(1998) 10 BOM CK 0031

In the Bombay High Court

Case No : Arbitration Petition No. 281 of 1998

Kotak Mahindra Finance Limited APPELLANT

Vs

Rajinder Steels Limited RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1

Citation : (1999) 1 BomCR 344 : (1999) 2 MhLj 586

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Ravi Kadam and B. Saraf, instructed by, Mahimtura and Co, for the Appellant; M.S. Singhavi and I.S. Krishnamurthy, for the Respondent

Judgement

F.I. Rebello, J.—Admit. Heard forthwith. By the present petition the petitioners have prayed amongst other reliefs for appointment of Receiver in respect of leased equipments described in Schedule Exhibit "A" to the petition. There is also a prayer for injunction to restrain the respondents from disposing and/or parting with possession, etc., of the leased property.

2. The petitioners pursuant to an agreement have leased out certain properties to the respondents. The lease rentals were to be paid in terms of the agreement. There were defaults by the respondents in making payments. On failure by the respondents to comply with the terms of the agreement and as respondents had committed breaches by letter dated 20th February, 1998 the petitioners terminated the agreement. The petitioners sought from the respondents immediate delivery of the equipment in good order and condition and further the amount specified in letter dated 3rd March, 1998. The respondents replied to the said letter by their letter dated 30th May, 1998 wherein they have taken the contention that it was a loan agreement. It is further set out that the agreement is a colourable document and invented to secure the money. The alleged agreement, it is pointed out, is not binding on the respondents being bad in law

it is devoid of free consent and consideration. It is further pointed out that the respondents were willing to get the dispute resolved through Arbitration as agreed between the parties. An Arbitrator has been appointed. In the meantime the petitioners have moved this petition u/s 9 of the Arbitration & Conciliation Act, 1996.

3. It is contended on behalf of the petitioners that they being the owners of the equipment and the lease having been terminated for non-payment of royalty or lease rentals the petitioners are entitled to have a Receiver appointed for the property so that the machinery is protected from waste and damage. It is pointed out that in similar matters this Court has been taking a consistent stand of appointing Court Receiver. Reliance has been placed on order dated July 31, 1998 by the present petitioners herein against another Company wherein this Court directed the appointment of Receiver.

On the other hand on behalf of the respondents it is contended that they have no objection to the grant of injunction as prayed for. It is contended that no case is made out for appointment of Receiver. It is further contended that the decree if obtained would be a money decree and as such no Receiver can also be appointed. At any rate it is pointed out that the petitioners had been unable to show any urgency for appointment of Receiver. It is pointed out that the petition does not contain any averment that there is any danger to the property demanding immediate action. Reliance for that purpose has been placed on the judgment of a Single Judge of the Madras High Court in the case of T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, . It is contended that for appointment of Receiver a party seeking such appointment must satisfy the principles as set out in para 13 of the judgment in T. Krishnaswamy Chetty''s case (supra). The said principles have been approved by the Apex Court. It is contended on behalf of the respondents that in the instant case the 3rd and 4th principles are not satisfied. It is pointed out that there is no emergency and at any rate a Receiver should not be appointed to deprive the respondent who is in de facto possession as that may cause irreparable loss. It is, therefore, contended that the petition should be rejected. In the alternative it is contended that the petitioners are willing to pay every month beginning from 31st January, 1999 an amount of Rs. 20,00 lakhs. It is contended that this would serve the ends of justice and/or protect the interest of the petitioners.

On the previous occasion of hearing it was brought to the attention of the Court that the Steel Mill was closed and not running. The respondents were therefore, called upon to file an affidavit to establish the fact whether the mill was running as that would have been a consideration for the appointment or non-appointment of Receiver, considering that the machinery is, installed in the Mill. No such affidavit has been filed at all, however learned Counsel fairly concedes that the mill is closed, but only as a temporary measure.

4. After having considered the various aspects of the matter I am satisfied that the petitioners have made out a case for appointment of Receiver. In the first

instance the machinery has been handed over to the respondents pursuant to an agreement. The said agreement has been terminated. It is the contention of the respondents herein that the said agreement is not binding upon them. That will be an issue to be decided in the arbitration proceedings. The respondents are not paying the lease rentals/royalty to the petitioners for a long time. The machinery is lying unused presently, the factory being closed. It is true that there may not be any imminent danger to the machinery. However, non-user by itself will result in damage to the machinery. The petitioners cannot be told on the one hand that they are not entitled to a Receiver, but at the same time that they are also not entitled to the lease rentals. This would be totally inequitable. The appointment of a Receiver is also an equitable relief. In the instant case the mere fact that the respondents are in de facto possession is no answer as their possession prima facie is possession of the petitioners. Whether the agreement has been rightly terminated or not will have to be decided in the course of the proceedings. The petitioners are, therefore, entitled to have the machinery secured and in proper custody. I am, therefore, satisfied that the petitioners are entitled to the relief as prayed for. However, as the respondents have expressed their willingness to pay at the rate of Rs. 20.00 lakhs from 31st January, 1999 the order of appointment of Receiver is made subject to the respondents complying with the offer made by them. In the meantime pending the Receiver taking possession of the machinery the petitioners will be entitled to the relief in terms of prayer Clause (b).

5. In the light of the above, the following order :--

(1) Petition allowed in terms of prayer Clause (a). Possession, however, to be taken only in the event the respondents fail to perform the following conditions:--

(i) The respondents to pay to the petitioners an amount quantified at Rs. 20.00 lakhs per month. The 1st of such installment being payable on 31st January, 1999 and the subsequent installments in the last day of every month till the disposal of the arbitral proceedings and 4 weeks from the communication of the Award of the Arbitral Tribunal.

(ii) In the event there is any default by the respondents in making payment of any installment the Receiver to take possession. Receiver, however, in such an event in the first instance to appoint the petitioners if they are willing within two weeks of taking possession to act as agents of the Receiver by furnishing security for the machinery and on payment of rentals in terms of the agreement between the parties. The agreement of agency should be entered into within four weeks from the respondents agreeing to act as agents of the Receiver.

(2) Petition is also allowed in terms of prayer Clause (b) till such time as the Receiver takes possession of the machinery mentioned at Exhibit "A" to the petition.

(3) In the circumstances of the case there shall be no order as to costs.

Certified copy expedited.

6. Petition allowed.

