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Double Dot Finance Limited Vs. Goyal Mg Gases Limited and anr.

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Court : Delhi

Decided On : Feb-03-2005

Reported in : 2005(1)ARBLR324(Delhi); 117(2005)DLT330; 2005(80)DRJ113; (2005)141PLR5

Judge : R.C. Chopra, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 16, 34 and 34(2); Negotiable Instruments Act - Sections 138; Code of Civil Procedure (CPC) - Sections 89; Legal Services Authorities Act, 1995

Appeal No. : OMP 76/2003

Appellant : Double Dot Finance Limited

Respondent : Goyal Mg Gases Limited and anr.

Advocate for Def. : Anurag Kumar Agarwal and ; Umeh Mishra, Advs.

Advocate for Pet/Ap. : Parag P.Tripahi, Sr.Adv., ; Rashi Malhotra and; Sumita Ahuj

Disposition : Petition allowed

Judgement :

R.C. Chopra, J.

1. This petition under Section 34 and Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter called ''the Act'' only) is directed against an Award dated 29.11.2002 passed by the named Arbitrator in favor of the claimant-respondent No.1. By the said Award, the learned Arbitrator held that the respondent No.1 is entitled to recover a sum of Rs,10,92,990/- from the petitioner along with interest in the sum of Rs.27,28,450/- up to 28.11.2002 @ 3% per month with monthly rest from 12.4.1999. Future interest also was awarded from the date of the Award till the date of payment @3% per month.

2. The facts relevant for the disposal of the objection petition, briefly stated, are that on 27.3.1998 the petitioner had taken an Inter-Corporate Deposit of Rs.1 crore from respondent No.1 on interest @ 21.5% per annum. This loan was for a period of 90 days. The agreement provided that so long the loan amount remained unpaid after the due date of payment the petitioner would be liable to pay penal interest @ 3% per month. The agreement contained an arbitration clause also. On 25.6.1998 in pursuance of the agreement, the petitioner issued a cheque for Rs.1 crore dated 25.6.1998 in favor of respondent No.1 and also issued a demand promissory note. Later on, it made a request for extension of time for payment due to financial constraints which request was not acceded to by respondent No.1 and the cheque was presented for payment. The cheque was dishonoured with the remarks ''funds insufficient''.

3. The respondent No.1 filed a complaint under Section 138 of the Negotiable Instruments Act in the Court of Metropolitan Magistrate, Mumbai. Simultaneously, the respondent No.1 initiated winding up proceedings also against the petitioner company in the High Court at Chennai. This petition was registered as Company Petition No.307/1998. The High Court at Chennai dismissed the Company petition filed by respondent No.1 for winding up the petitioner company against which the respondent No.1 file an appeal (SA No.5/1999). In the course of the proceedings in the appeal a settlement was arrived at between the parties. On 27.1.1999, the hearing was adjourned after recording that the petitioner had undertaken to pay a sum of Rs.1,15,00,000/- to respondent No. (sic) on or before 2.2.1999 subject to the right of the appellant to work out his remedy for the balance in accordance with law. The interim orders dated 25.1.1999 were vacated. On 1.2.1999, the petitioner

paid a sum of Rs.1,13,95,000/- to respondent No.1 by a pay order after deducting TDS from the interest payment. The respondent No.1 issued receipt dated 1.2.1999 acknowledging the receipt of the pay order and saying that, subject to the realization of the payment, the same will be treated as having received in full and final settlement of petitioner's liabilities towards its Inter-Corporate Deposit. it was also stated that on realization of the payment as aforesaid, the respondent No.1 agrees to withdraw all cases whatsoever pending before the Courts for recovery of its Inter-Corporate Deposit dues. In the receipt also attached to the letter dated 1.2.1999 issued by respondent No.1, it was stated that this payment was being accepted in full and final settlement of all dues against Inter-Corporate Deposit advanced by respondent No.1. Thereafter, the OSA No.5/1999 came up for hearing before the Court on 11.2.1999 on which date the High Court at Chennai passed orders that the counsel for respondent No.1 submits that the matter has been settled out of Court and as such, the appeal is being withdrawn. The appeal was accordingly dismissed as withdrawn.

4. The respondent No.1, however, appointed the Arbitrator thereafter and initiated arbitral proceedings claiming the balance amount of Inter-Corporate Deposit. The petitioner appeared before the Arbitrator and pleaded that he has no jurisdiction to enter on the reference inasmuch as the disputes between the parties have been amicably settled and there remains no arbitrable dispute between them. Issue were framed on the objections of the petitioner as to whether the Arbitral Tribunal has jurisdiction to adjudicate the dispute and as to whether the claim arising out of the agreement of loan stood discharged or not. Learned Arbitrator after considering the pleas of the parties and the evidence recorded by him held that the Arbitral Tribunal had jurisdiction to adjudicate the referred dispute and the liability arising out of the loan agreement had not been discharged. The plea of respondent No.1 was accepted that the letter and the receipt dated 1.2.1999 were issued under coercion and undue influence as the respondent No.1 was to receive a huge amount of Rs.1,15,00,000/- from the petitioner and in case he had not agreed to issue the letter and the receipt it would not have been able to get the major part of amount from petitioner.

5. Learned counsel for the petitioner vehemently argues that the impugned Award is liable to be set aside as the Arbitrator had no jurisdiction to enter upon the reference as neither there was any subsisting arbitration agreement nor an arbitrable dispute.

6. According to him, after the acceptance of the amount vide letter dated 1.2.1999 and the receipt which recorded ''full and final settlement'' of all claims of respondent No.1 against the petitioner, no dispute remained between the parties which could be referred to arbitration. According to him, the plea of financial expediency and coercion as raised by respondent No.1 and accepted by the learned Arbitrator was untenable, false and malafide inasmuch as the respondent No.1 after accepting the amount from the petitioner in full and final settlement could not turn around and say that he was coerced to do so.

7. Learned counsel for respondent No.1 on the other hand submits that the orders dated 27.1.1999 recorded by the High Court at Chennai in OSA No.5/1999 clearly convey that the amount of Rs.1,15,00,000/- was to be paid to the respondent No.1 without prejudice to his rights to claim the balance in accordance with law. According to him, the fact that the respondent No.1 had accepted this amount in full and final settlement is in itself sufficient to show that the respondent No.1 was coerced to enter into this settlement and as such, it was not binding upon it. According to him, the Arbitrator had acted within jurisdiction and rightly awarded the balance amount in favor of respondent No.1 along with interest at the agreed rate.

8. Before coming to the merits of the case, this Court would like to refer to the Apex Court judgment in ''Oil and Natural Gas Corp. Ltd. v. Saw Pipes Ltd.'' reported in : [2003]3SCR691 as well as a judgment of this Court in Union of India v. U.P. Upbhokta Sehkari Sangh Ltd., Lucknow and Anr., reported in : 2003(67)DRJ596 . There is no doubt that the objections under Section 34 of the Act have to be within the parameters laid therein. Under Section 34(2)(b)(i) of the Act an Award can be set aside if it is in conflict with the public policy of India. Para 30 of the Apex Court judgment in Oil and Natural Gas Commission v. Saw Pipes Ltd.''(supra) reads as under :

"Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions can not be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra) it is required to be held that the award could be set aside if it is patently illegal. Result would be-award could be set aside if it is contrary to :

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

9. This Court also in the case of Union of India v. U.P. Upbhokta Sehkari Sangh Ltd., Lucknow and Anr. (supra) had observed as under :

"It is true that an Arbitrator is a Judge by the choice of the parties and more often than not a person with little or no legal background and as such the findings given by the Arbitrator can be challenged only within the limited scope of the provisions of the Act. it is also true that the Courts disfavor interference with arbitral Awards merely on account of error of law or fact or on the ground of mis-appreciation and misreading of material on record but if in a case, the Court finds that the Arbitrator has arrived at a finding which is contrary to the material before him or has arrived at a conclusion which is capricious on the face of it, the Court cannot sit as a silent

spectator and allow miscarriage of justice. The Act of 1996 aims at expeditions disposal of the disputes between the parties through arbitration and narrows down the scope of interference by the courts but the purpose of Section 34 of the Act is to permit an aggrieved party to knock at the doors of the Court if Award suffers from any of the vices mentioned therein. The object of Section 34 of the Act would stand defeated if the Courts put their shutters down and throw out any and every objection even if gross injustice is brought to their notice. In spite of extensive powers an wide discretion an Arbitrator has to ensure that the Award passed by him is in accordance with law. If an Award passed by an Arbitrator is capricious and contrary to law, it can be safely termed as an Award in conflict with the public policy of India, which is founded on rule of law. The public policy of India does not countenance any violation of law resulting in miscarriage of justice.''

10. Coming to the question as to what is ''coercion'' or ''duress'' in commercial contracts, we may refer to the case of Privy Council case ''Pao On and Ors. v. Lau Yiu and Anr.'' reported in 1979 (3) ER 65. Economic duress in commercial context was dealt with by their Lordships and it was held that in contractual relations, a mere financial pressure is not enough. It was also held that the question as to whether at the time the person making a contract allegedly under coercion had not any alternative course open to him which could be an adequate legal remedy and whether after entering into the contract, he took steps or not to avoid it are matters which are relevant for determining as to whether he acted voluntarily or not. It was also held that the compulsion has to be of a nature which deprives a party of his freedom of exercising free will leaving no alternative course open to him. thereforee, the 'coercion' or 'duress' required for vitiating 'free consent' has to be of the category under which the person under 'duress' is left with no other option but to give consent and is unable to take an independent decision, which is in his interest. Bargaining and thereafter accepting an offer by give and take to solve one's financial difficulties cannot be treated as 'coercion' or 'duress' for the reason that in trade and commerce every day such situations arise and decisions are taken by parties some of which they might not have taken but for their immediate financial requirements and economic emergencies.

11. Regarding plea of 'full and final settlement' normally as soon as it is shown that the disputes are settled and one party has paid and the other has accepted payment in pursuance of settlement, that should be the end of the contract as well as disputes.

12. After deriving benefit under a settlement and making the opposite party change its position, a party cannot turn around and say that the 'accord and satisfaction' is not binding on him. The pre-condition is that the 'accord and satisfaction' should be sown to be voluntary and out of free will. In ''Nathani Steels Ltd. v. Associated Constructions'' reported in , it was held that once there is a full and final settlement in respect of a dispute or difference in relation to a matter covered under the arbitration clause, such a dispute or difference does not remain an arbitrable dispute and the arbitration clause cannot be invoked in respect thereof even though for certain other matters, the arbitration agreement may remain in subsistence. It was held that unless that settlement is set aside in proper proceedings, it does not lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and to proceed further by invoking the arbitration clause. It was stated that in case it is permitted, the sanctity of the contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take benefit under the settlement and then question the same on the ground of mistake without having the settlement set aside. This principle applies to a plea of 'duress' and 'coercion' also in respect of mutual settlement.

13. In certain cases, the plea of entering into 'settlement' under coercion, mistake, duress or misrepresentation may, however, be examined and accepted even if the facts and circumstances establish that the party repudiating the agreement was under pressure of the other party at the time of entering into settlement and had without delay taken steps to disclaim the accord and satisfaction. Mere financial exigency or economic expediency cannot constitute 'pressure'.

14. The legal position that emerges, thereforee, is that the Arbitrator has jurisdiction to adjudicate a dispute in regard to the existence of 'full and final settlement'. In case the plea of 'full and final settlement' between the parties is accepted by the Arbitrator, no Award can be passed in favor of a claimant but in

case this plea is rejected, the Arbitrator would be well within his rights to pass an Award in respect of the claims filed before him. The Arbitrator can go into the question as to whether the 'accord and satisfaction' recorded between the parties was voluntary or not inasmuch as 'free consent' remains the foundation of all agreements including the agreement in regard to the settlement of disputes between the parties. However, the plea of coercion, undue influence or duress raised by a party to challenge the 'accord and satisfaction' cannot be accepted lightly merely upon word of mouth. The facts and circumstances, material on record and conduct of the parties at the time of signing the settlement agreement and soon thereafter have to be looked into. It need not be stated that the burden to establish this plea remains on the party which raises it.

15. Coming to the facts of the case in hand, it is found that the respondent No.1 had given an inter-corporate deposit of Rs.1 crore to the petitioner on interest. The period of re-payment was 90 days only. The petitioner was facing financial crunch and a such, wanted more time for payment. Post dated cheque of Rs.1 crore was issued by petitioner which, on presentation, was dishonoured. The respondent No.1 initiated proceedings under Section 138 of the Negotiable Instruments Act against the petitioner and also moved a winding up petition. In OSA No.5/1999 against dismissal of the petition of respondent No.1, a settlement was arrived at on 27.1.1999 under which the petitioner agreed to pay a sum of Rs.1,15,00,000/- to respondent No.1 with liberty to take appropriate steps for the recovery of the balance amount. However, on 1.2.1999, when the payment was accepted by respondent No.1 a letter and a receipt dated 1.2.1999 were issued accepting the payment in 'full and final settlement' and also agreeing to withdraw all proceedings against the petitioner. On 11.2.1999, OSA No.5/1999 was unconditionally withdrawn and on that day even, it was not pleaded on behalf of the respondent No.1 that the payment accepted on 1.2.1999, was under any pressure, coercion or duress. If the settlement dated 1.2.1999 was under duress or coercion, the respondent No.1 should not have encased the pay order issued to it by the petitioner and rather pursued its OSA No.5/1999 instead of withdrawing it without any protest. The respondent No.1 could be in need of money and for that reason only entering into full and final settlement with the petitioner but that does not constitute duress, coercion or undue influence. The respondent No.1 was already

litigating with the petitioner and still had all the legal avenues open to it for redressal of its grievances including going to the Arbitrator for settlement of disputes, which was done only after encashing the pay order. The financial difficulties of respondent No.1 do not constitute 'duress' or 'coercion' and as such, the learned Arbitrator was absolutely unjust in holding that the payment accepted by respondent No.1 was under coercion or duress and the settlement dated 1.2.1999 was not out of free will of respondent No.1.

16. If such pleas are sustained, the sanctity and purpose of 'amicable settlements' between the parties would stand totally eroded. Amicable resolution of disputes and negotiated settlements is 'public policy of India'. Section 89 of the Code of Civil Procedure, Arbitration and Conciliation Act, 1996 as well as Legal Services Authorities Act, 1995 call upon the Courts to encourage settlement of legal disputes through negotiations between the parties. If amicable settlements are discarded and rejected on flimsy pleas, the parties would be wary of entering into negotiated settlements and making payments there under as a shrewed party after entering into a negotiated settlement, may pocket the amount received under it and thereafter challengethe settlement ad re-agitate the dispute causing immeasurable loss and harassment to the party making payment there under. This tendency has to be checked and such litigants discouraged by the Courts. It would be in consonance with public policy of India. The Arbitrator, thereforee, had acted against public policy of India by accepting the plea as raised by the respondent No.1 and thereafter, passing an Award. The view taken by the Arbitrator was absolutely capricious, unfair and unreasonable and as such, the impugned ward dated 29.11.2002 passed by him is liable to be set aside.

17. The Award of interest also @ 3% per month with monthly rests from 12.4.1999 and future interest also @ 3% per month was oppressive as well as excessive. However, in view of the fact that the Award is being set aside on the ground of satisfaction and accord, this Court need not go into the question of the grant of interest by the Arbitrator.

18. In the result, the objection petition is allowed and the impugned Award dated 29.11.2002 passed by the learned Arbitrator is set aside.

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