

Present At vs M/S. B L B Limited on 3 February, 2007

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IN THE COURT OF SH. DAYA PRAKASH :
ADDITIONAL DISTRICT JUDGE : DELHI

Suit no. 63/2006

Sh. Bhairav Datt Joshi,
s/o. Sh. Badari Datt Joshi,
r/o. Village & Post Meldungari,
Distt. Pithoragarh, Uttranchal-262529.

Present at:-

H. No. 150-A/5, Ward no. 2,
Garhwali Colony, Mehrauli,
New Delhi.

...Petitioner

VERSUS

1. M/s. B L B Limited
Through its Directors
4764/23-A, Ansari Road,
Darya Ganj, New Delhi-2.
2. Sh. Anil K. Chauhan, Advocate
The Sole Arbitrator
Chamber No. K-130-A, Tis Hazari Courts,
Delhi-54.

...Respondents

PETITION U/S. 34 OF THE ARBITRATION &
CONCILIATION ACT, 1996

JUDGMENT

1. By this judgment I shall dispose of the petition //2// filed u/s. 34 of the Arbitration & Conciliation Act, 1996 on behalf petitioner against the Arbitral Award of the Sole Arbitrator dt.13.04.2006.

2. Facts relevant for the disposal of the above said petition are that the petitioner was working as Trainee Computer Operator (Dealing Room) vide appointment letter dt.12.01.2002 in the respondent no.1 company. The petitioner was forced to resign vide his resignation letter dt. 04.03.2005 due to compelling circumstances created by respondent no.1 against the petitioner to resign. The respondent no.1 initiated arbitration proceedings against the petitioner and upon receiving the summons from respondent no.2 the Ld. Arbitrator, petitioner filed his written

statement alongwith counter claim. Ultimately the Ld. Arbitrator passed the final Arbitral Award against the petitioner vide its notice and award dt.13.04.2006. Aggrieved by the impugned Arbitral Award dt.13.04.2006 the petitioner filed the present petition u/s. 34 of the Arbitration & Conciliation Act, 1996 on the grounds/objections that the impugned Arbitral award is //3// false, frivolous, mischievous, malafide, without locus standi and jurisdiction and against the public policy as Ld. Arbitrator failed to consider the falsity of the false documents filed by the respondent no.1; that the Ld. Arbitrator failed to appreciate and consider the provisions of law; that the Ld. Arbitrator has not appreciated that the petitioner was forced to resign vide his resignation letter dt.04.03.2005 and had not absented himself since 07.03.2005 without permission or sanctioned leave of the company; that Sh. H. Lal is not the competent and authorized person to file the claim or to depose before the Ld. Arbitrator; that the respondent no.1 neither filed/produced the Certificate of Incorporation nor the original copy of Arbitration Agreement before the Ld. Arbitrator; that the Ld. Arbitrator has not passed the impugned Arbitration Award according to the objections raised by the petitioner in the arbitration proceedings; that the Ld. Arbitrator failed to appreciate the facts that respondent no.1 did not give increments in the salaries and also not paid incentives to the petitioner; that the petitioner never executed the documents i.e. Ex. CW1/C to Ex.CW1/G //4// and also challenged the validity of Employment Agreement which was Ex.CW1/B but the Ld. Arbitrator failed to appreciate that these alleged documents are hit by Sections 10,13,14,15,27 & 28 of the Indian Contract Act; that the Ld. Arbitrator did not give any opportunity to the petitioner to cross examine the witness of respondent no.1 Sh. H.Lal; that the respondent no.1 have not suffered any losses or damages as respondent no.1 have not filed the copy of extract of the Annual Report of 2004 & 2005, that the Ld. Arbitrator deliberately and intentionally did not appreciate and awarded the damages, incentives, commission and one month advance salary etc. amounted to Rs.29,75,000/- to the petitioner as mentioned in the legal notices as well as in the counter claim and that the whole of the claim of respondent no.1; appointment of Arbitrator; the impugned Arbitral Award dt.13.04.2006 for Rs.6,31,340/- and interest at the rate of 9% per annum are without any locus standi and jurisdiction and hence be declared null and void.

3. Respondent no.1 filed reply to the petition //5// wherein respondent no.1 took several preliminary objections that the petitioner has not approached the Court with clean hands and suppressed the material facts and that the objections raised by the petitioner deserves to be rejected as none of them covered under the preview of Section 34 of Arbitration & Conciliation Act.

In reply on merits respondent no.1 denied that on the compelling circumstances created by respondent no.1 the petitioner was forced to resign vide his resignation letter dt.04.03.2005. It is submitted that the petitioner absented himself w.e.f. 07.03.2005 without any prior intimation and with ulterior motive sent a letter dt.04.03.2005 expressing his intention to resign, which was never accepted. It is further submitted that the Ld. Arbitrator has passed the award in accordance with law after following the due process and after taking into consideration the legal aspects and the award is made bonafide with locus standi and within the jurisdiction. It is further submitted that all the necessary documents were produced by the respondent no.1 before the Ld. Arbitrator. It is also submitted that all the objections //6// raised by the petitioner were met by the Ld. Arbitrator. It is further submitted that the appointment does not cast a mandatory duty upon the respondent company to increase salary irrespective of the performance behaviour, discipline, attitude etc. of the

person and the petitioner did not meet the said requirements. It is also submitted that the petitioner out of his free will executed Bond, Undertaking and Employment Agreement. It is denied that the Ld. Arbitrator did not give any opportunity to the petitioner to cross examine the respondent witness.

It is submitted that the respondent no.1 company suffered loss @ Rs.5,650/- per day and the respondent no.1 filed the relevant document to show this fact.

It is submitted that the Ld. Arbitrator rightly dismissed the counter claim of the petition amounted to Rs.29,75,000/- as the petitioner could not prove any of his claim.

It is denied that the award of interest @9% per annum is unwarranted, illegal and void or that the appointment of Ld. Arbitrator, Arbitral Award of Rs.6,31,340/-

//7// and interest @9% per annum are without any locus standi and jurisdiction and hence null and void as alleged.

Accordingly, it is prayed by the respondent no.1 that the petition of the petitioner is liable to be dismissed with cost.

4. After the competition of pleadings following issue was framed by this Court vide order dt.07.11.2006:-

"Whether Award of the Ld. Arbitrator dt. 13.04.2006 is liable to be set aside on the ground mentioned in the petition u/s. 34 of the Arbitration & Conciliation Act."

5. Arguments heard. Respondent no.1 also filed the written arguments.

6. In the arguments advocate of petitioner argued that all the grounds raised under the petition u/s. 34 are covered under the said provision. It is further argued that the Arbitration Tribunal was neither validly constituted nor it was vested with jurisdiction. It is further argued that the Ld. Arbitrator has not passed a reasoned award and failed to //8// give the sufficient reasons on the basis of which he dismissed the counter claim of the petitioner. It is further argued that documents like Bond, Undertaking, Employment agreement etc. are against the public policy.

During the course of arguments petitioner filed 1975 (1) Bombay ILR 580; AIR 1982 Kerala 281; AIR 1962 SC 1314; 1 (12) App. Cas. 589; 2006 (3) Arb. LR 447 (Madras) (DB); AIR 1963 SC 1279; III (2003) SLT 324 and 121 (2005) DLT 495.

7. As per advocate of respondent no.1 the document i.e. Employment Agreement, Undertaking, Bond etc. are legal, valid and enforceable as the petitioner executed these documents out of his free will without any fraud or coercion. Moreover, petitioner never challenged the said documents after its execution and for the first time challenged the same in the arbitration proceedings and these documents neither against public policy nor in contravention of any law of land. The Arbitration

Tribunal was validly constituted and passed a reasoned award after considering the material on record as //9// well the counter claim of the petitioner. The grounds/objections raised by the petitioner in the present petition are not covered u/s. 34 of the Arbitration & Conciliation Act.

Advocate of respondent no.1 cited IOC 2006 III AD (Delhi) 517; 2001 II AD (SC) 79; 2001 V AD (SC) 364; (1989) 3 SCR 144; AIR 1998 SC 2045; 2006 III AD (Delhi) 589; 2003 VI AD (SC) 236; 2006 I AD (Delhi) 305 and AIR 2003 (SC) 2629.

6. I have seen the Arbitration proceedings, grounds of petition u/s.34 of Arbitration and Conciliation Act and reply and feel that the issue be decided in favour of the plaintiff and against the respondent and the Award of the Ld. Arbitrator dt.13.04.2006 is liable to be set aside on the following grounds:-

Firstly, Section 34 of the Arbitration and Conciliation Act provides the grounds for setting aside Arbitration Award. The Section 34 of Arbitration and //10// Conciliation Act is reproduced as under:

Application for setting aside arbitral Award.- (1) Recourse to a court against an arbitral Award may be made only by an application for setting aside such Award in accordance with sub-section(2) and sub-section(3).

(2) An arbitral Award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a part was under some incapacity; or

(ii)the Arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii)the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;or

(iv)the arbitral Award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or it contains decisions on matters beyond the scope of the submission to Arbitration:

Provided that, if the decisions on matters submitted to Arbitration can be separated from those not so submitted, only that part of the arbitral Award which contains decisions on matters not submitted to Arbitration may be set aside; or

(v) the composition of the arbitral tribunal //11// or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provisions of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by Arbitration under the law for the time being in force, or

(ii) the arbitral Award is in conflict with the public policy of India.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral Award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but no thereafter.

(4) On receipt of an application under sub-section(1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of //12// arbitral tribunal will eliminate the grounds for setting aside the arbitral Award.

Secondly, the Arbitration agreement dt.14.01.2002 is not disputed, though advocate of petitioner states that this agreement was executed by the petitioner under the undue influence of respondent no.1 and the agreement is against the public policy of India.

Undue influence of the other party at the time execution of contract, goes to the root of the case (AIR 1963 SC 1279).

Petitioner in his reply before the Ld. Arbitrator has challanged the Arbitration agreement itself on the ground of undue influence. The Ld. Arbitrator has not given any finding, whether the contract or employment agreement/ Arbitration agreement is good or bad due to undue influence.

It is a fact that the respondent company was in a dominant position at the time of entering into agreement/ Arbitration agreement. Though this court is not sitting as a Court of appeal before the Award of the Ld. Arbitrator but since the Ld. Arbitrator has not given the reason or opinion, //13// hence the Award of Ld. Arbitrator is bad.

Thirdly, Clause (i) and (ii) of the said Arbitration agreement are as follows:

(i) : That any and all disputes and differences whatsoever arising between the Employer and the Employee either during the course of the employment of the Employee or thereafter, in relation to their respective rights and liabilities including the effect and interpretation of the terms and conditions of the Letter of Appointment, Service Bond or any other document executed between the Employee including but not limited to any agreement(s) shall be refer to the Sole Arbitrator appointed by the Chairman of the Employer. The Arbitrator so appointed shall however, not be below the status of Executive Director/Working Director/Vice President of the Employer.

(ii) That after the appointment if at any stage, either prior to, or during the pendency of the proceedings, the Sole Arbitrator is prevented or enable to act for any reasons whatsoever including his resignation, death or any other incapacity, the Chairman of the Employer shall appoint another Arbitrator who shall act as a Sole Arbitrator. The Employee shall have no objection that the person so appointed as a Sole Arbitrator is an Executive //14// Director/Working Director/Vice President of the Employer. Both the Employer and Employee shall be bound by the decision of the Arbitrator whose decision shall be conclusive, binding and final upon them.

The effect of these clauses are that the Arbitrator has to be appointed by the Chairman. There is no letter or any communication or written instrument in the record of the Ld. Arbitrator or filed in this Court showing that the Chairman of M/s. BLB Limited has appointed the respondent no.2 as an Arbitrator for dispute between the parties.

These clauses i.e. clause (i) and (ii) further provides that the Ld. Arbitrator so appointed shall however, not be below the status of Executive Director/Working Director/Vice President of the Employer. The Ld. Arbitrator is an Advocate, so he does not fall under the category of Executive Director/Working Director/Vice President of the Employer i.e. M/s. BLB Ltd. Moreover he is not above the status of these persons. Hence an advocate could not be appointed as an Arbitrator for any dispute/differences between the parties as per arbitration agreement {III (2003) SLT 324}.

//15// The composition of the Arbitral Tribunal was not in accordance of the agreement between the parties. Hence, Award is bad u/s. 34 (2) (v) of Arbitration & Conciliation Act.

The Ld. Arbitrator derives his jurisdiction on the basis of contract between the parties. Even if in extreme case when the contract is legal and valid, the party to contract cannot not go beyond the terms of the contract. If the terms of contract or Arbitration agreement provides that only a particular person is competent as Arbitrator or a person above the rank can only be appointed as Arbitrator or that only a particular person is competent to appoint the Arbitrator then violation of these terms goes to the root of jurisdiction of Ld. Arbitrator. If Arbitrator has no jurisdiction as person competent not appointed him as Arbitrator under the terms of contract, the consequent Award on the face of it is illegal and bad.

//16// Fourthly, as many as six claims were preferred by the respondent no.1 against the petitioner before the Ld. Arbitrator.

The first claim was with respect to the expenses incurred by the respondent no.1 on the appointment of the petitioner as well as expenses incurred on the advertisement and scrutinization of the applications out of which the petitioner was appointed. This claim had no basis and rightly rejected by the Ld. Arbitrator.

The second claim was with respect to the loss of the profit. The agreement between the parties does not provide any payment with respect to the loss of the profit and there was no basis for allowing the loss of the profit in favour of the M/s.BLB Limited and against the petitioner. Even otherwise this claim is an indirect loss. A person may liable for direct loss but not for indirect loss. This claim is beyond the terms of the submission to Arbitration and accordingly beyond the scope of the submissions to Arbitration. This claim is also beyond the agreement between the parties.

The finding of the Ld. Arbitrator is accordingly //17// bad u/s. 34 (2) (iv). The Ld. Arbitrator has to give finding on each point which is not contemplated by the terms of agreement between the parties.

The third claim was with respect to non utilisation of the infrastructure. This was also not contemplated between the parties and was rightly rejected by the Ld. Arbitrator.

In fourth claim the cost of Ld. Arbitrator of Rs.22,000/- was claimed by the respondent company and the Ld. Arbitrator allowed the cost of Rs.15,000/-. What are the basis, on the basis of which the cost of Rs.15,000/- was allowed has not been explained by the Ld. Arbitrator. In extreme fault of the petitioner, the petitioner was liable to pay the half of the cost but more than half of the cost was allowed by the Ld. Arbitrator. There is no document on record to show that the cost of Rs.22,000/- was paid by the respondent no.1 to the Ld. Arbitrator. Whether it was paid through cheque/cash, is also not known.

The fifth claim is with respect to the compensation of one year salary. This is provided under the 'Bond' //18// between the parties. Though petitioner does not disputed the execution of the Bond however disputed the liability as the Bond is unconsciously bargained the contract and against the public policy. The petitioner is liable to pay one year salary only when fault of the petitioner is proved. Petitioner during the continuation of the proceedings has disputed the claim of the respondent company and also stated that it was the company who was responsible for its ultimate resignation from the company.

I feel that the Bond between the parties is unreasonable and unequal as the petitioner has to pay one year salary while at the time of termination by the respondent company no such salary is to be given to the Petitioner. Hence Bond dt.14.01.2002 is unequal between the parties and accordingly against the public policy. This shows that the Arbitration Award is not valid under the law as it is unreasonable and against the public policy.

In the sixth claim the respondent company claims the cost of basic working training given to the petitioner. This claim also had no basis and rightly rejected //19// by the Ld. Arbitrator.

Fifthly, I have seen the Arbitration Award. The Award merely accepted or rejected the claim. No reason has been given as to how the claim of the petitioner was not accepted. It is the duty of the Ld. Arbitrator to give sufficient reasons as to how the Award was passed, giving separate reasons for each claim which Ld. Arbitrator failed to give.

When specific objection has been raised by the petitioner before the Ld. Arbitrator with respect to the jurisdiction and existence and validity of Arbitration agreement, the Ld. Arbitrator ought to have considered and answered the same in first instance before it decided claims of the respondent on merits {121 (2005) DLT 495}.

If the dispute or difference is not mentioned in the Arbitration Agreement between the parties then that dispute or difference neither can be agitated in the Arbitration nor the Arbitrator can give finding thereon.

Sixthly, the petitioner has raised the objections //20// of jurisdiction of the Ld. Arbitrator before the Ld. Arbitrator and the Ld. Arbitrator has not decided the said objection.

The composition of the Arbitral Tribunal was not in accordance of the agreement between the parties. Hence, Award is bad u/s. 34 (2) (v) of Arbitration & Conciliation Act.

The Ld. Arbitrator derives his jurisdiction on the basis of contract between the parties. Even if in extreme case when the contract is legal and valid, the party to contract cannot not go beyond the terms of the contract. If the terms of contract or Arbitration agreement provides that a particular person is competent as Arbitrator or a person above the rank is appointed as Arbitrator or that only a particular person is competent to appoint the Arbitrator then violation of these terms goes to the root of jurisdiction of Ld. Arbitrator. If Arbitrator has no jurisdiction as not competent to be appointed as Arbitrator under the terms of contract, the Award on the face of it is illegal and bad.

7. In view of above, the issue is decided against //21// the respondent and in favour of petitioner and it is held that the Award of the Ld. Arbitrator dt.13.04.2006 is liable to be set aside u/s. 34 of Arbitration & Conciliation Act. Accordingly, the petition of the petitioner u/s.34 of the Arbitration & Conciliation Act, 1996 is allowed with no order as to cost.

8. File be consigned to Record Room.

Announced in the open court DAYA PRAKASH on dated : 03.02.2007 ADDITIONAL DISTRICT JUDGE (typed 1+1) DELHI