

(2015) 03 DEL CK 0176

Delhi High Court

Case No: O.M.P. 561/2014

Vivek Rai

APPELLANT

Vs

Aakash Institute

RESPONDENT

Date of Decision: March 4, 2015

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 34 (2) (b) (ii)
- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20
- Contract Act, 1872 - Section 23, 28
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2015) 3 AD 712 : (2015) 3 ARBLR 540 : (2015) 149 DRJ 309

Hon'ble Judges: S. Muralidhar, J.

Bench: Single Bench

Advocate: K.K. Rohatgi, for the Appellant; Himanshu Pathak, Advocates for the Respondent

Final Decision: Allowed

Judgement

Dr. S. Muralidhar, J.

The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 27th January 2014 passed by the sole Arbitrator in the disputes arising between the Petitioner and the Respondent (a division of Aakash Educational Services Ltd.)

2. The impugned Award was an ex parte Award requiring the Petitioner to pay to the Respondent Rs. 22,74,993 together with interest @ 18% per annum from the date of the claim till realisation apart from costs of arbitral proceedings amounting to Rs. 11,000.

3. The Respondent is supposed to be a division of Aakash Educational Services Ltd. ("AESL") which is in the business of giving tuitions en masse to children studying in

classes 11th and 12th and preparing them for appearing in the IIT-JEE and the entrance examinations for medical and engineering courses.

4. The Petitioner was offered a job on probation by the Respondent as a faculty in Physics at its Lucknow Centre. He states that he joined the Respondent's Lucknow Centre on 20th August 2009 on a monthly salary of Rs. 50,000. According to the Petitioner, he was at the relevant time residing at a tenanted accommodation at 302, Shriram Apartments, New Berry Road, Lucknow and had his old house at 120/1 Beladari Lane Indra Khan Plaza Lal Bagh, UP which he had given out on rent. According to the Petitioner he continued serving the Respondent and was given a rise in salary in 2010, again in 2011 and finally his salary was increased to Rs. 63,800 per month in January 2012.

5. According to the Petitioner at the end of February 2012, he was asked by the Respondent to enter into a fresh contract failing which his services would be terminated forthwith. It is stated that under coercion and undue influence, the Petitioner was compelled to enter into a fresh agreement on 1st March 2012. Inter alia under the fresh agreement, the Petitioner had to give three months' notice in writing if he were to leave the services and the notice had to be given in a manner that it was co-terminus with the expiry of academic session. If the Petitioner was unable to adhere to the mandatory notice period, he was liable to pay damages to the tune of double the gross salary for the deficient notice period or the remaining period of the academic year/contract period of three years whichever was higher. If the Petitioner did not submit a resignation between 15th February and 28th February it would be deemed that he was willing to continue for another term of three years.

6. As part of the agreement, the Petitioner was asked to give to the Respondent three signed undated blank cheques. If there was a dispute between the parties, the Petitioner had to bear the entire arbitration expenses which would not be less than Rs. 10,000 per hearing before the Arbitrator. A further clause permitted the Respondent to hold back 10% of the gross salary of the Petitioner which was to be held in a "sincerity fund" which was interest free and repayable after three years. As a result although the Petitioner's monthly salary was fixed at Rs. 72,222 after deducting Rs. 7,222 he was left only with Rs. 65,0000 as a carry home pay.

7. The Petitioner states that in view of the extremely one sided arbitrary clauses in the contract, he rescinded the contract on 20th July 2012 and left the services of the Respondent. The Respondent failed to pay the Petitioner the amount in the "sincerity fund" which was due to him. After leaving the services of the Respondent, the Petitioner shifted from Lucknow to Chandigarh. It is only when he returned to Lucknow to look after the affairs of his old property on 20th March 2014, he found a speed post letter carrying the ex parte Award dated 27th January 2014. Thereafter he filed the present petition on 28th April 2014.

8. Pursuant to the order passed by the Court, the entire arbitral record has been received. At the hearing on 24th November 2014, learned counsel for the Respondent stated that he did not wish to file a reply. The Petitioner has filed his synopsis of arguments.

9. The notice sent to the Petitioner herein at the Lucknow address by the learned Arbitrator was returned with the remarks "left". The tracking report also does not show that it was delivered at the address indicated in the notice. In the impugned Award the Arbitrator observed that since notice was not served, an application under Order v. Rule 20 CPC was moved for substituted service through publication which was affected in two local newspapers on 10th October 2013. The Arbitrator then concluded that the Petitioner herein deliberately failed to appear in the present arbitral proceedings. Accordingly, the Petitioner was proceeded ex parte on 16th November 2013.

10. As regards the copy of the Award, it is seen that it was sent again to the Petitioner's Lucknow addresses and was returned unserved. One of the covers has been returned with the remarks "left". The Court is satisfied that the explanation offered by the Petitioner that he learnt of the Award only on 20th March 2014 is bonafide. With the present petition having filed thereafter on 28th April 2014, the objection raised by the Respondent regarding limitation is hereby negated.

11. Turning to the merits of the Award, the Court finds that the learned Arbitrator has simply gone by the clauses in the agreement and even without scrutinising the calculation of the amount claimed by the Respondent, has awarded it in toto. The Court finds that this is a case where the Respondent is seeking to enforce terms and conditions of an agreement dated 1st March 2012 which are on the face of it opposed to public policy and clearly hit by Sections 23 and 28 of the Contract Act, 1872. In particular, the Court would like to refer to the following clause in the agreement:

"7 (b) In the event an employee wishes to leave the services of Aakash Institute, Lucknow Centre He/She is required to give notice in writing giving clear 3 months time to Aakash Institute Lucknow Centre so that such period co-terminates with expiry of the academic session. The said notice is required to be delivered to the Centre Director/Centre Manager by Regd. AD post or hand delivered but duly acknowledged to be received so that there would be ambiguity regarding the contents of your notice and its serving upon Aakash Institute (Lucknow Centre) . The notice for 3 months can be given only between 15th November to 28th November in any year after completion of the initial period of three years. If any employee gives notice at any time other than specified, it will not be accepted and will be invalid as per the terms between the above mentioned period, it will be assumed he/she is going to complete the coming next session."

12. Clauses 7 (d) , 7(e) and 7 (f) read as under:

"7(d) In case you are unable to adhere to the said mandatory notice period, you would be liable to pay to Aakash Institute (Lucknow Centre) a minimum pre-estimated and pre- determined damage to the tune of double the gross-salary for the deficient notice period or the remaining period of the academic year/contract period of three years, whichever is higher e.g. if a person quits on 31st October of any given year after completion of three years, he/she will be required to pay $4 \times 2 \times Y$ rupees as damages to Aakash Institute (Lucknow Centre) (the value of Y will be gross monthly salary) . Such liability would be automatically incurred once the breach is committed by the employee and no notice in this regard would be served upon you to claim the said pre- determined and pre-estimated damages. You would be severally liable to pay the same within (seven) days of your leaving. If Aakash Institute (Lucknow Centre) does not receive the payments within 7 days of leaving towards the damages as stated above, Aakash Institute (Lucknow Centre) shall have the right to recover the same along with interest @ Z p.a. through legal process ($Z = \text{PLR} + 3\%$; where PLR is Prime Lending Rate of Aakash institute (Lucknow Centre) Bankers) .

The above damages are not punitive but only a part compensation for the huge loss of face, reputation, brand equity, mind equity, future business losses due to your quitting without completing the academic year and leaving the students in a lurch. The damages are payable at the sole discretion of Centre Director of the Institute.

(e) After the expiry of the initial and minimum contract period, this contract will continue subject to clause 6(b) above for another term of 3 (three) years subject to the candidate being capable of rendering effective services.

(f) Corollary of clause (6) and 7(a) if in the last year of the contract period or extension thereof at Aakash Institute (Lucknow Centre) , an employee does not submit his resignation between 15th February to 28th February, it will be assumed that he/she is willing to continue his/her job for another term of three years subject to the conditions contained in this manual."

13. Apart from the above, in Clause 7 (g) it is mandated as under:

"You will submit three undated blank cheques in favour of Aakash Institute.

You hereby authorize Aakash Institute (Lucknow Centre) for the filling up of the date and amount on the cheques and thereafter to encash the said cheques. In case of non- compliance of the contract terms contained in this manual, the cheques become payable immediately. That the said cheques shall not be treated as a security cheque(s) for legal or any other purposes as it is issued by you in order to discharge of your liability which may occur on account of damages as mentioned under clause 7(d) of the agreement.

I, Vivek Rai undertake to keep sufficient balance in my bank account on which the above mentioned cheque are drawn to ensure the encashment of the said cheques.

Cheque nos are 328569, 328570 and 328571 drawn Punjab National Bank, Aliganj, Lucknow, (UP)

Signature.....

In case, the above said cheque gets dishonoured on its presentation to the banker for the reason of insufficient funds, a/c closed, stop payment or any other reason, you shall be deemed to commit an offence u/s 138 of N.I. Act and the appropriate proceedings shall be initiated against you before the appropriate courts of law.

Aakash Institute (Lucknow Centre) is further authorized to take appropriate legal action to recover the balance amount if any. Wilful and intentional breach of this contract would attract liability upon the employee for compensatory and exemplary damages in addition to contractual liabilities mention in clause 7(d) and 7(k) and under any other provision of this manual."

14. The above clauses appear to the Court to be wholly unconscionable and opposed to public policy and, therefore, hit by Section 23 of the Contract Act. An award based on the above clauses which promise the Respondent to recover an unconscionable sum would be clearly opposed to the public policy of India and likely to be interfered with under Section 34 (2) (b) (ii) of the Act.

15. Clauses 7 (h) and 7 (k) read as under:

"7(h) In the event of your default, non-compliance or wilful breach of the contract or sudden termination of the contract and/or your leaving the institute without following the proper procedure, as laid down in this manual, and the employee's refusal to meet his/her obligation towards Aakash Institute (Lucknow Centre) in letter and spirit of the service rules, and the matter becoming sub-judice, the employee shall be responsible for the entire litigation expenses including, arbitration proceedings, organizing hearing in the arbitration and other legal proceedings if any required to be initiated to facilitate arbitration proceedings. Needless to say, litigation expenses are subjective. However, such expenses cannot be less than Rs. 10,000/- per hearing either before the Court or before the arbitrator apart from the other expenses as elucidated above.

7(k) Whoever commits any act in violation to the provision of clause 7(j) of the agreement, with intend to cause wrongful loss to Aakash Institute (Lucknow Centre) , shall be held liable to pay a fixed sum of Rs. 5 lacs to Aakash Institute (Lucknow Centre) towards damages."

16. The above clauses clearly constitute an unconscionable restraint on the right of one of the parties to seek legal redress. The clauses are hit by Section 28 of the Contract Act. What is even strange is that even a copy of the said agreement is not made available to the other party. The Petitioner was only allowed to see/read the agreement. The Petitioner was required to contact the Centre Director with prior appointment. In fact, it is the Petitioner's case that he was not even given a copy of

the agreement.

17. It shocks the judicial conscience that the Arbitrator mechanically proceeded to pass an Award in favour of the Respondent on the basis of the aforementioned patently illegal clauses of the contract. The Court is unable to sustain the impugned Award of the learned Arbitrator. Accordingly, the impugned Award is hereby set aside. The petition is allowed but in the circumstances with no order as to costs.