

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

+ **OMP (T) (COMM) 104/2017 & IA No. 14671/2017**

+ **ARB.P.682/2017**

Reserved on: 08th February, 2018
Date of decision: 21st February, 2018

SUDHA GUPTA

..... Petitioner

Through Mr.Yakesh Anand and Mr.Nimit
Mathur, Advs. (in both the
petitions)

Versus

PNB HOUSING FINANCE LIMITED & ANR. Respondents

Through Mr.Ajay Uppal and Mr.Nishant
Maidasani, Advs. (in both the
petitions)

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') (ARB.P. 682/2017) and under Section 14(2) read with Section 15(2) of the Act (OMP (T) (COMM) 104/2017). As they raise similar question of fact and law and are between the same parties, they are taken up together for disposal.

2. The primary contention of the petitioner is that the respondent cannot unilaterally proceed to appoint an Arbitrator for adjudicating the disputes that have arisen between the parties and such unilateral appointment shall be *non-est* and the Arbitrator so appointed would be *de jure* ineligible to act as an Arbitrator.

3. The Arbitration Agreement between the parties is contained in Article 10.9 of the “Loan Agreement for Fixed and Floating Loan” dated 23.02.2015 executed between the parties and is reproduced herein under:-

“10.9 Arbitration

Any and all disputes, claims, difference arising out of or in connection with this Agreement and the Schedule or the performance of this Agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the PNBHFL and the award thereupon shall be binding upon the Parties to this Agreement. The place of arbitration shall be in Delhi or any other place as arbitrator may decide, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof. The proceeding of Arbitration Tribunal shall be conducted in English language. Each party has to bear cost of representing its case before the Arbitrator. Costs and charges of Arbitrator to be shared equally unless/otherwise provided for in the Award.

The Borrower further agrees that all claims, difference and disputes, arising out of or in relation to dealings/transaction made in pursuant to this Agreement including any question of whether such dealing, transaction have been entered into or not, shall be subject to the exclusive jurisdiction of the courts at Delhi only.”

4. It is the contention of the petitioner that the Arbitration Agreement, so far as it is authorizes the respondent alone to appoint a Sole Arbitrator for adjudication of the disputes, is unenforceable in view of Section 12(5) of the Act. I have rejected the said contention in my judgment pronounced today in OMP (T) (COMM) 101/2017, **Bhayana Builders Pvt. Ltd. Vs. Oriental Structural Engineers Pvt. Ltd.** and for the reasons stated therein, the said contention of the petitioner is rejected.

5. In the present case, even otherwise the contention of the petitioner was liable to be rejected. The petitioner, alongwith her husband had

availed a home purchase loan from the respondent under the above mentioned Agreement. The respondent, contending that the petitioner had defaulted in payment of the loan installments, vide its legal notice dated 09.03.2017 recalled the said loan, calling upon the petitioner to pay a sum of Rs. 1,16,03,068.58. The respondent thereafter filed an application under Section 9 of the Act being OMP (I) (COMM) 204/2017 before this Court praying for an ex-parte ad interim order restraining the petitioner from disposing of, selling, alienating, transferring or creating any encumbrance, charge or third party interest in any manner in respect to the property No.7, First Floor, Krishna Nagar, Jain Mandir, Shahdara, Delhi-110032 (hereinafter referred to as the 'Property').

6. In the said petition, this Court vide its order dated 24.05.2017 passed an ad-interim order restraining the petitioner from selling, alienating or creating third party interest in the said property.

7. Above mentioned application under Section 9 of the Act was disposed of by this Court vide its order dated 25.09.2017, which is reproduced herein under:-

“Learned counsel for the petitioner states that the petitioners have appointed an Arbitrator, namely, Mr.Lalit Kumar, Advocate, who has fixed the hearing of first proceeding on 9.10.2017.

Accordingly, the interim order dated 24.5.2017 passed by this Court shall continue to operate till pendency of the arbitration proceedings or until the same is modified/vacated by the learned Arbitrator on an appropriate application which may be filed by the respondents under section 17 of the Act. The present petition is disposed of. All pending applications, if any, also stand disposed of.”

8. The petitioner, therefore, was aware since 25.09.2017 atleast of the appointment of the Arbitrator by the respondent and agreed to the continuation of the interim order dated 24.05.2017 passed by this Court till the same is modified / vacated by the Arbitrator so appointed.

9. The petitioner also filed an application under Section 9 of the Act seeking interim order restraining the respondent from making recovery proceedings against the petitioner and also seeking stay of further proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act , 2002'). The said application was disposed of by this Court vide its order dated 27.09.2017 directing as under:-

“6. Keeping in view the above averment, the respondents is restrained from dispossessing the petitioner from the aforesaid premises till the pendency of the arbitration proceedings before the arbitrator or till adjudication of the objections of the petitioner under Section 17(1) of the DRT Act. It is clarified that in the eventuality that the petitioner does not take steps under Section 17(1) of the DRT Act as per law within four weeks, the present stay shall stand vacated.”

10. Therefore, the petitioner again submitted to the jurisdiction of the Arbitrator appointed by the respondent and persuaded this Court to pass an interim order in its favour, which was of course subject to modification / vacation by the Arbitrator under Section 17 of the Act.

11. The petitioner thereafter filed an application under Section 17 of the Act before the Arbitrator appointed by the respondent as also an application under Section 12 of the Act challenging the Arbitrator so appointed. It is important to note here that in this application, the challenge to the Arbitrator was not on the ground that he is ineligible to

be appointed as an Arbitrator because he has been appointed by the respondent alone. The petitioner, through its counsel also called upon the Arbitrator to make a disclosure in terms of Section 12 of the Act before proceeding further with the arbitration proceedings. The Arbitrator vide its communication dated 16.08.2017 has given the disclosure in compliance with Section 12 of the Act.

12. Thereafter certain correspondence were exchanged between the petitioner and the Arbitrator, whereby petitioner made certain allegations regarding the conduct of the arbitration proceeding by the Arbitrator.

13. The petitioner then filed the present petition being ARB.P. 682/2017 under Section 11(6) of the Act. While the said petition was pending before this Court, the another petition, being OMP (T) (COMM) 104/2017 was filed by the petitioner under Section 14(2) read with Section 15(2) of the Act.

14. The above history of the present petitions has been summarized by me only to show that two orders under Section 9 of the Act have been passed by this Court taking cognizance of the appointment of the Arbitrator by the respondent and the petitioner at that stage did not express any reservation to such appointment. In fact, the said orders were not challenged by the petitioner and the petitioner proceeded to appear before the Arbitrator so appointed by the respondent.

15. This, in my view, would also attract *Proviso* to Section 12(5) of the Act and amounts to waiver on the part of the petitioner. For this purpose reference may be made to the judgment of this Court in ***Bharat Broadband Network Limited Vs. United Telecoms Limited*** 2017 SCC Online Del 11905

16. As far as the other grounds on which the petitioner alleges that the Arbitrator so appointed is not independent or impartial, the same have to be taken before the Arbitrator himself in terms of Section 12(3) read with Section 13(2) of the Act. In **HRD Corporation Vs Gail (India) Limited** 2017 SCC Online SC 1024, the Supreme Court, after examining the provision of Section 12, Section 13 and Section 14 of the Act has held as under:-

“13. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the

arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.”

17. Therefore, the petitioner shall first have to take recourse to raising a challenge to the Arbitrator before the Arbitrator himself and the same cannot be gone into at this stage by this Court.

18. In view of the above, I find no merit in the present petitions and the same are accordingly dismissed, however, leaving it open to the petitioner to agitate all other contentions regarding the impartiality or independence of the Arbitrator before the Arbitrator himself or in such other proceedings as may be open to it in law. There shall be no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 21, 2018/rv