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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.919 OF 2015

M/s.Sea Eagle Dredging Marine)
Infrastructure Private Limited,)
Having address at Office Nos.501 & 502)
5th Floor, Concorde Building No.66-A)
CBD Belapur, Navi Mumbai,)
)
And Also)
)
202 & 203, Agrawal Corner Plot No.21,)
Sector 21, Nerul, Navi Mumbai – 400 706) ...Petitioner

....Versus....

1. Reliance Capital Limited,)
Having its registered address at 1st)
Floor, "H" Block, Dhirubhai Ambani)
Knowledge City, Koparkhairane,)
Navi Mumbai – 400 710)
)
And Also)
)
Corporate address at Rectifer House,)
Naigaum Cross Road, Next to Royal)
Industrial Estate, Wadala (West))
Mumbai – 400 031.)

2. B.A. Shelar)
Learned Sole Arbitrator)
Office No.201, 2nd Floor, Plot No.17)
Maruti Mansion, Raghunath Dadaji)
Lane, Near Handloom House,)
Fort, Mumbai – 400 001.) ...Respondents

Ms.Shilpa Kapil for the Petitioner.
Ms.Alpana Ghone i/b Ajay Misar & Co. for the Respondent No.1.

CORAM : R.D. DHANUKA, J.
DATE : 20TH APRIL, 2016.

ORAL JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "the said Act"), the petitioner has impugned the arbitral award dated 26th December, 2014 directing the petitioner to pay a sum of Rs.2,03,22,491.08 ps. as per the foreclosure statement together with further interest at the rate of 18% p.a. from 5th July, 2014 till payment or realization with costs fixed at Rs.7500/-.

2. The respondent no.1 vide their letter dated 1st September, 2011 informed the petitioner that an amount of Rs.1,92,00,000/- was sanctioned as and by way of loan to the petitioner. The respondent no.1 thereafter disbursed an amount of Rs.1,73,34,075/- to the petitioner along with letter dated 1st September, 2011. It is the case of the petitioner that during the period between 30th September, 2011 and 30th April, 2013, the petitioner made a payment of Rs.38,58,057/- to the respondent no.1.

3. It was the case of the respondent no.1 that since the petitioner committed default in making repayment of the loan, the respondent no.1 vide their advocate's notice dated 19th February,

2013 terminated the loan agreement. It is the case of the petitioner that even after such termination of the loan agreement vide their letter dated 19th February, 2013, the respondent no.1 continued to accept the payment of installment right upto November, 2014.

4. The respondent no.1 appointed the learned arbitrator by a notice dated 14th July, 2014 by invoking arbitration agreement recorded in clause 17 of the loan agreement. The learned arbitrator thereafter issued various notices from time to time to both the parties to remain present. The respondent no.1 filed a statement of claim before the learned arbitrator pursuant to the directions issued by the learned arbitrator *inter-alia* claiming an amount of Rs.2,03,22,419.08 p.s. with interest at the rate of 18% p.a. as per the foreclosure statement annexed to the statement of claim. The petitioner did not file any written statement before the learned arbitrator. The learned arbitrator made an award on 13th January, 2015 directing the petitioner to pay Rs.2,03,22,419.08 ps. with interest and cost. This award of the learned arbitrator is impugned in this arbitration petition filed under section 34 of the Arbitration Act.

5. Learned counsel appearing for the petitioner submits that the impugned award is dated 26th December, 2014, whereas the same was stamped on 8th January, 2015. She invited my attention to a letter dated 13th January, 2015 addressed by the learned arbitrator

and submits that as the award was stamped on 8th January, 2015, the award could not have been dated on 26th December, 2014.

6. The next submission of the learned counsel for the petitioner is that the respondent no.1 had suppressed before the learned arbitrator that there was no termination of the loan agreement. She submits that the petitioner never received a copy of the said so called termination letter. It is submitted that though the respondent no.1 had relied upon a Deed of Equitable Mortgage in the statement of claim, the same was not annexed to the statement of claim before the learned arbitrator. She submits that though the petitioner had made payment till August, 2014 and the last payment was received by the respondent no.1 in the month of November, 2014, the respondent no.1 had not disclosed this fact before the learned arbitrator. She submits that the respondent no.1 did not disclose all true and correct facts before the learned arbitrator, impugned award shall be set aside on this ground alone.

7. The next submission of the learned counsel for the petitioner is that the petitioner was not served with any notice by the respondent no.1 invoking arbitration agreement. She submits that since no notice invoking arbitration agreement was served upon the petitioner, the learned arbitrator could not have entered upon the reference.

8. Learned counsel for the petitioner submits that the learned arbitrator has been regularly appointed by the respondent no.1 as an arbitrator and thus he acted as biased and was not impartial. In support of her submission, she invited my attention to ground (d) raised in the arbitration petition. In support of her submission that the learned arbitrator acted bias, she also invited my attention to various minutes of the meeting of the learned arbitrator. She submits that on 4 days of hearing, minutes would indicate that the learned arbitrator resumed hearing at 11:48 hours. She submits that the minutes of the meeting shows the same print and font and that itself would indicate that the learned arbitrator was biased and prejudiced.

9. The next submission of the learned counsel for the petitioner is that there was no oral evidence led by the respondent no.1 before the learned arbitrator and the entire award is based on only documentary evidence produced by the respondent no.1.

10. Insofar as the issue as to why the petitioner remained absent before the learned arbitrator and not having filed the written statement is concerned, it is submitted by the learned counsel for the petitioner that since two of the officers of the respondent no.1 had assured the petitioner that the respondent no.1 would withdraw the arbitration proceedings before the learned arbitrator and thus the

petitioner was not required either to file the written statement or to personally remain present before the learned arbitrator, the petitioner accepted the assurance of two officers of the respondent no.1 and did not file any written statement and also remained absent. She submits that in any event the respondent no.1 had to point out true and correct facts before the learned arbitrator.

11. Learned counsel appearing for the respondent no.1 on the other hand would submit that the award is not anti dated. In support of her submission, the learned counsel for the respondent no.1 invited my attention to the minutes of the last meeting held by the learned arbitrator on 13th January, 2015. She submits that on 13th January, 2015, the learned arbitrator dictated the operative part of the impugned award making it clear that the reasons would be dictated separately. She submits that it is thus clear that the date of the award mentioned as 26th December, 2014 on the last page of the award was a typographical error. She submits that it is not the case of the petitioner that the award was fabricated by the respondent no.1 or by the learned arbitrator. The award was stamped on 9th January, 2015.

12. Insofar the issue of the alleged violation of the principles of natural justice raised by the petitioner is concerned, it is submitted by the learned counsel that the learned arbitrator had issued various

notices upon the petitioner to file the written statement and to remain present. She submits that none of the officers of the respondent no.1 made any such assurance as falsely alleged by the petitioner in the arbitration petition for the first time. She submits that since the petitioner remained absent inspite of various opportunity rendered by the learned arbitrator, the learned arbitrator was entitled to proceed with the matter *ex-parte* and to make an award. There is thus no violation of principles of natural justice.

13. Insofar as the submission of learned counsel for the petitioner that the respondent no.1 could not have made any claim in the arbitral proceedings for the enforcement of the mortgage or that the respondent no.1 did not produce the equitable mortgage deed before the learned arbitrator though referred in the statement of claim is concerned, it is submitted that in the statement of claim no such prayer for enforcement of the equitable mortgage was made. She submits that in any event the learned arbitrator has not allowed enforcement of the equitable mortgage in the impugned award.

14. Insofar as various payments alleged to have been made by the petitioner after notice of termination dated 13th February, 2013 is concerned, it is submitted by the learned counsel for the respondent no.1 that the respondent no.1 had annexed a copy of the foreclosure statement in the statement of claim in which the

respondent no.1 had given all credits of the payments made by the petitioner till the date of filing such foreclosure statement. She submits that if any payment is received by the respondent no.1 in the month of November, 2014 as alleged by the petitioner after filing of such foreclosure statement, the respondent no.1 will give credit of the said amount to the petitioner from the amount payable under the impugned award. The statement is accepted.

15. Insofar as the submission of the petitioner that the respondent no.1 not having led any oral evidence and thus the learned arbitrator could not have allowed claim is concerned, it is submitted by the learned counsel that since the documents relied upon by the respondent no.1 before the learned arbitrator, including the foreclosure statement were not disputed by the petitioner by filing any written statement, the respondent no.1 was not required to lead any oral evidence before the learned arbitrator. She submits that the learned arbitrator was thus justified in allowing the claim based on proved documents before the learned arbitrator by the respondent no.1.

16. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator was biased on the ground that he was regularly appointed by the respondent no.1 as arbitrator is concerned, she submits that the allegations of bias ought to have

raised before the learned arbitrator under section 12 read with section 13 of the said Act and not by raising an issue in the arbitration petition for the first time in this arbitration petition. She submits that even otherwise, there is no substance in this allegation.

17. In rejoinder, learned counsel for the petitioner submits that the respondent no.1 has not disclosed true and correct facts before the learned arbitrator.

18. Insofar as the first submission of the learned counsel for the petitioner that the award was dated 26th December, 2014 and could not have been declared on 26th December, 2014 since the said award was stamped on 9th January, 2015 is concerned, a perusal of the Roznama dated 13th January, 2015 clearly indicates that the learned arbitrator had dictated the operative part of the award on 13th January, 2015. A perusal of the impugned award indicates that it was stamped on 9th January, 2015 and must have been typed thereafter and thus the impugned award could not have been dated 26th December, 2014. It is thus obvious typographic error crept in the impugned award as if dated 26th December, 2014. It is not the case of the petitioner that the impugned award is either fabricated by the respondent no.1 or by the learned arbitrator. In my view, there is no substance in this submission made by the learned counsel for the petitioner. The fact remains that the award was

stamped prior to 13th January, 2015 when the same was declared by the learned arbitrator.

19. Insofar as the submission of the learned counsel for the petitioner that there was no notice of invocation received by the petitioner is concerned, the notice of invocation of the arbitration agreement will have bearing on limitation. There is no dispute that the learned arbitrator had served a copy of the said letter along with notice of his appointment by the respondent no.1 upon the petitioner. It is not the case of the petitioner that the learned arbitrator has allowed the time barred claims. There is thus no substance in this submission of the learned counsel for the petitioner.

20. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator had violated the principles of natural justice is concerned, it is not in dispute that the petitioner had received all the notices from the learned arbitrator of the hearing and also for preliminary meeting for giving direction to file written statement. It is the case of the petitioner that two of the officers of the respondent no.1 however, had made oral assurance to the petitioner that the respondent no.1 would withdraw the arbitral proceedings and the petitioner would not be required to remain present or to file the written statement before the learned arbitrator. No such alleged assurance made by the officers of the respondent no.1 has been

placed on record by writing a letter to the respondent no.1 or by filing any written statement before the learned arbitrator. The allegations made for the first time in the petition are denied by the respondent no.1 in their affidavit in reply. I am thus not inclined to accept these allegations made in the petition for the first time. Even otherwise the allegations made for the first time in the petition are *ex-facie* false and incorrect. Since the petitioner chose not to appear before the learned arbitrator or to file the written statement inspite of receipt of notices, in my view the petitioner cannot be allowed to urge that the award is in violation of principles of natural justice.

21. Insofar as the submission of the learned counsel for the petitioner that the respondent no.1 did not lead any oral evidence and thus the learned arbitrator could not have allowed the claims only on the basis of the documentary evidence is concerned, since the petitioner chose not to file any written statement, did not appear before the learned arbitrator, did not dispute the pleadings and documents filed by the respondent no.1, the averments and the documentary evidence filed by the respondent no.1, including foreclosure statement remained un-controverted. A perusal of the impugned award clearly indicates that the learned arbitrator has dealt with the averments made in the statement of claim and the documents including the foreclosure statement as un-controverted

and based on such proved documents has rightly allowed the claims made by the respondent no.1. In my view, since the documentary evidence produced by the respondent no.1 was not objected to by the petitioner and / or not disputed, the contents of such documents, including the foreclosure statement were deemed to have been proved by the respondent no.1 before the learned arbitrator. The respondent no.1 was thus not required to lead any separate oral evidence to prove the contents of the documents including the foreclosure statement. There is thus no substance in this submission made by the learned counsel for the petitioner.

22. Insofar as the allegations of bias made for the first time in the arbitration petition against the learned arbitrator on the ground that he has been appointed regularly by the respondent no.1 is concerned, the fact remains that the petitioner did not raise any such issue before the learned arbitrator by filing application under section 13 read with section 12 of the said Act and thus cannot be allowed to raise this issue for the first time in this arbitration petition. Insofar as the allegations of bias based on the basis of the minutes of meeting of the learned arbitrator disclosing same time of resuming the arbitral proceedings or that the font and print of the minutes of meeting being the same is concerned, in my view this submission of the learned counsel for the petitioner is *ex-facie* frivolous and without any basis

and is accordingly rejected.

23. A perusal of the impugned award also indicates that the learned arbitrator has dealt with the averments made in the statement of claim and the documents produced by the respondent no.1 as uncontroverted in view of the fact that the petitioner not having filed the written statement. In my view, the learned arbitrator has given ample opportunities to the petitioner to file the written statement and to remain present at the time of hearing. The impugned award is not in violation of the principles of natural justice. No infirmity in the impugned award is found by this Court.

24. Insofar as the submission of the learned counsel for the petitioner that the respondent no.1 has not given credit of the amounts paid is concerned, the respondent no.1 has given credit of all the amounts paid by the petitioner to the respondent no.1 in the foreclosure statement. However, if the last installment which is alleged to have been received by the respondent no.1 in the month of November, 2014 is concerned, since the learned counsel for the respondent no.1 has fairly stated that if any such installment is received in the month of November, 2014, credit thereof would be given to the petitioner for the same, no interference is warranted with the impugned order on this ground.

25. The petition is devoid of merits and is accordingly

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dismissed with costs of Rs.25,000/- which shall be paid by the petitioner to the respondent no.1 within two weeks from today.

(R.D. DHANUKA, J.)