(2008) 02 BOM CK 0052

In the Bombay High Court

Case No : Judge''s Order No. 494 of 2006 in Arbitration Petition No. 242 of 2005 in Arbitration Petition No. 66 of 2005, Chamber Summons No. 676 of 2007 and Chamber Summons No. 124 of 2007 in Execution Application No. 425 of 2005 in Arbitration Award No. 162 of 200

Angerlehner Michel Construction Pvt. Ltd. — APPELLANT

Vs

Shrimouli Builders and Another and Ambajogai Peoples Co-op. Bank Ltd.
 L. and T. Finance Ltd. Vs Shrimouli Builders and Others — RESPONDENT

Date of Decision : 01-02-2008

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 73

Citation : (2008) 2 BomCR 518 : (2008) 3 MhLj 702

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Shakuntala Joshi, J.P. Sen, instructed by Mehta Girdharlal, in Chamber Summons No. 676 of 2007 and Judge''s Order No. 494 of 2006, for the Appellant; S.B. Rao, instructed by G.S. Rao, for Defendant No. 1, in all Chamber Summons and Respondent No. 1 in Judge''s Order No. 494 of 2006, Reshma Nathani and Vijay Patil for Maharashtra Krishna Valley Development Corporation (Garnishee), for the Respondent

Judgement

S.J. Vazifdar, J.—The above proceedings can conveniently be disposed of by a common order.

2. It is not necessary to refer to the facts in detail as they have already been set out in the order and judgment dated 9.10.2007 passed by the learned single Judge in the above proceedings and the order of the Appeal Court dated 15.2.2007 in an appeal filed against the order of the learned single Judge in Appeal No. 127 of 2007.

3. The arbitration proceedings were initiated by Angerlehner Michel Construction Pvt. Ltd. -the Petitioner in the arbitration proceeding. The moneys have been deposited by various third parties on account of the Judgment debtor/

Respondent No. 1 in the above proceedings.

4. The order of the learned single Judge was set aside and remanded for a fresh hearing.

5. It is however, pertinent to note that the question of priorities in respect of the Petitioner Angerlehner Michel Construction Pvt.Ltd. has been decided against it by the learned single Judge. No appeal has been filed against the said order by the Petitioner. The Petitioner has remained absent today.

6. The question of priorities therefore requires to be decided only between L. & T. Finance Ltd. and Ambajogia Peoples Co-operative Bank Ltd.

7. It is necessary to note only a few dates for the purpose of deciding the question of priority between them. An award was passed in the proceedings in favour of L. & T. Finance Ltd. on 2.4.2003 in the sum of Rs. 61,85,989/-along with interest at 18% pa. on Rs. 54,46,118/- and costs of Rs. 75,000/-. The execution proceedings were commenced by L. & T. Finance Ltd. in April, 2004. The bank obtained a recovery certificate dated 14.9.2006 under the provisions of the Maharashtra Co-operative Societies Act, 1960 for Rs. 4,09,79,406/- with interest at 14% p.a. on Rs. 2,70,12,684/- from 1.7.2006 till payment.

8. Ms. Joshi contended on behalf of L. & T. Finance Ltd. that L. & T. Finance Ltd. was entitled to priority in view of the fact that the award was passed prior to the recovery certificate. The submission is not well founded. Section 73 of the CPC reads as under:

73. Proceeds of execution-sale to be rateably distributed among decree-holders. - (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed amongst all such persons:

Provided as follows:

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

9. There is nothing in Section 73 of the C.P.C. which indicates that priority is to be determined on the basis of the date of the decrees passed in favour of the parties claiming distribution.

10. Ms. Joshi thereafter took the ground of fraud in respect of the transactions between the bank and the Judgment debtor. It is pertinent to note in the first instance that the allegations of fraud pertain to the manner in which the transactions had been entered into between the bank and the Judgment debtor. The allegations were made against the officers of the bank in respect of the manner in which the loan was sanctioned and disbursed. It is crucial to note that it was not contended that there was any fraud between the bank per-se and the judgment qua the proceedings or the manner in which recovery certificate was passed.

11. Ms. Joshi in respect of the allegations of fraud, contended that there was no resolution of the bank for granting the loan ; that the share certificate issued to the Judgment debtor shows the address of the Director of the bank ; that the application for loan did not have photographs of the Applicant and did not mention the category of the loan ; that the category of the facilities have not been specified and that the address of the guarantor was that of one of the Director''s of the Judgment debtor itself and that the guarantor was the brother of the Director.

12. Apart from making these bare submissions, Ms. Joshi did not seek to corroborate the same in any manner whatsoever. No application for leading oral evidence was made. I do not find material sufficient to hold that there was any fraud between the bank and the Judgment debtor. Even assuming that there may have been collusion between certain officers of the bank and the Judgment debtor, it would not bar the bank from recovering the amounts admittedly lent and advanced. As stated earlier, it was neither contended nor is there anything to indicate that there was collusion between the bank itself and the Judgment

debtor in recovery proceedings.

13. In this view of the matter, it is not necessary to consider Mr. Sen''s further submission that there was no reply to the Bank''s Judge''s Order.

14. In the circumstances, it must be held that L. & T. Finance Ltd and the Bank are entitled to the amounts lying in Court in proportion to their claims. In other words, after deducting all costs, charges and expenses, L. & T. Finance Ltd. and the Bank shall be entitled to ratable distribution of the said amounts in proportion to their claim as on the date of this order. The Judge''s Order, Chamber Summons Nos.124 of 2007 and 676 of 2007 are disposed of in accordance with the above order.

15. Liberty to the parties to adopt independent proceedings if necessary for the remaining prayers in Chamber Summons No. 124 of 2007.

There shall be no order as to costs.