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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+
O.M.P. 308 of 2014

RAMESHWAR LAL ..... Petitioner
Through: Ms. Padma Priya, Advocate

versus

ESCORTS FINANCE LTD. AND ORS. ..... Respondents
Through: Mr. Sidhant Kaushik, Advocate for Respondent No.1;
Mr. A.K.Mishra for Respondent No.2

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>

% **14.05.2015**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 is to an Award dated 20th December, 2013 passed by the learned Arbitrator.

2. The background to this petition is that Escorts Finance Limited ('EFL'), Respondent No. 1 herein, advanced a loan in the sum of Rs. 14 lakhs to Mr. Kartha Ram Chowdhry (Respondent No. 3) under a Hire-Purchase Agreement dated 25th December, 2001. The Petitioner, who stood as guarantor, was also a party to the Agreement.

3. When Respondent No. 3 defaulted in repayment of the loan, after having paid the last instalment on 31st March, 2005, Respondent No. 1 purportedly invoked the arbitration clause and had the dispute referred to the arbitration of a sole Arbitrator nominated by it by letter dated 14th March, 2012.

4. It is seen from the impugned Award that notice of arbitral proceedings was first issued by the learned Arbitrator on 22nd March, 2012 and the notice was despatched on 26th March 2012 by registered post. The notice was made returnable on 4th May, 2012 on which date only the Authorized Representative (AR) of EFL appeared. The proceedings were adjourned to 5th June, 2012, on which date none appeared for the Petitioner herein (Respondent No. 2 in the arbitral proceedings). Accordingly, he was proceeded *ex parte*.

5. However, on the next date, i.e. 22nd September, 2012 counsel for Respondent No. 2 (Petitioner herein) filed his vakalatnama. The application filed by the Petitioner herein on 13th October, 2012 for setting aside the *ex parte* order was allowed by the learned Arbitrator. On 17th November 2012, Respondent No. 3, the Principal Borrower

(who was Respondent No. 1 before the learned Arbitrator) was proceeded *ex parte*. Later, counsel for Respondent No. 3 appeared. An application filed by him for setting aside *ex parte* order qua Respondent No.2 was allowed by the learned Arbitrator.

6. Thereafter, an application was filed by the Petitioner before the learned Arbitrator under Section 12 and 13 of the Act praying that he should cease to act as such. When the learned Arbitrator failed to decided the said application, the Petitioner filed OMP No. 1000 of 2013 before this Court. During the hearing of the said petition on 26th November 2013, the Court was informed that the Arbitrator had decided the said application on 26th October, 2013. The Court was also informed that the Arbitrator had reserved orders in the main matter for pronouncement of the award. The Court reserved the right of the Petitioner to urge the grounds which were the subject matter of OMP No. 1000 of 2013, in a petition that might be preferred under Section 34 of the Act.

7. In the impugned Award dated 20th December, 2013, the learned Arbitrator came to the conclusion that the claim against the Principal

Borrower i.e. Respondent No. 3 (who was Respondent No. 1 before the learned Arbitrator) was barred by limitation. However, the learned Arbitrator held that the claim against the Petitioner herein, i.e. guarantor was within limitation. Learned Arbitrator observed that a demand letter issued by EFL to the Principal Borrower was dated 16th January, 2009 and going by that date, EFL could proceed against the guarantor up to 15th January, 2012. The learned Arbitrator came to the above conclusion after noticing the judgment of the Supreme Court in ***Syndicate Bank vs. Channaveerappa Beleri 2006 11 SCC 506.*** Consequently, learned Arbitrator held that EFL was entitled to recover R. 23,72,860/- from the Petitioner herein along with interest @ 9% per annum from 30th March, 2012 till the date of payment and that in turn the Petitioner was at liberty to recover the said amount from the Principal Borrower.

8. This Court has heard the submissions of Ms. Padma Priya, learned counsel for the Petitioner and Mr. Siddhant Kaushik, learned counsel appearing for EFL.

9. The legal position on the liability of a guarantor has been discussed extensively in the decision in ***Syndicate Bank*** (*Supra*). It has been

explained that a guarantor's liability depends on the terms of the contract and that a 'continuing guarantee' is different from an ordinary guarantee. It has been emphasised that the extent of liability under guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract. It was pointed out that in case where guarantee is payable on demand, "the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand".

10. It is noticed that in the present case, Clause 14.1 of the Hire-Purchase Agreement dated 25th December, 2001 states that: "the guarantor shall on demand and without any demur or protest, contest or recourse pay the Owner all moneys and discharge all obligations and liabilities. ....". Consequently it was imperative that there had to be a demand made on the guarantor by the lender i.e. EFL. Under Clause 17, any notice on demand had to be given in writing and sent either by post or delivered by hand at the last known address of the parties. There is no document placed on record by EFL to show that prior to filing a claim before the learned Arbitrator, any notice on demand was served in writing on the guarantor i.e. the Petitioner

herein. On the other hand, it is stated in para 7 of the statement of claims that "Several letters and reminders were sent to the Respondents to clear the outstanding balance but all in vain. Despite several efforts, Respondents failed to clear the outstanding dues to the claimant." Consequently one of the conditions of the contract between the parties, namely the raising of a demand on the Petitioner, was not complied with by the EFL.

11. The other factor to be noticed is that the last payment made by the Principal Borrower, as per the statement of account placed by the EFL before the learned Arbitrator, was on 31st March 2005. There is no other entry after that date. Therefore, even as regards the Principal Borrower, a demand for payment had to be made by EFL within three years of that date. In any event, the claim itself had to be preferred within three years from that date.

12. Significantly the learned Arbitrator himself has not accepted the plea of the EFL that since "the account was not settled" the liability continued as far as the Principal Borrower is concerned. The learned

Arbitrator held that the claim as far as the Principal Borrower is concerned was barred by limitation.

13. Where the claim against the Principal Borrower is itself barred by limitation and no demand is made against the guarantor, then clearly there can be no claim maintainable against the guarantor as well. In the present case, even as noted by the learned Arbitrator, the claim against the Principal Borrower was made for the first time only on 16th January, 2009 by a demand letter which was already beyond the limitation which expired on 31st March, 2008. Therefore, on 16th January, 2009 the claim against the Principal Borrower itself was no longer a live claim. As explained in ***Syndicate Bank*** (supra) "if the debt had already become time-barred against the principal debtor, the question of the creditor demanding payment thereafter, for the first time, against the guarantor, would not arise."

14. There is no merit in the plea of the counsel for the Respondent that the claim filed before the learned Arbitrator was analogous to a notice under Section 106 of the Transfer of Property Act, 1882, and therefore satisfied the requirement of a demand having to be made in writing against the guarantor. Apart from the analogy being inapposite, the

submission overlooks the legal requirement of the claim against the Principal Borrower having to be "live claim" on the date on which a demand is made against the guarantor. In this case, there is no doubt that on the date the claim was filed against the guarantor, the claim against the Principal Borrower was a dead claim.

15. For the aforementioned reasons, the Court is satisfied that the impugned Award of the learned Arbitrator suffers from a patent illegality as it is contrary to the statutory law of India i.e. Limitation Act 1963, Therefore, it is fundamentally opposed to the public policy of Indian law. It is also contrary to the very terms of the Hire-Purchase Agreement to which the Petitioner and EFL were parties. The impugned Award is accordingly unsustainable in terms of Section 34(2) (b) (ii) of the Act and is hereby set aside.

16. The petition is accordingly allowed with costs of Rs. 10,000/- which will be paid by EFL to the Petitioner within four weeks.

S.MURALIDHAR, J

MAY 14, 2015/rs