

(2019) 02 DEL CK 0479

In the Delhi High Court

Case No : Original Miscellaneous Petition 665, 972 Of 2013, Miscellaneous Application No. 14901 Of 2018

Videocon Industries Ltd

APPELLANT

Vs

Morgan Securities & Credits Pvt. Ltd. & Anr

RESPONDENT

Date of Decision : 07-02-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7)(a), 34
Insolvency and Bankruptcy Code, 2016 — Section 14

Citation : (2019) 02 DEL CK 0479

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Rajneesh Sharma, K. Datta, Simran Mehta

Final Decision : Disposed Off

Judgement

Prathiba M. Singh, J

1. The present petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the "Act") challenging award dated 1st March, 2013, thereafter, corrected on 29th April, 2013 passed by Ld. Sole Arbitrator Justice A. P. Shah (Retd.).

2. Morgan Securities & Credits Pvt. Ltd. (hereinafter "Morgan Securities"), which is the Petitioner in OMP 972/2013, had extended a bill discounting facility to Videocon International Ltd. (hereinafter, "Videocon International") and BPL Display Devices Ltd. The said facility was extended vide letter dated 27th January, 2003. Under the facility Rs.5 crores was extended to Videocon International for a period of 150 days. Post-dated cheques were issued by Videocon International to secure the facility.

However, the said post-dated cheques were not presented for reasons, which would be discussed hereinafter. Morgan then issued notice invoking arbitration was issued on 31st January, 2006, seeking payment of the outstanding amounts.

On 7th December, 2005, Videocon International was amalgamated with Videocon Industries Ltd (hereinafter "Videocon Industries").

3. The Id. Sole Arbitrator was appointed by Morgan Securities, as per the arbitration clause in the contract. Though, the initial invocation was against Videocon International, the statement of claim filed before the Id. Arbitrator in May, 2006 was by arraying Videocon Industries as a party respondent. Notice was issued by the Id. Arbitrator to Videocon Industries on 11th July, 2006.

4. The arbitration proceedings, concluded after recordal of evidence on behalf of both the parties. Vide a detailed award, the Id. Sole Arbitrator has held in favour of Morgan Securities in the following terms:

"92. In view of the findings of the Tribunal above. Respondent No. 2 is liable to pay a sum of Rs.5,00,32,656/- (Rupees five crores thirty two thousand six hundred and fifty six only) to the Claimant alongwith interest at 21% p.a. till the date of demand notice. After the date of the demand notice, i.e. 10.01.2006, the Claimant is entitled to receive interest at the rate of 36% p.a. with monthly rests. Further, in terms of the aforesaid decision in S.L Arora, the Claimant is entitled to receive to post-award interest at the rate of 18% p.a. only on the principal amount of Rs. 5,00,32,656/-."

5. Videocon Industries has filed OMP 665/2013 challenging the award and Morgan Securities has filed OMP 972/2013 challenging the impugned award.

6. In brief, the case of Videocon Industries is twofold. First that the invocation of arbitration was against a non-existent company i.e. Videocon International, since the demand notice was issued against Videocon International only on 10th January, 2006, by which time it stood amalgamated with Videocon Industries. The said demand notice cannot be construed as deciding the limitation period in respect of Videocon Industries. According to Id. counsel for Videocon Industries, the first date that should be counted for the purpose of limitation against Videocon Industries, is 11th July, 2006, i.e., when notice was served by the Id. Arbitrator on Videocon Industries. According to him, on the said date, the claim of Morgan Securities was barred by limitation in respect of 15 hundies out of 20 hundies, and only qua 5 hundies, the claim could have been entertained.

7. The second submission is that the rate of interest is unusually high and such a high rate of interest ought not to be recognised by the Id. Arbitrator. Further, it is submitted that, currently, Videocon Industries. is facing insolvency proceedings, and vide order dated 21st January, 2019 passed by the National Company Law Tribunal, Mumbai, the moratorium period is continuing under Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, "IBC").

8. On the other hand, the submission of the Id. counsel appearing for Morgan Securities are twofold. First, it is submitted that the Id. Arbitrator has wrongly awarded post-award interest @ 18%, only on the principal amount, whereas it ought to have been on the entire awarded amount including interest. It is further

submitted that the interest, as per the award, has been awarded only from the date of demand and not from the date of default. According to Mr. Datta, it ought to have been from the date of default. Further, in response to objections raised by the Videocon Industries, it is submitted by Id. counsel appearing for Morgan Securities that the amalgamation of Videocon International and Videocon Industries was not informed to Morgan Securities. In any event, it is submitted that as per the scheme of amalgamation, the company Videocon Industries has taken over the liabilities of Videocon International. In the absence of specific notice of amalgamation being issued to Morgan Securities, the demand notice could not have been issued by Morgan Securities to Videocon Industries, when the facility itself had been availed of by Videocon International. It is further submitted that in the facility agreement, there was an obligation on Videocon International to inform Morgan Securities and take prior permission before entering into any merger/amalgamation. Having breached the said obligation, Videocon International cannot take advantage of the same.

9. Insofar as the post-dated cheques and the reasons for non-presentation thereof are concerned, it is submitted by Mr. Datta, that the evidence on record, shows that Morgan Securities was in fact requested by the senior management of Videocon, not to present the cheques. In response, no reliable or credible evidence was led on behalf of Videocon Industries to rebut the same. Further, evidence was also not produced by Videocon Industries i.e. to show that it had capacity to pay the said amounts on the date of the cheques.

10. It is further submitted that the rate of interest was agreed between the parties and as per the recent judgment of the Delhi High Court in M/s. BPL Ltd. v. M/s. Morgan Securities & Credits Pvt. Ltd., being OMP (COMM) 176/2017 decided on 18th December, 2018, this Court has taken a view that the rate of interest, as agreed in such a bill discounting facility, is a conscious conduct on behalf of the loanee and the Court ought not to interfere in the same. Accordingly, as per this judgement, the clause on interest deserves to be accepted and upheld.

11. This Court has heard Id. counsels for the parties. Insofar as the first argument that the demand notice was issued to the wrong entity is concerned, Clause 6 of the bill discounting facility dated 27th January, 2003 is relevant and set out hereinbelow:

"6. In the event of any amount remaining overdue on any hundi/bill of exchange under this facility, neither of the Drawer and Drawee shall without the prior written permission of the Discounting Company pass any resolution for its winding up for its amalgamation/merger or otherwise or for amalgamation/merger of any other company into the Drawer or Drawee; enter directly or indirectly into any new area/field of business/operation or dispose off or sell or encumber any transfer of its shares by any of its present promoters" group, change its paid up share capital or redeem any security, appoint or reappoint, or modify any term and condition or appointment of, any whole time or managing director; pay any remuneration to any of its managing directors, whole time

directors or the chairman; or pay any dividend on any share."

12. A perusal of the above clause makes it clear that even before Videocon International could pass a resolution for amalgamation with Videocon Industries, it ought to have taken prior written permission of Morgan Securities. It is not even the case of Videocon Industries that it took any permission let alone prior permission before amalgamation with Videocon Industries. Moreover, there is nothing on record to show that even while the amalgamation proceedings were pending, after they were approved by the Board, no notice/intimation was issued to Morgan Securities about the said amalgamation. Under such circumstances, it cannot be held that the demand raised against Videocon International was incorrect or procedurally faulty.

13. The earliest point in time when Morgan Securities became aware of the amalgamation/merger, it filed the statement of claim against Videocon Industries, before the Ld. Sole Arbitrator. Further, the scheme of amalgamation, which was approved by the Bombay High Court vide its order dated 25th November, 2005, is relevant and the same are set out hereinbelow:

"3.2 With effect from the Appointed Date, all the liabilities of the Transferor Company and charges and mortgages created by the Transferor Company shall, without any further act or deed, be and stand transferred or deemed to have been transferred to the Transferee Company pursuant to the applicable provisions of the said Act so as to become as and from the Appointed Date the debts, liabilities, duties and obligations of the Transferee Company pursuant to the provisions of Section 394 and other applicable provisions of the said Act, provided always that the scheme shall not operate to enlarge the security for any loan, deposit or facility created or available to the Transferor Company by virtue of the amalgamation and Transferee Company shall not be obliged to create any further or additional security thereof on or after the amalgamation has become effective or otherwise.

4.1 Subject to the other provisions of this scheme all contracts, deeds, bonds, agreements and other instruments of whatsoever nature to which the Transferor Company is a party, subsisting or having effect immediately before the Effective Date shall be in full force and effect against or in favour of the Transferee Company as the case may be, and may be enforced as fully and effectually as if, instead of the Transferor Company.

5. Legal Proceedings:

5.1 All legal and other proceedings by or against the Transferor Company, if any, pending on the Appointed Date and relating to the said. Undertaking, its rights, liabilities, obligations, duties and covenants shall be continued and enforced by or against the Transferee Company, as the case may be.

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11.1 All the creditors of the Transferor Company shall become the Creditors of

the Transferee Company on the same terms and conditions and without the Transferee Company being required to extend any further security or the same."

14. A combined reading of the above clauses reveals that all the liabilities of the transferor company i.e. Videocon International stood transferred or were deemed to have been transferred to Videocon Industries. The same is the position in respect of the contracts, deeds, agreements to sell entered into by Videocon International. Clause 11.1 is categorical to the effect that all the creditors of Videocon International were to become the creditors of Videocon Industries. While it is correct that no legal proceedings were pending under clause 5.1 of the scheme, on the date when amalgamation took place, in respect of the present bill discounting facility, Morgan Securities would, clearly, be a creditor and the payment to be made to Morgan Securities was a liability. Thus, under the scheme of amalgamation, the monetary liability towards Morgan Securities had passed on to Videocon Industries.

15. Further, Videocon Industries also stepped into the shoes of Videocon International and took upon itself all the responsibilities towards various creditors of the said company. Thus, any demand notice issued against Videocon International by Morgan Securities, without knowledge of the amalgamation, cannot be faulted with. Such a demand notice would, in law, have to be construed as a demand notice against Videocon Industries. It cannot, therefore, be held that the demand in respect of 15 hundis is barred by time. The hundis had a due date from 20th June, 2003 to 14th July, 2003. The demand notice was issued on 10th January, 2006. Thus, the claims in respect of all the hundis are held to be within limitation.

16. Insofar as interest is concerned, it is not in doubt that the initial loan amount was Rs.5,32,00,656/-. The Ld. Arbitrator while exercising his discretion has restricted the post award interest to 18% per annum only the principal amount. This being the discretionary power exercised by the Ld. Arbitrator, this Court is not keen to interfere with the same.

17. Insofar as the claim of interest prior to raising the demand notice is concerned, since the demand was raised almost two and a half years after the facility was availed, such restriction imposed by the Id. Arbitrator is valid and justified. It could not have been presumed by the Id. Arbitrator that the demand was due on the day when the liability accrued against Videocon International. Until and unless, the demand is raised, the Id. Arbitrator cannot presume that the amount is outstanding.

18. Finally, insofar as the interest rate imposed by the Ld. Arbitrator, the same being the contractual rate as agreed between the parties, is not liable to be interfered with. The challenge by Videocon, to the rate of interest is further not sustainable in view of the judgement in BPL Ltd (supra). The relevant portion of the said judgment is extracted hereinbelow:

"29. A reading of Section 31(7)(a) of the Act would show that the Arbitral

Tribunal is empowered to grant interest for the pre-reference and pendente lite period at such rate as it may deem reasonable, unless otherwise agreed by the parties. In the present case, the parties have clearly stipulated the rate of interest that is payable by the petitioner to the respondent and therefore, the award of such rate of interest by the Arbitrator cannot be faulted.

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38. Learned senior counsel for the petitioner has further submitted that the claim of interest even otherwise is highly exorbitant and cannot be sustained. He has produced a chart to contend that the amount payable with interest as awarded would become multiple times that of the principal and is therefore, unjustified.

39. I am unable to agree with the submission made by the learned senior counsel for the petitioner. In *PEL Industries Ltd. & Ors. vs. SE Investment Ltd.* 2018 SCC OnLine Del 8746, this Court had considered the issue of award of interest and held that where party to the transaction, being a business entity, was well aware of the rate of interest payable under the transaction, it would be beyond the jurisdiction of this Court to go into the reasonableness or otherwise of the rate of interest agreed upon between the parties. Relying upon the judgment of this Court in *Syndicate Bank vs. West Bengal Cements Ltd. & Ors.* AIR 1989 Del 107, it was held that grant of interest at less than contractual rate as a matter of rule, will amount to giving a premium to those who trade upon the money of others; defaulting borrowers cannot be given the benefit by reducing the rate of interest.

40. In the present case also, the reasonableness of the rate of interest has gained in magnitude only because of persistent defaults on the part of the petitioner to honour its side of the bargain. The petitioner certainly cannot be allowed to take advantage of its own defaults.

41. In any case, the Arbitrator having granted interest in accordance with the terms of the contract between the parties, such Award cannot be set aside by invoking the general principles of fairness or equity."

For the reasons set out above, the objections raised by the Morgan Securities and Videocon International/Videocon Industries are not tenable. The Id. Arbitrator has rightly awarded the amounts in favour of the Morgan Securities as per the clauses in the bill discounting facility. The award warrants no interference.

19. Both OMPs are, accordingly, disposed of in the above terms. All pending applications also stand disposed of.