(2012) 02 DEL CK 0366

In the Delhi High Court

Case No : OMP No. 120 of 2012 and IA No''s. 2411-12 of 2012 and ARB. A. No. 3 of 2012 and IA No''s. 2408-09 of 2012

Maharaji Educational Trust and Another	APPELLANT
Vs	
S.G.S. Constructions and Developers Pvt. Ltd.	RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 12(3), 13, 14, 14(1)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 14(1), 18, 25, 29, 34
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : (2012) 1 ARBLR 361

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : A. Sharan with S. Chandrashekhar and Somesh Chandra Jha, for the Appellant;

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—Maharaji Educational Trust (''MET'') and Dr. P. Mahalingam, its Chairman and Managing Trustee, have filed OMP No. 120 of 2012 under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (''the Act'') seeking removal of the sole arbitrator, who is presently adjudicating the disputes between MET and the respondent-M/s. S.G.S Constructions & Developers Private Limited. The same petitioners have filed Arbitration Appeal No. 3 of 2012 u/s 37 of the Act challenging the orders dated 15.01.2011, 28.02.2011, 30.03.2011, 30.07.2011, 10.09.2011, 28.09.2011, 21.10.2011, 14.11.2011 and 02.12.2011 of the learned sole arbitrator.

2. By this common order, both matters are being disposed of.

3. Mr. Amarendra Sharan, learned senior counsel appearing on behalf of the petitioners, submitted that under a loan agreement dated 20th December, 1995

entered into between HUDCO and MET for a loan of Rs. 75.07 crores, six properties of MET were mortgaged to HUDCO. OA No. 160 of 2002 was filed by HUDCO before the Debt Recovery Tribunal (''DRT'') on 20th August, 2002 against MET for recovery of the outstanding loan amount. On 4th May, 2007, HUDCO issued a notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (''SARFAESI Act''). The DRT allowed OA No. 160 of 2002 permitting HUDCO to recover from MET a sum of Rs. 148.08 crores along with interest. Pursuant thereto, a Recovery Certificate (''RC'') was issued by the DRT and the total loan liability of MET was determined as Rs. 320 crores as on 26th August, 2010.

4. The petitioners state that the respondent "played fraud upon the petitioner herein and deceitfully got an agreement for sale dated 26.08.2010 signed from the petitioner herein with respect to property at Sl. No. 6 mentioned above allegedly for Rs. 154 crores only". The property at ''Sl. No. 6'' is land admeasuring 63.45 acres situated at Village Akbharpur Behrampur, Mirjaput and Mithepur, Pargana Loni, Tehsil & District Ghaziabad (hereafter ''property in question''). The petitioners claim that the agreement to sell dated 26th August, 2010 entered into between MET and the respondent is void ab initio, as it is contrary to law and public policy and incapable of enforcement.

5. Admittedly, the said agreement contained an arbitration clause. As a result of the disputes between the parties, arising out of the said agreement, the respondent on 8th November, 2010 invoked the arbitration clause. Thereafter, the learned sole arbitrator entered upon reference. The petitioner states that on 15th January, 2011 it filed an application u/s 16 of the Act challenging the jurisdiction of the arbitrator to entertain the claim (it is stated that this is numbered as IA No. 2). An application u/s 17 of the Act (IA No. 1) was filed by the respondent. Counsel for the respondent on that date informed the learned arbitrator that the respondent would furnish an undertaking that it would not alienate the aforementioned property in question.

6. It is contended by Mr. Sharan that the arbitrator could not have passed any interim order, much less entertain any claim respecting the property in question, since it was the subject matter of the proceedings before the DRT and in respect of which an RC has been issued. According to him, Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (''RDDBFI Act'') excludes the jurisdiction of even the civil courts in relation to matters seized by the DRT. On 2nd May, 2011, the Recovery Officer (''RO'') of the DRT issued a demand notice under Sections 25 and 29 of the RDDBFI Act. The respondent herein then filed its objections before the RO on 19th May, 2011 raising objections to the sale of the property in question.

7. IA No. 5 of 2011 was filed by the petitioners before the learned arbitrator seeking recall of the interim order dated 15th January, 2011 and other subsequent interim orders. The petitioners state that neither IA Nos. 1 and 2, nor IA No. 5 have been heard and decided till date. It is submitted that, however,

the learned arbitrator continued to entertain the applications filed by the respondent.

8. On 6th September, 2011, the RO passed an order sustaining the objections raised by the respondent and directed issuance of sale proclamations with respect to the five properties of the MET, other than the property in question. The petitioners then filed an application on 20th October, 2011 before the RO seeking recall of the order dated 6th September, 2011. The respondent on 21st October, 2011 filed IA No. 8 of 2011 before the learned arbitrator claiming that the petitioners had violated the learned arbitrator''s interim order dated 15th January, 2011 read with the interim order dated 15th October, 2011, by filing the aforementioned application before the RO. On 21st October, 2011, the learned arbitrator passed an order directing the petitioner MET to seek adjournment before the RO This direction was continued by the learned arbitrator on 14th November, 2011.

9. It is stated that the respondent filed a writ petition in the Allahabad High Court, Lucknow Bench on 22nd November, 2011 for a direction to the RO not to proceed with the application filed by the petitioners on 20th October, 2011 till the properties at SI. Nos. 1 to 5 were not sold and for implementation of the RO''s order dated 6th November, 2011. The Allahabad High Court passed an interim order on 22nd November, 2011 itself. The petitioners challenged the said interim order in the Supreme Court, which stayed the said interim order of the High Court.

10. The submission of Mr. Sharan is that the learned arbitrator is, in terms of Section 14(1)(a) of the Act, disabled de jure from performing his functions as such since the subject matter of the claim before the arbitrator is also the subject of the proceedings before the DRT. u/s 18 of the RDDBFI Act read with Section 34 thereof, there was a complete bar on any other court or authority exercising jurisdiction, power or authority in relation to a matter pending before the DRT. Secondly, the interim orders passed by the learned arbitrator reflected his bias.

11. Mr. Sharan relied on the judgment of the High Court of Gauhati in State of Arunachal Pradesh Vs. Subhash Projects and Marketing Ltd. and Another, and sought to distinguish the judgment of the Division Bench of this court dated 16th May, 2011 in Progressive Career Academy Pvt. Ltd. Vs. FIIT JEE Ltd., The latter judgment holds that interference by the court is not possible at pre-award stage on the allegation of bias or partiality of the arbitral tribunal. The Division Bench of this court in the said decision held that "the statute does not postulate judicial interference in arbitral proceedings till the award is published, whereupon objections can be raised also on the platform of the alleged bias of the tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A & C Act".

12. Mr. Sharan submitted that the judgment of the Division Bench of this court in

Progressive Career Academy Private Limited vs. FIIT JEE Limited (supra), did not deal with the remedy provided u/s 14(1)(a) of the Act but only dealt with the issue of bias of the arbitrator which is only one of the grounds urged by the petitioner in the present case. He commended for acceptance of the judgment of the Division Bench of the Gauhati High Court in State of Arunachal Pradesh vs. Subhash Projects and Marketing Limited (supra), wherein it was observed that the remedy u/s 14(1)(a) of the Act was independent of the one u/s 13 of the Act and was "more comprehensive".

13. Referring to the judgments of the Supreme Court in A.R. Antulay Vs. R.S. Naik and Others, and State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , it is submitted by Mr. Sharan that the judgment of the Division Bench in Progressive Career Academy Private Limited vs. FHT JEE Limited (supra) is per incuriam and that if this court doubted its correctness, it should refer the matter to a larger bench. Meanwhile, the proceedings before the learned arbitrator should be stayed.

14. As regards the Arbitration Appeal No. 3 of 2012, it is submitted that the numerous interim orders passed by the learned arbitrator clearly reflect his bias. Since those orders touched upon the subject matter of the proceedings pending before the DRT, they were without the authority of law and deserved to be set aside. A grievance was made that the Application Nos. 1 and 2 filed by the respondent and MET respectively way back in January 2011 have not been disposed of till date by the learned arbitrator.

15. This court is not inclined to entertain the above pleas for more than one reason. Section 16 of the Act permits a party to challenge the jurisdiction of the arbitral tribunal by filing an application before such tribunal. The words "may rule on its own jurisdiction" occurring in Section 16(1) of the Act are followed by the word "including". Therefore, the grounds that can be urged before the arbitral tribunal to challenge its jurisdiction is not limited to those set out in Section 16(1)(a) and (b). It could include the ground set out in Section 14(1)(a) as well.

16. u/s 14(2) it is possible for a party to approach this court "if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1) of Section 14". The word "remains" implies that such a controversy must have been raised before the arbitral tribunal and must remain unresolved prior to approaching the court.

17. Therefore, the court would be slow to entertain a plea u/s 14(1)(a) if the aggrieved party has invoked the provisions of Section 16 of the Act already. The better course in such instance is to await the decision of the arbitral tribunal and abide by the mandate of the statute. If, as in the present case, the tribunal has not decided the application, then it can be persuaded to expedite its decision thereon.

18. As regards the alleged bias of the learned arbitrator, a remedy is provided u/s 12(3) read with Section 13 of the Act, the petitioner ought not to bypass that

remedy. In the judgment of the Division Bench of this court in Progressive Career Academy Private Limited vs. FIIT JEE Limited (supra) it was noted that in Shri Pinaki Das Gupta Vs. Publicis (India) Communications and Others, a learned Single Judge of this court had taken the view that interference u/s 14 is not warranted even in the face of allegations of bias of the arbitrator. In para 13 of the judgment, the Division Bench took note of the judgment of the Gauhati High Court in State of Arunachal Pradesh vs. Subhash Projects and Marketing Limited (supra). Thereafter, the Division Bench of this court set out the provisions contained in Sections 12 to 15 of the Act, analyzed them with reference to the corresponding provisions in the UNCITRAL Model Law, and concluded that at the pre-award stage, interference by the court was not called for. Consequently, the second ground of the petitioners, regarding bias of the learned arbitrator, cannot be entertained at this stage.

19. This court is not persuaded to accept the submission of Mr. Sharan that the judgment of the Division Bench of this court in Progressive Career Academy Private Limited vs. FIIT JEE Limited (supra) is sub silentio or per incuriam. Consequently, the further submission about referring the matter to a larger bench need not be considered.

20. The petitioners having invoked Section 16 of the Act to question the jurisdiction of the learned arbitrator, should pursue that remedy in accordance with law. As regards the allegation of bias, as already mentioned, the petitioners have a remedy u/s 12 read with Section 13 of the Act. Consequently, this court is not prepared to grant any of the reliefs prayed for in OMP No. 120 of 2012.

21. This court is not persuaded to hold that the orders challenged in Arbitration Appeal No. 3 of 2012 themselves reflect any bias of the learned arbitrator. Consequently, the appeal is dismissed.

22. However, the learned arbitrator is requested to dispose of the applications, IA Nos. 1, 2 and 5 pending before him within a period of two months from today. OMP No. 120 of 2012 and Arbitration Appeal No. 3 of 2012 are dismissed in the above terms. All applications stand dismissed.

