

34 Of The Arbitration And Conciliation ... vs Morgan Securities & Credits Pvt. Ltd on 21 January, 2021

Author: J.R. Midha

Bench: J.R. Midha

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (COMM) 307/2016 (Objections to the award under Section 34 of the Arbitration and Conciliation Act)

GANESH BENZOPLAST LIMITED

Through: Dr. Abhishek Manu Singhvi,
Senior Advocate with Mr.
Rawal, Ms. Iti Sharma, Ms.
Madhavi, Mr. Vikram Alung,
Advocates

versus

MORGAN SECURITIES & CREDITS PVT. LTD Respondent

Through: Mr. Shyam Divan, Senior
Advocate with Mr. Simran Mehta,
Advocate

+ OMP (ENF.) (COMM.) 108/2019 (Enforcement petition under Section 36 of the Arbitration and Conciliation Act)

MORGAN SECURITIES

AND CREDITS PVT. LTD.

Through: Mr. Shyam Divan, Senior
Advocate with Mr. Ankur
Mr. Abhishek Puri and Ms.
Gupta, Advocates

Versus

GANESH BENZOPLAST LIMITED Judgment debtor

Through: Dr. Abhishek Manu Singhvi,
Senior Advocate with Mr. Kuljeet
Rawal, Ms. Iti Sharma, Ms.
Madhavi, Mr. Vikram Alung,
Advocates

+ O.M.P. (I) (COMM) 62/2019 (Petition under Section 9 of the Arbitration and Conciliation Act)

Signature Not Verified

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By:RAJENDER SINGH

O.M.P. (COMM) 307/2016 & Connected matters

KARKI

Signing Date:25.01.2021

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MORGAN SECURITIES
AND CREDITS PVT. LTD.

Through:

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Mr. Shyam Divan,
Advocate with Mr. Simran
Advocate

Versus

GANESH BENZOPLAST LIMITED

.....Respondent

Through: Dr. Abhishek Manu Singhvi,
Senior Advocate with Mr. Kuljeet
Rawal, Ms. Iti Sharma, Ms.
Madhavi, Mr. Vikram Alung,
Advocates

+ OMP (I) (COMM) 363/2020 (Petition under Section 9 of the
Arbitration and Conciliation Act)

MORGAN SECURITIES
AND CREDITS PVT. LTD.

Through: Mr.

.....
Shyam Divan,
Advocate with Mr. Ankur C
Mr. Abhishek Puri and Ms.
Gupta, Advocates

Versus

GANESH BENZOPLAST LIMITED

..... Respondent

Through: Dr. Abhishek Manu Singhvi,
Senior Advocate with Mr. Vikrant
Negi, Ms. Ekta Tyagi, Ms. Iti
Sharma, Mr. Manhar S. Saini, Mr.
Nausher Kohli, Ms. Anjali Shah,
Advocates.
Mr. Dayan Krishnan, Senior
Advocate with Mr. Aditya Jalan,
Mr. Atul N. and Mr. Sanjeevi
Seshadri, Advocates for
impleaders.

Signature Not Verified

O.M.P. (COMM) 307/2016 & Connected matters

Digitally Signed

By:RAJENDER SINGH

KARKI

Signing Date:25.01.2021

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CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

ORDER

% 21.01.2021

1. Morgan Securities & Credits Private Limited (hereinafter referred to as „Morgan) advanced two Inter Corporate Deposits (ICD) of Rs.50 lakhs each to M/s Ganesh Benzoplast Limited (hereinafter referred to as „GBL) on 14th February, 2000 and 07th March, 2000 respectively. The first ICD was repaid by GBL whereas GBL defaulted in repayment of the second ICD.
2. The second ICD dated 07th March, 2000 was repayable on 05th June, 2000 along with interest @ 26% per annum. In the event of default, Clause 8 of the ICD agreement stipulates payment of penal interest @ 3% per month with monthly rest.
3. GBL pledged 15 lakhs shares to Morgan as a security for the two ICD loans. Upon default in repayment, Morgan sold the pledged shares in August-September, 2001 for a total consideration of Rs.24,67,531/- and adjusted the amount against the outstanding loan and interest.
4. Morgan initiated arbitration proceedings to recover the outstanding principal amount of Rs.34,59,218/- as on 28th September, 2001 along with interest @ 36% per annum with monthly rest.
5. GBL contested the arbitration proceedings on various grounds inter alia that Morgan fraudulently sold the pledged shares for Rs.24,67,531/- whereas the shares would have fetched more than Rs.37 lakh; and the penal rate of interest of 36% per annum with monthly rest was highly exorbitant.
6. The learned sole arbitrator passed an award dated 09 th December, 2015 whereby the learned arbitrator allowed Morgan s claim for Rs.34,59,218/- plus contractual penal rate of interest @ 36% per annum with monthly rest from 29th September, 2001 till the date of the award. The learned arbitrator further awarded post-award interest @ 12% per annum on the awarded amount including interest and cost of Rs.52,30,833/-. The total amount payable by GBL as per the award is about Rs.90 crore as on 15th January, 2021.
7. GBL has filed objections to the award under Section 34 of the Arbitration and Conciliation Act [OMP (COMM.) 307/2016] on various grounds inter-alia that the impugned award is in conflict with most basic notions of morality and justice. GBL has computed the simple interest @ 6%, 9%, 15%, 18%, 21% and 36% on the principal amount of Rs.34,59,218/- from 28th September, 2001 to 31st December, 2020, according to which the total amount payable (principal + interest) would be Rs.74,59,022/-, Rs.94,58,924/-, Rs.1,14,58,825/-, Rs.1,34,58,727, Rs.1,54,58,629/-, Rs.1,74,58,531, Rs.2,07,91,701/- and Rs.2,74,58,040/- respectively.
8. GBL has referred to the award dated 06th May, 2004 passed by the same arbitrator in another Morgan s arbitration claim against Modi Rubber Limited in which the ICD agreement contained an identical clause of penal interest @ 3% per month with monthly rest. The learned arbitrator held that the pendente lite and future interest claimed was very high and cannot be allowed. The learned arbitrator awarded simple interest @ 21% per annum till the date of award and future simple interest @ 18% p.a. However in the present case, the same learned arbitrator took a contrary view

and awarded penal rate of interest @ 36% with monthly rest.

9. According to Morgan, this Court cannot interfere with the contractual rate of interest of @ 36% per annum with monthly rest in a pure commercial contract and this Court is not competent to go behind the said Clause. Reliance is placed on the judgments but Explanation I

(iii) of Section 34 has not been considered in any judgment. With respect to GBL's contention that the impugned award is in conflict with most basic notions of morality and justice, Morgan's response is that "morality" used in Explanation I (iii) of Section 34 refers to sexual morality which is not applicable to the present case. However, Morgan has not yet responded, either in the written submission or in the oral submissions, to the objection of GBL that the award is in conflict with the most basic notions of "justice".

10. Section 34 of the Arbitration and Conciliation Act, 1996 was amended in 2015 to substitute Explanation I. The amended Explanation I

(iii) of Section 34 provides that an award to be in conflict with public policy of India if it is in conflict with the most basic notions of morality or justice. Relevant portion of Section 34 is reproduced hereunder:-

"Section 34-Application for setting aside arbitral award xxx xxx xxx (2) An arbitral award may be set aside by the Court only if-

xxx xxx xxx
(b) this Court finds that -
xxx xxx xxx

(ii) the arbitral award is in conflict with the public policy of India Explanation I: For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

xxx xxx xxx

(ii) it is in contravention with the fundamental policy of Indian law

(iii) it is in conflict with the most basic notions of morality or justice."

11. Although the scope of intervention in objections under Section 34 is very narrow but Explanation I (iii) has opened a new avenue to set aside an award, if it is in conflict with the most basic notions of morality or justice. Even the arbitrator is required to examine whether the claim is in conflict with most basic notions of morality or justice. If the petitioner's claim is in conflict with most basic notions of morality or justice, the Court can decline to appoint an Arbitrator. The term "most basic notions of morality or justice" has not been defined in the Act. Such a power has not even been conferred upon an appellate Court in a Regular First Appeal against a decree under Section 96 of the Code of Civil Procedure and the Appellate Court cannot set aside a decree on the ground that the

decree is in conflict with the most basic notions of morality or justice.

12. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court examined the scope of Section 34 and held that an award would be contrary to justice if it shocks the conscience of the Court. With respect to the term morality, the Supreme Court referred to Section 23 of the Contract Act. The relevant portion of the judgment is reproduced hereunder:-

"Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860)."

13. In *Kotak Mahindra Bank Ltd. v. Intercontinental Service Agencies Bureau Ltd.*, OMP 803/2014, this Court invoked the doctrine of "most basic notions of morality or justice". In that case, Kotak Mahindra Bank had taken a property on lease for 9 years at a monthly rent of Rs. 9 lakhs for first 36 months; Rs 10.35 lakhs for next 36 months; and Rs 11,90,250/- for last 36 months of the lease term. After few years of lease, there was fall in the rental in that area. So the parties renegotiated the terms of the lease and a Rectification Deed was executed to reduce the rent from Rs. 9 lakhs to Rs.6.5 lakhs for 36 months; Rs.9 lakhs for the next 36 months and Rs.10.35 lakhs for the next 17 months.

The bank started paying the reduced rent from April, 2009. The bank paid revised lease rental of Rs.6.5 lakhs per month in terms of the said Rectification Deed from April, 2009 till May, 2010 which was accepted by the landlord without any protest. However, vide letter dated 14th May, 2010,

the landlord claimed the rent for past period at the higher rate mentioned in the un-amended lease deed. The bank claimed the reduction of rent as per the Rectification Deed which was disputed by the landlord on the ground that the Rectification Deed was un-registered and therefore, cannot be looked into. The landlord invoked the arbitration whereupon a sole Arbitrator was appointed who allowed the claim in favour of the landlord. The bank challenged the award before this Court under Section 34 of the Arbitration and Conciliation Act. Although, the landlord's claim was legal as the Rectification Deed was un-registered and therefore, not enforceable but the landlord's claim was against the most basic notions of morality and justice. This Court also noted that the landlord made false claim that he never agreed to the reduction of rent. Vide order dated 12th August, 2018, this Court observed that the respondent has made false claims before this Court which is an offence under Section 209 under the Indian Penal Code. This case was finally settled between the parties and therefore, there was no adjudication on the doctrine of the most basic notions of morality or justice. However, this case is a clear example of a claim which was against most basic notions of morality or justice.

14. Morgan has filed OMP (ENF.) (COMM.) 108/2019 under Section 36 of the Arbitration and Conciliation Act for enforcement of the award in which this Court vide order dated 22nd December, 2020 directed GBL to file affidavit of assets in the formats provided in the judgment dated 05th August, 2020 titled Bhandari Engineers & Builders Pvt. Ltd. v. Maharia Raj Joint Venture, Ex.P.275/2012 (MANU/DE/1497/2020).

15. GBL has filed two affidavits dated 04th January, 2021 along with the relevant documents. GBL claims to have total realizable value of their assets to be Rs. 238 crore against secured loans of Rs. 35 crore. GBL claims to have an asset cover of 6.6x allowing it to borrow an additional Rs. 125 crore from banks while maintaining asset cover.

16. Morgan has filed OMP (I)(COMM.) No. 363/2020 under Section 9 of the Arbitration and Conciliation Act for restraining GBL from acting in furtherance to the resolutions with respect to the preferential allotment of shares and the proposed share sale and purchase agreement with Stolt Rail Logistic Systems Limited in which vide ex parte interim order dated 17th November, 2020, this Court restrained GBL from acting in furtherance to the resolutions passed in board meeting dated 07th October, 2020 and the special resolutions passed by way of postal ballot on 06th November, 2020, with respect to the preferential allotment of shares of GBL pursuant to proposed Share Sale and Purchase Agreement (SSPA) with Stolt Rail Logistic Systems Limited, in any manner, whether directly or indirectly till the next date of the hearing.

17. GBL is seeking vacation of the ex-parte interim order dated 17th November, 2020, on various grounds inter alia that GBL is willing to deposit the outstanding Rs. 2.75 crore towards principal amount of Rs. 34,59,218/- along with simple interest @36% per annum from 28th September, 2001 up to date with this Court. With respect to the claim of penal interest with monthly rest, it is submitted that the award is against the most basic notions of morality and justice. It is further submitted that GBL is in a very sound financial condition and has assets worth Rs.238 crore against secured loans of Rs.35 crore. It is submitted that GBL has sufficient means to satisfy the award if Morgan ultimately succeeds before this Court. It is further submitted GBL proposes to acquire

86.52% shares of Stolt Rail Logistic Systems Limited against 1,05,75,128 equity shares of GBL which would result in asset enhancement of Rs.65.75 crore.

18. This Court is of the prima facie view that the claim of 36% interest with monthly rest by which the principal amount of Rs.34,59,218/- along with interest has become Rs.90 crore (260 times) appears to be against the most basic notions of justice and warrants serious consideration by this Court. In that view of the matter, the continuance of the ex-parte interim order is not warranted.

19. If the interest is computed on the outstanding amount of Rs.34,59,218 @ 36% simple interest, GBL would be liable to pay Rs.2,11,49,564/- (till the date of the award i.e. 09th December, 2015) and Rs.2,74,58,040/- (calculated till 31st December, 2020) whereas Morgan is claiming Rs.90 crore by computing interest @ 36% per annum with monthly. According to GBL, the effective simple interest rate awarded by the learned arbitrator works out to be 1250% per annum. In that view of the matter, the direction to GBL to deposit Rs 3 crore at this stage would be fair and reasonable. If Morgan succeeds in this matter, GBL has sufficient means to satisfy the award.

20. The ex parte interim order dated 17th November, 2020 is modified to the extent that GBL is at liberty to act on the Resolutions passed in the Board meeting dated 07th October, 2020 and the special resolutions passed by way of Postal ballot on 06th November, 2020 with respect to the preferential allotment of shares of GBL pursuant to proposed Share Sale and Purchase Agreement, subject to deposit of Rs.3 crore by GBL with the Registrar General of this Court within one week towards the balance principal amount of Rs.34,59,218/- and simple interest @ 36 % per annum w.e.f. 28th September, 2001 upto this date. GBL shall not transfer, alienate or create any encumbrance with respect of its immovable assets without the permission of this Court till further orders. Morgan is permitted to seek the release of Rs.3 crore subject to the outcome of these petitions.

21. Morgan is directed to place on record an affidavit before the next date of hearing as to when they adopted the clause of 36% penal interest with monthly rest; how much loan amount they have advanced till date on the basis of this clause and how much amount they have recovered; whether this clause has been challenged by any debtor before any arbitration/Court and if so, the copies of the awards/judgments in which the aforesaid clause has been accepted/not accepted/rejected be placed on record; which other financial institutions have adopted such rate of interest; and whether any Rule/Regulation regulates the rate of interest in commercial contracts.

22. Both the parties have filed their brief note of submissions as well as video clips of their oral arguments. Learned senior counsels for both the parties have been further heard in the matters. Learned senior counsels for the parties seek time to file additional note to respond to the submissions of the opposite party. Let the same be filed within one week.

List for continuation of the arguments on 09th February, 2021.

23. Notice is issued to the Union of India, Ministry of Finance through Mr. Kirtiman Singh, learned Standing Counsel to place on record the Rules/Regulations which regulate the rate of interest.

24. The registry shall send the digitized copy of the entire records to the learned Standing Counsel within one week.

25. It is clarified nothing recorded herein shall be construed as a final expression of this Court with respect to observations made in this order.

26. Copy of this order be given dasti to counsels for the parties under signatures of Court Master.

J.R. MIDHA, J.

JANUARY 21, 2021 ak