

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on : 11.12.2012

+ **FAO 493/2012**

GE MONEY FINANCIAL SERVICES PVT. LTD. Appellant
Through: Mr. Ajay Uppal, Adv.

versus

SUBHADRA DEVI & ANR Respondents
Through: None.

CORAM:-
HON'BLE MS. JUSTICE VEENA BIRBAL

JUDGMENT

VEENA BIRBAL, J.

1. By way of this appeal, the appellant has assailed the impugned Judgment dated 23.12.2011 by which application of the respondents under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter to be referred as the Act) has been allowed and the award dated 26.08.2010 passed by the sole arbitrator Sh. Nitin Chadha, Advocate, has been set aside. The appellant has also assailed order dated 07.08.2012 by which review application challenging the aforesaid judgment is also dismissed.

2. Briefly, the relevant facts necessary for disposal of present appeal are as under:-

The appellant herein was the claimant in the arbitral proceedings and had filed a claim petition against the respondents stating therein that appellant/claimant is a company which provides financial credit facilities in

various kinds of loans. The respondents had approached the company for availing financial credit facility and accordingly, the appellant/claimant sanctioned and disbursed a loan of ₹ 14 lakhs to the respondents. The respondents had executed a loan agreement no.HDLH00004521 agreeing to repay the said loan with interest @ 14% and also created a mortgage with respect to the immovable property bearing no. RZ-500/A, near Niran Kari Bhawan, Raj Nagar-1, Palam Colony, New Delhi-45 by depositing the original title papers. It was alleged that the respondents defaulted in repayment of loan amount as agreed and therefore the loan facility was recalled vide notice dated 07.08.2009 and the appellants were directed to pay the entire loan amount with interest and other charges amounting to ₹ 16,68,841/-. It was alleged that as the respondents had failed to repay the amount demanded, the claimant company referred the dispute for arbitration wherein it had filed a claim of ₹ 16,68,841/- along with interest @ 14% per annum and further prayed for directions to the effect that the mortgage property of respondent referred to above be handed over to the appellant/claimant for the purpose of realization of their claim.

3. Perusal of award dated 26.08.2010 on record shows that appellant/claimant had sent a letter dated 30.09.2009 to the Arbitrator nominating him as the sole arbitrator to adjudicate upon the dispute between the parties and asked his concurrence to act as sole arbitrator in terms of the loan agreement. On 13.10.2009 the arbitrator is alleged to have given his concurrence. It is alleged that copy of the said letter was also sent to the parties and the Arbitrator had fixed the matter for preliminary hearing and directions on 16.11.2009. It is further stated in the award that the copy of the proceedings was sent to the respondents by registered post and were

given by hand to the appellant/claimant. However, none appeared on 16.11.2009 on behalf of respondents whereas the appellant had filed its claim petition. Thereafter, twice notices were sent to the claimants at their last known address but they failed to appear. Ultimately, due to non-appearance on 01.04.2010, the respondents were proceeded ex parte and thereafter ex parte evidence was recorded and award in the sum of Rs. 16,68,841/- was passed against the respondents along with interest @ 18% per annum on the principal amount. It was further ordered that in the event of non-payment of aforesaid amount within thirty days, the appellant/claimant would be entitled to sell the mortgaged property for recovery of loan amount.

4. Aggrieved with the same, the respondents had filed an application under Section 34 of the Act to set aside the ex parte award dated 26.08.2010 by the Arbitrator.

5. The stand of the respondents before the Id. ADJ was that they were not informed about the commencement of the arbitral proceedings. The sole arbitrator is a person appointed by the appellant and award passed by him is biased. No notice was ever served on the respondents by the Arbitrator to enable them to defend their case. It was further contended that the respondents had already paid Rs. 8,48,400/- to the appellant/claimant for repayment of loan amount and no adjustment has been given in the ex parte award for the said amount. They had further contended that they had come to know of the award only when they received a notice of the court in execution petition filed by appellant/claimant.

6. The Id. ADJ issued notice to the appellant/claimant and called for the arbitral proceedings. The respondent no.1/claimant did not file any reply to

the objections despite opportunity given. After hearing the counsel for parties and going through the record of arbitral proceedings, it was observed that as per the record, the Arbitrator had sent three notices to the respondent no.1 informing about the dates of hearing. On seeing the postal receipts, the Id. ADJ was of the view that the complete address of the appellants had not been stated therein. Only, the name of respondents and locality was given and no complete address was mentioned as such observed that the presumption of delivery of notice could not have been drawn as the notices were not sent at the complete address of the respondents. The Id. ADJ also observed that even the proceedings had not been conducted by the Arbitrator as per the provisions of the Act and noted the circumstances in the impugned order which created doubt about conducting the proceedings in an appropriate manner and accordingly allowed the objections and set aside the ex parte award and remanded the matter to the Id. Arbitrator for deciding the same afresh after giving notice to the parties to present their case.

7. Aggrieved with the same, appellant has filed the present appeal. It is contended that the finding of the Id. ADJ that no service was effected on the respondents is wrong. It is contended that the notices were sent mentioning the complete address of the respondents. However, the counsel for the appellant/claimant has failed to place on record any material to substantiate his contention that the notices were sent at the complete address of respondents. There is no receipts/AD card on record showing that the notices of arbitration proceedings were given to the respondents mentioning their complete address. Id. ADJ has gone through the arbitral record and has observed as under in the impugned order:-

“11. It is seen from the record of arbitration proceedings

that the only proof available to show that the notices were sent to the applicants are the postal receipts which read as follows:

(a) (Postal receipts dated 14.10.09 on page No.44 of arbitrator's file).

To: Subhadra Devi, Palam, N Delhi.

To: Surender Singh, Palam, N Delhi.

(b) (Postal receipts dated 16.12.09 on page No.46 of arbitrator's file).

To: Subhadra Devi, Palam, Ghaziabad

To: Surender Singh, Palam, Ghaziabad

(c) Postal receipts dated 06.03.10 on page No.48 of arbitrator's file.)

To: Surender Singh, Palam Colony.

N Delhi

To: Subhadra Devi, Palam Colony, N Delhi.

12. From the above it is clear that the address to which notices were sent is not the complete address but only shows the name of the applicant and the locality. Presumption of delivery of notice can be drawn only when a notice is sent to the complete address and not to an incomplete or wrong address. The postal receipts on page No.46 show that the notices are sent to Ghaziabad which is a far away place from the actual address of the applicants. It is pertinent to note that no acknowledgment card pertaining to the said notices are filed on record. The arguments of the Ld. Counsel for respondent No.1/claimant that the service of notices have to be presumed despite non receipt of acknowledgment cards cannot be accepted in the present case for following reasons:-

(i) The postal receipts do not show the complete address of the applicants and in fact some of the postal receipts show the wrong address of the applicants.

(ii) No acknowledgment card is received for all the 6 notices which are sent by registered post."

8. The ld. ADJ has also recorded that the record of arbitration proceedings also create a doubt as to whether the proceedings were properly conducted by the arbitrator as per provisions of the Act. The relevant finding in this regard is as under:-

“16. The other material on the record of arbitration proceedings also create a doubt as to whether the proceedings were properly conducted by the arbitrator as per the provisions of the Act. The circumstances which create doubt are as under:-

1. As per the record, one Aswani Kumar has filed claim petition before the arbitrator on 16.11.09. The power of attorney given in his favour by the claimant company i.e. Ex.CW1/1 is dated 23.11.09.
2. The date on the claim petition is shown as “12/10”. If it is considered as month and year, then it will be a claim petition filed after the passing of the award. If the same is considered as date and month, it is filed by the person who does not have authorization to file a claim on behalf of respondent No.1/claimant as on the date of filing.
3. The acknowledgment cards of the demand notice sent to the applicants which are on page No. 73 and 74 of the arbitration file do not bear any postal stamp which create doubt as to whether such notices were ever sent to the applicant.”

9. The ld. counsel appearing for the appellant/claimant has no answer to aforesaid observation of ld. ADJ. The ex parte award has serious consequences on respondents as it also authorizes the appellant/claimant to sell the mortgaged property of respondents on non-payment of amount awarded within 30 days. The right to contest the claim should not be denied to the respondents when on the face of the arbitral proceedings it is clear that respondents were not served.

10. In view of above discussion, ld. ADJ was right in coming to the conclusion that there was no service on the respondents. No illegality is seen in the order of the Ld. ADJ. The impugned order dated 23.12.2011 is a reasonable one and the findings are based on material on record.

11. The other contention of the appellant is that the application under Section 34 of the Act was filed beyond the period of limitation, as such, the same ought to have been dismissed on that ground. It is contended that Ld. ADJ has wrongly dismissed the review application wherein aforesaid contention was brought to the notice of the court. In this regard also, there is nothing on record to show that the ex parte award dated 26.08.2010 was served on the respondent no.1. Ld. counsel has referred to one AD card dated 10.09.2010 which pertains to a co-borrower. In the facts and circumstances of the case, the contention raised has no force. Even assuming it to be service, the service to a co-borrower cannot be taken as service on the other borrower.

12. In view of above discussion, no illegality is seen in the impugned order which calls for interference of this Court. The appeal stands dismissed with costs of Rs. 5000/-.

VEENA BIRBAL, J

DECEMBER 11, 2012
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