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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **O.M.P. 497/2015**

OGENE SYSTEMS INDIA PVT. LTD. ..... Petitioner
Through: Mr. Avijit Mani and Mr. Amit Kumar, Advocates.

versus

TECHNOLOGY DEVELOPMENT BOARD ..... Respondent
Through: Mr. S.S. Gautam, Advocate.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **10.01.2017**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Ogene Systems India Pvt. Ltd. is to an Award dated 19th May, 2015 passed by the learned sole Arbitrator in the disputes between the parties arising out of a financial facility/assistance termed as a loan agreement dated 31st March, 2010.

2. In terms of the said loan agreement, loan assistance of Rs. 13.50 crores was provided by the Respondent to the Petitioner. The loan assistance was to be given in four instalments of which Rs. 4.50 crores was for the first instalment towards implementation of the project. Rs. 4 crores each was for the second and third instalments and Rs. 1 crore as fourth instalment. Interest was to be paid in half-yearly instalments on the loan assistance outstanding from time to time, at the rate of 5% per annum simple interest

from the date of first disbursement of loan assistance. The payment of accrued interest was to commence from 1st October, 2012 while the repayment of principal amount was to start from 1st October, 2011.

3. As security for the loan, an agreement for pledge in the shares of the Petitioner was executed on 25th May, 2010. The borrower executed a personal guarantee agreement. A deed of hypothecation dated 26th May, 2010 was executed whereby the whole of the movable property including its movable plant and machinery, machineries, spares, tools and accessories etc. were hypothecated in favour of the Respondent. The immovable property being the industrial land located in Pashamylaram, Bashamylaram Village, Patancheru Mandal District, Medak Distt, Andhra Pradesh was also mortgaged by deposit of title deeds.

4. The repayment of the loan was rescheduled in terms of the supplementary loan agreement dated 5th October, 2011.

5. When the Petitioner failed to clear the outstanding dues, notices dated 5th February, 2013 and 17th May, 2013 were sent. As of 30th April 2013, the total outstanding sum was Rs.13,82,58,846. When despite the above notices the default continued, the Respondent invoked the arbitration clause and the disputes referred to the sole Arbitrator.

6. In the statement of accounts maintained by the Respondent in respect of the account of the Petitioner, the total outstanding as of 30th June, 2014 was Rs.15,26,47,841 which included the principal loan amount of Rs.12,54,81,136 and accumulated interest of Rs. 2,71,66,705. Apart from

the above two amounts, interest @ 10% per annum as additional interest on the defaulted amount was claimed with effect from 1st July, 2012 till the filing of the petition. The other claims were for sale of the hypothecated movable assets, sale of the immovable property mortgaged with the Respondent and *pendente lite* and future interest at 15% per annum apart from costs of arbitration.

7. As regards service of notice upon the Petitioner herein, the learned Arbitrator in para 10 of the Award observed as under:

> "10. After of the sufficient service of the notice upon each and every Respondents, appearance was initially tendered on behalf of the Respondent no. 1 & 2 through Counsel and filed vakalatnama, who received copy of the Statement of Claims submitted on behalf of the Petitioner. However subsequently the Counsel for Respondent 1, 2 filed his vakalatnama for Respondent no. 3.M/S Swine Finance & Trading Private Ltd. also and accepted the receipt of the copy of Statement of Claims submitted by claimant on behalf of Respondent No.3 also and prayed for time to file Reply/Defence Statement of Claims, the same was allowed but later on without filing any Reply/Defence Statement of Claims, Respondents stopped appearing and no further intimation was received either from the opposite parties or from their Counsel and consequently the orders 'for proceeding further in the matter u/s 25 of the Arbitration and Conciliation Act 1996 against Respondents were passed (to proceeded ex parte) vide order dated 22.08.2014."

8. Thereafter, the *ex parte* evidence of the Respondent in the form of affidavit and additional affidavit of its Assistant Legal Officer marked as Ex. CW-1/A and CW-1/B were taken on record and examined by the learned Arbitrator.

9. The evidence tendered was examined in some detail. Importantly, it was noted that there was no denial by the Petitioner of its liability. It was again noted in para 16 that although time was sought on behalf of the Petitioner to file reply/defence statement twice, they failed to appear in the matter thereafter and failed to file the reply/defence statement.

10. In that view of the matter, the claim was allowed and the Petitioner as well as its Directors were made jointly and severally liable to pay to the Respondent Rs. 12,54,81,136 towards the balance principal amount and Rs. 2,71,66,705 towards accumulated interest and additional interest at 10% per annum on the defaulted amount from 1st July, 2010 till the filing of the claim petition as well as *pendente lite* and future interest at 15% per annum from the date of invocation of the arbitral proceedings till the realisation.

11. One of the principal grounds of challenge in the present petition is that the Petitioner was not afforded adequate opportunity of defending itself in the arbitration proceedings. It is stated in para 3.14 that "the Petitioner engaged a counsel and he entered in appearance but without any reason the counsel for the Petitioner refused to participate in the arbitration proceedings." It is also claimed in para 3.16 that the Petitioner was not aware of having been proceeded *ex parte* in the arbitration proceedings on 22nd August, 2014 itself. The Petitioner is stated to have written to its counsel on 10th November, 2014 for submitting its reply. It is, accordingly, submitted that the learned Arbitrator referred the impugned Award without following the mandatory procedure under Sections 24, 28 and 31 (3) of the Act.

12. On merits, it is contended that the Petitioner had made a payment of Rs. 1.5 crores to the Respondent but the Respondent adjusted it against the interest which resulted in the principal amount which is awarded by the learned Arbitrator and that the Award of interest was accordingly contrary to the provisions of the agreement. It is further pointed out that the Arbitrator has relied upon documents in evidence contrary to the Indian Stamp Act, 1899 and the Indian Contract Act, 1872. The above submissions were reiterated by learned counsel for the Petitioner before this Court.

13. The Court is unable to agree with the submissions made by learned counsel for the Petitioner as regards the learned Arbitrator having not afforded the Petitioner adequate opportunity in the arbitration proceedings. The extracted passage shows that the learned Arbitrator granted sufficient number of opportunities to the Petitioner to file a statement of defence. However, the Petitioner's counsel abruptly stopped appearing before the learned Arbitrator. It was for the Petitioner to have followed up with its counsel and made sure that it is properly represented in the arbitral proceedings. The order setting out the Petitioner *ex parte* was passed by the learned Arbitrator on 22nd August 2014. Even thereafter, hearings took place as is apparent from para 11 of the impugned Award. There was sufficient time for the Petitioner to have diligently followed up the matter with its counsel and ascertained the progress of the arbitral proceedings.

14. There is nothing stated about the date on which the Petitioner contacted its counsel to find out about the progress of the arbitration case. The only date given is that the Petitioner had sent a copy of the reply to its counsel on

10th November, 2014. Why it was not done earlier is also not explained. The reasons given by the Petitioner for not participating in the arbitration proceedings is, therefore, not convincing at all. If indeed to the knowledge of the Petitioner its counsel stopped appearing, then the Petitioner clearly did not decide to make any alternative arrangement by engaging another counsel and following up the arbitration proceedings.

15. In the circumstances, the Court is unable to accept the submission that the impugned Award is passed in violation of the principles of natural justice or that the learned Arbitrator denied the Petitioner a full opportunity of presenting its defence in the arbitration proceedings. The Court does not find any violation of Section 18 of the Act as is sought to be made out by the counsel for the Petitioner.

16. It is then contended that the Award is based on no evidence at all and whatever has been referred to is contrary to the terms of the contract. It is accordingly contended that the impugned Award is contrary to Section 28(2) of the Act read with Section 31(3) thereof. A perusal of the impugned Award shows that the learned Arbitrator has not mechanically proceeded to allow the claims after setting the Petitioner *ex parte*. The affidavits of evidence of the Petitioner were perused and the documents in support of the claim were examined. It is only after discussing the evidence that the learned Arbitrator proceeded to award the claims. Consequently, the Court negatives the plea of the Petitioner that the impugned Award is contrary to Section 28(3) or 31(3) of the Act.

17. The petition is dismissed but, in the circumstances, with no order as to costs.

S. MURALIDHAR, J

JANUARY 10, 2017
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