
(2011) 09 BOM CK 0116
In the Bombay High Court
Case No : Arbitration Petition No. 95 of 2009

Rajesh P. Thakkar

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 27-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2012) 3 BomCR 420 : (2012) 1 MhLj 119

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Ashok Sarogi, for the Appellant; S.A. Oak, instructed by y, Mahesh Menon and Company, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The Petitioner who is alleged to be a guarantor and director of the company i.e Prabhu Hira Ice and Cold Storage Ltd has challenged the Award dated 23 July 2008 by invoking Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). By the Award, the liability is imposed in the following terms:

(a) The present Respondent Nos. 2 and 3 do jointly and/or severally pay to the Claimants a sum of Rs. 6,33,746.06/-, (Rupees six lakhs Thirty Three thousand seven hundred forty six and paise six only), as per the particulars of the claim, with interest @ 3% p.m on the principle amount of Rs. 3,33,746.06 (Rupees three lakhs thirty three thousand seven hundred and forty six and six paise only), from 2nd March 2005, as per the particulars of claim, till payment or realization thereof.

(b) The Arbitration cost and the fees fixed at Rs. 2,500/-, shall be equally paid by the claimants and the Respondent.

(c) Initially the Arbitration cost and the fees shall be paid by the claimants and the claimant may recover the same from the Respondent.

(d) The parties shall bear their own cost incidental to the present Arbitration proceedings.

2. From the record, it is clear that the main borrower was Mr. Satyajit Thakkar, but after his death, his legal heirs were not brought on record. The Petitioner only contested the matter in his individual capacity and also as a Director of the company. As there was an arbitration agreement clause, the Arbitrator, based upon the claim Petition filed by the Respondent, issued notices. The Petitioner appeared before the Arbitrator and had also filed the written statement/defence to the claim raised by the Respondent. There are various issues raised in the defences which definitely require trial as contemplated under the Arbitration Act.

3. The Arbitrator has however, on the date of the Award as noted, passed the impugned Award by recording that none appeared for the Petitioner.

4. The Arbitrator has dealt this aspect in the following words in paragraph 5:

5. It is a matter of record that the matter then came to be adjourned for the Cross examination of the Claimants witness Shri Naresh Anchan. It is to be mentioned that, the minutes of the hearing would clearly show that after filing the affidavit of evidence of Shri Naresh Anchan, matter came to be adjourned from time to time as much as eight dates i.e. 20/02/2008, 29/02/2008, 10/03/2008, 05/04/2008, 28/04/2008, 28/05/2008, 10/06/2008 and 18/06/2008. All these dates were given as per the convenience of the Learned Advocate for the present Respondents. Out of these dates, on one date i.e. 05/04/2008, the witness Shri Naresh Anchan was absent and on one date i.e. 10/03/2008 the matter could not be taken up for hearing by this Arbitral Tribunal for want of time though the Learned Advocate for the present Respondents Shri Sarogi was present. From 28/04/2008, matter came to be adjourned on three dates i.e. 28/05/2008, 10/06/2008 and 18/06/2008. However, on all these four dates i.e. from 28/04/2008 till 18/06/2008 none remained present for the present Respondents and no Cross-examination of the claimants witness was conducted. Ultimately, on 18/06/2008, being left with no option, the cross examination of the claimants witness was ordered to be closed. On the same day the claimants closed their side and the matter was adjourned to next date for the evidence of the present Respondents.

5. It is not that the Petitioner was absent throughout. The above paragraph itself shows that the Petitioner's counsel was present on some of the occasion. However, for one reason or the other, the matter could not be taken on the date when the Petitioner's counsel was present. On last three dates the Petitioner's counsel was absent. The Petitioner, therefore, could not cross-examine the Respondent's witnesses. The Arbitrator however proceeded and passed the impugned Award. Though in strict terms it is not an ex parte award, but the fact remains that no full opportunity has been given to the Petitioner to agitate and/or raise defence and/or at least put his case affidavit in chief, as contemplated under the Arbitration Act.

6. The submission of the Learned Counsel appearing for the Respondent, that there was full opportunity given to the Petitioner, but he has chosen not to attend and in fact in the defence/reply so filed, has admitted the claim in one paragraph though contradictory statement made in another paragraph. Merely because other party admits the claim that itself is not sufficient reason not to give opportunity to such party. It is settled law that admission even if made is always rebuttable and in a given case, the party may give justification and/or clarify the same admission. This also means opportunity is necessary which is required to be given to such party.

7. There is no serious dispute that the loan in question was given as a personal loan of Rs. 10,00,000/- to "Mr. Satyajit P. Thakkar" though he was promoter of the company and the document/agreement in question signed by Mr. Satyajit Thakkar, the Petitioner as a Director of the company i.e. Prabhu Hira Ice and Cold Storage Ltd. There is no dispute that the documents reflect their signatures, but the dispute is definitely raised by the Petitioner so far as the nature of loan and/or execution of the agreement in their respective or particular capacity. If loan is given to a person in his individual capacity and when claim is filed without taking into consideration to bring legal heirs of such person on record as died during the pendency of the proceedings and further without raising any specific plea to the effect that they are not pressing the so-called recovery against such expired person and/or his legal heirs and there is no even finding given in this regard by the Arbitrator, in my view, the Award so passed, therefore, definitely needs interference.

8. Even otherwise considering the scope and purpose of the procedure as contemplated under the Arbitration Act though nowhere required the provisions of CPC or the Evidence Act need to be strictly followed, yet the aspect of principles of natural justice, the case goes to the root of the matter. Therefore any award which reflects such breaches is unsustainable.

9. Resultantly, the impugned Award is quashed and set aside. However, considering the facts and circumstances, the parties to appear before the Arbitrator after four weeks. The Arbitrator to continue with the proceedings afresh after giving opportunity to the Petitioner/the parties from the evidence stage. The Arbitration Petition is accordingly allowed in the above terms. There shall be no order as to costs.