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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**ARBITRATION PETITION (L.) NO.1226 OF 2018
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ARBITRATION PETITION (L.) NO.1380 OF 2018**

Delhi Baroda Road Carrier Pvt. Ltd. & Anr.

..Petitioners

Vs.

Mahindra and Mahindra Finance Services Pvt. Ltd.

..Respondent

Mr.Aseem Naphade with Mr.Harish Khedkar and Mr.Rachit Lakmani i/b.
VIS Legis Law Practice for Petitioners/Applicant.

Mr.Mayur Khandeparkar for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 5th DECEMBER, 2018

ORDER:

This batch of petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) assail the awards dated 27 June 2018 passed by the learned sole Arbitrator whereby the claims as made by the respondent Mahindra & Mahindra Financial Services Private Limited stand allowed qua the amounts as awarded in each of these awards. The facts are not in dispute.

2. The petitioner No.1 in all these petitions is a private company incorporated under the Companies Act 1956 and is stated to be engaged

inter-alia in the business of transportation of goods. The respondent Mahindra & Mahindra Financial Services Private Limited is a non-banking finance company also incorporated under the Companies Act, 1956 and is involved in the business of extending financial assistance by providing loans against security.

3. The petitioners and the respondent entered into loan agreements wherein the respondent provided financial facilities to the petitioner No.1 company for purchase of trucks. In regard to each of these petitions, there are independent loan agreements. Pursuant to the said loan agreements, amounts were disbursed and the petitioner No.1 was supplied trucks by the vehicle manufacturing company namely Mahindra & Mahindra Limited. As per the terms and conditions of the loan agreements, the vehicles were hypothecated in favour of the respondent. There are about 133 such vehicles which were purchased qua 133 loan agreements and the loan amount as disbursed qua the purchase of said vehicles by the petitioners was Rs.36,52,42,000/-.

4. The case of the petitioners is that due to circumstances which were beyond the control of the petitioners, the petitioners were unable to keep up with the repayment of the loan installments. The respondent therefore, invoked arbitration proceedings against the petitioners qua

each of the financed vehicles. The respondent appointed a sole Arbitrator as per the arbitration clause contained in the said loan agreements. The arbitrator entered reference. A letter dated 12 August 2017 was received by the petitioners from the learned sole Arbitrator fixing a preliminary meeting of the arbitration on 4 September 2017.

5. As the petitioners were in financial difficulties and there were defaults, as also arbitrations were invoked by the respondent, the petitioners approached the respondent to settle the loans amicably, which according to the petitioners, was agreed by the respondent. The petitioners in paragraph 7 of the petition have averred that the petitioners addressed e-mails to the respondent proposing to repay the outstanding EMIs by June 2018, which was also agreed by the respondent. The petitioners also made certain payments. However, the entire payment as agreed could not be made. The petitioners had an understanding that the respondent had agreed that the petitioners would hand over the hypothecated trucks to the respondent, which the respondent would sell at the best possible price and the proceeds of the same would be distributed equally amongst the petitioners and the respondent. It is the petitioners' case that the petitioners also surrendered the hypothecated trucks. The petitioners however on 9 July 2018 were surprised to receive 134 impugned awards

passed by the learned Arbitrator against the petitioners.

6. The petitioners contend that the learned Arbitrator could not have passed the awards in view of the intervening events which had taken place, including surrender of vehicles. The petitioners being aggrieved by the awards have filed these petitions under Section 34 of the Act.

7. The only submissions as made by Mr.Naphade, learned Counsel for the petitioners, in assailing the awards are:-

(i) That there is no judicious application of mind on the part of the learned Arbitrator in making the awards. The requirement of judicious application of mind is a requirement of law as contemplated by Section 25(b) of the Act. This for the reason that the learned Arbitrator could not have referred to the undated letter of the petitioners, as received by the learned Arbitrator on 3 November 2017 enclosing therewith an e-mail dated 1 November 2017 addressed by the petitioners to the respondent. It is submitted that the said undated letter was addressed “without prejudice” to the respondent. It is submitted that the said letter and the e-mail could not have been construed by the learned Arbitrator as an admission of the liability so as to make an award granting claims as made by the respondent. This submission is being supported by referring to Section 81 of the Act which provides for

admissibility of evidence of the nature, of a without prejudice settlement between the parties.

(ii) It is next submitted that the principle as embodied in sub-section (b) of Section 25 is akin to the principles as contained in the provisions of Order 8 Rule 5(b) of the Code of Civil Procedure. It is thus submitted that the “without prejudice” communication addressed to the Arbitrator along with e-mail can never form the basis of the award.

(iii) It is submitted that paragraph 18 of the awards indicate that there is no particularization of the pleas and that the contents of paragraph 18 are omnibus expressions and hence the award cannot be said to be a well reasoned award.

8. No other ground on law or facts than what is noted above was urged on behalf of the petitioners.

9. In support of his contention Mr.Naphade has placed reliance on the decision of the Supreme Court in (1) *Balraj Taneja & Anr. Vs. Sunil Madan & Anr.*¹, (2) *Delta Distilleries Ltd. Vs. United Spirits Ltd. & Anr.*², (3) *Prakash Chandra Gangoly Vs. Nawn Estates Pvt.Ltd.*³

1 (1999)8 SCC 396

2 (2014)1 SCC 113

3 1968 Indian Law Reports 670

10. On the other hand Mr.Khandeparkar, learned Counsel for the respondent, at the outset would submit that there is no ground as made out under the provisions of Section 34 of the Act and more particularly in terms of the recent amendments to the said provision by Act no.3 of 2015 to assail the impugned awards. It is submitted that the primary consideration for the learned arbitrator was observation of the principles of natural justice. It is submitted that there were about five notices issued to the respondent by the learned Arbitrator seeking presence of the respondent in the arbitration proceedings, however, the respondent willfully defaulted in making an appearance and contesting the proceedings. It is submitted that the petitioners having refused to contest the respondent's claims by filing written statements, there was admittedly no dispute on the factual matrix and entitlement of the respondent to the monetary claim as made by the respondent before the arbitral tribunal. It is submitted that even otherwise at no point of time the claims of the respondent were ever denied by the petitioners. Referring to the averments as made in paragraphs 4, 5 and 7 of the petition, Mr.Khandeparkar submits that these averments show there is no dispute on the factum of disbursement of loan, default on the part of the respondent in making payment of installment and the statement of claim as made by the respondent. It is thus submitted that there was never a contest whatsoever on the petitioners liability towards the

respondent, qua the loans in question.

11. Mr.Khandeparkar submits that the contentions as urged on behalf of the petitioners in assailing the award are also not the grounds as raised in the petition. It is submitted that even assuming that the petitioners undated letter received by the learned Arbitrator on 3 November 2017 with e-mail dated 1 November 2017 addressed to petitioner is to be considered, there can be no relevance to the applicability of Section 25(b) of the Act. It is submitted that in fact the e-mail dated 1 November 2017 as addressed by the petitioner to the respondent is not a document which is without prejudice. It is submitted that in fact the said undated letter of the petitioners addressed to the learned Arbitrator alongwith e-mail dated 1 November 2017, are documents as placed on record of the arbitration proceedings on behalf of the petitioners, and thus there was no embargo for the learned arbitrator to refer the said letters. Mr.Khandeparkar further submits that this is not a stand-alone document on the basis of which the learned Arbitrator has proceeded to award the claim. Referring to paragraph 18 of the award, it is pointed out that there is complete application of mind by the learned arbitrator to all the documents which were placed on record, namely the loan agreements executed between the parties, the demand promissory notes issued in favour of the

respondent, recall noticed dated 25 July 2017, invocation notice dated 4 August 2017 and the statement of account as also failure on the part of the petitioner to make payment of the installment as stipulated under the agreement, and the fact that no defence was filed on behalf of the petitioners to contest the claim of the respondent. It is thus submitted that what was expected from the arbitrator was the qualitative consideration of the material on record and whether such material would support the award of a claim in the absence of contest whatsoever. Mr.Khandeparkar would submit that in a commercial transaction the borrower cannot have an approach that he would not defend the claim in the arbitration proceedings and on pronouncement of the awards and being confronted with a liability to pay the award amounts, only because a remedy to assail the award is available, make such specious pleas. Mr.Khandeparkar submits that the reliance on the above referred decisions on behalf of the petitioner is not well founded in the present facts.

Discussion and Conclusion

12. I have heard the learned Counsel for the parties. I have also perused the impugned awards and the record.

13. At the outset it needs to be noted that there is no dispute that the petitioners have availed financial facilities from the respondent for purchase of trucks in question. The loan documents are not in dispute. There is also no dispute that there were defaults on the part of the petitioners in making payment of the installment qua each of these loans. The record indicates the petitioners having taken a stand that for a variety of reasons they faced financial difficulties resulting in defaults in making payment of the installments. It is also not in dispute that the loan was accordingly recalled as also the respondent invoked the arbitration.

14. It also appears to be not in dispute that the petitioners had sufficient notice of the arbitral proceedings. The petitioners, however, preferred not to participate in the arbitration proceedings and contest the claims of the respondent as made before the learned arbitrator. In fact what has transpired in the proceedings before the learned arbitrator is important. The petitioner addressed an undated letter to the arbitrator as received on 3 November 2017 enclosing an e-mail dated 1 November 2017 of the petitioners addressed to the respondent, *inter alia* recording that the petitioners would repay installments at Rs.70 lakhs per month and that the entire outstanding EMIs would be cleared before 30 June 2018. Considering the arguments as advanced by the

learned Counsel for the parties, it would be necessary to note the contents of this letter and the e-mail which read thus:-

“
Delhi Baroda Road Carrier(P) Ltd.

To,
Mrs.Samindara R.Surve
203/A, Srushti Co-op.Hsg.Soc.Ltd.
G.D.Ambedkar Road.

WITHOUT PREJUDICE

Subject: Arbitration Petition filed by Mahindra & Mahindra Financial Services Ltd. Vs. Delhi Baroda Road Carrier Pvt.Ltd.

Dear Madam,

We would like to bring to your kind notice that subject to receipt of your notice Dt.11-10-2017 in which next date of hearing was mentioned as 1 November-2017 we visited the office Sadhana House Ground Floor Mahindra & Mahindra Worli Mumbai 400018 at 11.AM. That since you were not available at that time we visited the office of the Mahindra & Mahindra Financial Services Ltd. At Mahindra tower Wherein after the detailed discussion with the Mr.Shantnu Padhey, Mr. Uday Bakshi the parties have amicably resolved the matter. That pursuant to discussion a proposal has been forwarded by us to the Mahindra & Mahindra Financial Services Ltd. For the repayment of the loan. That after the said discussion around 3PM we again went to Sadhana House Ground Floor Mahindra & Mahindra, however by then the proceedings were concluded. That during the visit we also came into contact with Mrs.Kritika Thakkar and also informed her about the meeting that took place with the official of Mahindra & Mahindra Financial Services Ltd. That since the matter has been amicably resolved between the parties we would like to inform you that there is no requirement of present proceedings and in case there is any coercive or adverse step be taken in present matter against us the same should not be without prior intimation.”

(Emphasis supplied)

E-mail dt:1 Nov 2017:

“Mr.Shantanu Padhye,

We are proposing to clear our outstanding in following manner.

1. DBRC will repay the installment outstanding @ 70.00 lacs per month till March 18.
2. MMFSL will release 20 no. NOCs of tenor completed contracts in Nov.'17 and 15 nos. NOCs in Jan.' 18.
3. DBRC will pay additional amount of 400.00 lacs between Nov.'17 to March' 18.

4. DBRC will start paying 125.00 lacs per month from April'18 onwards.
5. MMFSL will issue the NOCs of the contracts which are getting closed in March and April'18 for getting refinance on this vehicles.
6. DBRC will clear entire outstanding EMIs before 30th June 2018.”

15. On a reading of the above letter and the e-mail what can be gathered is that the above letter of the petitioner is addressed to the arbitrator. It is not a letter *inter se* between the parties. There cannot be an argument on the words “without prejudice” as used in the said letter de hors the contents of the said letter. The respondent by the said letter merely informed that they had discussions with the respondent to settle the dispute and that according to the petitioners, the matter has been amicably resolved between the parties and that there is no requirement of the arbitration proceedings. What is peculiar are the last few lines of this letter. The petitioners being completely conscious that there are arbitration proceedings and that there is a likelihood of award being passed against them, the petitioners' record in the letter that “*in case there is any coercive or adverse step to be taken in the present matter against us, the same should not be without prior intimation.*”

16. If these are the contents of the petitioners' letter, one would fail to understand the efficacy of the word “without prejudice” as argued. The efficacy of the word “without prejudice” would be required to be considered and ascertained in the context in which it is used. In

regard to the petitioners' letter in question the use of these words can only mean that the petitioners intended to assert their rights to defend any adverse orders if so passed by the learned Arbitrator. Even otherwise in my opinion, the word "without prejudice" would not have any relevance when it comes to the learned Arbitrator considering the said letter, in the process of adjudication of the dispute in the arbitral proceeding. It also cannot be said that it was not incumbent for the petitioners to contest the claim as made by the respondent before the learned sole arbitrator.

17. A perusal of the impugned award would also indicate that the said undated letter and the petitioner's e-mail dated 1 November 2017 are not the stand-alone documents on which the claim has been awarded. Mr.Khandeparkar would be correct in his contention that the learned Arbitrator merely on these documents has not awarded the claim. The learned Arbitrator has taken into consideration other documents/evidence in regard to the disbursement of loan, the admitted default on the part of the petitioners in making payment of installment, the recall notice, promissory note etc., so as to award the claims.

18. In so far as the contention of Mr.Naphade referring to Section 25(b) of the Act, the said provision needs to be noted which reads thus:-

25. Default of a party.—Unless otherwise agreed by the parties, where, without showing sufficient cause,—

(a)

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;"

There can be no dispute on the obligation as would fall on the arbitral tribunal in regard to the circumstance as the said provision would contemplate. Section 25(b) provides that if the respondent before the arbitral tribunal fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and that the arbitral tribunal shall have a discretion to treat the right of the respondent to file such statement of defence as having been forfeited.

19. In my opinion, the contention of Mr.Naphade relying on the provisions of Section 25(b) is not well founded. This for the reason that Section 25(b) confers power on the arbitral tribunal to continue the proceedings on failure of the respondent to file his statement of defence and a discretion is conferred on the arbitral tribunal in a given set of facts not to treat the failure of the respondent as an admission of the allegations as made by the claimant. This would also mean that the arbitral tribunal in such a situation can independently test such allegations without the same being considered as a deemed admission of

the respondent. However, such is not a situation as confronted by the arbitral tribunal in the facts of the present case. Further in my opinion, there was no occasion for the arbitrator to apply such principle. The petitioner itself has not discharged the burden that the claim of the respondent stood satisfied. Mere assurance of the respondent was not sufficient for the arbitral tribunal to terminate the arbitral proceedings and more so considering the rigour of Section 25 of the Act. Under the scheme of Section 25 of the Act what is significant is sub-section (c) which contemplates a situation that when a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

20. The contention of Mr.Naphade that section 25(b) would contemplate judicious application of mind irrespective of the petitioners having not filed written statement and that in the facts of the present case, there is no judicious application of mind, also cannot be accepted considering the material on record and on a reading of the awards. The learned Arbitrator has taken into consideration all the documents as noted above to come to a conclusion that the respondent was entitled to the claims as made and more particularly in the absence of any contest by the petitioners.

21. In so far as the decision of the Supreme Court in “**Balraj Taneja & Anr.**” (supra) there can be no dispute on the observations as made in the context of Order 8 Rule 10 of the Code of Civil Procedure in paragraph 27 of the report as relied on by Mr.Naphade which reads thus:-

“27. In view of the above, it is clear that the court, at no stage, can act blindly or mechanically. While enabling the court to pronounce judgment in a situation where no written statement is filed by the defendant, the court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the court can either pronounce judgment against the defendant or pass such order as it may think fit.”

Mr.Naphade relying on the above observations is not in a position to make good the submission that the learned arbitrator has not applied her mind or has exercised discretion contrary to the record and or beyond the terms of reference in awarding the claims as made by the respondents. In assailing the award, there cannot be any scope for any academic pleas which would not assist the petitioners in assailing the award.

22. There is much substance in the contention as urged by Mr.Khandeparkar that the learned Arbitrator has adhered to the principles of natural justice and that there was no dispute on the liability of the petitioners to repay the loan and the defaults and the claims being uncontroverted before the learned Arbitrator.

23. Reliance of Mr.Naphade on paragraph 21 on the decision in **Delta Distilleries Ltd.** (supra) is also not well founded. The relevant observations in paragraph 21 of the decision read thus:-

“It is undoubtedly clear that if a party fails to appear before the Arbitral Tribunal, the Tribunal can proceed ex parte, as provided under Section 25(c). At the same time, it cannot be ignored that the Tribunal is required to make an award on the merits of the claim placed before it. For that purpose, if any evidence becomes necessary, the Tribunal ought to have the power to get the evidence, and it is for this purpose only that this enabling section has been provided.”

24. In relying on the above decision, Mr.Naphade is not in a position to draw home a point that the awards are not based on the materials which are available on record of the learned Arbitrator or that any further evidence was necessary without which the award could not have been made. In the absence of any such plea, the proposition of Mr.Naphade referring to paragraph 21 of the said decision, is of no avail.

25. In regard to the word “without prejudice” as referred in the undated letter received by the learned Arbitrator on 3 November 2017, Mr.Naphade has placed reliance on the decision in “**Prakash Ganguli**” (supra). This was a case where the Court was considering the application for recording compromise between the parties settling the suit for specific performance of a contract for lease of land and for a decree in accordance therewith. The plaintiff therein addressed a letter

marked “without prejudice” recording the terms of settlement and enclosing a cheque of Rs.25,000/- in part payment of the advance of the agreed sum. One of the questions which was considered by the learned Single Judge of the Calcutta High Court was 'whether the use of expression “without prejudice” embedded in the said letter of the plaintiff was in the form of compromise being recorded and given effect to.' The Court in the facts of the case considered the effect of the word “without prejudice” as observed in paragraph 15 which reads thus:-

“15. That the defendant company also prefixed the words 'without prejudice' before the signatures of its two directors in the same letter is very much in my mind. It appears to be the same thing as the defendant company accepting the offer, without prejudice, by a separate letter : just what Mr.Bachawat submits, and rightly, in my judgment. What can 'without prejudice' mean in this context? It may mean only this : the defendant company saying to the plaintiff “we shall grant you lease and do all that is stated in the letter, your letter, but you must withdraw the suit, as you have promised.” The same approach again: if the plaintiff will not accept it, here is an end of the matter; the whole thing fails in effect and cannot be used against the defendant company. But the plaintiff Gangoly has accepted it. So, the outlook is at once changed, a completed contract comes into being that way too, and there can be no going back upon it. Thus, in all circumstances here the words 'without prejudice' appear to be incapable of doing to the plaintiff Gangoly the harm the terrors of which the defendant company would have shaken on him.”

26. As noted above, the arguments of Mr.Naphade on the undated 'without prejudice' letter received by Arbitrator on 3 November 2017 is required to be considered in the context of the said letter, and considering the actual context of the said letter there is no scope and logic for the applicability of the context, in which the parties in the facts

of the said case before the Calcutta High Court, had used the words ' without prejudice'. Thus the said decision of the learned Single Judge of Calcutta High Court cannot be applied to the facts in hand. The above view is also supported as seen from the observations of the Supreme Court in the decision in ***“Peacock Plywood (P) Ltd. Vs. Oriental Insurance Co.Ltd.”***⁴ wherein in paragraph 42 the Supreme Court observed thus:-

“42. Only because the expression “without prejudice” was mentioned, the same, in our opinion, by itself was not sufficient and would not curtail the right of the insured to which it was otherwise entitled to. The expression “without prejudice” may have to be construed in the context in which it is used. If the purpose for which it is used is accomplished, no legitimate claim can be allowed to be defeated thereby. (See ***Cutts V. Head (1984 Ch 290, and Rush & Tompkins Ltd. V. Greater London Council (1989 AC 1280)***”

27. This apart, the said undated letter of the petitioners was addressed to the learned Arbitrator and at the most as observed above, it would mean that the petitioners intended to point out a certain factual position and would keep their right open to assail any orders/awards to be passed in the proceedings before the learned arbitrator. Although the petitioners submitted the said letter to the arbitral tribunal, however, the petitioners thereafter never appeared before the arbitral tribunal and consequently after about seven months of the said communications (dated 3 November 2017 & 1 November 2017 as addressed to the learned Arbitrator) the award came to be delivered.

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28. Before parting it needs to be observed that Mr.Khandeparkar would be correct in his submission that the above submissions as made on behalf of the petitioners are not forming part of any of the grounds to challenge the award. Be that as it may, as Mr.Naphade has referred to the provisions of law, it was necessary for the Court to discuss the above issues.

29. In view of the above observations, it may be observed with certitude that no ground has been made out for this Court to exercise its jurisdiction under Section 34 of the Arbitration and Conciliation Act,1996 so as to interfere in the impugned awards.

30. The petitions are devoid of any merit. They are accordingly rejected. No order as to costs.

[G.S. KULKARNI, J.]