
(2013) 07 BOM CK 0251

In the Bombay High Court

Case No : Appeal No. 316 of 2013 in Arbitration Petition No. 1021 of 2011

D. Virendra and Co. and Others

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6
Arbitration and Conciliation Act, 1996 — Section 19(1), 21, 34

Citation : (2013) 07 BOM CK 0251

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : S.U. Kamdar and Mr. N.M. Shah, for the Appellant; Rohit Gupta and Mr. Nikhil Rajani instructed by V. Deshpande and Co., for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—The Appeal arises from a judgment of a Learned Single Judge by which a petition filed u/s 34 of the Arbitration and Conciliation Act 1996 came to be dismissed. In appeal, three challenges have been raised:

i) When the appointment of an arbitrator was made by the Respondent, the Respondent did not issue a notice to the Appellants and this constituted a failure of compliance of the provisions of Section 21 of the Arbitration and Conciliation Act 1996 which cannot be remedied by the notice that was issued by the arbitrator, of the reference and the claim;

ii) In view of the decision of the Supreme Court in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, , the arbitral tribunal has no jurisdiction to entertain a claim in the nature of a suit for enforcement of a mortgage, since that constitutes an action for the enforcement of a right in rem; and

iii) The arbitral tribunal has proceeded on the basis of the admissions made by the Appellants, but Order 12 Rule 6 of the CPC would have no application in an arbitral proceeding since Section 19(1) of The Act of 1996 provides that the

arbitral tribunal shall not be bound by the CPC 1908 or by the Indian Evidence Act 1872.

2. The claim of the Respondent arose from a home equity agreement dated 30 June 2004 that was executed between the parties. The agreement contained an arbitration clause which was in the following terms:

(h) In the event of any dispute or differences arising under this Agreement including any dispute as to any amount outstanding, the real meaning or purport hereof ("Dispute"), such Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any amendment or reenactment thereof by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be at New Delhi and the arbitration shall be conducted in English language.

(Emphasis supplied)

3. The arbitration agreement contemplated that disputes or differences arising under the agreement, including in regard to the amount outstanding would be referred to arbitration and that the arbitrator would be appointed by the lender viz. the Respondent. Hence, in terms of the arbitration agreement, the authority to appoint an arbitrator was conferred upon the Respondent. In terms of the agreement, the Respondent appointed an arbitrator. Admittedly notice of the appointment of the arbitrator was furnished by the arbitral tribunal to the Appellants. The arbitrator informed the Appellants of his appointment and issued directions for the filing of the claim and a reply. Again it is not in dispute that the Appellants were duly served with all the arbitral proceedings. The Appellants participated in the arbitral proceedings. Hence, there is no merit in the contention of the Appellants that the constitution of the arbitral tribunal was defective. Under the agreement the Respondents had the sole and exclusive authority as the lender, to appoint an arbitrator. The Appellants were duly notified by the Arbitrator of her appointment. The reliance which has been placed on Section 21 is misconceived. Section 21 deals with the commencement of arbitral proceedings and stipulates that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent. This has absolutely no relevance to the issue which is involved in the present Appeal which is whether the arbitral tribunal was validly constituted. The Tribunal was, in the present case, constituted in terms of the agreement between the parties.

4. As regards the second objection to the legality of the award, it would at the outset be necessary to notice the nature of the claim and the content of and the directions in the arbitral award. The claim of the Respondent arose from the monies which were due and outstanding under the home equity agreement entered into between the parties on 30 June 2004. The Supreme Court has in *Booz Allen and Hamilton* (supra) held that a suit on a mortgage is not a mere

suit for the recovery of monies, but constitutes an action in rem which would have to be decided by a Court and not by an arbitral tribunal. On the other hand, it has been held that a claim seeking specific performance of an agreement of mortgage would be arbitrable. The Supreme Court has held as follows:

An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but creates only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance, will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided in courts of law and not by arbitral tribunals.

5. Now in the present case, it must be noted that the arbitral tribunal has allowed the claim of the Respondent for the recovery of an amount of Rs. 47,14,876/- being the principal outstanding on account of the loan together with interest and charges. The Tribunal has awarded interest in the amount of Rs. 11.46 lacs from 28 November 2009 till the date of the award and thereafter at the rate of 16% from the date of the award until payment. The arbitral tribunal has issued a declaration to the effect that the Second Respondent before the Tribunal had created an equitable mortgage with respect to a residential flat with the intention to secure the repayment of the loan. However, the Tribunal has specifically not passed a decree in the nature of a foreclosure, holding that the Respondent as the claimant would be at liberty to take out an appropriate legal action or proceeding for enforcing or selling the security to recover the amount which has been awarded. The declaration that was issued by the Tribunal has proceeded on the admission of the Appellants to the effect that the Second Respondent before the Tribunal had mortgaged the residential flat as security for the loan. The facts which have been admitted by the Appellants have been adverted to by the Tribunal and for convenience of reference, it would be appropriate to extract from the award:

Facts Admitted by Respondents

A. It is admitted in paragraph 1 of the Reply on merits that the Respondent No. 1 along with Respondent Nos. 2 and 3 availed loan facility from Associates India Financial Services Pvt. Ltd. for a sum of Rs. 60,00,000/- and executed loan agreement.

B. It is further admitted in paragraph 4(C) of Reply on merits that the loan facility was repayable with interest @ 11% p.a. in 120 months of Rs. 82,650/- each as installment.

C. In paragraph 3 of Reply on merits, it is stated that few installments were paid from the account of Respondent No. 1 company.

D. It is also admitted in the paragraph 1 of Reply on merits that Respondent No. 2 had mortgaged immovable property being Flat No. 9, 4th Floor, Vinod Building, Gawalia Tank, Mumbai - 400 036 as security for the aforesaid loan.

E. Further, in paragraphs 4(F) and (I) of the Reply on merits, it is also admitted that due to financial difficulty Respondent No. 1 has defaulted in payments of some EMIs.

6. Consequently, a bare reading of the award would indicate that the claim which has been awarded is not a claim seeking foreclosure or for the enforcement of the security on a mortgage. The arbitral tribunal was acting within jurisdiction in adjudicating upon the money claim and has only clarified that in the event that the Respondent seeks to enforce the security, it would have to take recourse to appropriate proceedings before an appropriate court of law in that regard. This is consistent with the judgment of the Supreme Court in *Booz Allen and Hamilton* (supra).

7. As regards the third point, the award indicates that though the Tribunal has adverted to the facts which were admitted by the Appellants, it is not based exclusively thereon. The award shows that the Tribunal decided the claim based on the facts on the record and the admissions of the Appellants. The Tribunal had due regard inter alia to the loan agreement and to the statement of account. As a matter of fact, the non-payment of the outstanding was not even in doubt before the Tribunal nor was it in dispute. But in any case, there is no bar to the arbitral tribunal even proceeding exclusively on the admissions made before it by one of the parties. The fact that the arbitral tribunal is not bound by the provisions of the CPC 1908 is not to indicate that the Tribunal commits an error of jurisdiction in drawing guidance from the fundamental principles which are embodied in procedural law. What Section 19(1) of the Arbitration and Conciliation Act 1996 does is to indicate that the strict principles governing the law of civil procedure and evidence will not bind the Tribunal. But that is quite distinct from the position that the arbitral tribunal would be acting within jurisdiction in looking at those fundamental principles. Hence, in the present case, we find no error in the judgment of the Learned Single Judge. For the completeness of the record, we also indicate that save and except for the first submission, the second and third submissions were not urged before the Learned Single Judge and, for that matter, were not even raised in the Arbitration Petition. Nonetheless we have dealt with those submissions in the course of this judgment.

There is no merit in the Appeal. The Appeal is accordingly dismissed.