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

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Date of Decision: 19.03.2024+ **FAO(OS) (COMM) 287/2018**

HERO FINCORP LTD

..... Appellant

Through: Mr. Sanjeev Singh, Mr. Prashant
Tripathi, Ms. Taniya Bansal, Advs.

Versus

M/S VIGYAN CHEMICALS PVT LTD & ORS Respondents

Through: Ms. Radhika Goel, Adv. for R-2.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (ORAL)**

1. The appellant, a Non-Banking Financial Company (NBFC), has filed the present appeal impugning a judgment dated 10.10.2018 (hereafter *the impugned judgment*) passed by the learned Single Judge in OMP(COMM) No.430/2018 captioned *Hero Fincorp Ltd. v. Vigyan Chemicals Pvt. Ltd & Ors.*

2. The appellant had filed the said petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter *the A&C Act*) impugning the Arbitral Award dated 14.08.2018 (hereafter *the impugned award*) passed by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*). The appellant's challenge to the impugned award was limited to the extent that the impugned award was confined against respondent nos. 1 and 2 and not against respondent no.3 (Mr. Ayush Jain). The Arbitral Tribunal did not accept that respondent no. 3 had stood as a surety for the



repayment obligations of respondent no.1 in terms of the Deed of Guarantee dated 27.05.2015 (hereafter *Deed of Guarantee*) and accordingly, rejected the appellant's claim. Respondent no.3 was jointly and severally liable for the amounts owed by respondent no.1 company to the appellant. The impugned award was thus, rendered in the favour of the appellant and against respondent nos.1 and 2.

3. It is the appellant's case that it had agreed to extend financial assistance of ₹7,30,00,000/- (Rupees Seven Crores and Thirty Lacs Only) to respondent no.1 company in terms of the Sanction Letter dated 26.05.2015. Thereafter, the appellant and respondent no.1 company entered into a Master Facility Agreement dated 27.05.2015 (hereafter *MFA*). In terms of a supplementary agreement dated 27.05.2015, a sum of ₹2,57,00,000/- (Rupees Two Crores and Fifty-Seven Lacs Only) was disbursed to respondent no.1 company. The appellant claims that the said financial assistance was also secured by the personal guarantees of respondent nos.2 and 3 in addition to other assets of respondent no.1 company. Subsequently, further amounts of ₹3,00,00,000/- (Rupees Three Crores Only); ₹93,00,000/- (Rupees Ninety-Three Lacs only); and, ₹80,00,000/- (Rupees Eighty Lacs Only) were disbursed to respondent no.1 company in terms of the Supplementary Agreements dated 20.08.2015, 11.12.2015 and 27.01.2016 respectively.

4. Respondent no.1 company failed to perform its repayment obligations. The appellant issued a legal notice dated 20.10.2016, whereby it sought recall of the outstanding amount of ₹7,35,22,719.30 (Rupees Seven Crores, Thirty-Five Lacs, Twenty-Two Thousand, Seven Hundred Nineteen and Thirty paise only). Thereafter, the appellant issued a notice invoking arbitration and the disputes relating to the MFA as well as the personal guarantees were referred



to arbitration. The arbitral proceedings culminated in the impugned award.

5. The Arbitral Tribunal awarded a sum of ₹7,35,22,719.33 (Rupees Seven Crores, Thirty-Five Lacs, Twenty-Two Thousand, Seven Hundred Nineteen and Thirty-Three Paise Only) along with interest at the rate of 13.5% per annum and penal charges at the rate of 2% per annum with effect from 15.12.2016, in favour of the appellant and against respondent nos.1 and 2.

6. The Arbitral Tribunal did not accept the appellant's claim against respondent no.3 as a guarantor. The appellant relied upon a Deed of Guarantee purportedly executed by respondent no.3. The Deed of Guarantee was disputed and respondent no.3 denied his signatures on the Deed of Guarantee. Respondent no.3 tendered his affidavit by way of an evidence and was also cross-examined. However, he was not confronted with the Deed of Guarantee in his cross examination. The Arbitral Tribunal took note of the same. In addition, the Arbitral Tribunal also found that there was nothing on record, which would indicate that the appellant had assessed the net worth of respondent no.3 before accepting him to be a guarantor, which any prudent person would do before accepting the personal guarantee for due repayment of the financial facility.

7. The learned counsel appearing for the appellant submits that the decision of the Arbitral Tribunal holding that respondent no.3 is not liable as a guarantor is patently illegal as it disregards respondent no.3's admission in the application filed on his behalf for discovery of certain documents.

8. Before proceeding further, it would be material to examine the impugned award in regard to the contentions advanced by the appellant and

FAO(OS) (COMM) 287/2018

Page 3 of 7



the reasons as to why the Arbitral Tribunal did not accept that respondent no.3 was liable in terms of the Deed of Guarantee dated 27.05.2015. The relevant extract of the impugned award is set out below:

“48. Much stress is given on the word “AND IS ONLY A GUARANTOR IN THE INSTANT CASE” by the counsel for the Claimant Company. This application does not bear the signature of respondent no.3. Similarly the affidavit annexed with the application also does not bear the signature of respondent no. 3. Even, this application is not bearing the signature of advocate appearing on behalf of respondent no. 3. It is settled position of law that if a party to the litigation intends to rely on a document which according to; it is the admission of the other party, then the party who is relying on the said document is bound to tender the document in cross examination, so as to enable the witness to explain that in what circumstances the admission was made by him. In the present case, respondent no. 3 appeared in evidence but he has not been cross examined by the counsel for the claimant to the effect that in the application dated 06.02.2017 respondent no. 3 has admitted that he was the surety of the loan amount.

49. Since the loan was sanctioned on personal guarantee of respondent no. 2 and 3 as mentioned in the sanction letter CW-1 dated 26.05.2015, therefore, as a prudent financier it was expected from the Claimant Company to assess the financial worth of respondent no. 2 and 3. In the present case, there are no documents on record on the basis of which the worth of respondent no. 2 and 3 could have been assessed. Neither there is a guarantor's statement nor the income tax return of respondent no.3 on the basis of which Claimant Company sanctioned the loan on the guarantee of respondent no.3.

50. In the circumstances, on the basis of the alleged admission in the application dated 06.02.2017 it is difficult to hold respondent no. 3 as surety for the loan amount given to respondent no.1 company with more than one reasons, Firstly, the application and the affidavit are not signed by respondent no. 3 or his advocate, Secondly, on this aspect respondent no. 3 was not cross examined. Thirdly, even respondent no. 3 was not asked that the application dated 06.02.2017 was filed by respondent no. 3 under his instructions or not and Lastly, such type of application cannot be treated as part of pleadings while in the Statement of Defence respondent no.3 has specifically denied the execution of CW-1/6.”



9. It is clear from the above that the Arbitral Tribunal has indicated cogent reasons for not accepting that respondent no.3 is liable in terms of the Deed of Guarantee. As noted above, the Arbitral Tribunal also faulted the appellant for not confronting respondent no.3 with the Deed of Guarantee. Insofar as the admission in the application is concerned, the Arbitral Tribunal found that the application did not bear the signatures of respondent no.3. Further, in the Statement of Defence, respondent no.3 denied the execution of the Deed of Guarantee and had also sought production of the original copy of the same.

10. It is at once clear that the controversy sought to be raised by the appellant relates to appreciation of evidence. In this case, the Arbitral Tribunal had examined the evidence and had found that the liability of respondent no.3 for the loans extended to respondent no.1 company was not established. The signature on the Deed of Guarantee – on which the appellant's claim against respondent no.3 was founded – was disputed by respondent no.3. The Arbitral Tribunal was not persuaded to accept that respondent no.2 had executed the Deed of Guarantee. It is settled law that the findings on questions of fact are not amenable to a merits review in proceedings under Section 34 of the A&C Act.

11. The Supreme Court in the case of *Associate Builders v. Delhi Development Authority*¹ held that Arbitral Tribunal's decision on questions of fact must pass muster as it is the ultimate master of the quantity and quality of evidence. A similar view is expressed by the Supreme Court in several decisions including in *SAIL v. Gupta Brother Steel Tubes Ltd.*² and *P.R. Shah, Shares & Stock Brokers Private Limited. v. B.H.H. Securities Private*

¹ (2015) 3 SCC 49

² (2009) 10 SCC 63



Limited & Ors.³ wherein, it was held that a court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the A&C Act.

12. The learned Single Judge had also considered and rejected the appellant's contention that the Arbitral Tribunal had erred in not accepting that respondent no.3 had admitted his signatures and therefore, no further evidence was required to prove the same. The learned Single Judge found that the application relied upon by the respondents had been filed at the initial stage of the proceedings, *inter alia*, to seek supply of complete set of paper book / Statement of Claims. However, in the Statement of Defence, respondent no.3 denied his signatures on the Deed of Guarantee dated 27.05.2015. The Court also noted that respondent no.3 was not confronted with the application and was provided with no opportunity to explain the contents of the application which were sought to be construed as his admission of standing as a guarantor for the repayment of the dues owed by respondent no.1 company.

13. We find no infirmity with the decision of the learned Single Judge in declining to interfere with the impugned award to the extent that the Arbitral Tribunal had not found respondent no.3 liable for the repayment obligations in respect of the financial facilities extended by the appellant to respondent no.1 company.

14. In view of the above, we find no merit in the present appeal. The same

³ (2012) 1 SCC 594



is accordingly dismissed.

15. This Court is informed that the respondents have also filed an application under Section 34 of the A&C Act assailing the impugned award. In this regard, it is clarified that nothing stated in this order shall be construed as precluding the respondents from pursuing their remedies in respect of the impugned award or foreclosing any of their contentions.

16. The appeal is dismissed in the aforesaid terms.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MARCH 19, 2024

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