IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.48 OF 2017

IndusInd Bank Ltd.	)
A banking company incorporated under	)
the provisions of the Companies Act, 1956	)
and having its registered office at 2401,	)
Central Thimmayya Road, Pune-411001	)
and branch office at Showroom no.3 & 4,	)
Olympic Tower, Station Road, Jodhpur,	)
Rajasthan	) ....Petitioner
	(Org.Respondent)

V/s.

M/s.Vinayak Arts	)
A sole proprietary firm having its office	)
At 12-B, Heavy Industrial Area, Jodhpur	)
342001 through its Proprietor Shrikant Garg	)
S/o K.L.Garg, Resident of Nehru Park,	)
Jodhpur	)....Respondent
	(Org.Claimant)

Mr.Rohaan Cama a/w Mr.Nishit Dhruva, Mr.Prakash Shinde and Mr.Chirag Bhavsar I/by MDP & Partners for petitioner.
Ms.Fatima Barodawala I/by Raval Shah for respondent.

CORAM : K.R.SHRIRAM,J

RESERVED ON : 15.3.2019
PRONOUNCED ON : 27.3.2019

Judgment :-

1. Petitioner is impugning an award dated 22.9.2016 passed by the sole Arbitrator on the ground that the award is perverse, patently illegal, fundamentally erroneous and proceeds on erroneous basis in law and against public policy. Petitioner alleges that the Arbitrator has not considered documentary evidence before him, has come to the conclusion arbitrarily, without any basis and also contrary to settled provisions of law.

2. Petitioner is a banking company and respondent is a proprietary concern engaged in the business of manufacturing and exporting handicraft goods.

3. On or about 15.2.2013, on the request of respondent, the Jodhpur branch of petitioner sanctioned credit limit viz. "forward cover limit" of Rs.80,00,000/- for a period of one year. The purpose was to hedge respondent's currency exposures for export transactions. Respondent also executed various documents including agreement for foreign exchange transaction, agreement for forward contract limit, letter of lien etc. In terms of the credit, respondent also created a lien on his fixed deposit for Rs.1,25,000/- and another for Rs.7,00,000/-

towards margin requirement. In terms of the arrangement, respondent requested petitioner to book forward contracts for amount of Euro 70,000, USD 25,000 and Euro 16,000. As per the arrangement between the parties the credit for all merchant forward contract was computed on daily basis on replacement clause for the outstanding forward contract and accordingly respondent was to ensure, if the re-recomputed exposure in net payable to petitioner exceeds 60% of the margin held, within 3 working days deposit additional margin so as to maintain a minimum cash margin. In case net margin calls are not met within 3 working days and/or net payable exceeds 80% of cash deposit held as margin, petitioner had right to terminate forward contract without reference to respondent.

4. In August-2013 the exposure on the outstanding deals of respondent breached 60% of the margin held and further 80% threshold. In view thereof, petitioner communicated the margin calls to respondent and requested respondent to deposit amounts towards additional margin. The communications were sent by auto generated messages.

5. Coming to the crux of the matter, as, until 12.9.2013, respondent did not top up the margin, petitioner sent an e-mail at 3.50 p.m. on 12.9.2013 calling upon respondent to provide top up for margin call of Rs.2,48,000/- by 11.00 a.m., the next working day, i.e., 13.9.2013 failing which it would lead to cancellation/close out and outstanding position shall be squared up without further notice or intimation. There is no dispute that such a notice was not required. The amount of Rs.2.48 lakhs was to be provided so as to remain within a margin of 60% as per the agreed terms failing which it would result in cancellation of the agreements.

6. Petitioner's representative visited respondent's office on 13.9.2013. It is stated by representatives of petitioner that they reached respondent's office at about 10.30 a.m. and according to petitioner they left at about 11.45 a.m. and further top up security communication was given at 11.45 a.m. According to respondent in its evidence in examination-in-chief, it is stated that petitioner's representatives reached at 10.20 a.m. and left at 10.30 a.m. This timing is of significance because petitioner terminated the forward contract because respondent according to petitioner, did not provide top up margin of Rs.2,48,000/- before 11.00 a.m. on 13.9.2013.

7. It is the case of petitioner that the forward contracts were terminated because the authority letter was not issued before 11.00 a.m. and by the time the letter was received at 11.45 a.m. contracts had been terminated. It is respondent's case in one communication that respondent had issued at 11.30 a.m. authority letter to Mark lien on fixed deposit amounting to Rs.3.51 lakhs thereby proposing to secure margin requirement on forward contract. Respondent in another communication has stated it was given at 11.45 a.m. and in the evidence it is stated to be 10.30 a.m.

8. Petitioner terminated all the forward contracts and debited amount of about Rs.14,72,600/- to respondent's account which was the difference in value of the currencies between future price and spot price as on 13.9.2013 in accordance with terms of the agreement. Therefore, respondent commenced arbitration proceedings to recover amount of about Rs.14,72,000/- together with interest.

9. The Arbitrator passed an award in favour of respondent ordering petitioner to pay to respondent sum of Rs.14,71,693/- with interest @ 12% p.a. from 13.9.2013 till full payment/realization and

also directed petitioner to bear its cost as also respondent's cost of arbitration.

10. One witness was examined on behalf of respondent and two witnesses were examined on behalf of petitioner.

11. After pleadings were completed, issues/points for determination were framed and the same with the findings read as under :-

Issues/Points for Determination	Findings
1) Does the Respondent prove that in the month of March & September 2013, outstanding deals of the Claimant breached 60% of the Mark to Market (MTM) & further 80% threshold ?	Yes.
2) Does it prove that the Respondent had, on regular basis, called upon the Claimant to deposit additional charges so as to maintain minimum cash margin underlying over & above payable on account of MTM valuation but the Claimant did not deposit the monies required to be deposited as per the sanction letter ?	Yes by auto generated mails.
3) Does the Claimant prove that on 13/9/2013 at about 10 am., it had instructed the Respondent by letter of said date, to create lien	The instructions given at about 11 a.m.

on the fixed deposit of Rs.3,51,795.56 towards the margin in compliance of the Respondent's demand by mail dated 12/9/13 ?	
4) Does it prove that on 13/9/13, the Respondent wrongfully, illegally & in arbitrary manner cancelled the forward contract referred to in para No.10 of SOC ?	Yes.
5) Does it also prove that the Respondent contacted, by phone & emails, since immediately after receiving letter dated 13/9/13 from the Respondent cancelling the forward contracts & that the Respondents officials had told the Claimant that they were enquiring as to how the contract got cancelled even when the Claimant had timely provided the margin money ?	Yes.
6) Does the Respondent prove that the Claimant ought to have deposited Rs.2.48 Lacs before 11.00 a.m. of 13th September, 2013 to remain within MTM of 60% and that despite notice the Claimant did not timely provide for the same & that therefore the termination of the contract was proper and legal ?	Ought to have deposited & deposited the amount. Termination illegal.
7) Does the Claimant prove that the Respondent wrongfully debited (from FDRs and Current Account held in the Respondent Bank) in its account of Rs.14,71,693.00 claimed therein due to the illegal breach of the contract by the Respondent	Yes.
8) Is the Claimant entitled to the	Entitled to the amount with

amount & interest as sought ?	interest @ 12% p.a.
9) To what order & relief, if any, is the Claimant entitled to ?	Entitled to the amount with interest @ 12% p.a.

12. Issue nos.3 and 6 are the ones that have generated the most heat.

13. The reason for arriving at that conclusion to issue no.3 is found in paragraph-16 of the award. Respondent's case before the Arbitrator was the instruments to mark lien on fixed deposit of Rs.3.51 lakhs (Exh.56) was given at 10.30 a.m. whereas petitioner has contended that instruments were given at 11.45 a.m. On 13.3.2013 petitioners' two representatives, viz., Navneet Gupta and Mayank Panwar (Panwar was petitioner's witness no.2) had gone to meet respondent. It is the case of respondent in his evidence in examination-in-chief that these two gentlemen from petitioner's office reached respondent's office at about 10.20 a.m. and Exh.56 was handed over at 10.30 a.m. Petitioner's case is that these two officers of petitioner had gone to the office of respondent by about 10.20 a.m. and at about 11.45 a.m. Exh.56 was handed over. Respondent relied on an endorsement on Exh.56, which was produced in evidence by respondent, and the endorsement read “Received on 13/9/2013”

below which Navneet Gupta had signed and the timing is mentioned below his signature. Mr.Navneet Gupta has written 11.45 a.m. Respondent contended that they got the office copy of the letter from petitioner's office few days later but petitioner contended that acknowledgment was signed, time written and given to petitioner immediately at 11.45 a.m. A lot has been stated on where the letter has been given but what is relevant is to ascertain the time it was given. Was it given before 11.00 a.m. ? In the statement of claim the time is not mentioned. In the examination-in-chief, respondent has stated in paragraph-11 “I then handed over a letter dated 13/9/2013 at or about 10.20 a.m. with instructions to create lien on .... aggregating to Rs.3,51,795/-”. It has to be noted that respondent by an e-mail dated 18.9.2013 (sent 5 days after forward contract was terminated) (Exh.19) has stated that he gave the authority letter against the required margin call to the Branch Manager and Relationship Manager of petitioner on 13.9.2013 at 11.30 a.m. The letter reads as under :-

“ *To,*
Mr.Ankit Parekh,
(Forex Head, Indusind Bank)
Mr.Ashish Jt.Chhabra
(Regional Head Indusind Bank)

Respected sir,

Referring to the forwarded mail, I would like to draw your sincere attention towards the Forward Deal cancelled on dt.13.09.13 without any intimation to us or confirming the price at which the deal was cancelled. And that too when we hd paid Bank the 3,51,795.56/- against the required Margin Call of 2.48 lac in form of F.D's to the Branch manager, and the R.Manager in Morning <u>at around 11.30 a.m.</u> who accepted the same & we also assured that we will pay more if it is required on Monday, i.e., 16.09.13, <u>scan copy</u> of the receiving letter attached herewith...................."

(emphasis supplied)

14. Petitioner's advocate in his letter dated 31.12.2013, and in the meanwhile, many communications have been exchanged between the parties, has stated that the representative of petitioner went to the office of respondent at around 10.45 a.m. and respondent had deposited Rs.3,50,000/- in the form of FD lien which was given to petitioner's representative at respondent's office at 11.45 a.m. The relevant portion of the said letter reads as under :-

".......... That on 12.09.2013 my client received your Email communication asking my client to deposit Rs.2.48 lakhs as Margin Money to be remitted and along with the same a detailed calculation of margin in Fixed Deposit that was maintained by my client was specified. It was specified in the above mentioned correspondence that my client was required to deposit the top of margin up to 11.00 AM on the next working

day. Next day i.e., on 13.09.2013 your bank Officials viz. Branch Manager and Relationship Manager come to the factory of my client at around 10.45 AM. and collected an addition sum of Rs.3,50,000/- in the form of Fixed Deposit (FD) lien (and convinced my client regarding the standing deals after they had a talk with their Regional Manager and Treasury Head in front of my client in their office itself). It will be relevant to mention here that although the margin call was of Rs.2.48 lakhs only but as per the request made by your Branch Manager my client had deposited a sum of Rs.3,50,000/- in the form of FD lien which was received by your bank officials who departed my clients premises after having Tea and snacks and exchanging pleasantries at around 11.45 A.M.........................."

(emphasis supplied)

15. Therefore, there were 3 versions of respondent on the timing of handing over the lien letter and respondent was unable to prove the exact time. The Arbitrator instead of coming to a conclusion that respondent was not able to prove that the authority letter was given before 11.00 a.m. and thereby rejecting the claim, has concluded as under :-

"My attention is drawn to the Claimant's the mail dated 18th September 2013 (Exh.19) inter alia that the letter was given around 11.30 a.m. The claimant has sought to clarify that the time was mentioned because of the mention of the time over Exh.56. In the circumstances, I am inclined to conclude that the timing mentioned over Exhibit 56 does not necessarily mean that the letter was given & received at that time. This is not to endorse the Claimant's case of handing over Exhibit 56 at 10.30 a.m. It seems that the truth lies in between in as much

as that the letter at Exhibit 56 authorizing the Respondent to convert sweep in Fds into normal Fds of over Rs.3.51 Lakhs was given around 11.00 a.m. I would show a little later on that the timing of receipt of the letter was inconsequential in this case."

16. I fail to understand how the Arbitrator could conclude it was given around 11.00 a.m., why not 10.45 a.m. or 10.50 a.m. or 11.20 a.m. and timing of letter was inconsequential. The Arbitrator has not explained as to how and the basis why he has come to a conclusion it was given "around 11.00 a.m." Moreover around 11.00 a.m. means it could also be after 11.00 a.m., in which case petitioner was totally justified in terminating the contract. This is because in issue no.6, the arbitrator has, in answer to "Does the Respondent prove that the Claimant ought to have deposited Rs.2.48 lakhs before 11.a.m. on 13.6.2013" has said "ought to have deposited". But he goes ahead to say in issue no.6 " and deposited the amount". But in issue no.3 he says "about 11.00 a.m. I am unable to fathom how when in issue no.3 he is not certain it was given before 11.00 a.m. because he says "about 11.00 a.m." but in issue no.6 says it was deposited before 11.00 a.m. It was very vital in the facts and circumstances of the case of respondent to pin the timing at which the authority letter was given and it cannot be the ipse dixit of the Arbitrator. Moreover, a glaring omission is, nowhere in the award has the Arbitrator dealt

with contents of respondent's advocate notice dated 31.12.2013 where it is mentioned (as quoted in para 14) that the letter was given at around 11.45 a.m. Respondent has also not explained as to how in evidence affidavit he says petitioner's representatives arrived at 10.20 a.m. and letter (Exh.56) was given at 10.30 a.m., whereas in e-mail dated 18.9.2013 he says it was given at around 11.30 a.m. and in respondent's Advocate's letter it is stated around 11.45 a.m. The Arbitrator could not have shifted the onus on petitioner to prove that it received the letter only at 11.45 a.m. and not earlier. The onus was on respondent to conclusively prove the exact time and that it was before 11.00 a.m. Respondent has failed to prove and the arbitrator was unable to definitely conclude that the letter was given before 11.00 a.m. This requirement was not fulfilled and petitioner's terminations was justified.

17. Therefore, the conclusion of the Arbitrator to say that he would not take the time given by claimant or respondent and he would come with the timing of his own "about 11.00 a.m. or around 11.00 a.m." is unacceptable. Respondent has not proved its case that letter dated 13th September 2013 (Exh.56) for sweep in of the fixed deposit was delivered at 10.30 a.m. or before 11.00 a.m.

18. Therefore, as regards the issue of time, the impugned award is perverse and suffers from patent illegality for the following reasons :-

> (i) The Arbitrator ignores the three contradictory stands taken by Respondent and does not even attempt to analyze the same ;
>
> (ii) The Arbitrator did not consider that contemporaneously 5 days after the termination, i.e., on 18th September, 2013 the respondent sent an e-mail specifically stating that the payment of the fixed deposit amount was made at around 11.30 a.m. ;
>
> (iii) Thereafter, after all disputes had been raised including in the detailed reply by petitioner on 7th November, 2013, respondent's Advocate addressed a letter dated 31st December, 2013 in which it was stated that the officers of petitioner had visited the factory of respondent at 10.45 a.m. and had departed the premises with the letter dated 13th September, 2013 at 11.45 a.m. This letter which is crucial, has not been referred to in the Award. Let alone considered and dealt with. This constitutes clear ignorance of material evidence rendering the Award ex facie perverse ;
>
> (iv) Respondent in evidence has specifically taken the stand that the letter dated 13th September, 2013 was handed over to petitioner's officers at 10.20 a.m. and they left the premises at 10.30 a.m. The Arbitrator has given no cogent reason for believing this evidence and has not dealt with the clear contradiction in the respondent's evidence and the document, i.e., email dated 18th September, 2013 and 31st December, 2013 ;
>
> (v) The Arbitrator after rejecting petitioner's stand and also rejecting respondent's case of delivery of the letter at 10.30 a.m., arbitrarily, and without any basis or reasons arrived at an approximate time of "around 11.00 a.m.". This is completely arbitrary, baseless, unreasoned, and does not in any manner imply

whether it is before 11.00 a.m. or after 11.00 a.m. which was the material point for determination before the Arbitrator. The award is thus clearly perverse, and ought to be set aside.

19. One more point, the Arbitrator has gone wrong is accepting respondent's submission that the termination was illegal because there was implied waiver of petitioner's right to assert strict compliance with contractual obligations.

20. As stated earlier, petitioner, from August-2013 has been sending everyday auto generated email to respondent stating that margin money requirement has fallen below the level to be maintained and calling upon respondent to top it up. In paragraph-19 the Arbitrator has stated as under :-

> *"The fact of the matter is that enabling clause was never used by the Respondent at any point of time except in the defence. Mr.Deshmukh, the Ld. Defence Counsel has submitted that the Respondent's not exercising the power to terminate the contract cannot be construed to be the waiver of the right available to the Respondent.........*
>
> *Repeated non assertion of right for a long period can surely be construed to be agreement, albeit implied, not to assert it, the Respondent was estopped from using the breaches of MTM committed earlier by the Claimant for the termination of the contract on 13th September 2013 more so after the monies were deposited.........."*

21. The Arbitrator has totally gone wrong on the law relating to waiver because it is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for which is laid in the pleadings. No plea of waiver has been raised in the statement of claim or in the evidence affidavit ? It has been raised for the first time at the hearing of the arguments. That was clearly impermissible. If it was properly pleaded in the statement of claim, petitioner would have an opportunity of placing on record facts and evidence showing why and in what circumstances petitioner kept sending the default notices/demand to top up the margin. ([1]***Motilal Padampat Sugar Millls Co. Ltd. Vs. The State of Uttar Pradesh & Ors***.).

22. Even if we take a step further, proceed on the basis that petitioner was merely lying by and not enforcing its rights, it is settled law that passing by an occasion to enforce a legal right whereby the right to enforce the same is lost, mere lying by is no waiver for this purpose. There must be some positive act. Waiver may be expressed

1 AIR 1979 supreme court 621

or implied, where one party consents at the request of the other to extend the time for performance or to accept performance in a different mode from that contracted for. It is a matter of intention, it must be deliberate in the sense that a party waiving a right should after applying his mind to the matter, decide to abandon the right. Paragraph nos.6 & 7 of the Judgment in the case of [2]***Narayan Badlaji Sali Vs. State of Bombay*** read as under :-

> *"6. …………. The mere fact, however, that the defendant sought certain particulars from the plaintiffs before filing the written statement and raising therein the question of sufficiency of notice would not, in our judgment, amount to a waiver of the plella as to the validity of a notice under Section 80 of the Code of Civil Procedure. Now, waiver h as been defined in Wharton's Law Lexicon as follows :*
>
> *The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost... Mere lying by is no waiver for this purpose; there must be some positive act... which act, however, if done, is a waiver in law...*
>
> *In Mitra's Limitation Act, 13^{th} fed., at p.447, it is stated -*
>
> *Waiver may be express or implied ; thus, where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for, there is a waiver.*
>
> *It is thus clear that waiver is a matter of intention and can be either express or implied. "Whether it is one or the other, it must be deliberate in the sense that the party waiving a right should after applying his mind to the matter decide to abandon the right. Can it be said that the defendant had decided expressly or by implication to*

2 1957 (59) BOM LR 532

abandon the defence with regard to the validity of the notice.

7. In order to infer a waiver some positive act on the part of the party which is supposed to have waived is necessary. Has such an act been proved against the defendant ? All that is shown by the plaintiffs is that there was delay in filing the written statement and that the defendant asked for particulars. A mere delay in doing a particular act or in raising a particular objection would not of itself justify an inference of waiver. …........."

23. In our case, first of all there is no plea of waiver and secondly there is no evidence led or even analyzed by the Arbitrator to come to a conclusion that there was a deliberate decision by petitioner to abandon the right after applying its mind to expressly or by implication to terminate the contract without further notice. On this ground also, the Arbitrator has erred.

24. The conclusion arrived at by the Arbitrator that the termination of all three contracts ought not to have been done and that it would have been sufficient for petitioner to terminate just one contract, is not correct, being contrary to the terms of the contract itself, which gave a right to petitioner to terminate all three contracts.

25. The contractual right of petitioner cannot be substituted or diluted by the Arbitrator's feeling of equity.

26. It is not the pleaded case of respondent that petitioner could have and should have terminated only one of the three contracts and should not have terminated the other two contracts to cover its dues. No such bifurcated relief was sought for by respondent. The Arbitrator had no occasion to delve into this point, there being no issue framed in this regard.

The award on this point as well is patently illegal.

27. The Apex Court in [3]***Associate Builders Vs. Delhi Development Authority*** has laid down the grounds contained in section 34 of the Arbitration & Conciliation Act, 1996 for assailing an award. One such ground is where a decision is perverse or so irrational that no reasonable person would have arrived at. If it is a finding based on no evidence or ignores vital evidence in arriving at his decision, will be termed as perverse. A finding which defies logic as to suffer from irrationality would be perverse. The finding of the Arbitrator that Exh.56 was given at about 11.00 a.m. or around 11.00 a.m., in my view, is based on no evidence and also irrational.

3 (2015) 3 Supreme Court Cases 49

Moreover, it ignores vital evidence in the form of respondent's Advocate's letter dated 31.12.2013. This letter has not been even discussed in the award. The other infirmity the award suffers is contravention of the law relating to waiver and that goes to the root of the matter. In law, as observed earlier, waiver has to be specifically pleaded and proved since waiver is a question of fact. No plea of waiver has been raised in the statement of claim but the Arbitrator proceeds that petitioner has waived its right from using the breaches of margin money committed earlier and therefore, was estoped from using the breaches for termination of the contract on 13.9.2013.

28. One point that should have, in my view, weighed against respondent was admittedly from August-2013 petitioner has been sending communications, *albeit* auto generated, calling upon respondent to provide top up for margin as per the terms of sanction letter and also cautioning respondent that failure to top up margin amount called for upto 11.00 a.m. on next working day will lead to cancellation and outstanding position shall be squared up without further notice/intimation. Respondent chose to give security letter only after over a dozen of such e-mails had been sent and petitioner personally went respondent's office requesting him to top up the margin.

29. In the circumstances, in my view, this petition under Section 34 of the Arbitration & Conciliation Act, 1996 has to be allowed. The award dated 22.9.2016 is set aside.

30. Prothonotary & Senior Master, High Court, Bombay to return the amount deposited by petitioner together with accumulated interest after four weeks of receiving a request from petitioner's Advocate.

(K.R.SHRIRAM,J)