

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 1038 of 2014

ADITYA GANAPA & ANR. Petitioners
Through: Mr. K. R. Chawla, Advocate.

versus

RELIGARE FINVEST LTD. Respondent
Through: Mr. Ajay Uppal, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER
30.01.2015

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 21st May 2014 passed by the sole Arbitrator in regard to the claims filed by the Respondent/claimant against the Petitioners.
2. The Petitioners are stated to be in the flower business and based in Hyderabad. It is stated that by an agreement dated 24th June 2010, the Respondent Religare Finvest Ltd. ('RFL') sanctioned to the Petitioners a loan of Rs.61 lakhs repayable in 120 equal monthly instalments of Rs.91,080 over a period of 10 years. At the time of sanctioning of the loan agreement, the Petitioners also signed other documents including a letter confirming the deposit of original title deeds of the property at Plot No. 81, H No. 3-9-242, West Marredpally, Hyderabad-500047 with the Respondent. The Petitioners claimed to have admittedly defaulted in payment of a few

instalments. RFL sent a notice dated 10th August 2012 which was received by the Petitioners on 5th September 2012. The Petitioners claimed to have thereafter paid certain instalments in the months of September, October and November 2012. Thereafter, RFL filed OMP No. 1020 of 2012 in this Court in which an order was passed on 9th November 2012 restraining the Petitioners from disposing of or selling or alienating the aforementioned property subject to RFL initiating arbitration proceedings within two weeks.

3. The Respondent appointed Mr. Nitin Chadha as sole Arbitrator to adjudicate the disputes. In response to the claims filed by the Respondent before the learned Arbitrator, the Petitioners filed a reply statement, *inter alia*, raising the following preliminary objections:

(i) The agreement dated 24th June 2010 being an unregistered document was invalid and unenforceable and not binding on the Petitioners. As the agreement was also not duly stamped, it had no sanctity in the eyes of law. Consequently, the arbitration clause contained therein also was unenforceable.

(ii) The Respondent had concealed material facts.

(iii) The person who had filed a statement of claims i.e. Mr. Ashutosh Sharma was not duly authorised to file the statement of claims. Further Mr. Mukesh Kumar Choudhary, in whose favour a power of attorney ('PoA') had been executed on 25th April 2011, was not in fact authorised to initiate arbitration proceedings. The PoA itself was an unregistered document and could not be relied upon.

(iv) The Petitioners also contested the claims on merits. They disputed the correctness of the calculation of RFL and its failure to account for the payments already made by the Petitioners.

4. The learned Arbitrator at an interim stage passed an Award on 27th August 2013 directing the Petitioners to pay the outstanding EMIs in the sum of Rs.7,94,429 immediately to RFL. The said order was challenged by the Petitioners in this Court by an Arbitration Appeal No. 17 of 2013. The said appeal was allowed by the Court by an order dated 5th February 2014. Apart from the fact that the said order of the learned Arbitrator dated 27th August 2013 was an ex parte order it was also noted by the Court that no partial Award could have been passed by the learned Arbitrator particularly when notice to the Petitioners in the application filed by the Respondent under Section 17 of the Act had been issued on that very date when the order was passed. Accordingly, the interim Award dated 27th August 2013 was set aside.

5. The arbitral Award was passed by the learned sole Arbitrator on 21st May 2014. With regard to the preliminary objections concerning the PoA, the learned Arbitrator simply noted as under:

“The claimant has filed the true copy of Special Power Attorney dated 25.Apr.11 executed by Mr. Ashutosh Sharma, of the Claimant Company whereby Mr. Mukesh Kumar Choudhary of the Claimant Company has been authorised pursue the captioned proceedings on behalf of the claimant company. Claimant averred that the Respondents as on 17. Sep.12 owed a total sum of Rs.5896957.28 in furtherance of the loan disbursed by the Claimant to the Respondents.”

6. As regards the other preliminary objection regarding the agreement not being stamped, the learned Arbitrator concluded that while the agreement dated 27th May 2010 bore a stamp showing payment of stamp duty its registration was not mandatory given the nature of the document. On merits the learned Arbitrator held that RFL had proved that the Petitioners owed it, after adjustment of all amounts paid by the Petitioners, Rs.5532637 together with simple interest @ 18% per annum from 17th September 2012 till the date of payment. RFL was also awarded costs of Rs.50,000.

7. In the operative portions of the Award, apart from directing the above payments, the learned Arbitrator also permitted RFL to take an appropriate legal action to encash the security i.e. the property in question for recovery of the awarded amount. After adjustment of the sale consideration towards the awarded amount, the balance was asked to be returned to the Petitioners.

8. Mr. K.R.Chawla, learned counsel appearing for the Petitioners submits that the learned Arbitrator committed a grave error in failing to deal with the preliminary objections raised by the Petitioner regarding the authorised representative (AR) of the claimant not being competent to file any claim in the arbitration proceedings. He next submitted that by way of the loan agreement, a mortgage was created on immovable property belonging to the Petitioners and, therefore, the said document was compulsorily registerable. He referred to the decision of the Supreme Court in ***State of Haryana v. Navir Singh (2014) 1 SCC 105***. Thirdly, he pointed out that the sole Arbitrator was virtually an in-house Arbitrator who had acted as such for RFL in more than 40 arbitrations over a period of three years. The said

Arbitrator could hardly be objective and neutral.

9. In reply Mr. Ajay Uppal, learned counsel for RFL, submitted that the loan agreement in question was in fact not in the nature of a mortgage deed. This was an instance of creation of an equitable mortgage by deposit of title deeds. The loan agreement only referred to the fact that such a mortgage was to be created and did not itself create the mortgage. He further submitted that even the letter of confirmation with regard to the depositing of title deeds was itself not the document creating mortgage. That document too was, therefore, not compulsorily registerable. In any event, the agreement containing the arbitration clause was duly stamped and, therefore, there was not difficulty in the arbitration proceeding in accordance with law. As regards the PoA, Mr. Uppal pointed out that there was a clause in the PoA which permitted RFL to ratify the acts of the PoA holder and, therefore, it could not be said that the filing of the arbitration claim was itself by a person not unauthorised. As regards the third objection, he submitted that merely because a sole Arbitrator had dealt with 40 other claims of RFL over a period of 3 years *per se* did not mean that he lacked objectivity. He was an Advocate and was expected to be conscious of the general requirement of having a judicious approach. He submitted that given the large number of claims that the Respondent had against borrowers which then resulted in arbitration proceedings, it was not unusual for the same Arbitrator to be entrusted as many as 40 such claims over a period of 3 years.

10. The above submissions have been considered. As regards the objection taken by the Petitioners before the learned Arbitrator on the PoA, the Court

finds that the impugned Award wholly fails to deal with this issue. The extracted passage of the arbitral Award merely notes the fact that RFL had filed a copy of the PoA dated 25th April 2011 executed by Mr. Ashutosh Sharma of the Respondent authorising Mr. Mukesh Kumar Choudhary to pursue the arbitral proceedings. Had the learned Arbitrator actually perused the PoA produced before him, he would have noticed that it authorised Mr. Choudhary, *inter alia*:

- “1. To sign file affirm and verify, the execution petition(s) in execution proceedings arising in respect of awards passed in Arbitration proceedings passed by the Learned Arbitrator(s) against the Borrower(s) of the Company. Before Court(s) having contempt jurisdiction, in this regard.
2. To appear before and represent the Company before the Court(s) having competent jurisdiction, in connection with the said execution petitions proceedings.
3. To swear/verify, sign, file and affirm affidavits and other necessary pleadings and applications, in support if such execution petitions/proceedings and to file such documents papers etc., which may be deemed necessary for the purpose of effectively pursuing such execution petition/proceedings.”

11. The entire PoA is with reference to execution proceedings. There is no clause that authorizes Mr. Choudhary to initiate arbitration proceedings or file a claim. Even Clause 6 talks of filing and verifying applications, affidavits “in execution of the Award”. The PoA no doubt states that the company agrees to ratify and confirm whatever the PoA holder has been asked to do. However that ratification could be only in relation to the lawful acts in terms of the PoA i.e. acts done in execution proceedings. Therefore even that clause does not wipe out the obvious illegality in the claim having

been filed before the learned Arbitrator on behalf of RFL by a person who is not authorised to do so.

12. The failure of a duly authorised person to act on behalf of the company goes to the root of the matter. It vitiates the entire proceedings. Besides, the Petitioner put RFL on notice by raising this point in their reply. Yet no attempt was made by RFL to file original of the POA, if any, before the learned Arbitrator which authorised Mr. Choudhary to file the claim before the learned Arbitrator. Secondly, the learned Arbitrator obviously overlooked the above preliminary objection and failed to deal with it. On this short ground, the impugned Award of the learned Arbitrator becomes wholly unsustainable in law under Section 34 (2) (b) (ii) of the Act and deserves to be set aside.

13. The second ground on which the Court is inclined to set aside the impugned Award is the obvious violation of the principle of natural justice inasmuch as there was a failure by the learned Arbitrator to disclose the fact that he was an Arbitrator in 40 other cases where the Respondent was a party. Learned counsel for the Respondent has not disputed the document placed before the Court by Mr. Chawla which is a draft Prospectus of RFL setting out salient features. *Inter alia* it lists out the proceedings initiated by RFL. There are at least 28 cases shown therein where Mr. Nitin Chadha was the sole Arbitrator. In the circumstances, in the instant case when he first entered upon reference, it was incumbent on Mr. Chadha at the very outset to disclose his interest to the parties. There is nothing to show that he did so. It is indeed unusual that the same person is a sole Arbitrator in over 28 cases

involving RFL as claimant within a short span of 3 years and yet RFL persists with him as the sole Arbitrator. Clearly, the Award passed by such an Arbitrator would come within the purview of an Award being against public policy of India as it is obviously in violation of the principles of natural justice.

14. However on the third ground urged by Mr. Chawla that the loan agreement was not registered, the Court is inclined to accept the submission of learned counsel for the Respondent that the loan agreement itself does not create a mortgage. It only refers to the fact that the property belonging to the Petitioners is mortgaged. Admittedly the mortgage in this present case is a mortgage by deposit of title deeds. Even the letter of confirmation only records the fact of such a mortgage having been already created. The letter of confirmation is itself not a document creating the mortgage.

15. The relevant observations of the Supreme Court in the decision in ***State of Haryana v. Navir Singh*** reads as under:

“In the face of it, we are of opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title deeds and for that, instrument of mortgage is not necessary. Mortgage by deposit of title-deeds further does not require registration. Hence, the question of payment of registration fee and stamp duty does not arise. By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract in writing and if such a document is the sole evidence of terms between them, the document shall form integral part of the transaction and same shall require registration under Section 17 of the Registration Act.”

16. Although Mr. Chawla argued that the latter part of the above passage would apply to the facts of the present case, the Court is of the view that the letter of confirmation is the “sole document evidencing the creating of an equitable mortgage.” In any event the loan agreement contains the arbitration clause on the basis of which the arbitral proceedings have been initiated. That document certainly does not create the equitable mortgage and is, therefore, not compulsorily registrable.

17. In view of the fact that the Court has found the Award unsustainable in law on the first two grounds discussed above, the impugned Award is set aside and the petition is allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

JANUARY 30, 2015
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