(2013) 01 BOM CK 0125

In the Bombay High Court

Case No : Arbitration Petition No. 1444 of 2010

Rajesh Tiwari APPELLANT

Vs

M/s. Motilal Oswal Financial Services Ltd. and M/s. Motilal Oswal Securities Ltd. RESPONDENT

Date of Decision : 03-01-2013

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 19, 34

Citation : (2013) 2 BomCR 348 : (2013) 3 MhLj 523

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : J.B. Mishra, for the Appellant; Chaitra Rao instructed by y Juris Matrix for Respondent No. 1 and Ms. Savina Bangera, for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short, Arbitration Act). The Petitioner, original borrower, has challenged Award dated 29 December, 2009 passed by the sole Arbitrator, thereby awarded claim in favour of the Respondent/original claimant/ Lender. The Petitioner had demat account with Motilal Oswal Securities Limited at Buxal, Bihar, which is stated to be sister concern of Respondent with whom the Petitioner entered into a Master Loan Agreement dated 14 December, 2007 for providing loan against the deposit of securities and/or finance for purchase of security facilities. The learned Arbitrator has dealt with the contention revolving around Respondent No. 2, while granting the Award in favour of Respondent No. 1. Admittedly, Respondent No. 2 was not party to the arbitration proceedings as they were not party to the agreement between the parties having arbitration clause. Therefore, there was no question of adjudicating or deciding any issue revolving around and/or related to Respondent No. 2 while adjudicating and/or granting any relief for and/or against the Petitioner. The arbitration proceedings, as settled, cannot be initiated and/or proceeded for and/or against the third party like Respondent No. 2 in the present case. The learned Arbitrator, however, inspite of the submission so raised and recorded, proceeded without joining

Respondent No. 2 as party and passed the Award. The Petitioner sought permission and requested for personal hearing in the matter. The learned Arbitrator, however, rejected the said application and proceeded with the matter without giving personal hearing to the Petitioner. There is no procedure agreed and/or pointed out whereby parties have agreed that the Arbitrator need not give personal hearing to the parties and/or parties can waive the personal hearing. Here is the case where the Petitioner has sought opportunity of personal hearing before passing final Award. The procedure, therefore, so adopted is against the principles of natural justice. The learned Arbitrator, in the present case, as noted by order dated 12 November 2009 rejected the application of personal hearing.

2. The reply was filed and so also the rejoinder. New documents were placed on record with the rejoinder. Therefore, an opportunity ought to have been given to the Petitioner to put up his case by giving personal hearing, basically when various documents including periodical statement of transaction in respect of new demat account was disclosed to the Petitioner in their rejoinder only. The periodical demand statements was also foundation for the Award. The supply of statement of new demat account itself was in issue.

3. The learned Arbitrator ought not to have proceeded with the matter without giving full opportunity to the petitioner in every aspects. No oral evidence was led by the claimant. Therefore, the Award passed by the learned Arbitrator, without giving opportunity to the Petitioner, including non-providing documents though sought for is clearly in breach of principles of natural justice.

4. As per the Agreement, it was necessary to give three days notice in writing to the borrower specifying the nature of event of default (Clause 5.2). There is nothing on record to show that such notice was given by Respondent No. 1 to the Petitioner at any point of time. The agreement was executed on 14 December, 2007 on the expired stamp-per. The issue is also with regard to the alleged Power of Attorney. Having statement of 11.06.2007 and signed on 11.10.2007, there is a denial even to the signature before the Notary. The submission of forgery and fabrication was also not dealt with by the Arbitrator. The dispute is also raised about the signature of two witnesses and authorized signatory of Respondent No. 2. The document so sought and placed on record by Respondent No. 2 who was not party to the arbitration proceedings, ought to have been taken note of by the learned Arbitrator while granting the Award against the Petitioner. The case built up by Respondent No. 1 on the basis of documents issued by the Petitioner, even if any, in favour of Respondent No. 2, is also unacceptable procedure. There is no clarity as to why the Respondent even after squaring off the account on 24.1.2008 after selling shares and by recording the outstanding of sum of Rs. 6,59,426/-, allowed to purchase shares on 12.2.2008 and 13.2.2008. The liability, therefore, based upon the squaring of action of January 2008 is also without assigning proper reasons. It is also on record that the trading for the shares and securities worth of Rs. 15 crores were permitted, though, the loan limit was Rs. 10 lacs by Respondent No. 1.

5. So far as the jurisdiction is concerned and considering the nature of agreement between the parties, including passing Award without joining necessary party and based upon the documents filed by such party, read with the admitted position that the Master Loan Agreement was executed at Mumbai on the date in question, Respondent''s office is at Mumbai, though there is no specific clause of jurisdiction but considering the facts and circumstances, I am inclined to observe that part of cause of action arose in Mumbai and as the Respondents office are at Mumbai, this Court has jurisdiction to decide the present Petition in Mumbai.

6. I have in Sahyadri Earthmovers Vs. L and T Finance Limited and Another, observed the basic parameters which the Arbitrator ought to have been followed while passing the final award in the following words:

Pleading-Claim-defence-counter claim-inspection documents

(i) The Petitioner/claimant to file claim petition with details particulars and supporting documents, if any. The Respondents be permitted to file reply/ defence/rejoinder/counter claim/set off and supporting documents, if any. The Arbitrator may direct the parties to file a list/compilation of documents and call for more informations or details. The parties may admit or deny the documents, after due inspection of the documents. Interim order or protective order.

Arbitrator''s power to dismiss for default or pass exparte award.

(xvi) The Arbitrator is entitled to dismiss the Arbitration Petition in default if the Petitioner/claimant is absent. The Arbitrator is also empowered to pass an exparte award, if the Respondent or his Advocate is absent. But still must act fairly and honestly.

Equal and fair treatment

(xvii) The Arbitrator must give equal opportunity to both the parties and, therefore, bound to follow the principles of natural justice, fair play and equity.

CPC & Evidence Act

(xviii) Though CPC and the Evidence Act are not applicable strictly, (Section 19), but the settled principles do apply. The power of Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of any evidence just cannot be overlooked.

7. In my view, Section 34 permits the Court to remand the matter in part and/or whole. It depends on the issue involved. If all issues are connected or interlinked, there is no question of remanding the matter on a particular issue. In the present case, all issues are interlinked and inter connected. Therefore, taking overall view of the matter, I am inclined to remand the matter. The Arbitral Tribunal may proceed on the basis of material already available on record. However, by consent and/or if necessary may permit the parties to add or file additional documents and the Arbitrator may thereafter by giving opportunity to

all the parties, proceed in accordance with law.

8. In the result the following order :

(I) The impugned Award dated 29 December, 2009 is quashed and set aside;

(II) The matter is remanded back for rehearing.

(III) All points are kept open.

(IV) The parties to take steps in accordance with law.

(V) The parties are also at liberty to settle the matter.

The Petition stands disposed of in the above terms. There shall be no order as to costs.

