
(2016) 01 BOM CK 0016

In the Bombay High Court

Case No : Appeal No. 328 of 2015 in Arbitration Petition No. 1643 of 2014

Birla International Pvt.Ltd. and Ors.

APPELLANT

Vs

Karvy Fiancial Services Ltd.

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 9

Citation : (2016) 5 ALLMR 263 : (2016) 4 ArbILR 191 : (2016) 2 BCR 89 :
(2016) 3 CivilLJ 696 : (2016) 3 MhLJ 819 : (2016) 6 RAJ 531

Hon'ble Judges : Anoop V. Mohta;G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Mayur Khandeparkar with Omkar Khaiyam Shaikh i/b. Vikas Salvi & Associates, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Kulkarni, J. - This appeal under Section 37 of the Arbitration and Conciliation Act,1996 (for short "the Act"), arises from the decision of the learned Single Judge dated 6th April,2015 in Arbitration Petition No.1643 of 2014, filed by the Appellants under Section 34 of the Act, whereby the challenge to the Arbitral Award has failed before the learned Single Judge.

2. Dr. Saraf, learned Counsel appearing for the Appellants in assailing the impugned order submits that in respect of the Appellants property which was mortgaged with the Respondent, Court Receiver was appointed by an order passed under Section 9 of the Act. The submission is that the Respondents could not have made a monetary claim for the entire amount in the Arbitration Proceedings inasmuch as the Respondent was required to file an independent suit for foreclosure of mortgage under Section 67 of the Transfer of Property Act,1882 read with Order 34 of the Civil Procedure Code.

3. The second contention as urged by Dr. Saraf, learned Counsel for the Appellants is that there was a Memorandum of Understanding dated August,

2013 between the Appellants and the Respondent by virtue of which the learned Arbitrator could not have proceeded on the original agreement between the parties and ought to have terminated the arbitration proceedings, and thus, on this count also the arbitration proceedings before the learned Arbitrator were vitiated.

4. We have heard the learned Counsel for the parties. We have also perused the impugned order and the documents so relied upon and referred by the learned Counsel during the arguments.

5. It is an admitted position that the Appellants did not file any written statement before the learned Arbitrator, though the Appellants were served notices from time to time by the learned Arbitrator. Although the Advocate for the Appellants appeared before the learned Arbitrator, adjournments were taken on the ground of settlement and though there was no settlement arrived at between the parties, the Appellants did not file any written statement. Subsequently, the Appellants did not appear before the learned Arbitrator. The learned Arbitrator, therefore, proceeded on the pleadings filed on behalf of the Respondent and the documents produced on record and rendered his Award. It is, therefore, clear that the learned Arbitrator proceeded in consonance with the principles of natural justice in recording the finding of facts, after giving complete opportunity to the Appellants to file written statement. It is also clear that in the absence of a written statement, the claims made by the Respondent were deemed to have been admitted.

6. As regards the contention of Dr. Saraf that the Respondents ought to have filed an independent suit in regard to the mortgaged property and could not have made a monetary claim in the Arbitration Proceedings, in our view cannot be accepted. The Respondent had raised a monetary claim in the Arbitration Proceedings in regard to the amount due and payable by the Appellants. The learned Arbitrator had adjudicated on the liability of the Appellants as regards the amount due and payable, to the Respondent under the contract. The issue as regards the mortgaged property was not the issue before the learned Arbitrator neither the same was raised by the Appellants before the learned Arbitrator. In any event the Respondent had all the rights in law to realise the claim amount by exercising the rights accrued to them under the mortgage, as per the provisions of Section 67 of the Transfer of Property Act, at any time after the amount had become due and payable from the appellants and/or before a decree for redemption of the mortgaged property could be obtained by the appellants-mortgagor. Admittedly no suit for redemption of the mortgage has been filed on behalf of the Appellants. The plea that the Receiver has been appointed under Section 9 of the Act is also of no avail in view of the provisions of Section 69-A of the Transfer of Property Act, 1882 which clearly provides for appointment of Receiver at the behest of the mortgagee. We, therefore, do not find any error in the impugned order rejecting the submissions as urged on behalf of the Appellants on this count. We also cannot accept this submission of Dr. Saraf that

in view of the mortgage the respondents were precluded from invoking the arbitration qua the monetary claim as made in the arbitration proceedings as we find no legal basis to sustain this submission, neither any such position in law has been pointed out to us.

7. As regards the contention that the learned Arbitrator ought to have terminated the arbitration proceedings in view of the Memorandum of Understanding dated August, 2013 in view of the provisions of Section 30(2) of the Act and that the learned Arbitrator could not have proceeded to pass an Award, in our view, is also untenable, in view of the clear understanding between the parties as recorded in clause 7 of the Memorandum of Understanding which reads thus:-

"7. No prejudice

(a) This MOU is in addition to and supplemental to the Facility. Documents and any other related Document thereto and does not prejudice the Facility Documents or any of their respective provisions in any manner.

(b) All Facility Documents executed by the Lender, the Borrowers and the Security Provider will continue to be valid in force and binding on the respective parties thereof and the Lender will be free to enforce its rights under such Facility Documents in accordance with the terms thereof.

(c) This MOU and the performance of the obligations contained hereunder will not affect or prejudice in any manner whatsoever any legal or other proceedings initiated by the Lender against any Borrower of the Security Provider or any proceedings initiated by the Lender against any Borrower or the Security Provider before any court, tribunal, arbitral panel or other forum and all such proceedings will continue unabated however till the time the borrower or the Security provider continues to make payment as per the schedule, KARVY Financial Services Limited shall maintain a "STATUS QO " on the legal cases initiated and wold not press for any such action in court, which will dilute the terms and conditions of the MOU in principal and in spirit."

8. The findings of the learned Arbitrator on facts and in law have been accepted in totality by the learned Single Judge, in refusing to interfere in the jurisdiction vested under Section 34 of the Act. In view of the above discussion, we see no reason to interfere with the orders passed by the learned Single Judge in exercise of our appellate jurisdiction under Section 37 of the Act.

9. The appeal is devoid of any merit and is accordingly rejected. No order as to costs.