, besides the fact that even summons in the suit were served upon the petitioner herein at the South Extension address. In addition thereto, Mr.Dholakia submits that even the Sale Deed dated 8.6.2010 mentions the South Extension address of the petitioner.

11. Mr.Dholakia contends that the judgment rendered in the case of *Surinder Kumar & Bros.* (supra), sought to be relied upon by the petitioner, is not applicable to the facts of the present case, more particularly on account of Sections 3 and 19 of Arbitration and Conciliation Act. It is contended that the judgment sought to be relied upon was pertaining to old Act and as per the new Act the Arbitral Tribunal is not strictly bound by the Code of Civil Procedure or the Evidence Act.
12. It is submitted by Mr. Dholakia that the stand taken by counsel for the petitioner that the principles of natural justice were not complied with is unfounded on account of the fact that the Arbitrator made number of attempts to serve the petitioner herein, however, the petitioner willfully avoided appearance before the Arbitrator.
13. Mr. Dholika further submits that the argument raised by the counsel for the petitioner with respect to payment of interest is without any force as the Loan Agreement dated 17.12.2007 makes it abundantly clear that in case petitioner paid the amount of Rs.30.00 lakhs within one week of the execution of the Sale Deed the loan amount would carry no interest. It is also clear upon reading of the Loan Agreement that in case the amount is not paid within seven days the entire amount is to be repaid with interest @18%. It is also submitted that there is no perversity in the Award rendered by the Arbitrator and thus the present objections filed by the petitioner are liable to be dismissed.
14. I have heard counsel for the parties and also perused the Award rendered by the sole Arbitrator on 10.10.2011 as also various documents including the Loan Agreement, Sale Deed, and the Orders sheets of the proceedings before the learned Arbitrator.
15. The facts, which led to the disputes between the parties are that a suit for partition was filed by the respondent in this Court in respect of the

property bearing no.4, Bhagwan Das Road, New Delhi – 110001, which was decreed on 30.5.2008 in terms of the settlement between the parties arrived at during the Mediation. On 8.12.2007, a promissory note was executed by the petitioner for Rs.30.00 lakhs. The petitioner in the year 2006-2007 had been periodically taking loan from the respondent, which added upto Rs.25.00 lakhs. A further amount of Rs.5.00 lakhs was given by the respondent to the petitioner when it was decided between the parties that a loan agreement be executed. On 17.12.2007, a loan agreement was accordingly executed by which time the loan amount added upto Rs.30.00 lakhs. As per the loan agreement executed between the parties, it was agreed that the entire loan amount would be repaid within one week from the payment of share of sale proceed to the petitioner. In the loan agreement there was an arbitration clause being Clause No.7, which reads as under:

“7. The Parties hereto agree that any dispute arising under this agreement shall be referred to the sole arbitration of Mr.Arvind Nigam, Advocate. If for any reason Mr.Arvind Nigam, Advocate is unable to act as the sole arbitrator, the parties agree that the sole arbitration shall be appointed by Mr.Arvind Nigam, Advocate, and such appointment shall be binding on the Parties. The arbitration proceedings shall be in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Delhi. The courts in Delhi shall have exclusive jurisdiction.”

16. On 8.6.2010 the property bearing no.4, Bhagwan Das Road, New Delhi – 110001 was sold by way of a registered sale deed and consequently the respondent became entitled to payment of Rs.30.00 lakhs within one week in terms of the loan agreement. On 9.6.2010 the respondent wrote a letter to the petitioner calling upon the petitioner to make payment of the loan amount on or before expiry of one week from the date of execution of the sale deed. The petitioner failed to respond to the said letter nor repaid the

said loan. On 2.9.2010 the respondent invoked the arbitration clause contained in the loan agreement and requested Mr.Arvind K. Nigam, Senior Advocate, the named Arbitrator in the loan agreement to enter upon reference or alternatively to appoint his nominee as arbitrator in terms of the arbitration clause contained in the Loan Agreement.

17. Broadly the following grounds have been urged by counsel for the petitioner:

- (i) the first Arbitrator, who entered upon reference, recused himself and appointed another Arbitrator, which he was not entitled to do so as per law.
- (ii) the second Arbitrator did not take proper steps to serve the petitioner;
- (iii) the Arbitrator has failed to interpret the Loan Agreement dated 17.12.2007 in a rational manner, thus, making the Award perverse;
- (iv) the Arbitrator has failed to follow the principles of natural justice, as before proceeding *ex parte* the Arbitrator has failed to consider that the statement of claim was yet to be filed before the Arbitrator;

18. Before dealing with the objections raised by the petitioner I deem it appropriate to revisit the law, which has been laid down by the Apex Court with regard to deciding the objections under Section 34 of Arbitration and Conciliation Act. It has been repeatedly held that the Court does not sit in appeal over the award to review the decision of the Arbitrator.

19. The observations of the Apex Court in the case of **State of Rajasthan Versus Puri Construction Co. Ltd And Another** reported in **(1994) 6 Supreme Court Cases 485 after referring to a catena of decisions** are

worth noting on this issue wherein it has been held that “The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of the evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator”. Similar view was reiterated in **Bijendra Nath Srivastava (Dead) through LRs Versus Mayank Srivastava And Others** reported in **(1994) 6 Supreme Court Cases 117** with a further observation that “the Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal” (SCC pg. 134, para 20).

20. Reference was also made in this case to another decision of the Apex Court in **Sudarshan Trading Co. Versus Govt. of Kerala** reported in **(1989) 2 SCC 38** holding that:

“there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator has acted contrary to the bargain between the parties”.

(emphasis supplied).”

21. Applying the law to the facts of this case, I find there is no force in the submission made by learned counsel for the petitioner that the appointment of Mr.Sudhanshu Batra was illegal as Mr.Arvind Nigam, who was the named Arbitrator, could not have appointed Mr.Sudhanshu Batra once he had entered upon reference. The communications dated

2.12.2010 and 10.2.2011 placed on record would show that Mr.Nigam never entered upon reference and he only called upon the parties to give their stand in terms of Clause 7 of the Loan Agreement. There is also nothing on record to show that Mr.Arvind Nigam had formally entered upon reference in the matter and after the proceeding commenced he recused himself. Mr.Nigam appointed Mr.Sudhanshu Batra to act as an Arbitrator, which he was entitled to do as per Clause 7 of the Loan Agreement and it was not necessary for Mr.Nigam to consult the parties before approaching an arbitrator.

22. As far as the second objection of counsel for the petitioner is concerned, a careful reading of the Award would show that the Arbitrator had made every possible effort to serve the petitioner with the notice of entering upon reference. The respondent served the petitioner with a copy of the claim and thereafter every order passed by the Arbitrator was sent/served upon the petitioner at the address, which finds mention in the Sale Deed as also at the address the petitioner received a communication dated 4.9.2010 pursuant to which the petitioner made a telephonic call to Mr.Arvind Nigam. The memo of parties pertaining to Suit No.1368/2011, wherein the petitioner has been arrayed as defendant no.2, shows the South Extension address and the order dated 11.8.2011 passed by Joint Registrar also shows that defendant no.2 (petitioner herein) was represented before him. In the said suit along with the written statement the petitioner herein has filed his affidavit, wherein the petitioner has deposed that at that point of time he was residing at South Extension, although he has given his permanent address of Bangalore. The arbitrator noted that the speed post tracking record indicated that notice was served upon the petitioner on 09.0-2.2011.

23. The above facts would clearly show that the address of the South

Extension is not an incorrect address, the petitioner has been receiving summons and other mail at this address and, thus, it cannot be said that the Arbitrator has failed to follow the principles of natural justice. There is no merit in the submission made by counsel for the petitioner that it was mandatory for the Arbitrator to send the statement of claim to the petitioner. A perusal of the order sheets of the Arbitrator reveal that a copy of the statement of claim was sent by the respondent to the petitioner and the original courier receipts were placed on record. The judgments sought to be relied upon by counsel for the petitioner is not applicable to the facts of this case.

24. There is also no merit in the submission made by counsel for the petitioner that the Arbitrator could not have awarded interest @18% from the date of the Loan Agreement, as a complete reading of the Loan Agreement dated 17.12.2010 would leave no room for doubt that in case the loan amount was repaid by the petitioner to the respondent within seven days from the Sale Deed, it would carry no interest, however, in case the petitioner fails to repay the loan amount within the stipulated time, the petitioner would repay the same with 18% interest. In view of this, I find that there is no infirmity in the Award passed by learned Arbitrator and the Award is not perverse. Consequently, there is no merit in the present objections and the same are accordingly dismissed with costs quantified at Rs.20,000/-, to be paid by petitioner to the respondent. Learned counsel for the respondents submits that costs may be deposited with Delhi High Court Lawyers Welfare Fund.
25. Accordingly, let costs be deposited by the petitioner with Delhi High Court Lawyers Welfare Fund.

G.S.SISTANI, J

FEBRUARY 02, 2012 msr