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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10th October, 2018

+ O.M.P. (COMM) 430/2018

HERO FINCORP LIMITED

Through

..... Petitioner
Mr.Sanjeev Singh,
Mr.Prashant Tripathi and
Ms.Amisha Agarwal, Advs.

versus

VIGYAN CHEMICALS PRIVATE LIMITED & ORS.

Through

Nemo

..... Respondents

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.14058/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 430/2018 & I.A. No.14057/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 14.08.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation with the Master Facility Agreement dated 27.05.2015 and the Personal Guarantee dated 27.05.2015. The challenge to the Arbitral Award is to the

limited extent of challenging the finding of the Sole Arbitrator that the petitioner has been unable to prove that the Guarantee document dated 27.05.2015 bears the signature of respondent no.3 thereby making him liable as a guarantor for the liability of respondent no.1.

2. Learned counsel for the petitioner places reliance on the application filed by the respondent no.3 before the Sole Arbitrator seeking supply of complete set of the proceedings wherein the respondent no.3 in paragraph 4 states as under:

“4. That now, the applicant/respondent no. 3 is not the Director of the respondent no. 1 co. and is only a guarantor in the instant case.”

3. Learned counsel for the petitioner further places reliance on yet another application filed by the respondent no.3 before the Sole Arbitrator under Section 12 and 13 of the Act wherein the respondent no.3 has stated as under:

*“2. That the respondent no. 3 had filed his appearance and application for providing complete set of proceedings on 06.02.2017 and the copy of the same was delivered to the counsel of the respondent no. 3 at night on 06.02.2017. The copy of the proceedings is annexed as **Annexure A**.*

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6. That now, the respondent no.3 is not the Director of the respondent no.1 co. and is only a guarantor in the instant case. At the outset, the respondent no.3 opposes the appointment of the Sole Arbitrator Hon'ble Mr.Justice N.K.Mody (Retd.) in the matter referred by the claimant co. which is made without following the due process of law and in an arbitrary, biased and illegal manner.”

4. Learned counsel for the petitioner submits that in both these applications the respondent no.3 has admitted that he was the guarantor for the loan advanced to respondent no.1. In spite of these clear admissions of respondent no.3, the Arbitrator has erred in his finding that the petitioner was unable to prove the Guarantee document dated 27.05.2015. He submits that the admission in the pleading by a party would be the best evidence against him and for this proposition he relies upon the Judgment of the Supreme Court in *Nagindas Ramdas v. Dalpatram Ichharam and Ors.*, AIR 1974 SC 471.

5. He further places reliance on the order dated 06.03.2017 passed by the Sole Arbitrator wherein the Arbitrator has stated that respondent no.3 is also a party to the Deed of Guarantee.

6. I have considered the submissions made by the learned counsel for the petitioner. It cannot be disputed that the respondent no.3 in his Statement of Defence has taken a categorical plea that the Deed of Guarantee dated 27.05.2015 does not bear his signature. This, therefore, became an issue to be adjudicated by the Sole Arbitrator. The parties led oral evidence in support of this issue with the petitioner examining Mr.Vivek Pathak (CW-1), while respondent no.3, apart from examining himself as a witness, examining Mr.Sameer Mehta (RW-3/2), one of the employees of the petitioner company, Mr.Mohit Sharma (RW-3/3) an ex-employee of the petitioner company and Mr.Saiyed Sarfaraz Ahmad (RW-3/5) as handwriting expert.

7. The Sole Arbitrator discusses the oral evidence led by the parties and finally comes to his conclusion in paragraph 41 of the Award which is reproduced hereinbelow:

“41. Thus, from the discussion of the oral evidence adduced by the parties, it is clear that Claimant has utterly failed to prove that the document CW-1/6 bears the signature of Respondent No.3.”

8. The above being a matter of appreciation of evidence led by the parties before the Sole Arbitrator, this Court cannot sit as a Court of appeal to re-appreciate the same. The Arbitrator is the final judge of the evidence and inference to be drawn therefrom. In the present case, the learned counsel has been unable to show how the finding of the Arbitrator can be said to be so perverse or unreasonable so as to shock the conscience of the Court.

9. In ***Associate Builders v. DDA*** (2015) 3 SCC 49, Supreme Court, after analyzing the provisions of Section 34 of the Act, has held as under:-

“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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous

English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with

the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.”

10. As far the reliance of the petitioner on the applications filed by the respondent no.3 is concerned, learned counsel for the petitioner fairly admits that the respondent no.3 was not confronted with the contents of these applications when he appeared as a witness in this case. Therefore, the respondent no.3 was given no opportunity to explain the contents of these applications or his alleged admission in these applications. I may only note that these applications were filed at the initial stage of the arbitration proceedings seeking supply of complete set of paper book/Statement of Claims filed by the petitioner, while the other was a challenge to the jurisdiction of the Arbitrator under Section 12 and 13 of the Act. Thereafter in his Statement of Defence, the respondent no.3 denied his signature on the Deed of Guarantee stating that he could make this submission only after perusing the copy of the Deed of Guarantee that had been supplied to him pursuant to the applications filed by him. In view of these peculiar facts the Judgment of Supreme Court in ***Nagindas Ramdas*** (*Supra*) would have no application.

11. The Arbitrator has also considered this submission of the

petitioner and has held as under:

“48. Much stress is given on the word "AND IS ONLY A GUARANTOR IN THE INSTANT CASE" by the counsel for the Claimant Company. This application does not bear the signature of respondent no.3. Similarly the affidavit annexed with the application also does not bear the signature of respondent no. 3. Even this application is not bearing the signature of advocate appearing on behalf of respondent no. 3. It is settled position of law that if a party to the litigation intends to rely on a document which according to it is the admission of the other party, then the party who is relying on the said document is bound to tender the document in cross examination, so as to enable the witness to explain that in what circumstances the admission was made by him. In the present case, respondent no. 3 appeared in evidence but he has not been cross examined by the counsel for the claimant to the effect that in the application dated 06.02.2017 respondent no. 3 has admitted that he was the surety of the loan amount.

49. Since the loan was sanctioned on personal guarantee of respondent no. 2 and 3 as mentioned in the sanction letter CW-1 dated 26.05.2015, therefore, as a prudent financier it was expected from the Claimant Company to assess the financial worth of respondent no. 2 and 3. In the present case, there are no documents on record on the basis of which the worth of respondent no. 2 and 3 could have been assessed. Neither there is a guarantor's statement nor the income tax return of respondent no. 3 on the basis of which Claimant Company sanctioned the loan on the guarantee of respondent no.3.

50. In the circumstances, on the basis of the alleged admission in the application dated 06.02.2017 it is difficult to hold respondent no. 3 as surety for the loan amount given to respondent no.1 company with

more than one reasons, Firstly, the application and the affidavit are not signed by respondent no. 3 or his advocate, Secondly, on this aspect respondent no. 3 was not cross examined, Thirdly, even respondent no.3 was not asked that the application dated 06.02.2017 was filed by respondent no. 3 under his instructions or not and Lastly, such type of application cannot be treated as part of pleadings while in the Statement of Defence respondent no. 3 has specifically denied the execution of CW-1/6.”

12. The above finding of the Arbitrator, in my opinion, is not perverse or irrational in nature.

13. I therefore, find no merit in the present petition and same alongwith pending application is dismissed. There shall be no order as to cost.

14. As far as reliance of the petitioner on the order dated 06.03.2017 passed by the Arbitrator is concerned, I may only highlight that the said order was passed on the application filed by respondent no. 3 under Section 12 and 13 of the Act. In passing the said order the learned Arbitrator observed that respondent no. 3 is a party to the deed of guarantee. However, this was merely an observation and not a finding of the learned Arbitrator and can certainly not act as a *res judicata*.

NAVIN CHAWLA, J

OCTOBER 10, 2018/Arya