

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.07.2021

+ **O.M.P. (COMM.) 166/2019 and IA Nos. 6024/2019
& 11657/2020**

KOMAL NARULA

..... Petitioner

versus

DMI FINANCE PVT. LTD. AND ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Chinmoy Pradip Sharma and Mr Irfan
Hasieb, Advocates.

For the Respondents : Mr Ashutosh Kumar Pandey, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 01.05.2016 (hereinafter 'the impugned award') passed by the Arbitral Tribunal comprising of a learned Sole Arbitrator.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to a Common Loan Agreement dated 14.01.2015.

3. By the impugned award, the Arbitral Tribunal has partly accepted the claims preferred by the respondents. The Arbitral Tribunal has accepted that the total amount of ₹1,43,92,456/- is payable to respondent no.1 in respect of its claim; and an amount of ₹62,57,590/- is payable to respondent no.2 in respect of its claim. The Arbitral Tribunal has further awarded *pendente lite* and future interest till realisation of the awarded amounts at the rate of 12% per annum. The Arbitral Tribunal has also awarded costs, which it quantified at ₹80,000/-.

4. The petitioner has assailed the impugned award on the ground as set out in Section 34(2)(a)(iii) of the A&C Act – that the petitioner was not given a proper notice of appointment of the Arbitral Tribunal or of the arbitral proceedings and, was unable to defend the case.

Factual context

5. DMI Finance (hereinafter ‘respondent no. 1’) is registered as a non-banking finance company with the Reserve Bank of India (RBI) and DMI Housing (hereinafter ‘respondent no. 2’) is registered as a housing finance company with the National Housing Bank. The respondents are companies of the same group with a common management.

6. It is the respondents’ case that Ms. Komal Narula (the petitioner), Mr. Nitin Chawla, Mr. Harsh Chawla, Mr. Jitin Chawla and Chawla Iron Traders Private Limited (hereinafter collectively referred to as ‘Borrowers’) jointly approached them and requested for

financial assistance of ₹1,65,00,000. The respondents jointly agreed to grant two loans of a sum of ₹1,15,00,000 and ₹50,00,000 respectively (hereinafter collectively referred as ‘loan facilities’). It was further agreed between the parties that the loan facilities and the payment obligations would be secured against an equitable mortgage of the *“freehold residential entire 3rd floor with roof rights build on plot bearing 156 in- Block – A, having area admeasuring 287.50 sq. yards situated in the layout plan of Janta Co Operative House Building Society Ltd, Meera Bagh, Paschim Vihar, New Delhi - 110087”* (hereinafter ‘the Property’).

7. The said loan facilities were sanctioned by the respondents by letters dated 14.01.2015, which were signed by the Borrowers, as acceptance of the terms and conditions contained therein.

8. Pursuant to the sanction of the said loan facilities, a Common Loan Agreement dated 14.01.2015, a Demand Promissory Note dated 14.01.2015 and an Affidavit cum Undertaking dated 14.01.2015 were executed by the Borrowers.

9. Further, the Borrowers executed a declaration and a letter dated 14.01.2015 confirming the deposit of the title deeds and deposited the original title documents of the Property with the respondents.

10. The sanctioned loan amount of ₹1,15,00,000 was disbursed by respondent no.1 vide Cheque No. 000265 dated 16.01.2015 drawn on HDFC Bank in favour of M/s Chawla Iron Traders Private Limited and ₹50,00,000 was disbursed by respondent no.2 vide Cheque No.

000045 dated 16.01.2015 drawn on HDFC Bank for ₹26,52,838 in favour of HDFC Bank Limited Loan A/c No 28333075; vide Cheque No. 000046 dated 16.01.2015 drawn on HDFC Bank for ₹12,11,930 in favour of IndusInd Bank Limited; vide Cheque No. 000047 dated 16.01.2015 drawn on HDFC Bank for ₹5,25,999 in favour of Shriram City Union Finance Limited; Cheque No. 000048 dated 16.01.2015 drawn on HDFC Bank for ₹3,30,142 in favour of Mrs. Harsh Chawla; and a sum of ₹2,79,091 was adjusted towards processing charges and other charges.

11. In terms of the Common Loan Agreement and the sanction letter dated 14.01.2015, the Borrowers were liable to pay a sum of ₹2,28,414 per month in 84 (eighty-four) equal monthly instalments (EMI) commencing from 05.03.2015 to respondent no.1 towards the repayment of loan; and ₹99,310 per month in 84 (eighty-four) equal monthly instalments (EMI) commencing from 05.03.2015 to respondent no.2 towards the repayment of loan.

12. The Borrowers, however, failed to make the payments for the aforesaid EMIs regularly. The electronic payment instructions provided by Mrs. Harsh Chawla for the payment of the EMIs towards the loan amount was dishonoured on account of “insufficient funds”. It is the respondents’ case that the EMIs have not been paid since the month of July, 2015.

13. The respondents, by a letter dated 16.07.2015, recalled the loan facilities granted to the Borrowers. In the said letter, the respondents

alleged that the sale deed documents submitted by the Borrowers were not genuine and therefore, the Borrowers had “*knowingly and wilfully committed fraud and misrepresentation against the lenders*”. It was further alleged that the Borrowers were in default of their payment obligations and had defaulted in paying the EMI due on 05.07.2015. Accordingly, respondent no.1 recalled the amount of ₹1,14,04,541 and respondent no. 2 recalled the amount of ₹49,58,818 and demanded that the amounts be paid on or before 23.07.2015. It is averred that the Borrowers did not respond to the said letter.

14. On the basis of the complaint of the respondents, FIR no. 511/2015 was registered with PS IP Estate alleging commission of offences under Sections 420/467/468/471/120B of the Indian Penal Code (IPC). The respondents also instituted proceedings under Section 138 of the Negotiable Instruments Act, 1881 for the dishonour of cheques.

15. Clause 10.8 of the Common Loan Agreement dated 14.01.2015 contains an agreement to refer the disputes to arbitration. Since disputes had arisen between the parties, the respondents sent a letter dated 15.01.2016 invoking the said Arbitration Clause and, Sh. Brij Bhushan Gupta was appointed as the Sole Arbitrator.

16. Notices dated 01.02.2016 were issued to the Borrowers and the respondents to be present before the learned Arbitrator on 18.02.2016. On the said date, the respondents were represented by their counsel, however, the Borrowers (including the petitioner herein) were not

represented. The postal report indicated that the Borrowers had 'refused' to accept the said notice and the office of M/s Chawla Iron Traders Private Limited (the Borrower company) was reported to be 'closed'. In the said circumstances, the Arbitral Tribunal issued notice calling upon the Borrowers to join the proceedings on 11.03.2016 and further, put the Borrowers to notice that in case they are not represented on the said fixed date and time, the Arbitrator would pass appropriate orders in the case.

17. The respondents filed an application dated 02.03.2016 for service of notice to the Borrower company at a new address. The aforesaid application was granted and disposed of by the learned Arbitrator on 02.03.2016.

18. Thereafter, a notice was sent to the Borrower Company at both the addresses and via email as well. As per the postal service report, the notice issued at the old address indicated that the premises were locked and notice issued at the fresh address indicated that the same was 'refused'.

19. On 11.03.2016, one Gaurav Soni appeared before the Arbitral Tribunal on behalf of the Borrowers and his presence was recorded on their behalf. The arbitral proceedings were thereafter, adjourned to 17.03.2016. The record of the arbitral proceedings held on 17.03.2016 indicates that none appeared for the Borrowers at the hearing. By an order dated 17.03.2016, the Arbitral Tribunal issued a formal notice to the Borrowers and restrained them from creating any third-party

interest or alienating, transferring, selling or handing over the possession of the mortgaged property to any third party.

20. The arbitral record indicates that the Borrowers had refused to accept the notices on earlier occasions and that they were served through affixation of the notices at the premises. Thereafter, on 30.03.2016, the learned Arbitrator recorded a formal order, to proceed *ex parte* against the Borrowers.

21. The arbitral records further indicate that the records of proceedings were sent to the Borrowers through e-mail, however, no response was received from them after 11.03.2016.

22. The arbitral proceedings culminated in the impugned award.

23. Aggrieved by the impugned award, the petitioner filed the present petition.

Submissions

24. It is averred by the petitioner that she had divorced Mr. Nitin Chawla on 05.03.2016 and has been residing separately since 15.01.2014. It is further averred that neither the petitioner had anything to do with the Borrower Company nor was a working director in the Borrower Company and, all debts and liabilities borne by the company were required to be discharged by Mr. Nitin Chawla.

25. Mr. Sharma, learned counsel appearing for the petitioner, assailed the impugned award on the sole ground that the petitioner did not have any notice of the arbitral proceedings.

26. He submitted that the petitioner was a house wife. She did not participate in any business activities of the Borrower company and was made a director in the company merely for registration purposes. Further, due to temperamental differences, she divorced Mr. Nitin Chawla in the year 2016 and was assured that she would be removed as a director of the Borrower company.

27. He submitted that the impugned award is liable to be set aside as no communication was received by the petitioner from the respondents. He further stated that the respondents were well aware that the petitioner had divorced Mr. Nitin Chawla and moved her residence to property bearing no. B-5/12, Paschim Vihar, Delhi-110063. The substitute address of the petitioner is mentioned in the Common Loan Agreement dated 14.01.2015 and despite knowing the same, they did not affect the service at the said address.

28. He submitted that neither the petitioner received any notice for initiation of arbitral proceedings nor a notice from the Arbitral Tribunal nor a copy of the *ex parte* award prior to 29.09.2018 and therefore, was unable to place her defence. He relied on the decisions of *Dulal Poddar v. Executive Engineer, Dona Canal Division & Ors.: (2004) 1 SCC 73* and *Bindiya Ajay Chawla v. Citifinancial*

Consumer Finance India Ltd: 2012 SCC OnLine Bom 208, in support of his contentions.

29. He stated that the petitioner had not authorised Mr. Soni to appear on behalf of the petitioner on 11.03.2016.

30. Further, it is only on 29.09.2018 that the petitioner became aware of the arbitral award as the Enforcement Petition bearing no. 34/2018 was served to her in the court of the learned MM, Patiala House Courts during the hearing of the matter concerning commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

31. Next, he submitted that the petitioner had filed Form No. DIR 11 with the Ministry of Corporate Affairs, that is, her notice of resignation from the office of a Director. However, she was unable to get her name deleted from the Master Data available on the website of Ministry of Corporate Affairs.

32. Mr. Pandey, learned counsel appearing for the respondents, countered the aforesaid submissions. He submitted that the petitioner had signed the Power of Attorney nominating the respondents to act, take possession, create mortgage, to register property in the land registry or municipal records along with letter of continuity, undertaking cum indemnity, along with letter of declaration, letter evidencing deposit of title deeds among other documents. Further, the petitioner is a director of the company and is liable for the acts and omissions of the company as

the company is an artificial person that functions through natural persons.

33. Next, he submitted that the impugned award duly recorded deemed service of notice of the arbitration proceedings on the petitioner. He further submitted that the notice was sent through e-mail. In addition, *dasti* service was also affected. He stated that Mr. Gaurav Soni had appeared on behalf of the petitioner and, on subsequent non-appearance on 17.03.2016, the Sole Arbitrator proceeded *ex parte* against the petitioner.

34. Lastly, he submitted that the factum of divorce between the petitioner and Mr. Nitin Chawla is not relevant for the present petition. He submitted that the petitioner is the director of the Borrower company (M/s Chawla Iron Traders Private Limited) and was actively involved in the affairs of the company. He referred to the Master Data of the Company managed by the Ministry of Corporate Affairs.

Reasons and Conclusion

35. The only question to be addressed is whether the petitioner was served due notice of the arbitral proceedings and had full opportunity to defend the case instituted by the respondents. The arbitral record does not indicate that any notice for the appointment of an arbitrator was sent to the petitioner.

36. The record of proceedings held on 18.02.2016 before the Arbitral Tribunal record that notices were sent to the parties regarding the arbitral proceedings but the envelopes, in which the notices were

sent, were received back with the noting “refused”. In the circumstances, the Arbitral Tribunal recorded that the respondents were deemed to have been served. The arbitral record also indicates that a notice dated 01.02.2016 was sent to the petitioner at two addresses- one at A-156, Second Floor, Meera Bagh, Delhi -110087 and the second at B-5/12, Paschim Vihar, Delhi-110063. The envelopes containing the notices sent to the petitioner at A-156, Second Floor, Meera Bagh, Delhi - 110087 were returned and the same have been placed on record. The said envelopes bear the noting “refused”. The envelope sent to the petitioner at B-5/12, Paschim Vihar, Delhi - 110063 is not on record.

37. The learned Arbitral Tribunal had also made notings on the notice addressed to each of the parties against their respective names. It is seen that there is a specific noting against the name of the petitioner indicating that she had refused service of the notice. However, it is pointed out that the said noting is against her address at A-156, Second Floor, Meera Bagh, Delhi-110087 and there is no such noting against her second address – B-5/12, Paschim Vihar, Delhi – 110063. On the basis of the aforesaid notice, it was argued on behalf of the petitioner that there is no material to indicate that the petitioner had refused service of the notices at her address in Paschim Vihar. There is also no material on record to indicate that any of the notices had been served on the petitioner at her email address.

38. The speed post receipts do indicate that the notice dated 01.02.2016 had been sent to the petitioner at her address in Paschim

Vihar and it appears that the said notice was not received back. *Prima facie*, the same would indicate that the petitioner was served the said notice and was, therefore, duly aware of the arbitral proceedings. However, there is merit in the contention that the record does not clearly establish that the petitioner had in fact received notice of the proceedings at the said address.

39. Section 3 of the A&C Act does provide that notice is deemed to be served “*if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.*” The postal receipt indicating that the notice was sent by speed post at the petitioner’s Paschim Vihar address is on record and, by thus, the petitioner would be deemed to be served at the said address.

40. Having stated the above, it is relevant to note that it is not established that in fact, the petitioner was served the notices or was aware of the proceedings. It is important to note that that the Arbitral Tribunal had proceeded on the basis that the petitioner had refused service of the notice. But, there is no evidence or any material to indicate that the petitioner had refused service of the notice sent to her at her Paschim Vihar address.

41. It is also material to note that although *dasti* notices were served on the company – M/s Chawla Iron Traders Pvt. Ltd., the respondents did not request for *dasti* notices to be served to the petitioner and admittedly, there is no material on record to indicate that the respondents had personally served any notice to the petitioner.

Considering that the notices served to the petitioner at A-156, Second Floor, Meera Bagh, Delhi – 110087 had been returned with the noting “refused”, the assumption made by the learned Arbitral Tribunal that the petitioner was duly served is a rebuttable assumption. In the facts of the present case, it is on record that there was a matrimonial dispute between the petitioner and her husband. An order dated 18.08.2015 passed by the Principal Judge, Family Court also indicates that the petitioner had left her matrimonial home (that is, A-156, Second Floor, Meera Bagh, Delhi – 110087) on 15.01.2014. She had thereafter, been residing at the premises bearing no. B-5/12, Paschim Vihar, Delhi – 110063.

42. Concededly, the respondents were aware of the said address and the same was also mentioned in the Memo of Parties. This Court, in its order dated 24.02.2020, had accepted the contention that the petitioner was residing at B-5/12, Paschim Vihar, Delhi – 110063 and, had left her matrimonial home on 15.01.2014.

43. In these circumstances, it is difficult to accept that the notice dated 01.02.2016 issued by the Arbitral Tribunal was duly served on the petitioner at A-156, Second Floor, Meera Bagh, Delhi – 110086 on account of the noting “refused”. There is ample material on record to indicate that the petitioner was not residing at the said address on 01.02.2016.

44. The Arbitral Tribunal was also persuaded to accept that the petitioner was duly served the notices and was aware of the arbitral proceedings as one Mr. Gaurav Soni, who had represented himself to

be the executive / representative of the Borrowers before the Arbitral Tribunal, had appeared at a hearing held on 11.03.2016. He had stated that Mr. Nitin Chawla (ex-husband of the petitioner) would be present before the Arbitral Tribunal on 17.03.2016 and had sought an adjournment on his behalf. Mr. Gaurav Soni did not appear before the Arbitral Tribunal thereafter. However, he did telephonically inform the Arbitral Tribunal that Mr. Nitin Chawla would not be available on 17.03.2016 as according to him, he was admitted to a hospital. Mr. Gaurav Soni also did not appear before the Arbitral Tribunal after 11.03.2016. The Arbitral Tribunal proceeded on the basis that since Mr. Gaurav Soni had appeared on behalf of the Borrowers (including the petitioner), she was duly served of the notice regarding the arbitral proceeding and had willfully chosen not to appear before the Tribunal. However, it is seen that Mr. Gaurav Soni did not furnish any authority from the petitioner to represent her before the Arbitral Tribunal. The petitioner claims that she had not authorized Mr. Gaurav Soni or any other person to appear in the arbitral proceedings as she was not aware of the same. It does appear that Mr. Gaurav Soni had not appeared on the instructions of the petitioner but of her ex-husband.

45. In the given circumstances, this Court is of the view that the respondents have failed to establish that the petitioner was duly served of the notices regarding constitution of the Arbitral Tribunal or had due notice of the arbitral proceedings at the material time. Although it does appear that one of the notices sent to the petitioner at her correct address had not been received back but, in the facts of the present

case, where the petitioner has affirmed on affidavit that she had not received any notice from the Arbitral Tribunal and the respondents have failed to establish that the same was delivered to the petitioner, this Court is of the view that there is merit in the petitioner's contention that she did not have notice of appointment of the Arbitral Tribunal or of the arbitral proceedings.

46. In view of the above, the impugned award insofar as the petitioner is concerned, is set aside. It is clarified that the impugned award is not interfered with in so far as the other Borrowers are concerned.

47. Nothing stated in this order would preclude the respondents from enforcing the arbitral award against the said parties.

48. It is further clarified that the respondents are at liberty to institute fresh proceedings against the petitioner. Needless to state that if any such proceedings are instituted, the same would be considered uninfluenced by any of the observations made by this Court in these proceedings. All rights and contentions of the parties are reserved.

49. The petition is allowed in the aforesaid terms. The pending applications are also disposed of.

VIBHU BAKHRU, J

JULY 15, 2021
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