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

ARBITRATION PETITION NO.1076 OF 2012

Darpan Garden Exports Pvt. Ltd. .... Petitioner

Vs.

Motilal Oswal Financial Services Ltd. .... Respondent

ALONGWITH

ARBITRATION PETITION NO.1077 OF 2012

Jalco Financial Services Pvt. Ltd. .... Petitioner

Vs.

Motilal Oswal Financial Services Ltd. .... Respondent

Mr. V.P. Sawant a/w Mr. Nikhil Patil, Ms. Pallavi Bali i/by Bali & Associates, Advocate for the Petitioners.

Mrs. A.R. Lambay a/w Mr. Vikas Singh, Mr. Praful Salvi i/by Mr. S.R. Kanojia, Advocate for the respondent.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 21st January, 2016

P.C.

1 The above petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Arbitration

Act" for short) to challenge the Awards of the same date i.e. 28th May, 2012. The respondent to both the petitions is the same. The subject matter of the petitions is similar and the questions arising for consideration therein are same. Therefore, the petitions are being disposed off by this common order.

2 The respondent, company, which is registered with the Reserve Bank of India, carries on business, inter-alia, of providing loan against deposit of securities and/or financing purchase of securities. Both the petitioners had availed off loan facility from the respondent.

3 The petitioner in Arbitration Petition No.1076 of 2012 had availed off, under the Master Loan Agreement dated 8th November, 2006, loan from time to time, against deposit of securities and/or finance for purchase of securities to the limit of Rs.5.00 Crores for purchase of securities. As on 31st August, 2011, the amount outstanding against the petitioner in the loan account was of Rs.82,41,596.46. The petitioner in Arbitration Petition No.1077 of 2012 had similarly availed off identical loan facilities with the loan limit of Rs.2.00 Crores under the Master Loan Agreement dtd. 10th January, 2007 and as on 31st August, 2011, the amount outstanding against it

was of Rs.68,81,430.64. The respondent, had therefore invoked arbitration against both the petitioners under Clause-7.10 of the Master Loan Agreement, by separate letters dtd. 6th August, 2011. The same Arbitrator had been appointed for adjudication of the dispute with both the petitioners. He had by the notice dtd. 6th September, 2011 intimated the petitioners about the initial date of hearing as of 27th September, 2011. Thereafter, hearings were held on five dates finally culminating into the impugned Awards dtd. 28th May, 2012. The award impugned in the first petition directs the petitioner to pay a sum of Rs.77,22,578/- to the respondent with interest at the rate of 18% per annum from 1st September, 2011 till the date of payment. The award in the second petition directs the petitioner herein to pay a sum of Rs.66,42,904/- to the respondent alongwith identical directions as regards the interest as in the first petition.

4 The challenge to both the awards in the petitions is identical. The petitioners contend that (i) invocation of the arbitration was not proper and was not in accordance with the provisions of the Arbitration Act, and (ii) there was no disclosure of "No interest" by the learned Arbitrator as required under Section 12 of the Arbitration Act. They also challenge the Awards on merit. According to the petitioners,

the findings of the learned Arbitrator are perverse.

5 Under the Master Loan Agreements, the petitioners were required to maintain certain margin of security as per the policy of the respondent. It was agreed that, if the margin requirement reached below 20%, the respondent would have the right of immediate sale of securities provided by the petitioners as collateral. For that purpose, both the petitioners had executed power of attorney in favour of the respondent. The petitioners had provided shares of a company by name, GHCL Limited to the respondent by way of margin security. However, SEBI by the order dtd. 25th April, 2007 debarred the petitioners from trading in the shares of GHCL and initiated proceedings against them for investigation in the trading and dealing in the shares of GHCL during the period 1st November, 2006 to 31st March, 2007. The respondent, then by its letter dtd. 8th May, 2007 requested for additional security from the petitioners, to the extent of Rs.1.00 crore from the petitioner in the first petition and Rs.2.00 crores from the petitioner in the second petition, within a period of one week. In the alternative, both the petitioners were called upon to repay the outstanding loan amount as on the date of the letter. Each petitioner had, on 15th April, 2008 given a written confirmation stating that, it shall make the payment towards the interest and the loan amount within six months i.e. by 30th

September, 2008, but had by the letters dtd. 14th January, 2009 sought further time to make the payment.

6 Later SEBI by the consent order dtd. 12th January, 2010 disposed off the proceedings against the petitioners in the matter of investigation of trading and dealing with the shares of GHCL. Since the petitioners had failed to make the good, the outstanding due under the facilities provided to them, in order to protect its rights and interest and pursuant to the SEBI consent order, the respondent liquidated the shares of GHCL held with it by way of collateral in order to recover part of the loan amount outstanding in the petitioner's accounts. As against the petitioner in the first petition, the total sale proceeds received by the respondent were of Rs.78,22,206.49 ps. and that against the petitioner in the second petition were Rs.7,06,640.13 ps. This recovery left the amount to be recovered from the two petitioners as Rs.82,41,595.46 ps. and Rs.68,81,430.64 ps. respectively.

7 As regards the first objection to the impugned awards i.e. improper invocation of the arbitral proceedings, the petitioners contend that no notice invoking arbitration was ever served upon them. Also no notice of appointment of the arbitral tribunal was served upon them. Therefore, the

commencement of arbitral proceedings is untenable and improper. The decision of the learned Arbitrator thereon is at paras 8.3 to 8.7 of the impugned awards. The learned Arbitrator notes the arbitration clause 7.10 from the Master Loan Agreement, under which all disputes in connection with the agreement and the schedules thereto are to be settled by arbitration to be referred to the sole arbitrator to be appointed by the lender with the place of arbitration being Mumbai. By the letters dtd. 6th August, 2011, the respondent had invoked arbitration and had appointed the learned Arbitrator as the sole Arbitrator to adjudicate the disputes. The letters were sent by registered post A/D to the petitioners to their address as disclosed to the respondent. The letters returned with remark "shifted". Then the respondent sent the letters vide DTDC Courier but those packets also returned undelivered. The respondent produced before the learned Arbitrator copies of notice, packets sent by post bearing endorsements of return of service and the packets sent by courier. There is no comment made by the petitioners on these documents. Clause 7.4 of Master Loan Agreement between the parties, makes it incumbent upon the petitioners to communicate to the respondent change in the address if any. It is not the case of the petitioners that they had informed the respondent about any change in their address. Consequently, issuance of the notices by the respondent at the address mentioned in its records will have to be accepted as proper service of notices. The respondents had subsequently found another address of the petitioners and had delivered through DTDC Courier the statement of case and other documents to the petitioners. The said packet had been received by respondent vide it's letter. Dtd. 26th September, 2011. Alongwith it's statement of case, the respondent had also forwarded copy of letter dtd. 6th August, 2011 to the petitioners. The learned Arbitrator refers to Section 3 of the Arbitration Act, which provides for receipt of written communication to hold that the communication sent to the last known address of the petitioners is deemed to have been received. Thus, there is no substance in the contention that invocation of the arbitration is not proper. In any case, the petitioners had appeared before the learned Arbitrator and participated fully in the process of adjudication before him.

8 The second objection of the petitioners is that it was incumbent upon the learned Arbitrator to disclose, as required under Section 12 of the Arbitration Act, that he has no personal interest in the matter. This contention is absolutely without merit in view of the Minutes of hearing dtd. 19th October, 2011, a copy of which has been produced by the

petitioners in the compilation filed by them. The Minutes record that the Arbitrator had by the letter dtd. 11th August, 2011 declared that he does not have any interest in either party to raise any justifiable doubt of his independence and impartiality. On the next date i.e. third date of hearing dtd. 3rd December, 2011, the objection of the petitioners as regards the disclosure by the learned Arbitrator was considered as settled by both the parties and the matter was to be heard on merit. The relevant portion of the Minutes of hearing dtd. 3rd December, 2011 is reproduced below:

> "Pursuant to the receipt of the letter of the Arbitrator wherein the declaration of not having any interest in either party to raise any justifiable doubt of his independency and impartiality, the matter of preliminary objection of matter relating u/s 12 of the Arbitration and Conciliation Act, 1996 is considered as settled as confirmed by both parties.
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> The matter accordingly on merits was thereafter heard.
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> Both parties after discussion agreed and confirmed that there are three issues as mentioned hereunder to be decided.
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> 1 Invocation of arbitration
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> 2 The Claimant to substantiate the claim and interest.

> 3 The Respondent to substantiate their loss as mentioned in Annexure "B" of the statement of defence.
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> The Respondent during the discussion had confirmed that they have no counter-claim but would like the loss of Rs.76,72,125/- as mentioned in Annexure "B" of their statement of defence to be off-set against the claim of the claimant.

It is unfortunate that despite this clear position emerging from the record, the petitioners have sought to contend that there is no disclosure by the learned Arbitrator under Section 12 of the Arbitration Act.

9 As regards the merits of the respondent's claim, the main grievance of the petitioners is to the sale of securities by the respondent. As has been pointed out by the respondent, the petitioners had not made any grievance of those sales with Investors Grievance Cell. The learned Arbitrator has accepted the claim of the respondent that there was constant follow up by it with the petitioners to make good the deficit/debit balance, but the petitioners had given mere assurance to clear the payment. The petitioners had infact in their confirmation letter dtd.14th January, 2009 promised that they will make the payment of interest and the loan amount outstanding in due course of time. The respondent had sold the other shares of

the petitioners held in security with it. The petitioners contend that sale of those shares has caused substantial loss to them because the shares were sold at a very low price. It was their contention that price of those shares within a short time would have appreciated for more than 35% to 100%. The learned Arbitrator has rejected the contention on the ground that the same is hypothetical as well as notional in nature. He also noted that by selling those shares at a particular price, the respondent did not get any benefit for itself. The learned Arbitrator has thereafter considered the letters of confirmation from the petitioners in which there is a clear admission of the outstanding amount and a promise to pay. This view taken by the learned Arbitrator is clearly a probable view of the matter and as such cannot be amenable to limited judicial scrutiny under Section 34 of the Arbitration Act. In fact the award of the learned Arbitrator is an extremely well reasoned award dealing with each contention raised by the petitioners. Thus, there is no merit in the challenge to the impugned awards. Hence, the petitions are dismissed.

(Smt. R.P. SondurBaldota, J.)