

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 427 OF 2013

1. Naresh Kanayalal Rajwani)
 2. Shirley Naresh Rajwani)
 3. Amit Naresh Rajwani)
 all of Mumbai Indian Inhabitants, having)
 address at Knight Kingh Inns Pvt.Ltd.,)
 S. N. Enterprises, 73, Jai Hind Market,)
 Dr.C.G.MA, Chembur, Mumbai 400 074) Petitioners

VERSUS

1. M/s.Citi Financial Consumer Finance)
 India Ltd.,)
 a company incorporated under the)
 Companies Act, having its registered office)
 at 3, LSC, Pushp Vihar, New Delhi 110062)
 2. Ms.Arti Rohatgi,)
 Sole Arbitrator,)
 having her address at Chamber No.212,)
 Block No.III, Delhi High Court,)
 New Delhi – 03.) Respondents

Dr.A.Chandrachud, i/b. Mr.Ruturaj Pawar for the Petitioners.

None for the Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 17th AUGUST, 2015

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioners have impugned the arbitral award dated 30th January, 2013 rendered by the learned arbitrator declaring that the petitioner no.1 had created an equitable mortgage in respect of the property being Flat No.82, on 8th Floor in the Building known as the Chembur Venus Co-op.Hsg.Soc.Ltd. situate at

Plot No.564A, Golf Links, Off A Sores Road, Chembur, Mumbai – 400 071 popularly known as Flat No.82, 8th Floor, Chembur Co-op.Hsg.Soc.,Plot No.564A, Off A Soares Road, Golf Links, Chembur, Mumbai – 400 071 (hereinafter referred to as the said mortgage property) and directing the petitioner to pay various amounts to the respondent no.1.

2. The petitioners were the original respondents whereas the respondent no.1 herein was the original claimant in the arbitral proceedings. None appeared for the respondents though served. Respondent no.2 is the arbitrator who was appointed by the respondent no.1 and has rendered the impugned arbitral award.

3. Pursuant to an order passed by this court on 29th July, 2013, the respondents have been served with the notices. Mr.Santosh Kumar Mishra, advocate appeared before this court on 21st January 2014, 3rd February 2014, 17th February 2014, 24th February 2014, 10th March 2014 and 24th March 2014 for the respondent no.1 but did not file Vakalatnama on behalf of respondent no.1 in the present proceedings. No affidavit in reply is filed. None appeared for any of the respondents when the matter was called out. Some of the relevant facts for the purpose of deciding this petition are as under :-

4. It was the case of the respondent no.1 that certain credit facilities aggregating a sum of Rs.96,50,000/- were granted to the petitioners under a home loan equity agreement which was repayable in installments and the said loan was secured by virtue of a deed of mortgage dated 30th April, 2005 executed by the petitioners in favour of the respondent no.1.

5. On 18th April, 2011 the respondent no.1 appears to have addressed a letter to the respondent no.2 invoking clause 10.7(h) of the loan agreement and nominating her as the sole arbitrator to adjudicate upon the dispute of claim made against the

petitioners. The respondent no.1 did not serve any copy of the said letter dated 18th April, 2011 upon the petitioners.

6. On 20th April, 2011 the learned arbitrator addressed a letter to the respondent no.1 and forwarded a copy thereof to the petitioners informing of her concurrence to act as the sole arbitrator in respect of the dispute that had arisen between the parties. In the said letter, the learned arbitrator referred to the letter dated 18th April, 2011 alleged to have been addressed by the respondent no.1 to the learned arbitrator referring the disputes between the parties for adjudication to the learned arbitrator. In the said letter the learned arbitrator directed the parties to attend her office on 25th May, 2011 either personally or through authorized representative/counsel along with power of attorney/vakalatnama/authorization letter for enquiry into the dispute.

7. By the said letter, the learned arbitrator directed the respondent no.1 to submit the claim statement along with the relevant documents. It was, however, directed that the petitioners herein would be furnished with a copy of the statement of claim along with relevant documents on appearance, after which the petitioners might file their statement of defence or statement of counter claim along with relevant documents before the learned arbitrator. It was further stated that in case if any of the party failed to appear in person or through authorized representative on the date of hearing i.e. on 25th May, 2011, then the learned arbitrator shall proceed with the case in absence of the said party. The petitioners did not remain present before the learned arbitrator on 25th May, 2011. It is the case of the petitioners that since no notice was received from respondent no.1 in relation to the alleged credit facilities, the petitioners did not respond or correspond with the learned arbitrator.

8. In the meeting held on 25th May, 2011, the learned arbitrator directed to give one more opportunity to the petitioners to appear before the learned arbitrator and to contest the matter and further directed that a copy of the said minutes be sent to the petitioners through registered post. The learned arbitrator also made it clear that the petitioners could obtain the copy of the statement of claim and supporting documents from the learned arbitrator and adjourned the proceedings to 6th July, 2011.

9. The petitioners however did not appear before the learned arbitrator on the same ground on 6th July, 2011. On 6th July, 2011, the learned arbitrator observed that since the petitioners were absent, the petitioners were proceeded ex-parte due to non-appearance. The learned arbitrator directed the respondent no.1 to file evidence by way of affidavit on the next date of hearing and also to bring the witnesses to be examined by it and also to argue its case on the next date of hearing i.e. 20th August, 2011. The learned arbitrator directed that the copy of the said minutes be sent to the petitioners through the registered post.

10. Dr.Chandrachud, learned counsel for the petitioners invited my attention to various minutes of the arbitral proceedings and also the impugned award. It is submitted that on 20th August, 2011 when the learned arbitrator had decided to proceed ex-parte against the petitioners, the arbitral file of the learned arbitrator was not traceable and thus the matter was adjourned by the learned arbitrator till the files were traceable. In support of this submission, learned counsel invited my attention to para (V) of the impugned award. The learned arbitrator recorded in the impugned award that on 20th August, 2011, the respondent no.1 herein had sought time to file its evidence. However, since the arbitral file was not traceable, the matter was adjourned till the file was traceable. He submits that according to

the impugned award, the said file was found by the learned arbitrator on 15th January, 2013. The learned arbitrator accordingly directed the respondent no.1 to file its evidence by way of affidavit on 23rd January, 2013 and to bring the witnesses to be examined by it. The learned arbitrator also directed the respondent no.1 to argue its case on 23rd January, 2013. It is submitted that admittedly the learned arbitrator did not issue any notice to the petitioners of the adjourned date of hearing. He submits that the respondent no.1 also did not serve admittedly any affidavit of its witnesses or documents upon the petitioners.

11. Learned counsel for the petitioners submits that though the respondent no.1 was required to serve the pleadings, documents and affidavit of evidence that were filed by the respondent no.1 before the learned arbitrator upon the petitioners' simultaneously, the learned arbitrator directed that the petitioners would be furnished such pleadings and documents only upon the petitioners' filing appearance and the same would be provided by the learned arbitrator herself. He submits that the procedure followed by the learned arbitrator that the pleadings and documents would be supplied to the petitioners only if the appearance was filed by the petitioners before the learned arbitrator and that also would be furnished by the learned arbitrator only is contrary to section 24(3) of the Arbitration and Conciliation Act, 1996.

12. Learned counsel appearing for the petitioners submits that the file of the learned arbitrator was not traceable during the period between 6th July, 2011 and 15th January, 2013. No notice of hearing was issued by the learned arbitrator to the petitioners nor any pleadings and documents were served upon the petitioners. He submits that the learned arbitrator proceeded with the matter ex-parte and has allowed the respondent no.1 to file affidavit of evidence on 23rd January, 2013 and

exhibited various documents behind the back of the petitioners and without any notice and service of the said affidavit of evidence along with documents. The learned arbitrator closed the evidence of the respondent no.1 without giving any opportunity to cross examine the said witness. He submits that the learned arbitrator has relied upon the statement of claim, documents and also affidavit of evidence filed by the respondent no.1 without the same having been served upon the petitioners. He submits that the impugned award is in violation of principles of natural justice and contrary to section 24(3) and also section 25(1) of the Arbitration and Conciliation Act, 1996. He submits that the learned arbitrator has not treated both the parties equally and has violated section 18 of the Arbitration and Conciliation Act, 1996.

13. Learned counsel for the petitioners placed reliance on the judgment of this court in case of ***Rajnikant B.Vora vs.Fincruise Credit Services Pvt. Ltd.*** in Arbitration Petition No.1399 of 2014 delivered on 23rd March, 2015 in support of the submission that the learned arbitrator could not have considered the affidavit of evidence without effecting service of such affidavit upon the petitioners. He submits that under section 24(3) of the Arbitration Act, all statements, documents or other information supplied or application made by the arbitral tribunal by one party has to be communicated to the other party.

14. It is submitted by the learned counsel for the petitioners that in the impugned award, the learned arbitrator has declared that the petitioner no.1 herein had created a charge/security by way of equitable mortgage on the immoveable property on the loan advanced by the respondent no.1. The learned arbitrator has also held that the respondent no.1 may take out appropriate legal action or proceedings to enforce said security so as to recover the awarded amount

mentioned in the award. He submits that even such declaration about creation of the mortgage in favour of the respondent no.1 was without jurisdiction.

15. Learned counsel for the petitioners placed reliance on the judgment of Supreme Court in case of ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others, (2011) 5 SCC 532*** and in particular paragraphs 46, 50 and 51 and would submit that the mortgage suit for sale of the mortgaged property is action in rem and a suit on mortgage is not a mere suit for money and thus a suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by the courts of law and not by arbitral tribunal.

REASONS AND CONCLUSIONS

16. A perusal of the letter dated 20th April, 2011 addressed by the learned arbitrator to the parties clearly indicates that the learned arbitrator had issued a direction that the petitioners herein would be furnished with the copy of the statement of claim along with relevant documents only on their appearance after which they could file their statement of defence or statement of counter claim along with relevant documents before her. A perusal of the minutes of the meeting dated 25th May, 2011 indicates that the learned arbitrator took on record the statement of claim along with supporting documents filed by the respondent no.1 against the petitioners and once again directed that the petitioners could obtain copy of the statement of claim and supporting documents from the learned arbitrator.

17. In the minutes of the meeting dated 6th July, 2011, the learned arbitrator directed the respondent no.1 to file affidavit of evidence on the next date of hearing and to bring the witnesses to be examined by it and also directed respondent no.1 to argue its case on the next date of hearing and adjourned the

matter to 20th August, 2011. It is not in dispute that the respondent no.1 admittedly did not serve any copy of the statement of claim and documents which were filed by the respondent no.1 before the learned arbitrator as and by way of service upon the petitioners.

18. A perusal of the award indicates that in the meeting held on 20th August, 2011, the respondent no.1 sought time to file its evidence. However since the arbitral file of the learned arbitrator was not traceable, the matter was adjourned till the file was traced. The learned arbitrator in the impugned award has recorded that it was only on 15th January, 2013, the learned arbitrator could trace the file. Learned arbitrator accordingly called upon the respondent no.1 to file its affidavit of evidence on 23rd January, 2013 and also to bring the witness to be examined by it. Learned arbitrator also directed the respondent no.1 to argue its case on 23rd January, 2013. Learned arbitrator however did not issue any notice to the petitioners to remain present before the learned arbitrator. Admittedly the respondent no.1 did not serve even copy of the affidavit of evidence which was filed by the respondent no.1 before the learned arbitrator on 23rd January, 2013 along with the documents.

19. In the meeting held on 23rd January, 2013, the learned arbitrator proceeded with the arbitral proceedings ex-parte and has alleged to have compared the loan document with the original documents alleged to have been produced by the respondent no.1 and thereafter returned the original documents to the witness. The learned arbitrator also exhibited the documents as exhibit CW-1/1 to CW-1/10 in terms of the evidence tendered by the respondent no.1. The learned arbitrator without giving any opportunity of the cross-examination to the petitioners of the said witness closed the evidence of the respondent no.1 after recording the

statement that the respondent no.1 did not wish to lead any further evidence. The learned arbitrator has alleged to have heard the arguments of the respondent no.1 and reserved the award. The learned arbitrator did not issue any notice even at that stage to the petitioners informing that the evidence of the respondent no.1 was closed and even the arguments were heard by the learned arbitrator.

20. A perusal of the award indicates that the learned arbitrator in the impugned award has considered such affidavit of evidence and has rendered a finding that in the absence of any rebuttal of the evidence led by the respondent no.1, by the petitioners herein, the evidence of the respondent no.1 remained uncontroverted and was to be taken as true and correct. It is held that there were no reasons or grounds to disbelieve the testimony of the respondent no.1 or the documents exhibited by them and held that the petitioners had defaulted in paying the equated monthly installments towards repayment of the loan in terms of the loan agreement as stated by the counsel for the respondent no.1 company. The learned arbitrator accordingly directed the petitioners to pay a sum of Rs.95,24,301/- which was inclusive of principal, interest, prepayment and other charges. The learned arbitrator however held that the petitioners would be entitled to the credit of Rs.31,63,097/- which had been paid after recall of the loan vide legal notice dated 29th March, 2011 till 21st March, 2012 and that the said amount would be adjusted by the respondent no.1 firstly towards outstanding interest, then towards cost and thereafter towards the principal amount. The learned arbitrator also directed the petitioners to pay simple interest at the rate of 10% per annum on the outstanding amount of Rs.95,24,301/- w.e.f. 29th March, 2011 till the date of award and thereafter future interest @ 11% per annum till the actual date of payment by the petitioners.

21. In my view under section 24 (2) of the Arbitration and Conciliation Act, 1996, the learned arbitrator has to give sufficient advance notice of any hearing and of any meeting of the arbitral tribunal to the parties. Under section 24(3) of the Arbitration Act, all statements, documents or other information supplied or application made to the arbitral tribunal by one party have to be communicated to other party including any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision.

22. A perusal of the minutes of the meetings held by the learned arbitrator clearly indicates that the respondent no.1 had not served any statement of claim, documents or affidavit of evidence upon the petitioners which were filed before the learned arbitrator. In my view, the directions issued by the learned arbitrator that the petitioners could obtain copy of statement of claims and supporting documents from the learned arbitrator only upon filing appearance and not issued any direction to the respondent no.1 to serve such pleadings and documents upon the petitioners is the procedure unknown to law and contrary to section 24(3) of the Arbitration and Conciliation Act, 1996. The entire procedure followed by the learned arbitrator shows patent illegality and is gross violation of principles of natural justice. This court in case **Rajnikant B.Vora** (supra) has held that under section 24(2) of the Arbitration Act, the learned arbitrator has to give sufficient advance notice of any hearing and/or any meeting of the arbitral tribunal to the parties. It is also held that under section 24(3) of the Arbitration Act, all statements, documents or other information supplied to or applications made to the arbitral tribunal by one party have to be communicated to the other party. Similarly any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision has to be communicated to the parties. This court has held that if the learned arbitrator has relied upon any such statement of claim,

documents and also the affidavit of evidence which were not served upon the other party, the award would be contrary to section 24 of the Arbitration Act and would be in gross violation of principles of natural justice. In my view, the said judgment of this court squarely applies to the facts of this case. I am respectfully bound by the said judgment.

23. In my view, the learned arbitrator could not have relied upon the statement of claim, documents and evidence filed by the respondent no.1 unless the same were served upon the petitioners and could not have drawn any inference and/or conclusion that in the absence of any rebuttal of the evidence led by the respondent no.1 by the petitioners, the testimony of the respondent no.1 or the document exhibited by them were deemed to have been proved. The award shows patent illegality and is in conflict with public policy.

24. A perusal of the impugned award also clearly indicates that the learned arbitrator has declared that the petitioner no.1 had created a charge/security by way of an equitable mortgage on the said mortgaged property on the loan advanced by the respondent no.1 to the petitioners. The learned arbitrator has also directed that the respondent no.1 may take out appropriate legal action or proceed to enforce the said security so as to recover the awarded amount mentioned in the impugned award and has granted liberty to the respondent no.1 to take out appropriate legal action/proceedings to enforce/sale the said security and to recover the awarded amount.

25. A perusal of the judgment of Supreme Court in case of **Booz Allen and Hamilton Inc.** (supra) relied upon by the learned counsel for the petitioners indicates that the Supreme Court has held that the mortgage suit for sale of the mortgaged property is action in rem and will have to be decided by the courts of

law and not by arbitral tribunal. In paragraph (51) of the said judgment, it is held that the mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due but it is about enforcement of the mortgage with reference to an immoveable property and adjudicating upon the rights and obligations of several classes of persons who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-a-vis the mortgagor and mortgagee. It is held that even if some of the issues or questions in a mortgage suit are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. In my view the learned arbitrator could not have declared the creation of a equitable mortgage in the impugned award in respect of the mortgaged property and could not have granted any liberty to respondent no.1 to take out appropriate legal action or proceedings to enforce/sale the said mortgaged property to recover the awarded amount.

26. In my view, such relief thereby declaring the creation of mortgage and granting liberty to enforce such mortgage and sale the mortgaged property cannot be granted in the arbitral proceedings and this part of the relief is contrary to the judgment of Supreme Court in case of **Booz Allen and Hamilton Inc. (supra)** and thus deserves to be set aside on that ground. Since the arbitral award shows patent illegality for the reasons stated aforesaid, I have not heard the learned counsel for the petitioners on various other issues raised by the petitioners in the arbitration petition.

27. Arbitration petition is made absolute in terms of prayer (a). Impugned award dated 30th January, 2013 is set aside. No order as to costs.

[R.D. DHANUKA, J.]