
(2004) 12 AP CK 0094

In the Andhra Pradesh High Court

Case No : Arbitration Application (SR) No. 6397 of 2004

D. Dhananjaya Rao

APPELLANT

Vs

Bank of India and Another

RESPONDENT

Date of Decision : 08-12-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 7
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 11, 13(2), 2, 3

Citation : (2005) 3 ALD 90 : (2005) 2 ALT 266 : (2005) 2 ARBLR 52 : (2005) 3
BC 604 : (2006) 133 CompCas 28 : (2006) 67 SCL 299

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : S. Krishna Mohan, for the Appellant; Not Appearing, for the
Respondent

Final Decision : Dismissed

Judgement

N.V. Ramana, J.—This applicant, namely Sri D. Dhananjaya Rao, is the Proprietor of M/s. Ganesh Industries, Ganapavaram. The applicant states that one Sri Kata Adinarayana, who is in cotton business, introduced him to the 1st respondent, namely Bank of India, Kothapet Branch (hereinafter referred to as "the Bank"), who had sanctioned cash credit loan to the tune of Rs. 20,00,000/- in the name of M/s. Ganesh Industries, for carrying on cotton trade. At the time of sanction of loan, the applicant states that he opened an Account bearing No. CC-220336, and one Sri T. Harinarayana, Deputy Manager in the Bank, had taken blank signed cheque book from him. Thereafter, an amount of Rs. 3,000/- was debited to his loan Account towards processing and stamp charges on 2-3-2002.

2. According to the applicant, as per the norms and procedures, of the Bank, the loanee has to furnish the bills for withdrawing the money from the cash credit loan Account, but in the case of his cash credit loan Account, without his furnishing any bills, the Bank debited various amounts to his cash credit loan

Account - Rs. 10,00,000/- on 8-3-2003 vide Cheque Nos. 2341651 and 2341652 for Rs. 6,00,000/- and Rs. 4,00,000/- respectively; and Rs. 3,50,000/- vide Cheque No. 2341653 dated 4-3-2002.

3. He states that out of the amount of Rs. 6,00,000/- withdrawn vide Cheque No. 2341651 dated 8-3-2003, an amount of Rs. 5,75,000/- was credited to CC Account No. 220123 of M/s. Sri. Aditya Enterprises and its Proprietor, namely, Sri K. Narayana, admitted about the illegal adjustment made by the Bank and issued a letter to that effect. He states that though this fact was brought to the notice of the officials of the Bank, no steps to rectify the illegal adjustments were made by the Bank, and in fact, respondent No. 2, namely Zonal Manager of the Bank, while acknowledging receipt of the letter dated 13-1-2004, vide his letter dated 27-1-2004 informed him that they are looking into the matter, and he will be informed shortly.

4. Even after the said letter, when there was no response from the Bank, the applicant states that he filed a complaint before the Banking Ombudsman in the month of May, 2004, which was registered as Complaint No. 76 of 2004-05 and the parties were directed to file their respective versions on or before 22-6-2004, and while the matter was pending before the Banking Ombudsman, the Bank issued notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Securitization Act"). The applicant states that when he brought the fact of issuance of notice by the Bank under the provisions of the Securitization Act, to the notice of the Banking Ombudsman, the Banking Ombudsman without conducting any enquiry and without providing any opportunity of being heard, rejected the complaint stating that inasmuch as already notice under the provisions of the Securitization Act has been issued by the Bank, he may seek the remedies available to him under the Securitization Act.

5. The applicant states that he brought the above fact to the notice of the Chairman and Managing Director of the Bank, but to no avail. The applicant states that when Sri Kata Adinarayana, who took loan in the name of M/s. Sudha Enterprises, and failed to repay the loan amount, the Bank initiated recovery proceedings against M/s. Sudha Enterprises and their surety Sri K. Mastan Rao, who intelligently removed the title deeds pledged as security, before the Debts Recovery Tribunal. The applicant states that as the Bank failed to settle the dispute raised by him, he filed the present application u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), having regard to the arbitration clause in Section 11 of the Securitization Act.

6. When the counsel for the applicant presented the Arbitration Application for filing, the Registry returned the same to him raising the following objection:

It should be stated how this petition is maintainable for appointment of Arbitrator when the applicant is not a company in view of Sections 10 and 11 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002.

7. In reply to the above objection, the counsel for the applicant submitted that the Securitization Act prescribes for arbitration, and therefore, the Arbitration Application, be posted for orders of the Court. That is how the Arbitration Application, which is still at the stage of SR, is posted before the Court for orders.

8. Heard the learned counsel for the applicant.

9. He submitted that the applicant is a loanee of the bank and inasmuch as the Bank has made misadjustments and wrongful debits to his loan account, there arose disputes between the applicant and the Bank, and this is evident from the various representations made by the applicant to the Bank and his approach to the Banking Ombudsman, who rejected the application. He further submitted that inasmuch as the Bank has issued notice u/s 13(2) of the Securitization Act for recovery of the loan dues, having regard to the provisions of Section 11 thereof, which provides for resolution of disputes by way of arbitration, the disputes raised by the applicant as regards the misadjustments and wrongful debits made by the Bank to his loan account, should be referred to an Arbitrator. He, thus prayed that the Arbitration Application is maintainable u/s 11 of the Securitization Act.

10. A reading of the averments, as pleaded by the applicant in support of the Arbitration Application, and as set out supra, would disclose that the applicant has availed cash credit loan from the Bank to the tune of Rs.20,00,000/-, which according to his own admission, has not been repaid, allegedly owing to misadjustments and wrongful debits made by the Bank. The applicant, as against the alleged misadjustments and wrongful debits made by the Bank, it appears, represented to the Bank, but in vain, and the complaint made by him to the Banking Ombudsman, was also rejected having regard to the fact that the Bank had already issued notice u/s 13(2) of the Securitization Act, calling upon the applicant to pay the dues, and that on failure to do so, the money would be recovered by effecting sale of the property, mortgaged at the time of availing loan. Sri Kata Adinarayana, who introduced the applicant and assisted him in getting the loan sanctioned, it appears, is also a loanee, and for the default committed by him, the Bank already initiated proceedings against him and his surety, namely Sri K. Mastan Rao, for recovery of the monies due by him, before the Debts Recovery Tribunal, which are pending. The grievance of the applicant, in short, is that the Bank by making the alleged misadjustments and wrongful debits to his loan account, sought to discharge the liability of Sri Kata Adinarayana and his surety, namely Sri K. Mastan Rao.

11. Whatever be the grievance of the applicant, in order to maintain an Arbitration Application for appointment of Arbitrator u/s 11 of the Arbitration Act, there should be an arbitration agreement between the parties, as provided u/s 7 thereof, which may be either in the form of an arbitration clause in a contract or in the form of a separate agreement, and it shall be in writing. Admittedly, the

applicant is a borrower and loanee of the Bank, and in the loan agreement, entered into by the applicant with the Bank, at the time of availing loan, there is no arbitration clause, and inasmuch as there is no arbitration clause in the loan agreement entered into by the applicant and the Bank, the applicant is barred from maintaining an Arbitration Application u/s 11(6) of the Arbitration Act for appointment of an Arbitrator.

12. It may now be noticed, whether having regard to the provisions of Section 11 of the Securitization Act, the applicant is entitled to maintain an Arbitration Application u/s 11(6) of the Arbitration Act. To consider this question, it would be useful to extract the provisions of Section 11 of the Securitization Act, which reads thus:

Resolution of disputes:- Where any dispute relating to securitization or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely the bank or financial institution, or a securitization company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

13. From a reading of the above provision, it becomes clear that if any dispute amongst the bank or financial institution or a securitization company or reconstruction company or qualified institutional buyer, as regards securitization or reconstruction or non- payment of any amount due including interest arises, then such dispute shall be settled by conciliation or arbitration as provided under the Arbitration Act, as if the parties to the dispute had consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly. In that, the invocation of the provisions of Section 11 of the Securitization Act, for arbitration is limited only to those parties, namely the "bank" or "financial institution" or "securitization company" or "reconstruction company" or "qualified institutional buyer", and that too if any dispute arises with regard to securitization or reconstruction or non-payment of any amount due including interest amongst them, and there need not be any agreement in writing, for it is deemed that the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration as per the provisions of the Arbitration Act.

14. Therefore, such of those parties, who fall within the definition of parties mentioned in Section 2(c), (m), (za), (v) and (u) of the Securitization Act, namely the "bank" or "financial institution" or "securitization company" or "reconstruction company" or "qualified institutional buyer", as appearing in Section 11 of the Securitization Act, are entitled to invoke the provisions of Section 11 of the Arbitration Act, for resolution of disputes by an arbitrator, if any, and in respect of those parties, who do not fall within the definitions of the terms mentioned above, invocation of Section 11 of the Securitization Act, and

consequently the provisions of Section 11 of the Arbitration Act, is barred. Section 11 of the Securitization Act, envisages arbitration of disputes only amongst the "bank" or "financial institution" or "securitization company" or "reconstruction company" or "qualified institutional buyer".

15. It is, therefore, required to be seen whether the applicant, falls within the definition of the terms "bank" or "financial institution" or "securitization company" or "reconstruction company" or "qualified institutional buyer", as defined in Section 2(c), (m), (za), (v) and (u) of the Securitization Act. The applicant, according to his own admission is, a borrower and a loanee of the Bank, and he, not being a "bank" nor financial institution" nor "securitization company" nor "reconstruction company" nor "qualified institutional buyer", is not entitled to invoke the provisions of Section 11 of the Securitization Act and consequently the provisions u/s 11 of the Arbitration.

16. This apart, "securitization company" or "reconstruction company" to invoke the provisions of Section 11 of the Securitization Act, should be one which is registered u/s 3 thereof, and unless the "securitization company" or "reconstruction company" is registered u/s 3 of the Securitization Act, it cannot carry on the business of securitization or asset reconstruction. The applicant, admittedly being merely a borrower and a loanee of the Bank, and not being a "securitization company" or "reconstruction company" registered u/s 3 of the Securitization Act, which alone are permitted to act as agents for any bank or financial institution for the purposes of recovering the dues, is not entitled to invoke the provisions of Section 11 of the Securitization Act, and consequently the provisions of Section 11 of the Arbitration Act, to maintain the present Arbitration Application, for appointment of an Arbitrator.

17. For the foregoing reasons, the objections raised by the Registry is upheld, holding that the Arbitration Application, which is at the stage of SR. and which purports to invoke the provisions of Section 11 of the Arbitration Act having regard to deemed provision u/s 11 of the Securitization Act, for referring the disputes to an Arbitrator, is not maintainable and is accordingly, rejected.