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

Date of Decision: 16.02.2023

+ O.M.P. (COMM) 69/2023 & I.A. 3068-71/2023
BELL FINVEST (INDIA) LIMITED & ORS.

..... Petitioners

Through: Mr.Ramesh Singh, Sr. Adv.
with Mr.Ravi Raghunath, Adv.

versus

TATA CAPITAL FINANCIAL SERVICES LTD.

..... Respondent

Through: Mr.R. Sudhinder, Ms.Ekta
Bhasin & Mr.Sanidhya
Sonthalia, Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 22.09.2022 passed by the learned Sole Arbitrator.

2. In a nutshell, the facts leading to the present petition are as under:-

a) The respondent by its Sanction Letter dated 26.07.2018 had sanctioned a Term Loan Facility for an aggregate amount of Rs.10 Crores in favour of the petitioners.

b) In terms of the Sanction Letter, a Term Loan Agreement dated 28.07.2018 was executed between the petitioner no.1 and the respondent no.1. Simultaneously,

the petitioner nos.2 and 3 executed a Letter of Guarantee dated 28.07.2018, and the petitioner no.1 executed a Deed of Hypothecation dated 28.07.2018.

c) Claiming that the petitioner no.1 had defaulted in making the payment of the due installments, the respondent issued a Loan Recall Notice dated 09.12.2019, also invoking the Arbitration Agreement as contained in Clause 19.4 of the Term Loan Agreement.

d) The respondent thereafter issued another notice dated 27.07.2020, invoking arbitration not only under Clause 19.4 of the Term Loan Agreement, but also under Clause 29 of the Letter of Guarantee dated 28.07.2018.

e) The respondent thereafter filed a petition under Section 11 of the Act, being ARB.P. 58/2021 titled ***Tata Capital Financial Services Limited v. Bell Finvest (India) Limited & Ors.*** This Court by its order dated 03.02.2021 was pleased to appoint a Sole Arbitrator.

f) The learned Sole Arbitrator has by the Impugned Award directed as under:-

“23. In the above mention facts and law, the Award is accordingly passed in favour of the Claimant and against the Respondents, as under:-

a) Since the Respondent No. 1 has failed to make payment to the Claimant, the Respondent Nos. 2 (Mr. Chirag Rathod) and Respondent no. 3 (Mr. Bhupesh Rathod) are liable to pay the entire outstanding amount of Rs.7,91,46,873/- as on 09.04.2021 together with applicable and additional interest from 10.04.2021 till its actual realization under the Term Loan Agreement dated 28.07.2018 and the Letter of Guarantee dated 28.7.2018 given by the

Respondent no. 2 and Respondent no. 3 to the Claimant.

- b) Claim for Legal Costs, charges and other expenses is allowed along with fee of the Arbitrator.*
- c) The Respondents have filed the affidavits of Respondent no. 2 — one is before the final hearing and another one after the reserve of order, whereby the baseless, improper, incorrect averments are made and also inappropriate language is used, therefore, the Respondents are burdened with costs of Rs.30,000/- (Rupees thirty thousand only) which shall be deposited by Respondent no.2 with the Delhi High Court Mediation Centre within the period of five weeks. Copy of receipt shall be given to the counsel for the Claimant after the deposit, which is not paid.”*

3. The learned senior counsel for the petitioners submits that the learned Sole Arbitrator has erred in his interpretation of the Term Loan Agreement. He submits that in terms of Clause 12 of the Term Loan Agreement, in the event of default, it is only the ‘*outstanding dues*’ that can be claimed by the respondent, that is, only the installments that remained due and payable from the petitioners as on that day could have been claimed by the respondent in the arbitration proceedings. He submits that it is only upon termination of the Facility Agreement and as provided in Clause 11.3 of the Term Loan Agreement, that the respondent can demand immediate repayment ‘*of all outstanding moneys advanced under the Facility*’.

4. He submits that the learned Sole Arbitrator has placed reliance on Clause 9 of the Term Loan Agreement which relates to the prepayment of the Facility and, in the facts of the case,

had no application. He submits that even otherwise, the scope and ambit of a clause on prepayment of the Loan Facility would be entirely different from an event of default. He submits that the interpretation placed by the learned Sole Arbitrator is, therefore, contrary to the reading of the Agreement and cannot be sustained.

5. Placing reliance on Section 39 of the Indian Contract Act, the learned senior counsel for the petitioners submits that the Contract could have been terminated by the respondent only where the petitioners refused to perform their obligations under the Term Loan Agreement in entirety. Mere default of an installment would not enable the respondent to terminate the Term Loan Agreement as a whole or to avoid their obligation under the Term Loan Facility.

6. The learned senior counsel for the petitioners further submits that the learned Sole Arbitrator has also erred in his finding that the outstanding dues of the petitioners cannot be recovered by the respondent through the process of Deed of Hypothecation. He submits that by way of the Deed of Hypothecation, the petitioner no.1 had created a charge over its assets, including the Book Debts recoverable. The respondent, without exercising its rights under the Deed of Hypothecation, could not claim the amount to be outstanding against the petitioners under the Term Loan Agreement. He submits that the learned Sole Arbitrator in rejecting the above plea of the petitioners has placed reliance on his order dated 07.12.2021, passed on an application under Section 17 of the Act, which, in turn, clarifies that the views expressed therein are only *prima facie* in nature and shall not have any bearing at the stage of the

Award. He submits that, therefore, the learned Sole Arbitrator has contradicted himself in the Impugned Award by relying on the order dated 07.12.2021.

7. The learned senior counsel for the petitioners further submits that Clause 5.2.6 of the Term Loan Agreement provides that the respondent can charge additional interest in case of default of the petitioners in the repayment schedule. He submits that in terms of Section 55 of the Indian Contract Act, 1872, therefore, time would not be of essence and in case of default of the petitioners, the respondent would only be entitled to a claim of damages; the respondent could not have terminated the Term Loan Agreement.

8. Placing reliance on Section 28 of the Indian Contract Act, 1872, he submits that the Arbitrator is necessary to decide the dispute in accordance with the terms of the Agreement. Having ignored the vital term of the Agreement, the Impugned Award suffers from an illegality and is liable to be set aside.

9. The learned senior counsel for the petitioners further submits that the respondent vide its notice dated 09.12.2019, earlier invoked the Arbitration Agreement contained in the Term Loan Agreement alone. The petitioner nos. 2 and 3 are not parties to the Term Loan Agreement. He submits that in the order dated 03.02.2021, while appointing an Arbitrator, this Court has referred only to the Arbitration Agreement as contained in the Term Loan Agreement. He submits that, therefore, no direction against petitioner nos. 2 or 3 could have been passed by the learned Sole Arbitrator.

10. He submits that even otherwise the final direction contained in paragraph 23 of the Impugned Award and as

reproduced hereinabove, is only against the petitioner nos.2 and 3. In absence of any direction against petitioner no.1, which is the principal borrower, direction against petitioner nos.2 and 3 alone could not have been made.

11. The learned senior counsel for the petitioners further submits that the petitioners were not granted an opportunity of addressing oral submission by the learned Sole Arbitrator. He submits that the arbitration proceedings were fixed for the parties to address their oral submission on 30.07.2022. On the said date, a request for an adjournment was made on behalf of the counsel for the petitioners, however, the learned Sole Arbitrator refused the said request and, thereafter, proceeded to pass the Impugned Award. He submits that in this manner, the petitioners have not been afforded a reasonable opportunity to present their case before the learned Sole Arbitrator.

12. I have considered the submissions made by the learned senior counsel for the petitioners.

13. Before I advert to the challenge laid to the Impugned Award, I must remind myself of the limited jurisdiction that I exercise under Section 34 of the Act. The same has been explained by the Supreme Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***, (2019) 15 SCC 131, as under:-

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as

explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not

subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. *Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. *To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

41. *What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a*

finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

14. A reading of the above would show that the Supreme Court has warned the Courts that while in terms of Section 28(3) of the Act the Arbitral Tribunal is mandated to take into account the terms of the Contract, the construction of the terms of the Contract is primarily for an Arbitrator to decide. Unless the Arbitrator construes the Contract in a manner that no fair-minded or reasonable person would, that is where the Arbitrator's view is not even a plausible view to take, it is only then that a ground of challenge to the Award under Section 34(2A) of the Act is available.

15. As noted hereinabove, the challenge to the Impugned Award is to the interpretation placed by the learned Sole Arbitrator on Clause 11.3 and 12 of the Term Loan Agreement. The learned Sole Arbitrator on considering the above terms of the Agreement has observed as under:-

“12. It appears that outstanding Dues, as used in the Facility Agreement, have been construed to mean the entire amount of the facility, the instalments which were became due and payable, as well as the balance amount, in view of reading the clauses which make it clear that the entire loan amount, both the amount which is due and payable as well as balance amount and not only the three instalments as alleged by the Respondents. Even when the offer at the initial stage of arbitration proceedings was made by the counsel for the Claimant that if the Respondents are prepared to deposit the amount of instalment dues with the undertaking the rest of the instalments would

be deposited on time as per agreement, the Claimant may consider to withdraw the Loan Recall Notice, however, the Respondents, did not response and were not agreeable to the said offer.”

16. The Arbitrator in arriving at the above finding has relied upon Clause 1(1.1)(a) of the Term Loan Agreement, which reads as under:-

*“1 DEFINATION AND
INTERPRETATION*

1.1 For the purpose of this Agreement, the following words and expressions shall, unless the context otherwise requires, have the following meaning:

(a) “Dues” shall include, at any time, all amounts payable by the Borrower to the Lender pursuant to the Facility Documents including without limitation (i) the principal amount of the Facility, interest and additional interest thereon and all taxes, expenses, fees, costs and charges in connection with the Facility, (ii) any and all sums advanced by the Lender in order to preserve the security provided in relation to the Facility; and (iii) in the event of any proceeding for the collection or enforcement of the security, the expenses of enforcement, retaking, holding, preparing for sale, selling or otherwise disposing of the security provided under the Facility Documents or of any exercise by the Lender of its right, together with legal fees and court costs.”

17. Clause 11.3, 12.1 and 13.1 of the Term Loan Agreement, on which reliance has been placed by the learned senior counsel for the petitioners, are reproduced hereinunder:-

11.3 The Borrower agrees that TCFSL may at its sole and absolute discretion, without assigning reasons, and upon notice to the Borrower, cancel the said Facility herein granted and demand immediate repayment of all outstanding moneys advanced under the Facility. Delivery of such notice to the Borrower, in the manner as TCFSL may deem fit, shall constitute sufficient notice of such cancellation, and thereupon the Facility, all

interest and other moneys due and payable thereon, shall become due and payable by the Borrower immediately to TCFSL.

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12. EVENTS OF DEFAULT

12.1 At the option of TCFSL, and without the necessity of any demand upon or notice to the Borrower, all of which are hereby expressly waived by the Borrower, and notwithstanding anything contained herein or in any other documents that may be executed by the Borrower pursuant to this Agreement, all the outstanding Dues and obligations of the Borrower to TCFSL hereunder, shall immediately become due and payable and the said Facility shall stand frozen upon the happening of any of the following events, hereinafter referred to as "the Events Of Default":

12.2 Failure to make payments to TCFSL of the outstanding Dues or part thereof payable under these presents on the due date(s) or on demand as the case may be;

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13. CONSEQUENCES OF DEFAULT

In the event of the Borrower committing any breach or default or on the happening of any of the Events of Default under this Agreement and such default remaining unremedied at the end of the four days notice period:

13.1 TCFSL shall be entitled to demand Immediate repayment of the entire outstanding Dues under the Facility."

18. A reading of the Clause 12.1 of the Term Loan Agreement would show that where the borrower commits an 'event of default', which, in terms of Clause 12.2 includes failure to make payment of the outstanding dues or part thereof on the due date(s), all outstanding dues and obligations of the borrower shall immediately become due and payable and the said Facility shall stand frozen. Therefore, all obligations of the borrower under the Term Loan Agreement would become due and payable on the failure of the petitioners to make the

payment of the outstanding dues, that is the installments as and when the same falls due. Though Clause 11.3 further empowers the respondent to cancel the Loan Facility granted and demand immediate repayment of all outstanding monies advanced under the Facility, this is an additional power conferred on the respondent. It in no manner detracts from the effect of Clause 12.1 of the Term Loan Agreement. Similarly, Clause 13.1 states that in the event of the borrower committing any breach or default or on happening of any of the events of default under the Agreement and such default remaining unremedied at the end of the four days' notice period, the respondent shall be entitled to demand immediate repayment of the entire outstanding dues under the Facility and may also terminate the Facility, whereupon, the unutilized security shall be set off against any outstanding amounts due and payable by the borrower to the respondent. The said Clauses, therefore, re-emphasize that in the event of default, the respondent shall be entitled to demand an immediate repayment of the entire outstanding dues. The interpretation placed by the learned Sole Arbitrator on the term '*outstanding dues*', in my view, is correct and warrants no interference from this Court. In any case, this being a question of interpretation of the clauses of the agreement, and the view of the learned Arbitrator being a plausible one, if not the correct one, in any case, the Award cannot be interfered with on this account.

19. The submission of the learned senior counsel for the petitioners that in terms of Section 55 of the Indian Contract Act, 1872, time to make payment cannot be said to be of essence and/or in terms of Section 39 of the Indian Contract

Act, 1872, the Contract could not be terminated for mere default in payment of installments, does not again impress me.

20. The terms of the Term Loan Agreement are clear and provide for consequences of default in payment of the amounts as and when due. Time for making such payment was clearly of an essence and merely because Clause 5.2.6 provides for a right to the respondent to charge additional interest in the event of default does not detract from the same. In contracts like the present, time is always of essence, unless one can find an intention contrary thereto. In fact, the terms of the Term Loan Agreement, read as a whole, clearly shows that time for making payment of the installments when falling due was of essence to the Contract.

21. As far as Section 39 of the Indian Contract Act, the same would also not have any application in view of the express terms of the Term Loan Agreement providing for the effect of the event of default leading to the Facility being frozen by the respondent and also empowering the respondent to terminate the Loan Facility.

22. The submission of the learned senior counsel for the petitioners that the respondent should have first exercised its rights under the Deed of Hypothecation, is also ill-founded. The learned Sole Arbitrator in rejecting the said prayer has given cogent reasons, which cannot be said to be perverse so as to warrant any interference by this Court. In any case, the learned senior counsel for the petitioners has been unable to show any term of the Loan Facility Agreement and/or Deed of Hypothecation which obliges the respondent to first exhaust its

remedies under the Deed of Hypothecation before enforcing its claims against the petitioners under the Term Loan Agreement.

23. The submission of the learned senior counsel for the petitioners that the learned Sole Arbitrator, having observed in his order dated 07.12.2021 that the same contains only *prima facie* views and shall not influence the Arbitrator at the final adjudication, could not have relied upon the said order at the time of passing of the Award, is also ill-founded. The learned Sole Arbitrator has merely re-stated and reiterated the reasons for rejecting the above plea of the petitioners. It is not necessary for the Arbitrator to give the same reasons again in his Award, in case, after hearing the parties at the stage of the final Award, he finds no reason to disagree with the observation made by him in the order dated 07.12.2021.

24. The submission of the learned senior counsel for the petitioners, placing reliance on the order dated 03.02.2021 passed by this Court on the petition under Section 11 of the Act, is also ill-founded. Merely because this Court made reference only to Clause 19.4 of the Term Loan Agreement in its order, cannot detract from the fact that prior to the filing of the said petition, the respondent had invoked the Arbitration Agreements not only in the Term Loan Agreement but also under Clause 29 of the Letter of Guarantee executed by petitioner nos.2 and 3. It is also not disputed that the petition under Section 11 of the Act was filed by the respondent referring to the Arbitration Agreements contained in both the abovementioned documents. The learned Arbitrator has also, placing reliance on the terms of the Term Loan Agreement and the Letters of Guarantee, held that the scope of arbitration

invoked under Clause 19.4 of the Term Loan Agreement would also include the dispute arising out of Letters of Guarantee as well as the Deed of Hypothecation. I find no fault in the above observation of the learned Sole Arbitrator.

25. On the submission of the learned senior counsel for the petitioners that an opportunity of making oral submission was not granted by the learned Sole Arbitrator, also does not impress me. Apart from the fact that all challenges to the Arbitral Award have been considered by me hereinabove on merit and no fault with the Arbitral Award could be found, it is not disputed that the Arbitrator had afforded an opportunity of oral hearing to the petitioners, however, on the date fixed, a request for adjournment was made. An adjournment cannot be sought as a matter of right. In fact, the object of Section 29A of the Act is to sensitize the Arbitral Tribunal and the parties of the need to expeditiously conclude the arbitration proceedings. The petitioners having itself failed to avail the opportunity of making oral submissions that was granted by the learned Sole Arbitrator, cannot now be heard to challenge the Award on this ground.

26. The submission of the learned senior counsel for the petitioner that in the impugned Award direction to pay having been passed only against the petitioner no. 2 and 3 and not against the petitioner no.1, the Award is liable to be set aside, is again without any merit. It is not disputed that the petitioner no. 2 and 3 have executed Letter of Guarantee dated 28.07.2018, clause 8 whereof makes petitioner no. 2 and 3 jointly and severally liable with the petitioner no. 1 to the dues owed to the respondent, and Clause 7 thereof entitles the respondent to

enforce the debt as if the petitioner no. 2 and 3 were the principal borrowers.

27. In view of the above, I find no merit in the present petition. The same is dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 16, 2023/rv

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 23.02.2023

15:37:05

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