IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO: 671 OF 2016

Tata Capital Financial Services Limited ....Petitioner

V/s.

Varaha Infra Limited and Ors. ...Respondents

Mr. Naushad Engineer a/w Mr. Nikhil Mehta i/b M/s KMC Legal Venture, for the Petitioners.

None for the Respondents.

Coram: S.J. KATHAWALLA, J.
Date :24th June 2016

P.C.

1. This Petition is filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 seeking reliefs as prayed against the Respondents. The Petition is served on the Respondents and the Affidavits of Service have been placed on record. However, none appear for the Respondents though served.

The brief facts of the present case are as follows:

2. In or around June 2012, Respondent Nos. 1 to 5 submitted an application to the Petitioner seeking a corporate loan of Rs. 25,00,00,000/-. In pursuance thereof the Petitioner issued a Sanction Letter dated 18th July, 2012 bearing No. PF/18072012/147 thereby sanctioning a Term Loan of Rs. 25,00,00,000/-

in favour of the Respondent No.. 1 on terms and conditions more particularly recorded therein.

3. Thereafter a Term Loan Agreement dated 27th July, 2012 was executed by and between the Petitioner and the Respondent No.1 setting out the terms and conditions on which the aforesaid Term Loan of Rs.25,00,00,000/- was granted to the Respondent No.1, as more particularly recorded therein. The aforesaid Loan was granted for a period of four years. The rate of interest payable was 13% per annum. As per the said Term Loan Agreement, a Personal Guarantee of the Respondent Nos. 2 to 5 was to be obtained, whereby Respondent Nos. 2 to 5 in their Personal Capacity guaranteed the due repayment of the Loan Amount with interest by Respondent No.1 to the Petitioner. Clause 16.1 of the said Agreement stipulates that in the event the Respondent commits a default thereunder then in that event the Petitioner shall be entitled to demand immediate repayment of the entire outstanding dues under the credit facility payable to the Petitioner. Clause 23 of the said Term Loan Agreement provides that all the disputes arising out of the said Term Loan Agreement shall be referred to arbitration to be held at Mumbai in accordance with the Arbitration and Conciliation Act, 1996. Clause 25 provides that the Courts at Mumbai shall have jurisdiction to decide any matter that may arise for consideration under the Arbitration and Conciliation Act, 1996.

4. As per the terms of the aforesaid Term Loan Agreement dated 27th July, 2012, the Respondent No.2 has executed a Deed of Guarantee dated 29th July,

2012 and Respondent Nos. 3 to 5 have also executed a Deed of Guarantee dated 27th July, 2012, in their personal Capacity guaranteeing due repayment by Respondent No.1 of all amounts along with interest as specified in the Term Loan Agreement. The aforesaid Deeds of Guarantee dated 29th July, 2012 and 27th July, 2012 are continuing Deeds of Guarantee whereby upon default of the Respondent No. 1 in repaying any outstanding amounts under the Term Loan Agreement alongwith interest, the Respondent Nos. 2 to 5 were jointly and/or severally liable to pay the same to the Petitioner any outstanding amounts with interest due and payable by the Respondent No.1 under the aforesaid Term Loan Agreement.

5. The Respondent No. 2 has also executed two Memorandums for Recording Creation of Mortgage by Deposit of Title Deeds dated 27th July, 2012 and 24th May, 2013 respectively thereby recording the creation of equitable mortgage of immovable property being land bearing Khasra Nos. 5664, 6857, 6858/7395, 6816, 6863, 6864 situated at Bheenmal District: Jalor belonging to the Respondent No.2 in favour of the Petitioner as and by way of security for due repayment of all amounts with interest due and payable by the Respondent No.1 to the Petitioner under the Term Loan Agreement. In pursuance thereof, the Respondent No.2 has deposited with the Petitioner all the original title deeds and of all the above mentioned properties. The detailed description of the mortgaged lands is contained in the Schedule marked as Exhibit E-3 to the Petition.

6. The Respondent No.2 has also executed Declarations dated 30th July, 2012 and 24th May, 2013 whereby the Respondent No.2 has declared that he is the sole owner of all the mortgaged lands described in the Schedule to the Memorandum Recording Creation of Mortgage by Deposit of Title Deeds dated 27th July, 2012 and 24th May, 2013 respectively. By the said Declarations, the Respondent No.2 has also agreed and declared that the said Properties described in the Schedule to the Memorandum recording creation of mortgage by deposit of Title Deeds dated 27th July, 2012 and 24th May, 2013 respectively stand validly mortgaged and continue to remain mortgaged in favour of the Petitioner till all outstanding dues including interest along with all fees, costs, charges and expenses payable by the Respondent No.1 to the Petitioner are duly repaid in full.

7. The Respondent No.1 had also executed two Deeds of Hypothecation dated 11th September, 2012 and 8th October, 2012 respectively in favour of the Petitioner whereby the Respondent No.1 had hypothecated the equipment described in the Second Schedule to the said Deeds of Hypothecation, as and by way of security for due repayment of all amounts with interest and all other costs, fees and charges payable by the Respondent No.1 to the Petitioner under the Term Loan Agreement.

8. The Respondent Nos. 1 &2 have also executed the following documents in favour of the Petitioner:

(i) Demand Promissory Note dated 10th September, 2012 for Rs.25,00,00,000/- executed by the Respondent No.1 in favour of the Petitioner whereby the Respondent No.1 has promised to pay on demand to the Petitioner a sum of Rs.25,00,00,000/- together with interest @ 13% p.a. or such other rate as the Petitioner may fix from time to time with monthly rests.

(ii) Irrevocable Powers of Attorney dated 11th September, 2012 & 8th October, 2012 respectively executed by the Respondent No.1 in favour of the Petitioner, whereby the Respondent No.1 has appointed the Petitioner as their duly appointed Constituted Attorney to do or cause to be done all acts, deeds, matters and things on behalf of the Respondent No.1 as more particularly specified therein.

(iii) Powers of Attorney dated 27th July, 2012 & 24th May, 2013 respectively executed by the Respondent No.2 in favour of the Petitioner, whereby the Respondent No.2 has appointed the Petitioner as their duly appointed Constituted Attorney to do or cause to be done all acts, deeds, matters and things on behalf of the Respondent No.2 as more particularly specified therein.

9. The Petitioner states that pursuant to the Term Loan Agreement and in consideration of all the above mentioned documents being executed, at the request of the Respondent No.1 vide the Disbursal Request Letter dated 13th September 2012, the Petitioner disbursed to the Respondent No.1 a sum of

Rs.8,00,00,000/- on 31st July, 2012. A further sum of Rs.9,25,00,000/- was disbursed to the Respondent No.1 on 13th September, 2012. A further sum of Rs.7,75,00,000/- was disbursed to the Respondent No.1 on 9th October, 2012. The total amount disbursed therefore comes to Rs.25,00,00,000/-.

10. Subsequently, there has been default on the part of the Respondent to make timely repayments of the amounts due under the Term Loan Agreement. Accordingly, the Petitioner issued its notice dated 22nd April, 2015 to Respondent Nos.1 to 5 calling upon them to jointly and severally repay to the Petitioner an amount of Rs.2,16,92,500/- within four days of receipt of the said notice.

11. The Petitioner was constrained to send one more notice dated 22nd December, 2015 to the Respondent Nos.1 to 5 calling upon them to jointly and severally repay to the Petitioner an amount of Rs.2,62,37,277/- (Rupees: Two Crores Sixty Two Lacs Thirty Seven Thousand Two Hundred and Seventy Seven Only) within four days of receipt of the said notice.

12. Subsequently, the Petitioner through their Advocate's notice dated 25th January, 2016 addressed to the Respondent Nos.1 to 5 finally called upon them to make payment to the Petitioner a sum of Rs.8,14,33,716/- due as on 20th January, 2016 together with further interest thereon at the rate of 13.25% p.a. along with further penal interest thereon, within seven days from receipt of the aforesaid notice failing which the Petitioner would invoke the Arbitration

Clause under the Term Loan Agreement. The Particulars of Claim are annexed as Exhibit Q to the Petition.

13. The Petitioner has therefore prayed for an injunction in respect of the mortgaged properties described in the Schedule at Exhibit E3 to the Petition. The Petitioner has also prayed for the appointment of the Court Receiver, High Court, Bombay as receiver in respect of the mortgaged properties described in the Schedule at Exhibit E3 to the Petition. Counsel for the Petitioner has on instructions indicated that the hypothecated equipments set out in schedule 2 of the Deeds of Hypothecation dated 11th September 2012 and 8th October 2012 have been released at the request of the Respondent No.1, and hence are not available, and hence the only security are the mortgaged properties described in Exhibit E3. The Petitioner has also sought relief against the Respondent Nos. 6 and 7 in their capacities as garnishees. It is stated in Paragraph No. 9 of the Petition that the Respondent Nos. 6 and 7 have appointed the Respondent No. 1 as a sub-contractor for the purpose of construction of roads and highways. It can be noted that amounts would be due and payable by the Respondent Nos. 6 and 7 to the Respondent No. 1. Accordingly, it is prayed that the Respondent Nos. 6 and 7 should be called upon to disclose the amount payable to the Respondent No. 1 and that the Respondent Nos. 6 and 7 should deposit in this Hon'ble Court the sum that is due and payable by the Respondent Nos. 6 and 7 to the Respondent No.1 upto the amount of Rs. 8,14,33,716/- being the claim of the Petitioner. The Counsel

for the Petitioner relies on the judgment of the Hon'ble Madras High Court in the case of *M/s. L&T Finance Ltd. M/s J.K. Construction Pvt. Ltd* reported in *2014 1 L.W. 888* in which it has been held that in a Section 9 petition a direction can be issued to garnishees to deposit into the Court the amount due and payable by it to the borrower.

14. The Respondents have despite the service of the Petition not appeared and have also not filed their Affidavit in Reply to contest the Petition. In absence of any defence or contest by the Respondent Nos. 1 to 5, the averments contained in the Petition have remained uncontroverted. I see no reason why the statements/submission made in the Petition should not be accepted. Section 9 of the Arbitration and Conciliation Act, 1996 empowers the Court to pass an interim measure of protection and to secure the amount in dispute. As the Respondent Nos. 1 to 5 have defaulted in the repayment of the outstanding dues it is just and necessary to safeguard the interest of the Petitioner.

15. The Respondent Nos. 1 to 5 do not appear to have any defence. They have chosen not to appear and contest the petition. In that view of the matter and considering the documents and averments made in the petition, it would be appropriate to direct the Respondent Nos. 6 and 7 to disclose how much is due and payable to the Respondent No. 1 and to direct the Respondent Nos. 6 and 7 to deposit the amount due and payable to the Respondent No.1 with the Prothonotary and Sr. Master, High Court Bombay. It is made clear that if the amount due and payable by the Respondent Nos. 6 and 7 to Respondent No.1 is

in excess of .8,14,33,716/-, the maximum amount that the Respondent Nos. 6 and 7 would be required to deposit with the Prothonotary and Sr. Master, High Court Bombay is Rs. Rs.8,14,33,716. If the said amount is deposited the Petitioner's claim will be fully secured and no other interlocutory reliefs are necessary. However, if the Respondent Nos. 6 and 7 indicate that no amounts are due and payable or that a sum less than Rs. 8,14,33,716/- is due and payable then it will be necessary to grant further protection of appointing the Court Receiver, High Court, Bombay as Receiver in respect of the mortgaged properties described in Exhibit E3 to the Petition. The appointment of Court Receiver is necessary in order to ensure that the said mortgaged properties are not wasted or alienated, thereby defeating the rights of the Petitioner. The claim of the Petitioner is substantial and unless adequately protected, the Petitioner may suffer irreparable harm and injury.. Accordingly the Petitioner has made out a strong prima facie case and the balance of convenience is also in favour of the Petitioner. Irretrievable harm loss and injury would be caused if the interim protection is not given to the petitioner.

16. Hence the following order is passed:

i. The Respondent Nos. 6 and 7 shall disclose the amounts payable, if any, to Respondent No. 1, within a period of 2 weeks from the date of this order. The Respondent Nos. 6 and 7 shall deposit the amount declared payable by them to the Respondent No.1 with the Prothonotary and Senior Master, High Court, Bombay within 3 weeks from the date of this order. It is made clear that if the amount due and payable by the Respondent Nos. 6 and 7 to Respondent No.1 is in excess of .8,14,33,716/-, the maximum amount that the Respondent Nos. 6 and 7 would be required to deposit with the Prothonotary and Sr. Master, High Court Bombay is Rs. Rs.8,14,33,716.

ii. In the event no amount is payable by the Respondent Nos. 6 and 7 to the Respondent No. 1 or if the amount so deposited is less than the Petitioner's claim i.e. Rs. 8,14,33,716/- then in that event:

ii.a. Pending hearing and final disposal of the arbitration proceedings, the Court Receiver, High Court, Bombay is appointed as Receiver in respect of the mortgaged properties described in the Schedule at Exhibit E3 to the Petition. The Court Receiver shall take possession of the mortgaged properties described in Exhibit E3 to the Petition with the assistance of local Police Authorities if necessary, and after preparing an inventory of the same file his report before this Court and seek further directions with regard to the said mortgaged properties. The copy of such report of inventory prepared by the Court Receiver shall be provided to the Parties.

ii.b. Until the Court Receiver High Court, Bombay takes possession of the said mortgaged property, the Respondent their agents and/or any representatives claiming through or under them are restrained by an order of injunction from in any manner selling, transferring, disposing off and/or alienating encumbering or parting with possession or creating third party rights in respect of the said mortgaged property described in Exhibit "C" to the Petition.

17. A copy of this order shall be forthwith served on the Respondents by Speed Post AD

18. The Petition stands disposed off.

(S.J. KATHAWALLA, J.)