
(2017) 01 MAD CK 0293
In the Madras High Court
Case No : 6878 of 2015

M/s.Shriram City Union Finance Limited	APPELLANT
Vs	
M/s.Super-Rubber & Engineering Co. Pvt. Ltd.	RESPONDENT

Date of Decision : 11-01-2017

Acts Referred:

[Negotiable Instruments Act, 1881](#), [Section 138](#) - Dishonour of cheque for insufficiency, etc., of funds in the account

Citation : (2017) 01 MAD CK 0293

Hon'ble Judges : Rajiv Shakdher

Bench : SINGLE BENCH

Advocate : Rajiv Shakdher

Judgement

1. In this application, the following substantive relief has been sought for by the applicant: "to direct the respondent to furnish security to the tune of Rs.1,64,88,543/- or such sum that this Hon''ble Court may direct; within such time that this Hon''ble Court may stipulate along with an order of conditional attachment and in case of default to do so, order attachment of the property of the respondent more fully described in the schedule to the judge's summons through the District Court, Pune pending disposal of the arbitral proceedings and the enforcement of the award....."
2. Notice in this application was issued on 12.10.2015. On 27.04.2016, after notice had been served, opportunity was given to the counsel for the respondents to file a reply, within a period of two (2) weeks from that date.
3. The next substantive hearing was held on 29.06.2016, wherein, I had ordered respondent No.1 company as well as respondent Nos.2 and 3 to file an affidavit of their respective assets. A further direction was issued that the affidavits so filed would disclose the location of the assets and also their approximate market value. Furthermore, the respondents were also directed to indicate as to whether the assets were encumbered, and if so, the outstanding sum qua the loan advanced against such encumbrance. The respondents were also directed to

append the necessary documents, by which encumbrance, if any, was created on the assets.

4. Thereafter, respondent No.2 filed an additional list of documents dated 16.05.2016, which showed that respondent No.1 had borrowed a sum of Rs.2,70,00,000/- from an entity, by the name, "The Seva Vikas Cooperative Bank Ltd." (in short the Cooperative bank). The copy of the loan sanction letter indicated that the loan facility was extended to respondent No.1, on 02.12.2013, and an immovable property being: Survey No.41, D-II Block, MIDC, Telco Road, Chinchwad (East), Pune - 411 019 (in short Pune property), had been given as security. 4.1. Furthermore, an e-mail from bank dated 16.05.2016 was also appended to the very same additional typed set of documents, which was demonstrative of the fact that recovery proceedings had been launched by the Cooperative bank in view of respondent No.2 acting in her capacity as guarantor of respondent No.1 breaching twice over the terms of settlement arrived at with it.

5. Moreover, the Income Tax Department, as it appears, has also, commenced proceedings against respondent No.1, which is, exemplified by letter dated 18.10.2014, issued by the Cooperative bank to respondent No.1. With this communication, the Cooperative bank communicated to respondent No.1 that they had received a notice from the Income Tax Department attaching the current account of the respondent No.1 for a sum of Rs.14,53,570/- qua assessment year 2011-12, and Rs.76,085/- for the assessment year 2000-01. In addition to the said sums, evidently, monies were also payable to the Income Tax Department towards interest. The notice of the Income Tax Department dated 17.10.2014, was also, appended to the said communication.

6. Besides the above, respondents have also placed on record an order of attachment dated 10.02.2015 issued by the Income Tax Department, whereby, the Pune property stands attached. The fact that proceedings under Section 138 of the Negotiable Instruments Act, 1881 (in short the NI Act) have been commenced against the respondents, is sought to be demonstrated by appending a copy of the complaint filed by the Cooperative bank in the Court of Judicial Magistrate First Class.

7. Amongst other documents filed by the respondents, there is also a balance sheet filed by the respondent No.1, i.e., balance sheet for the year ending 31.3.2014. To be noted, the profit and loss account for the same year, i.e., 2013-2014 has not been filed. 7.1. A perusal of the balance sheet would show that : issued/subscribed/paid capital is Rs.50,00,000/-; general reserves were Rs.34,14,558/-; long term borrowings were Rs.42,40,080/-; likewise short term borrowings were Rs.80,43,750/-; trade payables were shown as Rs.1,72,08,500/-; other current liabilities were Rs.35,63,555/-; and provisions were reflected as Rs.6,21,709/-.

8. The financial picture of respondent No.1 company, which emerges is that, it is

a company, which is heavily in debt and, has not able to pay its creditors.

9. In so far as the applicant is concerned, its case, briefly, is as follows: 9.1. The applicant had extended a financial assistance to respondent No.1 company in the form of an enterprise loan. Accordingly, a loan agreement dated 31.03.2015 was executed between the applicant and respondent No.1, to which, according to the applicant, respondent Nos.2 and 3 along with Sri.Rakesh R.Agarwal stood as guarantors. The amount loaned to respondent No.1 was a sum of Rs.1.00 Crore. This amount equivalent to Rs.66,84,164/-, was payable along with finance charges in 84 Equated Monthly Instalments (EMIs). Each instalment was equivalent to a value of Rs.1,98,061/-. The 1st instalment was payable on 05.05.2015, while the last instalment was payable on 05.04.2022. The erstwhile Director and husband of respondent No.2, i.e., Sri.Rakesh R.Agarwal, was one of the guarantors to the loan given by the applicant. According to the applicant, respondent Nos.2 and 3, i.e., wife and son of Sri.Rakesh R.Agarwal were the other guarantors, as indicated above, to the loan given to respondent No.1. Furthermore, loan given to respondent No.1 was also secured by execution of simple mortgage of a property under a deed of simple mortgage dated 30.04.2015, which was registered by the Joint SubRegistrar, Haveli - 13, and is, described as: "All that piece and parcel of property bearing a) Flat No.101, First Floor, admeasuring 69.70 sq.mt. built-up and parking space area 69.70 sq.mt., b) Float No.201, Second Floor, ad measuring 78.99 sq.mt. built-up and parking space area 69.70 sq.mt. c) Flat No.301, Third Floor, admeasuring 69.70 sq.mt. built up and parking space area 69.70 sq.mt. built-up and parking space area 69.70 sq.mt. in building Prathmesh Park, situated at S.No.143/2, at Village Baner, Tal Haveli, Dist. Pune" (hereinafter referred to as the Haveli Property) 9.2. The applicant avers that respondent No.1 committed a default in repayment of the loans from 05.06.2015, which was the due date for payment of the second EMI. After the payment of first EMI, no further monies were paid to the applicant either by the principal borrower, i.e., respondent No.1, or, by the remaining two guarantors, i.e., respondent Nos.2 and 3. The applicant further avers that the cheques issued by respondent No.1 were also dishonoured and, therefore, proceedings under Section 138 of the NI Act had been instituted by the applicant against the respondents. 9.3. Evidently, on account of the default committed by the respondents, the applicant vide notice dated 16.07.2015 terminated the loan agreement dated 31.3.2015. It appears that, in response to the said notice, respondent Nos.2 and 3 sent a reply dated 07.08.2015, whereby, they informed that Sri.Rakesh R.Agarwal had expired, on 09.05.2015. This apart, respondent Nos.2 and 3, in their reply, appeared to have taken a stand that deed of guarantees available with the applicant had not been signed by them and, hence, they were not liable to pay any money to the applicant. 9.4. The applicant, as it appears, sent a rejoinder dated 28.08.2015. In the rejoinder, the applicant asserted that respondent Nos.2 and 3 had signed the loan agreement in their capacity as guarantors and, therefore, they were liable to pay money to the applicant.

10. Since, the loan agreement contained an arbitration clause, the applicant vide their notice dated 05.08.2015 triggered the arbitration clause and appointed an arbitrator. 10.1. In response to the same, respondent Nos.2 and 3 issued a reply dated 21.08.2015, whereby, it called upon the applicant to recall the arbitration proceedings against them. 10.2. Furthermore, it is the case of the applicant that its inquiries revealed that late Sri.Rakesh R.Agarwal was not the owner of the Haveli property, which was mortgaged to it. It is averred that the sale deed said to have been executed by the owners of Haveli property in favour of Late Rakesh R.Agarwal were forged and fabricated. 10.3. It is also the case of the applicant that late Rakesh R.Agarwal at the time of availing of the loan facility had produced a No Objection Certificate (NOC) from the Cooperative Bank, which was reflective of the fact that the mortgage created in favour of the Cooperative Bank in respect of the Pune property was free from all encumbrances. The applicant claims that it is now revealed that the NOC was forged and fabricated, and that, the Cooperative Bank's charge over the Pune property continues to subsist. 10.4. As indicated herein above, the respondents have taken the same stand before this Court in so far as the charge over the Pune property is concerned. Even according to the respondents, the Cooperative Bank holds charge over the Pune property. 10.5. It is therefore, the case of the applicant that the only property, via which its claim against respondents could be secured is, the property referred to in the schedule appended to the Judges summons. (hereafter referred to as scheduled property).

11. It is the stand of the applicant that respondent Nos.2 and 3 have inherited the said property from Late Sri.Rakesh R.Agarwal and, at present, they are in possession and enjoyment of the said property.

12. The applicant, therefore, approached this Court for an order of attachment qua the scheduled property on the ground that apart from any other security that respondent Nos.2 and 3 may offer, respondent Nos.2 and 3 will be the beneficiaries of the estate of Late Sri.Rakesh R.Agarwal and therefore, the scheduled property should be attached to secure its interest.

13. The stand taken by the respondents is that late Sri.Rakesh R.Agarwal, in collusion with some unscrupulous officials of the applicant, fabricated the signatures, purportedly, appended in the loan documents. It is emphasised, in particular, that the signatures of respondent Nos.2 and 3 are fabricated and forged. It is, therefore, the stand of respondent Nos.2 and 3 that the signatures on the loan agreement and documents executed along with the loan agreement are not their signatures. 13.1. It is also the respondent's submission that the loan agreement has no legal validity in the eyes of law, as the loan granted to respondent No.1, was not backed by a special resolution passed in that behalf, despite a provision being made to that effect in its Articles of Association. It is also submitted that respondent No.2 joined as a Director of respondent No.1 company on 01.01.2013, while her son respondent No.3 became the Director of respondent No.1 company on 01.03.2013. Respondent Nos.2 and 3 aver that late

Sri.Rakesh R.Agarwal was in complete charge of the affairs of respondent No.1 and that they became involved in the day-to-day activities of respondent No.1 only after the demise of Late Sri.Rakesh R.Agarwal. 13.2. It is further the stand of respondent Nos.2 and 3 that after Sri.Rakesh R.Agarwal had committed suicide and, consequently, died on 09.05.2015, they started visiting the factory premises of respondent No.1 from June, 2015 onwards. It is, thus, the stand of respondent Nos.2 and 3 that only, thereafter, they became aware of the guarantee deeds having been ostensibly signed on their behalf as a part of loan documentation. Respondent Nos.2 and 3 claim that, consequently, they have filed criminal complaints against the officials of the applicant.

14. I may only indicate that, in paragraph 15 of the counter affidavit dated 24.05.2016, filed on behalf of the respondents, there is an admission qua the fact that a sum of Rs.98,09,322/- was credited to the account of respondent No.1, on 04.05.2015. This averment is, however, followed by an assertion that, out of the said sum, an amount equivalent to Rs.20.00 lakhs was paid to the agents of the applicant, for the reasons best known to the applicant.

15. The respondents have also taken the stand that these issues have been taken up before the Arbitrator, who is adjudicating the main dispute. Furthermore, the respondents submit that the applicant, in the first instance, should take recourse to the Haveli property, which, even according to the applicant, was mortgaged by Late Sri.Rakesh R.Agarwal, in its favour.

16. I must also indicate that in so far as the stand taken by the respondents in its counter affidavit dated 24.05.2016 with regard to the alleged payment made to the agents of the applicant is concerned, the same has been elaborated upon by an additional counter affidavit filed by Basant Kumar Jain, who claims to be the authorised signatory of respondent No.1 company. 16.1. In this affidavit, the said affiant has, inter alia, given the names of persons to whom the sum of Rs.20.00 lakhs is said to have been distributed. It is further averred that a sum of Rs.30.00 lakhs was paid to one Sri.Nishikant Rajegaonkar, one of the owners of the four flats, which have been collectively described herein above by me as Haveli property. 16.2. Thus, the manner in which the amount, claimed to have been received by respondent No.1, has been utilised is, as indicated above, set out in paragraph 7 of the affidavit filed by Basant Kumar Jain. In paragraph 8 of the affidavit, there are assertions with regard to utilisation of funds by late Sri.Rakesh R.Agarwal. 16.3. In sum, Basant Kumar Jain says that the applicant has not followed the KYC norms; that the applicant is engaged in fraud and that, therefore, respondent Nos.2 and 3 are victims of fraud. 16.4. The applicant, in its rejoinder dated 11.08.2016 have denied the assertions made on behalf of respondents, both in their counter affidavit, as also those, which are made in the additional affidavit. It is further asserted that the persons, whose name are given in the counter affidavit, are neither the employees nor the agents of the applicant. The applicant asserts that it has no privity of contract with the persons, who have been named by the respondents in their additional counter

affidavit. The applicant has submitted that the assertions are baseless and these assertions have been made after arbitration proceedings were initiated against the respondents. 16.5. An important assertion has been made in the rejoinder, which is that, the respondents, in their reply dated 07.08.2015 issued qua notice of the applicant dated 16.07.2015, did not advert to any of the allegations now made in the counter affidavit. It is further emphasised on behalf of the applicant that the respondents, even in their notice dated 21.08.2015, which was issued via their Advocate, had made no such assertions with regard to the collusion between the so called agents of the applicant and the applicant vis-a-vis, the loan transaction. It is further asserted that it is only after notice in the captioned application was served on the respondents on 15.10.2015, that the, respondents lodged a frivolous complaint, on 19.12.2015, levelling allegations made in the counter affidavit filed in this Court.

17. I may only note that the arguments advanced by Sri.Umashankar on behalf of the applicant and Sri.Vivek Menon on behalf of respondents have proceeded in line with the pleadings filed before the Court.

18. The sum and substance of the arguments advanced on behalf of the respondents is, broadly, as follows: i) That respondent Nos.2 and 3 are not signatories to the loan agreement and the attendant guarantees said to have been executed by them.

ii) The loan agreement said to have been executed on behalf of respondent No.1 is not backed by a special resolution, which is necessary for extension of loan to a private company.

iii) That late Sri.Rakesh R.Agarwal, i.e, the husband of respondent No.2 and the father of respondent No.3, in collusion with certain agents of the applicant, had entered into the loan transaction.

iv) In this connection, it is asserted that respondent No.1 received a sum of Rs.98,09,322/- on 04.05.2015, out of which, Rs.20.00 lakhs was repaid to the agents of the applicant.

v) Out of the very same sum, an amount equivalent to Rs.30.00 lakhs was paid to, one, Sri.Nishikant Rajegaonkar, owner of one of the four(4) flats, which is described herein above by me, as the Haveli property.

vi) That the entire transaction was fraudulent and that this issue has been raised in the proceedings pending adjudication before the Arbitrator.

vii) That the Pune property of respondent No.1 stands mortgaged to the Cooperative Bank.

viii) That attachment orders have been issued by the Income Tax Department.

ix) That the Cooperative Bank has initiated proceedings under Section 138 of the NI Act against all the respondents.

19. Furthermore, in so far as the applicant is concerned, it appears that the applicant has also initiated proceedings under Section 138 of the NI Act against the respondents. Moreover, the applicant's inquiries have revealed that the Haveli property, given as security against the loan advanced to respondent No.1, was not owned by Late Sri.Rakesh R.Agarwal.

20. This apart, I may also indicate that on 12.08.2016, when, Ms.Pushpa Menon, Advocate, appeared on behalf of the respondents, the following order was passed: "1. Mrs.Pushpa Menon, who appears for the respondents 1 to 3, says that her client will deposit a sum of Rs.24,12,022/- (Rupees twenty four lakhs twelve thousand and twenty two only) with this Court, within a period of six weeks from today, by way of Demand Draft drawn in the name of the "Registrar General, High Court of Madras, Chennai-600 104".

2. Upon receipt of such Demand Draft, the Registrar General will liquidate the same and invest the amount in an interest bearing fixed deposit with a national bank, initially for a period of three months.

3. Re-notify on 26.09.2016."

21. On the next date of hearing, i.e., 26.09.2016 Ms.Pushpa Menon, Advocate conceded before me that her clients are not in a position to comply with the order dated 12.08.2016. It was further stated that this fact had been set out in an affidavit sworn to by the respondents, which would be filed with the Registry within one (1) week of that date. Ms.Menon had also sought time to obtain instructions whether an undertaking could be given by respondent Nos.2 and 3 that the Scheduled property would remain attached to the extent of the share of respondent Nos.2 and 3, pending resolution of the dispute via arbitration. The matter was directed to be relisted for hearing on 17.10.2016.

22. On that date, at the behest of Ms.Menon, the following order was passed: 1.Ms.Pushpa Menon, who appears for the respondents 1 to 3, says that her client is not able to comply with the order dated 12.08.2016. She has brought to Court a copy of the affidavit sworn by the respondents in that behalf.

1.1 Learned counsel says that she will file the original affidavit with the Registry, within one week from today.

1.2 Furthermore, learned counsel says that she will obtain instructions from her client as to whether an undertaking can be given to the effect, that the property adverted to in the schedule appended to the Judges summons would remain attached to the extent of her client's share pending resolution of dispute via arbitration.

2. At request, re-notify on 17.10.2016."

23. In the context of the orders referred to above, I may only indicate that vide an earlier order, i.e., order dated 29.07.2016, I had directed that the respondents would not create any third party interest with the extent of the

share in the Scheduled property. 23.1. The proceedings, thereafter, to which, I have made a reference above, i.e., 12.08.2016, 26.09.2016 and 17.10.2016, were held in the background that at some stage, Sri.Basant Kumar Jain, i.e., the authorised signatory of respondent No.1, had given a compromise proposal to the applicant, whereby, it was indicated that a sum of Rs.30.00 lakhs would be paid to the applicant in 24 equal instalments of Rs.1,25,000/- each and a further sum of Rs.30.00 lakhs would be paid by Nishikant Rajegaokar, owner of one of the four (4) flats in the Haveli Property. This settlement proposal is dated 03.05.2016. In the settlement proposal, interalia, the following was indicated: "The Company is hereby giving the following proposal as compromise settlement for your kind consideration.

The Company will pay Rs.30 lakhs to you in 24 equal instalments of Rs.1,25,000/- each by way of 24 post dated cheques of 1st day of every month. Nishikant Rajegaokar has agreed to pay you Rs.30 lakhs on behalf of our Company.

All the above cases filed by the respective parties to be withdrawn/compromise/ necessary proceedings to be filed in the respective forum as known in the law.

The legal heirs of late Rakesh Agarwal will cooperate with your Company and Shri.Nishikant Rajegaokar for cancellation of the Registered document and refund of the Stamp duty. In the premises above, you are requested to consider the above proposal favourably and we request you to take the adjournment of the Arbitration Proceedings on 4th May 2016."

24. Having, thus, heard the arguments of counsels and perused the pleadings and the record, it is quite clear that the applicant had extended financial assistance to respondent No.1 company. As a matter of fact, when, I had queried the counsel for respondents as to whether out of the amount said to have been remitted, any amount came into the account of the respondent No.1, the answer that I have received was that, the money that had come in, but the documents, which were ostensibly executed in that behalf did not bear the signatures of respondent Nos.2 and 3.

25. As adverted to above, while the applicant says that a sum of Rs.1.00 crore was advanced, the respondents, in no uncertain terms, have admitted that respondent No.1 had received a sum of Rs.98,09,322/-. Therefore, more or less the entire sum of Rs.1.00 crore is admitted to have been received by respondent No.1. The respondents, however, today say that some of that money was paid to the agents of applicant. More particularly, it is contended that a sum of Rs.20.00 lakhs were paid to the agents of the applicant and a further sum of Rs.30.00 lakhs was paid to, one, Nishikant Rajegaokar. Therefore, in so far as the principal borrower is concerned, that is, respondent No.1, it is liable to make repayment of the loaned amount with agreed interest and charges, unless it is found that a fraud was perpetuated, as alleged by the respondents.

26. These are, however, matters, which would require adjudication by the

Arbitrator. The respondents, while asserting that these issues have been raised before the Arbitrator, also say, that, since, fraud is alleged by them, this matter cannot be tried by the Arbitrator. As a matter of fact, it was stated that even this Court could not pass any orders under Section 9 of the Arbitration and Conciliation Act, 1996.

27. In my view, such an assertion before me cannot be sustained, as it is for the Arbitrator to decide finally, as to whether the stand taken by the respondents has merit and, therefore, whether or not he has jurisdiction to proceed further in the matter. 27.1. In paragraph 2 of the counter affidavit, dated 24.05.2016, filed by respondent No.2, it is specifically asserted that a plea about non-maintainability of the arbitration proceedings has been taken before the Arbitrator and the said issue is pending consideration by him.

27.2. Therefore, what this Court is required to consider, for the moment, is that, is there sufficient security available to the applicant to protect its interest, in case, it were to succeed in the arbitration proceedings.

28. The respondents, on their own, have demonstrated that the assets of the company are either charged to the Cooperative Bank or stand attached by the Income Tax Department. Therefore, the only asset available is the Scheduled property, in which, admittedly, respondent Nos.2 and 3 have a share. As a matter of fact, as adverted to above, on 17.10.2016, Ms.Menon had, in no uncertain terms, stated that she would file an affidavit setting out therein an undertaking to that effect that respondent No.2 and 3's share in the Scheduled property would remain attached, till the resolution of disputes via arbitration.

29. Therefore, having regard to the totality of the circumstances, I am persuaded to order accordingly. Consequently, the share of respondent Nos.2 and 3 in the Scheduled property shall remain attached till the conclusion of the arbitration proceedings and for a further period of 30 days post the pronouncement of the award.

30. The captioned application is disposed of in the aforementioned terms.