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

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Date of decision: September 20, 2017

+ O.M.P. (COMM) 450/2016 and IA No. 13090/2016 (stay)

DD GLOBAL CAPITAL PVT.LTD. & ORS. Petitioners

Through Mr. Jayant K. Mehta, Mr. Diggaj Pathak, Ms. Shweta Sharma and Mr. Shaurya Vardhan, Advocates.

versus

M/S S.E INVESTMENTS LTD. Respondent

Through Mr.P.Nagesh, Advocate.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to challenge the Award dated 22.06.2016 passed by the learned Arbitrator.

2. The respondent is a company incorporated under the Companies Act, 1956 and registered to carry on the business of non-banking financial institution. The case of the respondent as comes out from the pleadings, namely, the statement of claim/replication filed before the learned Arbitrator is that in 2008, petitioner No.1 approached the respondent for availing a loan facility of Rs.4 crores. Loan amount of Rs.3.20 crores was sanctioned and disbursed to petitioner No. 1 on July, 2008. Petitioner No.1 executed various

documents including hypothecation agreement, guarantee agreement all dated 08.07.2008. Petitioner No.1 is said to have failed to re-pay the loan amount of Rs.3.20 crores together with interest. Based on discussions, the respondent agreed to restructure the loan which had gone into default. Consequently on 31.07.2010, the entire loan amount plus outstanding interest was quantified at Rs. 6.37 crores. This was re-financed by the respondent in the form of five new loans for a period of one year by charging and loading upfront interest @ 30% per annum. The total came to Rs.9.10 crores which was payable by petitioner No.1 to the respondent on 31.07.2011 in the form of one bullet payment. On 31.07.2010, five different loan agreements were entered into i.e. four agreements for Rs.2 crores each and one for Rs.1.10 crores. Along with the loan agreements dated 31.07.2010 executed by the petitioners i.e. petitioner No.1 as the principal borrower and petitioners No. 2 to 4 as guarantors, petitioners No. 2 to 4 also executed guarantee agreement dated 31.07.2010 whereby petitioner No.2 became the corporate guarantor and petitioners No. 3 and 4 became the personal guarantors. The petitioners also executed undertakings/declaration dated 31.07.2010 and five debit vouchers of the same date aggregating to Rs.9.10 crores. In addition, a resolution of the Board of Directors dated 30.07.2010 of petitioner No. 1 was also placed on record. The petitioner also gave post dated cheques of Rs.9.10. crores. As default took place, the present proceedings were commenced.

3. Based on pleadings filed by the parties, the learned Arbitrator framed 11 issues as follows:-

i. Whether the loan agreements and other loan documents relied on by the claimant in connection with the said loan agreements in

question, are illegal, bad in law and void-ab-initio on any of the grounds pleaded by the Respondents ? If so, whether this arbitral tribunal has jurisdiction in this case?

ii. Whether the documents relied on by the claimant as loan agreements and other related documents in question are forged and fabricated and the said question is exclusively triable by the Civil court as distinguished from the Arbitral Tribunal.

iii. Whether the claimant is duly registered with R.B.I. as a Non-Banking Finance Company and is competent to institute the present proceedings?

iv. Whether the consideration under the loan agreements in question was by adjustment of the dues under the earlier loan agreements as alleged in the rejoinder by the Claimant?

v. Whether undated cheques were handed over by the Respondents to the claimant during the processing of the request for the grant of loan in question as alleged by the Respondents?

vi. Whether the statement of account relied on by the claimant with regard to the loan in question or any one or more of them is correct and binding on the Respondents, if so, its effect?

vii. Whether the claimant failed to demand the amount becoming due after encashment of any of the loan amounts, if so, its effect?

viii. Whether the Respondents executed guarantee agreements and other documents relied upon by the claimant by way of security for repayment of the loans and other dues, if so, its effect?

ix. Whether the Claimant is entitled to recover Rs.9 .10 Crores as on 26.10.2012 from the Respondents jointly and severally?

x. Whether the Claimant is entitled to recover Rs.8,23,46,000/- as on 26.10.2012 on account of late payment charges for alleged default in the repayment of loan amount?

xi. Whether the Claimant is entitled to interest for the prerule period, pendente lite and future interest, if so the principal amount, the period and the rate thereof?

4. Evidence of four witnesses was led by the parties. On behalf of the respondent/claimant CW-1 Sh.Samresh Aggarwal filed his evidence. On behalf of petitioner No.1, Sh. Deepak Kumar-RW-1/1 and Sh.Narender Kumar Agarwal-RW-1/2 filed their evidence. Sh.Baldev Chand Bansal-RW-2, Director of petitioner No.2 also filed his evidence.

5. Various pleas raised by the petitioners were rejected by the learned Arbitrator. The learned Arbitrator held that the documents including the hypothecation agreement dated 08.07.2008, guarantee agreement dated 08.07.2008, letter evidencing deposit of title deeds dated 08.07.2008, five loan agreements dated 31.07.2010, the guarantee agreement dated 31.07.2010 and other loaning documents were lawfully valid and binding. The Award also holds that the respondent/claimant is duly registered with RBI as non-banking financial institution. It is also held that the statement of accounts filed by the respondent is correct and binding on the petitioners. The Award also holds that the respondent is entitled to recover Rs.9.10 crores as on 31.07.2010 jointly and severally from petitioners. An award was passed accordingly for Rs.9.10 crores with simple interest @ 18% p.a. for the principal for the pre-award period from 01.08.2010 to 22.06.2016 i.e. the date of the award amounting to Rs.9,66,19,561/-. Future interest @ 18% per annum was also awarded.

6. I have heard learned counsel for the parties.

7. Learned counsel for the petitioners has submitted that the Award suffers from material illegality and ignores the agreements between the parties and is liable to be set aside being in conflict with public policies of India for the following reasons:-

(i) It has been urged that the Arbitrator cannot re-construct the contract or go beyond the terms of the contract. Reliance was placed on the five agreements dated 31.07.2010 to contend that a reading of these agreements would show that they have no co-relation to the loan allegedly given in July 2008. It is stressed that the agreement itself states that the respondent has sanctioned a fresh loan which is to be disbursed in one or two tranches at the option of the respondent. Hence, he submits that the five loan agreements have no connection with the previous loan of 2008. No consideration was received for the loan agreements dated 31.07.2010. Accordingly, no award can be passed in favour of the respondent based on the agreements dated 08.07.2008 as the said earlier agreement of 2008 does not have an arbitration clause.

(ii) It has further been urged that without any cogent evidence on record, the Award has been passed against the petitioners. It is urged that the learned Arbitrator has relied upon debit vouchers dated 31.07.2010 to try to link the alleged outstanding loan of the 2008 agreement to the present agreement. It is urged that a perusal of the debit vouchers do not show as to how these vouchers are linked to the loan agreement dated 31.07.2010.

It is further pleaded that the learned Arbitrator passed an order dated 19.01.2013 permitting inspection of certain documents in original from the respondent which included proof of loan disbursement. It is urged that the

respondent in their reply to the learned Arbitrator stated that these documents cannot be made available as the same have been filed in proceedings under Section 138 of the Negotiable Instrument Act. Hence, it is stated that the debit vouchers relied upon by the respondent show the consideration for the loan agreement was a blank debit voucher which has been filled up by the respondent in a desperate attempt to link the loan agreement of 31.07.2010 to the previous loan of 2008. This plea has been rejected by the learned Arbitrator without any evidence on record.

(iii) Learned counsel for the petitioners further submits that the statement of accounts filed by the respondent has been wrongly accepted by the learned Arbitrator. It is urged that a perusal of the statement of account would show that as on 31.07.2010 only a sum of Rs. 6.37 crores was payable by the petitioners. This figure has suddenly jumped up to Rs.9.10 crores by adding interest in advance of Rs.2.73 crores which is wholly illegal and unauthorized. It is further urged that on the same date, namely, 31.07.2010 an amount of Rs.77 lakhs is transferred to Super King Investment Pvt. Ltd. from the account of the petitioner No.1 on the alleged instructions of the Director. It was strongly urged that this statement of account is false and that the learned Arbitrator has ignored vital glaring mistakes rendering the entire Award illegal.

(iv) Reliance is also placed by the petitioner on the order of the learned Arbitrator dated 11.05.2013 where Mr. Karan Gambhir was deleted from the array of parties on the ground that he is not a party to the agreement dated 31.07.2010. It is urged that on the same analogy, no arbitration proceedings can be held against the petitioners.

8. Learned counsel for the respondent has strenuously urged that the documents executed by the petitioners have to be read conjointly as has rightly been done by the learned Arbitrator. He reiterates that the statement of account was filed along with the certificate under Section 65B of the Evidence Act. He points out that as noted by the learned Arbitrator the objections which are being raised by the petitioners, namely, that no consideration was received pursuant to the loan agreement dated 31.07.2010 has never been raised at any earlier stage. The petitioners have signed the documents noted in the award including the loan agreements, debit vouchers, undertakings/declarations, the guarantee agreement and also placed on record the resolution of the Board of Directors. They have also given post dated cheques of Rs.9.10 crores. He stresses that the petitioners have admittedly taken a loan of Rs.3.20 crores from the respondents in 2008 and despite lapse of 9 years have not paid the amount despite re-scheduling. They have merely being trying to raise technical arguments. He submits that out of the loan of Rs.3.20 crores, the petitioners have paid back Rs.1.48 crores leaving a balance of Rs.1.71 crores. He further states that without prejudice to his rights and contentions, if the petitioners are serious about making payment of the loan taken , the respondent have no objection in case the balance principal amount of Rs.1.71 crores is repaid to the respondent along with the normal interest which was agreed upon of 23.36% p.a. compounded yearly without any penal interest.

9. I may add the despite this offer from the respondent, the petitioner did not accept the same.

10. I will now deal with the submissions of learned counsel for the petitioner. The first plea of the petitioner is that the learned Arbitrator has

reconstructed the loan agreements and has gone beyond the terms of the contract inasmuch as he has connected the loan agreement of 31.07.2010 to the loan disbursement done by the respondent in 2008. It has been stressed that in the claim petition, the respondent did not connect the loan of 2008 to the loan agreement dated 31.07.2010. This was only done in rejoinder. The learned Arbitrator has noted that the petitioners have admitted execution of all the loaning documents. They have also admitted disbursement and receipt of Rs.3.20 crores which was disbursed on 08.07.2008. The Award also states that five debit vouchers have been duly admitted by their executor, namely, Shri Narender Kumar Agarwal, Director of petitioner No.1 though it was the stand of petitioner No. 1 that the said debit vouchers were executed in blank and were filled in subsequently. The Award rejects the said contention of the petitioners that the debit vouchers were filled in blank.

11. The award notes that the five loan agreements dated 31.07.2010 do not contain any recital linking them with the first loan of 08.07.2008. It also notes that the claimant did not explain this position in the statement of the claim. However, a detailed clarification has been given in the rejoinder and the petitioners had adequate opportunity to deal with the contentions of the respondent. The award also holds that the five debit vouchers all dated 31.07.2010 contain a clear and categorical reference to the adjustment of the first loan and link the first loan to the second loan.

12. In my opinion, there are no reasons to interfere with the said interpretation of the documents by the learned arbitrator. A sample of the debit voucher dated 31.07.2010 is as follows:

Debit Voucher	Amount (in Rs.)	Dated
Being case No.LD 2325 Disbursement adjusted against the current overdue in case No.LD 2018 on the request of Mr.Sanjay Gambhir, Director though Mr.Narendra Kumar Agarwal, Director of M/s. D.D.Township Ltd. Adjusted in LD 2018 Rs.14000000 interest charged upfront for 1 year Rs.6000000 Total: 20000000	20000000	31.07.2010

Hence, as per above debit voucher, the disbursement of the new loan is adjusted against the previous loan overdue on the request of the Directors.

It is noteworthy that the petitioners executed all the loan agreements on 31.07.2010. There has been no protest ever lodged saying that the petitioners have not received any part of the loan.

The learned arbitrator has on account of the debit voucher dated 31.07.2010 linked the old loan which was overdue to the present set of documents. The interpretation of the debit voucher, the loan agreements etc. is a reasonable interpretation.

13. Interpretation of an agreement is within the domain of the arbitrator. Reference may be had to the judgment of the Supreme Court in the case of

McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors., 2006

(11) SCC 181/(MANU/SC/8177/2006), wherein the court held as follows:

“72. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission* MANU/SC/0803/2003: AIR2003SC4519 and *D.D. Sharma v. Union of India* MANU/SC/0419/2004: (2004)5SCC325]. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

14. Hence, there is no merit in the said plea of the petitioner.

15. The next submission of the learned counsel for the petitioners was that the debit voucher dated 31.07.2010 was executed in blank. A perusal of the award would show that the learned arbitrator has noted that these documents have admittedly been executed by Sh.Narendra Kumar Agarwal, director of respondent No.1. He has appeared as a witness and has admitted the execution of the documents. Hence, the onus was on the petitioners to prove that when these documents were executed they were executed in blank. The award holds that the respondent has failed to discharge this burden.

16. In my opinion, the conclusion arrived at by the learned arbitrator is a plausible conclusion. Other than the pleading that pursuant to the order of the learned arbitrator the entire documents were not given for inspection, no other plea has been raised. Having signed the blank debit voucher as alleged, petitioners have signed the loan and other documents for the said amount of Rs.9.10 crores. After having signed the documents, there has been no protest ever lodged about execution of the debit vouchers in blank. There is no reason to disturb the finding recorded by the learned arbitrator.

17. The next plea of petitioners is that the statement of account has been accepted by the learned Arbitrator without any proper proof. To support this, plea stressed has been put on two entries which at first glance do seem to raise serious doubts about the credibility of the accounts. On 31.07.2010 a debit has been made in the name of Super King Investment Pvt. Ltd. of Rs.77 lakhs. Similarly, a sum of Rs. 2.73 cores as upfront interest has been added making the total due in Rs.9.10 crores from the original amount due being Rs.6.30 crores. Reliance is also placed on the evidence of CW-1 where he has admitted that the respondent have not produced any written instructions of the Director of petitioner No.1 to debit the account of petitioner No.1 with these entries. The witness further states that whether this request of the Director was oral or in writing is not known to him. He has also been unable to produce any documentary evidence showing that the said sum was paid to Super King Investment Pvt. Ltd.

18. The Award notes that the petitioners have failed to file their books of accounts. Further, Mr. Sanjay Gambhir who is said to have given the oral instructions to debit these amounts has failed to appear in the witness box. The Award also notes that Shri Narender Kumar Agarwal, Director of

petitioner No. 1 had appeared but has failed to give any explanation as to why no objection was raised by him and petitioner No.1 at the time of execution of the five loan agreement and other loaning documents about these entries when they accepted balance of Rs.9.10 crores. The Arbitrator hence gave a finding of fact that Rs.77 lakhs was paid by the respondent to Super King Investment Pvt. Ltd. which forms part of the loan amount of Rs. 9.10 crores. The debit of Rs.2.73 crores was also held to be valid.

19. It is a matter of fact that even after the loan agreement was executed on 31.07.2010, the petitioner have at no stage raised disputes about the additional interest added to the debit vouchers of Rs.2.73 crores or the debit of Rs.77 lakhs in their accounts being transferred to Super King Investment Pvt. Ltd. It cannot also be ignored that despite knowledge of these debits in the accounts which as per the petitioners have been wrongly made, the petitioners have signed the debit vouchers and other documents accepting the outstanding balance as on 31.07.2010 as Rs.9.10 crores which includes these two debits which they now seek to challenge.

20. In the light of these facts, the findings of fact recorded by the learned Arbitrator accepting the statement of account are plausible findings which cannot be interfered with in the present proceeding.

21. Findings of fact recorded by an Arbitrator are not subject to challenge. In *Associate Builders vs. DDA, AIR 2015 SC 620* it was held by the Supreme Court as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the

conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to

decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

.....”

22. The last contention of the learned counsel for the petitioners was the reliance placed on the order of the learned Arbitrator dated 11.05.2013 whereby one respondent before the arbitration proceedings, namely, Sh.Karan Gambhir was struck off from the array of parties. The said Karan Gambhir was impleaded as a party pursuant to an application made by respondent.

23. A perusal of the order of the learned Arbitrator dated 11.05.2013 would show that the reason for impleading Sh. Karan Gambhir as a party was that the said Karan Gambhir had pledged 20000 equity shares in capital stock of DD Township Ltd. vide Share Pledge Agreement dated 05.07.2008 as collateral security in favour of respondent for repayment of the loan. However, the said Karan Gambhir is not a signatory to the loan agreements dated 31.07.2010. The said loan agreements do not also refer to the Share Pledge Agreement dated 05.07.2008. Hence, the learned Arbitrator held that the loan agreements dated 31.07.2010 do not bind the said Sh. Karan Gambhir. The Share Pledge Agreement executed by Sh. Karan Gambhir dated 05.07.2008 does not have an arbitration clause. Hence, the application of Karan Gambhir was allowed and his name was struck off from the array

of the parties. It has been vehemently argued by the learned counsel for the petitioners that on the same analogy of Sh. Karan Gambhir, the petitioners should also have been deleted from the array of parties. The facts of the case of Karan Gambhir are clearly not applicable to the facts of the petitioners. Karan Gambhir was not a party to the loan agreements dated 31.07.2010. In contrast, the petitioners are parties to the said agreements. The said order of the learned Arbitrator hence is of no assistance to the petitioners.

24. There is no merit in the plea of the petitioners. The petition and all pending applications are accordingly dismissed.

**(JAYANT NATH)
JUDGE**

SEPTEMBER 20, 2017

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