

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

% *Judgment pronounced on: March 10, 2014*

+ **O.M.P. No.858/2011**

SUNIL NANDA Petitioner
Through Mr.Ajay Verma, Adv. with
Mr.Sanjeev Sharma, Adv.

versus

L & T FINANCE LTD & ORS Respondents
Through Mr.Amit Bajaj, Adv. for R-1.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order, I propose to decide the abovementioned petition under Section 34 of the Arbitration and Conciliation Act, 1996 filed by Mr.Sunil Nanda, the petitioner, against the impugned Award dated 29th July, 2011 published by the sole Arbitrator.

2. The present petition involves the question, whether a guarantor for a loan, who is not a party to the loan agreement which contains an arbitration clause, admittedly executed between the lender, namely, L & T Finance Ltd. (respondent No.1 herein) and borrower, namely, Mr.Aditya Talwar (respondent No.2 herein) can be made a party to a reference to arbitration with regard to a dispute relating to repayment of a loan.

3. Learned counsel for respondent No.1, in whose favour the Award was published, has admitted before the Court that Mr.Sunil Nanda (petitioner herein) is merely a guarantor and not a party to the loan agreement.

4. Few facts which are necessary to decide the present petition are that under the loan agreement, respondent No.1 extended a loan to respondent No.2 to the extent of ₹66 lacs for purchase of three truck chasis. Respondent No.2 was irregular in making the payment of principal and interest to respondent No.1 who repossessed and sold the vehicles. The details of the same are given as under:-

Vehicle Particulars	Repossession No.	Sale Date	Sale Amount	Balance sum due after sale (in ₹)
Chasis No. 415206HRZ309802 Engine No. 80H62707057	15/Aug/09	23/Nov/09	13,60,000.00	9,07,697.00
Chasis No. 415206HRZ309718 Engine No. 80H62707111	01/Aug/09	23/Nov/09	13,60,000.00	8,71,311.00
Chasis No. 415206HRZ309791 Engine No. 80H62707292	01/Aug/09	23/Nov/09	13,60,000.00	8,69,909.00

5. Respondent No.1 thereafter initiated the arbitration proceedings for recovery of an amount of ₹26,48,917/- and further interest @ 36% p.a. on ₹9,07,697/- from 16th August, 2009, on ₹8,71,311/- from 2nd August, 2009 and on ₹8,69,909/- from 2nd August, 2009, till payment and/or realization.

6. Before the Arbitrator, respondent No.1 at the time of filing the statement of claim has admitted that the loan was sanctioned to respondent No.2. The petitioner and respondent No.3 have signed the Letter of Guarantee in favour of respondent No.1. Thus, the guarantors, who are not the signatories to the agreement, were also made parties in the arbitration

proceedings. Respondent No.3 is the father of respondent No.2 and I have been informed that they have not challenged the impugned award. Learned counsel appearing on behalf of the respondent No.1 has not confirmed about the pendency of execution proceedings against them.

7. It is an admitted position that the petitioner herein (respondent No.2 before the Arbitrator) filed the objection-cum-reply to the claim, inter-alia, informed the Arbitrator that the petitioner is not a party to the alleged agreement.

8. Learned counsel for the petitioner has argued that in the Deed of Guarantee dated 29th September, 2008, nowhere it is mentioned that the terms and conditions of the loan agreement executed between respondent No.1 and respondent No.2 would be binding upon the petitioner (being guarantor).

9. Learned counsel for the petitioner further states that respondent No.1 has not initiated any proceedings against respondent No.2 who was the borrower and has taken the loan from respondent No.1. Respondent No.3 is the father of respondent No.2. Respondent No.1 is also not initiating any action against him. The respondent No.1 only intends to harass his client (petitioner herein) who is not a party to the loan agreement. Counsel did not dispute the fact that the civil remedy is maintainable for recovery of loan amount from the borrower and guarantor. However, in the absence of being party to the award on the agreement, the orders of arbitration proceedings could not have been passed.

10. In para 2 of the Award, surprisingly, the Arbitrator has incorrectly mentioned that the agreement was entered into between respondent No.1 and respondents No.2 & 3 and the petitioner. Whereas, the actual position is

otherwise that the loan agreement was only executed between the respondent No.1 and respondent No.2. The arbitration was invoked in view of clause 17 of the loan agreement. The Arbitrator in his Award did not discuss the objection raised by the petitioner that the petitioner is not a party to the agreement. The Arbitrator has held that all the respondents are bound by the terms of the loan agreement and had committed default in payment under the loan agreement, therefore, respondents No.2 & 3 and the petitioner are jointly and severally liable to pay to respondent No.1 a sum of ₹26,48,917/- together with further interest @ 24% per annum on ₹17,41,220/- from 2nd August, 2009 and on ₹9,07,697/- from 16th August, 2009 till payment and/or realization in full. In the Award, the Arbitrator did not note the objections raised by the petitioner and also did not specifically come to the conclusion that the loan agreement was executed by and between respondent No.1 and respondent No.2 whereas the petitioner and respondent No.3 have executed the guarantee separately from the loan agreement.

11. In the similar situation, the Hon'ble Supreme Court has dealt with the same issue in the case of *S.N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited and Others*, reported in (2011) 1 Supreme Court Cases 320. Relevant paras 10 & 11 read as under:-

“10. An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under Section 7(4)(a) or (b) of the Act, insofar as appellant was concerned, though there was an arbitration agreement as defined under Section 7(4)(a) of the Act in regard to the second and third respondents. As the letter

dated 27-10-1995 does not refer to any document containing an arbitration clause, there is also no arbitration agreement between first respondent and appellant as contemplated under Section 7(5) of the Act.

11. What therefore remains to be considered is whether there is an arbitration agreement as contemplated under Section 7(4)(c) of the Act, which provides that an arbitration agreement in writing can be said to exist, if it is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. The statement of claim filed by the first respondent before the arbitrator does not contain an allegation or assertion of an arbitration agreement between the first respondent and appellant. Nor has the appellant accepted the existence of any arbitration agreement by not denying such arbitration agreement in the defence filed before the arbitrator. On the other hand, the appellant specifically contended before the arbitrator that there was no arbitration agreement between them (first respondent and appellant) and therefore the arbitrator did not have jurisdiction.”

12. Learned counsel for respondent No.1 has also referred the following decisions in support of his submissions:-

- (i) ***Krishna Bhagya Jala Nigam Ltd. vs. G.Harischandra Reddy and Anr.***, Appeal (Civil) No.149 of 2007, decided on 10th January, 2007 by the Supreme Court.
- (ii) ***S.N.Malhotra and Sons vs. Airport Authority of India and Anr.***, 2008(2) ARBLR 76 Delhi.
- (iii) ***Scholar Publishing House Pvt. Ltd. vs. M/s Khanna Traders***, FAO(OS) No.184/2013, decided by this Court on 19th July, 2013.

13. After having gone through the above said decisions, I am of the view that none of the judgments referred by the learned counsel for respondent

No.1 is applicable to the facts and circumstances of the present case. It has been noticed from the said decisions that the consent was given by the parties and even, in view of the cases, no objection was raised in the arbitration proceedings. However, in the present case, there was no consent given by the petitioner to continue with the arbitration proceedings against him and rather, the petitioner has raised the specific objection before the Arbitrator within the meaning of Section 16 of the Arbitration and Conciliation Act, 1996 that he is not a party to the agreement and the said objection has not been decided by the Arbitrator in his Award.

14. Admittedly, there was no arbitration clause in the Guarantee Deed. The arbitration clause exists only in the loan agreement in which the respondent No.1 and respondent No.2 are the parties. The impugned Award admittedly passed from the arbitration clause in the loan agreement, it cannot be binding upon the petitioner on the face of it in the present case. Thus, the same is set aside as far as petitioner is concerned.

15. The present petition is accordingly allowed.

(MANMOHAN SINGH)
JUDGE

MARCH 10, 2014