

Ruia Exports & Anr vs Moneywise Financial Services Pvt.Ltd & ... on 18 January, 2023

Author: Prateek Jalan

Bench: Prateek Jalan

\$~36 & 37

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (COMM) 16/2020 & I.As. 438/2020, 440/2020.

RUIA EXPORTS & ANR.

versus

MONEYWISE FINANCIAL

SERVICES PVT.LTD & ORS.

+ OMP (ENF.) (COMM.) 214/2019 &
EX.APPLs.(OS) 974/2019, 1127-28/2021

.... CCP(0)

MONEYWISE FINANCIAL SERVICES

PRIVATE LIMITED

versus

M/S RUIA EXPORTS THROUGH ITS

PROP. RAJEEV GUPTA & ORS.

..... Judgeme

Appearances:

Mr. Gaurav Srivastava, Ms. Namrata Parashar, Advocates for pet
in item No. 36 and for Judgment debtor in item No. 37.

Mr. Vishv Dev, Advocate for respondent in item No. 36 and for
holder in item No. 37.

Mr. Abhinav Sharma, Advocate for Objector Sandeep Gupta in ite
37.

Mr. Shashank Garg, Amicus Curiae in item No. 36.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% 18.01.2023

1. O.M.P. (COMM) 16/2020 has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], for setting aside of an award dated 07.08.2019 passed by a sole arbitrator, in an arbitration arising out of a Master Loan Agreement dated 13.10.2017 ["the Agreement"], wrongly mentioned in the award as Loan Agreement dated 31.10.2018. By the Agreement, the respondent granted a loan of 5.75 crores to the petitioners.

2. OMP (ENF.) (COMM.) 214/2019 has been filed by the award holder for enforcement of the same award.

3. Although in the prayer clause of O.M.P. (COMM) 16/2020, the petitioner has also sought setting aside of an order of the learned arbitrator dated 04.05.2019, I find that the said order was, in fact, passed under Section 17 of the Act. It is, therefore, not an order susceptible to challenge under Section 34 of the Act. In these circumstances, Mr. Gaurav Srivastava, learned counsel for the petitioner, does not press the challenge to the said order.

4. As far as the challenge to the award under Section 34 of the Act is concerned, the principal ground urged by Mr. Srivastava is that the learned arbitrator was appointed unilaterally by the respondent. Relying upon the judgments of the Supreme Court in TRF Ltd. vs. Energo Engineering Projects Ltd. [(2017) 8 SCC 377], Perkins Eastman Architects DPC & Ors. vs. HSCC (India) Ltd. [2019 SCC OnLine SC 1517] and Bharat Broadband Network Limited vs. United Telecoms Limited [(2019) 5 SCC 755], it is urged that the learned arbitrator was ineligible to act as the arbitrator under Section 12(5) of the Act and the award is liable to be set aside on this ground.

5. These judgments have been considered in the recent judgments of the Division Bench of this Court in Ram Kumar and Anr. vs. Shriram Transport Finance Co. Ltd. [judgement dated 05.12.2022 in FAO (COMM) 60/2021] and Govind Singh vs. M/S Satya Group Pvt Ltd and Anr. [judgement dated 06.01.2023 in FAO (COMM) 136/2022]. It has been clearly held that an award rendered by a person who was ineligible to act as arbitrator, by reason of appointment by one of the parties unilaterally, cannot be sustained.

6. Mr. Vishv Dev, learned counsel for the respondent, accepts the legal position that the award is liable to be set aside on this ground. However, he requests that a substitute arbitrator may be appointed so that the proceedings can be adjudicated expeditiously. For this purpose, he relies upon an order of a Division Bench of this Court dated 14.10.2022 in FAO(COMM.) 143/2022 [Smt Babita Sharma & Anr. vs. Bansal Credits Limited] which reads as follows:

"3. The appellants have filed the present appeal impugning an order dated 25.05.2022 (hereafter 'the impugned order'), whereby the learned Commercial Court had rejected the appellants' application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act').

4. The appellants had preferred the said application to challenge the arbitral award dated 27.01.2020 (hereafter 'the impugned award'). In terms of the impugned award, the Arbitral Tribunal had awarded an amount of 8,31,812.06/- along with the pendente lite and post award interest, in favour of the respondent.

5. The appellants had challenged the impugned award on several grounds. First, that the Arbitral Tribunal had not made any disclosure as required under Section 12(1) of the A&C Act and in terms of the Sixth Schedule to the A&C Act.

6. Second, he submitted that the learned Sole Arbitrator, constituting the Arbitral Tribunal, was ineligible to act as an arbitrator in terms of Section 12(5) of the A&C Act. It is stated that during the course of the arbitral proceedings, the learned

Arbitrator was also acting as an arbitrator in at least three other arbitral proceedings involving the respondent. It is also alleged that he was named as an arbitrator at the instance of the respondent in respect of several other transactions.

7. Third, it is stated that the respondent had not issued any notice under Section 21 of the A&C Act.

8. Whilst the challenge laid to the impugned award is substantial, this Court also notes that there is no dispute that the appellants had availed of an interest-bearing loan of a sum of 11 lacs from the respondents. The appellants also do not dispute that they are liable to repay the said loan in equated monthly instalments including interest.

9. The dispute, essentially, relates to the quantum of the amount payable by the appellants to the respondents. During the course of the hearing, the learned counsel for the parties have arrived at a consensus. They agree that the impugned award and the impugned order be set aside, subject to the parties being forthwith relegated to arbitration afresh. The reference of the arbitrator would be limited to the quantum of the amount payable by the appellants since the liability to repay the loan along with interest is not disputed. The parties also request that this Court appoint an independent arbitrator in these proceedings.

10. The scope of the present proceedings does not include appointing an arbitrator. However, to avoid any further delays and to assist the parties in resolution of the disputes, this Court considers it apposite to accede to the said request and appoint an arbitrator in these proceedings.

11. At the request of the learned counsel for the parties, Mr Deepak Joshi, Chartered Accountant (Mobile No. 989919115) is appointed as a Sole Arbitrator to adjudicate the quantum of amount payable by the appellants to the respondent in terms of the agreement in question. The appointment is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

12. The Arbitrator shall be paid a consolidated fee of 1.0 lacs.

13. The Arbitral Tribunal shall endeavour to complete the proceedings as expeditiously as possible and preferably within a period of three months.

14. The parties are at liberty to approach the learned Arbitrator for further proceedings.

15. The impugned order and the impugned award are, accordingly, set aside. The application is also disposed of.

16. It is clarified that the above order is passed at the instance and with the consent of the learned counsels for the parties.

17. The appeal is disposed of with the aforesaid observations."

7. Following the said order, learned counsel for the parties have arrived at a consensus in the present matter also. It is clear from the order of the Division Bench that, although a substitute arbitrator is not ordinarily appointed in proceedings under Section 34 of the Act, the Court can accept the request of the parties and do so by consent.

8. The facts of the present case being similar in this respect to the facts in Smt Babita Sharma (supra), with the consent of learned counsel for the parties, O.M.P. (COMM) 16/2020 is disposed of with the following directions: -

a. The award of the learned arbitrator dated 07.08.2019 is set aside on the ground that the learned arbitrator was ineligible to act under Section 12(5) of the Act.

b. At the request of learned counsel for the parties, Hon'ble Ms. Justice Asha Menon, a former Judge of this Court [Tel:-

9910384664] is appointed as the sole arbitrator to adjudicate the disputes between the parties under the Master Loan Agreement dated 13.10.2017.

c. The pleadings and affidavits of evidence filed before the erstwhile arbitrator will be placed before the learned arbitrator appointed today. I am informed that no cross-examination of witnesses was conducted in the arbitral proceedings. At the request of Mr. Srivastava, it is clarified that it will be open to the parties to seek procedural orders, for example for amendment of the written statement, before the learned arbitrator, which the learned arbitrator may consider in accordance with law.

d. The arbitration proceedings will be conducted under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi ["DIAC"] and will be subject to the Rules of the DIAC, including as to the remuneration of the learned arbitrator.

e. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference. f. Mr. Srivastava submits that some of the issues in the arbitration proceedings are also issues between the parties in proceedings before the Debts Recovery Tribunal. This position is disputed by Mr. Dev. It is made clear that these are matters which the parties can agitate before the learned arbitrator and this Court has not expressed any view thereupon.

g. Parties are at liberty to approach the learned arbitrator for an expeditious hearing.

9. In view of the fact that the award has been set aside and a new arbitrator is appointed with the consent of learned counsel for the parties in O.M.P. (COMM) 16/2020, OMP (ENF.) (COMM.) 214/2019 also stands disposed of.

10. The Court expresses its gratitude to Mr. Shashank Garg, learned Amicus Curiae in O.M.P. (COMM) 16/2020, who has very ably assisted the Court on the legal issues involved.

11. The petitions, alongwith all the pending applications, stand disposed of in the aforesaid terms.

PRATEEK JALAN, J JANUARY 18, 2023/'Bhupi'/