
(2013) 04 MAD CK 0185
In the Madras High Court
Case No : A. No. 111

Sundaram Finance Ltd.

APPELLANT

Vs

K. Stalin

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5, Order 38 Rule 5
Contract Act, 1872 — Section 172, 173, 174, 175, 176
Limitation Act, 1963 — Section 9(ii)(b)
Partnership Act, 1932 — Section 69(3)

Citation : (2013) 4 BC 227 : (2013) 5 MLJ 251

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Judgement

Vinod K. Sharma, J.—This order shall dispose of A. Nos. 111, 268 and 360 of 2013, as the common question of fact and law are involved in all these applications. These three applications under Order XIV Rule 8 of O.S. Rules read with sec. 9(ii)(b) & (e) of the Arbitration and Conciliation Act, 1996 have been filed by M/s. Sundaram Finance Ltd. to direct the respondent to furnish security or in the alternative, attach the schedule mentioned properties to secure the amount in arbitration.

2. It is not in dispute that so far arbitration proceedings have not commenced and undertaking is filed to start arbitration proceedings.

3. Though it is permissible for this Court to entertain an application prior to commencement of arbitration proceedings, but it depends on facts of each case. It is admitted case of the applicant that the vehicle against which loan was advanced has been hypothecated in favour of the applicant and loan is also guaranteed by the guarantor. The loan therefore, is already secured, which does not require further security. It will be always open to the applicant to enforce security and move against the guarantor.

4. The Hon''ble Madhya Pradesh High Court in Bank of India vs. State of Madhya Pradesh and others (1990(2) BC 321) holding that the Bank would be secured creditor in view of hypothecation.

5. The Hon''ble Madhya Pradesh High Court was pleased to lay down as under:

6. In view of the contentions referred earlier, the learned counsel Shri Shard referred to a catena of decisions, which are as follows: The Bank of Bihar Vs. The State of Bihar and Others, . In this case, after referring to sections 172 to 190 of the Contract Act in paras 7 and 8, their Lordships held:

In our judgment the High Court is in error in considering that the rights of the pawnee who had parted with money in favour of the pawnor on the security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary nature on the goods and so long on his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure.

the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff in for such amount which the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

The plaintiffs right as a pawnee could not be extinguished by the seizure of the goods in its possession in as much as the pledge of the goods was not meant to replace the liability under the case credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor, the Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiffs dues."

(ii) AIR 1980 Andhra Pradesh 1, State Bank of Hyderabad v. Susbela. This is a Full Bench, decision which supports the same proposition. Bank of India Vs. Binod Steel Ltd. and Another, The petitioner Bank had advanced loan to respondent company on the hypothecation of its machinery which under the terms of the contract was allowed to remain with the company. The company later failed to pay wages of its workers and the payment of wages Inspector having moved the Additional Tahsildar for recovering the amount, the Additional Tahsildar took steps to attach the machinery and other moveables and to sell the same for recovery of the amounts due. The Bank objected to the act on taken by the Additional Tahsildar. In this Division Bench decision, placing reliance on the

decision in *The Bank of Bihar Vs. The State of Bihar and Others*, , it was held

The bank stood in the position of secured creditor. "The possession of the company was for on behalf of the petitioner; that the legal possession and custody of the machinery must be held to be with the petitioner though physical possession was with the company; that the petitioner was in the position of secured creditor and that the Authorities has no right to attack and sell the machinery without satisfying petitioner's debit.

(iii) Still another decision referred in *State Bank of Indore Vs. The Additional Tehsildar-Cum-Sales Tax Officer and Others*, There is the question for consideration was as to construction of section 33-C introduced in the M.P. General Sales tax Act, 1958 from March 1976 by the Amending Act No. 20 of 1976, namely, whether the charge for arrears of sales tax over the properties of the dealer brought into effect by this section would affect a mortgage or pledge created by the dealer before 15th March, 1976. On facts of that case, it was held that section 33-C does not affect the rights created in the petitioner's favour by mortgage or pledge before 15th March, 1976 and this rights cannot, be sold for recovery of Sales tax dues of the dealer.

7. In view of the above discussion of facts and law, though the action taken by the N.I.D. u/s 22 of the M.P. M.V. Taxation act was illegal, yet because of the special lien and hypothecation, the Bank being a secured credit, it has first change and was entitled to sell the bus and appropriate the sale proceeds first towards its dues since hypothecation lien is dt. 16.12.73, whereas the amended section 22 came into force w.e.f. i.e., subsequent transaction. The Civil Court had already decreed, on 23.7.81, the Bank's claim for Rs. 14,870.35 and interest pendente lite and future from the date at the rate of 14% per annum. The bus has already been sold and the sale has been confirmed.

The decretal dues of the Bank are said to be to the tune of Rs. 20,533.03 which is entitled to be reimbursed.

6. The averments in support of all these three applications, seeking direction to furnish security reads as under:

The respondent herein, who is legally liable to the claim of the applicant herein, with the evil intention of defeating the legitimate rights and claims of the applicant herein is attempting to alienate the properties belonging to him. It is reliably learnt that the respondent herein is negotiating with real estate brokers for the sale of the immoveable properties which are more particularly set out in the schedule to the Judges summons and siphon out the sale proceeds out of the reach of the applicant. The properties set out in the schedule to the Judges summons, according to the knowledge of the applicant, are the only properties of the respondent. The respondent herein has hatched at this plan of sale of the immoveable properties, in order to defeat and delay the realization by the applicant of the fruits of the award that may ultimately be passed in the arbitral proceedings. If the respondent herein, succeeds in selling away the immoveable

properties, the applicant would suffer irreparable injury, in that, the award that may be passed in the arbitral proceedings, could not be enforced for want of property. Except the properties described in the schedule to the Judge's summons, the respondent does not own any other properties. Ends of justice therefore require that the respondent herein be directed to furnish security for a sum of Rs. 4,80,019.32 (Rupees four lakhs eighty thousand and nineteen and paise thirty two only) and in default to attach the properties described in the schedule to the Judges summons. Further under Article 3.9 of the loan agreement, the respondent has agreed to provide additional security to secure the amount due and payable under the loan agreement, which he failed to honour.

7. The reading of the pleadings shows, that the jurisdiction of this Court is mechanically invoked by making identical averments in all cases without verifying facts in each case.

8. This Court cannot direct the respondent to furnish security on the vague allegations in the absence of any substantial materials to support the allegations.

9. The submission that the respondent is taking steps to dispose of the property with an intention to defeat the rights of the applicant cannot be accepted, as there is no material on record to show any overact on the part of the respondent showing steps being taken to dispose of the property.

10. Learned counsel for the applicant vehemently contended that the underlying principle of Order 38 Rule 5 C.P.C., are not strictly applicable to the proceedings u/s 9 of the Arbitration and Conciliation Act, as there is no restriction imposed u/s 9 of the Arbitration and Conciliation Act for exercising jurisdiction by this Court.

11. In support of this contention, reliance has been placed on the Division Bench Judgment of this Court in Ganesh Benzoplast Ltd., Mumbai, Ramkant S. Pilani and Shankarmal G. Pilani Vs. Sundaram Finance Ltd., Chennai and Oil and Natural Gas Corporation Ltd., Mumba, .

12. This contention cannot be accepted in view of the law laid down by the Hon''ble Supreme Court in Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, wherein it was laid down as under:

12. The effect of the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991 admittedly executed between the parties and the rights and obligations flowing therefrom are really matters for decision by the Arbitral Tribunal. We do not think that it is for us, at this interlocutory stage, to consider or decide the validity of the argument raised on behalf of the appellant-company that the agreement between the parties was co-terminus with the mining leases and the respondent firm could not terminate the agreement so long as the mining leases in its favour continued to be in force. Nor do we think it proper to decide the sustainability of the argument on behalf of the respondent firm that it was mainly an agency agreement for a fixed term and on the expiry of the term,

no right survives in the appellant-company unless of course the respondent firm agreed to an extension of the period. We leave that question open for decision by the Arbitral Tribunal.

13. Prima facie, it is seen that the mining lessee had entered into an agreement with the appellant-company for the purpose of raising the iron ore from the area covered by the mining lease. The term of the original agreement expired and this was followed by two extensions for three years each. Thereafter, the respondent firm had refused to extend the agreement and claims that it wants to do the mining itself. Prima facie, it is not possible to say that the High Court was wrong in thinking that it may be a case where an injunction could not be granted in view of the provisions of the Specific Relief Act. Here again, we do not think that we should pronounce on that question since that again will be a question for the arbitrator to pronounce upon. Suffice it to say that the position is not clear enough for us to assume for the purpose of this interlocutory proceeding that the appellant is entitled to specifically enforce the agreement dated 14.3.1991 read in the light of the Power of Attorney dated 25.3.1991. Of course, this aspect will be again subject to the contention raised by the appellant-company that the agreement created in his favour was co-terminus with the mining lease itself. But, as we have stated, these are the aspects to be considered by the Arbitral Tribunal. We refrain from pronouncing on them at this stage.

14. We think that adequate grounds are not made out by the appellant at this interlocutory stage for interfering with the order of the High Court. In that view alone, we consider it proper to decline to interfere with the order of the High Court and leave the parties to have their disputes resolved in terms of the arbitration agreement between the parties.

15. The argument that the power u/s 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power u/s 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court u/s 9 of the Act. The power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima

facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power u/s 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power u/s 9 of the Act is not controlled by Order XVIII Rule 5 of the CPC is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power u/s 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.

13. Again, the Hon''ble Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., has held as under:

10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures u/s 9 of the Act.

The averments made by the applicant in mechanical manner does not make out any case for furnishing of security, when the loan is already secured, and it shall be open to the applicant to enforce the security after the award attains finality.

No merit. Dismissed.

No costs.