
(2013) 08 BOM CK 0071

In the Bombay High Court

Case No : Appeal (Lodging) No's. 130 and 131 of 2013 in Arbitration Petition
No's. 1095 and 1321 of 2012

Deccan Chronicle Holdings Limited

APPELLANT

Vs

L and T Finance Limited

RESPONDENT

Date of Decision : 08-08-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 9(ii)(b)

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 34 Rule 14, Order 38 Rule 5

Citation : (2013) 08 BOM CK 0071

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

Bench : Division Bench

Advocate : Gaurav Joshi assisted with Mr. Samsheer Garud, Mr. Agasti Vibhute and Mr. Vivek Deo instructed by Jayakar and Partners in both Appeals, for the Appellant; Dinyar Madon with Ms. Shakuntala Joshi, Anand Poojari instructed by S.I. Joshi and Co. in Appeal (L) No. 130 of 2013, Mr. Shailesh Shah with Ms. Leena Desai and Mr. Nilesh Gala instructed by MDP and Partners in Appeal (L) No. 131 of 2013, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Admit. Learned counsel for the Respondents waive service. The appeals are taken up for hearing and final disposal, by consent and on the request of the learned counsel. Both the appeals arise out of a judgment and order of a learned Single Judge dated 5 February 2013 on two petitions which were filed by Tata Capital Financial Services Limited and L & T Finance Limited against the Appellant. The Petitioners before the learned Single Judge u/s 9 of the Arbitration and Conciliation Act, 1996 are the Respondents to the appeals.

2. The claim of Tata Capital Financial Services Limited ("Tata Capital") is Rs. 100.86 crores on which interest would be liable to be paid. The dues of L & T Finance Limited ("L & T Finance") are Rs. 25.02 crores together with interest. These dues arise out of the credit facilities extended to the Appellant. Tata Capital has invoked the arbitration agreement between the parties and has

submitted a claim in the arbitration, which is pending adjudication. L & T Finance has an award dated 15 March 2013 of a sole arbitrator allowing its claim in the amount of Rs. 25.02 crores together with interest at the rate of 15% p.a. Although the creditors have mortgages in their favour, the claim in the arbitral proceedings has been restricted to a money claim. No relief for the enforcement of the mortgaged security has been sought in arbitration.

3. On applications u/s 9 of the Arbitration and Conciliation Act, 1996, the learned Single Judge issued the following directions in the two petitions:

Tata Capital:

- (i) A direction to the Appellant to furnish security in the amount of Rs. 101.71 crores together with further interest;
- (ii) Failing (i) above, the appointment of the Court Receiver as Receiver in respect of the mortgaged properties at Exhibit-P and other properties in Exhibit-Q with a direction to appoint the Appellant as an agent on usual terms and conditions of the payment of royalty and/or furnishing security;
- (iii) An attachment of bank accounts;
- (iv) A disclosure of assets and properties on oath.

L & T Finance:

- (i) A direction to furnish security of Rs. 25.02 crores together with overdue compensation;
- (ii) Failing (i) above, the appointment of the Court Receiver as Receiver in respect of the properties at Exhibit-G, with a direction to appoint the Appellant as agent on usual terms and conditions on payment of royalty and/or furnishing security;
- (iii) A disclosure on oath of unencumbered property;
- (iv) An injunction against alienation of the properties till the Receiver takes possession.

4. The following submissions have been urged by counsel in the appeals, while assailing the order of the learned Single Judge:

- (i) In view of the judgment of the Supreme Court in *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, the arbitral tribunal would have no jurisdiction to entertain a claim in the nature of a suit for the enforcement of a mortgage since that constitutes an action for the enforcement of a right in rem;
- (ii) Once the mortgage claim is given up in the arbitration proceedings, the Respondents take the position of an unsecured creditor and an attachment can be ordered only on a ground contained in Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908; and

(iii) The extent of the attachment which has been ordered is excessive in comparison with the claim in arbitration.

5. We will deal with each of the three submissions separately. In *Booz Allen and Hamilton Inc. (supra)*, the Supreme Court held that a suit on a mortgage is not a mere suit for recovery of monies but constitutes an action in rem which is to be decided by a Court and not by an arbitral tribunal. The principle which has been laid down is 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.

6. In both the cases in appeal, it is common ground that the claim in arbitration is not for the enforcement of a mortgage. In both cases, the two creditors have asserted a claim for the recovery of monies due and outstanding. Order XXXIV Rule 14 of the Code of Civil Procedure, 1908 provides as follows:

O. 34, R. 14: Suit for sale necessary for bringing mortgaged property to sale.-

(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended."

Hence, where a mortgagee obtains a decree for the payment of money in satisfaction of a claim under a mortgage, before the mortgaged property can be brought to sale, a suit for sale in enforcement of the mortgage has to be filed and such a suit can be instituted notwithstanding anything contained in Order II Rule 2 of the Code. Consequently, both the creditors were justified in seeking to assert their money claims in arbitration. The creditors would thereafter be entitled to espouse their rights under Order XXXIV Rule 14 of the Code. The principle which has been laid down by the Supreme Court in *Booz Allen and Hamilton Inc. (supra)* has not been breached because the claim in the arbitration was not an assertion of a right in rem but a claim for the recovery of monies due and outstanding simpliciter. There is no merit in the first submission.

7. The second submission proceeds on a logical fallacy. When a creditor, who has a mortgaged security in his favour, confines the claim in arbitration for the

recovery of monies due and outstanding, he does not relinquish the mortgaged security or abandon his right to bring the mortgaged security to sale by subsequently instituting a suit as envisaged in Order XXXIV Rule 14. The creditor cannot enforce a right in rem in the course of arbitral proceedings. Hence, a claim for the enforcement of the mortgaged security cannot be entertained in arbitration. But when the creditor asserts a money claim simpliciter in the course of arbitral proceedings, the law does not compel him to relinquish his mortgaged security as a condition for asserting the money claim in arbitration or to abandon his right as a secured creditor to bring the mortgaged property to sale by filing an independent suit in accordance with Order XXXIV Rule 14. Consequently a secured creditor can invoke the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 which is a provision incidental to or ancillary to the arbitration proceedings for seeking an interim measure of protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime. That is exactly what has been done by the secured creditors and correctly accepted by the learned Single Judge.

8. As regards the applicability of Order XXXVIII Rule 5 of the Code, to an application u/s 9 of the Arbitration and Conciliation Act, 1996, it needs to be noted that Section 9(ii)(b) allows a party to apply to the Court before, during or after the arbitral proceedings for securing the amount in dispute in the arbitration. Moreover under sub-clause (d) of Clause (ii) of Section 9, the Court is empowered to appoint a Receiver whereas under sub-clause (e) of Clause (ii) of Section 9 the Court may order such interim measure as may appear just and convenient. In the judgment of a Division Bench of this Court in *Nimbus Communications Limited Vs. Board of Control for Cricket in India* and another, , this Court after having due regard to the judgments of the Supreme Court on the subject including in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, , held as follows:

24. A close reading of the judgment of the Supreme Court in *Adhunik Steels* would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition u/s 9, the Court was of the view that the power u/s 9 is not totally independent of those principles. In other words, the power which is exercised by the Court u/s 9 is guided by the underlying principles which govern the exercise of an analogous power in the CPC 908. The exercise of the power u/s 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition u/s 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power u/s 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the CPC 1908, the rigors of every procedural provision in the CPC 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles

laid down in the CPC 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application u/s 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application u/s 9(ii) (b).

9. The principle is that when the Court decides a petition u/s 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application u/s 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process.

10. Now it is in this background that it will be necessary to consider as to whether a case was made out for the grant of an order for furnishing of security. The dues of Tata Capital are in excess of Rs. 100 crores exclusive of interest. The learned Single Judge has relied upon the averments which are contained in paragraphs 9, 12, 13 and 16 to 19 of the arbitration petition. The Respondent has averred that the Appellant owes a large amounts to banks and financial institutions and apprehends that with a view to defeat the satisfaction of its claim, the Appellant was likely to alienate its properties. It has been urged that there is an intentional and willful failure to comply with the conditions of the term loan agreement and of the security documents. Reliance has been placed on a certificate of the Chartered Accountant of the Appellant stating that the net worth of the Second Respondent herein is Rs. 890 crores. Relying on this certificate it was asserted on behalf of the Appellant that even according to the creditor, the net worth is well in excess of the claim against the Appellant. However, it is evident from the certificate of the Chartered Accountant that the figure of Rs. 890.37 crores is as on 31 March 2010 and a major component of this consists of investments valued at Rs. 884 crores in the shares of Deccan Chronicle Holdings Limited which were valued at Rs. 156.43 per share. On behalf of the Respondent it has been stated in Court that the current value of the shares is Rs. 2/- each and hence the valuation placed on the net worth as on 31 March 2010 has substantially eroded. Winding-up petitions have been filed against the Appellant and other creditors have also attached the properties, or as the case may be, the bank accounts.

11. Significantly the conduct of the Appellant discloses that:

(i) The claim of the two secured creditors has not been seriously disputed;

(ii) There has been no effort on the part of the Appellant to disclose the valuation of its properties or the entities to whom the properties have been encumbered;

(iii) There has been no disclosure on affidavit of the bank accounts despite the fact that the order of the learned Single Judge was passed nearly six months ago on 16 February 2013.

12. The Appellant is, therefore, clearly in breach of the directions issued by the Single Judge by failing to make disclosures as ordered. Moreover, the learned counsel for L & T Finance also stated before the Court that of the four properties in respect of which the Court Receiver has been appointed as Receiver (Exhibit-G to the arbitration petition), the Court Receiver was not allowed to take possession of two of the properties purportedly on the ground that they had been encumbered in favour of a third party. In this view of the matter, we are of the view that sufficient ground was made out before the learned Single Judge for a direction to furnish security and failing that for an order of attachment in respect of the properties and the bank accounts. The order of attachment cannot be regarded as being excessive. The Appellant has not come forth before the Court with any degree of candour and has not made a full, honest and true disclosure of its assets and properties and in regard to the encumbrances thereon. The Appellant has not disclosed on affidavit the particulars of the bank accounts or of the movables. The conduct of the Appellant is lacking in bona fides. In these circumstances, the learned Single Judge was, in our view, completely justified in passing the impugned order and directions. No interference in appeal is hence required. The appeals are accordingly dismissed. There shall be no order as to costs.