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

+ **FAO (OS) COMM 121/2017, CM APPLS. 20780/2017,
20782/2017 & 27338/2017**

+ **FAO (OS) COMM 122/2017 & CM APPL. 20905/2017 (stay)**

*Reserved on : 12th December, 2017
Date of decision : 13th February, 2018*

**M/S. PANKHURI INVESTMENTS & SECURITIES
LIMITED & ORS.**

..... Appellants

Through: Ms. Anita Sahani, Advocate.

versus

M/S. S. E. INVESTMENTS

..... Respondent

Through: Mr. P. Nagesh and Mr. Dhruv Gupta,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh J.,

The only question raised in the present appeals is as to whether the compromise recorded by the Single Judge in orders dated 17th March, 2017, 24th March, 2017 and 26th April, 2017, is valid and legal as per the provisions of Order XXIII Rule 3 of the Code of Civil Procedure, 1908 ('CPC', *for short*), and whether the same was entered into with the consent of the parties. The orders dated 17th March, 2017 and 24th March, 2017 in OMP 530/2016 are impugned in FAO (OS) COMM 121/2017 and order dated 26th April, 2017 in IA No. 5078/2017 in OMP 530/2016 is impugned in FAO(OS) COMM 122/2017.

Brief Background

2. The case of the respondent is that it is a Non Banking Finance Company ('NBFC') providing loans. The appellants applied for a loan of 12 crores against which Rs.11.50 crores was sanctioned by the respondent on 25th May, 2010, under three different agreements for amounts of Rs.4.5 crores, Rs.4 crores and Rs.3 crores. The loans were to carry interest @6.95% p.a., and were to be repaid in 24 monthly instalments, commencing from 26th May, 2010. As per paragraph 4 of the loan agreements, the appellants issued several post-dated cheques for repayment of the loans, on an undertaking that the said cheques would be honoured on presentation. In the event that the cheques issued were dishonoured, the appellants were liable for action under the Negotiable Instruments Act, 1881. The directors of the appellant company stood as guarantors and were jointly and severally liable. It is alleged by the respondent, that Mrs. Deepti Gupta, had separately executed several Personal Guarantee Agreements dated 28th May, 2010, to guarantee repayment of the loans. It is also the case of the respondent that Mrs. Deepti Gupta mortgaged one immovable property bearing no. B-213, Chitaranjan Park, New Delhi, in favour of the respondent.

3. After deducting process fee of Rs. 54,61,542/- and service tax amounting to Rs. 12,68,450/-, as was agreed to between the parties, the balance amount of loan of Rs. 10,82,70,008/- was disbursed by the respondent to the appellant No. 1 by RTGS in two tranches of Rs. 5,20,00,000/- and Rs. 5,62,70,008/-, respectively. Thereafter, Rs.4.83 crores, in the form of fixed deposits, was given by the first appellant to the respondent as cash collateral. The FDRs were refundable only on final

closure of loan amounts or maturity period of the cash collateral. In this manner and as per agreed terms, the full loan amount of Rs. 11.50 crores was released to the first appellant, and the first appellant started paying instalments calculated on the sum of Rs. 11.50 crores. It is admitted that 69 post-dated cheques of EMIs were furnished, which shows that the full amount as was agreed between the parties was paid to the first appellant.

4. The respondent states that in spite of demands and reminders by the respondent, the appellants defaulted in the repayment. The post-dated cheques issued by the first appellant stood dishonoured, and even after issuance of notices under Section 138 of the Negotiable Instruments Act, 1881, the appellants failed to repay the loans.

5. On the other hand, the appellants' case is that on 26th May, 2010 the respondent paid Rs. 2 crores, Rs. 1.80 crores, and Rs. 1.20 crores i.e., a total of Rs. 5.20 crores out of the sanctioned loan amount of Rs. 11.50 crores. The respondent, due to some urgency and on the ground that the loan amount of was to be transferred from another company account, asked the first appellant to transfer back a sum of Rs. 4.83 crores, which the appellants duly deposited. Thereafter, the respondent further transferred Rs. 2,23,66,525/-, Rs. 1,96,59,133/-, and Rs. 1,42,44,350/- i.e., Rs. 5,62,70,008/- to the appellants. Thus, only a total of Rs. 5,99,70,008/- was disbursed to the appellants out of the total sanctioned amount of Rs. 11.50 crores, and the first appellants had already repaid a sum of Rs. 6.23 crores to the respondent. According to the appellants, since the respondents had failed to disburse the complete loan amount, there ceased to be any duly executed loan agreement, and no cause for arbitration arose.

6. In light of these disputes, the matter got referred to the Sole Arbitrator on 5th September, 2013, and the respondent made a claim of Rs.12,16,44,871/- due from the appellants as on 26th June, 2013. On 5th July, 2016 the Arbitrator passed the following award to the tune of Rs.25,99,26,542/-. He had observed and concluded:-

“12. In view of the facts and discussions, this Arbitral Tribunal holds, that the Claimant is entitled to recover a sum of Rs. 12,16,44,871/- towards the outstanding dues as on 26.06.2013 from the Respondents jointly and severally. Further, the Claimant shall be entitled to recover pendente lite interest amounting to Rs.13,82,81,671/- from 27.06.2013 to the date of signing of the Award i.e. 05.07.2016. In lieu of late fee at the contractual rate on the overdue Installments of Rs.6,25,70,892/-, thus making a total of Rs.25,99,26,542/- (Rupees Twenty Five Crores Ninety Nine Lacs Twenty Six Thousand Five Hundred Forty Two Only), recoverable from the Respondents jointly and severally.

In addition to the above, the Claimant shall also be entitled to recover future interest on the above amount at the rate of 18% p.a. compounded on monthly rest from the date of signing of award to the date of payment from the Respondents jointly and severally.

During the arbitration proceedings, this Tribunal had imposed the cost of Rs.1,00,000/- on the Respondents due to procrastinating the arbitration proceedings on one or other pretext and the same was not paid by the Respondents till date. This Tribunal awards the cost of arbitration proceedings amounting to Rs. 4,60,500/- (Rupees Two Lacs Only), including the aforesaid cost and the cost of stamp paper i.e. 2,60,500/- for making this Award, In favour of the Claimant which the.

Respondents shall pay along-with award amount jointly and severally.”

Challenge to the award

7. The award was challenged by way of a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (*'A&C Act', for short*). In the said petition, on 17th March, 2017, the Single Judge passed the following order:

“1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act').

2. There is no dispute as to the amounts paid to the petitioner. The only controversies raised are with regard to deposit of cash collateral and the penal interest. After some arguments, the parties have arrived at a settlement. The respondent is now agreeable to treat the payment of cash collateral by the petitioner as repayment of the principal amount. Further, the respondent has also given up its claim for penal charges at the rate of Rs.2 per Rs. 1,000/- per day. The parties have agreed that the principal amount (after reducing the amount of cash collateral) will be treated as the amount advanced and interest on such amount(s) will be computed at the rate of 18% per annum with monthly rest till the date of the award. The said amount would thereafter carry simple interest at the rate of 18% per annum till the date of payment. The petitioner is willing to accept the award for the amount computed as above.

3. The learned counsel for the parties shall quantify the exact amount payable till 31.03.2017 on the aforesaid basis and submit the same on the next date of hearing.

4. List on 24.03.2017.

5. This order has been passed solely on the basis of the consent of the parties. It is clarified that nothing stated

herein shall be considered as an expression of opinion on the merits of this case.”

8. As recorded in the above order, the only issue was with respect to deposit of cash collaterals and penal interest payable by the appellant. On 24th March, 2017 a calculation sheet was filed by the respondent indicating that Rs.4,02,13,129/- was payable till 31st March, 2017, which was taken on record and the petition was disposed of. The appellants did not file any computation or calculation sheet.

9. After the disposal of the petition, the appellant moved an application being IA no.5078/2017 on the ground that the computation filed by the respondent, which was taken on record on 24th March 2017, was erroneous, as on the said date the appellants was not fully prepared on the question of computation and had also sought an adjournment, due to unavailability of the main counsel. This application was decided on 26th April, 2017 by the Single Judge who categorically records as under:

“9. Even though there were letters on record evidencing that the petitioner no.1 had paid money towards fixed deposit carrying interest at the rate of 6.95% for a period of 24 months; the respondent agreed to treat the said deposit as repayment of the loan, thus in effect substantially reducing the interest burden on the petitioners. The respondent had also agreed to forgo charges at the rate of Rs.2 per rupees thousand per day and also to reduce the rate of interest to 18% per annum.

10. The respondent had agreed to such reduction to put quietus to the disputes and the aforesaid settlement was thrashed out at over a period of three hearings. The terms of settlement as agreed to between the parties was finally recorded in the order passed on

17.03.2017. As stated above, this was after much discussion and at the instance of the petitioners. The petitioners agreed to pay the interest at the rate of 18% per annum compounded with monthly rests on reducing balance till the date of the award and 18% simple interest thereafter.

11. The terms of the settlement were recorded in the order dated 17.03.2017 after much discussion. The learned counsel for the parties took time to quantify the exact amount payable on the basis as indicated in order dated 17.03.2017 and the matter was adjourned to 24.03.2017. On that date i.e. 24.03.2017, the learned counsel for the respondent submitted a calculation sheet indicating the amount payable, which was examined in the court and was taken on record. And, the petition was disposed of with consent of parties.

12. It is apparent from the above that the petitioners seek to now further reduce its liability and resile from the agreed terms. The petitioners have therefore engaged a fresh set of advocates and have filed the present application.

13. The learned counsel appearing for the respondent states that this is not acceptable to the respondent since the order dated 17.03.2017 and 24.03.2017 were passed with the consent of the petitioners.

14. Mr. Ganda, Senior Advocate - who is present in court, albeit in another matter confirms that the terms of the settlement were duly informed to the representatives of the petitioners.”

Appellants' submissions

10. Learned counsel for the appellants submits that the terms of the settlement were erroneously recorded, inasmuch as the requirement of Order

XXIII Rule 3 of the CPC does not stand satisfied. According to the appellant, there was in fact no agreement between the parties as the appellants had understood that the interest to be at 18% simple interest. According to the appellants, the compromise, to be valid and lawful, had to be in writing and signed by the parties and since the appellants had not signed the consent terms, the settlement or consent order was not binding and was contrary to law. In support of her submission, Ms. Anita Sahani, learned counsel appearing for the appellant relies upon ***Jagdish Manohar Singh v. South Delhi Builders Pvt. Ltd. ILR (2008) Supp. (9) Delhi 89*** (hereinafter '*Jagdish Manohar Singh*') and ***Gurpreet Singh v. Chatur Bhuj Goel AIR 1988 SC 400*** (hereinafter '*Gurpreet Singh*')

Respondent's submissions

11. Learned counsel for the respondent, on the other hand, submits that the matter was taken up on various occasions by the Single Judge. Thereafter a consent was passed. The concessions given by both sides were well understood by the parties, as is recorded by the Single Judge in his order dated 26th April, 2017. Mr. Nagesh, learned counsel appearing for the respondent, relies upon ***Jineshwardas v. Jagrani & Anr. AIR 2003 SC 4596*** (hereinafter '*Jineshwardas*'), to argue that the provisions of Order XXIII Rule 3 of the CPC, are being misunderstood and misinterpreted by the appellants.

Analysis and Findings

12. A perusal of the three orders dated 17th March 2017, 24th March, 2017 and 26th April, 2017 reveals the following:

- i. The amounts paid to the appellant No. 1 were not in dispute. Payments of loan and deposit in the form of FDRs was as per agreements.
- ii. The only issue raised by the appellants was with respect to deposit of cash collaterals and penal interest. The contention was based on equity.
- iii. The respondent was entitled to claim penal charges @ Rs.2 per Rs.1000 per day.
- iv. Both parties has conceded and given concessions before the Court. The amount disbursed, it was agreed, would be determined after reducing the amount of cash collaterals i.e. the amount would be the actual disbursement made to the appellants. The appellants were benefitted.
- v. It was agreed that interest @ 18% per annum with monthly rest would apply till the date of the award. Again the appellants benefited and gained as penal interest was not payable.
- vi. For periods post the award, simple interest @18% per annum till the date of payment was payable. This was advantageous and beneficial for the appellants.
- vii. The appellants, on all the dates of the hearing, were represented duly by Senior Counsel and other counsels, who confirmed to the Court that the terms of the settlement and concessions recorded were duly informed to and accepted by the representative of the appellants.

- viii. Consent order in fact had resulted in more favourable terms to the appellant than what would have been payable as per the award/agreement. Amounts payable in terms of the award got reduced.
- ix. In fact, the respondent had agreed to accept reduced interest by foregoing penal interest of Rs.2 per Rs.1000 per day as also by reducing the rate of interest to 18% as against 23% payable.
- x. After consent orders dated 17th March, 2017 and 24th March, 2017 were passed, the appellant had sought modification of settlement by engaging fresh set of counsels and seeking 18% simple interest for the entire period
- xi. The Single Judge was clearly of the opinion that the appellants sought to reduce its liability and resiled from the agreed terms.

13. Under such circumstances, the scope of the present appeal is narrow and limited. On the day when the consent terms were recorded, i.e. 17th March 2017, the appellants were duly represented by their counsel who had filed the petition challenging the award. A perusal of the said order clearly reveals that the 18% interest was to apply with monthly rest till the date of award and thereafter, simple interest of 18% per annum was payable till the date of payment. This order precedes the date when the computation chart was filed i.e. 24th March, 2017. It is not the case of the appellants that as per order dated 17th March 2017, 18% simple interest was payable. This was not so recorded. The order is categorical and brooks no confusion. Pre-award interest as agreed was 18%, with monthly rests. The stand of the appellant in IA No.5078/2017 is that the terms recorded in the order dated 17th March,

2017 “*are not in line with the instructions given by the petitioner to its erstwhile counsel*, is obviously wrong and unacceptable”

14. The appellants give various reasons to allege that several important terms were not recorded. All these contentions have been considered by the Single Judge in the order dated 26th April, 2017. The Single Judge has held that the issues raised by the appellants in the application for clarification/modification were not in line with the proceedings in the Court in the last three hearings. The Single Judge records that the terms had been thrashed out over a period of three hearings and was finally recorded in the order passed on 17th March, 2017. It is the finding of the Single Judge that the recordal on 17th March, 2017 was after much discussion and at the instance of the petitioners i.e. the appellants herein. The contention that the concessions given and consent recorded, were never given by the appellants, was clearly an afterthought and wrong.

15. Under such circumstances, it is not for this Court, in an appeal, to go behind the terms duly recorded by the Single Judge. A perusal of the order sheets in the OMP 530/2016 clearly reveals that the appellants were always represented by their counsel and in fact a Senior Advocate on most occasions. Order sheets also reveal that the discussions were continuously taking place during the hearings of the OMP 530/2016. After due consideration and deliberations, the respondent had agreed to terms which were less favourable to it. The award was to be modified. It is now not open to the appellant to resile from the terms as recorded by the Single Judge. This would be unjust and unfair.

16. The legal position on Order XXIII Rule 3 of the CPC is quite well settled. In **Gurpreet Singh (supra)**, the Supreme Court had observed:

“11.....The word ‘satisfies’ denotes satisfaction of the claim of the plaintiff wholly or in part, and for this there need not be an agreement in writing signed by the parties. It is open to the defendant to prove such satisfaction by the production of a receipt or payment through bank or otherwise. The satisfaction of the claim could also be established by tendering of evidence. It is for the court to decide the question upon taking evidence or by affidavits as to whether there has in fact been such satisfaction of the claim and pass a decree in accordance with Order XXIII, rule 3 of the Code.”

17. Thus, as per **Gurpreet Singh (supra)**, the provision has two parts. Insofar as the latter part of O.XXIII Rule 3 is concerned, there is no requirement for the agreement to be in writing. The appellants had suffered an arbitration award, which is a decree. They had filed objections. The objections were heard and considered on several dates. After due deliberations, parties agreed to certain concessions. These were recorded and noted. The appellants now want to resile and go back.

18. The proposition that counsels can enter into a settlement on behalf of the parties was accepted and upheld in **Jineshwardas (supra)** wherein the Supreme Court has observed as under:

“8. We are in respectful agreement with the above statement of law. Consequently, it is not permissible for the appellant, to contend to the contrary. That apart we are also of the view that a judgment or decree passed as result of consensus arrived at before Court, cannot always be said to be one passed on compromise

or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case.”

19. A similar view was taken in ***Rajinder Singh v. Pushpa Devi*, AIR 2004 Del 228** (hereinafter, '*Rajinder Singh*'). A learned Single Judge of this Court has elucidated and held that Order XXIII Rule 3 of the CPC is in two parts. The first part requires an agreement or compromise in writing and signed by the parties. Such an agreement could either be an out of Court settlement or during the hearing in a suit or an appeal. The second part which relates to satisfaction of whole or part of the subject matter of the suit, the Court observed that this need not be by an agreement in writing, signed by the parties. Such a satisfaction could take place during the proceedings before the Court as well.

20. In ***Rajinder Singh (supra)***, it was also held that “*a counsel could compromise a dispute on behalf of his client*”. Such a compromise could be the result of a consensus arrived at before the Court and such a consensus would fall in the second part of Order XXIII Rule 3 of the CPC, which does not require a compromise in writing and signed by the parties. *Rajinder Singh (supra)* was upheld by the Supreme Court in ***Pushpa Devi v. Rajinder Singh* AIR 2006 SC 2628** where it was observed as under:

“...The above view was reiterated in Jineshwardas v. Jagrani AIR 2003 SC 4596 . Therefore, the words 'by parties' refer not only to parties in person, but their attorney holders or duly authorized pleaders.

19. Let us now turn to the requirement of 'in writing' in Rule 3. In this case as noticed above, the respective statements of plaintiffs' counsel and defendants' counsel were recorded on oath by the trial court in regard to the terms of the compromise and those

statements after being read over and accepted to be correct, were signed by the said counsel. If the terms of a compromise written on a paper in the form of an application or petition is considered as a compromise in writing, can it be said that the specific and categorical statements on oath recorded in writing by the court and duly read over and accepted to be correct by the person making the statement and signed by him, can be said to be not in writing? Obviously, no. We may also in this behalf refer to Section 3 of the Evidence Act which defines a document as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording the matter. The statements recorded by the court will, therefore, amount to a compromise in writing.”

21. In ***Jineshwardas (supra)***, the ratio in ***Gurpreet Singh (supra)*** was examined, considered and distinguished. The present case is not of fraud or concessions given and recorded without instructions of the appellants. In the present case, the order sheet clearly depicts the on-going deliberations on concessions during the hearings before the Court. The order dated 17th March, 2017 expressly records that it has been passed “*solely on the basis of the consent of the parties.*” The authorised signatory of the first appellant does not dispute that he used to be present during the hearings before the Single Judge, which practice continued even before this Division Bench while the matter was being heard from time to time. In fact, on almost all hearings before the Division Bench, the authorised signatory was present in Court. The order dated 26th April, 2017 also records that the settlement was “*after much discussion and at the instance of the petitioners.*” This fact goes to show that the terms or concessions recorded at in the course of hearing of

OMP No.530/2016 falls squarely within second part of Order XXIII Rule 3 of the CPC, which does not require that the terms have to be in writing and signed, to be effective and binding.

22. The authorities cited hereinabove, clearly support the proposition that terms agreed to during Court proceedings, in the presence of counsels and on instructions of the parties are as valid as settlements which are reduced in writing and signed by parties. The order sheets of the Single Judge in this case establish the continuous attempt between the parties to negotiate and arrive at a consensus. This situation was apparent to the Single Judge. After due deliberations, statements were recorded. It can be safely said that there was complete participation on behalf of the appellants. We are not shown any reason whatsoever as to why the situation before the learned Single Judge should be treated as having been different. The clear impression is that after the matter was resolved and agreed terms had been recorded, there is an attempt to resile from the settlement as observed by the learned Single Judge.

23. Order dated 17th March, 2017 is lawful and no reason exists for setting aside the same. Thus, the impugned orders do not call for any interference.

24. The appeals are accordingly dismissed. No order as to costs. All pending applications also stand disposed of.

PRATHIBA M. SINGH, J

SANJIV KHANNA, J

FEBRUARY 13, 2018/dk