

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1021 OF 2014

Deccan Chronicle Holdings Ltd. & Anr. Petitioners

VERSUS

L. & T. Finance Ltd. Respondent

Mr.Rohan Cama, a/w. Ms.Sapana Rachure, Ms.Ekta Tripathi, i/b. Dhir & Dhir Associates for the Petitioners.

Mr.Anand Poojary, a/w. Mr.Nilesh Gala, i/b.S.I.Joshi & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 5th MAY, 2015

P.C.

By this petition, the petitioners have impugned the arbitral award dated 15th March, 2014 thereby allowing some of the claims made by the respondent.

2. The respondent was the original claimant whereas the petitioners were the original respondents in the arbitral proceedings.

3. Sometimes in the year 2011, the respondent had granted various facilities under facility agreement entered into between the petitioner no.1 and the respondent. On 13th May, 2011 the petitioner no.2 had entered into a deed of guarantee with the respondent. The petitioner no.1 also entered into a deed of simple mortgage in favour of the respondent on 20th May, 2011.

4. It was the case of the respondent that since the petitioner committed default in making repayment of the amount, on 13th August, 2012, the respondent invoked arbitration agreement and called upon the petitioner to pay the arrears.

5. On 29th August, 2012, the respondent herein filed petition under section 9 of the Arbitration and Conciliation Act, 1996 (1095 of 2012) against the petitioner in this court inter alia praying for interim measures. The said arbitration petition was opposed by the petitioners by filing reply. In the said arbitration petition, this court was pleased to grant interim measures in favour of the respondent. In paragraph 14 of the said arbitration petition, the respondent had averred that the respondent had invoked the arbitration clause and the disputes shall be referred to arbitration of Mr.Bharat B.Jain, advocate. The petitioners were aggrieved by the said order passed by this court and filed an appeal before Division Bench of this court. The said appeal was rejected by the Division Bench. I am informed that the Special Leave Petition filed against the said order passed by the Division Bench is also rejected.

6. Mr.Cama, learned counsel appearing for the petitioner submits that neither any statement of claim alongwith documents nor any notices were served upon petitioner no.2. Learned counsel invited my attention to the compilation of documents filed by the respondent in support of this submission.

7. Insofar as notice invoking arbitration agreement dated 29th August, 2012 is concerned, it is submitted by the learned counsel that though the said notice was alleged to have been dispatched at the correct address of the petitioner no.2, the same was not served upon the petitioner no.2 personally. It is submitted that the recipient of the said notice is not known to the petitioner no.2.

8. Insofar as letter dated 16th October, 2012 alongwith statement of claim alleged to have been served upon the petitioner no.2 is concerned, learned counsel submits that though the address of the petitioner no.2 mentioned on the said letter and the receipt issued by the postal authority is concerned is correct, the respondent has not produced any acknowledgement card issued by the postal authority. He submits that no such statement of claim was served upon the petitioner no.2.

9. Insofar as notice dated 21st November, 2012 from the learned arbitrator to the parties is concerned, learned counsel submits that there is no dispute that the address mentioned in the notice as well as on the acknowledgement card is that of the petitioner no.2. The petitioner no.2 however disputes the receipt of the said notice. He submits that the petitioner no.2 does not know who has signed the acknowledgment card on behalf of petitioner no.2 and the same was not personally served upon the petitioner no.2.

10. Insofar as notice dated 26th December, 2012 issued by the learned arbitrator is concerned, learned counsel submits that the address mentioned in the notice as well as on the acknowledgement card is that of the petitioner no.2. The petitioner no.2 however does not know who had signed the said acknowledgment card and the said notice was not personally served upon petitioner no.2.

11. Insofar as minutes of the meeting dated 16th January, 2013 is concerned, learned counsel submits that the petitioner no.2 was never served with the copy of such minutes of meeting. He submits that since petitioner no.2 was not served with the statement of claim and notices from the learned arbitrator, the petitioner no.2 could not appear before the learned arbitrator and could not file any written

statement. The learned arbitrator thus could not have passed any ex-parte award against the petitioner no.2.

12. Insofar as award dated 15th March, 2013 is concerned, learned counsel submits that copy of the award was duly served upon the petitioner no.2 and the same is not in dispute.

13. Learned counsel submits that the statement of claim as well as all the notices ought to have been served by the respondent as well as by the learned arbitrator respectively personally upon the petitioner no.2 and not merely at the last known address available with the respondent.

14. The next submission of the learned counsel for the petitioner is that the learned arbitrator who has rendered an award has been appointed in larger number of matters by the respondent as an arbitrator and in view of such appointments regularly of the same arbitrator by the respondent, the arbitrator would act with biased in favour of the respondent and against the borrowers. In support of this submission, learned counsel placed reliance on IBA Guidelines on Conflict of interest on the international arbitration.

15. The next submission of the learned counsel for the petitioner is that the respondent could not have consolidated the arbitration proceedings and claims against the principal borrower with the petitioner no.2. He submits that there were two separate agreements entered into between the respondent no.2, one with the petitioner no.1 and another with the petitioner no.2. Both the agreements contained a separate arbitration agreement and thus though the respondent could have referred two separate references to the same arbitrator, there ought to have

been separate arbitral references and proceedings one against the petitioner no.1 and another against the petitioner no.2.

16. Mr.Poojary, learned counsel appearing on behalf of the respondent on the other hand supported the findings rendered by the learned arbitrator. He invited my attention to the documents forming part of the compilation before the learned arbitrator and would submit that both the petitioners were served with the statement of claim alongwith documents and notices from time to time. He submits that the petitioners have not disputed that the addresses at which the notices as well as statement of claim was sent by the respondent were not that of the petitioners. He submits that the petitioners had contested the proceedings filed by the respondent under section 9 of the Arbitration and Conciliation Act, 1996 and were fully aware that Mr. Bharat Jain, advocate was appointed as the sole arbitrator. He submits that since the petitioner failed to file any written statement though were served with a copy of the statement of claim, no issue of jurisdiction which could have been raised by the petitioners before the learned arbitrator can be allowed to be raised for the first time in this proceedings under section 34 of the Arbitration and Conciliation Act,1996.

17. Insofar as submission of Mr.Cama, learned counsel for the petitioners that no acknowledgment cards were produced by the petitioners in respect of one of the notice issue by the respondent is concerned, he submits that the respondent has produced copy of the receipt issued by the postal authority which shows that the said notice was dispatched by the postal department at the address mentioned therein. He submits that the respondent did not receive the said packet returned from the postal authority. Reliance is placed on section 3 of the Arbitration and Conciliation Act, 1996 and also on section 27of the General Clauses Act and it is

submitted that once the notice is dispatched at the correct address duly sent by the Registered A.D., there is deemed service of such notice upon the noticee.

18. A perusal of the record clearly indicates that the petitioners had contested the proceedings filed by the respondent under section 9 of the Arbitration and Conciliation Act before the learned Single Judge as well as before the Division Bench. In the petition filed under section 9 by the respondent in this court, there was a reference to the proposed appointment of Mr. Bharat Jain, advocate as an arbitrator. It was also one of the issues raised in those proceedings whether the respondent could apply for enforcement of mortgage in the arbitration proceedings or not. This court has taken a view that as and when the statement of claim would be filed by the respondent before the learned arbitrator, it would be for the respondent to decide whether to press for such relief or not.

19. A perusal of the notice invoking arbitration agreement dated 29th August, 2012 by the respondent clearly indicates that the said notice was sent by the respondent at three addresses of the petitioner no.1 and at the residential address of the petitioner no.2. The acknowledgement cards forming part of the record of this proceedings clearly indicates that the said notice was received by somebody at the residential address of the petitioner no.2 and by petitioner no.1 at various addresses.

20. Notice dated 30th August, 2012 was also sent at three addresses of the petitioner no.1 and at the residential address of the petitioner no.2. Even the said acknowledgment card is signed by somebody on behalf of the petitioner no.2.

21. Similarly the statement of claim forwarded by the respondent to the learned arbitrator as well as to the petitioners vide letter dated 16th October, 2012 was also served at three addresses of the petitioner no.1 and at the residential address of the petitioner no.2. The respondent however has not annexed the acknowledgment card insofar as petitioner no.2 is concerned. The respondent however has annexed the copy of the receipt issued by the postal authority showing the proof that the same was dispatched to the petitioner no.2 at his residential address.

22. Insofar as notices dated 21st November, 2012 issued by the learned arbitrator is concerned, even the said notice was served at three addresses of the petitioner no.1 and at the residential addresses of the petitioner no.2. The said acknowledgment card is also signed by somebody on behalf of the petitioner no.2. The notice dated 26th December, 2012 issued by the learned arbitrator is also similarly sent at the three addresses of the petitioner no.1 and at the residential address of the petitioner no.2. The said acknowledgment card is also signed on behalf of the petitioner no.2.

23. A perusal of the award dated 15th March, 2013 alongwith copy of the covering letter issued by the learned arbitrator and the acknowledgment cards annexed thereto also indicates that the copy of the award was also served at three addresses of the petitioner no.1 and at the residential address of the petitioner no.2. It is not in dispute that the copy of the award was duly served upon both the petitioners at the addresses mentioned in the award, covering letter as well as on the acknowledgment card. A perusal of the acknowledgment card of petitioner no.2 clearly indicates that even the said acknowledgment card was signed by somebody else on behalf of the petitioner no.2. Mr.Cama, learned counsel appearing for the petitioners does not dispute that

though the said copy of the award was received by somebody else on behalf of the petitioner no.2 at the address mentioned in the award, covering letter of the learned arbitrator and on that acknowledgment card, the same was received by the petitioner no.2.

24. In my view the respondent has served notice invoking arbitration agreement and the statement of claim upon both the petitioners at the last known addresses of the petitioners. It is not in dispute that the address mentioned on these notices were the correct addresses of the petitioners. All the notices were sent by Registered A.D. The respondent has produced the receipts issued by the postal authorities in respect of all such notices whether sent by the respondent or by the learned arbitrator. The respondent has also produced the acknowledgment cards in respect of all such notices except one. Only in respect of one such notice sent by the learned arbitrator, the respondent could not produce the acknowledgment card insofar as petitioner no.2 is concerned. In my view once the notices are sent by Registered A.D. at the correct address and even if the same are not returned by the postal authorities to the sender, there is deemed service under section 3 of the Arbitration and Conciliation Act, 1996 read with section 27 of the General Clauses Act.

25. Insofar as submission of Mr.Cama, learned counsel for the petitioners that there was no signature of the petitioner no.2 personally on any of the acknowledgment cards produced by the respondent is concerned, in view of section 3 of the Arbitration and Conciliation Act, 1996, even if there is no acknowledgment of the recipient of any notice, once the notice is dispatched at the correct address and is not returned, there is a deemed service.

26. It is curious to note that though the petitioner no.2 has admitted the receipt of the copy of award by the learned arbitrator though acknowledgment card is showing signature of somebody else on behalf of petitioner no.2, the petitioner no.2 has now disputed the factum of receipt of the notices and statement of claim on the pretext that the same were not signed by petitioner no.2 but somebody else which is not known to the petitioner no.2. I am not inclined to accept the submission of the learned counsel that the petitioner no.2 was not served with any of the notices or the statement of claim.

27. Since the petitioners have not chosen to file written statements and remained absent though served, petitioners cannot be allowed to raise issue of jurisdiction for the first time in this proceedings under section 34 of the Arbitration and Conciliation Act, 1996. Be that as it may, in my view there is no merit in the submission of the learned counsel for the petitioners that the respondent ought to have filed two separate arbitration proceedings, one against the petitioner no.1 and another against the petitioner no.2. It is not in dispute that in the agreement entered into with the petitioner no.1, there is a reference to the agreement with the petitioner no.2 and vis-a-versa. In my view respondent thus could have invoked arbitration agreement in any of the agreement against both the petitioners.

28. Insofar as submission of the learned counsel for the petitioner that the learned arbitrator acted biased in view of the fact that he has been regularly appointed by the respondent as an arbitrator in large number of matters is concerned, it is not in dispute that the petitioner did not file any application under sections 12 and 13 before the learned arbitrator. I am thus not inclined to accept this submission across the bar or in the petition under section 34 for the first time. Whether an arbitrator who has been regularly appointed by the respondent as an

arbitrator in larger number of matters, whether would indicate any bias on the part of the arbitrator or not is concerned, the same can be decided in appropriate case. Learned counsel for the petitioners did not make any other submission.

29. In my view there is no merit in any of the submission made by the petitioner. Petition is devoid of merits and is accordingly dismissed with cost quantified of Rs.25,000/- which shall be paid by the petitioners to the respondent within two weeks from today.

[R.D. DHANUKA, J.]