

26.09.2023  
Court No. 19  
Item no.22  
CP

C.O. No. 3127 of 2023

Mr. Prem Singh Rao  
Vs.  
Srei Equipment Finance Limited & ors.

Mr. Krishna Raj Thaker  
Ms. Shusna Santra  
.....for the petitioner.

Liberty is granted to correct the date of the order, in the cause title.

This revisional application arises out of an order dated July 21, 2023, passed by the learned sole arbitrator, in the arbitration between SREI Equipment Finance Limited vs. M/s. Khush Infratech Private Limited & ors. By the order impugned, an application under Section 16 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act), was rejected.

The learned arbitrator was appointed by an order of this court on April 5, 2022, passed in an application under Section 11 of the said Act. The claimant filed a statement of claim against the petitioner and opposite party Nos.2 to 5. The opposite party no. 2 was the principal borrower and the petitioner and the other opposite parties were arrayed as guarantors. The opposite party Nos. 2 to 5 and the petitioner filed separate applications under

Section 16 of the said Act. All the applications were heard together and disposed of by a common order. Such order is the subject matter of challenge before this court.

Objections with regard to the jurisdiction of the learned arbitrator were raised. The issue revolved around two agreements, namely, the loan agreement dated September 15, 2019 and Rupee Facility Agreement dated March 15, 2020. The loan agreement dated September 15, 2019, had been signed by the opposite party no. 4, Lokendra Pal Singh on behalf of the opposite party no. 2 borrower and by the petitioner, namely, Prem Singh Rao, as co-borrower. The said agreement clearly mentioned that the petitioner was the son of Mufat Singh Rao, who was a co-borrower.

It was the claimant's case that the borrower failed to pay the instalments under the loan agreement which resulted in a demand notice of Rs.28,45,47,594/-. Upon such demand, the opposite parties/respondents requested the claimant to restructure the facility which led to the execution of the Rupee Facility Agreement. The agreement recorded that its purpose was to subsume and incorporate the liability arising out of Loan 1, further that the fresh document superseded and replaced the terms and conditions of the liability arising out of

Loan 1 and that in furtherance of the said arrangement, the claimant sanctioned the Rupee Facility Agreement dated March 15, 2020, being the Contract No. 187386 for an amount of Rs.179.65 crores.

Each of the applications filed by the respondents to the proceeding, were considered individually by the learned arbitrator. The petitioner was the respondent no. 2 in the proceeding. The petitioner, alone, has approached this court.

This court restricts this order to the findings of the learned arbitrator on the application filed by the petitioner. The points raised by the petitioner, have been discussed at page 8 of the order impugned. The petitioner contended as follows:-

- a) He was not a party to the Loan 2 Agreement and had not guaranteed the payment obligations under the said agreement. Consequently, the arbitration clause in Loan 2 Agreement, would not bind him.
- b) No Deed of Guarantee had been executed by the petitioner. He was made a party to the proceeding on the basis of a Memorandum Recording Creation of Mortgage by deposit of title deeds, which was an undated and incomplete document.

c) The said Memorandum Recording Creation of Mortgage, had neither been executed nor signed by the respondents in the proceeding, in presence of witnesses. The document contained several blank spaces.

The claimant filed an objection and contended as follows:-

a) That Loan 1 was executed by the petitioner as a co-borrower.

b) The said agreement clearly mentioned that the petitioner was the son of Mufat Singh Rao, a co-borrower under Loan 1.

c) Loan 2 was merely restructuring of Loan 1 and the petitioner could not deny his liability arising out of Loan 2.

d) The contention of the petitioner that he was not a party to the arbitration clause contained in Loan 2, was incorrect.

Heard Mr. Thakkar, learned Advocate for the petitioner. The deed dated September 15, 2019 had been signed by the petitioner at every page. The learned Arbitrator found that the petitioner had executed Loan 1, as a co-borrower. Loan 2 was admittedly, a restructuring of Loan 1. The petitioner could not avoid his liability under the Loan 2 agreement and he was bound by the arbitration clause.

Moreover, in the deed dated September 15, 2019, name of Mufat Singh Rao as a guarantor figured. The same had been signed by his son, i.e., the petitioner, at every page. The petitioner did not deny his signatures in the deed dated September 15, 2019.

The claimant had annexed a stamped document indicating that the petitioner had granted a power of attorney in favour of the claimant in respect of Loan 2, with the power to deal with his properties. The claimant also relied upon a Memorandum Recording Creation of Mortgage by Deposit of Title Deeds dated March 15, 2020 and clause – 1 thereof was referred to. The said document was executed for the purpose of Loan 2 agreement. Further reference was made to clause – 7(h) of the document to demonstrate that the document also placed reliance on the arbitration clause.

The learned arbitrator recorded the above facts in great detail and finally arrived at the conclusion that the application under Section 16 was not maintainable. The tribunal was not in doubt that the stamped power of attorney had been executed for the purpose of Loan 2, which entitled the claimant to implead the petitioner as a respondent in the proceeding. The two agreements were intrinsically interconnected and interdependent. The power of

attorney bore the same date as the date of execution of the Loan 2. Clause -2 read with clause – 7(h) of the Memorandum Recording Creation of Mortgage by Deposit of Title Deeds dated March 15, 2020, clearly related to the Loan 2, which contained the arbitration clause.

Reliance was placed on the decision of Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. and ors., reported in (2013) 1 SCC 641, wherein the Hon'ble Apex Court held that in case of multiple agreements between different parties where some contain an arbitration clause and other do not, even where the parties were not identically common in the proceedings before the forum and in the arbitration agreement, a reference of disputes as a whole or in part could be made to the arbitral tribunal, more particularly where the parties to an action, were claiming under or through a party to the arbitration agreement. The Hon'ble Apex Court held that the origin and end of all was the mother or the principal agreement. The fact that the party was a non-signatory to one or other agreement, might not be significant. The performance of any one of such agreements was irrelevant, without the performance and fulfillment of the principal or the mother agreement.

On the facts as narrated hereinabove, which have been traversed in great detail by the learned arbitrator and the law settled in Chloro Controls India Pvt. Ltd. (supra), the application under Section 16 of the Arbitration and Conciliation Act, 1996 was rejected.

The plea of the agreement being insufficiently stamped, was not urged before the learned Arbitrator. The application, the objection and the submissions of the parties before the learned Arbitrator, do not reflect that any issue of such nature, had been agitated.

It is contended by Mr. Thakkar on behalf of the petitioner, that before the order impugned was passed, the written notes of arguments along with the decision of the Hon'ble Apex Court in M/s. N. N. Global Mercantile Private Limited appellants vs. Indo Unique Flame Limited & anr., had been mailed to the learned arbitrator. The same was not dealt with in the order impugned. The order was liable to be set aside. It is contended that a sitting was also held thereafter, when the point was urged.

The law is well-settled. The aggrieved party is entitled to challenge the order passed under Section 16 of the said Act, at Section 34 stage. Thus, the petitioner is not remediless and can always raise the objection with regard to insufficiency of the stamp, in

accordance with law. No exceptional situation has been made out here, which would require interference of this court under Article 227 of the Constitution of India.

In the decision of ***Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.***, reported in **(2022) 1 SCC 75**, the Hon'ble Apex Court held as follows:-

**17.** Thereafter, Respondent 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Articles 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as

“34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)”.

(emphasis supplied)

The use of term “only” as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

**18.** In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In *Nivedita Sharma v. COAI* [Nivedita Sharma v. COAI, (2011) 14 SCC 337 : (2012) 4

SCC (Civ) 947] , this Court referred to several judgments and held : (SCC p. 343, para 11)

“11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation — L. Chandra Kumar v. Union of India [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

(emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear “bad faith” shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

**26.** It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the court examines the same under Section 34. Respondent 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706] , this Court observed as follows : (SCC p. 718, para 22)

“22. One other feature of this case is of some importance. As stated hereinabove, on 9-5-2018, a Section 16 application had been dismissed by the learned arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34.”

Moreover, if the petitioner contends that submissions with regard to N. N. Global (supra) had not been recorded by the learned Arbitrator in the order impugned, although urged after the written notes has been filed, the petitioner was required to approach the learned arbitrator. There is nothing on record to substantiate such plea.

Law is well settled. If an aggrieved party contends that some of the submissions had either not been recorded or omitted or wrongly recorded,

the proper course would be to approach the said forum which passed the order and urge such points.

Reference is made to the decision of ***Mohd. Akram Ansari v. Chief Election Officer***, reported in **(2008) 2 SCC 95**. The Hon'ble Apex Court held that:-

**“13.** The appellant submitted that he had taken a large number of points in his election petition, but they have wrongly not been discussed in the impugned judgment.

**14.** In this connection we would like to say that there is a presumption in law that a judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a court, the presumption is that that point was never pressed before the learned judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the court concerned to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an

appeal and seek to argue a point which even if taken in the petition or memorandum filed before the court below, has not been dealt with in the judgment of the court below. The party who has this grievance must approach the same court which passed the judgment and urge that the other points were pressed but not dealt with.”

The revisional application is accordingly disposed of without any interference.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

**(Shampa Sarkar, J.)**