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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 4th September, 2018

Date of decision : 7th September, 2018

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O.M.P. 1589/2014

M/S SCHIFFLIES INDIA LTD & ANR

..... Petitioners

Through: Mr. Jayant Kumar, Advocate.
(M: 9654425878)

versus

M/S S.E INVESTMENTS LTD & OTHERS

..... Respondents

Through: Mr. P. Nagesh & Mr. Dhruv Gupta,
Advocates for R-1. (M: 9999877566)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*) impugning the award passed by the Learned Sole Arbitrator dated 20th November, 2013 by which the claims of the Respondents were allowed in the following terms:

“This Tribunal is of the opinion that these principles are now well entrenched in the context of matters relating to the recovery of commercial loans. Therefore, it is held that from 29.03.2013 to the date of start of arbitration proceedings and thence to the date of making of this award all three Respondents must pay interest/late fees on the unpaid amount of instalments of Rs. 76,66,998/- (Rupees Seventy Six Lac Sixty Six Thousand Nine Hundred Ninety Eight Only) in accordance with clause 7 of the Loan Agreement. This Tribunal therefore holds that the Claimant is entitled to receive a sum of Rs. 2,24,22,033/- (Rupees Two Crore

Twenty Four Lakhs Twenty Two Thousand and Thirty Three only) plus late fee from the date of start of arbitration proceedings and thence to the date of award as discussed hereinabove jointly and severally from all the three Respondents which they must pay and this award is made accordingly. The Respondents will pay interest on the sum aforesaid @ 18% p.a. from the date of this award to the date of actual realisation and shall also pay the cost of the award/decreed to the Claimant which are assessed of Rs. 1,50,000/-, which include the fees and administrative charges of the Arbitration.”

2. The brief background is that the Respondent No.1 had sanctioned a loan in favour of the Petitioner for a sum of Rs.1,15,00,000/-. After deducting the interest for a period of one year, the actual disbursement was Rs.99,47,500/- which was paid through RTGS. A loan agreement was executed by the Petitioner in favour of the Respondents. The loan was to be repaid in twelve equal instalments of Rs.9,58,334/-. Only four instalments were paid by the Petitioner thus leaving an outstanding amount of Rs.76,66,998/-. The Respondent then invoked the arbitration clause and filed its statement of claim. The impugned award was then passed awarding the entire amount claimed along with interest.

3. The main plank of challenge to the award by the counsel for the Petitioners is that though initially the claim was filed by the Respondent and statement of defence was also filed by the Petitioner, thereafter, no notice was issued in respect of subsequent dates of hearing. It is claimed by the Petitioner that notice dated 29th July, 2013 was received by the Petitioner and after filing the statement of defence, the matter was adjourned to 8th August, 2013. On the said date, the Petitioner was informed that the next date would be communicated to the Petitioner, but no intimation was ever

received. Accordingly, the award was passed on 20th November, 2013 “*behind the back*” of the petitioner and therefore the same deserves to be set aside.

4. On the other hand, learned counsel for the Respondents submits that notices were issued by the Arbitrator by speed post as is clear from the arbitral record. He relies on the notice dated 28th June, 2013 and the speed post receipts which are on pages 71 of the arbitral record. He further submits that the Petitioner filed the statement of defence on 8th August, 2013 and the only plea was that signatures were obtained on blank papers and various clauses in respect of late payments and interest, which were incorporated in the loan agreement, which were never agreed to by the Petitioners. He submits that after appearing on 8th August, 2013, the Petitioner had a duty to follow up as to further proceedings and it is unfathomable as to how a party against whom such a huge claim is pending, after having acquired knowledge of the arbitration, could have completely stayed away. He further submits that the agreed sum and interest as per the loan agreement is what has been awarded by the Arbitrator, who has no option but to go by the contract between the parties.

5. He relies upon the judgment of Single Judge of this Court in ***PEL Industries v. S.E. Investment Ltd. [OMP(COMM) 152/2016] decided on 23rd April, 2018*** (hereinafter, ‘*PEL Industries*’) where under similar circumstances, a challenge to the quantum of interest has been rejected.

6. This Court has heard the submissions of both the parties. A perusal of the arbitral record and the order sheets of the arbitrator reveal that till 8th August, 2013 i.e. the fourth hearing, the Petitioners and the Respondents herein were appearing. However, on 16th August, 2013 which was the next

date of hearing, none appeared for the Respondents. The arbitral record clearly states that “*copies of the last order were sent to all the parties*”. The next date of hearing was fixed as 4th September, 2013. On 13th August, 2013, 11th September, 2013 and 1st October, 2013, copies of the orders have been sent to the Petitioners. In the same manner, the award dated 20th November, 2013 has been sent by speed post on 21st November, 2013 by the Ld. Arbitrator. There is no reason to believe that the Ld. Arbitrator’s record is either manipulated or fabricated in any manner. The counsel for the Petitioners relies on an order of this Court in ***Surender Singh v. SE Investment [OMP 1568/2014]*** to submit that qua one of the Directors, the very same impugned award has been set aside. In the said order, it was noticed that the separate notice to the Respondent No.3 was not served and the notice to the Respondent No.2 and the company could not be treated as notice to Respondent No.3. Since, separate notice was not sent to Respondent No.3 i.e. Sh. Surender Singh, the award was set aside. However, this is not the position here. Notices have in fact been served and the Petitioners have filed their statement of defence before the Tribunal. Thus, the objection of non-service of notice by the Arbitrator is untenable. The non-appearance of the Petitioners left the Arbitrator no choice but to proceed with the arbitration.

7. During oral submissions, it was also not disputed by counsel for the Petitioners that the loan was in fact availed by the Petitioners. The basic grievance on merits, was only in respect of the interest charged by the Respondents and also the fact that the Petitioners ought to be given credit of the amount which was initially held back and not disbursed. According to the Ld. Counsel for the Petitioners, though the sanctioned loan was Rs.1.15

crores, the actual disbursement was Rs.99,85,000/-. Thus, the credit for the amount of approx. Rs.15 lakhs ought to be given and the high rate of interest which has been charged along with the penalty ought not to be up held.

8. The basic facts in terms of the amounts disbursed and the amounts paid by the Petitioners are not in dispute. The question is as to whether the interest and the late fee would be liable to be paid. In the judgment relied upon by the Respondents, the Arbitrator had granted interest @18% per annum compounded monthly from the date of award till payment of awarded money. The said grant of interest was upheld by this Court in **PEL Industries (supra)** with the following observations:

“28. In the present case as well, I find no exceptional or special circumstance warranting any reduction in the rate of interest awarded by the Arbitrator. After filing of the present petition, repeated opportunities were granted to the parties to arrive at an amicable settlement. In fact, even during the course of the final hearing of the petition, at the request of the counsel for the petitioners, the hearing was deferred so as to give another opportunity to the petitioners to arrive at a settlement. In spite of such opportunity being granted, the petitioners did not give any viable offer to the respondent to settle the matter, clearly showing their intent not to make payments of the awarded amount or part thereof to the respondent, but to take advantage of the law which had prescribed for an automatic stay on the enforcement of the Arbitral Award during the pendency of the petition under Section 34 of the Act. The petitioners, therefore, cannot claim any equity in the form of reduction of the rate of interest in their favour.”

9. The above judgement is in the context of an agreement involving the same loan disbursing company. Thus, the interest awarded by the Arbitral

Tribunal @ 18% per annum from the date of award till actual realization on the principal amount of Rs.76,66,998/- does not deserve to be interfered with.

10. However, insofar as the late fee of Rs.2 per thousand per day of default is concerned, the same is in the nature of a penalty. A penalty cannot be imposed as part of the contract unless and until actual loss is established, as per Sections 73 and 74 of the Contract Act. This is the settled position as per *Fateh Chand v. Balkishan Dass (1964) 1 SCR 515*, and *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705*. Thus, the payment of late fee is liable to be set aside.

11. Insofar as the plea of the Petitioner that credit needs to be given for the sum of Rs.15 lakhs which was withheld initially is concerned, the same is not been gone into in this case as the Petitioners have failed to act with due diligence and failed to place their defence before the Arbitral Tribunal. The question as to whether withholding of interest amounts at the time of disbursement of loan is against the public policy, is left open.

12. The Petitioners are thus liable to pay the awarded sum due and payable. The award is upheld except insofar as the imposition of late fee is concerned.

13. The O.M.P. is disposed of with these observations.

PRATHIBA M. SINGH
JUDGE

September 7, 2018
Rahul