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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 02.02.2018

+ O.M.P. (COMM) 449/2016

RENNAISSANCE BUILDCOM

COMPANY PVT LIMITED & ORS.

..... Petitioners

Through Mr.Sandeep Sharma, Mr.Ashutosh
Gupta, Mr.Brighu Dhami and
Mr.Suraj Narain Shukla, Advs.

versus

S.E INVESTMENTS LIMITED & ORS.

..... Respondents

Through Mr.P.Nagesh, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to impugn the Award dated 22.06.2016 passed by the learned Sole Arbitrator.

2. It may be noted that there are two petitions filed challenging the same Award dated 22.06.2016. The claimant/respondent No.1 had initiated the arbitration proceedings against seven parties/respondents. The Award has been passed by the learned Arbitrator against petitioner No.1 the Corporate Guarantor and respondents No.2 to 4. Respondent No.2 was the Principal Borrower, Respondents No.3 and 4 Guarantors were at the relevant time Directors of petitioner No.1 and respondent No.2. Respondents No.2 to 4 have filed a separate petition under Section 34 of the Act being OMP (COMM.) 450/2016 challenging the Award. This petition has been

dismissed by this court on 20.09.2017. This petition was also listed on 20.9.2017 and could not be heard on the said date as the learned counsel for the petitioner had sought an adjournment. This matter was heard on 22.9.2017 when I heard learned counsel for the petitioner Shri Sandeep Sharma and learned counsel for respondent No.1 Mr.P.Nagesh. However, in the course of finalising the judgment it was felt necessary to seek some clarifications. Matter was listed in court today for directions. I again heard Mr.P.Nagesh, learned counsel for respondent No.1 who appeared.

3. The factual controversy has already been noted by this court in its judgment dated 20.09.2017 passed in OMP (COMM) 450/2016.

4. The respondent No.1 (S.E Investments Ltd.) is a company incorporated under the Companies Act, 1956 and registered to carry on the business of non-banking financial institution. The case of respondent No.1 as comes out from the pleadings, namely, the statement of claim/replication filed before the learned Arbitrator is that in 2008, DD Global Capital Ltd. (respondent No.2) approached respondent No.1 for availing a loan facility of Rs.4 crores. Loan amount of Rs.3.20 crores was sanctioned and disbursed to respondent No.2 on July, 2008. Respondent No.2 executed various documents including hypothecation agreement, guarantee agreement all dated 08.07.2008. Respondent No.2 is said to have failed to pay the loan amount of Rs.3.20 crores together with interest. Based on discussions later on, respondent No.1 agreed to restructure the loan which had gone into default. Consequently on 31.07.2010, the entire loan amount plus outstanding interest was quantified at Rs. 6.37 crores. This was re-financed by respondent No.1 in the form of five new loans for a period of one year by charging and loading upfront interest @ 30% per annum totalling Rs.9.10

crores which was payable by respondent No.2 to respondent No.1 on 31.07.2011 in the form of one bullet payment. On 31.07.2010, five different loan agreements were entered into i.e. four agreements for Rs.2 crores each and one for Rs.1.10 crores. A loan agreement dated 31.07.2010 was executed by Respondent No.2 as the principal borrower and respondent Nos.3 and 4 and petitioner No. 1 as guarantors. In addition, petitioner No. 1 and respondent Nos.3 and 4 executed guarantee agreement dated 31.07.2010 whereby petitioner No.1 became the corporate guarantors and respondent Nos. 2 and 3 became the personal guarantors. The petitioner No.1 also executed undertakings/ declaration dated 31.07.2010, five debit vouchers of the same date aggregating to Rs.9.10 crores. In addition, a resolution of the Board of Directors dated 30.07.2010 of petitioner No.1 was also placed on record.

5. Based on the above, in the claim petition filed by Respondent No.1, the learned Arbitrator framed 11 issues as follows:-

i. Whether the loan agreements and other loan documents relied on by the claimant in connection with the said loan agreements in question, are illegal, bad in law and void-ab-initio on any of the grounds pleaded by the Respondents ? If so, whether this arbitral tribunal has jurisdiction in this case?

ii. Whether the documents relied on by the claimant as loan agreements and other related documents in question are forged and fabricated and the said question is exclusively triable by the civil court as distinguished from the Arbitral Tribunal.

iii. Whether the claimant is duly registered with R.B.I. as a Non-Banking Finance Company and is competent to institute the present proceedings?

iv. Whether the consideration under the loan agreements in question was by adjustment of the dues under the earlier loan agreements as alleged in the rejoinder by the Claimant?

v. Whether undated cheques were handed over by the Respondents to the claimant during the processing of the request for the grant of loan in question as alleged by the Respondents?

vi. Whether the statement of account relied on by the claimant with regard to the loan in question or any one or more of them is correct and binding on the Respondents, if so, its effect?

vii. Whether the claimant failed to demand the amount becoming due after encashment of any of the loan amounts, if so, its effect?

viii. Whether the Respondents executed guarantee agreements and other documents relied upon by the claimant by way of security for repayment of the loans and other dues, if so, its effect?

ix. Whether the Claimant is entitled to recover Rs.9 .10 Crores as on 26.10.2012 from the Respondents jointly and severally?

x. Whether the Claimant is entitled to recover Rs.8,23,46,000/- as on 26.10.2012 on account of late payment charges for alleged default in the repayment of loan amount?

xi. Whether the Claimant is entitled to interest for the preference period, pendente lite and future interest, if so the principal amount, the period and the rate thereof?

6. Evidence of four witnesses was led by the parties. On behalf of Respondent No.1/claimant CW-1 Sh.Samresh Aggarwal filed his evidence. On behalf of respondent No.2, Sh. Deepak Kumar-RW-1/1 and Sh.Narender Kumar Agarwal-RW-1/2 filed their evidence. Sh.Baldev Chand Bansal-RW-

2, Director of petitioner No.1 also filed his evidence. Various pleas raised by the petitioners were rejected. The learned Arbitrator held that the documents including the hypothecation agreement dated 08.07.2008, guarantee agreement dated 08.07.2008, letter evidencing deposit of title deeds dated 08.07.2008, five loan agreements dated 31.07.2010, the guarantee agreement dated 31.07.2010 and other loaning documents were lawful, valid and binding. The Award also holds that the respondent/claimant is duly registered with RBI as non-banking financial institution. It is also held that the statement of accounts filed by respondent No.1 is correct and binding on the petitioners. The Award also holds that respondent No.1 is entitled to recover Rs.9.10 crores as on 31.07.2010 jointly and severally from petitioner No.1 and respondent Nos.2 to 4. An award was passed accordingly with simple interest @ 18% p.a. for the principal of the pre-award period from 01.08.2010 to 22.06.2016 i.e. the date of the award amounting to Rs.9,66,19,561/- and costs were awarded. Future interest @ 18% per annum was also awarded.

7. It is the case of the petitioners that petitioner No.1 i.e. Company-Renaissance Buildcon Company Pvt. Ltd., respondent No.4-DD Global Capital Pvt. Ltd. earlier known as DD Township Limited then represented by respondents No. 3 and 4, namely, Mrs.Reena Gambhir and Mr.Sanjay Gambhir entered into a Shareholder Agreement in May 2007 with D.B.Zwirn Mauritius Trading No. 2 Ltd. (*hereinafter referred to as the Investor*). By the said Agreement, the said Company invested a sum of Rs.93 crores in the township project situated at Zirakhpur, Greater Mohali, Chandigarh of petitioner No.1 Company. The Investor by virtue of the investment became 50% shareholder of petitioner No.1. It is the case of the

petitioners that the Director-Sh. Sanjay Gambhir i.e. respondent No.4 withdrew a sum of Rs. 51.51 crores from the designated account of petitioner No.1 Company without prior knowledge or consent of the Investor for his personal benefit. Thereafter, the Investor to settle the dispute entered into an Acknowledgment and Agreement dated 05.03.2010 with petitioner No.1 and respondents No.3 & 4. By virtue of the said Acknowledgment and Agreement, it was expressly admitted that without consent and authorization of the Investor, the amount of Rs.52,90,43,764/- was withdrawn for his own personal benefit by respondent No.4. The said respondent agreed to repay the entire claim with interest to the Investor not later than 30.06.2010. Further, the said respondent along with other entities agreed that the Investor shall be entitled to take recourse to all the personal assets including investment in petitioner No.1 Company. The share transfer forms and share of respondent Nos.3 and 4 in petitioner No.1 Company signed in blank were kept in escrow with the Investor as custodian. If there was default on the part of the said respondent Nos.3 and 4, the Investor was permitted to sell the shares of petitioner No.1 Company to any independent third person. On account of the default of the said respondents, the Investor entered into a share purchase agreement on 25.10.2010 with M/s. Black Stone Infracon Co. Pvt. Ltd. for sale of 50% of shares of petitioner No.1 company owned by the Investor. The Investor also sold the shares of the other promoters (i.e. respondent Nos.3 and 4) by virtue of Acknowledgment and Agreement dated 05.03.2010 to the extent of 45% in petitioner No.1 Company. Petitioners No.2 to 4 by virtue of being shareholders of Black Stone Infracon Co. Pvt. Ltd. were appointed on 23.11.2010 as directors of petitioner No.1 Company and Form 32 reflecting the appointment of petitioners No.2 to 4 was filed

with the Registrar of Companies in 2012. It is the case of the petitioners that they were stumped and surprised to learn about the pendency of the arbitration proceedings before various forums whereby respondent No.4 and petitioner No.1 were said to have defaulted in making payment to respondent No.1

8. I have heard learned counsel for the parties.

9. Learned counsel for the petitioners seeks to impugn the Award only to the extent it seeks to uphold the alleged Corporate Guarantee given by petitioner No.1 and passes an award against petitioner No.1. It may be noted that though petitioners No. 2 to 4 were parties before the arbitration proceedings, but no award has been passed against the said petitioners. Learned counsel for the petitioners has made the following submissions as to why the Award has wrongly been passed against petitioner No.1.

(i) The Guarantee Agreement dated 31.07.2010 allegedly executed by petitioner No.1 and respondent No.1 is void ab initio as it was not signed on behalf of petitioner No.1 by any authorized representative. Hence, the Guarantee Agreement cannot bind petitioner No.1.

(ii) The Resolution of the Board of Directors dated 30.07.2010 allegedly passed by the Board of Directors of petitioner No.1 which is signed by respondents No.3 and 4 is illegal and not binding. Reliance is placed on Clause 26(f) (k) (p) of the Articles of Association of petitioner No.1 to contend that as per the said Clauses, petitioner No.1 would not become bound or committed to any of the resolution or transactions relating to “affirmative consent matters” stated in the said clause without the approval of at least one director of the Investor or the transaction having been specifically approved by the Investor in writing. Clause 26(f), it is pointed

out deals with encumbering any asset of the company by mortgage. As the Investor has not consented to the said Resolution authorizing execution of the Corporate Guarantee, the said Guarantee is void. The alleged mortgage is also void.

(iii) On 31.07.2010 when the loan agreements were executed by the respondents allegedly along with petitioner No.1, respondents No. 3 and 4 had no authority to execute any such document on behalf of petitioner No.1.

(iv) Reliance is placed on the judgment of the Supreme Court in the case of *MRF Ltd. Vs. Manohar Parrikar & Ors., (2010) 11 SCC 374* to contend that where on the face of the record there is a suspicion about the manner of dealing, the doctrine of indoor management would have no application as the said doctrine only protects an outsider dealing or contracting with the company. However, suspicion of irregularity is an exception to this doctrine of indoor management. It is urged in view of the Acknowledgment and Agreement dated 05.03.2010 between respondents No.3 and 4 and the Investor, it was clear to respondent No.1 that there was something suspicious and they could not have got the loan agreements on 31.07.2010 validly executed.

(v) Learned counsel for petitioner further reiterates the submissions made by the petitioner in OMP 450/2016 on the legality and validity of the loan agreements and debit vouchers dated 31.07.2010.

10. The learned Arbitrator in his Award has rejected the said contentions of the petitioners. The Award notes that Sh.Baldev Chand Bansal, Director of petitioner No.1 who is impleaded as petitioner No.2 has appeared as a witness. In his cross-examination on 28.01.2014, he has stated that the property of petitioner No.1 is under a charge in favour of respondent No. 1

as security for a loan relating to year 2008 and subsequent loan advanced in 2010. Thereafter, he has submitted that according to his information no such charge exists on the property of petitioner No. 1 relating to the loan of 2010. The Award notes that there is an equitable mortgage and consequential charge registered with the Registrar of Companies pertaining to both the transaction, namely, of 2008 and 2010. The witness admitted this in no uncertain terms. It also notes that the petitioners have taken no steps to get the charge removed/deleted if it did not pertain to the loan transaction of 2010. The plea of invalidity of the corporate guarantee was rejected. Regarding the plea that the Resolution of the Board of Directors dated 30.07.2010 of petitioner No.1 was invalid, the Award holds that petitioners No.2 to 4 came into control of the Company in October/November 2010. They have taken no steps to negate and nullify the said Resolution or the Guarantee Agreement. They have failed to prove that the Board Meeting of petitioner No. 1 did not take place on 30.07.2010. The onus to do so was on the petitioners as the statutory records maintained under the Companies Act pertaining to petitioner No.1 were in their possession and control. The Award also notes that the alleged irregularity, if any, in conduct of the management of petitioner No.1 in conducting its internal affairs cannot affect the liability of petitioner No.1. The pleas of the petitioner were accordingly rejected.

11. I will now deal with the first two pleas of the learned counsel for the petitioners, namely, that the Guarantee Agreement dated 31.07.2010 allegedly executed by petitioner No. 1 is void and that the Resolution of the Board of Directors dated 30.07.2010 is also illegal and not binding. The resolution of the Board of Directors of petitioner No.1 company held on

30.7.2010 resolved that the company approves to provide the guarantee in favour of respondent No.1 and that respondent No.4 Shri Sanjay Gambhir, the Director was authorised to execute and sign the guarantee form, agreements, deeds papers and other documents on behalf of the company. Similarly, a guarantee agreement was executed on 31.7.2010 between respondent No.1, respondent No.2 and petitioner No.1 whereby the petitioner No.1 is described as the guarantor. The agreement also states that the guarantor agrees to indemnify respondent No.1 against all loss and to pay and satisfy all demands and dues from the borrower i.e. respondent No.2. What the learned counsel for the petitioners stresses is that the Resolution dated 30.07.2010 is only signed by respondents who on that date had already admittedly hoodwinked the Investor and defaulted in their payment of more than Rs.50 crores to petitioner No.1 which they have admitted in their Acknowledgment and Agreement dated 05.03.2010. Reliance was placed by the learned counsel for the petitioner on an order of the National Company Law Tribunal dated 25.11.2016 in a petition filed by respondents No. 3 and 4 against petitioner No.1 alleging various acts of mis-management and oppression. The National Company Law Tribunal had dismissed the petition holding that there is no act of oppression or mis-management. The order also notes that respondents No. 3 and 4 have admitted defalcating amounts invested for business development of petitioner No.1 Company and have gone to the extent of encumbering assets of petitioner No. 1 for their personal gains.

12. It is not clear as to how the above facts pleaded by the learned counsel for the petitioners in any manner can lead to a conclusion that the Resolution dated 30.07.2010 passed by the Board of Directors of petitioner No.1 is

illegal and void. It is not the case of the petitioners that respondent No.1 was in any manner aware of the execution of the Acknowledgment and Agreement dated 05.03.2010 or the acts of respondents No. 3 and 4. No such plea has been raised nor proved before the learned Arbitrator. It has also not been pleaded that no such Board Meeting took place on 30.07.2010 as rightly noted in the Award. It was for the petitioners to have produced the statutory records pertaining to Board Meeting which would be in their possession if they wanted to show that no such Meeting had taken place. It is also a matter of fact that they have come into the Board Management sometimes in October/November 2010. Till date no steps have been taken to nullify the so called Resolution of 30.07.2010 passed before the Board of petitioner No.1. It is also not disputed that as on the date when the resolution was passed, namely, 30.7.2010, respondent No.4 continued to be on the Board of Directors of petitioner No.1. Hence, merely because within the internal management there were certain disputes amongst the Directors/promoters inter se would not in any manner effect the legality and validity of the Board resolutions passed on behalf of petitioner No.1 company.

13. The other plea of the petitioners relying upon Clause 26 of the Articles of Association is also misplaced. If such a resolution was contrary to the Articles of Association inasmuch as it has not been consented to by the Director nominated by the Investor/Investor, it was for the petitioners to have taken appropriate steps once they came into control of the affairs of the Company in October/November 2010. Nothing of that sort has been done. It is their own ipsi dixit that the Investor has not approved this Resolution merely because his signatures are not there on the Resolution.

14. I may note that the Investor has admittedly come into the Management of the Company having purchased 50% of the shares of petitioner No. 1 on 15.05.2007. The first loan that respondent No.2 has taken was on 08.07.2008. This loan as stated by the Award was merely restructured on 31.07.2010 by execution of the respective documents. From July 2008 till the Investor sold their shares to Black Stone Infracon Co. Pvt. Ltd. in October, 2010, the Investor never protested or took steps to have this transaction rescinded. It is inconceivable that he did not have knowledge of this transaction for all these years. The investor had 50% shares in the petitioner No.1 since 15.5.2007. The first loan came in 8.7.2008. Petitioner No.1 executed "Letter Evidencing Deposit of title deeds dated 8.7.2008" and created equitable mortgage of two properties. It is inconceivable that the investor did not know about the documentation and the mortgage of petitioner No.1's property to respondent No.1 for the long years when it owned 50% of the shares of petitioner No.1, namely, from 15.5.2007 till sale of the shares in October, 2010. There is no merit in the said plea of the petitioners. The argument appears to be only an afterthought to somehow escape the liability.

15. Hence, the Resolution of the Board of Directors dated 30.07.2010 and the Guarantee Agreement dated 31.07.2010 has been rightly upheld by the learned Arbitrator.

16. On the other plea of the petitioners pertaining to doctrine of indoor management, reliance was placed on the judgment of the ***MRF Ltd. Vs. Manohar Parrikar & Ors., (supra)***. The Supreme Court in the said judgment held as follows:-

“111. The doctrine of indoor management is in direct contrast to the doctrine or rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed. Therefore doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of a company or corporation against dealings with the outsiders. However suspicion of irregularity has been widely recognized as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry.”

17. It is pleaded by the petitioners that this doctrine of indoor management would have no application to the facts of this case as there was grave suspicion of irregularity in the conduct of the affairs of petitioner No.1 by respondents No. 3 and 4. Accordingly, the said suspicion would create an exception to the plea of the respondent No. 1 that the conduct of respondent Nos.3 and 4 is related to internal management of petitioner No.1. The plea is that the Acknowledgment and Agreement dated 05.03.2010 had been executed between petitioner No.1 and respondents No. 3 and 4 and the Investor. Mr.Sanjay Gambhir, respondent No. 4 has clearly admitted his guilt of having siphoned off funds from petitioner No. 1 Company. A similar plea has already been made regarding the legality and validity of the Board Resolution of respondent No.2 dated 30.7.2010 and the execution of the

guarantee agreement dated 31.7.2010. The same pleas are somewhat repeated here, namely, that respondent No.1 should have known that there is something suspicious and should not have entered into the transaction. As noted above, no argument was raised before the Learned Arbitrator that respondent No.1 was aware of any internal issues amongst the Directors/promoter of petitioner No.1. Reliance of learned counsel for the petitioner on the above noted judgment of the Supreme Court in *MRF Ltd. vs. Manohar Parrikar & Ors. (supra)* is misplaced and misconceived.

18. Regarding the other pleas raised by the learned counsel for the petitioner, I have already rejected those pleas in my judgment dated 20.09.2017 passed in OMP(COMM) 450/2016.

19. There is no merit in the plea of the petitioner. Essentially what the petitioner is seeking to do is to challenge the findings of fact recorded by the learned Arbitrator.

20. Findings of fact recorded by an Arbitrator are not subject to challenge. In *Associate Builders vs. DDA, AIR 2015 SC 620* it was held by the Supreme Court as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon

when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

21. There is no merit in the plea of the petitioner. The petition is dismissed.

JAYANT NATH, J.

FEBRUARY 02, 2018/rb/n/v

corrected and signed on 22.02.2018

