

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

+ **FAO (OS) 338/2016 & CMs Nos.43195/2016,
45018/2016, 45938/2016**

Reserved on: 11th August, 2017
Date of decision: 22nd September, 2017

SHABNAM GULATI Petitioner
Through Mr. Krishanendu Dutta,
Ms. Sonam Sharma &
Mr. Angna Dewan, Advs.
versus

M/s RELIGARE FINVEST PVT LTD. Respondent
Through Mr. Ajay Uppal, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') has been filed by the appellant Shabnam Gulati challenging the order dated 29.07.2016 passed by the learned Single Judge dismissing her objection under Section 34 of the Act in OMP No.1062/2013. The appellant had challenged the Arbitration Award dated 27.04.2013 passed by the sole arbitrator against the

appellant and her husband late Sunil Dhakamvik Gulati, inter-alia awarding a sum of Rs.2,88,78,504.23 along with interest @ 18% p.a. w.e.f. 14.08.2012 and cost.

2. The dispute between the parties arose out of a loan agreement bearing XMORGHT00029775 (Application ID-564783), wherein an amount of Rs.2.90 crores was advanced by the respondent to the appellant and her late husband for a period of 120 months, repayable in monthly installments of Rs.4,50,273/- each. As the appellant and her late husband had failed to pay the due installments and certain cheques issued by them had also been returned unpaid for want of funds in the account, the respondent, after due notice, had invoked arbitration.

3. As stated above, the sole arbitrator passed the award dated 27.04.2013 in favour of the respondent and against the appellant. The said award was passed ex-parte against the appellant.

4. The primary challenge to the award as also the order passed by the learned Single Judge is on the following two grounds:

- (i) There was no proper authorization by the respondent to initiate the arbitration proceedings inasmuch as the

proceedings were initiated through Mukesh Kumar Choudhary, however, the power of attorney dated 25.04.2011 filed on record in support of such authority to file, did not expressly authorize Mukesh Kumar Choudhary to initiate arbitration proceedings against the appellant;

- (ii) The appellant had been wrongly proceeded against ex-parte as initial notice regarding arbitration proceedings sent by the arbitrator were addressed to an incorrect address and on the second occasion, though addressed to the correct address, the notice had been returned “unclaimed”.

5. In support of the first contention, the appellant has drawn our attention to the Power of Attorney dated 25.04.2011 to assert that there was no delegation of power in favour of Mukesh Kumar Choudhary to initiate arbitration proceedings against the appellant. The appellant has also referred to judgment dated 30.01.2015 passed by a learned Single Judge of this Court in OMP No.1038/2014, titled as *Aditya Ganapa & Anr. v. Religare Finvest Ltd.*, wherein the

learned Single Judge, after examining the Power of Attorney had held that the claim filed therein was not filed by a person who was authorized to do so.

6. We, however, are not persuaded by the above argument of the appellant. In the case of *Aditya Ganapa (supra)* the objector had questioned the authority of Mukesh Kumar Choudhary and Ashutosh Sharma in his reply statement before the arbitrator. The Court found that even after being put to notice of such objection, Religare Finvest Ltd. made no attempt to file the original Power of Attorney, if any, before the arbitrator, which authorized Mukesh Kumar Choudhary to file the claim before the arbitrator. We hereunder quote paragraph 12 of the order dated 30.01.2015:

“12. The failure of a duly authorised person to act on behalf of the company goes to the root of the matter. It vitiates the entire proceedings. Besides, the Petitioner put RFL on notice by raising this point in their reply. Yet no attempt was made by RFL to file original of the POA, if any, before the learned Arbitrator which authorised Mr. Choudhary to file the claim before the learned Arbitrator. Secondly, the learned Arbitrator obviously overlooked the above preliminary objection and failed to deal with it. On this short ground, the impugned Award of the learned Arbitrator becomes wholly unsustainable in law under Section 34 (2) (b) (ii) of the Act and deserves to be set aside.

7. In the present case however, as noticed above, the appellant had been proceeded against ex-parte and therefore no objection was raised to the authority of Mukesh Kumar Choudhary to file the claim petition on behalf of the respondent. A technical flaw or defect in the authority of the person signing the petition or appeal will not invalidate such petition/appeal, if said omission or defect is not deliberate and the signing of the petition/appeal or the presentation thereof before appropriate forum was with the knowledge and authority of the party concerned. Such omission or defect, being one relatable to the procedure, can subsequently be corrected as and when said defect is noticed or pointed out. The Court should permit the concerned party to rectify the defect. Reference in this regard can be made to the judgment of the Supreme Court in *Uday Shankar Triyar v. Ram Kalewar Prasad Sigh & Anr* (2006) 1 SCC 75 and *Haryana State Coop. Supply and Marketing Federation Ltd. v. Jayam Textile and Anr.* AIR 2014 SC 1926.

8. In the present case, as no objection was raised to the authority of Mukesh Kumar Choudhary to sign the claim petition before the Arbitrator due to absence of the appellant from the proceedings, this

issue of authority was clearly not questioned before the arbitrator nor any occasion for granting an opportunity to rectify such defect to the respondent arose. We, therefore, are of the opinion that the appellant cannot challenge the award on this ground. It is a lame attempt, to raise a technical plea, when the case on merits is weak and limping.

9. At this stage, we may note that in the appeal filed before us, there is no averment denying the fact of the loan being availed of by the husband of the appellant and/or mortgage of their immovable property bearing No.603, 6th Floor, D-Wing, Elco Archde, FP No.84, Hill Road, Bandra (W) Mumbai-400050. In fact, from the emails dated 06.04.2013, 09.04.2013 and 10.04.2013 written by the appellant herself, it is apparent, that she was aware of the entire loan transaction. This would also be relevant when we discuss the objection of the appellant denying her signature on the loan agreement. There is also no dispute on the amount being claimed by the respondent as outstanding, after taking into account the installments paid by the husband of the appellant.

10. In similar circumstances, Supreme Court in the case of ***United Bank of India v. Naresh Kumar***, (1996) 6 SCC 660 had held that

procedural defects, which do not go the root of the matter, should not be permitted to defeat a just cause. There is sufficient power in the Courts, under Code of Civil Procedure, to ensure that injustice is not done to any party who has a just cause. We may herein quote from the said judgment:

“9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

10.A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer.

10. xxxxxxxx

11. xxxxxxxx

12. The Courts below having come to a conclusion that money had been taken by respondent no.1 and that respondent no.2 and husband of respondent no.3 had

stood as guarantors and that the claim of the appellant was justified it will be a travesty of justice if the appellant is to be non-suited for a technical reason which does not go to the root of the matter. The suit did not suffer from any jurisdictional infirmity and the only defect which was alleged on behalf of the respondents was one which was curable.

13. The court had to be satisfied that Sh. L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub-Judge, Ambala, had continued for about two years. It is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Sh. L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Sh. L.K. Rohatgi in signing the plaint and thereafter it continued with the suit.”

11. In fact, it will be a travesty of justice if the respondent herein is to be non-suited for a technical reason on the ground that the authority was lacking and defective. A person may be expressly authorized to sign the pleadings on behalf of the company and in absence thereof, the company can later ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. In the present case, the respondent, by their conduct, have clearly ratified all actions

taken by Mukesh Kumar Choudhary in the arbitration proceedings. The respondent's do not dispute his authority. They affirm the same.

12. As far as the second contention is concerned, learned counsel appearing on behalf of the appellant drew our attention to the notice of the arbitration proceedings dated 19.09.2012 issued by the arbitrator and the postal receipt and also the envelop cover by which the said notice had been returned with remark "unclaimed". The appellant points out that the postal receipt reflects an incorrect Pin Code inasmuch as instead of Pin Code "400050", Pin Code reflected in the postal receipt is "400001". In our opinion this mistake in the Pin Code is of no relevance inasmuch as other details and particulars, namely, name of the addressee i.e. the appellant and her husband and their residential address i.e. the flat number, the floor, colony, etc. are correct. It is not that the postal authorities were unable to locate the address, for the said reason. Further, subsequent notice was issued by the arbitrator before proceeding ex-parte against the appellant. The envelope at page 162-163 of the paper book enclosing the second notice correctly records the Pin Code number as "400050". The

envelope was returned with the remark “unclaimed” and not because the address was incorrect or not found.

13. The arbitrator in his order/record of proceeding dated 03.10.2012 had directed issuance of a fresh notice to the appellant. Admittedly, there was no mistake in the pin code mentioned in the envelope and/or in the postal receipt on this occasion and the envelope has been returned “unclaimed”.

14. Learned counsel for the appellant then referred to the judgment of learned Single Judge dated 14.10.2011 of the High Court of Judicature of Bombay in Civil Application No.1979/2011 in First Appeal (stamp) No.13185/2011, titled as ***The New India Assurance Co. Ltd. v. Smt.Nasibunnisa Mohd. Israr Khan & Ors.*** to contend that where the envelope is returned with remarks “unclaimed”, the service of summons or Court notice cannot be treated as good service. In the written submission filed before us, reference has also been made to the judgment of Gujarat High Court in ***Bai Bachiben Velabhai v. State of Gujarat and Anr.*** (1995) 1 GLR 761. We, however, are not persuaded to accept the plea and submission of the appellant.

15. In the case of *New India Assurance Co. Ltd.* (Supra), High Court of Bombay was dealing with Rule 9 and 9A of Order V of Code of Civil Procedure, 1908. It was in that light that though the judgment of Supreme Court in *P.T.Thomas v. Thomas Job*, (2002) 7 SCC 531 and *M/s Madan and Company v. Wazir Jaivir Chand*, AIR 1989 SCC 630, having been referred, the Court held that service of summons of the Court notice cannot be treated as good service where the envelop is returned with remarks “intimation posted”, “not claimed” or “unclaimed”. The Court held that the presumption of service is a rebuttable one and therefore, in light of the facts, the Court would not presume valid service in view of Section 27 of General Clauses Act or Section 114 of Evidence Act. The service effected was not treated as good service. The Court distinguished service of Court notices, from service of statutory notice of the landlord to the tenant or notice exchanged between the parties. Without commenting on the ratio, we would distinguish the decision as Section 3 of the Arbitration and Conciliation Act applies to the facts of the present case.

16. In the case of *Bai Bachiben Velabhai* (supra), Gujarat High Court was dealing with the question of service under the Urban Land

(Ceiling and Regulation) Act, 1976. The Court held that there can be myriad situations because of which the envelope may have been returned with the remark “unclaimed”. In the present case, the appellant has contended that it was because the Pin Code in the postal receipt is incorrect. As we have discussed above, we do not think that the said mistake was of any consequence.

17. As far as the service of notices under Arbitration and Conciliation Act is concerned, Section 3 of the Act provides for a specific mode and manner of service as also presumption of such service. Section 3 of the Act is reproduced herein below:

“3. Receipt of written communications. – (1) Unless otherwise agreed by the parties, -

(a) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.”

18. Section 3(1) of the Arbitration and Conciliation Act, specifically states that a written communication is deemed to have been received, if it is sent to the addressee's last known place of business, habitual address or mailing address by registered letter or by any other means which provides a record of “attempt to deliver it”. Therefore, unlike Sub-Rule 5 of Rule 9 of Order V of CPC requiring proof of acknowledgment or any other receipt of due delivery of the summons, or drawing of a presumption of due service only where the summons were properly addressed but the acknowledgement was lost or mislaid or for any other reason was not received by the Court, under the Arbitration and Conciliation Act sending of notice by registered letter or by other means at last known place of business, habitual residence or mailing address which provides the record of “attempt to deliver it” is sufficient to draw a presumption of service. In fact the sub-section hold that it is deemed service.

19. It is also important to note here that Section 19(2) of the Arbitration and Conciliation Act, specifically provides that the

Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Arbitration and Conciliation Act is a special statute and would therefore have primacy in matters of procedure, including mode of service of notice issued by the Arbitrator. In view, thereof, Order V of CPC would not have direct application in matter of mode and/or manner of service. Moreover, it is obvious that the appellant was trying to avoid service and wanted to take advantage of slyness and pretence.

20. It is not the case of the appellant that the address given in the envelope was incorrect and/or was not the habitual residence of the appellant. The respondent cannot be made to suffer only because the appellant was purportedly not at her residence, whether intentionally or otherwise, when attempts were made to serve her with the notice issued by the arbitrator.

21. Barring the above two technical objections, on merits, the appellant has contended that the loan agreement did not bear her signature and she had not signed the same. Her signatures, in other words were forged. This is the only issue and contention on merits. We are afraid that we cannot go into this issue. The stage of raising

the said issue was before the arbitrator and was lost once the appellant choose not to appear and was proceeded against ex-parte. In any case, as noted above, the appellant does not deny that her husband availed of the loan facility or the amount remaining outstanding due to his default in paying the installments. Signature of the husband are not denied or disputed. We feel that such plea of non-signing of the agreement has been taken as an afterthought and sham attempt to protract the litigation and gain more time.

22. The appellant also contended that there was an insurance policy taken at the time of grant of loan in favour of her late husband and even a premium amount of Rs.2 lacs was deducted. It is therefore claimed that injustice would be caused, if the arbitration award is upheld. Though we feel that this ground cannot be agitated in appeal against the rejection of the objection challenging the arbitration award, we inquired from the respondent regarding the status of such insurance policy. We were informed that the insurance policy had lapsed as the appellant and her late husband had failed to pay the insurance premium in the subsequent year. In any case, this cannot be a ground to challenge the Arbitration Award but is a matter of dispute, if at all,

between the appellant and the insurance company and, therefore, we need not go into the said issue.

23. During the pendency of the present appeal, we had inquired from the learned counsel for the appellant, if the appellant would be willing to pay the awarded amount in installments etc. Appellant herself was not present before us, however, her son appeared and we were informed that they would not be in a position to or agreeable to pay any amount to the respondent even to show their bonafide. We noticed that even the learned Single Judge had offered such opportunity to the appellant but it was not availed by the appellant.

24. In view of the above, we find no merit in the present appeal and the same is dismissed along with pending applications, however, with no order as to cost.

NAVIN CHAWLA, J

SANJIV KHANNA, J

SEPTEMBER 22, 2017/vp