

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.05.2018

O.M.P. (COMM) 273/2016 & I.A. Nos. 6346/2016 & 2751/2017

JAY POLYCHEM (INDIA) LTD & ORS.Petitioners

Versus

S.E. INVESTMENT LTD Respondent

Advocates who appeared in this case:

For the Petitioner : Mr P.P. Malhotra, Senior Advocate
with Mr Shubhendu Kaushik.

For the Respondent : Mr P. Nagesh and Mr Dhruv Gupta.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 31.07.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, Justice S.B. Sinha, a former Judge of the Supreme Court of India (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the petitioners and the respondent with respect to the Loan Agreements dated 29.08.2011 (hereafter 'the Loan Agreements').

2. The present petition was filed on 31.10.2015. However, the said petition was neither signed on behalf of the petitioners nor supported

by signed and attested affidavits. In addition to the above, the petition was also defective on several other grounds and, thus, was returned on 31.11.2015. It is relevant to note that the petition was filed just before the expiry of the period of three months available in terms of Section 34(3) of the Act, for filing a petition under Section 34 of the Act.

3. The petition was thereafter refiled on 23.12.2015. This was not only beyond the period of three months as prescribed under Section 34(3) of the Act but also beyond the further period of 30 days, which could be condoned by the Court in terms of proviso to Section 34(3) of the Act. Although, Section 34(3) of the Act is not applicable for any delay in refiling – as held by the Supreme Court in *Northern Railway v. M/s Pioneer Publicity Corp. Pvt. Ltd.* (2017) 11 SCC 234 as well as by a Division Bench of this Court in *Delhi Development Authority v. Durga Construction Co.*: 2013 (139) DRJ 133 – but what was filed by the petitioners on 31.10.2015 could not be considered as a petition at all in view of the defects noticed above.

4. In *Ashok Kumar Parmar v. B.D.C. Sankiila & Ors*: 1995 RLR 85, this Court had, in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967, observed as under:

“If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit.”

5. The aforesaid view would also be applicable in case of a petition under Section 34 of the Act. In ***Delhi Development Authority v. Durga Construction Co*** (supra), a Division Bench of this Court had observed as under:

“..in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing.”

6. Clearly, a Statement, which is neither signed nor supported by an affidavit cannot be considered as an application under Section 34 of the Act. Thus, the petition filed on 31.10.2015 was non-est. In this view, the present petition is not maintainable, as it has been filed beyond the prescribed period of three months and also beyond the further period of thirty days within which this Court could entertain the petition on petitioners establishing that it was prevented from sufficient cause from presenting the petition within the period prescribed.

7. The Supreme Court in the case of ***Union of India v. Popular Construction: (2001) 8 SCC 470*** has held that the time limit prescribed under Section 34(3) of the Act to challenge an award is not extendable by the Court under Section 5 of the Limitation Act, 1963 in view of the express language of Section 34(3) of the Act. The petition

is, thus, not maintainable because as on 23.12.2015, the maximum time available within which the petition could be entertained by this Court – that is three months and a further period of 30 days – had expired.

8. Even if it is assumed that what was filed on 03.11.2015 by the petitioners could qualify as a petition under Section 34 of the Act, it is seen that the delay in refiling is unreasonable. As observed above, the petition was refiled on 23.12.2015; however, all the defects were not removed. The said petition was not accompanied by a Statement of Truth and all the objections as pointed out earlier had not been removed. Thus, the filing was marked as defective and returned on 02.01.2016. It was refiled on 10.03.2016 and was returned on 14.03.2016 as it continued to be defective. Thereafter, the petitioners refiled the petition on 30.03.2016, which was returned on 31.03.2016 after scrutiny. The petition was refiled on 18.04.2016 (which was also beyond the period of extension granted) and was returned on 19.04.2016. It was next filed on 27.04.2016 but in view of the defects, was returned on the same date. The petition was again refiled on 05.05.2016 and 06.05.2016 and on both the occasions was returned as defective. It was finally filed on 16.05.2016; that is, after about six and a half months after it was initially filed.

9. The petitioners have filed an application (I.A. No.6346/2016), *inter alia*, praying that the delay of 132 days in refiling the petition be condoned. The only explanation provided for delay in refiling is that the clerk of the counsel for the petitioners had stopped coming to

office and had switched off his mobile phone. The learned counsel for the petitioner made efforts to search the file but could not find the same. However, one day, after about two months, the said clerk switched on his mobile phone and it is only upon his mobile being activated that enquiries were made from him and the file could be traced out. The said explanation cannot be accepted. Plainly, waiting helplessly for two months for the clerk to switch on his mobile can hardly be accepted as a sufficient cause preventing the petitioners from refiling the petition. Further, the application is also bereft of any particulars: who was the clerk? When did he go missing? When did he switch on his mobile phone? And, when was the file traced?

10. The explanation provided also appears to be untrue. This is so because the petitioner did refile the petition on 23.12.2015, that is, after approximately seven weeks of the initial filing. As noticed above, it was refiled successively on several occasions thereafter. Thus, the clerk of the petitioners' counsel being incommunicado for about two months cannot explain the period of over six and a half months that it took for the petitioners to finally file a defect free petition. The explanation that the file could not be traced out also cannot be believed, as the petition was refiled on several occasions as indicated above.

11. In *Delhi Development Authority v. Durga Construction Co* (*supra*), a Division Bench of this Court had held that this Court would have jurisdiction to condone the delay in refiling even if the period extends beyond the time specified in Section 34(3) of the Act;

however, this jurisdiction is not to be exercised liberally in view of the legislative intent to ensure expeditious conclusion of the proceedings.

12. The petitioners have relied on the decision of the Supreme Court in *Northern Railway v. M/s Pioneer Publicity Corp. Pvt. Ltd* (*supra*). In that case, the Supreme Court observed as under:

“We find that said Section has no Application in re-filing the Petition but only applies to the initial filing of the objections Under Section 34 of the Act. It was submitted on behalf of the Respondent that Rule 5(3) of the Delhi High Court Rules states that if the Memorandum of Appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing.”

13. Thus, in cases where repetitive extensions are granted, it may not be apposite to strictly apply Rule 5(3) of Delhi High Court (Original Side) Rules, 1967 in relation to refiling of a petition under Section 34 of the Act; however, in this case, the refiling has been beyond the time as specified by the registry. However, even if it is accepted that Rule 5 of Delhi High Court (Original Side) Rules, 1967 is inapplicable, in view of the legislative intent of Section 34(3) of the Act, inordinate delays in refiling cannot be accepted, more so, when there is no reasonable explanation for the delay and the Court is not persuaded that the petitioners were prevented from refiling despite due diligence. It is relevant to note that in *Northern Railway v. M/s*

Pioneer Publicity Corp. Pvt. Ltd (*supra*), the Supreme Court had accepted the explanation provided for the delay re-filing the petition.

14. In view of the above, I.A. No. 6346/2016 is rejected. In this view, it is not necessary to examine the merits laid by the petitioners to the impugned award; however, for the sake of completeness, this Court considers it apposite to consider that as well.

15. Briefly stated, the relevant facts necessary to address the controversy are as under:-

16. Petitioner nos. 1 and 2 are companies registered under the Companies Act, 1956. Petitioner nos. 3 and 4 are directors of Petitioner nos. 1 and 2. The respondent (SEIL) is a Non-Banking Finance Company and is, *inter alia*, engaged in the business of lending finance to borrowers.

17. SEIL granted a loan of ₹20,00,00,000/- to petitioner no. 1 (JPIL) and the parties entered into Loan Agreements – all dated 29.08.2011 – being LD 2639, LD 2640, LD 2641, LD 2642 and LD 2643 for sum of ₹6 crores, ₹5 crores, ₹4 crores, ₹3 crores and ₹2 crores respectively. The repayment obligations of JPIL were guaranteed by petitioner nos. 2 to 4, *inter alia*, by entering into separate agreements of guarantees.

18. The said loan carried interest at the rate of 10.75% per annum (flat) or 23.59% per annum (annualized), which was to be repaid in twenty four monthly installments commencing from 30.08.2011.

19. SEIL disbursed a sum of ₹18,56,44,000/- after deducting amount of ₹1,21,50,000/- on account of first Equated Monthly Installment (EMI) and ₹22,06,000/- on account of processing charge. Out of the above amount of ₹6,00,00,000/- was disbursed on 30.08.2011 and the balance 12,56,44,000/- was disbursed on 01.09.2011.

20. On 30.08.2011, JPIL remitted a sum of ₹5,00,00,000/- to SEIL by RTGS. SEIL claims that the said amount was paid as a 'Cash Collateral' carrying an interest at the rate of 9% per annum; however, JPIL disputes the same and claims that the same was in part repayment of the loan disbursed.

21. JPIL paid seven EMI's but failed to pay further monthly installments due from 30.03.2012. Since JPIL defaulted in payment of the installments as agreed, SEIL imposed a late fee at the rate of ₹2 per thousand per day, which was increased to ₹6 per thousand per day in terms of Clause 7 of the Loan Agreements.

22. JPIL had also issued cheques in favour of the petitioner, but all the cheques were returned dishonored. Thereafter, SEIL initiated criminal proceedings against JPIL under Section 138 of the Negotiable Instruments Act, 1881.

23. On default of repayment of the loan amount, SEIL issued a notice dated 04.02.2013 invoking the agreements of guarantee executed by petitioner nos. 2, 3 & 4. Thereafter, on 07.02.2013, SEIL issued a winding up notice to JPIL.

24. On 11.02.2013, the petitioners responded to SEIL's notice dated 04.02.2013 stating that an amount of ₹5 crores forming part of the loan amount had been remitted to SEIL.

25. SEIL filed its Statement of Claims, *inter alia*, claiming sum of ₹40,80,10,376/- on account of the installments due and ₹15,00,000/- towards cost of legal expenses along with *pendente lite* and future interest on sum of ₹40,80,10,376/- and ₹15,00,000/- at the rate of ₹6 per thousand per day as late fee.

26. The petitioners filed the Statement of Defence contesting the claims made by SEIL. The petitioners, *inter alia*, claimed that the high rate of interest reflected in the Loan Agreements was contrary to the Usurious Loans Act, 1918.

27. The principal issues before the Arbitral Tribunal related to the enforceability of the contract as the petitioners claimed that the contract was not enforceable in terms of the various statutes including Usurious Loans Act, 1918 and Punjab Relief of Indebtedness Act, 1934. It was also claimed that the late fee charged in terms of Clause 7 of the Loan Agreements that entitled SEIL to levy a late fee charge of ₹2 per thousand per day, which could be increased to ₹6 per thousand per day, was in the nature of penalty and is not enforceable. The Arbitral Tribunal was also called upon to decide whether the sum of ₹5 crores paid by JPIL at the outset was a cash collateral bearing the interest at the rate of 9% or whether the same amounted to repayment of the loan advanced by SEIL.

28. The Arbitral Tribunal after considering the material and evidence placed on record concluded that the Loan Agreements were enforceable and JPIL was liable to pay the amounts borrowed in terms of the Loan Agreements. However, the Arbitral Tribunal held that the loan advanced by SEIL was only to the extent of ₹15 crores and not ₹20 crores as claimed by SEIL. It accepted JPIL's plea that the sum of ₹5 crores remitted on 30.08.2011 was to be construed as repayment of the loan and adjusted from the amount of loan disbursed to JPIL. The Arbitral Tribunal held that in fact, SEIL had only advanced a sum of ₹15 crores out of which it had recovered the first installment of ₹1,21,50,000/- and the processing charges of ₹22,06,000/- in advance.

29. Insofar as late payment charges are concerned, the Arbitral Tribunal held that the same were punitive in nature and, thus, could not be recovered. After accounting for the amounts recovered, the Arbitral Tribunal made an award against the petitioners for the balance amount. The Arbitral Tribunal also awarded *pendente lite* interest at the rate of 15% per annum on the amounts so awarded. In addition, the Arbitral Tribunal awarded future interest at the rate of 18% per annum.

30. Mr Malhotra, the learned Senior Counsel appearing for the petitioners has sought to assail the award, essentially, on three grounds. First, he submitted that the relationship between the parties was very friendly and, therefore, JPIL had accepted the loan on a friendly basis but SEIL had played a fraud in getting several documents executed, which did not bear out the true transaction between the parties. Second, he submitted that the rate of interest

accepted by the learned arbitrator was far in excess as agreed to under the Loan Agreements. He submitted that the Loan Agreements expressly provided that the rate of interest would be 10.75% per annum but the Arbitral Tribunal had accepted the same to be equivalent to 23.59% per annum. Lastly, he submitted that the transaction would be hit by the Usurious Loan Act, 1918.

31. This Court is of the view that none of the contentions are merited. Copies of the Loan Agreements have not been annexed with the petition. However, copies of the same are available on the records of the petition filed by SEIL under Section 34 of the Act, being OMP (Comm) No. 12/2016, challenging the impugned award. Clause 1 of the Loan Agreements, which are identically worded expressly provides that *“The said loan shall carry interest at the flat rate of 10.75 % per annum or such modified rates as indicated by the Company....”*. The words *“flat rate”* are important. The interest rate of 10.75% per annum is applicable on the loan amount for the entire term of the loan without taking into account the installments paid during the term of the loan. The installments payable – seven of which were also paid – were also computed on the aforesaid basis. The Arbitral Tribunal had examined the same and concluded that the flat rate of interest of 10.75% per annum would work out to 23.59% on the reducing balance referred to by the learned arbitrator as *“23.59% per annum (annualized)”*.

32. The contention that the loan was a friendly loan is also unmerited as, admittedly, the petitioners had executed several

documents for documenting the transactions as is noticed in paragraph 42 of the impugned award. The documents clearly evidence that the transaction was a commercial transaction.

33. The Arbitral Tribunal had, after examining the documents and evidence on record observed that, “*there are enough direct as well as circumstantial evidence to show that the Respondents have entered into the said agreements knowing fully well the contents thereof.*” This Court finds no infirmity with the aforesaid conclusion. And, in any view, this finding cannot be influenced with as it does not offend any of the grounds as set out in Section 34(2) of the Act.

34. The contention that the transaction is hit by the Usurious Loan Act, 1918 is also unmerited. The said contention was rejected by the Arbitral Tribunal and, in the opinion of this Court, rightly so. In *Morgan Securities and Credits Pvt. Ltd. v. Morepan Laboratories Ltd. & Anr : 132 (2006) DLT 588*, this Court had held that the Usurious Loan Act, 1918 does not include reference to an arbitral award.

35. In view of the above, the petition is dismissed on account of delay as well as on merits. The pending applications are also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 07, 2018
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