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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 6/2015

SIDHI INDUSTRIES & ORS

..... Petitioners

Through: Mr. Ashish Virmani with Mr Akshay
Abrol, Advocates.

versus

RELIGARE FINVEST LIMITED

..... Respondent

Through: Mr. Ajay Uppal, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

08.02.2017

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1. Mr. Ashish Virmani, learned counsel for the Petitioners submits that the challenge to the impugned award dated 30th August, 2014 passed by the learned sole Arbitrator is essentially on the following grounds:

(i) The claim petition was signed by one Ms. Megha Gulati who was not authorized by the Respondent to initiate arbitration proceedings or file claims since the power of attorney ('POA') dated 19th April, 2012 placed on record did not expressly authorize her to do so;

(ii) the arbitration clause in the Loan Agreement (LA) mandated that the Arbitrator appointed by the Respondent should, unless an extension was consented to by the parties, conclude the arbitration proceedings and pronounce an Award within two months from the date of entering upon reference. It is pointed out that the Arbitrator entered upon reference on 27th

September, 2013. Therefore, he ought to have pronounced the Award by 26th November, 2013. On the other hand, the learned Arbitrator pronounced the Award only on 30th August, 2014. Reliance is placed by learned counsel for the Petitioner on the decisions of the Supreme Court in ***NBCC Limited v. J.G. Engineering Private Limited (2010) 2 SCC 385*** and ***Bharat Oman Refineries Limited v. M/s. Mantech Consultants (2012) 2 Arb.LR 482 (DB) (Bom)***.

(iii) The learned Arbitrator could not have proceeded with the arbitration since the LA containing the arbitration clause was not properly stamped.

2. In reply to the above arguments, it is pointed out by Mr. Ajay Uppal, learned counsel for Respondent, that by not objecting to the continuation of the arbitration proceedings beyond 26th November 2013, the Petitioners had in fact acquiesced in it and cannot be now heard to object. Reference is made to Section 4 (b) of the Arbitration and Conciliation Act, 1996 ('Act'). It is pointed out that a reply was filed by the Petitioners in the arbitration proceedings on 31st March, 2014 i.e., much beyond the stipulated date of completion of the arbitration proceedings. Thereafter, they participated in the final arguments of the arbitration proceedings on 25th July, 2014 and the Award was reserved.

3. It is further pointed out by Mr. Uppal that both ***NBCC Limited v. J.G. Engineering Private Limited*** (*supra*) and ***Bharat Oman Refineries Limited v. M/s. Mantech Consultants*** (*supra*) turned on their peculiar facts and are distinguishable. As regards the POA not authorizing Ms. Megha Gulati to institute the arbitration proceedings, attention has been drawn to the latter

dated 14th August 2012 whereby the Respondent ratified the action of Ms. Megha Gulati initiating the arbitration proceedings, after noticing that the POA did not clearly authorize her to do so. In any event, it is submitted that this is a curable defect as held by the Supreme Court in *United Bank of India v. Naresh Kumar (1996) 6 SCC 660*. As regards the insufficient stamping of the LA, it is submitted by Mr. Uppal that no such ground was urged before the learned Arbitrator. It has been raised for the first time in the present petition under Section 34 of the Act.

4. Further, Mr. Uppal pointed out that on merits the Petitioner did not have any case at all since, admittedly, the fact of their borrowing a loan and defaulting in making payment of the equal monthly instalments (EMIs) has not been denied by them.

5. As regards the first issue concerning the POA, while learned counsel for the Petitioner is right in pointing out that the POA dated 19th April, 2012 does not expressly authorise Ms. Gulati to institute arbitration proceedings by filing a statement of claims, the lack of the authority to do so has been acknowledged by the Respondent's letter dated 14th August, 2012. Although Mr. Virmani pointed out that the said letter was not placed on record before the learned Arbitrator, the Court finds that no plea as regards the lack of authority of Ms. Gulati was raised before the Arbitrator. Mr. Virmani referred to the Petitioners' written submissions before the learned Arbitrator where in the parawise reply to para 1, the objection was raised. Nevertheless, going by the impugned Award, at the stage of arguments the said point appears to not have been pressed. In any event, as explained by

the Supreme Court in *United Bank of India v. Naresh Kumar* (*supra*), the lack of authorisation is in fact a curable defect. The following paras in the said judgment are relevant in this regard:

“9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be presented 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 procedure irregularity which is curable.”

“10. A person may be expressly authorized 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 rectify the said action of its officer in signing the pleadings. Such rectification can be express or implied.”

6. The letter dated 14th August 2012 issued by the Respondent should be taken to be a ratification of the filing of claims by Ms. Gulati on its behalf. In that view of the matter, this Court finds no merit in the submission of Mr Virmani that the claim should be rejected on the ground that Ms Gulati was not authorized by the Respondent to do so.

7. Turning to the next submission, it is necessary to refer to the arbitration clause in the LA which reads as under:

“Arbitration:

If any dispute, difference, claim or controversy including the matter of damages if any (collectively referred to as "Dispute") arises between

the parties about the validity, interpretation, implementation or alleged breach of any provision of this Agreement, or anything connected or related to or incidental to this Agreement then the parties shall negotiate in good faith to endeavour to resolve the matter. However, if the Dispute has not been resolved by the parties within seven (7) days after of receipt of written notice of the Dispute by either party from the party raising the Dispute, then either party may submit the Dispute to arbitration to be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act 1996, as amended from time to time Arbitration shall be held at Delhi, India. The Dispute shall be referred to a suitably qualified sole arbitrator to be appointed by RFL. The arbitration proceedings shall be conducted and the award shall be rendered in the English language. The arbitrator will required to make the award within two (2) months of entering upon the reference unless the time is extended by consent of the parties to the arbitration proceedings. The award rendered by the arbitrator shall be final, conclusive and binding on all Parties to this Agreement and shall be subject to enforcement in any court of competent jurisdiction exclusively at Delhi. The cost of arbitration, including cost of preparing and presenting its case and the fees and expenses of the arbitrator shall be shared equally by the parties, unless the award otherwise provides.”

8. In the present case, it is not in dispute that the appointment of the arbitrator was made by the Respondent on 8th August, 2013 and notice was issued to the Petitioner in the arbitration proceedings for the first time on 11th September, 2013. It is also not in dispute that the first sitting of the arbitration was on 22nd September, 2013. Going by the above arbitration clause, and given that there was no express consent by the Petitioners to the extension of time, the last date for the pronouncement of the Award by the learned Arbitrator was on 26th November, 2013. However, what is not in dispute is that the reply was filed by the Petitioner on 31st March, 2014 and thereafter the arguments were advanced before the learned Arbitrator on 26th

July, 2014 when the Award was reserved. Thereafter the impugned Award was published on 30th August, 2014.

9. It is necessary at this stage to refer to Section 4 of the Act which reads as under:

“4. Waiver of right to object. —A party who knows that—

- (a) any provision of this Part from which the parties may derogate, or
- (b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

10. What is plain from Section 4 (b) is that where a party knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without stating his objection to such non-compliance without undue delay within that period of time “shall be deemed to have waived his right to so object.”

11. When asked if there was any specific objection raised before the learned Arbitrator by the Petitioners that he should not continue after the lapse of two months after entering upon reference, counsel for the Petitioner answered in the negative. He was candid that an objection in this regard has been raised for the first time in the present petition under Section 34 of the Act.

12. The decisions in *Bharat Oman Refineries Limited v. Mantech*

Consultants (supra) and *NBCC Limited v. J.G. Engineering Private Limited (supra)* do not help the Petitioner. In *NBCC Limited v. J.G. Engineering Private Limited (supra)*, the parties had mutually agreed to extend the time till 30th September, 2005 for the arbitrator to pronounce the Award, but the arbitrator failed to do so. In the circumstances, the High Court terminated the mandate of the arbitrator and appointed another arbitrator in his place. It is in those circumstances that the Supreme Court clarified that

“the arbitrator was bound to make and publish his award, within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. Therefore, the condition precedent for enlargement of time would depend only on the consent of the parties, that is to say, that if the parties agree for enlargement of time. If consent is not given by the parties then the authority of the arbitrator would automatically cease to exist after the expiry of the time-limit fixed.”

13. In the present case, however, the Petitioner continued to participate in the arbitration proceedings without raising any objection and the arbitrator proceeded thereafter to hear the arguments and publish the Award.

14. Likewise, in *Bharat Oman Refineries Ltd v. Mantech Consultants (supra)*, the arbitration clause in question required the arbitrator to pronounce the Award within one year of conclusion of arguments. The arguments concluded on 21st April, 2004 and the Award was pronounced on 17th August, 2006. There was no consent of the parties extending the period for pronouncement of the Award. As rightly pointed out by the Bombay High Court, the doctrine of waiver “is always based on the facts and circumstances of each case, conduct of the parties in each case and as per the

agreement entered into between the parties.” The Bombay High Court also distinguished the earlier judgment in *Snehdeep Auto Centre v. Hindustan Petroleum Corporation Limited* (decision dated 16th April 2012 in Appeal No. 143 of 2012) where a written statement had been filed before the learned Arbitrator even beyond the period within which the arbitration proceedings had to be concluded. The Bombay High Court in *Bharat Oman Refineries Ltd v. Mantech Consultants* (*supra*) noted that “the facts are totally different here”.

15. In the considered view of the Court, the facts of the present case clearly attract the waiver as envisaged under Section 4 (b) of the Act. Consequently, the Court does not agree with the submission of the counsel for the Petitioner that notwithstanding that the Petitioner participated in the arbitral proceedings beyond the period of two months after the Arbitrator entered upon reference, the continuation of the proceedings thereafter was without jurisdiction.

16. Lastly, as regards the question of improper stamping of the LA, the Court finds that no such point was urged before the learned Arbitrator. If it had been, then it is possible that the learned Arbitrator might have proceeded, if it was so warranted, in terms of the law pronounced by the Supreme Court in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited* (2011) 14 SCC 66. Here again, the Petitioners having not raised any objection despite knowing the requirement of law cannot be permitted to do so at this stage.

17. It must be noticed that the Petitioners did not deny the fact of their

having issued post-dated cheques and that after paying two of the EMIs, they defaulted in paying the further EMIs.

18. None of the grounds under Section 34 of the Act stand attracted in the present petition. It is accordingly dismissed with but, in the facts and circumstances of the case, with no order as to costs.

FEBRUARY 08, 2017

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S.MURALIDHAR, J

