

(2014) 01 BOM CK 0268

In the Bombay High Court

Case No : Arbitration Petition (L) No. 1460 of 2013 and Notice of Motion (L) No. 2178 of 2013

L and T Finance Limited

APPELLANT

Vs

Vardhman Chemtech Ltd. and Others

RESPONDENT

Date of Decision : 07-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : (2014) 1 ABR 803 : (2014) 4 ALLMR 831 : (2014) 2 ARBLR 41 :
(2014) 1 BomCR 552

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : S.I. Joshi, Mr. Anand Poojari instructed by and M/s. S.I. Joshi and Co, for the Appellant; Amit Shroff, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Dhanuka, J.—By this Petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 the petitioner seeks appointment of Court Receiver, injunction in respect of the properties described at Exhibit G, for an order of deposit in the sum of Rs. 3,78,01,512/- with further interest thereon and for an order and direction against the respondents to disclose the location of the properties.

A few relevant facts for deciding this Petition are as under:

Vide loan agreement dated 19.11.2010 entered into between the petitioner and respondent no. 1 the petitioner granted a loan of Rs. 10 crores to the respondents on terms and conditions described in the said agreement. The respondent nos. 2 to 4 were the guarantors of respondent no. 1 in respect of the said loan and executed a deed of guarantee in favour of the petitioner. The respondent no. 1 was liable to repay the entire amount with interest to the petitioner in instalments. It is the case of the petitioners that since the respondents committed defaults in making the payment in instalments, the

petitioner issued a demand cum termination notice dated 8.8.2013 through their advocate thereby terminating the loan agreement and calling upon the respondents to pay Rs. 3,78,01,512/- with further interest thereon. The petitioner referred the dispute to Mr. B.B. Jain advocate who was appointed as the sole Arbitrator by the petitioner. According to the petitioner, there was no response to the said notice nor any repayment by the respondents.

2. By an ad interim order dated 5.9.2013 this Court passed an order in terms of prayer clauses (c) and (d) thereby directing the respondents to disclose the location of the properties described in Exhibit G and injunction restraining the respondents from parting with possession, creating third party rights, alienating and/or encumbering with the properties described in Exhibit G to the petition.

3. In the month of November, 2013 the respondents filed a Notice of motion (Lodging) No. 2178 of 2013 in this Arbitration proceedings inter alia praying for condonation of delay in filing the Notice of motion and for vacating the ex-parte ad interim order dated 5.9.2013 passed by this Court on the ground of jurisdiction. The respondents did not file any affidavit on merits and also did not disclose any assets though directed by the said order dated 5.9.2013 passed by this Court.

4. Ms. Joshi learned counsel appearing on behalf of the petitioner submits that the whereabouts of the hypothecated assets are not known. There is no response to the notice of demand. According to the petitioners, the respondents have to pay a sum of Rs. 3,78,01,512- as on 7.8.2013 with further interest thereon @ 36 % p.a. till payment. The learned counsel submits that the petitioner has good chances of succeeding in arbitration. The properties which are secured in favour of the petitioner are not sufficient to protect the claims of the petitioner. It is submitted that there are no other securities to secure the claim of the petitioner. The respondents are in financial distress and the petitioner apprehends that the respondents may alienate the properties with a view to delay the execution of the award as a decree. It is submitted that if the reliefs as claimed by the petitioner are not granted, the award will remain as a paper decree and would be unexecutable. The petitioner thus, seeks appointment of receiver in respect of the properties described at serial nos. 1 to 4 of Exhibit G and also seeks appointment of Court Receiver in respect of the items described at Sr. 5 of Exhibit G which are hypothecated in favour of the petitioner vide deed of hypothecation dated 19.11.2010.

5. Mr. Shroff learned counsel appearing on behalf of the respondents submits that this Court has no jurisdiction to entertain and try this petition as no cause of action has arisen within the territorial jurisdiction of this Court. The learned counsel submits that the respondents are carrying on business at Chandigarh. It is submitted that the Deed of guarantee were also executed at Chandigarh. Even the demand promissory note dated 19.11.2010 was executed at New Delhi. It is submitted that the petitioner has not obtained leave under clause XII of the Letters Patent. The learned counsel submits that in any event the petitioner are

secured by pari passu charge on the hypothecated assets and no case is made out for attachment before Judgment under Order 38 Rule 5 of the Code of Civil Procedure, 1908.

6. The learned counsel placed reliance on the Judgment of this court in Kotak Mahindra Finance Ltd. Vs. T. Thomas Educational Trust A Charitable and Educational Trust and Others, in support of his submissions that since no part of cause of action has arisen at Mumbai even though the agreement provides for conferring jurisdiction on the Courts at Mumbai, this Court cannot entertain this petition since this Court has no jurisdiction to entertain this petition. The learned counsel placed reliance on the Judgment of this Court in Navin Makhija and Others Vs. Tulsi Bhimjiyani and Another, in support of his submissions that in any event the petitioner ought to have obtained leave under clause XII of the Letters Patent and since no leave is obtained this petition cannot be entertained in this Court on that ground also. Reliance is placed on para 13 of the said judgment which holds that this Court granted leave under clause XII of the Letters Patent to the petitioners in view of the fact that the property was situated at Mumbai, and thus the petitioner in this case also ought to have obtained leave under clause XII of the Letters Patent in view of the fact that the property is situated outside Mumbai.

7. Ms. Joshi learned counsel appearing for the petitioner in rejoinder submits that the loan was sanctioned from the corporate office of the petitioner. Clause 3.3 of the loan agreement provides for payment of the loan instalments and other charges and moneys due under that agreement which shall be payable by the borrower to the lender at the corporate office or at such other addresses as may be specified in the schedules hereto and shall be deemed to have been paid on the date on which the amounts thereunder are realized. The learned counsel also placed reliance on clause 14 of the Agreement which provides that the said Agreement shall be governed by and construed in all respects with the Indian laws and the parties hereto agree that any matter or issues arising thereunder or any dispute thereunder shall at the option/discretion of the lender, be subject to the non-exclusive jurisdiction of the courts of the city of Mumbai. The learned counsel submits that even the demand promissory note clearly show that the respondents had promised to pay to the petitioner at their office situate at New Delhi or wherever else demanded. The learned counsel submits that the petitioners issued a notice dated 8.8.2013 calling upon the respondents to pay the amounts under various documents which clearly indicates that the payments were to be made at Mumbai and this court has thus jurisdiction to try, and entertain this petition. It is submitted that the respondents have not denied the averments made in para 28 of the petition which provides as to how this court has exclusive jurisdiction to try, entertain and dispose of this petition.

8. Ms. Joshi learned counsel appearing on behalf of the petitioner placed reliance on the Judgment of this Court in L& T Finance Limited vs. M/s. Spotlight Tradecom Pvt. Ltd. in Arbitration Petition No. 62 of 2013 delivered on 1.7.2013 in

which after considering the Judgment of the Supreme Court in case of A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies Salem and other Judgments of this Court, it is held that part of cause of action has arisen at Mumbai. The loan was sanctioned from Mumbai, both the parties having agreed to confer exclusive jurisdiction to one of the Court having jurisdiction, i.e. Bombay this Court has the jurisdiction to entertain, try and dispose of the petition.

9. Ms. Joshi learned counsel also placed reliance on the Judgment of this Court in the case of Konkola Copper Mines (Plc) vs. Stewarts and Lloyds of India Limited and distinguished the Judgment of this Court relied upon for the respondents. The learned counsel also placed reliance on the Judgment of the Division Bench of this Court in case of Konkola Copper Mines supra delivered on 9.7.2013 in Appeal (Lodging) No. 199 of 2013 in support of her submissions that since venue of the arbitration was at Mumbai, this Court has jurisdiction to entertain and dispose of this petition.

10. The learned counsel invited my attention to the averments made in the petition and in particular paras 13, 17, 18, 19, 20 and 23 in support of her submissions that the petitioners have made out a case for attachment before judgment in respect of the properties described at serial nos. 1 to 4 of Exhibit G.

11. The learned counsel appearing on behalf of the Respondents furnished a copy of the reply dated 21.8.2013 alleged to have been sent to the petitioners. Ms. Joshi learned counsel for the petitioners could not take instructions in view of the respondents having tendered copy of the said reply in Court after conclusion of the hearing. The learned counsel for the respondents fairly conceded that based on the view taken by the division bench of this Court in case of Konkola Copper Mines supra this court has the jurisdiction to entertain and dispose of the present petition.

12. In view of the fact that the respondents have conceded the fact that this Court has the jurisdiction to entertain and dispose of the petition, I need not deal with the issue of jurisdiction raised by the respondents in detail. The records including the provisions of the agreement clearly indicates that this court has jurisdiction to entertain this petition. Loan was sanctioned at Mumbai. Parties agreed to confer jurisdiction at courts at Mumbai exclusively.

13. A perusal of the record clearly indicates that it is not the case of the respondents that no default is committed by the respondents. Clause 8 of the loan agreement provides for event of default. Clause 9 provides for consequences in the event of default committed by the respondents in making payment of the loan instalments, interest or other moneys payable within the stipulated time whether demanded or not. The petitioner is entitled not only to terminate the loan agreement but, is entitled to recover the monies from the respondents including the future instalments and initiate legal action. Since the respondents have not denied the claim on merits, the averments made in the petition are deemed to have been admitted.

14. On the perusal of the record I am of the prima facie opinion that the respondents have committed default in making repayment of the instalments to the petitioners. A perusal of the affidavit in support of the notice of motion it is clear that the respondents have not denied the liability of the petitioner.

15. According to the petitioner the petitioner has to recover Rs. 3,78,01,512/- with future interest thereon with effect from 8.8.2013. The respondents have not disclosed their encumbered and/or unencumbered assets though directed by the ad-interim order passed by this Court on 5.9.2013 so far. The petitioner has thus, made out a case for attachment before Judgment as averred in the petition in respect of the properties described at serial nos. 1 to 4 of Exhibit G and has made out a case for appointment of Court Receiver in respect of the current assets, movable properties and equipments described in the Deed of hypothecation dated 19.11.2010. Accordingly, I pass the following order:

ORDER

(i) Court Receiver, High Court, Bombay is appointed as receiver in respect of the hypothecated assets described at Serial No. 5 of Exhibit G with a direction to the Court Receiver to appoint the respondents as agent of the Court Receiver in respect of the movable properties and equipments on usual terms and conditions and on payment of royalty.

(ii) In so far as current assets are concerned, the Court Receiver shall allow the respondents to carry on business using those current assets in the ordinary course of business.

(iii) Till the disposal of the arbitration proceedings and for a period of four weeks thereafter, there shall be interim injunction of this court from alienating or creating any third party rights in respect of the properties described at serial nos. 1 to 4 of exhibit G.

Arbitration Petition is disposed of in aforesaid terms. Notice of Motion is dismissed. No order as to costs.