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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 7th October, 2016*

+ **FAO(OS) (COMM) 50/2016, CM Nos.25219-25220/2016**
METAL CLOSURES PVT LTD & ORS Appellants
Through: Mr. Dayan Krishnan, Sr. Adv. with
Mrs. Pritha Srikumar Iyer, Mr.
Sulabh Rewari, Adv.

versus

RELIGARE FINVEST LIMITED & ANR Respondents
Through: Mr. Sanjay Poddar, Sr. Adv. with
Mr. Ajay Uppal, Adv.

CORAM:
HON'BLE MS. JUSTICE INDIRA BANERJEE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT

INDIRA BANERJEE, J. (ORAL)

1. This appeal is against judgment and order dated 17.05.2016, passed by the learned Single Judge, dismissing the application being OMP (Comm.) No.112/2016 filed by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to '1996 Act') for setting aside an arbitral award dated 17th September, 2014 passed by the sole Arbitrator Mr.Lalit Kumar, in Arbitration Case No.RFL/Mortgage/LRN/L-4/748 between the appellants and the respondent.

2. Religare Finvest Limited (hereinafter referred to as 'RFL'), a non banking financial company, executed a loan facility agreement with the

appellants on 29th November, 2011, pursuant to which RFL disbursed a loan of Rs.2,10,00,000/- to the appellant No.1 Metal Closures Pvt. Ltd., hereinafter referred to as the appellant company on the terms and conditions contained in the said loan facility agreement.

3. As security for the money lent and advanced by RFL to the appellant company, the appellants mortgaged their property being No.39/4, Khatha No.14826 (SI No.353), Doddakallasandra Village, Uttarahalli Hobli, Bangalore, Karnataka-560062 in favour of RFL by depositing the original title deeds thereof with RFL.

4. On or about 15th March, 2014, RFL recalled the loan facility and demanded a sum of Rs. 1,33,60,183.63p along with interest at 36% per annum. The loan advanced by RFL to the appellant company was repayable to RFL in equated monthly instalments. The appellant company apparently defaulted in payment of instalments in terms of the said loan facility agreement.

5. Disputes and differences arose between RFL and the appellants by reason of alleged breaches of the said loan facility agreement allegedly committed by the appellants. It is not in dispute that the appellant company defaulted in payment of instalments as agreed under the aforesaid loan facility agreement.

6. RFL invoked the arbitration clause in the said loan facility agreement, appointed Mr.Lalit Kumar as sole Arbitrator, and submitted its Statement of Claim before the learned sole Arbitrator *inter alia* claiming a sum of Rs.1,33,60,183.63p from the appellants along with interest.

7. The claim of RFL was allowed by an ex-parte award made and published by the learned sole Arbitrator on 17th September, 2014, which

was impugned before the learned Single Bench, by the appellants by filing the aforesaid application under Section 34 of the 1996 Act.

8. The impugned award of the learned Arbitrator was challenged mainly on three grounds. The first ground of challenge was that the award impugned was allegedly in violation of the principles of natural justice. The appellants contended that the award was made ex-parte. Notice was not served on the appellants.

9. It however, appears that the learned Single Bench took pains to carefully look into the records of the arbitral proceedings and recorded a finding that notice had duly been served. The learned Single Bench found:-

“11. The Arbitral record was added. The same was examined by the Court. Before passing the Award, it appears from the postal receipt as well as A.D. Cards that the Arbitral Tribunal had sent the notices of intention to proceed ex parte, dated 17th July, 2014 which were duly despatched on 23rd July, 2014 and the same were received by the petitioners on 2nd August, 2014. Prior to that, the notices for arbitration proceedings were sent on 3rd July, 2014. The postal receipts are available on record. All A.D. Cards and postal receipts were placed on record of arbitration proceedings.”

10. In view of the factual finding of the learned Single Bench that notices had duly been served, we hold that there was no violation of the principles of natural justice.

11. Citing the judgment of a Division Bench of this Court in **Power Grid Corporation of India Ltd. vs. Electrical Manufacturing Company Ltd.** reported in (2008) 3 *Arbitration Law* 239 (Del.), the appellants argued that the learned Arbitrator had decided to proceed with

hot haste without affording the appellants adequate opportunity. The award was liable to be set aside on that ground. Counsel argued that even though the Code of Civil Procedure does not apply to arbitration proceedings, the Arbitral Tribunal is bound by the principles of natural justice. Counsel referred to **Ruchi Agarwal & Ors. vs. Nicolian (India) & Ors.**, reported in *2010 AIHC 1100* where the Court held that parties are to be treated on equal footing in terms of being permitted to represent the case before the Arbitrator.

12. There can be no doubt that an Arbitral Tribunal is bound by the principles of natural justice. The parties are to be treated on equal footing before the Arbitrator and permitted equal opportunity of representation. However, a party who wilfully does not appear in the proceedings in spite of notice and allows the proceedings to go on ex-parte cannot complain of violation of the principles of natural justices. This is well settled.

13. The impugned award has also been challenged on the ground that the same is patently illegal and against the public policy of India. The disputes referred for arbitration were not arbitrable.

14. Citing the judgment of the Supreme Court in **Booz Allen & Hamilton Inc vs. SBI Home Finance Ltd. & Ors.**, reported in *(2011) 5 SCC 532*, counsel appearing on behalf of the appellants submitted that even though there was an agreement for arbitration, the disputes were not arbitrable. The subject matter of the disputes was not capable of settlement by arbitration. The award was therefore liable to be set aside under Section 34(2)(b)(i) of the 1996 Act.

15. In **Booz Allen** (*supra*), the Supreme Court held:-

“35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public

fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that

property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

16. As held by the Supreme Court in **Booz Allen** (*supra*), the 1996 Act does not specifically exclude any category of disputes as being not arbitrable. However, the arbitral award would be set aside if the Court found that the subject matter of the dispute was not capable of settlement and/or adjudication by arbitration.

17. A judgment has to be construed and understood in the context of the facts in which the judgment was rendered. In the case of **Booz Allen** (*supra*), the Court found the proceedings for sale, foreclosure or redemption of a mortgaged property should only be tried by a Court and not by Arbitral Tribunal as an action for sale of mortgaged property is an action *in rem* for enforcement of right *in rem*.

18. In the aforesaid case, the sale of the mortgaged property would involve the interests of several tenants and others who were not parties to the arbitration agreement.

19. In the unreported judgment of **Aditya Ganapa & Anr. Vs. Religare Finvest Ltd.**, a Single Bench of this Court referred to **Booz Allen** (*supra*). The Court found the award unsustainable in law, having regard to the facts of the case, where a mortgage of immovable property had been created. The learned Arbitrator had not at all considered the preliminary objection and in any case, the award was found to be in violation of the principles of natural justice.

20. There is no bar in law to the Arbitrator deciding a question of sale of mortgaged property. Further it is well settled that creation of a mortgage by depositing original title deeds is not required to be affected by a registered document. In this case, it does not appear that there were any third party rights involved. At least, there is no pleading to that effect. The award is not hit by the principles of law laid down by the Supreme Court in **Booz Allen** (*supra*).

21. It is well settled that the Court does not sit in appeal over an award. The grounds for interference with an award are limited. An award can be said to be against the public policy of India, when such an award is against the interest of India, not compatible with justice or morality or patently illegal.

22. As held by the Supreme Court in **Associate Builders vs. Delhi Development Authority** reported in (2015) 3 SCC 49, an award is against fundamental policy of Indian law when it is not in compliance with statute or judicial precedents or it violates the principles of judicial approach or is not in compliance with principles of natural justice or

violates principles of Wednesbury reasonableness.

23. We find that there are no grounds for interference with the award under Section 34 of the 1996 Act. The learned Single Bench has rightly rejected the application. The appeal is therefore, dismissed.

INDIRA BANERJEE, J

V. KAMESWAR RAO, J

OCTOBER 7, 2016/gm



