

(2018) 01 DEL CK 0529

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 341 Of 2017

Kotak Mahindra Bank

APPELLANT

Vs

S.Nagabhushan & Ors

RESPONDENT

Date of Decision : 24-01-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7(4), 7(4)(a), 7(4)(b), 7(4)(c), 11, 34, 43(4), 45

Citation : (2018) 01 DEL CK 0529

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Kaushik Mishra, Bheemsain Jain

Final Decision : Allowed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been filed by the

petitioner challenging the Arbitral Award dated 07.04.2017 passed by the Sole Arbitrator in Case no. ARB/DKS/34/2016 titled M/s. Kotak Mahindra

Bank v. S.Nagabhushan & Ors. (hereinafter referred to as the "Impugned Award"). The Impugned Award holds that as the petitioner was not

a signatory to the Loan Agreement executed between the respondent nos. 1 and 2 on the one hand and respondent no. 3 on the other, the reference of

the disputes to arbitration by the petitioner was not maintainable and the Sole Arbitrator does not have jurisdiction to adjudicate the disputes.

2. The case of the petitioner, in short, is that the respondent nos. 1 and 2 had approached respondent no. 3 Citifinancial Consumer Finance India

Limited for obtaining a housing loan for purchase of an immovable property

being site no. 76, Cascading Meadows 2 Khata No. 119/4,

Marangondanahalli Village, Bidra Halli Hobli, Bangalore- 560036. Respondent No. 3 sanctioned a loan of Rs. 47.90 lakhs to the respondent nos. 1 and

2 and accordingly Loan Agreement dated 31.05.2007 was executed between the respondent nos. 1 and 2 on one hand and respondent no. 3 on the

other. Some of the relevant terms of the loan agreement are reproduced herein under:-

10.2 Inspection, Assignment

(a) xxxxxxxx

(b) The lender shall have the right to create charge over the property in favour of any bank, institution or body by way of security for any

refinance facility or any loan availed of by lender from such bank, institution or body. Lender shall also have the right to transfer or assign

the mortgage over the property in favour of any bank, institution or body in connection with any sale or transfer of the loan by lender to

them

10.3 Securitization:

(a) The lender reserves the right to assign/ sell/ securitize the loan with or without security, if any, in any manner by transferring and/or

assigning or otherwise all its right, title and interest which the lender deems appropriate and the Borrower hereby expressly agrees that in

that event, lender is not required to obtain any permission or put the Borrower to any notice.

(b) The Borrower shall be bound to accept any such securitization and any such sale, assignment, or transfer and the Borrower shall accept

such other party(s) as creditors exclusively or as a joint creditor with the lender, or as a creditor exclusively with the right to lender to

continue to exercise all powers hereunder on behalf of any such other party.

(c) Any cost in this behalf, whether on account of such sale, assignment or transfer or enforcement of rights and recovery of outstanding

and dues shall be to the account of the Borrower. The Borrower undertakes to pay to third parties the difference between

the loan outstanding and the amount received by the lender in the event of transfer of the portfolio to a third party.

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10.7 The Borrower agrees/confirms as follows:

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(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 (â??Disputeâ?), 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.â??

3. The respondent nos. 1 and 2 also created an equitable mortgage of their above mentioned property in favour of the respondent no. 3, as well as

executed Deed of Declaration and Deed of Undertaking in this regard.

4. It is the case of the petitioner that the respondent no. 3 had further sanctioned a personal loan of Rs. 27.10 lakhs to the respondent nos. 1 and 2 and

a Supplementary Loan Agreement dated 31.05.2007 was also executed between the respondents.

5. It is submitted by the petitioner that by way of a â??Deed of Assignment of Receivables with Underlying Securityâ?

dated 31.10.2012 (hereinafter referred to as the â??Assignment Agreementâ?) respondent no. 3 inter alia assigned to the petitioner the loan

accounts of the respondent nos. 1 and 2. Some of the relevant terms of the Assignment Agreement are reproduced herein under:-

â??1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed, unless the context otherwise requires, the following expressions shall have the meanings set out below:

xxxx

â??Borrowersâ? mean the Persons specified in Schedule 1 of this Deed, to whom Financial Assistance has been extended by the Assignor

under the Financing documents; xxxx

â??Financial Documentsâ? mean all the agreements, deeds and/or documents,

executed in favour of the Assignor and/or entered into

between the Assignor and any Borrower, inter alia, setting out the terms and conditions on which the Assignor has agreed to provide

Financial Assistance to such Borrower; xxxx

“Receivables” means the aggregate amount outstanding of all the Financial Assistance as on the Cut-Off Date, and includes all

amounts due and all other monies whatsoever stipulated in or payable, under the Underlying Documents, by the Borrower to the Assignor,

including but not limited to past overdues, future payments, interest charges for delayed payments, indemnities and damages or other

charges and/or all other monies, if any, received or to be received by the Assignor under the Underlying Documents, including the proceeds

of any enforcement of the Underlying Documents or any Security Interests and/or pledge, created by the Borrower to secure the repayment

of the Financial Assistance under the Underlying Documents and/or any guarantee issued in relation thereto as also includes right over the

sale proceeds over the sold-out Security Interest either by the liquidator or receivers or other like officials or otherwise.

Provided that it is hereby clarified that Receivables and all other monies stipulated in or payable, under the Financing Documents shall not

include any undisbursed Commitment by the Seller to the Borrower under the Financing Documents;

“Security Document” means a Guarantee, if any, and/or any other deed, agreement, document, instrument, writing, record or any

memorandum, recording, creating or evidencing the creation of any Security Interests. The description of the movable/immovable properties

over which Security Interests have been created in favour of the Assignor is set out in Schedule 1 hereto;

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“Underlying Documents” mean any one or more of the following:

(i) Financing Documents; (ii) post dated cheques (PDCs); (iii) ECS Mandates; (iv) Security Documents; and (v) any other undertakings,

authorizations, declarations, letters, agreements, instruments, writings or documents relating to the Receivables, Financial Assistance and

Security Interest.

(ii) xxxx

2 ASSIGNMENT OF RECEIVABLES

2.1 Assignment

2.1.1 As per the terms of these presents and in consideration (illegible) assignee having made payment of the Purchase Consideration to the

Assignor on the Effective Date and upon the terms and conditions set forth herein and (illegible) relevant Transaction Documents, the

Assignor as the true, legal (illegible) owner of the Receivables, hereby unconditionally and irrevocably (illegible) transfers, conveys and

release on an "as is where is and as is what is" basis:

(i) all rights, title, interests and benefits of the Assignor in the Receivables;

(ii) all rights, title, interests and benefits of the Assignor over the Security Interests;

(iii) all corresponding rights, title, interests and benefits of the Assignor under the Underlying Documents; and

(iv) all risks, liabilities and obligations relating to the Receivable and the Underlying Documents;

(hereinafter collectively referred to as the "Assets") to and unto the Assignee (illegible) to the end and intent that the Assignee shall

hereafter be deemed to be the full, true and absolute owner and the only Person legal and beneficially certified to the Assets and the

Assignee shall hereinafter be vested with all the (illegible), duties, obligations and remedies of the Assignor against the Borrowers in respect

of the Assets, including the right to recover and receive all Receivables the right to file a suit or institute such other recovery proceedings

and take such other actions, as may be required for the purpose of recovery and/or realization of the Assets, in its own name and right and

as a legal acquirer and not as a representative or agent of the Assignor.

6. On the basis of its rights under the Assignment Agreement, the petitioner sent a notice dated 11.01.2016 demanding a sum of Rs.1,68,51,491/- from

the respondent nos. 1 and 2 along with interest. Said notice was replied to by the respondent nos. 1 and 2 and eventually, as loan remained unpaid, the

disputes were referred to the Sole Arbitrator for adjudication.

7. As noted above, the Sole Arbitrator by his Impugned Award has held that as

the petitioner was not a signatory to the Arbitration Agreement, reference of the disputes at its behest was not maintainable. The relevant findings of the Sole Arbitrator in the Impugned Award are reproduced herein below:-

11. Admittedly, the claimant is not a signatory to the arbitration agreement herein. Though the article 10.2 and 10.3 of the Home Loan

Agreement confers right to the lender to create charge over the Property in favour of any bank, institution or body by way of security for

any refinance facility or any loan availed of by the lender from such bank, institution or body and Lender shall also have the right to

transfer or assign the mortgage over the property in favour of any bank, institution or body in connection with any sale or transfer of the

loan by the lender to them.

12. However the claimant cannot take any advantage of article 10.2 & 10.3 for the purpose of adjudication of disputes by way of

arbitration as the claimant is not a party to arbitration agreement as envisaged in the Loan agreement dated 31.05.2007. It is settled law

that in the absence of any document signed by the parties as contemplated under section 7 (4) of the Arbitration and Conciliation Act and in

the absence of any arbitration agreement as contemplated in clause(a), (b) or (c) of sub section (4) of Section 7, the dispute cannot be

referred to the arbitrator by the claimant in respect of subject matter.

13. In view of the above, at the threshold, I am of the view that the reference to the arbitrator, in the facts and circumstances of the present

case, cannot be made. Before parting, several other contentions have been made by the learned counsel for the parties which need not be

gone into by me in view of the above. All contentions are kept open.

14. Therefore, I hold that the Arbitrator does not have jurisdiction to adjudicate the present case. The arbitration proceedings stand closed

and the reference to the arbitrator is answered accordingly.â??

8. The learned counsel for the petitioner submits that the Sole Arbitrator has failed to appreciate that the Loan Agreement by its very nature was

assignable. Once the rights under the Loan Agreement are assigned in favour of the petitioner, the rights under the Arbitration Agreement, being only

in nature of remedy for enforcement of such rights, are equally assignable and have been duly assigned in favour of the petitioner in the present case

by way of the Assignment Agreement. It is submitted that the Arbitrator had, therefore, erred in not exercising the jurisdiction vested in him under the

Arbitration Agreement.

9. The learned counsel for the respondent, on the other hand, submits that the Arbitration Agreement is a separate and an independent agreement;

even though the rights under the Loan Agreement are transferred by the respondent no. 3 in favour of the petitioner, the rights to enforce the

Arbitration Agreement would not stand transferred and therefore, the Sole Arbitrator has rightly held that the arbitration proceedings were not

maintainable at the behest of the petitioner. He further submits that in any case, the claim raised by the petitioner before the Sole Arbitrator, being one

of enforcement of the right of mortgage, was not maintainable as held by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance*

Ltd. and Ors (2011) 5 SCC 532.

10. I have considered the submissions made by the counsels for the parties. The counsel for the petitioner has rightly contended that the rights under

the Loan Agreement and the Supplementary Agreement were assignable by their very nature. In *ICICI Bank Limited v. Official Liquidator or APS*

Star (2010) 10 SCC 1, Supreme Court held as under:-

“46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the

bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or

hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer).

Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it

cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor Bank has never purchased the debt(s). It has

advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes non-performing

asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not

acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything

from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security; the borrower(s) ceases to be the borrower(s)

of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee).

47. At this stage, we wish to once again emphasise that debts are assets of the assignor Bank. The High Court(s) has erred in not

appreciating that the assignor Bank is only transferring its rights under a contract and its own asset, namely, the debt as also the

mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or

in the assets. None of the clauses of the impugned deed of assignment transfers any obligations of the assignor towards the assignee.â??

11. This Court also in *Hindon River Mills Ltd. v. IFCI Ltd. & Anr.* (2012) 173 CompCas264 (Delh,i) reiterated that sale of Non Performing Assets by

way of assignment does not affect the right of the debtor and is, therefore, permissible.

12. This now brings me to the second question, which is as to whether under Assignment Agreement the petitioner would also get the right to enforce

the Arbitration Agreement that was contained in the Loan Agreement executed between the respondent nos. 1 and 2 on one hand and respondent no.

3 on the other. Under Clause 2.1.1 of the Assignment Agreement, respondent no. 3 transferred and conveyed to the petitioner all of its rights, title,

interest and benefits under the â??Underlying Documentsâ??.

13. â??Underlying Documentsâ? was defined in Clause 1.1 to mean and include the financing documents. Therefore, all rights, including the right to

seek adjudication of disputes from Arbitration, stood transferred from respondent no. 3 to the petitioner.

14. This would now bring me to yet another aspect of the matter, as to whether Arbitration Agreement itself is capable of assignment and would inure

to the benefit of a non signatory to such an Arbitration Agreement. In my view, this issue is also no longer res integra.

15. In *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Others* (2013) 1 SCC 64,1 the Supreme Court, while

discussing the issue as to whether even non signatories to the Arbitration Agreement can be referred to Arbitration held as under:-

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as

well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against

or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute

obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a

third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming through or under the

signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to

the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:

1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it

incorporates, or the benefit of a claim which has already come into existence.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the

Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether

binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under

Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration

agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of

contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to

private as well as public legal entities.â?? (emphasis supplied)

16. This Court in the case of Bestech India Private Ltd. v. MGF Developments Ltd. & Ors. (2009) 161 DLT 282 held that if a Contract is assignable,

an Arbitration Clause will follow the Assignment of the Contract. This judgment was followed by the Bombay High Court in DLF Power Limited v.

Mangalore Refinery & Petrochemicals Limited 2016 SCC Online Bom 5069.

17. Rajasthan High Court in Aerens Goldsouk International Co. Ltd. v. Samit Kavdia and Ors. 2009 (1) R.A.J. 128 (Raj) relying upon Russell on

Arbitration held that an Arbitration Agreement will bind not only the actual parties to it, but also an assignee of a Contract containing it.

18. In Geo-Group Communications Inc. v. IOL Broadband Limited (2010) 1 SCC 56,2 a Single Judge of the Supreme Court, while exercising his

powers under Section 11 of the Act held as under:-

â??31. There is no manner of doubt that the respondent Company is the successor-in-interest of Exatt. After amalgamation of Exatt with the

respondent, all the liabilities and obligations of Exatt, including those mentioned in SHA dated 1-12-2005 stood transferred, in law, to the

respondent Company. This position of law was fairly admitted by the learned counsel for the respondent at the time of hearing of the

application. Even Clause 3.3 of the scheme of amalgamation inter alia specifically provides that the respondent Company will be bound by

all the obligations and liabilities of any nature of Exatt. Therefore, Clause 11.7 of SHA dated 1-12-2005 is applicable to the respondent

Company in the same manner as it was applicable to Exatt.â??(emphasis supplied)

(Clause 11.7 of SHA dated 01.12.2005 was the Arbitration Agreement)

19. The Arbitrator, has relied upon the judgment of the Supreme Court in Indowind Energy Limited v. Wescare (India) Limited and Another (2010) 5

SCC 306, however, in my view, the said judgment would have no application as it was decided in the facts of the said case. There was no question of

assignment in the said case. The only issue was whether Indowind, which was not a signatory to the Arbitration Agreement, could be referred to

Arbitration merely because Subuthi had described Indowind as its nominee and the Agreement was signed on behalf of Subuthi by a person who

was also a director of Indowind. Supreme Court held that as each company is a separate and distinct legal entity, the above facts were not sufficient

to make Indowind to be deemed as a party to the Arbitration Agreement.

20. The Arbitrator also place reliance on the judgment Yogi Agarwal v. Inspiration Clothes & U and Others (2009) 1 SCC 372, which was a case

where there was no Arbitration Agreement in relation to the suit transaction. Arbitration Agreement contained in three invoices, which did not relate

to the suit transaction, were being relied upon and such reliance was rejected by the Supreme Court.

21. In view of the above, in my opinion, the Assignment Deed transferred all rights, including the right to seek Arbitration, from respondent no. 3 to the

petitioner and the Sole Arbitrator has failed to exercise the jurisdiction vested in him under the Arbitration Agreement. The Impugned Award is,

therefore, liable to be set aside.

22. On the issue whether the claim filed before the Arbitrator, being one of enforcement of mortgage, is not maintainable in view of the judgment of

the Supreme Court in Booz Allen and Hamilton Inc. (Supra), is an issue to be decided by the Arbitrator. In the Impugned Award the Arbitrator has

not rendered any finding on the said issue and therefore, it would not be proper for me to proceed to decide the said issue at this stage.

23. In view of the above, the present petition is allowed and the Impugned Award dated 07.04.2017 is set aside, with no order as to costs.

24. As the Arbitrator had not considered the other submissions, including merits of the claim, it will be open to the petitioner to invoke fresh Arbitration

for adjudication of its claims and for that purpose rely upon Section 43(4) of the Act.