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

ARBITRATION PETITION NO.415 OF 2015

L & T Finance Limited	...Petitioner
V/s.	
Kemrock Industries & Exports Ltd. & Ors.	...Respondents

WITH
NOTICE OF MOTION (LODGING) NO.473 OF 2015
IN
ARBITRATION PETITION (LODGING) NO.473 OF 2013

Allahabad Bank	...Applicant
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IN THE MATTER BETWEEN :

L & T Finance Limited	...Petitioner
V/s.	
Kemrock Industries & Exports Ltd. & Ors.	...Respondents

Ms.S.I. Joshi with Ms.Nikita Pawar i/b S.I. Joshi & Co. for the
Petitioner.

Mr.Dirshat Mehra i/b Rajani,Singhanian & Partners for Respondent
Nos.1 and 2.

Mr.Bhavik Manik i/b V.N. Ajikumar for the Applicant – Allahabad
Bank- in Notice of Motion (Lodging) No.473 of 2015.

CORAM : R.D. DHANUKA, J.

DATE : 8TH JULY, 2015.

P.C. :-

1. The petitioner in Arbitration Petition No.415 of 2015 seeks
interim measures in the petition filed under section 9 of the Arbitration
& Conciliation Act, 1996 (for short “the Arbitration Act”) *inter-alia*

praying for an order and direction against respondent nos.1 and 2 to act as an agent of the Court Receiver in respect of the properties in Exhibit "H" to the petition and seeks further directions against the Court Receiver to fix royalty in terms of the installments due and payable by the respondents under the loan agreement dated 15th June, 2011 and for further reliefs.

2. Notice of Motion (Lodging) No.473 of 2015 has been filed by the applicant (Allahabad Bank) *inter-alia* praying for recall of the order dated 24th December, 2013 passed by this Court in Arbitration Petition (Lodging) No.473 of 2013 to the limited extent of granting injunction, attachment before judgment and appointment of the Court Receiver in respect of the property described at item no.1 in Exhibit "G" to the Arbitration Petition (Lodging) No.473 of 2013 on the ground that the said property is mortgaged to the applicant bank and other banks under consortium by the respondent no.1

3. The applicant to the notice of motion was not a party to the Arbitration Petition (Lodging) No.473 of 2013.

4. On 24th December, 2013, this Court passed an order in Arbitration Petition (Lodging) No.473 of 2013, which was filed under section 9 of the Arbitration act, taking a *prima-facie* view that the respondents had committed defaults in making payment of the loan amount with interest. The respondents did not disclose the current position and fixed assets of respondent no.1, which were hypothecated in favour of the petitioner. This Court accordingly directed respondent no.1 to file affidavit of disclosure disclosing the current position of the hypothecated assets with details to the petitioner within two weeks from the date of the said order. In the said

order, it was made clear that upon the respondents furnishing such list to the petitioner, the Court Receiver shall take possession of the hypothecated assets. This Court also granted injunction in respect of the properties in Exhibit "G" to the petition.

5. Pursuant to the said order passed by this Court, the respondents filed an affidavit in the said arbitration petition on 10th January, 2014, disclosing the list of properties held by respondent no.1 with their respective details as on the date of filing of the said affidavit. It was stated that there were no un-encumbered properties of the respondents. In the statement annexed to the said affidavit, there was a reference to the property "Carbon Fiber And Resin Division and whole land of company situated at village Asoj, Vadodara-Halol Expressway, Taluka Waghodia, District Vadodara 391".

6. On 2nd December, 2014, the petitioner filed Chamber Summons (Lodging) No.1019 of 2014 in the said arbitration petition inter-alia praying for an order against the respondents for fixation of royalty and for other reliefs. By an order dated 2nd December, 2014, this Court permitted the petitioner to withdraw the said chamber summons with liberty to take out appropriate proceedings, including the petition under section 9 of the Arbitration Act. Pursuant to the said liberty granted by this Court, the petitioner has filed Arbitration Petition No.415 of 2015 under section 9 of the Arbitration Act for various reliefs.

7. Learned counsel for the applicant in the Notice of Motion (Lodging) No.473 of 2015, invited my attention to the various documents annexed to the affidavit in support of the notice of motion,

including the agreement between the consortium of the five banks, including the applicant with the respondent no.1. My attention is also invited to the term loan entered into by the consortium of several banks, including the applicant with respondent no.1 on 15th May, 2007. Respondent no.1 has created equitable mortgage of the said property described at item no.1 in Exhibit "G" in favour of the said consortium. The charge created in favour of the applicant along with other banks of the consortium in respect of the said property has been already registered with the Registrar of Companies. My attention is also invited to a deed of hypothecation dated 15th May, 2007 entered into between the said consortium and respondent no.1.

8. Some time in the year 2013, the applicant filed an application before the Debts Recovery Tribunal, Ahmedabad being O.A. No.260 of 2013 against respondent no.1 for recovery of their dues. On 28th September, 2013, the applicant has also issued notice under section 13(2) of the Securitisation And Reconstruction Of Financial Assets & Enforcement Of Security Interest Act.

9. It is the case of the applicant that on 18th December, 2014, when the authorized officer of Allahabad Bank visited the said property, the applicant came to know about the board put up by the Court Receiver on the said property. After making inquiry by the applicant, the applicant addressed a letter to the Court Receiver pointing out their alleged rights in the said property. Pursuant to the said letter addressed by the applicant, the Court Receiver by a notice dated 30th January, 2015 to learned advocate representing the petitioner and the respondents requested to record their say in the matter to the letter received from the applicant's advocate. The applicant thus filed the notice of motion for re-call of the order passed

by this Court insofar as the property in respect of which the applicant claims charge and mortgage in their favour along with other members of the consortium.

10. Learned counsel for the applicant invited my attention to all the aforesaid documents and submits that in view of the applicant along with other members of the consortium having first charge and are secured creditors in respect of the said property, described at item no.1 at Exhibit "G", no order could have been passed by this Court in favour of the petitioner. My attention is also invited to paragraphs 16 and 17 of Arbitration Petition (Lodging) No.473 of 2013 filed by the petitioner admitting that the respondents had failed to create charge as assured in their favour within a period of 90 days. He submits that thus it is not in dispute that insofar as the property described at item no.1 in Exhibit "G" is concerned, there was no charge created in favour of the petitioner by the respondents. He submits that since the order passed by this Court was behind the back of the applicant, the order passed by this Court on 24th December, 2013 be re-called and/or vacated.

11. Learned counsel for respondent nos.1 and 2 does not dispute that the property described at item no.1 at Exhibit "G" was mortgaged in favour of the applicant along with other consortium banks. He submits that respondent nos.1 and 2 had already brought this fact in their affidavit in reply to the said arbitration petition filed pursuant to the order passed by this Court. He submits that some of the creditors have filed various company petitions against respondent no.1 before the High Court of Gujarat inter-alia praying for winding up of respondent no.1 company and for appointment of the Official Liquidator. He submits that by an order dated 4th May, 2015, passed

by the Gujarat High Court, respondent no.1 has been ordered to be wound up. My attention is also invited to the two orders passed by the Division Bench of the Gujarat High Court in O.J. Appeal Nos. 18 of 2015 and 19 of 2015 passed on 8th May, 2015, by which the Division Bench has granted interim reliefs in favour of respondent no.1 thereby stayed the operation, implementation and execution of the said judgment and order dated 4th May, 2015 during the pendency of the said appeal, which was passed by the learned Company Judge in Company Petition No.83 of 2013. He submits that the said two appeals are pending.

12. Ms.Joshi, learned counsel for the petitioner submits that though respondent nos.1 and 2 agreed to create charge in respect of the property described in item no.1 in Exhibit "G" in favour of the petitioner, respondent nos.1 and 2 failed to create such charge. She submits that even if this Court vacates the said order insofar as the said order dated 24th December, 2013 insofar as item no.1 in Exhibit "G" is concerned, in the event of the applicant selling the said property, if there is any excess recovery upon selling the said property after adjusting the dues of the applicant, the applicant should be entitled to recover the same from Allahabad Bank.

13. A perusal of the record clearly indicates that the property described at item no.1 of Exhibit "G" to the Arbitration Petition (Lodging) No.473 of 2013 was admittedly not mortgaged in favour of the petitioner by the respondents nor any charge was created. When this Court passed the said order on 24th December, 2013, the respondents had not filed any affidavit of disclosure, disclosing their assets whether encumbered or un-encumbered. Only after disposal of the said arbitration petition on 24th December, 2013, respondent nos.1

and 2 filed an affidavit of disclosure. A perusal of the said affidavit clearly indicates that the said property described at item no.1 in Exhibit "G" was already encumbered property. Learned counsel for respondent nos.1 and 2 admits that the said property was mortgaged in favour of the applicant along with other members of consortium banks. A perusal of the record produced by the applicant in the notice of motion also clearly indicates that the said property was mortgaged in favour of the applicant along with other consortium banks and a charge in respect thereof is already created in their favour.

14. A perusal of the averments made in paragraphs 16 and 17 of Arbitration Petition (Lodging) No.473 of 2013 clearly indicates that no such mortgage or charge was created in favour of the petitioner by respondent nos.1 and 2 in respect of the said property. In my view, the applicant has thus made out a good case for re-call of the said order dated 24th December, 2013 insofar as the property described at item no.1 of Exhibit "G" i.e. "village – Asoj, Vadodara – Halol Expressway, Taluka – Waghodia, Dist : Vadodara, Gujarat – 391 510" is concerned.

15. Learned counsel for the applicant also invited my attention to page no.119 i.e. part of the Joint Deed of Hypothecation dated 15th May, 2007 entered into by the banks of consortium, including the applicant and respondent no.1 herein. Under the said agreement, respondent no.1 has agreed that there would be first charge on the current assets of respondent no.1, such as raw materials, semi finished goods, stores and spares not relating to plant and machinery, bills receivable and book debts and all other movables both present and future. My attention is also invited to the Deed of Hypothecation

entered into between the petitioner and respondent no.1 on 27th July, 2011 and it is submitted that admittedly respondent no.1 had agreed to create second charge of all the assets, including the fixed and current assets and book debts in favour of the petitioner. He submits that the applicant has thus first charge on this hypothecated assets described in Exhibit "D" to Arbitration Petition (Lodging) No.473 of 2013. The applicant has prayed that the order dated 24th December, 2013 be accordingly re-called in respect of the hypothecated assets is concerned.

16. A perusal of the Deed of Hypothecation entered into between the consortium banks and respondent no.1 clearly indicates that there is first charge in respect of all the current assets of respondent no.1, both present and future. A perusal of the Hypothecation Deed dated 27th July, 2011 entered into between the petitioner and respondent no.1 clearly indicates that respondent no.1 has second charge on all the assets whether fixed or current including the book debts in favour of the petitioner and not the first charge. In my view, the applicant along with other members of the consortium bank who claims first charge in respect of the said hypothecated assets will have priority over the claim of the petitioner on those hypothecated goods. The order dated 24th December, 2013 is accordingly also re-called insofar as the hypothecated assets described in Exhibit "D" to Arbitration Petition (Lodging) No.473 of 2013 is concerned. It is made clear that the Court Receiver in respect of the aforesaid properties which are claimed by the applicant stands discharged.

17. Insofar as prayers in Arbitration Petition No.415 of 2015 in terms of prayer clause (a) and insofar as other properties described in

Exhibit "G" in respect of which the applicant has not claimed any charge is concerned, it is not in dispute that the Court Receiver has already taken formal possession in respect of the said properties. The petitioner has no objection if respondent nos.1 and 2 are permitted to act as an agent, however on the usual terms and conditions, including furnishing of the security and payment of royalty which shall be decided in terms of the installments due and payable by the respondents under the loan agreement dated 15th June, 2011.

18. I, accordingly, direct the Court Receiver to appoint respondent nos.1 and 2 in respect of the other property described in Exhibit "G" other than the property described at item no.1 as an agent of the Court Receiver on the usual terms and conditions, on furnishing security and on payment of royalty to the satisfaction of the Court Receiver. If respondent nos.1 and 2 does not accept the agency of the Court Receiver within two weeks from the date of such offer, the Court Receiver shall take forcible possession of the said property and if necessary, with the assistance of the police and shall submit a report to this Court for further directions.

19. A perusal of the record indicates that respondent nos.2 and 3 have not disclosed their assets whether encumbered or un-encumbered. Respondent no.2 is accordingly directed to file affidavit of disclosure within two weeks from the date of this order.

20. Insofar as prayer clause (g) made by the petitioner against respondent no.3 from releasing any payment to respondent no.1 to the extent of Rs.4, 44,27,653/- is concerned, learned counsel for respondent nos.1 and 2 states that though respondent no.1 has to recover some amount from respondent no.3, he is not able to make

any statement about the exact amount recoverable by respondent no.1 from respondent no.3. A perusal of the record, including the order passed by the Gujarat High Court and the order passed by this Court clearly indicates that respondent no.1 company is heavily indebted. Large number of creditors have filed winding up proceedings against respondent no.1. The petitioner has thus made out case for grant of injunction in terms of prayer clause (h), which is ordered accordingly.

21. Both the proceedings are disposed of in the aforesaid terms. No order as to costs.

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

(R.D. DHANUKA, J.)