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

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Judgment delivered on: 21.04.2023

+ FAO(OS) (COMM) 71/2023

BELL FINVEST (INDIA) LIMITED & ORS. Appellants

versus

TATA CAPITAL FINANCIAL SERVICES LTDRespondent

Advocates who appeared in this case:

For the Appellant: Mr Rajshekhar Rao, Sr. Advocate with Ms Pooja M. Saigal, Mr Simrat Singh Pasay, Mr Nipun Gupta, Ms Tanya Pandey and Mr Ishank Jha, Advocates.

For the Respondent: Mr R. Sudhinder, Ms Ekta Bhasin and Mr Sanidhya Sonthalia, Advocates.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

CM APPL. 19754/2023

1. Allowed, subject to all just exceptions.

FAO(OS) (COMM) 71/2023 & CM APPL. 19753/202

2. Appellants impugns order dated 16.02.2023 whereby the petition filed by the appellants under Section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been dismissed.

3. Appellant had challenged the Arbitral Award dated 22.09.2022 passed by Sole Arbitrator.

4. Respondent had sanctioned a term loan for an aggregate amount of ₹10 crores to the appellant no.1 by sanctioned letter dated 26.07.2018.

5. Along with the sanction of the loan, a Term Loan Agreement dated 28.07.2018 was executed by appellant no.1 besides execution of Letter of Guarantees dated 28.07.2018 by appellant nos.2 & 3 and a Deed of Hypothecation also dated 28.07.2018 by appellant no.1

6. Appellant no.1 defaulted in making payment of the installments and, accordingly, respondent issued a loan recall notice dated 09.12.2019 and invoked the arbitration agreement contained in Clause 19.4 of the Term Loan Agreement.

7. Another notice was issued invoking arbitration under clause 29 of the Letter of Guarantee dated 28.07.2018 in addition to invocation under Clause 19.4 of the Term of Loan Agreement.

8. Since the appellant did not concur in appointment of the Arbitral Tribunal, respondent filed an application under Section 11 of the Act before this Court and consequently by order dated 03.02.2021, the subject Arbitral Tribunal was constituted as the Sole Member Tribunal.

9. Consequent to the appointment of the Tribunal, the statement of claim was filed by the respondent *inter alia* claiming an outstanding of ₹7,91,46,873/-. The Arbitral Tribunal initially passed an order under Section 17 of the Act on 07.12.2021 and, thereafter, rendered the award dated 22.09.2022 which became subject matter of the petition under Section 34 of the Act filed by the appellants.

10. By way of the order dated 07.12.2021 passed under Section 17 of the Act, the Arbitral Tribunal, *inter alia*, directed the appellant to furnish a bank guarantee in favour of the respondent in the sum of ₹7,91,46,873/- and also restrained the appellant from creating third party rights in the properties that were not mortgaged with the respondent.

11. It may be noticed that the appellant had on 10.09.2021 given an undertaking that they shall not deal with the mortgage assets.

12. With regard to the direction to the appellant to furnish a bank guarantee, appellants filed an application before the Arbitral Tribunal contending that they were not in a position to furnish the bank guarantee in view of the freezing of all their accounts by the Debts Recovery Tribunal, Jaipur in proceedings initiated by a third party.

13. As noticed above, the Arbitral Tribunal rendered its final award on 22.09.2022 directing the appellant to pay the outstanding amount of ₹7,91,46,873/- as on 09.04.2021 together with applicable and additional interest from 10.04.2021 till actual realization.

14. Learned senior counsel for the appellant submits that the Arbitral Tribunal seems to have been prejudiced on the ground that the appellant failed to furnish the bank guarantee as directed by the Tribunal in the order passed under Section 17 of the Act. He further submits that the Tribunal seemed to be in a tearing hurry as the Tribunal did not grant an adjournment to the appellant when the same was sought on the ground of illness of the counsel. He further submits that the Arbitral Tribunal did not permit the appellant to address on the application seeking to cross examine the witnesses of the respondent and even no opportunity was granted to cross-examine them.

15. Learned senior counsel for the appellant submits that the Arbitral Tribunal also erred in not making correct and true disclosure in terms of Section 12 in the format prescribed in the Sixth Schedule of the Act.

16. He further submits that the Arbitral Tribunal has erred in recording that there was an admitted default on the part of the appellant insofar as the loan transaction is concerned and that the entire loan was liable to be repaid because of the alleged default.

17. Learned senior counsel for the appellant very candidly admitted that there was no dispute to the loan transaction. There was also no dispute that the loan had been given to the appellant and the appellant had defaulted in three installments. He, however, contended that the default had occurred on account of the freezing of the bank accounts by DRT, Jaipur and was not on account of the own violation of the

appellant. He submits that till the freezing had occurred the appellant had been servicing the loan diligently without a single default.

18. To counter this, learned counsel for the respondent contended that the freezing of the accounts was not on account of any action on the part of the respondent and was the result of some alleged default of the appellant with third parties and as such the respondent could not be faulted with the same.

19. The other contention of leaned senior counsel for the appellant that the respondent should not have sought to recover the entire loan outstanding but should have only sought to recover the outstanding installments is also not sustainable for the reason that the Term Loan Agreement dated 28.07.2018 in Clause 12 (Events of Default) specifically stipulates that at the option of the respondent, without the necessity of any demand upon or notice to the borrower all of which was expressly waived, all the outstanding due and obligations of the borrower to the respondent shall immediately become due and payable.

20. In view of the specific condition of the contract there is no fault in the respondent making a claim for the entire outstanding as on the said date.

21. We have also perused the statement of defence filed by the appellant and the statement of defence also does not show any defence having been raised by the appellant to the merits of the claim of the respondent.

22. The only ground urged by learned senior counsel for the appellant on behalf of the appellant is that the appellant had handed over the Deed of Hypothecation of book debts, which had a receivable of approximately 1.15 times of the alleged principal outstanding.

23. Though there is a dispute to the amount of the book debts, however, it may be noticed that the alleged book debts are recoverable of the appellant from third parties. The recoverability of all those debts is also debatable and even if such a security was handed over the same would not substitute for the liquid amount in the account of the respondent. A mere chance of recovery of book debts is no substitute for actual payment of the outstanding amount.

24. He further submits that request was made to the Arbitral Tribunal to defer the proceedings in view of the fact that the counsel was unwell and the Arbitral Tribunal did not accede to the request and proceeded further with the final hearing and rendered the impugned award.

25. Since the focus of the submission of the learned senior counsel for the appellant seems to be that the appellant has been prejudiced and no opportunity was granted to present his case, we proceeded further to elicit from the counsel as to what was the defence of the appellant on merits. Though we are conscious of the fact that in a proceeding under Section 37 of the Act, this Court is not required to look into the evidence and examine the same afresh as if it was an appeal, however, for the purposes of satisfying the judicial conscience,

this exercise was endeavoured particularly in view of the fact that allegations of bias were made against the Arbitral Tribunal.

26. We noticed that on merits, the appellant has not been able to show any defence to the loan transaction.

27. In view of the fact that appellant has failed to raise any defence, the rejection of the request of the appellant to seek cross-examination of the witnesses of the respondent does not show any prejudice having been caused to the appellant.

28. Evidence and cross-examination of witnesses is required on disputed questions of fact. As noticed hereinabove in the facts and circumstances of this case, we find that there is no defence raised by the appellant to the claim of the respondent towards the outstanding amount.

29. It is not in dispute that loan was taken. It is also not in dispute that the appellant defaulted in repayment of the loan and even to the extent of the entire outstanding amount, there is no dispute. The only dispute is that the respondent should have sought to recover only the outstanding installments as on the date of making the claim. This as we have noticed is specifically covered by Clause 12 of the agreement between the parties.

30. In view of the fact that appellant has failed to raise any defence requiring any trial, we find no prejudice having been caused to the appellant in rejection of the request to cross-examine the witnesses of

the respondent.

31. Now coming to the allegation that the Arbitral Tribunal had not made the requisite disclosure. We note that no proceedings were initiated by the appellant with regard to the alleged disclosure made by the Arbitral Tribunal not being in the format. Learned senior counsel for the appellant has not been able to point out to any circumstances which could raise a justifiable doubt as to the independence or impartiality of the Arbitral Tribunal. The only contention is that the disclosure is not in the prescribed format. We noticed that the Arbitral Tribunal had sent a notice dated 12.02.2021 to the parties wherein in respect of the Fifth and Sixth Schedule of the Act, the Tribunal has stated as under:-

“The Sole Arbitrator ensures you that there is no conflict of interest in the compliance of Section 12 read with Fifth and Sixth Schedule of Arbitration and Conciliation Act, 1996 before commencing the arbitration.”

32. Appellant has failed to point out as to whether there was any conflict of interest of the Arbitral Tribunal in the present case. The only contention of learned senior counsel for the appellant is that the haste with which the Tribunal seems to have progressed gave an impression of bias.

33. Since appellant had failed to raise a defence on merits, we are of the view that there are no circumstances that could even raise an apprehension of bias or conflict of interest of the Arbitral Tribunal in

the facts of the present case.

34. Learned Single Judge while considering the objections filed by the appellant under Section 34 of the Act has relied on the decision of the Supreme Court in *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (2019) 15 SCC 131* to hold that unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would or that the arbitrator's view is not a plausible view to take, only then a challenge to the award under Section 34(2)(a) of the Act is available. Learned Single Judge has, thereafter, adverted to the terms of the contract and held, in our view rightly so, that the interpretation placed by the Arbitral Tribunal on the term 'outstanding dues' is correct and warrants no interference.

35. In *Jhang Cooperative Group Housing Society Ltd. v. Pt. Munshi Ram*, 2013 SCC OnLine Del 1886 : ILR (2013) 2 Del 1632, a coordinate bench of this court in which one of use (*Sanjeev Sachdeva J.*) was a member, relying upon the judgment of the Supreme Court of India in *McDermott International INC. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 held as under:

“15. The law is no longer res Integra and is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an

Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

16. If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.

17. The extent of judicial scrutiny under Section 34 of the Arbitration Act 1996 is limited and scope of interference is narrow. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under Section 34.

18. As laid down by the Apex Court, the supervisory role of the court in arbitration proceedings has been kept at

a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.”

36. Accordingly, we find that the view taken by the Arbitral Tribunal is a plausible view and does not warrant any interference under Section 34 and more so under Section 37 of the Act.

37. We, accordingly, find no merit in the appeal. The appeal is consequently dismissed.

SANJEEV SACHDEVA, J.

VIKAS MAHAJAN, J.

APRIL 21, 2023

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