

(2008) 02 DEL CK 0292

Delhi High Court

Case No: AA 472 of 2007

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

Prem Power Construction Pvt.
Ltd.

RESPONDENT

Date of Decision: Feb. 29, 2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6)
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 18, 34

Citation: (2008) 2 ARBLR 39 : (2008) 151 DLT 172 : (2008) 103 DRJ 605

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: M.S. Vinaik and Pankaj Pathak, for the Appellant; A.P. Singh and S.P. Suman, for the Respondent

Judgement

Hima Kohli, J.

The present petition is filed by the petitioner u/s 11(6) of the Arbitration and Conciliation Act 1996, praying inter alia, for appointment of an Arbitrator in terms of Clause 5 contained in the Memorandum of Understanding dated 31st August, 2007 which is reproduced here in below:

That all disputes, differences and/or claim arising out of or touching upon this Memorandum of Understanding shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitration of an Arbitrator who shall be appointed either by mutual agreement or in case no mutual agreement is reached by court. The arbitration shall be held in New Delhi. The award given by such an Arbitrator shall be final and binding on all the interested parties to this MOU.

2. It is stated in the petition that the respondent No. 1 which is a private limited Company, approached the petitioner for a loan of Rs. 50 lacs for the purposes of capital expenditure to be incurred by them for advancement in business. A Loan-Cum-Hypothecation agreement was accordingly executed between the parties wherein the petitioner was the lender and the respondents No. 1 to 3 were borrower, co-borrower and guarantor respectively. In terms of the aforesaid agreement, the petitioner released the amount to the respondents. The said loan carried an interest of 18.025% per annum.

3. It is stated on behalf of the petitioner that as the respondents started defaulting in paying the monthly Installments, the petitioner issued a notice dated 10th August, 2007 to them recalling the entire loan amount and also calling upon the respondents to pay a sum of Rs. 43,33,801.45. Upon receipt of the aforesaid notice, the respondents approached the petitioner and offered to pay a sum of Rs. 7,38,000/- to it in full and final settlement of the entire outstanding claims of the petitioner against the respondents. They also assured the petitioner that they would continue to pay future Installments regularly. Accordingly, the parties signed the Memorandum of Understanding dated 31st August, 2007, which contains the arbitration clause referred to hereinabove.

4. Subsequent to execution of the aforesaid MoU, the respondents paid an initial amount of Rs. 3,19,000/- to the petitioner, but the very first cheque which was tendered by the respondents in payment of future Installments was dishonoured on presentation. It is stated that the balance amount of Rs. 4,19,000/-, out of the initial payment of Rs. 7,38,000/- contracted to be paid, has also not been paid by the respondents till date. The applicant accordingly issued a notice dated 4th October, 2007 to the respondents calling upon them to pay the sum of Rs. 41,59,637.02 less Rs. 4,19,000/- (which was not immediately payable at that stage to the petitioner), i.e. Rs. 37,40,637.02/-. Counsel for the petitioner contends that despite the aforesaid notice, the respondents failed to pay the demanded amount and failed to reply to the notice, thus compelling the petitioner to prefer the present petition.

5. Notice was issued on the aforesaid petition on 12th November, 2007. A reply to the same has been filed, wherein the arbitration agreement governing the parties is not disputed, but it is stated that the respondent No. 2 is not a signatory to the MoU and has been wrongly imp leaded. The aforesaid objection is conceded to by the counsel for the petitioner who makes an oral prayer for deletion of the name of the respondent No. 2, which is allowed.

6. It is not denied on behalf of the respondents that the equated monthly Installments as stipulated in paragraph 3 of the Memorandum of Understanding have not been paid by them to the petitioner, regularly. However, counsel for the respondents submits that as the petitioner failed to comply with the conditions contained in Clause 4 of the Memorandum of Settlement by withdrawing all legal cases, notices/complaints including pending proceedings of winding up before the

Company Court and the Debt Recovery Tribunal and those initiated under the Negotiable Instruments Act, the respondents did not pay the balance amount of Rs. 4,19,000/- to the petitioner.

7. It is further submitted by the counsel for the respondents that the winding up petition filed by the petitioner was disposed of by the Company Court as recently as on 13th February, 2008 and hence the respondents cannot be blamed for non-compliance of Clause 4 of the Memorandum of Understanding. Fact remains that the respondents are defaulters and the plea taken by them, as above, will constitute "a dispute" for being adjudicated by the Arbitral Tribunal.

8. Counsel for the respondents further states that the entire transaction between the parties is covered by the provisions of the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, and that this Court does not have the jurisdiction to try and entertain the present petition. In support of his contention, he seeks to place reliance on the provisions of Sections 18 and 34 of the aforesaid Act. A perusal of the aforesaid provisions does not indicate that if parties have mutually agreed to choose a forum of adjudication by agreeing to appoint an Arbitrator to go into their inter se disputes, then merely because the petitioner is a Bank or financial institution, it is barred from invoking the provisions of the Arbitration and Conciliation Act, 1996. The aforesaid submission of the respondents is, Therefore, turned down.

9. Fact remains that the respondents have not complied with Clause 3 of the Memorandum of Understanding by paying equated monthly Installments.

10. A perusal of the letter dated 4th October, 2007, issued by the petitioner shows that the petitioner had suggested the name of an Arbitrator and called for the consent of the respondents to appoint him. However, the respondents failed to reply to the said notice.

11. In the case of *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* reported in 1 (2000) CLT 191 (SC) : (2000) 7 SLT 543 : JT 2000 (Supp.2) SC 226, the Supreme Court has held that if the vacancy of an arbitrator is not filled till the party approaches the Court and files a petition for appointment of an arbitrator by the designated authority of the Chief Justice of that Court u/s 11(6) of the Arbitration and Conciliation Act, the right to supply the vacancy by the opposite party stands extinguished. The ratio of the aforesaid case was approved by the Supreme Court in [Shrikant Vs. Vasantrao and Others](#), and it was again followed by a Division Bench of this Court in the case of [Delkon \(India\) Pvt. Ltd. Vs. The General Manager, Bharat Heavy Electricals Ltd.](#), .

12. In view of the aforesaid judgments, the respondents have lost their right to appoint an Arbitrator, they having failed to do so within 30 days from the date of receipt of the notice from the petitioner for appointment of an Arbitrator, or even prior to the institution of the present petition.

13. In these circumstances, it is deemed appropriate to allow the present petition. Ms. Justice Sharda Aggarwal(Retd.) is appointed as the sole Arbitrator to adjudicate all the disputes arising between the parties. The parties shall share the fee equally, which shall be fixed by the Arbitrator.

14. The parties shall appear before the Arbitrator on 13th March, 2008 at 4.30 P.M. The Registry is directed to forward a copy of the order to the Arbitrator forthwith. The parties are also directed to intimate the Arbitrator about the order.

15. The petition is disposed of.