

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1839 OF 2015

1. Deccan Chronicle Holdings Limited)
a Company incorporated under the)
Companies Act, 1956 having its office at)
36, Sarojini Devi Road,)
Secunderabad – 500003, Andhra Pradesh)

2. Mr.T. Venkatram Reddy,)
An adult Indian Inhabitant, residing at)
Plot No.54 H.No.8-2-703/A/6/C, Road No.12))
Banjara Hills, Hyderabad – 500034)
Andhra Pradesh)

..... Petitioners

VERSUS

Tata Capital Financial Services Ltd.,)
A Non-Banking Finance Company duly)
registered with Reserve Bank of India)
and A Company incorporated under the)
Provisions of the Indian Companies Act)

..... Respondent

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

Mr.Shailesh Shah, Senior Advocate a/w. Ms.Nelly Mehta, Ms.Radhika Dixit, i/b. MDP Partners for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 23rd JUNE, 2016

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (in short the Arbitration Act), the petitioners have impugned the interim award dated 16th April, 2014 passed by the learned arbitrator directing the

petitioners to pay to the respondent a sum of Rs.100 crores and directing that the balance claim made by the respondent and interest payable if at all would be considered at the time of final award. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent vide its letter dated 13th April, 2011 sanctioned the working capital term loan facility to the petitioner no.1 for an amount of Rs.100 crores on the terms and conditions setout in the said sanction letter and in the term loan agreement entered into between the parties on 15th April, 2011. The petitioner no.1 executed the demand promissory note in favour of the respondent. The petitioner no.1 executed and entered into a registered Deed of Simple Mortgage dated 15th April, 2011 creating a charge in respect of its immovable property known as Mathuradas Mills Compound, Lower Parel, Mumbai to secure the said term loan amount together with interest, additional interest, penal interest, costs, charges, expenses and all other monies in terms of the term loan. There is no dispute that the respondent had disbursed the entire loan amount of Rs.100 crores to the petitioner no.1.

3. The respondent vide its letter dated 12th July, 2012 called upon the petitioner no.1 to cure the Material Adverse Effect within 7 days or to make immediate payment of all the alleged outstanding dues under the said term loan agreement within 30 days alleging that the petitioner no.1 had breached its obligations in terms of clause 1.1(e) of the said term loan agreement. It is the case of the petitioner that the said letter dated 12th July, 2012 was addressed by the respondent based on the report released in Press on 2nd July, 2012 by Credit Analysis and Research Limited. In the said press release, the rating of the petitioner no.1 had been downgraded for long term bank facilities/instruments.

4. The respondent vide its notice dated 3rd August, 2012 called upon the petitioner no.1 to make payment of the alleged outstanding dues on or before 10th August, 2012. The respondent through their advocates' issue a demand notice dated 17th August, 2012 calling upon the petitioner no.1 and petitioner no.2 to pay to the respondent a sum of Rs.100,86,97,052/- alleged to be due and payable as on 12th August, 2012 with further additional interest.

5. The respondent thereafter filed a petition for interim measures under section 9 of the Arbitration and Conciliation Act, 1996 (1321 of 2012). This court granted various interim measures on 21st February, 2013 in favour of the respondent in the said arbitration petition thereby directing the petitioner no.1 to furnish security in favour of the respondent in the sum of Rs.101,71,03,644/- as on 23rd August, 2012 with further interest thereon at the rate of 3% per annum over and above the agreed rate of interest with costs and charges to the satisfaction of the Court Receiver, High Court, Bombay within four weeks from the date of the said order. There were various other orders passed by this court in the said proceedings.

6. Pursuant to the liberty granted by the learned arbitrator, the respondent herein filed a statement of claim before the learned arbitrator. The petitioners resisted those claims by filing written statement on various grounds. During the pendency of the said arbitral proceedings before the learned arbitrator on 20th August, 2013, the respondent filed an application under section 31(6) of the Arbitration Act inter alia praying for passing an interim award against the petitioners in view of the alleged admission by the petitioner no.1 towards its liability to the respondent by applying the principles of Order 12 Rule 6 of the Code of Civil Procedure, 1908. The petitioners resisted the said application by

filing an affidavit in reply.

7. By an order dated 16th April, 2014, the learned arbitrator held that there was an acknowledgement of the liability on the part of the petitioners to the extent of Rs.100 crores in various documents and accordingly directed the petitioners to pay to the respondent herein an admitted amount of Rs.100 crores. The learned arbitrator further directed that insofar as balance claim made by the respondent herein and interest payable if at all is concerned, it would be considered at the time of final award.

8. Being aggrieved by the said interim award dated 16th April, 2014 passed by the learned arbitrator, the petitioners herein have impugned the said award in this petition filed under section 34 of the Arbitration Act.

9. Mr.Cama, learned counsel for the petitioners invited my attention to some of the paragraphs of the written statement filed by the petitioners before the learned arbitrator raising various issues. He submits that the petitioners had disputed the jurisdiction of the learned arbitrator to entertain and try the claims filed by the respondent. It is submitted that the respondent herein had no right to recall the loan and the said question on the part of the respondent was premature. He submits that the learned arbitrator thus could not have granted final reliefs by way of interim award on the application filed by the respondent in favour of the respondent without dealing with the issues raised by the respondent in the written statement. Learned counsel also invited my attention to some of the correspondence annexed to the compilation in support of his submission that the petitioners had not admitted the liability alleged to have been payable to the respondent.

10. It is submitted by the learned counsel for the petitioners that the petitioners had referred to a scheme propounded by the petitioner no.1 under sections 391 and 394 of the Companies Act, 1956 which was filed before the High Court of Andhra Pradesh at Hyderabad (Company Application No.347 of 2013) connected with the Company Application No.346 of 2013) in the matter of Composite Scheme of Demerger and Arrangement between the petitioners and Land Interactive Media Limited and its shareholders and the creditors. He submits that the petitioners herein had explained the purpose of filing such company application before the High Court of Andhra Pradesh in the written statement filed by the petitioners. The petitioners had also pointed out that the said scheme was pending.

11. It is submitted that the learned arbitrator has directed the petitioners to pay a sum of Rs.100 crores merely based on the few documents annexed to the application filed under section 31(6) of the Arbitration Act in which the petitioners had not admitted their liabilities to the respondent as canvassed by them. He submits that merely because the petitioners had referred to the term loan amount in those documents given by the respondent to the petitioner no.1, reference to the term loan in those documents would not amount to acknowledgment of liabilities and particularly a clear acknowledgment which is necessary for the purpose of passing a decree on admission under Order 12 Rule 6 of the Code of Civil Procedure, 1908. He submits that in any event, the petitioners were entitled to explain such alleged admission and alleged acknowledgment of liabilities in those documents.

12. It is submitted that the learned arbitrator did not give any opportunity to the petitioners to explain such alleged admission and acknowledgement of liability. It

is submitted that the petitioners could have explained such alleged acknowledgement and admission of liabilities at the stage of oral evidence it could have led before the learned arbitrator and not at this stage. In support of this submission, learned counsel for the petitioners placed reliance on following judgments :-

- (1) Judgment of Supreme Court in case of ***S.M.Asif vs. Virender Kumar Bajaj***, (2015) 9 SCC 287, (Paragraph 8)
- (2) Judgment of Supreme Court in case of ***Jeevan Diesels and Electricals Limited vs. Jasbir Singh Chadha (HUF) and another***, (2010) 6 SCC 601, (Paragraphs 10, 14 to 16)
- (3) Judgment of Supreme Court in case of ***Himani Alloys Limited vs. Tata Steel Limited***, (2011) 15 SCC 273, (Paragraphs 6 to 11)
- (4) Judgment of Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another***, (2012) 8 SCC 148, (Paragraphs 28, 29 and 32).

13. Mr.Shah learned senior counsel for the respondent on the other hand invited my attention to the documents referred to and relied upon in the application filed under section 31(6) of the Arbitration Act. My attention is invited to a letter dated 10th September, 2012 addressed by the petitioner no.1 to the CDR Cell, Mumbai thereby submitting the Flash Report, Debtor Creditors Agreement and necessary Board Resolution for referring the proposal to the Corporate Debt Restructuring Cell for consideration towards restructuring of its debt facilities under the CDR mechanism and requesting the CDR Cell to table the Flash Report in the meeting scheduled for 12th September, 2012. He submits that in the said letter, the petitioners have not referred to the term loan advanced by the respondent to the

petitioner no.1 but has requested for restructuring of its debt facilities. Learned senior counsel invited my attention to the lender presentation annexed to the said Flash Report. In the schedule 2, list of clause (B) creditors has been annexed by the petitioners. He submits that the name of the respondent is disclosed in the said list of class (B) creditors with an amount of Rs.100,00,00,000/- (Rupees hundred crores only).

14. It is submitted by the learned senior counsel that the petitioners have admitted and acknowledged their liabilities to the respondent under the said term loan not only in the said Flash Report submitted before the High Court of Andhra Pradesh but also in several documents filed before this court.

REASONS AND CONCLUSIONS

15. There is no dispute that during the pendency of the arbitral proceedings before the learned arbitrator, the respondent to this petition (original claimant) filed an application under section 31(6) of the Arbitration Act inter alia praying for an interim award against the petitioners herein thereby directing the petitioners jointly and/or severally to pay to the respondent herein an amount of Rs.1,12,74,03,306/- due as on 1st April, 2013 with further interest thereon. The said application was based on the premise that the petitioners herein had admitted and acknowledged their liabilities to the respondent in the principal amount of Rs.100 crores in various documents and pleadings filed in various courts. The said application was opposed by the petitioners by filing affidavit in reply.

16. A perusal of the Company Application No.346 of 2013 filed by the petitioners under sections 391 to 394 of the Companies Act, 1956 in the High Court of Andhra Pradesh at Hyderabad thereby submitting the composite scheme

of demerger and arrangement between the petitioner no.1 and the Land Interactive Media Limited, their creditors and the shareholders indicates that in the said application, the petitioner no.1 had annexed the audited financial statement of the petitioner no.1 company for the period of 18 months ended on 30th September, 2012. In the said scheme, in paragraph 11.1 it was provided that subject to the cancellation and/or termination of all agreements entered into by and between any of the Class B creditors and the petitioner no.1, the loan outstanding shall be settled w.e.f. reconstruction date in the various percentage mentioned therein. In paragraph 11.2 it was provided that the amount to be distributed to class (B) creditors in accordance with the provisions of the said scheme shall be calculated and determined in the percentage mentioned in paragraph 11.1 of the said scheme on the basis of the loan outstanding to each Class B creditors. In schedule (2), list of Class B creditors was provided. Names of the respondent was shown as one of the class B creditors in the sum of Rs.100,00,00,000/- (Rupees hundred crores only).

17. The petitioner no.1 had also filed a form (8) with the Registrar of Companies in which the petitioner no.1 had admitted the creation of charge under the Deed of Simple Mortgage and term loan agreement. The said form also clearly indicates that the petitioner no.1 had created a clear registered charge in respect of various properties in favour of the respondent. The petitioner no.1 had thus admitted having availed of loan of Rs.100 crores repayable by them to the respondent under the said term loan agreement dated 15th April, 2011 in the said form.

18. A perusal of the record further indicates that the petitioner no.1 had filed a Flash Report with the CDR Cell on 10th September, 2012 for restructuring of the

debts of the petitioner no.1. In the said report the petitioners have furnished the details of all the creditors in schedule (3) alongwith the security provided to each of them by the petitioner no.1. Schedule 3(B) to the said report furnishes the details of the loan amount availed by the petitioner no.1 from the respondent herein under head of working capital facilities. It is thus clear that the petitioner no.1 had admitted and acknowledged its liability towards the respondent in the sum of atleast Rs.100 crores in their report filed with the CDR Cell.

19. On perusal of the affidavit in reply filed by the petitioners to the said application filed by the respondent under section 31(6) of the Arbitration Act, it is clear that the petitioners have not disputed the contents of the said documents including the company application filed by the petitioners before the High Court of Andhra Pradesh at Hyderabad inter alia praying for sanction of its scheme. The petitioners in the said affidavit have contended that all the statements including the reference of the respondent herein in Schedule (2) to the scheme were subject to the fulfillment of the conditions as prescribed in clauses 11 and 27 of the scheme and were mere proposals made, subject to the approval of the Andhra Pradesh High Court and were not to be construed as alleged acknowledgment or admission of its liability to the respondent of the principal amount of Rs.100 crores or any other amount as alleged. It is the case of the petitioners that a mere proposal subject to the approval of the schemes by the High Court thus cannot be construed as acknowledgement of the liability.

20. A perusal of the impugned award passed by the learned arbitrator indicates that the learned arbitrator has considered the documents referred to and relied upon by the respondent (original claimant) in the said application filed under section 31(6) of the Arbitration Act in detail. It is held by the learned arbitrator that the

contents of the documents annexed by the respondent in the said application filed under section 31(6) of the Arbitration Act were not disputed by the petitioners herein. The learned arbitrator has also construed the provisions of sections 235 to 251 and sections 391 and 394 of the Companies Act, 1956 and has held that the application filed before the High Court under section 391 was presumed to be correct unless it would show otherwise.

21. The learned arbitrator has also referred to the balance sheet of the petitioner no.1 company and has held that the amount is shown in the latest balance sheet of the petitioner no.1 as an admitted liability and by filing the scheme before the High Court of Andhra Pradesh, the petitioners has admitted the contents thereof and has admitted and acknowledged the liabilities towards the respondent herein. The learned arbitrator has also considered the definition of class B creditors as defined in clause 1.7 of the scheme which provided that Class B creditors shall mean creditors that have extended financial assistance secured by a charge, whether specific or residual, on specific moveable and immoveable property of the demerged company or the resulting company as the case may be which charge is structurally subordinated to the Class A creditors as setout in Schedule 2 to the said scheme.

22. Insofar as submission of the learned counsel for the petitioner that the amount mentioned in the scheme propounded by the petitioner no.1 or in the other documents annexed by the respondent to the application under section 31(6) would indicate only that the petitioner no.1 had obtained a loan in the sum of Rs.100 crores and would not reflect any admission or acknowledgment of liability is concerned, a perusal of those documents referred to aforesaid would clearly indicate that the petitioners in those documents had referred to their liabilities

towards the respondent and other creditors. Under the provisions of sections 391 and 394 of the Companies Act, 1956, the company who proposes to apply for sanctioning a scheme has to disclose by affidavit or otherwise all material facts relating to the company including the latest financial position of the company, the latest auditors' report of account of the company, pendency of any investment proceedings in relation to the company etc. It is one of the mandatory requirement of the scheme to have the latest financial position before the court and the creditors.

23. It is not the case of the petitioners that in the said company application filed under sections 391 and 394 and other relevant provisions of Companies Act, 1956 before the High Court of Andhra Pradesh, Hyderabad or in the official documents annexed to the said company application, the petitioners had made any false or incorrect statement therein regarding the liability of the petitioner no.1 company to various creditors including the respondent. In my view merely because the said scheme was not approved by the High Court of Andhra Pradesh or the same was pending, the fact remains that the petitioner had admitted and acknowledged its liability and had disclosed their liability towards various creditors including the respondent herein. The petitioners are thus estopped from contending that the disclosure made before the High Court of Andhra Pradesh in the company application or in the audited balance sheet or other documents annexed to the said application could not be the basis for passing an interim award by the learned arbitrator based on admission and acknowledgment of liability mentioned therein.

24. In my view based on the admission in the balance sheet of a company, a court is empowered to pass a decree on admission by applying the provisions of Order 12 Rule 6 of the Code of Civil Procedure, 1908. In this case the petitioners

have not disputed the contents of such documents which were filed by the petitioners. Be that as it may, though the petitioners had ample opportunities given by the learned arbitrator to explain such admission and acknowledgment of such liability in the said application filed by the respondent under section 31(6) of the Arbitration Act, a perusal of the affidavit in reply filed by the petitioners in the said application clearly indicates that the petitioners have not chosen to explain their admission and acknowledgment of the liabilities towards the respondent. On the contrary, the petitioners have not even disputed the contents of those documents.

25. A perusal of the arbitration petition filed by the petitioners also clearly indicates that no ground is raised by the petitioners that the petitioners had only mentioned the fact of having availed of having loan from the respondent but the same was not payable to the respondent or that the statement made in their proposal before CDR Cell or the documents annexed to the company application were false or incorrect. The petitioners have also not raised any ground challenging the findings rendered by the learned arbitrator holding that the contents of those documents were not disputed by the petitioners.

26. I am not inclined to accept the submission of the learned counsel for the petitioners that the petitioners could have explained such alleged admission and acknowledgment of liability only at the stage of oral evidence and not while at the stage of deciding the application filed by the respondent for interim award under section 31(6) of the Arbitration Act. A perusal of section 31(6) of the Arbitration Act clearly indicates that the arbitral tribunal is empowered to make an arbitral award at any time during the arbitral proceedings in any matter in respect to which it may make a final arbitral award. It is not in dispute that the respondent had made a claim against the petitioners in the arbitral proceedings and had prayed for

recovery of more than Rs.100 crores. In my view the principles of Order 12 Rule 6 of the Code of Civil Procedure, 1908 can be applied by the learned arbitrator for making an interim award under section 31(6) of the Arbitration Act if the learned arbitrator comes to the conclusion that the respondent in the arbitration proceedings has admitted and acknowledged their liability to the petitioners which admission and acknowledgment of the liability is clear and unambiguous. In this case since the petitioners had not even disputed the contents of the documents which documents were the documents of the petitioners themselves and having not explained the admission and acknowledgment of the liability inspite of opportunity having given by the learned arbitrator, the learned arbitrator in my view was right in making an interim award against the petitioners in the sum of Rs.100 crores.

27. Insofar as judgment of Supreme Court in case of ***Jeevan Diesels and Electricals Limited*** (supra) relied upon by the learned counsel for the petitioners is concerned, it is held by the Supreme Court that the decree of admission can be passed only if the admission is not ambiguous and such admission is clear. In the facts of this case, since the petitioners had not disputed the contents of the admission and acknowledgment of the liability made in various financial documents and the pleadings filed before the court of law on oath, the learned arbitrator has rightly held that the admission and acknowledgment of liability on the part of the petitioners and the respondent was clear and unambiguous. The judgment of the Supreme Court in case of ***Jeevan Diesels and Electricals Limited*** (supra) thus would assist the case of the respondent and not the petitioners.

28. In case of ***Himani Alloys Limited*** (supra), the Supreme Court has held that a judgment can be on an "admission" contained in the minutes of a meeting but the admission should be categorical. It should be a conscious and deliberate act of the

party making it, showing an intention to be bound by it. It is held that Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The Supreme Court in the said judgment had considered a situation where both the parties had referred to different figures in the entries made in their record which were tentative and were subject to the verification. The parties had agreed to arrive at the final figures in the next meeting after discussion. With such facts in hand, the Supreme Court held that the figures mentioned in the entries relied upon by the party, could not be termed as an "admission" for the purpose of Order 12 Rule 6 of the Code of Civil Procedure. In this case, it was not the case of the petitioners that the amount mentioned in the list of creditors in an audited balance sheet and in the other financial documents were tentative or were subject to the further verification at the end of the respondent. The judgment of Supreme Court in case of ***Himani Alloys Limited*** (supra) is thus clearly distinguishable in the facts of this case and would not assist the case of the petitioners.

29. Insofar as judgment of Supreme Court in case of ***S.M.Asif*** (supra) relied upon by the learned counsel for the petitioners is concerned, it is held by the Supreme Court in the said judgment that admission is not a matter of right and rather a matter of discretion of the court and where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12 Rule 6 of the Code of Civil Procedure. In my view, the learned arbitrator has rightly exercised the discretion after considering the undisputed documents and pleadings filed before the High Court of Andhra Pradesh and before CDR Cell filed by the petitioners in making an interim award in the sum of Rs.100 crores. Such discretion exercised by the learned arbitrator cannot be faulted with. The said judgment of the Supreme Court in case of ***S.M.Asif*** (supra) would not assist the case of the petitioners but would assist the

case of the respondent.

30. Insofar as judgment of Supreme Court in case of ***Union of India*** (supra) relied upon by the learned counsel for the petitioners is concerned, it is held by the Supreme Court that the admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. It is held that the admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act.

31. In my view since the petitioners have not withdrawn the statement made in the company application filed before the High Court of Andhra Pradesh or the statements made in the audited balance sheet and in the application filed before the CDR Cell and other related documents, the statements made in those proceedings and in the financial documents would operate as an estoppel against the petitioners and would be the decisive factor for passing a decree for admission by applying the principles of Order 12 Rule 6 of the Code of Civil Procedure, 1908. I am not inclined to accept the submission of the learned counsel for the petitioners that the said statements reflected in the documents and pleadings were only tentative and were made only for the purpose of making an application for sanctioning of the schemes under sections 391 and 394 of the Companies Act, 1956 and the High Court not having approved the said schemes, the pleadings and documents annexed thereto could not be relied upon as an admission and acknowledgment of the liabilities.

32. The learned arbitrator has rendered various findings of fact after considering the documents annexed to the application filed by the respondent under section 31(6) of the Arbitration Act and also the other documents forming part of the record of the arbitral proceedings which were not disputed by the petitioners. The findings recorded by the learned arbitrator being not perverse cannot be interfered with by this court under section 34 of the Arbitration Act. In my view the petition is devoid of merits.

33. I, therefore pass the following order :-

- (a) Arbitration Petition No.1839 of 2015 is dismissed.
- (b) No order as to costs.

[R.D. DHANUKA, J.]