

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

APPEAL (LODGING) NO.755 OF 2015
IN
ARBITRATION PETITION NO.784 OF 2015

Krishna Sales Corporation, Gorakhpur, Uttar Pradesh & Ors.		Appellants
V/s.		
Tata Capital Financial Services Ltd., Lower Parel, Mumbai		Respondent

ALONG WITH

NOTICE OF MOTION (LODGING) NO.2797 OF 2015
IN
APPEAL (LODGING) NO.755 OF 2015
IN
ARBITRATION PETITION NO.784 OF 2015

M/s. BOSTON		Applicant
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In the matter between

M/s. BOSTON		Appellant / (Org. Respondent)
V/s.		
M/s. Solar Sportswear		Respondent / (Org. Petitioner)

Mr. Pankaj Gupta, i/by Ms. Tapasvini Shah, i/by
M/s. TJS Legal, for the Appellants.

Mr. Ashish Kamat, a/w. Mr. Ashok Paranjpe,
Ms. Leena Desai-Padhye and Ms. Aparna Wagle,
i/by M/s. M.D.P. & Partners, for the Respondent.

Mr. S.S. Deshpande, Court Receiver, a/w.
Mr. A.B. Malvankar, Section Officer, is present.

**CORAM : V.M. KANADE &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

DATE : 26TH OCTOBER, 2015.

P.C. :

1. Heard learned counsel for the Appellants and learned counsel for the Respondent at length.
2. Appellant is aggrieved by the order dated 9th September, 2015 passed by the learned Single Judge of this Court in an Arbitration Petition filed under Section 9 of the Arbitration & Conciliation Act, 1996. Firstly, it is submitted by the learned counsel for the Appellants that the Appellants have not been served in accordance with Rule 803E and 803F of the Bombay High Court (Original Side) Rules, 1980. It is further submitted that what was served on the Appellants was the lawyer's notice and not the Court notice, as contemplated under the Bombay High Court (Original Side) Rules, 1980.
3. Secondly, it is submitted that the date of hearing of the Appeal was not mentioned in the said notice and, therefore, the impugned order is liable to be set aside on that ground alone.

4. Thirdly, it is submitted that no case is made out by the Respondent for appointment of Court Receiver. It is submitted that the only averment made in respect of appointment of the Court Receiver is to be found in para 12 of the Arbitration Petition. It is submitted that the said averment does not make out a case for appointment of Court Receiver. It is submitted that it was necessary to make out a case of special circumstances or some unusual occasion and only then the Court would take an extreme step of appointment of Court Receiver. The learned counsel for the Appellants has invited our attention to the Judgment of the Privy Council in the case of ***Benoy Krishna Mukherjee and Ors. Vs. Satish Chandra Giri & Ors., Vol. XXXII Page 681.***

5. The learned counsel for the Appellants then submitted that the learned Single Judge of this Court was pleased to pass an order of appointment of Court Receiver on the ground that the Appellants had promised to clear the charge over the property, which was executed in favour of Punjab National Bank. It is submitted that only on that basis, the impugned order was passed. It is submitted that this was a clear suppression of facts. He has invited our attention to the letter dated 30th October, 2012 issued by the Chief Manager of Punjab National Bank, in which it is clearly stated that the loan had been fully adjusted on 30th

October, 2012. It was submitted that this fact was known to the Respondent herein.

6. The learned counsel for the Appellants then submitted that these properties are already secured in favour of the Respondent and, therefore, it was not necessary again to appoint a Court Receiver in respect of the said property.

7. The learned counsel for the Appellants has also invited our attention to the previous observations made by the learned Single Judge in the impugned order. He then submitted that the entire cause of action had arisen at Gorakhpur as the property was situated at Gorakhpur and the agreement was also executed at Gorakhpur. It is, therefore, submitted by clearly mentioning that the jurisdiction in Mumbai did not confer jurisdiction on the Courts at Mumbai. He has invited our attention to the Channel Finance Agreement and pointed out that the said Agreement was executed at Gorakhpur. The property is situated at Gorakhpur. It is, therefore, submitted that, though Clause (XVII) of the said Agreement mentions that *“the Courts at Mumbai in the State of Maharashtra shall have exclusive jurisdiction to decide any and all matters referred to the Court of law under the Arbitration and Conciliation Act, 1996 or otherwise*

under law”, it could not confer jurisdiction by consent on a Court which did not have jurisdiction.

8. On the other hand, the learned Counsel appearing on behalf of the Respondent submitted that the Division Bench of this Court, in the case of ***Konkola Copper Mines (PLC) Vs. Stewarts and Lloyds of India Ltd., 2013(4) Arb. LR 19 (Bombay) (DB)***, has clearly held that, in such cases, since part of the cause of action has arisen in Mumbai, the seat of arbitration was in Mumbai and the creditors' registered office is situated in Mumbai, the Court at Bombay will have jurisdiction to entertain and decide the applications filed under Section 9 of the Arbitration & Conciliation Act, 1996. It is submitted that, in fact, arbitration has been commenced. It is submitted that, therefore, the submissions made by the learned counsel for the Appellants are without instructions.

9. On the other hand, the learned counsel appearing on behalf of the Appellants submitted that the Judgment which was relied upon by the learned counsel for the Respondent has been challenged in the Apex Court by filing Special Leave Petition No.2969 of 2013 and though the stay has not been granted to the said Judgment, the said Special Leave Petition No.2969 of 2013 is kept for final hearing on 30th October, 2015.

10. The learned counsel for the Respondent then submitted that the Respondent had served the Appellants herein, initially, when the ad-interim order in terms of prayer clause (b) was granted on 16th April, 2015 and thereafter again the Respondent has served the Appellants herein and the affidavit-of-service clearly mentions that even the date of hearing was informed. The learned Single Judge of this Court has, in para 1 of order dated 9th September, 2015, referred to the affidavit-of-service filed by the Respondent herein. It is submitted that the Appellants having been served, question of again serving them by Court notice did not arise, more particularly, in an application to be filed under Section 9 of the Arbitration & Conciliation Act, 1996, wherein there is an urgency of securing the assets, which have been mortgaged.

11. It is submitted that, so far as appointment of Court Receiver is concerned, the Division Bench of this Court has held that, whenever a property is mortgaged to a Financial Institution, Court Receiver has to be appointed as a matter of course.

12. The learned counsel for the Appellants has invited our attention to the Judgment of the Apex Court in the case of ***Industrial Credit and Investment Corporation of India Ltd. & Ors. Vs. Karnataka Ball***

Bearings Corporation Ltd. & Ors., AIR 1999 SC 3438, more particularly para 13 of the said Judgment.

13. The Apex Court in the case of ***Wander Ltd. and Another vs. Antox India P. Ltd.***¹, in para 14, has clearly held that, while exercising jurisdiction under Clause 15 of the Letters Patent, the Appellate Court to interfere with the order passed by the learned Single Judge, which is patently perverse and contrary to the law laid down by the Apex Court and the High Courts. In para 14 of the said Judgment, the Apex Court has observed as under:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal

¹ 1990(Supp) SCC 727

on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd vs. Pothan Joseph (1960) 3 SCR 713 : AIR 1960 SC 1156 : (SCR 721).

“..... These principles are well established, but as has been observed by Viscount Simon in Charles Oseinton & Co. v. Jhanaton [1942 AC 130) '....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that

arises is due only to the application of well settled principles in an individual case.”

The appellate judgment does not seem to defer to this principle.”

14. In the present case, the first contention of the Appellants is that the Court notice was not served, as contemplated under Rule 803E and 803F of the Bombay High Court (Original Side) Rules, 1980. The said Rules read as under :-

803E : Notice of Filling Application to persons likely to be affected -

Upon any application by petition under the Act, the Judge in chambers shall, if he accepts the petition, direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted.

**803F : Processes to be issued on Application by
Arbitrator or a Party -**

Processes to the parties to arbitration proceedings or to witnesses shall be issued by the Prothonotary and Senior Master on the written application of the Arbitrator or a party with specifications as provided under Section 27(2) of the Act.

15. It is not in dispute that the Respondent has filed affidavit-of-service and the said affidavit-of-service clearly mentions that, even the date of hearing of Arbitration Petition was informed to the Appellants. It is also an admitted position that the Appellants chose not to appear before this Court on the second date as well. The Court has, in para (1) of its order dated 9th September, 2015, noted this fact. The Appellants, having been served with the lawyer's notice, cannot then insist that they should also be served through a Court notice and thereafter interim order should be passed under Section 9 of the Arbitration & Conciliation Act, 1996. If this happens then the very purpose for which application is filed under Section 9 of the Arbitration & Conciliation Act, 1996 will be defeated, because there is

every possibility that the party may, under that pretext, create third party rights or try to alienate the property or part with possession of the said property, which is mortgaged. We find no substance in the said submission that only after the Court notice is served, as contemplated under Sections 308E and 308F of the Bombay High Court (Original Side) Rules, 1980, any order can be passed under Section 9 of the Arbitration & Conciliation Act, 1996.

16. As regards the issue of jurisdiction is concerned, Clause (XVII) of the Channel Finance Agreement clearly mentions that the Courts at Bombay shall have exclusive jurisdiction to decide any and all matters referred to the Courts of law under the Arbitration and Conciliation Act, 1996. The Division Bench of this Court, in the case of ***Konkola Copper Mines (PLC) (Supra)***, has clearly held that, in such cases, where the seat of arbitration is in Bombay, the creditors' registered office is situated in Bombay and part of the cause of action has arisen in Mumbai, it cannot be said that the Court at Bombay is not having jurisdiction at all to entertain and decide the applications filed under Section 9 of the Arbitration & Conciliation Act, 1996. Though it is true that a Special Leave Petition has been filed against the said order, however, no stay has been granted to the same. Hence, we are bound by the ratio of the Judgment of

the Division Bench of this Court. We are of the view that this submission is also without any merit.

17. It is further submitted by the learned counsel for the Appellants is that no case is made out by the Respondent for appointment of a Court Receiver. We are unable to accept this submission. The Judgment on which the reliance has been placed by the learned Counsel for the Appellants, in the case of ***Industrial Credit and Investment Corporation of India Ltd. (Supra)***, mainly deals with the case where the Court Receiver, before the decree was passed, was going to sell the immovable property, which was in his possession. Para 13 of the said Judgment reads as under :-

“13. In the premises, we do hereby record and observe that the question of there being any embargo in the matter of sale of immovable property by the Receiver before passing of decree does not and cannot arise and we do feel it expedient to record that the observations of the Full Bench is too wide a preposition and as a matter of fact runs counter to the true intent of the legislature as appears from Order 40,

Rule 1 of the Code of Civil Procedure. The observations of the Full Bench pertaining to the above is to be treated as merely stated for the purposes of the facts of the particular case of the State Bank (supra) and cannot be treated as a precedent. The instant matter is thus remitted back to the High Court for being dealt with in accordance with the merits. It is made clear that no part of the observations of this Court would be treated as an expressions of opinion in any particular matter, but the observations as above pertains to the general principles of law without any specific reference to any matter. We reiterate however that the High Court would be at liberty to deal with the issue in accordance with the factual details as is available in the matter under consideration. The order under appeal thus stands set aside. The appeal is allowed. The matter is remitted back to the High Court for being dealt with as above. No order as to costs. Appeal allowed.”

18. In our view, the ratio of this Judgment, therefore, does not apply to the facts of the present case.

19. Even otherwise, the grant of relief of appointment of Court Receiver is a discretionary relief and the learned Single Judge, after observing the peculiar facts and circumstances of the case, has thought it fit that the appointment of Court Receiver is necessary. He has, therefore, exercised the discretion which is vested in it in an appropriate manner and has appointed the Appellants as the agents of the Court Receiver. It cannot be forgotten that, in this case, it is an admitted position that the Appellants have taken a loan of Rs.3 crores and the amount which has been now due was about Rs.5.32 crores and the said amount has not been repaid by the Appellants since last two – three years. We are, therefore, of the view that the learned Single Judge of this Court has justified in securing the property and appointing a Court Receiver, so that part of the amount, which is due, shall be recovered by appointing a Court Receiver and by asking the Appellants to pay the royalty in respect of the said property.

20. Taking an overall view of the matter, therefore, we are of the view that this is not a fit case where this Court should interfere with the interim

order, which is passed by the learned Single Judge of this Court. Appeal, therefore, is dismissed.

21. In view of the above, Notice of Motion (Lodging) No.2797 of 2015, pending in the Appeal does not survive and the same is disposed of accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[V.M. KANADE, J.]