

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.05.2017

+ O.M.P. (COMM) 194/2017

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S.E. INVESTMENTS LTD. Respondent

WITH

+ O.M.P. (COMM) 195/2017

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ O.M.P. (COMM) 196/2017

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ O.M.P. (COMM) 197/2017

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ O.M.P. (COMM) 198/2017

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD.

..... Respondent

WITH

+ **O.M.P. (COMM) 199/2017**

S.E. INVESTMENTS LIMITED

..... Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Respondents

WITH

+ **O.M.P. (COMM) 200/2017**

S.E. INVESTMENTS LIMITED

..... Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Respondents

WITH

+ **O.M.P. (COMM) 201/2017**

S.E. INVESTMENTS LIMITED

..... Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Respondents

WITH

+ **O.M.P. (COMM) 202/2017**

S.E. INVESTMENTS LIMITED

..... Petitioner

versus

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Respondents

WITH

+ **O.M.P. (COMM) 203/2017**

S.E. INVESTMENTS LIMITED Petitioner

versus

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Respondents

WITH

+ **O.M.P. (COMM) 208/2017**

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ **O.M.P. (COMM) 209/2017**

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ **O.M.P. (COMM) 210/2017**

SMT. SHAKUNTLA EDUCATIONAL AND WELFARE SOCIETY & ORS. Petitioners

versus

S. E. INVESTMENTS LTD. Respondent

WITH

+ O.M.P. (COMM) 211/2017

S.E. INVESTMENTS LIMITED Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.** Respondents

WITH

+ O.M.P. (COMM) 212/2017

S.E. INVESTMENTS LIMITED Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.** Respondents

WITH

+ O.M.P. (COMM) 213/2017

S.E. INVESTMENTS LIMITED Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.** Respondents

WITH

+ O.M.P. (COMM) 214/2017

S.E. INVESTMENTS LIMITED Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.** Respondents

WITH

+ **O.M.P. (COMM) 215/2017**

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Petitioners

versus

S. E. INVESTMENTS LTD.

..... Respondent

WITH

+ **O.M.P. (COMM) 216/2017**

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Petitioners

versus

S. E. INVESTMENTS LTD.

..... Respondent

WITH

+ **O.M.P. (COMM) 219/2017**

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Petitioners

versus

S. E. INVESTMENTS LTD.

..... Respondent

AND

+ **O.M.P. (COMM) 220/2017**

S.E. INVESTMENTS LIMITED

..... Petitioner

versus

**SMT. SHAKUNTLA EDUCATIONAL AND
WELFARE SOCIETY & ORS.**

..... Respondents

Advocates who appeared in this case:

For the Smt. Shakuntla

Educational & Welfare Society : Dr Abhishek Manu Singhvi, Senior

Advocate with Mr Ashwini Mata, Senior

Advocate with Mr Sanjeev Narula, Mr
Sunil Dalal, Ms Sangeeta and
Mr Anshuman Upadhyay
For the S.E. Investment Ltd. : Mr P. Nagesh, Ms Shuchi Sejwal and Mr
Sanskar Agarwal, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. These petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 23.01.2017 (hereafter 'the impugned award') passed by the sole arbitrator, Justice R.C. Chopra (Retired).

2. The impugned award was rendered in the context of disputes that had arisen in respect of loans - ten in number - advanced by S.E. Investments Ltd. (hereafter 'SEIL') to Smt. Shakuntla Educational and Welfare Society (hereafter 'the Society'). M/s Galgotias Hotels & Resorts Private Limited, M/s Galgotia Publications Private Limited, Sh. Suneel Galgotia and Smt. Padmini Galgotia had agreed to be jointly and severally liable along with the Society for repayment of the loans, interest and late fees in terms of the loan agreements. Sh. Dhruv Galgotia also guaranteed one of the loans (that is, loan no. LD2926). The aforementioned two companies and the three individuals are hereafter collectively referred to as 'the Guarantors'; the said expression would exclude Sh. Dhruv Galgotia when used in the context of loans other than the loan under Code LD2926.

3. SEIL is a Non-Banking Financial Company (NBFC) which is duly registered with the Reserve Bank of India under Section 45-IA of the Reserve Bank of India Act, 1934. The Society is a registered society under the Societies Registration Act, 1860 and is stated to be the primary sponsor

of several educational institutions including Galgotias University. Sh. Suneel Galgotia, Smt. Padmini Galgotia and Sh. Dhruv Galgotia are office bearers of the governing body of the Society; Sh. Suneel Galgotia is the President, Smt. Padmini Galgotia is the Secretary and Sh. Dhruv Galgotia is the executive member. The said persons are closely related; Smt. Padmini Galgotia is the wife of Sh. Suneel Galgotia and Sh. Dhruv Galgotia is the son of Sh. Suneel Galgotia and Smt. Padmini Galgotia. M/s Galgotias Hotels & Resorts Private Limited and M/s Galgotia Publications Private Limited are companies incorporated under the Companies Act, 1956.

4. The Society failed to repay the loans in terms of the loan agreements entered into between the parties. The Guarantors also failed to discharge the liability when called upon to do so. This led to disputes between the parties which were referred to the sole arbitrator appointed by this Court with the consent of the parties.

5. There is no dispute that the Society had availed the loans in terms of the loan agreements entered into between the parties. The said loans were to carry interest at the rate of 26% p.a. flat and were to be paid in 23 equal monthly instalments (EMIs) excluding the advance EMI. It was also stipulated that default in paying any of the EMIs would result in liability to pay late fee at the rate of ₹2 per thousand per day or such other rate as may be specified by SEIL.

6. Admittedly, the parties had a long standing relationship and SEIL had extended loans on various occasions in the past to the Society and other related parties. It is also stated that the total finance extended by SEIL to such parties during the period from 2000 to 2011 exceeded ₹100 crores. All such loans were extended on interest rates ranging between

20% p.a. to 26% p.a. flat. The said loans (advanced in the past) had also been repaid by the Society/related parties. During the period April 2011 to November 2012, SEIL extended loans aggregating ₹37,60,00,000/- to the Society. The loan documents executed included pro-notes, loan agreements, guarantee agreements, undertakings, etc. SEIL also received post dated cheques (PDCs) for the EMIs for all the loans, calculated on the basis of interest payable at the rate of 26% p.a. flat.

7. The details of the amounts borrowed (₹37,60,00,000/-) against the loan agreements (identified by the respective Codes) are as under:-

Code	Date of Agreement	Finance Amount (in Rs.)
LD2518	06.04.2011	2,25,00,000
LD2734	28.12.2011	2,00,00,000
LD2739	30.12.2011	4,00,00,000
LD2757	21.01.2012	3,00,00,000
LD2758	21.01.2012	3,40,00,000
LD2759	21.01.2012	3,60,00,000
LD2792	21.01.2012	5,00,00,000
LD2808	02.03.2012	5,00,00,000
LD2816	20.03.2012	4,00,00,000
LD2926	29.11.2012	5,35,00,000
TOTAL:		37,60,00,000

8. SEIL filed its claims for recovery of the loan amounts along with interest and late fee charges in terms of the loan agreements. SEIL also made a claim for costs. The Society/Guarantors contested the aforesaid claims on several fronts. The relevant facts and defence set up by the Society/Guarantors before the arbitral tribunal are summarized as under:

8.1 It was the case of the Society/Guarantors before the arbitral tribunal that in the year 2011-12, the Society was in desperate need for funds for

the purposes of furthering its philanthropic goals including establishment of the Galgotias University which was at its "*nascent stage*". The Society also needed funds for financing other educational institutions viz. Galgotias College of Engineering and Technology, Galgotia Institute of Management and Technology and Galgotias Business School. Accordingly, the Society had entered into loan agreements (ten in number) on various dates for availing loans aggregating ₹37,60,00,000/-.

8.2 It is stated that the Society had also given a sum of ₹2.75 crores towards security deposit. However, SEIL claims that a sum of ₹2.45 crores had been paid as consideration for a separate transaction for providing consultancy services.

8.3 The Society/Guarantors claimed that SEIL being aware of the Society's precarious financial position took undue advantage of the same and abused its dominant position to provide finance on unconscionable terms and conditions. Such terms were incorporated in loan agreements/documents made on standard templates. SEIL did not permit the said documents to be changed or any new clause to be incorporated. As signing the said loan agreements was a pre-condition for grant of loan, therefore, the Society had no alternative but to agree to the imposition of enormous, harsh, usurious and exorbitant rates of interest and other penal charges.

8.4 The Society/Guarantors claimed that during the first half of the financial year 2012-13, the financial condition of the Society was under enormous stress occasioned by completion of establishment of the Galgotias University coupled with high rate of interest being charged by SEIL in respect of the loans granted (except loan under LD2926 which was availed subsequently in November 2012). Thus, on or about middle of

October 2012, a meeting took place between Sh. Suneel Galgotia in his capacity as the President of the Society and Sh. Sunil Aggarwal, the Managing Director of SEIL and a settlement was arrived at between the parties on the following terms:-

- "(i) other than cheques (for October 2012) already banked, Claimant would bank no other cheques;
- (ii) EMI cheques for remainder tenure of the captioned nine loan agreements would be returned to Respondent No.1;
- (iii) the remaining outstanding amounts in each of the nine loan agreements would be treated (subject to final application of agreed rate of interest mentioned below to be applicable from the date of commencement of each loan account respectively) as principal for a new advance/loan;
- (iv) each of the nine loan accounts would carry an agreed interest @12.5 per annum. There would be a moratorium on repayment of both principal and interest for a period of two years ending on 31.10.2014.
- (v) fresh loan, agreements would be executed for which Respondent No.1 would be required to pass necessary resolutions."

8.5 It is asserted that the aforesaid terms were accepted by both the parties; thus, bringing about a "*new/novated agreement/ arrangement/ understanding*", which substituted the obligations under the loan agreements entered into earlier. It is asserted that in terms of the said understanding/agreement, SEIL stopped banking EMI cheques from October 2012 onwards. SEIL also returned several PDCs to the Society and also promised to return the remainder cheques. It is stated that Society/Guarantors once again sought and were granted a further loan of ₹5,35,00,000/- from SEIL in November 2012 to meet some unanticipated

expenses. This loan was also guaranteed by Sh. Dhruv Galgotia. Admittedly, the loan agreement in respect of this loan (LD2926 dated 29.11.2012 for a sum of ₹5,35,00,000/-) was also executed on similar terms as the earlier loan agreements; that is, on interest at the rate of 26% p.a. flat.

8.6 The Society/Guarantors claimed that thereafter *ad hoc* payments aggregating to ₹5.28 crores were made after June 2013 as "*a goodwill gesture*" and SEIL was reminded to execute fresh loan agreements on revised terms.

8.7 On 07.12.2013, SEIL sent a letter claiming that the Society had defaulted in making payments and hence the late fee penalty/penal interest had been increased to ₹3 per thousand per day. SEIL claimed that an amount of ₹17,91,43,799/- was due on account of "late fee on overdue instalments". The Society/Guarantors claimed that the said late fee was unilaterally increased from ₹11,94,29,206/- as on 01.12.2013 by increasing the charges with retrospective effect.

8.8 Thereafter, SEIL sent another notice dated 18.12.2013 invoking the guarantees and called upon the Guarantors to discharge the amounts as claimed. It is averred that thereafter the parties made efforts to resolve the disputes amicably and held several meetings for the said purpose.

8.9 On 29.03.2014, SEIL sent a signed settlement letter by Mr Sarmesh Aggarwal along with a board resolution in his favour recording an agreement that a sum of ₹32,04,10,466/- would be paid by the Society on or before 20.04.2014 towards full and final settlement of all claims/outstanding amounts and all legal action initiated by the parties would be withdrawn.

8.10 Although Sh. Suneel Galgotia took delivery of the said letter, he did not execute the same as according to the Society/Guarantors, the amount mentioned in the settlement letter dated 29.03.2014 was not in accordance with the arrangement/understanding/agreement arrived at between the parties in October 2012. According to the Society/Guarantors, an aggregate amount of ₹15,90,66,935/- was agreed as payable as on 29.03.2014.

9. SEIL disputed the contentions advanced on behalf of the Society/Guarantors. Insofar as the settlement agreement dated 29.03.2014 is concerned, SEIL stated that no such agreement could fructify because Sh. Suneel Galgotia refused to sign the said settlement and also refused to return the original copy. Further, the said settlement was premised on the basis that the payment would be made by 20.04.2014, which was admittedly, not done and, therefore, there was no agreement between the parties. A complaint was also filed with the Commissioner of Police, Gurgaon for the acts of the Guarantors after 29.03.2014.

Impugned Award

10. The arbitral tribunal considered the rival contentions and after examining the evidence and material on record, passed the impugned award. The arbitral tribunal rejected the contention that the loan agreements were induced by exerting undue influence and held that the parties had agreed to the rate of interest and other terms as mentioned in the loan agreements. The arbitral tribunal also noted that the Society had been availing loans for the past many years at the rate of interest ranging from 20% p.a. to 26% p.a. and had also repaid such loans along with the agreed interest. The arbitral tribunal held that it was unbelievable that in the ten loan transactions (which were the subject matter of the arbitral proceedings) and 42 prior loan transactions, the Society/Guarantors had

agreed to pay higher rate of interest under pressure or duress. The arbitral tribunal also held that the rate of interest did not appear to be in violation of the RBI guidelines or the Fair Practices Code for NBFCs.

11. The contention that the loan agreements were signed in blank or under duress was rejected as being baseless. The arbitral tribunal found that the relationship between the parties was cordial till SEIL sent a legal notice dated 07.12.2013. The contention that interest rate of 26% p.a. flat misrepresented the actual rate of interest, which worked out to a yield of about 49% p.a. on reducing balance, was also rejected as the arbitral tribunal found that the copies of the "*Loan Scheme*", which clearly indicated the "*Effective annualised rate of interest*" being around 49% p.a., was signed by the Society/Guarantors. Thus, there was full disclosure.

12. The contention that interest rate of 26% p.a. was unconscionable and shocking was rejected. Accordingly, the arbitral tribunal held that the Society/Guarantors was liable to pay interest at the rate of 26% p.a. flat.

13. Similarly, the arbitral tribunal also rejected the contention that levy of late fee at the rate of ₹2 per thousand per day was in the nature of penalty or was punitive. The arbitral tribunal held that the late fee was in the nature of compensation payable by the Society/Guarantors for default and delays in paying the EMIs. The RBI also did not debar charging of late fee and, therefore, such levy was permissible.

14. Insofar as the controversy regarding existence of an oral settlement purportedly entered into between the parties in October 2012 is concerned, the arbitral tribunal held that there was certainly an oral agreement between the parties which envisaged a revision/modification of the terms of the earlier loan agreements entered into between the parties. However, the arbitral tribunal held that the Society/Guarantors had failed to prove by

satisfactory evidence as to what rate of interest was agreed to be charged. The arbitral tribunal held that mere existence of an oral agreement was not sufficient to return a finding as to the revised rate of interest. However, the arbitral tribunal held that there was sufficient material to conclude that the parties had agreed for a moratorium on repayment of loans for a period of two years from October 2012. The arbitral tribunal concluded the above on the basis of the oral testimony of Sh. Suneel Galgotia (RW-1) as well as on the basis that there was no communication issued by SEIL till 07.12.2013, demanding the instalments. On the contrary, certain PDCs had been returned and SEIL had also not presented other PDCs for encashment, which were in its possession.

15. The arbitral tribunal rejected the contention that during the said period, ₹5.28 crores had been paid by the Society/Guarantors towards the clearance of outstanding EMIs on the basis that there was no written document between the parties which indicated the details of the EMIs which were being cleared by those payments. The arbitral tribunal also noted that cheques relating to the EMIs pertaining to the loan extended in November 2012, had also not been presented. After considering the totality of the evidence, the arbitral tribunal concluded that the parties had orally agreed that there would be a moratorium on payments for a period of two years. Resultantly, the arbitral tribunal held that no amount for delayed charges was payable during the moratorium period.

16. The arbitral tribunal also held that a sum of ₹2.45 crores was not received towards consultancy charges as claimed by SEIL and the same was liable to be adjusted from the amounts due under the loan agreements.

17. In view of the above, the claims made by SEIL were allowed to the extent of the balance amount along with interest from 10.08.2014 till the

date of the award. The arbitral tribunal also awarded future interest at the rate of 18% p.a. from the date of the award till payment. SEIL was also awarded cost at the rate of ₹3,00,000/- in each case, thus, aggregating ₹30,00,000/-.

18. The counterclaims (for a sum of ₹595 crores) preferred by the Society/Guarantors for damages on account of malicious prosecution were rejected on three grounds. First, the arbitral tribunal held that no finding had been returned by any court to the effect that the complaint case as well as FIR filed against Smt. Padmini Galgotia and Sh. Dhruv Galgotia were false, frivolous and bogus. The FIR (FIR No.862/2004) had been quashed by the Allahabad High Court for the reason that the ingredients of the offence alleged were not made out and the disputes between the parties were of a civil nature. Second, there was no basis to quantify the claim amount of ₹595 crores. And third, the FIR and complaint case were filed by two individuals, Mr Samresh Aggarwal and Mr Sanjeev Aggarwal, who were not parties to the arbitration agreement or the arbitral proceedings and in absence of the said parties, the counterclaims could not be sustained.

Submissions

19. Mr Singhvi, learned Senior Counsel appearing on behalf of the Society/Guarantors contended that the rate of interest of 26% p.a. flat was excessive, harsh, burdensome and usurious and the arbitral tribunal had grossly erred in not accepting the same. He submitted that the loan agreements between the parties for charging such interest was void *ab initio*. Mr Mata, learned Senior Counsel appearing for the Society/Guarantors also supplemented the aforesaid contentions. He also argued that the arbitral tribunal had come to a definite finding that there was an oral settlement between the parties in October 2012, which entailed

that there would be a moratorium of two years. The arbitral tribunal had also accepted that such settlement was arrived at on account of a high rate of interest, which the Society/Guarantors were finding difficult to bear. However, the arbitral tribunal rejected the claim that the parties had agreed to reduce the interest rate from 26% p.a. flat to 12.5% p.a. flat on the basis that the same was not established. He submitted that this course was not open to the arbitral tribunal as having held that there was an oral agreement, the arbitral tribunal had to adjudicate and determine the terms of the said oral agreement and the rate of interest as specified in the loan agreements (that stood novated) could not be accepted. He submitted that Sh. Suneel Galgotia (RW-1) had in his evidence set out the terms of the agreement which included that there would be a reduction in the rate of interest from 26% p.a. to 12.5% p.a. and his evidence remained uncontroverted as there was no cross-examination on the same. Thus, the finding of the arbitral tribunal that there was no material to establish the reduction in rate of interest, was perverse and the arbitral tribunal's approach adopted was not judicious.

20. He also contended that in terms of Section 3 of the Usurious Loans Act, 1918, the Court had to reach the conclusion that the rate of interest was excessive and the transaction was unfair. The excessive rate of interest of around 49% (annualised) clearly indicated that the ingredients of Section 3 of the Usurious Loans Act, 1918 were fully satisfied. He also urged that the charging of exorbitant rate of interest was also hit by Section 23 of the Indian Contract Act, 1872.

21. Lastly, he contended that the arbitral tribunal had erred in rejecting the counterclaims as the decision of the Allahabad High Court in quashing the FIR clearly indicated that the FIR lodged was vicious and malicious and, therefore, the counterclaims ought to have been allowed.

22. Mr Nagesh, the learned counsel appearing for SEIL countered the aforesaid submissions made on behalf of the Society/Guarantors. He supported the findings of the arbitral tribunal in regard to rate of interest as well as payment of late fee charges. He, however, stoutly contended that the decision of the arbitral tribunal that there was an oral agreement was perverse and wholly unsustainable. He pointed out that the contention that parties had agreed for a moratorium in October 2012 was plainly belied by (i) the loan agreement entered into in November 2012, which did not incorporate any of the terms of the oral agreement allegedly arrived at between the parties in October 2012; and (ii) the fact that payments to the extent of ₹5,28,69,710/- were made between June 2013 and 07.12.2013. He submitted that these payments were made against EMIs. He also referred to the Society's letter dated 15.10.2013, which specifically indicated that payment of an aggregate sum of ₹99,13,088/- (₹39,65,220/- plus ₹59,47,868/-) was against specific cheques issued against EMIs. The arbitral tribunal had explained away the same by stating that the said payments would be against EMIs due prior to October 2012. However, the same was plainly contrary to the letter dated 15.10.2013. He stated that in all, payments of ₹5,28,69,710/- were admittedly made between June and November 2013 and the same could not be accepted as *ad hoc* payments.

Reasoning and Conclusion

23. The first and foremost question to be addressed is whether the impugned award is liable to be set aside inasmuch as the arbitral tribunal had rejected the contention of the Society/Guarantors that the contractual rate of interest was expropriatory and unconscionable and thus opposed to public policy. The arbitral tribunal had considered the aforesaid contentions and had held that the parties had agreed to the stipulated rate of interest and had availed the loans exercising their free will and, therefore, it

was not open for the Society/Guarantors to resile from its agreement and challenge the loan agreements.

24. The arbitral tribunal had also referred to the decision of the Supreme Court in the case of *Indian Bank v. Blue Jagers Estates Limited and Others: (2010) 8 SCC 129* and the decision of this Court in *Deepak Bhatia v. Virender Singh: 2015 SCC OnLine Del 12187* and concluded that it was not open for a borrower to challenge the rate of interest after having availed of the loan facilities.

25. In the case of *Blue Jagers Estates (supra)*, the Supreme Court had rejected the arguments raised by the respondents therein that the rate of interest was unconscionable, expropriatory and contrary to law since they had, at no stage, questioned the terms on which the loans/financial facilities were extended by the appellant bank (Indian Bank). The respondents therein had enjoyed the facilities for more than a decade and, therefore, the Court held that it was not open for them to raise such contentions at that stage.

26. The *ratio decidendi* of the said decision would, *a fortiori*, apply to the facts of the present case. In the present case, the arbitral tribunal had noted that the Society/Guarantors/affiliated companies, had entered into 42 loan transactions (other than the subject transactions) over a period of approximately 12 years and had discharged the liability in terms of the loan agreements (SEIL claims that the number is even larger and the Society/Guarantors/affiliated companies had availed of and repaid 47 loans between the year 2000 and 2012). The Society/Guarantors could not be permitted to challenge the terms of the loan agreements after having enjoyed the benefit of the funds lent by SEIL.

27. The above also establishes that the Society/Guarantors were also in no doubt as to the terms of the loan agreements and had entered upon the same voluntarily at the effective rate of the interest payable by them.

28. The arbitral tribunal had referred to the decision of a Coordinate Bench of this Court in *Morgan Securities & Credits Pvt. Ltd. v. Morepen Laboratories Ltd & Anr.: 2006 (3) ArbLR 159 Delhi* and the decision of the Division Bench in *Morepen Laboratories Ltd. & Ors. v. Morgan Securities and Credits Pvt. Ltd.: 2008 (105) DRJ 408* and rejected the contention that the loan transactions fell foul of the Usurious Loans Act, 1918. This Court finds no infirmity with the aforesaid view.

29. It is also necessary to bear in mind that the transactions between the parties was a commercial transaction. Although the rate of interest of 26% p.a. (which would work out to be much higher as it is a flat rate of interest and not based on reducing balance method) is ex facie a very high rate of interest; it cannot be denied that the said transactions were entered into by the parties voluntarily without undue influence, in their commercial interest and it is not safe for courts to pronounce any value based decision on the merits of commercial terms as the same are determined by market forces, given the exigencies of trade and commerce. This is not a case where the Society/Guarantors are vulnerable parties who were - or could be - subjected to an exploitative unconscionable agreement. It is also relevant to mention that the funds provided by SEIL were unsecured and the loan transactions were plainly perceived as high risks transactions (from a lender's point of view). It is also apparent that the loan or finances sought by the Society was unavailable from the normal banking system and, therefore, the Society/Guarantors had to resort to availing loans from SEIL.

30. It is common knowledge that NBFCs do provide a source of resources to entrepreneurs and persons of commerce in cases where such resources are otherwise unavailable to them. It is also for this reason that it would not be apposite to curtail or restrict such transactions as they may have an effect of completely shutting out the only avenue available to entrepreneurs to avail of such high risk finance.

31. The cost of funds available to NBFCs engaged in lending high risk finance is also significantly higher and would in most cases also include significant component of proprietary funds.

32. The task to regulate such transactions and such NBFCs rests with the Reserve Bank of India and if the Reserve Bank of India has not found fit to put any cap on the interest rate in such commercial transactions, it would be wholly inapposite for the courts to venture to re-write the contract between the parties.

33. This Court in *Deepak Bhatia v. Virender Singh* (*supra*) had found no fault in a transaction which entailed interest at the rate of 20% p.a.

34. In view of the above, this Court finds no infirmity with the decision of the arbitral tribunal in regard to the rate of interest so as to warrant any interference under Section 34 of the Act.

35. The next question to be addressed is whether the late fee charges as included in the agreements are in the nature of penalty. The arbitral tribunal had concluded that the late fee as envisaged in the loan agreements was not in the nature of penalty but was in the nature of compensation payable by the Society/Guarantors to SEIL for defaults and delays in clearing the stipulated EMIs. The arbitral tribunal had also held that SEIL was not claiming the late fee as damages and, therefore, it was not

incumbent upon SEIL to prove the loss. Paragraph 94 of the impugned award is relevant and is quoted as under:-

"94. In my view, the Late Fee as envisaged in the Loan Agreements was not in the nature of penalty. It was in the nature of compensation payable by the Respondents to the Claimant for defaults and delays in clearing the stipulated EMIs. It does not stand established that the Loan Documents were signed by the Respondents when the same were blank or unfilled or that the Claimant had exercised any pressure, coercion or duress upon the Respondents for agreeing to Clause relating to the Late Fees. I also do not agree with the contention of the Learned Counsel for the Respondents that the Claimant is not entitled to recover Late Fees without proving the loss suffered by it. The reason is that non-availability of the funds to the Claimant as and when the same had fallen due, was bound to result in financial loss to the Claimant as it is a Finance Company and requires funds for carrying out its business. The Claimant is not claiming the Late Fee as damages so as to make it incumbent upon it to prove the loss. Clause 7 of the Loan Agreement regarding Late Fee was neither unreasonable nor arbitrary nor unconscionable or illegal. This clause was incorporated in the Agreements to make the Respondents abide by the understanding in regard to repayment of the loans along with interest on due dates. The Late fee clause was only to compensate the Claimant for delay in the clearance of the stipulated EMIs in regard to the loans and was not aimed at punishing the Respondents. If the idea had been to punish the Respondents, Section 138 of NI Act was there, which could be easily resorted to by the Claimant as and when any EMI Cheque got dishonored."

36. It is seen from the above that although the arbitral tribunal had concluded that the late payment fees was to compensate for the delay or default in honouring the EMIs, there was no material indicated by the arbitral tribunal in the award, which would support such conclusion. The late fee charges ranged upward of ₹2 per thousand per day which would translate to a minimum of ₹730 per thousand p.a., that is, 73% p.a. The

interest payable on the loans was at the rate of 26% p.a., which would translate to more than 45% p.a. on reducing balance. Yet the late payment charges were significantly higher at 73% p.a. If the said charges were increased - as SEIL had attempted to do - to ₹3 per thousand per day, the late fee would translate into a burden of 109.5% p.a. It is material to note that such charges would be triggered only if the Society/Guarantors breached the loan agreements and thus, such charges were clearly in the nature of damages and thus the arbitral tribunal was plainly wrong in its conclusion that SEIL was not required to justify the same.

37. SEIL had relied on the decisions of the Supreme Court in **Central Bank of India vs Ravindra and Others: 2002 (1) SCC 369** and **Punjab Urban Planning and Development Authority vs Raghunath Gupta and Others: AIR 2012 SC 3194** as well as the decision of the Andhra Pradesh High Court in **T. K. Srinivasulu vs Union of India Air : 2002 AP 335**. The said decisions are not authorities for the proposition that a penalty *in terrorem* for breach of contract is permissible. The issue before the Supreme Court in ***Ravindra's*** case (*Supra*) was the interpretation of the expression “the sum adjudged” as used in Section 34 CPC. The question whether a bank could levy a higher rate of interest, as penalty for breach of the obligations by a borrower was not a subject matter of controversy in that case. Similarly, the decision of the Supreme Court in ***Punjab Urban Planning and Development Authority*** (*Supra*) is wholly inapplicable. In that case the court was considering whether the state officer could impose a penalty at the rate of 2% per month on the amount due from an allottee of a plot of land. The court considered that the allotment of a plot was made on ‘as is where is’ basis and thus having accepted such allotment the allottee was estopped from contending that amenities were not provided by the authority and further withholding the amounts payable on that ground.

38. The case of *T. K. Srinivasulu* (*Supra*) pertains to credit card issued by a bank. As per the terms of agreement between the parties, the bank was entitled to recover interest at the rate 2.95% if (i) the payment was not made on due dates or (ii) partial payment was made or (iii) cash was withdrawn on the card. A credit card is service provided by the bank (or any other service provider) and it was entitled to charge interest on amounts that remained outstanding. The late fee in that case was restricted to the specified sum further the fee charged for availing the service of cash advance was also fixed at Rs.2.5% of the transaction value. Thus, these charges were plainly for the services rendered by the bank. This case is also not an authority for the proposition that punitive damages could be levied for breach of a contract.

39. It was SEIL's case that such charges were compensatory. It explained that once there was a default in payment of the EMIs, there was no mechanism to charge interest on the funds that were not made available to SEIL and, therefore, imposition of late fee was included in the loan agreements for the purposes of compensating SEIL for non-receipt of funds in time. The arbitral tribunal had readily accepted the aforesaid contention without examining the difference in the contractual rate of interest chargeable under the loan agreements and the rate of interest which the late fee would translate to.

40. Given that the late fee would translate to interest rate in excess of 73.5% p.a. which was significantly higher than the interest rate chargeable under the loan agreements, coupled with the fact that the interest rate under the loan agreements was itself extremely high; this Court has little doubt in accepting that unless SEIL could establish the loss suffered, it would not be entitled to claim such late fee to the extent of such late fee being in excess of the contractual rate of interest. SEIL had made no attempt to

claim damages or prove the loss and, therefore, would not be entitled to such charges.

41. Having stated the above, it is also relevant to mention that the aforesaid issue is only academic as the learned counsel for SEIL had fairly conceded that in this case he was not pressing for such charges and in any event, the arbitral tribunal had not awarded the same as it had held that the parties had agreed on a moratorium on payments.

42. The next question to be addressed is whether the arbitral tribunal had erred in holding that the parties had arrived at an oral settlement in October 2012, in terms of which the parties had agreed that there would be a moratorium on repayment of loans for a period of two years from October 2012 for EMIs other than already paid. The Society/Guarantors had asserted that there was an oral settlement, which not only entailed a moratorium on payments for a period of two years but also entailed reduction in the rate of interest from 26% p.a. flat to 12.5% p.a. flat. Although the arbitral tribunal had not accepted the contention that there was any settlement as to reduction of rate of interest, the contention that the parties had agreed on a moratorium was accepted.

43. Whilst the Society/ Guarantors have challenged the arbitral tribunal's decision to reject their claim of an oral settlement regarding reduction of interest, SEIL has challenged the finding that there was any oral agreement for a moratorium on repayment of loans.

44. Before proceeding further to address the rival contentions, it would be necessary to refer to the details of the ten loan transactions and the repayment schedules as agreed under the loan agreements. Tabular Statements indicating the repayment schedule of the loans and the amounts received against repayment of these loans are set out below:-

SMT. SHAKUNTALA EDUCATIONAL & WELFARE SOCIETY										
CASE NO WISE CHART OF AMOUNT DUE AND RECEIVED										
CASE	LD 2518		LD2734		LD2739		LD2757		LD2758	
MONTH	INSTT DUE	AMT RECD								
APR 2011	1,486,957	1,486,957								
MAY 2011	1,486,957	1,486,957								
JUN 2011	1,486,957	1,486,957								
JUL 2011	1,486,957	1,486,957								
AUG 2011	1,486,957	1,486,957								
SEP 2011	1,486,957	1,486,957								
OCT 2011	1,486,957	1,486,957								
NOV 2011	1,486,957	1,486,957								
DEC 2011	1,486,957	1,486,957	1,321,740	1,321,740		2,643,479				
JAN 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479		1,982,609	1,982,609	2,246,957	2,246,957
FEB 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
MAR 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
APR 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
MAY 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
JUN 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
JUL 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
AUG 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
SEP 2012	1,486,957	1,486,957	1,321,740	1,321,740	2,643,479	2,643,479	1,982,609	1,982,609	2,246,957	2,246,957
OCT 2012	1,486,957	1,486,957	1,321,740		2,643,479	2,643,479	1,982,609		2,246,957	
NOV 2012	1,486,957		1,321,740		2,643,479		1,982,609		2,246,957	
DEC 2012	1,486,957		1,321,740		2,643,479		1,982,609		2,246,957	
JAN 2013	1,486,957		1,321,740		2,643,479		1,982,609		2,246,957	
FEB 2013	1,486,957		1,321,740		2,643,479		1,982,609		2,246,957	
MAR 2013			1,321,740		2,643,479		1,982,609		2,246,957	
APR 2013			1,321,740		2,643,479		1,982,609		2,246,957	
MAY 2013			1,321,740		2,643,479		1,982,609		2,246,957	
JUN 2013			1,321,740		2,643,479		1,982,609		2,246,957	
JUL 2013			1,321,740		2,643,479		1,982,609		2,246,957	
AUG 2013			1,321,740		2,643,479		1,982,609		2,246,957	
SEP 2013		1,288,696	1,321,740		2,643,479	2,643,479	1,982,609		2,246,957	2,246,957
OCT 2013			1,321,740	660,870	2,643,479	5,947,868	1,982,609	5,947,829	2,246,957	
NOV 2013					2,643,479		1,982,609	1,982,609	2,246,957	
TOTAL	34,200,011	29,540,879	30,400,020	13,878,270	60,800,017	35,026,137	45,600,007	25,773,919	51,680,011	22,469,570

CASE	LD2759		LD2792		LD2808		LD2816		LD2926	
MONTH	INSTT DUE	AMT RECD	INSTT DUE	AMIT RECD	INSTT DUE	AMT RECD	INSTT DUE	AMIT RECD	INSTT DUE	AMT RECD
JAN 2012	2,379,131	2,379,131								
FEB 2012	2,379,131	2,379,131	3,304,348	3,304,348						
MAR 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
APR 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
MAY 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
JUN 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
JUL 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
AUG 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
SEP 2012	2,379,131	2,379,131	3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
OCT 2012	2,379,131		3,304,348	3,304,348	3,304,348	3,304,348	2,643,479	2,643,479		
NOV 2012	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	3,535,653
DEC 2012	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
JAN 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
FEB 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
MAR 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
APR 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
MAY 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
JUN 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	3,535,653
JUL 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	3,535,653
AUG 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
SEP 2013	2,379,131		3,304,348		3,304,348	3,304,348	2,643,479	2,643,479	3,535,653	3,535,653
OCT 2013	2,379,131	4,758,262	3,304,348	264,348	3,304,348		2,643,479	10,573,916	3,535,653	
NOV 2013	2,379,131		3,304,348		3,304,348		2,643,479		3,535,653	
DEC 2013			3,304,348		3,304,348		2,643,479		3,535,653	
JAN 2014					3,304,348		2,643,479		3,535,653	
FEB 2014									3,535,653	
MAR 2014									3,535,653	
APR 2014									3,535,653	
MAY 2014									3,535,653	
JUN 2014									3,535,653	
JUL 2014									3,535,653	
AUG 2014									3,535,653	
SEP 2014									3,535,653	
TOTAL	54,720,013	26,170,441	76,000,004	30,003,480	76,000,004	29,739,132	60,800,017	34,365,227	81,320,019	14,142,612

45. It is apparent from the above that the first loan (LD2518) was to be repaid in 23 EMIs commencing April 2011 upto February 2013 and the last disbursed loan - LD2926, which was disbursed in November 2012 - was to be repaid in 23 EMIs commencing November 2012 and ending in September 2014. It is apparent from the above that till September 2012 there was no default in payment of any of the aforesaid loans which were disbursed prior to the said date. However, the Society/Guarantors defaulted in repayment of loans thereafter and failed to pay the EMIs due in October 2012 in respect of four loans (LD2734, LD2757, LD2758 and LD2759).

46. The arbitral tribunal had accepted that there was an oral agreement on the basis of (i) the oral testimony of Sh Suneel Galgotia (RW-1);(ii) the fact that certain cheques of EMIs had been returned by SEIL;(iii) the fact that EMI cheques had not been deposited by SEIL; (iv) there being nothing in writing produced by SEIL to justify its action of not depositing the cheques and/or return of the cheques; and (v) no written demand for EMIs having been raised by SEIL.

47. The explanation that the cheques had not been deposited on the verbal request of the Society/ Guarantors was not accepted as the arbitral tribunal was of the view that something in writing to that effect was necessary. However, at the same time, the arbitral tribunal accepted that the parties had modified their written agreement by an oral agreement without entering into any document.

48. This Court is unable to concur with the view of the arbitral tribunal in this regard for several reasons. First of all, the finding that no amount against EMIs were received after October 2012 till the notice dated

07.12.2013 was issued, is plainly incorrect. SEIL had received a sum of ₹5,28,69,710/- after May 2013. The breakup of that is reflected in the tabular statements as set out above. The Society/Guarantors claimed that the said payments were merely *ad hoc* and at the request of SEIL for avoiding certain audit objections and tax complications. As to what audit objections and tax complications would arise is not reflected in the impugned award. As against this, SEIL had placed on record, the letter dated 15.10.2013, which reads as under:-

"Date: 15 Oct 2013

To,

M/s S.E. Investment Ltd
M-7, 1st Floor, M-Block Market,
Greater Kailash,
New Delhi 110048.

Sir,

Please find enclosed herewith DD No. 584409 Dt 15.10.2013 for Rs. 39,65,220/- towards repayment of our Loan No. LD 2734. The Demand Draft has been issued against cheques number as appeared here under:

<u>Cheque No.</u>	<u>Date</u>	<u>Amount (Rs.)</u>
629285	28.08.2013	13,21,739/-
629286	28.09.2013	13,21,739/-
629287	28.10.2013	13,21,739/-
		39,65,220/-

Also please find enclosed herewith DD No. 584410 Dt 15.10.2013 for Rs 59,47,868/- towards repayment of our Loan No. LD 2518. The Demand Draft has been issued against cheques number as appended here under:

<u>Cheque No.</u>	<u>Date</u>	<u>Amount (Rs.)</u>
971752	06.11.2012	14,86,957/-
971753	06.12.2012	14,86,957/-
971754	06.01.2013	14,86,957/-
971755	06.02.2013	14,86,957/-
		59,47,868/-

Please note that with this payment of Rs.59,47,826/- The LD 2518 stands adjusted in full & final.

Yours' Faithfully

For Smt Shakuntla Educational & Welfare Society

SD/-

(Suneel Galgotia)

President"

49. The above letter clearly indicates that the Society had made payments of ₹39,65,220/- and ₹59,47,868/- against cheques issued earlier. SEIL had also provided details of the payments aggregating ₹5,28,69,710/- paid by the Society from 29.06.2013 to 25.11.2013. Out of the aforesaid payments, one payment was made by RTGS on 26.07.2013; two payments were made by cheques on 29.06.2013 and 06.09.2013; and the remaining were made by 14 demand drafts issued on various dates. Plainly, if there was any arrangement for moratorium of two years, as claimed, there was no occasion for such demands to be made. Further, as pointed out, payments were made on 17 occasions.

50. The statement that the above payments were *ad hoc* payments can also not be readily accepted.

51. Secondly, the parties had entered into the agreement for loan disbursed in November 2012 (LD2926) on the same terms as the earlier loans. If there was any oral settlement as claimed (assuming that an oral settlement could be set up contrary to a written agreement), the written agreement executed thereafter would clearly be in terms of the settlement between the parties and not on terms in variance thereof.

52. More importantly, both the parties are incorporated entities and courts would be very sceptical in accepting oral settlement between incorporated entities which are required to keep record of their transactions. Additionally, in this case there was ample evidence on record to indicate that the parties entered into agreements by meticulously documenting the same. As indicated before, SEIL had extended loan on the basis of loan agreements, pro-notes, deed of guarantees and PDCs.

53. Having stated the above, this Court is also conscious that the scope of interference in the arbitral award is limited and the arbitral tribunal is the final authority on appreciation of evidence and findings of facts. The decision of the arbitral tribunal that there was a moratorium by an oral agreement falls squarely within the jurisdiction of the arbitral tribunal and this Court would have to refrain from interfering with the same. However, even if it is accepted that the parties had verbally agreed on a moratorium, there was hardly any material to indicate, other than the self serving testimony of Sh. Suneel Galgotia (RW-1), that the parties had agreed on the reduction of rate of interest. The arbitral tribunal had rightly accepted

that no such agreement had been established and this Court finds no infirmity with the said view.

54. The next question to be considered is whether the arbitral tribunal had erred in rejecting the counterclaims. The Society/Guarantors had preferred counterclaims for a sum of ₹595 crores in each of the ten cases pertaining to the respective loan agreements. However, the Society/Guarantors conceded that their counterclaims may be considered in only any one of the cases. The counterclaims were based on damages on account of defamation/malicious prosecution. A complaint and FIR had been filed against the Guarantors which had resulted in Smt. Padmini Galgotia and Sh. Dhruv Galgotia being incarcerated.

55. The complaint case is still pending, however, the FIR (FIR No. 862/2004 registered at PS Hari Parvat, Agra) was quashed by the Allahabad High Court. The High Court held that the allegations made in the FIR did not satisfy the ingredients of the offences alleged. The Society/Guarantors had asserted that the decision of the Allahabad High Court clearly established that the FIR and the complaint were malicious. They had severely tarnished the image of the Society/Guarantors and thus, they were entitled to compensation.

56. Without going into the question as to the arbitrability of the said disputes, it is clear that the counterclaims were premised on the basis that the Allahabad High Court had found the FIR to be vexatious and malicious. The arbitral tribunal had rejected the said contention and concluded that no such findings had come so far in favour of the counter claimants and the complaint case was still pending before the court. It is

seen that the Allahabad High Court had quashed the FIR on the ground that ingredients of the alleged offence were not made out.

57. In addition to the above, the arbitral tribunal had also rejected the counterclaims on the ground that the Society/Guarantors had not led any evidence in the proceedings to the effect that the statements made in the FIR were false and the arbitral tribunal was thus not in a position to return a finding to that effect. The arbitral tribunal also held that the complaint case as well as the FIR were filed by two individuals who were not parties to the arbitral proceedings. Lastly and most importantly, the arbitral tribunal had held that there was nothing in the pleadings or the evidence to reveal as on what basis the counterclaims have been quantified. This Court also finds no reason to interfere with the aforesaid findings.

58. Before concluding, it would be necessary to observe that during the course of proceedings, Mr Nagesh, had readily conceded that to put a quietus to the disputes, SEIL would not press for any claim regarding late fee and also accept a reduction in the *pendente lite* and future interest. SEIL is bound down to the aforesaid concessions. Accordingly, *pendente lite* and future interest is reduced to 15% p.a. and the impugned award is modified to the aforesaid extent. Needless to mention that if the Society/Guarantors seek to agitate the matter in appeal, SEIL would not be bound by its concessions granted.

59. Although, this Court has held that late fee is not payable but no modification of the impugned award on that ground is necessary because, as noticed hereinbefore, the arbitral tribunal had held that late fee was payable, but had not awarded the same for a different reason.

60. The petitions and all pending applications are disposed of with the aforesaid observations.

VIBHU BAKHRU, J

MAY 29, 2017

RK

