
(2016) 03 DEL CK 0238

In the Delhi High Court

Case No : O.M.P. (I) (Comm.) No. 1/2015, I.A. No. 2811/2016, O.M.P. (I) (Comm.) No. 2/2015, I.A. No. 2812/2016, O.M.P. (I) (Comm.) No. 3/2015, I.A. No. 2813/2016, O.M.P. (I) (Comm.) No. 4/2015, I.A. No. 2814/2016, O.M.P. (I) (Comm.) No. 5/2015, I.A. No. 2815/2016,

GE Capital Services India

APPELLANT

Vs

Vasan Health Care Pvt. Ltd.

RESPONDENT

Date of Decision : 08-03-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, Section 9
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2016) 229 DLT 1 : (2016) 157 DRJ 77 : (2016) 5 RAJ 684

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Deepika V. Marwaha, Worthing Kasar, Advocates and Gaurav Tyagi, for the Appellant; Rahul Srivastava and Manu Dev Sharma, Advocates, for the Respondent

Final Decision : Disposed off

Judgement

Manmohan Singh, J.—1. The abovementioned petitions have been filed before this Court under Section 9 of the Arbitration and Conciliation Act, 1996, for an interim relief of appointment of a Receiver for attachment and taking into possession/custody the collateral security, i.e. medical equipments which were got financed by Vasan Health Care Pvt. Ltd. for Vasan Eye Care Centres.

2. The details of the machinery have been filed along with each of the petitions as annexures.

3. The petitions are pertaining to eleven loan agreements, out of which tenure of 9 loan agreements has already ended.

4. The list of loan agreement numbers along with the OMP numbers, their details and loan terms are given as under:

5. It is submitted there was a cross default agreement between the parties with respect to all the agreements. The intention of the document was to create a cross default and cross security between and among all. The agreements, with respect to the accounts opened at that point of time or thereafter acquired. It was stipulated that the default under any account or agreement shall be deemed to be a default under all other accounts and agreements. A similar kind of cross collateral and cross default agreement was executed with respect to all the loan agreements that are part of OMP (I) (Comm) Nos. 1 to 7.

6. Pertaining to Loan Legacy I.D. HSHFSRCEZ00371887 and HSHFSRCEZ00371927 which are subject matter of OMP(I) (Comm) No. 8, the said covenant was made part of Master Loan Agreement itself, as the said loan Account was for Rs. 25 Crore, wherein money was released in 2 tranches, have 2 different Legacy ID.

7. It was stipulated in Annexure 1 to the agreement under the heading of Security and Nature of Security that-

"3. Hypothecation over all assets given by the Borrower under all existing facilities provided by the Lender or its affiliates to the Borrower, including charge over the assets hypothecated pursuant to the Deed of Hypothecation dated November 23, 2013."

8. Therefore, it is apparent on the face of all agreements and documents executed and filed that all the medical equipment got financed by Vasan Health Care Pvt. Ltd. from the petitioner will be considered as collateral with respect to all the other loan agreements, so even if a loan account is clear, however if there is outstanding in other account, the said machinery will still be considered hypothecated with the petitioner.

9. It is submitted by the learned counsel for the petitioner that on 15th December, 2015 the earlier Bench recorded on behalf of the respondent to the affect that:

"The Petitioner advanced a loan of Rs. 100 crores to the Respondent, which was repayable alongwith interest at Rs. 1,11,44,36,166/- against which the Respondent had paid Rs. 71,77,44,906/- leaving the balance outstanding amount of Rs. 39,66,91,260/- which does not include any penal interest."

The contention of the learned counsel of respondent is not correct that the respondent had paid Rs. 87 Crore in total. The said submission has been clarified in paragraph No. 14 of their preliminary objections dated 3rd February, 2016, wherein it is stated that a difference of Rs. 15.22 Crores (approx.) has been paid with respect to 6 other loan agreements between petitioner and respondent, which are not subject matter of issue.

10. The statements of accounts filed on record by the petitioner are correct and have not been denied in the preliminary objections filed by the respondent.

11. In the order dated 15th December, 2015, the respondent was directed to meet the petitioner's representatives on 21st December, 2015 to reconcile the accounts.

The said meeting was postponed to 7th January, 2016 on respondent's request and despite the fact that the Statement of Accounts were duly received by the representatives of the respondent on 7th January, 2016, as per petitioner's counsel, nobody had reverted ever on the same.

12. Learned counsel for petitioner has rightly informed that as no contrary evidence has been produced, thus, the total outstanding amount under the loan agreements, subject matter of the OMP(I) (Comm.) No. 1/2016 to OMP(I) (Comm.) No. 8/2016 are more than Rs. 40 crore in excess as of today. It is the argument of the learned counsel for the petitioner that the medical equipments are being used by the respondent in its Eye Care Centres and it is earning monies out of it. It is further submitted that such earnings are being transferred and siphoned off into other accounts, companies and businesses of the respondent's directors.

13. In compliance with the order dated 15th December, 2015, petitioner had filed a Valuation Report of Medical Equipments, which was taken on record on 21st January, 2016. As per the said report, inspection was conducted all over India and showed that the market value of the Medical Equipment, hypothecated to the petitioner, (as on 6th January, 2016) is Rs. 37,13,09,059/-.

It is stated in the report that the Inspection was denied by the respondent at Jalandhar and Ludhiana, and 13 centres were found to be closed including the one at Pusa Road, Karol Bagh.

14. Learned counsel for the petitioner is pressing the prayer on urgent basis because of the reason that now it has come to the notice of the petitioner that the Landlord of the premises at Pusa Road Centre, due to non- payment of arrears of rent, had filed a winding up petition before High Court at Chennai and a suit for possession before this Court. The winding up petition was compromised and the respondent had paid a sum of Rs. 4.50 crore as full and final settlement towards the outstanding of more than Rs. 5 crore. The respondent had also closed its said institute and shifted the machinery out of there on 22nd January, 2016 without informing the petitioner and this Court, even when the said fact was in its knowledge, as the said compromise in Chennai happened in October 2015. The machinery at the said institute is the property of petitioner, of which the petitioner is seeking possession through receiver. The said document has been filed in the OMP(I) (Comm) No. 8/2016, but the petitioner has no knowledge as to where the said Machinery has been shifted. The photographs filed along with the Valuation Report would show that it is huge machinery which was financed.

15. It is alleged that it is also learnt now that the Vasan Health Care Centre at Plot No. 20, Block A-1, Janakpuri, has also been subject matter of litigation,

before this Court in CS (OS) No. 3402/15. As per the order dated 30th November, 2015 the respondent was in arrears of rent of Rs. 2.73 Crore.

16. The concern of the petitioner is that as per the order dated 30th November, 2015 passed in the said suit, a Local Commissioner was appointed to inventorize the Medical Equipment lying at the centre. On the next date of hearing i.e. 19th January, 2016 in the said suit bearing No. CS (OS) No. 3402/15, the respondent i.e. Vasan Health Care Pvt. Ltd. had put appearance through counsel and the matter was sent to Mediation.

17. The apprehension of the petitioner is that respondent who may be siphoning off its funds to other projects of the Directors, and is embroiled in many financial irregularities which is making this company cash-strapped, because of which, situations like CS(OS) 3402/15 are arising, wherein the equipment hypothecated to the petitioner i.e. GE Capital Services India is being attached and might get auctioned off in future, without respondent disclosing about the hypothecation of the equipments with the petitioner.

It is alleged by the petitioner that there might be many matters and litigations against Vasan Health Care Pvt. Ltd. with respect to its rented eye centres, where the hypothecated machinery is in use. If the respondent is defaulting on its rent payment there also, then many landlords must be approaching the Courts all across the country and the Courts might be passing orders of attachment of these assets, which are totally hypothecated with GE Capital Services India, as the respondent despite the orders dated 21st January, 2016, 15th December, 2015, 23rd November, 2015, 18th November, 2015 passed by this Court never declared about these proceedings, even in its reply dated 3rd February, 2016.

18. Learned counsel for the respondent in his preliminary objections has made the following pleas:-

i. The respondent are running more than 200 medical centers throughout the country and a lot of equipments present in these centers had been financed by the respondent from the petitioner and a sum of Rs. 100 crores had been taken by the respondent from the petitioner, which was payable along with interest thereon and as of December, 2015 the respondent had paid off, to the petitioner a sum of Rs. 87 crores, (Rs. 69 crores towards principal and Rs. 18 crores towards interest), though the petitioner disputes and states that the respondent has paid only a sum of Rs. 71,77,44,906/- leaving a balance of Rs. 39,66,91,260/- and over and above that the petitioner is also claiming penal interest.

ii. Due to the general economic recession which is going on, the respondent had suffered losses and there has been less footfall in their medical centers/hospital resulting in default towards payment of legally payable dues by the respondent to the petitioner.

iii. In order to show their bonafide as well as reach a settlement between the

parties, the respondent on their own on 15th December, 2015 had given three cheques towards part payment of the dues payable to the respondent, the details of which are mentioned in the order dated 15th December, 2015. However, due to financial difficulties and the fact that there was delay in arranging the funds, the respondent through their counsel on 19th January, 2016 had informed the counsel for the petitioner that they require one week's time to honour the first installment of Rs. 1 crore. The same was not honoured as because of legal complication the accounts of respondent stood attached, nevertheless the respondent through RTGS paid to the petitioner the said sum of Rs. 1 crore on 28th January, 2016.

iv. The valuations made therein with respect to the equipment are on a very less scale as well as incorrect. The respondent submits that the lesser valuation made by the petitioner in their report has been made in order to prejudice this Court and to seek orders for appointment of Receiver, but the fact is that on the showing of the petitioner themselves, a sum of more than Rs. 71 crores stands duly paid by the respondent to the petitioner.

v. The equipments bought under various agreements have more than 10 years of life and as of now as admitted by the petitioner's Valuers themselves the equipment have more than 70% of their life still intact, as only 3-4 years have passed since they were bought. Thus, the equipments are still usable and they have prime value in market.

vi. The petition(s) filed before this Court are not at all maintainable as the petitioner has given up its right under the Arbitration clause. The clause No. 7 in the agreements envisages how a dispute is to be resolved. The relevant clause is reproduced herein below:-

"7. Dispute Resolution: The Parties shall endeavour to settle any dispute arising in connection with the interpretation, performance, termination of the Agreement and/or the Security Document, or otherwise in connection with the Agreement ("Dispute"), through consultations and negotiations. If no settlement can be reached through consultations of the Parties within 15 days of one Party delivering a written notice of the Dispute to the other Party, then such matter shall be finally settled by arbitration under the (Indian) Arbitration and Conciliation Act, 1996, as may be amended, or its re-enactment, by a sole arbitrator, appointed by the Secured Party. The Parties agree with respect to such arbitration that: (i) The arbitration proceedings shall be conducted in English; (ii) The place of arbitration shall be New Delhi, India; (iii) The arbitration award shall be final and binding on the Parties, and enforceable in accordance with its terms; (iv) The arbitrators shall state reasons for their findings in writing; (v) the costs of such arbitration shall be borne by the losing Party or otherwise as determined in the arbitration award; (vi) If a Party is required to enforce an arbitral award by legal action of any kind, the Party against whom such legal action is taken shall pay all reasonable costs and expenses and attorneys' fees, including any cost of additional litigation or arbitration taken by the Party seeking to enforce the

award; (vii) When any dispute occurs which is submitted to arbitration, except for the matter under dispute, the parties shall continue to exercise their remaining respective rights and fulfill their remaining obligations under the Agreement."

It is submitted that the petitioner sent its first notice on 6th April, 2015 wherein it demanded the sums due under the agreements. Thereafter they sent further notice on 5th May, 2015 where under also they reiterated their demand made earlier and terminated the Agreement and did not at all refer the matter to arbitration under the Arbitration and Conciliation Act, 1996. The third notice was sent on 7th October, 2015 which also envisaged demand for recovery of monies and the petitioner did not once again refer the matter to arbitration. The respondent thus submits that the petitioner did not want the matter to be referred for Arbitration and had thus given up its right under the Arbitration and Conciliation Act, 1996 and since up till now no notice to refer the matter for arbitration has been sent, it is stated that the present petition(s) are thus barred and not maintainable as up till now there has been no reference to be made under the Act, by the petitioner and by sending the above mentioned notices under general law, the petitioner has given up its right to refer the matter for arbitration and/or proceedings there under and thus the present petition(s) are not maintainable.

19. The matters have been discussed many times and it is informed to the learned counsel for the respondent to take instruction in order to secure the amount. However, there is no positive sign of the same. Thus the only submission is that the value of the machinery is much high as stated in the valuation report submitted by the petitioner. He submitted that after passing of the order dated 15th December, 2015, the respondent had deposited a sum of Rs. 1 crore with the petitioner. Due to money crunch, the respondent is not able to clear the amount due. He states that reasonable time be granted, so that the respondent may be able to recover its position.

20. It is also a matter of fact that on 15th December, the respondent handed over 3 cheques to the petitioner in Court dated 20th January, 2016 bearing cheque No. 195351 of amount Rs. 1,00,00,000/-, dated 20th February, 2016 bearing cheque No. 195352 of amount Rs. 3,00,00,000/- and dated 20th March, 2016 bearing cheque No. 195353 of amount Rs. 3,00,00,000 respectively. The said cheque on 20th January, 2016 had got dishonoured due to insufficiency of funds. On 21st January, 2016 in utter confidence and under proper directions from the respondent, the counsel of respondent had claimed and asserted that the said cheque will be honoured and the same may be represented. The only one thing that was not mentioned in all honesty is that the account of respondent with Axis Bank had been frozen vide notice dated 5th January, 2016 by ESI. The said freezing of the account was due to non-payment of arrears of ESI.

21. The counsel for the respondent had admitted that the Company is in trouble, as the accounts have been frozen for non-payment of ESI and may not be in

position at present to provide any type of security and bank guarantees to the petitioner. The cheques which were handed over with elaborated confidence in the Court by the respondent on 15th December, 2015 and upon it getting dishonoured, on 22nd January, 2016 the respondent reassured about its clearance upon being re-deposited, fully aware of the fact that the same account had been frozen on 5th January, 2016. A sum of Rs. 50 lakh was transferred through RTGS on 28th January, 2016 to the account of petitioner by respondent. Even after reserving the judgments in the matters, after mentioning fresh applications under Section 151 CPC, the respondent sought directions for the petitioner to accept the securities so offered by the respondent as well as to accept from respondent a sum of Rs. 1 crore per month starting from June, 2016 for the time being, as the respondent is hopeful that it would be able to clear off the dues of the petitioner in a short time.

22. It is also stated in the application(s) that in order to safeguard the investments already made by the respondent to the tune of more than Rs. 1800 crores, out of which more than Rs. 88 crores paid to the petitioner and to safeguard the employment of more than 7500 employees out of which there are 1800 Doctors and to keep the medical eye centres running which are in the number of about 200, the respondent is willing to give further properties, numbering 9, having pari-passu charge, which properties are with City Union Bank Ltd. which has outstanding of about Rs. 52 crores but the properties are worth more than Rs. 78 crores. Thus, the petitioner would be validly secured with respect to the 10 properties as mentioned in the applications.

23. It is also stated in the application that the petitioner be asked to accept pari passu charge of immovable assets which are already mortgaged with some other banks.

24. I agree with the submissions of the learned counsel for the petitioner that the petitioner is a Financial Institution and is not covered under the SARFAESI Act, 2002, as such, like Banks. The petitioner cannot seek possession or sale of any such property under the said Act. Thus, creating a second, third or pari passu charge of any such immovable property will not help the petitioner. The petitioner is also not willing to accept any pari passu charge of already mortgaged immovable properties of the respondent with some banks, when it has collateral assets financed by it under the present Loan Agreements hypothecated to it. The purpose of hypothecation of movable assets is to sell the assets to recover the dues of the lender if the borrower fails to repay the loan amount. The loan tenure of the 9 Loan Agreements has already ended and the outstanding of the respondent is approx. Rs. 40 crores

25. The filing of the application after reserving the judgment would show that the respondent wishes to further drag the decision of this Court. One fails to understand that the respondent itself is not disclosing on its own as to why so many institutes (being run by the respondent-Company) were found locked during the assets valuation exercise conducted by the petitioner during the

pendency of the present petition. It is not denied that many litigations are pending against the respondent-Company in forums across the country. There is a force in the submission of the petitioner that either the respondent-Company will be wound up or the hypothecated assets in question may get attached in some other proceedings.

26. Considering the reality that the respondent-Company's accounts have been seized and two cheques of Rs. 3 crores each have been asked to be returned by the respondent and the fact that the financial investigations are being conducted against the respondent, the offer of Rs. 1 crore payment from June, 2016 onwards, coupled with the huge outstanding amount of Rs. 40 crores, the said repayment tenure is not acceptable to the petitioner who submits that it would continue for the next 3-4 years being financially unviable for the petitioner in the facts. However, the counsel submitted that at the time of selling the machinery in question, the petitioner has no objection, if the first option be given to the respondent to purchase the same and if the respondent is unable to purchase, only then the same would be sold in the open market.

27. There is a force in the submission of learned counsel for the petitioner that the sole intention is to defer the event of repossession of the machinery to gain advantage of time and in the meantime dispose of the assets hypothecated to petitioner.

28. The other argument of the respondent's counsel that the petitions are not maintainable as the petitioner has not taken necessary steps to invoke the arbitration clause. There is a malafide on its part. They are deliberately pressing the prayers for appointment of receiver, actually, the arbitration proceedings ought to have been initiated in time. As they have failed to do so, those petitions are liable to be dismissed.

29. It is a matter of fact that as per the Master Loan Agreement both the parties, in all the OMPs as per Clause 6, on events of default occurring, the secured party has the right to make a written request to the borrower - that is when the first legal demand Notice dated 6th April, 2015 was issued by petitioner to respondent with respect to all the Loan Agreements that are subject matter of the present case.

30. It is a matter of fact that the borrower had failed to regularize its accounts. As per Acceleration and Cancellation Clauses, the secured party can declare the total outstanding amount and inform the borrower and has to issue a written notice again.

Therefore, in all cases a Termination Notice dated 5th May, 2015, recalling the whole amount due under the respective loan agreement was issued. By issuance of these notices, the arbitration clause entered between the parties does not get waived off, these notices are required as per the terms and conditions of the agreement between the parties.

31. According to the general terms and conditions that are part of the Master Loan Agreement as per interpretation clause, no waiver of any written covenant can happen till any such waiver is made in writing duly signed by both parties. The arbitration clause under these circumstances cannot be waived off with the issuance of demand or Termination Notice. As and when the reference notice under Section 21 of the Arbitration and Conciliation Act is to be issued, the arbitration will commence, meanwhile the relief claimed in Section 9 of the Act is permissible. Except in three matters, loan term in other matters have already expired. The petitioner is entitled to recover the said admitted amount as per agreement from the respondent who has no defence at all. As they have failed to pay the amount, there is no alternative to pass the orders as prayed for.

32. In view of these facts and circumstances, it is fit case where the prayer for appointment of Receiver is liable to be allowed. Because of the financial irregularities of the respondent, there is likelihood of every chance that where the petitioner will lose its machines and any future order/ award/ decree, if passed in favour of the petitioner, the same may become non- executable, without any machinery/equipment/asset of respondent to secure/execute coupled with the fact that all machineries are scattered around the country. It is just and convenient for the protection and preservation of the collateral machinery, therefore the representative of the petitioner Company, Sh.Gaurav Tyagi, be appointed as a receiver to take possession of all the machineries and medical equipments financed by petitioner to respondent. He can take the assistance of other authorised representatives of the petitioner.

33. The receiver shall be at liberty to obtain the assistance of the local police, in the event of any breach of peace by the person occupying the machineries. The concerned SHO shall provide assistance to the receiver as and when requested.

34. At the time of taking the custody of the machineries, the receiver shall deliver copy of this order to the person from whom the possession is taken. The receiver shall take the photographs of the machineries from different angles along with the person(s) who were occupying the machineries as well as the place of taking over the possession.

35. The receiver shall file his report before the Arbitrator within one month of taking the custody of the machineries along with the photographs and inventory mentioned above as well as the addresses where the machineries are kept. In case, the respondents would be able to clear the outstanding amount within four weeks, it would not be necessary to do such exercise for selling the same in the market. Under these circumstances, against the receipt of outstanding amount, the same be released to the respective parties. However, in failure to make the payment, the receiver would comply with the orders by selling the same. The petitioner is directed not to create third party interest or to sell the same for the next four weeks. At the time of selling the machineries in question- seized by receiver from the premises, the first option be given to the respondents to purchase the same as per market value. But if they fail to purchase the same,

then the same be sold in the open market. On receipt of sale proceed, after adjustment of the loan amount, the remaining amount be given to the respondents if the market value is more than the amount due. The authorized representative of the respondents would be allowed to overview the sale process if so required. As far as the fresh applications are concerned, the offer given on behalf of the respondent is rejected, for the reasons mentioned in para 24-27 of my order as this Court feels that it is another attempt made by the respondent not to pay the said admitted amount due.

36. The petitioner shall take the necessary steps in order to appoint the Arbitral Tribunal in terms of the loan agreement within 30 days if already not taken. The receiver shall submit copy of his report before the arbitrator. The learned arbitrator will adjudicate the disputes between the parties without any influence of my order passed in these petitions. The parties are at liberty to apply to the learned Arbitrator for modification of this order if so required under the circumstances.

37. The petitions are disposed of in the above terms. The findings arrived at are tentative which shall have no bearing when the matters are decided by the Arbitral Tribunal on merit after trial, if such situation would arise. The pending applications also stand disposed of.

38. Copies of the order be given dasti to both the parties.