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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.626 OF 2014

Tata Capital Financial Services Ltd.	...Petitioner
V/s.	
M/s.Bedi Automobiles & Ors.	...Respondents

Mr.Ashish Kamat with Ms.Aparna Wagle, Ms.Leena Desai and Mr.Ashok Paranjape i/b M/s.MDP & Partners for the Petitioner.

Ms.Priyanka Desai i/b K.Ashar & Co. for the Respondents.

Mr.A.B. Malvankar, Section Officer to Court Receiver present.

CORAM : R.D. DHANUKA, J.
DATE : 8TH JULY, 2015.

P.C. :-

1. By this petition filed under section 9 of the Arbitration & Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioner seeks an appointment of the Court Receiver and injunction in respect of the hypothecated assets described in Exhibit "AA" and for various reliefs.

2. Pursuant to the request made by respondent no.1 for financial assistance, the petitioner sanctioned financial assistance by way of channel finance facilities in the sum of Rs.1.00 crore on 14th January, 2010. The parties entered into an agreement on 11th March,

2011 in respect of the said facilities on the terms and conditions recorded therein. On 6th March, 2011, respondent no.1 requested the petitioner to enhance the then existing facility by Rs.30.00 lacs. The petitioner considered the said request and enhanced the said facility from Rs.1.00 crores to Rs.1.30 crores on 7th March, 2011. Respondent No.1 executed various documents, including demand promissory note, deed of hypothecation, two powers of attorney, irrevocable and unconditional deed of guarantee and notarized affidavits declaring the statement of assets and liabilities of respondent nos.2 to 4.

3. On 11th June, 2013, the parties entered into the second agreement recording the terms and conditions for revised facility to the tune of Rs.1.30 crores.

4. It is the case of the petitioner that since respondent no.1 failed to pay the outstanding dues on 31st October, 2013, the petitioner issued a notice calling upon respondent to pay a sum of Rs.1,00,40,124.62 ps. The respondents vide their undated letter which was received by the petitioner on 14th November, 2013, accepted and acknowledged their liability to repay the principal amount as well as interest thereon.

5. On 26th November, 2013, the petitioner once again called upon the respondents to pay an amount of Rs.1,05,24,075.31 ps. due

as on 26th November, 2013 with further interest thereon. The respondents neither repaid the said loan nor responded to the said notice. The petitioner thus filed this petition under section 9 of the Arbitration Act for interim measures.

6. By an ad-interim order passed by this Court on 19th December, 2013, after recording reasons, this Court appointed the Court Receiver in respect of the hypothecated assets described at Exhibit "AA" with a direction to make inventory of the assets. The respondents were directed to disclose their encumbered and un-encumbered assets by filing affidavit within four weeks from the date of the said order. The respondents were restrained from creating any further third party rights in respect of the properties described in Exhibits "R", "S" and "Q" to the petition.

7. Pursuant to the liberty granted by this Court, the petitioner amended this petition and enclosed several documents which were admittedly entered into between the parties. The arbitration petition is resisted by the respondents by filing an affidavit in reply on 7th January, 2015.

8. Mr.Kamat, learned counsel appearing for the petitioner invited my attention to the various documents annexed to the petition and also to the ad-interim order passed by this Court. My attention is also invited to various objections raised by the respondents in the

affidavit in reply.

9. Learned counsel appearing for respondents submits that no interim measures can be granted by this Court in this petition filed under section 9 of the Arbitration act on the ground that the petitioner had invoked arbitration agreement vide its notice dated 26th November, 2013 recorded under clause 17 of the channel finance agreement dated 11th March, 2013. It is submitted that the said agreement dated 11th March, 2011 is substituted by the agreement dated 11th June, 2013. She submits that the petitioner has not invoked any arbitration agreement recorded in the said agreement dated 11th June, 2013 and thus no interim measures can be granted by this Court. In support of this submission, she placed reliance on the judgment of the Supreme Court in the case of *Young Achievers vs. IMS Learning Resources Pvt. Ltd., (2013) 10 SCC 535* and in particular paragraphs 5 to 8.

10. A perusal of the record indicates that the respondents had applied for facility by way of the channel finance which was granted to respondent no.1 by the petitioner vide the agreement dated 11th March, 2011. Pursuant to the request of the respondents, the petitioner had enhanced the said facility from Rs.1.00 crore to Rs.1.30 crore on the terms and conditions recorded in the second agreement i.e. dated 11th June, 2013.

11. It is not in dispute that the petitioner has already issued a notice of demand under the agreement dated 11th June, 2013. It is the case of the petitioner that the said agreement dated 11th June, 2013 is in continuation of the agreement dated 11th March, 2011.

12. Insofar as the submission of learned counsel for the respondents that since no arbitration agreement under the agreement dated 11th June, 2013 is invoked and thus this petition filed under section 9 of the Arbitration Act is not maintainable is concerned, in my view, even if no arbitration agreement under the agreement dated 11th June, 2013 is invoked by the petitioner, there would be no bar from filing this petition under section 9 of the Arbitration Act. The proceedings under section 9 of the Arbitration Act can be filed even before invocation of the arbitration agreement. In my view, even if no notice invoking arbitration agreement is issued under the said agreement dated 11th June, 2013, at the most limitation in respect of cause of action, if any, under the agreement dated 11th June, 2013 would not stop till the arbitration agreement under the said agreement is invoked and till the notice is received by the respondents. Thus I am not inclined to accept the submission of learned counsel for the respondents that these proceedings under section 9 of the Arbitration Act is not maintainable because the petitioner has not issued the notice invoking the arbitration agreement under the said agreement

dated 11th June, 2013. It is for the petitioner to decide as to which agreement the petitioner would invoke for the purpose of making a claim before the learned arbitrator.

13. Insofar as the judgment of the Supreme Court in *Young Achievers vs. IMS Learning Resources Pvt. Ltd.* (supra) relied upon by the respondents is concerned, it is held by the Supreme Court that if the agreement containing arbitration clause is superseded/novated by subsequent agreement between parties, arbitration clause of the original agreement does not survive. It is not in dispute that even under the subsequent agreement dated 11th June, 2013, an arbitration agreement exists between parties. It is not the case of the respondents that in the agreement dated 11th June, 2013, there is no arbitration agreement. In my view, the said judgment of the Supreme Court in the case of *Young Achievers vs. IMS Learning Resources Pvt. Ltd.* (supra) thus does not assist the case of the respondents even remotely.

14. Be that as it may, a perusal of the second agreement indicates that by the said agreement, the petitioner has enhanced the facility.

15. The respondents has not canvassed any other submissions before this Court.

16. A perusal of the record clearly indicates that the

respondents have committed default in making repayment of the installments of loan granted by the petitioner. There was no response to the notice of demand issued by the petitioner under the agreement dated 26th November, 2013.

17. This Court while granting ad-interim order dated 19th December, 2013, has already recorded reasons for granting such reliefs and has accordingly appointed the Court Receiver. The said order has not been set-aside by this Court, so far. In my view, the petitioner has thus made out a case for confirmation of the said ad-interim order passed by this Court on 19th December, 2013.

18. I, therefore, pass the following order :-

a). Arbitration Petition is made absolute in terms of ad-interim order passed by this Court on 19th December, 2013. No order as to costs.

19. The parties as well as the Court Receiver to act on the authenticated copy of this Court.

(R.D. DHANUKA, J.)