

(2012) 12 BOM CK 0009

In the Bombay High Court

Case No : Arbitration Petition No. 783 of 2011 and Arbitration Petition No. 347 of 2012

M/s. Sahyadri Earthmovers, Mr. Suresh Sitaram Kamthe, APPELLANT
Partner of M/s. Sahyadri Earthmovers, Mr. Nandkumar
Dhulaji Jadhav, Partner of M/s. Sahyadri Earthmovers and Mr.
Kailas K. Kamthe

Vs

L and T Finance Ltd.
 L and T Finance Limited Vs RESPONDENT
Sahyadri Earthmovers, (Borrower), Mr. Suresh Sitaram
Kamthe, Partner of Respondent No. 1.- Sahyadri
Earthmovers, Mr. Nandkumar Dhulaji Jadhav, Partner of
Respondent No. 1 Sahyadri Earthmovers and Mr. Kailas K.
Kamthe, (Guarantor)

Date of Decision : 17-12-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 36, 7, 9
Contract Act, 1872 — Section 72

Citation : (2013) 3 ABR 602 : (2013) 2 MhLj 302

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Sachin Punde in Arbitration Petition No. 783 of 2011 and Mr. Anand Poojari assisted with Ms. Shakuntala Joshi instructed by M/s. S.I. Joshi and Co. in Arbitration Petition No. 347 of 2012, for the Appellant; Sachin Punde in Arbitration Petition No. 347 of 2012, Mr. Anand Poojari a/w Ms. Shakuntala Joshi instructed by y M/s. S.I. Joshi and Co. in Arbitration Petition No. 783 of 2011, for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioners have challenged award dated 6 May 2011 u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act). Petitioner No. 1 is a partnership firm, Petitioner Nos. 2 and 3 are the partners of the firm. Respondent No. 4 is a guarantor. (The borrower). All of them have challenged even the validity, including the existence of Loan-Cum-Hypothecation Agreement dated 7 June 2007 (for short, "the loan agreement"), deed of guarantee for the vehicle/equipment and all actions arising out of the same. The

Respondent/claimant (the financier) has invoked Section 9 of the Arbitration Act for protective and injunctive reliefs.

2. The Vehicles/Equipments which have been in their possession since 2007, stated to have been purchased by them by their own funds. The submission is made on behalf of Respondent No. 4 that there exists no loan and Arbitration agreement and therefore there was no question of passing award against him. This was also on the ground that the loan agreement in question was not signed by Petitioner No. 4.

3. The case of the financier, Petitioner in Arbitration Petition No. 347 of 2012, based upon the admitted documents on record is as under:-

On 7 June 2007, Respondent No. 1 through Respondent Nos. 2 and 3 (the borrowers) approached the Petitioner (the financier) with a request for loan facility to the extent of Rs. 54,70,000/- for the purchase of 1 No. of Volvo EC 210 BLC Hydraulic Excavator bearing Serial No. 18388 and Engine No. 10240298 along with 1 No. of Fine 22X Hydraulic Rock Breaker with standard Accessories bearing Serial No. 22/F-22 A-65, more particularly described in Exhibit "F" to the Petition, on loan-cum-hypothecation basis and the Petitioner accorded their consent to the said request and agreed to grant the loan of Rs. 54,70,000/- i.e. Rs. 44,21,000/- towards Equipments and Rs. 10,49,000/- towards Rock Breaker. Accordingly, a loan agreement was entered into on 7 June 2007 between the Petitioner as "the lender" and Respondent No. 1 as "the borrower" through Respondent Nos. 2 and 3 on the terms and conditions as more particularly described under the said agreement. Under the said agreement, the Petitioner advanced said loan to Respondent No. 1 and Respondent No. 1 agreed and undertook to repay the said loan with interest @ 8.43% p.a. totalling Rs. 72,21,084/- in 48 and 36 equated Monthly Installments (EMI) respectively comprising of a sum of Rs. 1,23,170/- each commencing from 25 August 2007 till 25 July 2011 towards the Excavator and Rs. 36,359/- each commencing from 25 August 2007 till 25 July 2011 towards the Rock Breaker, more particularly mentioned in the schedules attached with the said agreement. Respondent No. 1 agreed that, in case of delay in payment of the installments, Respondent No. 1 shall pay delayed payment charges @ 35% p.a. as per clause No. 3.5 of the agreement. On 7 June 2007, in consideration to the loan granted by the Petitioner to Respondent No. 1 executed Demand Promissory Note, inter-alia, agreed to repay the said loan with interest at the rate of 8.43% p.a.

4. On 12 June 2007, pursuant to the loan granted by the Petitioner to Respondent No. 1, Respondent No. 4 executed a Deed of Guarantee in favour of the Petitioner, inter-alia, guaranteeing the due performance and observances of the terms and conditions of the said agreement by Respondent No. 1. Respondent No. 4 further agreed and undertook that in case Respondent No. 1 failed to pay the outstanding loan amount or any other amount due under the said agreement, Respondent No. 4 shall pay the same without any demur or protest.

Respondent No. 1 was in arrears in payment of loan installments. In spite of repeated reminders and requests, Respondent No. 1 failed and neglected to pay the outstanding loan amount. The Petitioner by its various letters called upon Respondent No. 1 to pay over due loan installments, however, Respondent No. 1 failed to comply with the same and therefore, event of default has occurred as per term 12 of the said agreement.

5. On 19 May 2009, consequently the Petitioner has issued advocate's notice and thereby terminating the said agreement and calling upon the Respondents jointly and severally to pay to the Petitioner a sum of Rs. 51,09,481/- comprising overdue loan installments of Rs. 9,52,022/- delayed payment charges of Rs. 2,76,484/- as of 5 May 2009 and unmatured loan installments of Rs. 38,70,975/- with further compensation of 36% p.a. from 6 May 2009 till payment and/or realisation. The Petitioner had made it clear in the said notice that in failure to make the repayment of the outstanding loan amount, the Petitioner shall entitle forthwith to the repossession of the said Equipments and further that in failure to comply with the requisitions in the said notice, the Petitioner would be constrained to take legal proceedings against the Respondents including referring the disputes, differences and claims under the said agreement to the sole arbitrator Shri Bharat B. Jain, Advocate High Court as per the terms of the said agreement.

The Petitioner had duly served the said notice upon the Respondents by way of RPAD, however, till the date the Petitioner has neither received any returned packet from the postal authority nor reply from the Respondents. The Respondents have breached the terms and conditions of the said agreement by not making the payment of outstanding loan amount, as agreed in the said agreement. Therefore, the dispute and differences arose between the parties.

6. On 10 June 2009, pending the arbitration proceedings, the Petitioner filed Arbitration Petition u/s 9 of the Arbitration Act, inter-alia praying for the reliefs. On 25 October 2010, the Petitioner learnt that the arbitration proceedings was not closed for an award, therefore filed another petition u/s 9 of the Arbitration Act. However, the same was dismissed by the Court.

7. On 24 April 2012, an award came to be passed in favour of the Petitioner and the learned Arbitrator inter-alia granted possession of the Equipments along with the claim as more specifically mentioned in the award.

At present the said Equipments are lying with the Respondents and they are illegally enjoying the fruits of the said Equipments which are hypothecated in favour of the Petitioner and in spite of the termination of the loan agreement and award, the Respondents have failed to repay the loan installments to the Petitioner. The Respondents owed a huge amount under the loan agreement, therefore, filed Petition u/s 9 of the Arbitration Act.

8. By order dated 18 November 2011, this Court (Coram-S.J. Kathawalla, J), by keeping Section 34 Petition pending, directed the Arbitrator to comply with the

order passed by this Court (Coram-Anoop V. Mohta, J.) in Sahyadri Earthmovers Vs. L and T Finance Limited and Another, .

9. The learned Arbitrator, in pursuance to the order, has passed the award in question. Both the parties, therefore, by amending their respective Petitions placed those subsequent events and award on record. As already ordered, both these Petitions (Arbitration Petition No. 783 of 2011 filed by the Borrowers u/s 34 and another Petition No. 347 2012 filed by the Financer [Claimant] u/s 9 of the Arbitration Act) tagged together and heard finally accordingly.

10. The learned Arbitrator read, referred and relied upon the documents and the evidence laid down by the respective parties and by detail reasoned order has passed the award in favour of the financer.

96. I therefore, make and pass the Award in favour of the Claimants as under:

a) Respondents do jointly and severally pay to the Claimants a sum of Rs. 45,72,904/- (Rupees Forty Five Lacs Seventy Two Thousand Nine Hundred & Four Only), consisting of overdue installment amounts, future loan installments, overdue compensation etc., as on 05.05.2009;

b) further, the Respondents do pay interest @ 36% p.a. on said sum of Rs. 45,72,904/- from 06.05.2009 to 29.05.2009 and @ 24% p.a. from 30.05.2009 till payment and/or realisation;

c) The Claimants are entitle to possession of the agreement Equipments being, Volvo EC 210 BLC Hydraulic Excavator bearing Serial No. 18388 and Engine No. 10240298 with 1 No. Fine 22X Hydraulic Rock Breaker with Standard Accessories bearing Serial No. 22/F-22A-65. The Respondents do forthwith surrender possession of the said Equipments to the Claimants. The Claimants are permitted to dispose off the said Equipments for recovery of their dues under this Award and the Claimants do credit the net sale proceeds thereof in the accounts of Respondents, after deducting the expenses incurred to affect the said sale. If the amounts so recovered after the said sale of the Equipments is more than the amounts recoverable from the Respondents under this Award, the Claimants do refund the excess amount to the Respondents and if the amounts recovered after said sale is less than the Awarded amount, the Claimants are entitle to recover balance from the Respondents;

d) Fees and costs of the Arbitration is calculated at a sum of Rs. 2,85,000/-. Both the parties are liable to bear the said fees and costs equally. However, the Claimants are directed to initially make payment of the said Arbitration fees and costs and recover the 50% of the said amount, being an amount of their share from Respondents.

11. Following issues were framed by the learned Arbitrator:-

1. Whether the Claimants prove that they are entitle to the amounts claimed from the Respondents?

2. Whether the Claimants prove that they are entitle to the repossession of the Hypothecated equipments?

3. Whether the Respondents prove that they had not executed the loan Cum Hypothecation Agreement and other documents relied upon by the Claimants?

4. Whether the Respondents prove that the Arbitral Tribunal has jurisdiction to entertain the Counter Claim?

5. Whether the Respondent No. 1 proves that the amount paid by them to the Claimants was not in payment of the agreed agreement installment but otherwise?

6. For costs?

7. What Award.

12. The burden to prove issue Nos. 1 and 2 was of the Financer/Claimants; and other issues Nos. 3, 4 and 5 was of the borrowers/guarantor. The Borrowers led oral evidence of one partner. The Financer led evidence of an authorized person of the company.

13. The agreement, alleged to have been signed by the borrowers and the Financer's authorized signatory. A summary schedule to the agreement shows the date, place and the period and number of the Agreement; the borrowers' and guarantor's name and the amount with agreed interest rate of 8.43% flat and the delayed payment charges @ 36% p.a.. The reference is also made to valuation dated 31 May 2007. Every page of this agreement has been signed by the borrowers. This loan agreement was for 36 months, expired on 25 June 2011. The agreement provides the details of suppliers name and the address. It provides the asset type and its description. Demand promissory note dated 7 June 2007 is also part of the record, signed by the concerned parties. The deed of guarantee admittedly not signed by the partners being the borrowers but only signed by the guarantor-Respondent No. 4. This deed of guarantee is in reference and pertains to the loan agreement and for its debt.

14. Admittedly, there is no specific Arbitration clause in this deed of guarantee. The Arbitration clause is provided in the loan agreement which is as under:-

17 Arbitration

17.1 Any question dispute or difference that arises between parties or any of them touching or concerning this agreement or any condition herein contained or as to the rights, duties or liabilities of parties hereto or any of them either during the continuance of the agreement or after termination or purported termination hereof shall be referred to the sole Arbitrator to be appointed by the Lender, according to the provisions of Arbitration & Conciliation Act, 1996 and rules thereunder and any amendment thereto from time to time shall apply.

17.2 The award of the arbitrator shall be final, conclusive and binding on all the

parties, and all the parties undertake to carry out the award immediately without any delay. The venue of the arbitration shall be Mumbai.

15. It is clear from this deed of guarantee that the loan agreement and its terms and conditions are the part and parcel of deed of guarantee. It cannot be dissected and read in isolation. No guarantor would like to sign the deed of guarantee without understanding the basic loan agreement and/or agreement between the borrowers and the financier. The purpose of deed of guarantee itself means there exists finance agreement and/or loan agreement between the parties and to secure the amount, the guarantor volunteered and guaranteed the same by signing the deed. It is inter-linked and interconnected.

16. There is a specific defence raised even with regard to the signing of these documents by the borrowers, as well as, the guarantor. After going through the material placed on record, as well as, those specific defences so raised, I am inclined to observe that there is no contra evidence on record to justify that they never signed these documents. No further steps and or proceedings were initiated and/or moved by the Petitioners-borrowers or the guarantor to challenge the signature part. Mere denial to the existence of signature itself is not sufficient.

17. Strikingly, the documents so referred and relied by the financier, which are part of the record including the invoices, provides the name of the supplier of the Equipments with detailed description including the amount. There is no dispute that those Vehicles/Equipments have been in possession of the borrowers since the date of delivery as per these invoices. There was no question of party in possession of the Vehicles and/or Equipments, unless authorized and permitted and/or the requested amount is paid by the parties or it's financier. The submission that they made the payment of their own though raised, but could not be substantiated by any documentary or oral evidence on record, though the basic burden upon them is to prove the same, specifically when the financier has placed on record these documents, which proved that they provided finance to the borrowers, who in turn able to take possession of the Vehicles/Equipments. Their obligation was now to make the monthly payment to the financier, as the financier subject to the terms and conditions already made payment to the supplier of the Vehicles/Equipments. There are documents/disbursement advices on record referring to the agreement, amount referring to the borrowers. The documents clearly show the amount financed was Rs. 54,70000/-.

18. Admittedly, the borrowers made the part payment by respective installments to the extent of Rs. 29,00,000/-. There was no question of making any payment in such fashion, if the borrowers/guarantor were stranger to the agreement and the documents. This part payment itself shows that both the parties in fact acted upon and proceeded further. There was no question of taking possession of the Vehicles/Equipments but for the signed agreements and the finance so made by the financier. There was no occasion/reason even to issue 36 post dated cheques by letter dated 31 May 2007. The contents of the letter itself goes against all

these contentions raised to claim damages/counter claim.

19. The contention was raised and therefore the issue was also framed, but the Petitioners-borrower No. 1 in fact, failed to prove that the amount paid by them was not towards the agreed installments as per the agreement. It was specifically contended that the amount was paid by mistake. The learned Counsel appearing for the Respondent-Claimant has also cited a Judgment, AIR 1949 297 (Privy Council) , referring to Section 72 of the Contract Act and further contended that if the money was paid by mistake and as was not due by any contract or otherwise therefore, must be repaid. The counter-claim was also raised based upon this for the refund of the said money. The proposition of law is quite well settled and needs no further discussion. What is required to see is the facts and circumstances read with the agreement between the parties. In the present case, as recorded above, I am inclined to observe that both the parties acted upon the agreement and in fact the payments were made towards the agreed installments. There is no contra material placed and brought on record to prove otherwise. Mere allegations and/or averments itself are not sufficient to overlook the written documents on record. There is no justification whatsoever placed on record to show how and in what circumstances they have been in possession of the Vehicles/Equipments since the date of the agreement. The aspect of self finance, if any, as contended, to purchase vehicles, is also nowhere proved by the oral, as well as, the written documents. This is also not a case that the agreement in question can be stated to be illegal and/or contrary to the law. The learned Arbitrator, therefore, has rightly decided these issues against the borrowers/guarantor by providing detailed reasons. The rejection of the counter-claim therefore, cannot be stated to be incorrect and/or wrong. It is well within the framework of law and the record available. The learned Arbitrator has rightly observed that the borrowers/guarantor failed to prove that the payments were made by mistake; and under pressure. The findings therefore so given that the Respondents-borrowers were failed to establish their case in all counts, need no interference.

20. In view of above itself, it is clear that the possession of the Vehicles/Equipments has been only because of the agreement between the parties and as there are consistent defaults in payment, the financier is entitled to take steps to recover the possession of the Vehicles/Equipments by following the due procedure of law. The proceedings, therefore, so initiated is well within the framework of law and the record. The learned Arbitrator, considering the facts and circumstances and the material placed on record, right in ordering and permitting the financier to take possession of those Vehicles/Equipments. The borrowers/guarantor, in view of the reasons so recorded and/or otherwise and even on the basis of the reasonings, are entitled to get the possession of the vehicles as they failed to perform their obligations and defaulted in making payment. The financier, therefore, is entitled to take all necessary steps to take possession and to dispose of the said Equipments and/or machinery in accordance with law and the agreement.

21. The learned Arbitrator has also dealt with the contention that there was no sanction and/or disbursement of payment made at any point of time to the borrowers or the guarantor. This contention is unacceptable. Even otherwise, considering the terms and nature of the agreement between the parties, they never contended that the amount and the payment should have been made directly to the borrowers and/or the guarantor. There is ample material on record to show that the financier has made requisite payment, which is clear even from the tax invoices placed on record. The requisite amount was paid to the supplier of the Vehicles/Equipments directly based upon which the borrowers able to take possession of the Vehicles/Equipments. The obligation of making monthly installments by the borrowers/guarantor has not fulfilled, therefore this action.

22. The submission was also made on behalf of Respondent No. 4 guarantor to say that there was no Arbitration agreement and therefore, there was no question of initiation of any such Arbitration proceedings including the award. Following judgments were cited to show that there exists no Arbitration agreement in view of Section 7 of the Arbitration Act. The provisions, as well as, the law so settled need no discussion.

i) Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, .

ii) S.N. Prasad Vs. Monnet Finance Ltd. and Others, .

23. As recorded above, having once signed the deed of guarantee which provides and specifically mentioned and referred the loan agreement between the parties and as the loan agreement contains the Arbitration agreement, this itself in my view sufficient to reject the contention so raised as it is permissible and recognized mode to enter into such Arbitration agreement to settle the dispute. There is nothing to point out that the deed of guarantee itself can be read in isolation and/or is independent document. This being commercial document and as those documents are part of the record and as borrowers acted upon the same by making the part payment to the extent of Rs. 29,00,000/- and having taking possession of the vehicles based upon the same, now to deny the existence of Arbitration agreement by only Respondent No. 4 guarantor, is unacceptable. The borrowers have nowhere denied the existence of such Arbitration agreement to settle their dispute arising out of the same, therefore also the guarantor just cannot take shelter of non-mentioning of specific Arbitration clause in the deed of guarantee to say that there exists no specific Arbitration agreement between the parties. I am inclined to observe that there exists Arbitration clause in the agreement between the parties which covers to settle the dispute between the financier and the borrowers and the guarantor, as all these documents are interlinked and interconnected.

24. Taking over all view of the matter including the well reasoned award so passed by the learned Arbitrator providing reasons for every aspects, in my view, need no interference. There is no perversity in the order. The award is well within the framework of law and the record. Even otherwise, the Court u/s 34 would not

like to interfere with the reasoned award by re-appreciating and/or reassessing the evidence and material placed on record and as applied. P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, , Indian Oil Corporation Ltd. Vs. Kadbrotee Engineering Industries, and Sahyadri Earthmovers (Supra).

25. Accordingly, Petition No. 783 of 2011 is dismissed. There shall be no order as to costs.

26. So far as Arbitration Petition No. 347 of 2012, is concerned, in view of the reasonings so given while dismissing Section 34 Petition whereby award dated 6 May 2011 passed by the Arbitrator arising out of the contract in question between the parties have been upheld, I am inclined to dispose of Section 9 Petition for same reasons.

27. The contention was raised by the learned Counsel appearing for the borrowers-guarantor that as the Arbitrator has passed the award in favour of the financier, the remedy is to put the award in execution and therefore there is no question of passing and/or granting any order in Section 9 Petition. To this, a submission is made by the learned Counsel appearing for the financier that the Arbitration Act provides and permits to protect and at least ask for security and/or to secure the amount in view of the award so already passed and therefore, pending the execution, it is permissible to grant protective and security order.

28. Considering the scope of Section 9 read with the above facts on record and also the fact that the Arbitrator has passed the reasoned order, the protection as sought needs to be granted to avoid further complications. This is also for the reason that the borrowers guarantor has been enjoying the possession of the Vehicles/Equipments since 2007 by making only part payment. The contract/agreement in question even otherwise expired on 25 June 2011. Therefore, the retention of the vehicles in such circumstances itself sufficient reason to pass order of security and the protection u/s 9 of the Arbitration Act.

29. The learned Counsel appearing for the borrowers read and refer again the provisions of Section 9 and 36 of the Arbitration Act and contended that, as this Court has confirmed the award for the first time, the remedy to the financier is to execute the award in accordance with law and therefore, there is no question of passing any further order in Section 9 Petition. The learned Counsel appearing for the financier has pointed out the judgment of the Division Bench of this Court Nimbus Communications Limited Vs. Board of Control for Cricket in India and another, , whereby this Court has considered the various facet of Section 9 of the Arbitration Act read with O-38 of the CPC (for short, CPC) and thereby granted interim protection, pending the Arbitration proceedings and also directed to furnish solvent security to the satisfaction of the Prothonotary and Senior Master.

30. Taking over all view of the matter and in view of the above reasonings, I am inclined to observe that the financier has made out the prima facie case and balance of convenience and equity also lies in their favour, so also the borrower"s

conduct. The submission to secure the decretal amount in the present facts and circumstances, cannot be denied.

31. This Court by order dated 21 April 2010 in Arbitration Petition No. 457 of 2009 (Coram:-R.Y. Ganoo, J.) has granted interim protection in terms of prayer clause (d), pending the Arbitration Proceedings, thereby restrained the borrowers guarantor from dealing with and/or parting with possession and/or creating third party rights or encumbering with the said Equipments described in Exhibit "F" to the Petition. Those are the Equipments and the machineries in question. This order has been in force till this date.

32. In the present Arbitration Petition No. 347 of 2012 (lodging No. 1051 of 2011), on 3 October 2011 this Court, (Coram:-S.J. Vazifdar, J.), pending the disposal of the Petition ad-interim relief in terms of prayer clause (c) and (e), except the bracketed portion marked in red ink, have been granted. Prayer clauses (c) and (e) read as under:-

(c) Pending the execution of the Award dated 24.4.2012 or the said award is enforced in accordance with Section 36 of the Arbitration and Conciliation Act, 1996, this Hon''ble Court be pleased to direct the Respondents to disclose the location of the said Equipments on oath to enable the Court Receiver to take possession of the said Equipments;

(e) Pending the execution of the Award dated 24.4.2012 or the execution of the said Award is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, the Respondents and their respective servants and agents be restrained by and order and injunction of this Hon''ble Court in any manner (dealing with and/or) parting with possession and/or creating third party rights and/or alienating and/or encumbering with the properties described in Exhibit "J" to the Petition";

There are other property of the borrowers.

33. Therefore, taking overall view of the matter, I am inclined to maintain the order already passed as recorded above. The Respondents Borrowers/guarantor shall not create any third party rights or interest in Vehicles/Equipments. The learned counsel appearing for the financier submitted that though they have obtained the injunction in terms of prayer clause (e) but till this date no details of the properties (Exhibit "J") available with them. So far as this part is concerned, the financier have applied for interim protection/injunction. The basic description should have been placed on record. Order dated 3 October 2011 has been in force till this date. Therefore, without observing anything and by keeping all points open, I am inclined to maintain both the above orders, pending the execution of the impugned award. Both the Petitions are accordingly disposed of. There shall be no order as to costs.