(2011) 09 MAD CK 0232

Madras High Court

Case No: O.S.A. No. 47 of 2009

B. Kalaiselvi Proprietrix, S.P.A. Offset 4/4, Mangesh Street, T. Nagar, Chennai - 600017	APPELLANT
Vs	
The National Small Industries Corporation Ltd.	RESPONDENT

Date of Decision: Sept. 28, 2011

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138, 5

Hon'ble Judges: V. Periya Karuppiah, J; R. Banumathi, J

Bench: Division Bench

Advocate: Pramodkumar Chopda, for the Appellant; Ajay Kumar Gnanam for R1 and No appearance for R2, for the Respondent

Final Decision: Dismissed

Judgement

V. Periya Karuppiah, J.
This appeal is directed against the judgment of the learned single Judge passed in Tr.O.P. No. 177 of 2008 dated 28.7.2008 modifying the award passed by the second respondent/Arbitrator.

2. The case of the appellant/petitioner before the learned single Judge would be as follows:

The petitioner took loan from M/s. The National Small Industries Corporation Ltd., hereinafter referred to as "NSIC" for purchase of Fuser - Singe colour sheet fed offset printing machine. The petitioner entered into loan agreement dated 06.04.2001 with NSIC for purchase of Fuser - single colour sheet fed offset printing machine. The total amount

of loan as per the loan agreement was Rs. 4,53,200/-repayable in equal quarterly instalments of Rs. 27,104/-each (inclusive of interest) and handed over 20 post dated cheques (bearing dates of each respective quarter on which instalment fall due and become payable). In addition to the above 20 post dated cheques, the 1st respondent, out of record collected three cheques No. 173401 dated 21.9.2001 No. 173402 dated 1.12.2001 and No. 173403 dated 1.3.2002 for Rs. 13,483/-each for gestation period interest which is not found in the CTL agreement and hence, it is violation of agreement. As per the norms and policy of CTL scheme, no interest or dues are collected during the gestation period and the same are collected with the 1st instalment. Such being the case, the respondent all of a sudden, on 1.10.2003 in the mid night, in the absence of the petitioner, seized the printing machine without any notice. Initially the petitioner had paid initial payment of Rs. 92,384/-, gestation period interest Rs. 40,494/-1st instalment Rs. 27,200/-, 2nd instalment Rs. 8000/-and credit guarantee annual fees Rs. 6,227/-. The printing machine was erected on 20.06.2001 and the 1st respondent on 3.10.2002 locked the machine. The machine was unlocked on 05.12.2002. The machine was seized on 15.10.003. Because of the locking of the machine and seizing of the machine, the petitioner was not in a position to do any business and thereby, they defaulted in paying the instalments. Moreover, the respondent had initiated action u/s 138 of the Negotiable Instruments Act for dishonour of cheques, which were handed over at the time of taking loan. Because of the arbitrary action of the respondents in locking the machine, seizing the same and taking action u/s 138 of Negotiable Act, the petitioner was put into mental agony and suffered huge loss because she could not do the business without the machine. After illegal seizure of the printing machine did not take care to sell the same and the printing machine had become scrap. The 1st respondent did not permit the petitioner either to use the machine for work or for selling the machine. Because of the seizure of the printing machine, the petitioner is not in a position to pay the dues promptly. The loan amount availed by the petitioner from NSIC was refinanced from Credit Guarantee Fund Trust for Small Industries CGTSI @ 1% on the outstanding balance for the machines supplied towards annual service fee and the same amount was collected from the petitioner. Initially, 2.5 % of the loan amount was collected for credit guarantee fee. According to the scheme, in case of non-payment of dues the CGTSI reimburse 75% amount to NSIC. Before raising any dispute with reference to the aforesaid agreement and informing the said CGTSI, the matter was referred to the arbitration. The first respondent appointed the second respondent as sole Arbitrator and filed claim petition dated 7th August 2004 alleging that the petitioner is liable to pay a sum of Rs. 4,91,884/-as on 04.08.2004 with subsequent interest at 15% per annum from that date on the principal sum of Rs. 4,53,200/-till date of payment. They filed written statement and participated in the arbitration proceedings. The petitioner also preferred counter claim. The petitioner, through her counsel sent a registered letter on 3.1.2005 requesting the 2nd respondent viz., the arbitrator to implead the Chief Executive Officer, Credit Guarantee Fund Trust for Small Industries at Mumbai. But the arbitrator without impleading the CEO, CGTSI proceeded with the arbitration proceedings. Ex.P16 is the letter from NSIC to the petitioner and Ex.P17 is the letter from petitioner requesting for

working capital were not marked by the arbitrator. The Arbitral Award passed against her is against the principles of natural justice and therefore, the same is liable to be set aside. Hence, the original petition was filed to set aside the Arbitral Award passed by the second respondent on 6.6.2007 which was received by the petitioner on 29.6.2007.

3. The learned single Judge, after considering the submission made in the O.P. had come to the conclusion of upholding the award passed by the arbitrator but had modified the payment of interest from 15% per annum to 9% per annum from 05.08.2004 on the principal amount of Rs. 3,71,599/-till the date of payment and in other respects the award passed by the arbitrator was confirmed.

4. Aggrieved by the said decision reached by the learned single Judge, the petitioner before the learned single Judge has preferred the present appeal.

5. Heard Mr.T.Pramod Kumar Chopda, learned counsel for the appellant and Mr.Ajay Kumar Gnanam learned counsel for the first respondent. There is no appearance for the second respondent.

6. Learned counsel for the appellant would submit in his arguments that the very seizure of the printing machine without approaching the Court of law for enforcing his right, was illegal and the claim shall not be allowed for the illegal action of the first respondent. He would further submit that there was no notice issued to the petitioner before the seizure of printing machine, however, the Arbitrator had allowed the claim of the first respondent which is arbitrary and illegal. He would further submit that the preliminary objection of appointment of Arbitrator was not decided, before entering into the dispute in between the parties and on that aspect, the award passed by the arbitrator should have been held invalid by the learned single Judge. He would also submit that the Arbitrator himself has taken action for the locking the machinery and for its seizure when he was working as a Joint Manager and hence, the entire proceedings is vitiated on the ground of malafide and bias. He would submit in his arguments that no person can be a judge for his own cause and in this case, the Arbitrator who had acted as one of the Officers to lock the machinery and seize the machinery and who had signed as a witness in the arbitration agreement, cannot be appointed as Arbitrator and on that preliminary objection, the appointment of Arbitrator should have been revoked and set aside. He would rely upon the judgment of the Honourable Apex Court reported in Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., in support of his arguments. He would also submit in his arguments that the Arbitrator did not consider that the petitioner had paid 15% EMD, gestation period interest and few instalments and the subsequent non-payment was only due to the arbitrary action of the respondent in locking the machinery and subsequently, ordering the same without notice. He would further submit that the arbitrator did not direct the first respondent to claim the award amount from CGTSI and not from the petitioner. He would further submit that the arbitration proceedings was conducted without impleading the necessary parties namely CGTSI and CUO. He would further submit that the counter claim of the appellant was not properly

considered but was rejected summarily and this would go show the bias attitude of the Arbitrator. He would further submit that the Arbitration fees and expenses charged at Rs. 25,000/-is enormous, since the Arbitrator himself is one of the Officers of the first respondent. Therefore, he would request the Court that the arbitration award passed by the second respondent/Arbitrator, has to be set aside and the judgment of the learned single Judge, confirming the award with some modification has to be set aside and the appeal is also to be allowed.

7. Learned counsel for the first respondent would submit in his arguments that the appellant has not paid the entire interest for the gestation period but had defaulted to pay the instalments and therefore, it has become necessary for the first respondent to proceed with the locking of the machinery as well as the seizure of the machinery. The said locking and seizure was done in accordance with the terms and conditions of the agreement and there is no necessity for approaching the Court for the seizure of the machinery. He would also submit that if the appellant was prompt in the payment of EMI and the payment of interest for gestation period promptly, there would not be any locking and seizure of the machinery. He would further submit that the appellant herself is liable for her own default and the appellant cannot blame the first respondent for the default committed by the appellant and that the first respondent had acted in accordance with the terms and conditions of the agreement. He would further submit that the award passed by the Arbitrator was in terms of the agreement reached in between the parties and the interest amount awarded at 15% as per the agreement was also modified by the learned single Judge from the date of award namely 5.10.2004 till the date of realisation at 9% per annum. He would further submit that the learned single Judge had correctly assessed the situation and found that the arbitrator did not travel beyond the terms of the agreement but had passed a legal award and there was no interference in the said award. He would further submit that the appellant herself has submitted in the counter claim made before the Arbitrator for passing an award in her favour and there was no preliminary objection raised regarding the appointment of the Arbitrator. He would further submit that the objection was mentioned only before the learned single Judge and not before the Arbitrator. He would therefore submit that the appellant is estopped from questioning the proprietory of arbitrator to pass the award. He would further submit that the appointment of Arbitrator was in consonance with the agreement reached in between the parties and the arbitrator was a named Arbitrator and the second respondent/arbitrator was working as a Joint Manager during the time of transaction and after his promotion, he became the Chairman and he has to necessarily be appointed as an Arbitrator since he happened to be the Chairman. Learned counsel for the respondent would draw the attention of the Court to the principle that when the named arbitrator has been agreed to be appointed in the Arbitration Agreement, there cannot be any removal or revoking of such authority of the Arbitrator. In support of his argument, he would cite a judgment of the Honourable Apex Court reported in 1988 Suppl. SCC 651 (Secretary to Government, Transport Department, Madras V. Munuswamy Mudaliar). He would also rely upon yet another judgment of the Honourable Apex Court reported in International

Airports Authority of India Vs. K.D. Bali and Anr, for the same principle. He would further submit in his arguments that the arbitrator has passed the award which is in accordance with the terms and conditions of the agreement and therefore, the learned single Judge has confirmed the award passed by the second respondent and there is no illegality nor any violation of the fundamental policies as envisaged in the judgment of the Honourale Apex Court reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

8. He would further submit in his arguments that the arguments advanced towards interest payable at the contractual rate of interest cannot be disputed by the appellant since the arbitrator has followed the agreed rate of interest in the agreement as 14% + 1% penal interest and he collectively calculated at 15% per annum for the transaction which is perfectly alright. He would further submit that the learned single Judge has also discussed the validity of fixing the interest at 15% per annum till the date of arbitration as per the terms and conditions. He would draw the attention of the Court to the judgment of the Honourable Apex Court reported in 2010 (4) CTC 856 (Indian Bank v. Blue Jaggers Estates Ltd.) and Syndicate Bank Vs. R. Veeranna and Others, in respect of the applicability of the contractual rate of interest for commercial transaction had with the financial institution. Relying upon the said judgment, he would submit in his arguments that the contractual rate of interest as ordered by the Arbitrator was modified and confirmed by the learned single Judge need not be disturbed. He would further submit that the learned single Judge had not disturbed the conclusion arrived at, by the Arbitrator in respect of the factual aspect and had modified only in respect of payment of interest after passing the award. He would further submit that in proceedings to set aside the award, the Court cannot sit in appeal over the conclusion of the arbitrator by reappraising the evidence adduced before the Arbitrator. In support of his argument he would rely upon the judgment of the Honourable Apex Court reported in AIR SC 1646 (Union of India v. Kalinga Construction Co.). He would therefore submit that the award passed by the Arbitrator is in consonance with the terms and conditions reached in between the parties in the agreement and therefore, the learned single Judge did not disturb the award passed by the second respondent and there is no reason for any interference in the judgment of the learned single Judge and hence, the appeal may be dismissed.

9. We have given anxious thought to the arguments advanced on either side.

10. The indisputable facts are that the appellant had borrowed a sum of Rs. 4,53,200/-towards the composite terms loan agreement dated 6.4.2001, which has to be repaid in 20 equal quarterly instalments of Rs. 27,104 each towards the purchase of Fuser, Single Coloured Sheetfed Offset Printing Machine, Size: 15" x 20" with D.C.Drive and with all standard accessories. Accordingly, the said printing machine was supplied to her and the appellant has also paid certain instalments as well as the interest for gestation period and those payment have been admitted by the first respondent.

11. The trouble started when the appellant was not able to pay the instalments properly and had defaulted, as the post dated cheques issued by the appellants were dishonoured

and the criminal proceedings have also been commenced against the appellant by the first respondent in accordance with the terms of the agreement reached in between them. However, a notice was issued by the Joint Manager of the first respondent to lock the machinery for want of payment of the instalments and even after the locking of the machinery, the instalments were not paid.

12. However it was alleged by the appellant that due to the locking of the machinery, the business of the appellant was blank and therefore, she could not pay the instalments and the seizure of the machinery had made her totally disabled from paying any instalments as there was no income, generated. However, the arbitrator was appointed for the purpose of adjudicating the disputes in between the parties. In Clause 35(i) of the agreement, the appointment of arbitrator has been detailed. Clause 35(i) of the agreement reads as follows:

35(i) If any dispute of difference arises between the Corporation and the Borrower with regard to the construction meaning, and effect of this agreement or any past thereof or any other matter under this agreement of performance or observance of any of the terms and conditions of this agreement including repayment of principle interest or any other charges, the same shall be referred to the sole arbitration of the Chairman of the Corporation or such officer as he may appoint to be the arbitrator. There would be no objection that the arbitrator is an employee of the Corporation, that he had to deal with the matters to which this agreement relates or that in the course of his duties as an employee of the Corporation, he has expressed his views on all or any of the matters in disputes or difference. The award of the Chairman or the officer so appointed by him shall be final and binding on the parties hereto this agreement.

13. On a careful perusal of the aforesaid clause, we could understand that the Chairman of the Corporation or such an Officer he may appoint to be the Arbitrator. There would be no objection for the arbitrator as an employee of the Corporation. As per the said stipulation, whoever the person be the Chairman of the Corporation, will be the Arbitrator. In certain cases, the Chairman may appoint some other person to act as an Arbitrator and in this case, the Arbitrator was appointed since he happened to be the Chairman of the first respondent at the relevant point of time. When we analyse as to whether the appointment of such a person who participated in the transaction had with the appellant could be made as a Arbitrator is a question to be decided with various pronouncement of the Honourable Apex Court. According to a judgment cited by the learned counsel for the appellant reported in Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., , it has been categorically laid down as follows:

17. There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic Tribunal. The said domestic Tribunal must be an impartial one. It is well settled principle of law that a person cannot be a Judge of his own. It is further well-settled that justice should not only be done but manifestly seen to be done.

18. Actual bias would lead to an automatic disqualification where the decision maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial Tribunal.

14. In the said judgment, it has been laid down that the named Arbitrator being the domestic tribunal must be an imparital one. However, in the judgment cited by the learned counsel for the first respondent in 1988 (Suppl) S.C.C. 651 (Secretary to Government, Transport Department, Madras V. Munuswamy Mudaliar) it has been categorically laid down as follows:

11. This is a case of removal of a named arbitrator u/s 5 of the Act which gives jurisdiction to the curt to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior land the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and make a ground for removal of a named arbitrator. In our opinion this cannot be at all, a good or valid legal ground. Unless there is allegation gainst the named arbitrator either against his honesty or capacity or mala fide or interest in the subject matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretionvested in the court u/s 5 of the Act....

13. This Court in International Authority of India v. K.D.Bali held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the government, clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of the ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator.

15. Yet another judgment was cited by the learned counsel for the respondent in support of his case reported in International Airports Authority of India Vs. K.D. Bali and Anr, . The relevant passage would run as follows:

...The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. While on this appoint we reiterate that learned counsel appearing for the petitioner in his submissions made a strong plea that his client was hurt and had apprehension because the arbitrator being the appointee of his client was not acceding to the request of his client which the petitioner considered to be reasonable. We have heard this submission with certain amount of discomfiture because it cannot be and we hope it should never be in a judicial or a quasi-judicial proceeding a party who a party to the appointment could seek the removal of an appointed authority or arbitrator on the ground that appointee being his nominee had not acceded to his prayer about the conduct of the proceeding. It will be a sad day in the administration of justice if such be the state of law. Fortunately, it is not so. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision. It is the reasonableness and the apprehension of an average honest man that must be taken note of. In the aforesaid light, if the alleged grounds of apprehension of bias are examined, we find no substance in them. It may be mentioned that the arbitrator was appointed by the Chief Engineer of the petitioner, who is in the service of the petitioner.

16. On a careful perusal of the said judgments, it is seen that unless any misconduct or any impartiality is noted with the arbitration and the award was affected by such misconduct or impartiality, there would not be any removal of such arbitrator. It has also been emphasised that the mere apprehension of bias cannot be a ground against the arbitrator for setting aside the award. The learned single Judge had observed that the factual aspects considered by the arbitrator cannot be reappraised since he had acted in terms of the agreement and passed the award. In the said circumstances, there was nothing placed before us to vary the said conclusion reached by the learned single Judge for coming to a different conclusion that the arbitrator, even though he was named in the agreement itself, had acted bias and misconducted himself in the award passed by him. Moreover, the appellant has not raised any preliminary objection in the counter claim statement before the Arbitrator regarding his appointment as a preliminary objection. Per contra, we could see that the appellant has asked for in the counter claim before the Arbitrator, the damages caused due to the seizure of the machinery. In the said circumstances, the argument advanced by the learned counsel for the appellant that the Arbitrator had acted in a biased manner and the award passed by him has to be set aside on that score cannot has no force.

17. Coming to the next argument of the learned counsel for the appellant that the Arbitrator has not considered the interest paid by the appellant during the gestation period and direction to pay the rate of interest payable at 14% with 1% penal interest are

concerned, we have perused the terms of the agreement regarding the payment of interest. In the agreement, it is covered under clauses 4 and 5 of the agreement, which would runs as follows:

4. The Borrower shall pay to the Corporation on the loan amount or on the balance thereof due from time to time at the rate of 14% pa. (or at such other rate as may be notified by the Corporation from time to time) with quarterly rest.

5. The Borrower also agrees to pay to the Corporation additional interest @ 1% from time to time on the instalments remaining unpaid or overdue in case of default of payment of instalments.

18. As per the said clauses, the rate of interest fixed was at 14% per annum with quarterly rest with additional interest of 1% from time to time if the instalments are remaining unpaid or overdue. Therefore, the agreement regarding the payment of interest is very clear to show that the appellant was liable to pay 14% per annum with quarterly rests and 1% more than the said rate in case of defaulted payments. No doubt the appellant had defaulted to pay the instalments and therefore, there was a necessity to lock the machinery as well as the seizure of the machinery. Under such circumstances, can the arbitrator reduce he quantum of interest payable by the appellant lesser than the contractual is the question. The judgment of the Hoourable Apex Court cited by the learned counsel for the respondent reported in 2010 (4) CTC 856 (Indian Bank v. Blue Jaggers Estates Ltd.) and Syndicate Bank Vs. R. Veeranna and Others, are the answer.

19. In the judgment reported in 2010 (4) CTC 856 (Indian Bank v. Blue Jaggers Estates Ltd.) in paragraph No. 16, it has been held as follows:

16. The argument of the learned counsel for the Respondents that the rate of interest is unconscionable, expropriatory and contrary to law also merits rejection because at no stage the Respondents had questioned the terms on which loan and other financial facilities were extended by the Appellant. That apart, after having enjoyed those facilities for more than one decade, the Respondents cannot turn around and raise an argument based on the judgments of this Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, . It must be remembered that the respondents were not in a position of disadvantage vis-a-vis the appellant. If they so wanted, the respondents could have declined to avail loan and other financial facilities made available by the appellant. However, the fact of the matter is that they had signed the agreement with open eyes and agreed to abide by the terms on which the loan, etc. was offered by the appellant. Therefore, the Doctrine of Unconscionable Contract cannot be invoked for frustrating the action initiated by the Appellant for recovery of tis dues.

20. In the judgment reported in Syndicate Bank Vs. R. Veeranna and Others, in paragraph No. 8 it has been held as follows:

We may add that in the light of the acknowledgement of their liability by the defendants in 1978, it is not open to them now to deny to make payment of the amount due to the Bank on the ground that higher rate of interest could not be charged. It is clear from the judgment of this Court in Harialal v. Badkulal that an unqualified acknowledgement of liability as in the present case by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim.

21. The first respondent being the financial institution is entitled to charge the contractual rate of interest and the learned Arbitrator has also awarded the interest in accordance with Clauses 4 and 5 of the agreement. The learned single Judge had also found the award of interest during the period of arbitration as correct. However, the learned single Judge had reduced the rate of interest from 15% to simple interest of 9% from the date of award till the date of realisation on the outstanding principal sum of Rs. 3,71,599/-. In the said circumstances, we find no merits in the submissions made by the learned counsel for the appellant stressing to interfere with the decision of the learned single Judge. Therefore, we are of the considered view that there are no merits in the submissions made by the learned counsel to interfere with the judgment of the learned single Judge and therefore, the appeal deserves dismissal.

22. For the foregoing discussion, we are of the considered view that the appeal deserves dismissal. Accordingly, the appeal is dismissed. There shall be no order as to costs.