

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2018

CORAM

THE HONOURABLE Mr.JUSTICE ABDUL QUDDHOSE

O.P.No.35 of 2018

and

Application No.251 of 2018

1.M/s.Kumud Enterprises Pvt. Ltd.,
1/5875, Kabool Nagar,
Loni Road, Shahdara,
Delhi 110 032.

2.Ashwani Kumar

3.Gunjan Kumar

.. Petitioners

Vs

M/s.Kotak Mahindra Bank Ltd.,
1st Floor, Ceebros Centre,
39, Montieth Road, Egmore,
Chennai 600 008.

.. Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the exparte award dated 11.01.2016 in A.C.P.No.AR80464 of 2015 passed by the arbitrator herein and allow this O.P.

For Petitioners : Mr.M.V.Venkataseshan

For Respondent : Mr.Balasubramanian

ORDER

The instant Original Petition has been filed by the petitioners challenging the arbitration award dated 11.01.2016 passed against them.

2. The primary ground raised by the petitioner for challenging the Arbitral Award is that neither the arbitrator nor the respondent has furnished the copies of the documents sought for by them vide letter dated 14.11.2015.

3. The arbitrator has given a categorical finding that the notice dated 22.12.2015, in the arbitral proceedings was duly served on the second and third petitioners and the notice sent to the first petitioner was returned with an endorsement "LEFT". The second and third petitioners are the Directors of the first petitioner and they are also the guarantors to the loan transaction. On receipt of the letter dated 14.11.2015 from the petitioners, the arbitral Tribunal has also sent the copies of the documents through Registered Post to the petitioners which was returned by the postal authority with an endorsement "LEFT". The arbitrator has recorded all these facts in the arbitral award.

4. Despite the notice having been served on the petitioners, they have failed to appear before the arbitral proceedings to defend the claim.

As seen from the Arbitral Award, the arbitrator has given sufficient opportunity to the petitioners to defend the claim, but they failed to make use of those opportunities. Ultimately, the Arbitrator set the petitioners ex-parte, due to their non-appearance.

5. The claim made by the first respondent arose out of a loan agreement dated 29.03.2011, entered into between the first respondent and the petitioners, under which a sum of Rs.20,00,000/- was availed by the petitioners, which will have to be paid together with interest vide 60 Equated Monthly Installments of Rs.51,882 commencing from 05.05.2011 to 05.04.2016.

6. The first respondent has submitted all the documents to establish their claim before the arbitrator. The statement of account was also filed by the first respondent disclosing the amount payable by the petitioners under the said loan transaction.

7. Five exhibits namely A1 to A5 were marked, on the side of the respondent in the arbitral proceedings. Based on these records, the arbitral tribunal after setting the petitioners exparte, has passed an award for a sum of Rs.31,13,435 in favour of the respondent/claimant against the petitioners together with interest and costs. The arbitrator had framed three issues

and all the three issues have been duly considered by the arbitrator and only thereafter, the arbitrator has passed a reasoned award, which is the subject matter of challenge in the instant Original Petition.

8. This Court after pursuing the Arbitral Award does not find any patent illegality in the Arbitral Award. The receipt of notice by the petitioners in the arbitral proceedings is also not disputed by the learned counsel appearing on the side of the petitioners.

9. This Court granted an order of interim stay of execution of the award pending disposal of the O.P.No.35 of 2018 on 08.02.2018 on condition that the petitioners shall pay a sum of Rs.10,00,000/- to the respondent within a period of six weeks from the date of receipt of a copy of that order. The learned counsel for the petitioners fairly concedes that the conditional order passed by this Court on 08.02.2018 has not been complied with by the petitioners.

10. The following propositions emerge from the decisions of Hon'ble Supreme Court relating to the scope of Section 34 of the Arbitration and Conciliation Act, 1996 right from **Renusagar Power Company Ltd vs. General Electric Company 1994 Supp (1) SCC 644** to the recent **Associated Builders Vs DDA (2015) 3 SCC 49**.

(i) The four reasons motivating the legislation of the Act, in 1996, were:-

- (a) to provide for a fair and efficient arbitral procedure,
- (b) to provide for the passing of reasoned awards,
- (c) to ensure that the arbitrator does not transgress his jurisdiction, and
- (d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if:-

- (a) it is contrary to the fundamental policy of Indian law, or
- (b) it is contrary to the interests of India,
- (c) it is contrary to justice or morality,
- (d) it is patently illegal, or
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or
- (b) it is patently violative of statutory provisions, or
- (c) it is not in public interest, or
- (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted in a fair, reasonable and objective approach, or has acted

arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The #patent illegality# has to go to the root of the matter.

Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law,

Or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has

to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

- (a) the findings, in the award, are based on no evidence, or
- (b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or
- (c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

- (a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",
- (b) if the view adopted by the arbitrator is a plausible view, it has to pass muster,
- (c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

11. The Arbitrator has considered each and every objection raised by the Appellant and only thereafter the Award has been passed in favour of the first respondent.

ABDUL QUDDHOSE, J.

12. In the present Original Petition, the petitioners have not been able to satisfy this Court that the Arbitral Award suffers from any infirmities postulated in the above mentioned propositions to attract Section 34 of the Arbitration and Conciliation Act.

13. For the reasons stated above, this Court is of the considered view that there is no merit in the petition. Accordingly, this Petition shall stand dismissed. Consequently, connected application is closed.

13.06.2018

Index: Yes/No
Internet: Yes/No
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