(2011) 03 BOM CK 0121

In the Bombay High Court

Case No : Arbitration Petition No. 778 of 2010

Y.T. Entertainment Limited — APPELLANT

Vs

Mrs. Nasreen Azam Khan, Prashant Sawant and Vishram Sawant — RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:
Arbitration Act, 1940 — Section 11
Arbitration and Conciliation Act, 1996 — Section 9

Citation : AIR 2011 Bom 294 : (2011) 7 ALLMR 206

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.U. Kamdar and Hetal Thakore, Pravan Sampat and Naseer Rizvi, instructed by Thakore Jariwala and Associates, for the Appellant; Alok Bagla and Sneha Bohra, instructed by Bagla Dandekar and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioners have invoked Section 9 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) for appropriate reliefs based upon the agreement (Exhibit "B") which is executed between M/s. R.F.C. Limited, now the Petitioner Y.T. Entertainment Limited and M/s. Risk Design and Advertising Limited (the Company).

The relevant facts, as alleged are-

2. On 26/12/2007, Respondent Nos. 1, 2 and 3 at all relevant times, the Directors of the company, which has availed of a financial assistance from the Petitioners, formerly known as Rajsamuh Financial Consultancy Ltd. for the purpose of production of its feature film ''Bang Bang Bangkok'' now titled ''Khalbali Fun Unlimited'' under an agreement dated 26/12/2007 (the contract) and which company has failed and neglected to repay the same.

3. Under Clause 8 of the said Agreement, the Respondents being the signatories of the contract which is a binding contract. They have accepted personally also, the liability to repay the dues of the Petitioners.

4. Amounts disbursed and admittedly not repaid by the said company. On 13/04/2010, the Petitioners addressed a legal notice to the Respondents invoking the personal guarantee and calling upon them to repay the Petitioners'' dues. The Respondents, inspite of the receipt of the said notice, have failed to honour their personal guarantee. Hence the present Petition.

5. The Respondents are, admittedly Directors of the Company. There is arbitration Clause 19 which is reproduced as under:

19. If any dispute arises amongst the parties hereto during the subsistence of this Agreement or thereafter in connection with the validity interpretations implementation or alleged material breach of any provision of this Agreement the parties shall endeavor to settle such disputes amicably. In case of failure by the parties to resolve the dispute in any manner set out above within 30 (Thirty) days from the date when the dispute arose, the dispute shall be referred to an Arbitration of a retired Judge of the Mumbai High Court to be jointly appointed by both the parties at the cost of the Producers under the Arbitration and Conciliation Act, 1996 and any statuary modification or reenactment thereof for the time being in force and the decision shall be binding on both the parties and/ or their legal heir or representatives. The place of the court of arbitration shall be Mumbai. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996 & shall be in the English language. The arbitrator/arbitral panel shall also decide on the costs of the arbitration proceedings.

6. Relevant Clause 8 is also reproduced as under:

8. Notwithstanding anything contained in this Agreement the Producers and their Managing Director Vishram Sawant and the Director Prashant Sawant & Mr. Nasreen A Khan shall also personally responsible and liable to pay all the moneys due to the Negative Right Holders under this Agreement including the principal amount, compensation, cost, interest, commission, charges, etc., latest by the DUE DATE (unless extended by mutual consent) - Time Being The Essence Of This Agreement.

7. The submission of the learned Counsel appearing for the Respondents is that there exists no Arbitration agreement between the parties in their individual capacity. A strong reliance has been placed on Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, and thereby contended that a person or the parties not signatory to the Arbitration Agreement, the Petition u/s 9 as filed, is not maintainable for any reliefs. This judgment is distinguishable on facts. The proposition of law which is clear, needs no discussion. The Respondents/ Directors, admittedly, have signed the contract.

8. In that matter, there was agreement between the Petitioner and one Risk Design and Advertising Limited and One More Thought Entertainment Pvt. Ltd. It was signed by Respondent No. 3 Mr. Azam Khan, who is the husband of Nasreen Azam Khan Respondent No. 1 in the present case. Though the Respondents were not parties to the earlier proceedings, which was between the company of which

the Respondents are Directors, the Petitioner''s amount has been crystallized, pursuance to the order dated 6th August, 2009 in Arbitration Petition No. 387 of 2009. After considering the rival contention and scope of Section 9, I have observed in paragraph 15 as under:

15. The earlier contracts have been emerged with the last Deed and the Respondents have already acted by making some payment as recorded in the Deed itself. Such commercial contracts cannot be said to be one sided or excessive. The default on the part of the Respondents cannot be permitted to utilise and to use against the Petitioner to deny his right of getting interim protection/measure/reliefs which, otherwise available in the present case, on the basis of the basic elements of equity, balance of convenience and injury. The conduct of Respondent by not paying the amount though settled and agreed is also an additional facet. The apprehension, therefore, so raised in the Petitioner are supported by the material particulars and the conduct of the Respondent as referred above.

9. Based upon the above, the following order was passed. The relevant part of the order is reproduced as under:

(e) In view of the admitted default and considering the scope and purpose of Section 9 of the Act, I am inclined to grant prayer (h), (i) directing the Respondents to furnish the security in the sum of Rs. 5,01,00,000/, subject to the adjustment of the amount, if already paid for the Deed to secure the Petitioners'' dues within ten (10) weeks failing which I am granting liberty to the Petitioner to invoke the prayer Clause (j) & (k).

10. This order has attained finality. After hearing, the Appeal against the same, is disposed of as withdrawn. However, the fact remains that the amount has not paid.

11. The contention that the Petitioners have suppressed various facts is also a matter which can only be decided finally in the Arbitration proceeding. There are averments made with the supporting document to show the payments have been made by the Petitioners. The document/agreement in question which is admittedly signed by the Respondents, as reproduced above, which provides Arbitration clause, in whatever their capacity, at this prima facie stage, in my view is sufficient to pass orders u/s 9 of the Arbitration Act. There exist the agreement between the parties and there is a arbitrable dispute, which needs to be considered finally before the Arbitrator.

12. It is settled that the claimant can file a recovery proceeding against the principle borrower, as well as, the guarantors. A separate claim petitions can also be filed only against the guarantors. In view of agreement Clause 8 itself, the decision in Shree Meenakshi Mills Ltd. Vs. Ratilal Tribhovandas Thakar, as relied by the learned Counsel appearing for the Respondents, is distinguishable. That was not a case where the Directors also signed the contract.

13. Considering the averments made including the reply and rejoinder filed on record, I see there is a case made out by the Petitioners for passing appropriate interim order, protective/ interim relief. It is not only of Section 9, but other elements which are contemplated under Code of Civil Procedure, are also relevant to pass the interim and protective orders.

14. It is made clear that the findings/observations, existence of the agreement u/s 9 of the Act, in the present Petition is only prima facie as the Respondents are denying the existence of the agreement, which itself in my view, is not sufficient to deny the interim relief/ protection as sought by the Petitioners pending the appointment of the Arbitrator and pending the final disposal of the Arbitration proceedings.

15. The Respondents are not willing to appoint the Arbitrator, as their objection itself is to the existence of the Arbitration agreement. Therefore, the Petitioners shall have no option but to initiate proceedings u/s 11 of the Arbitration Act for appointment of the Arbitrator. This is also one of the factor where the Court needs to consider to pass appropriate interim order/ protection pending the appointment of the Arbitrator.

16. As recorded above, and as the case is made out and as the balance of convenience and equity lies in favour of the Petitioners and against the Respondents so also, the issue of conduct, the Petitioners are entitled for security and/or protective order to secure the amount. As this Court by order dated 9th July, 2010, 23rd July, 2010 and lastly on 13th August, 2010 has already granted status quo, which has been in force since then, in my view, needs to be continued till the Arbitration proceedings are concluded finally.

17. In Perma Container (UK) Line Ltd. Vs. Perma Container Line (India) Pvt. Ltd. and Others, have already observed that

A Division Bench of this Court in Saraswat Co-operative Bank Ltd., Mumbai Vs. Chandrakant Maganlal Shah and Others, , has observed that if a case is made out, the Court can pass an interlocutory order or appoint a Court Receiver under Order 40 of the CPC or pass order of attachment before judgment as envisaged under Order 38 of the CPC. A prima facie opinion at the interlocutory stage is sufficient [Rajendran and Others Vs. Shankar Sundaram and Others,].

18. The interim order/ status quo, as passed in Arbitration Petition No. 778 of 2010 referring to Exhibit "F" as already recorded, accordingly shall continue till the final decision of the Arbitration Proceedings.

19. The learned Senior counsel appearing for the Petitioners, on instructions, makes statement that they will file application u/s 11 of the Arbitration Act, within a period of three weeks.

20. The present Petition is accordingly disposed of by keeping all points open. No costs.

