

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order pronounced on: 1st February, 2016*

+ **ARB.A.(COMM) No.5/2016**

BHARAT VASUDEV KHATER & ORS. Appellants
Through Mr. Sameer Nandawani, Adv.

versus

M/S RELIGARE FINVEST LTD. Respondent
Through None

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The above mentioned appeal has been filed by the appellants under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') against the order dated 12th January, 2016 passed by Shri Gaurav Dubey, Arbitrator under Section 16 of the Act in Arbitration matter/Ref. no. RFL/Mortgage/L-1/177 titled as 'M/s Religare Finvest Ltd. v. Ashwin Bharat Khater & Ors.' for setting aside the said order. The contents of the order are reproduced here as under:-

"ORDER
12.01.2016

1. The respondents no. 1,3,5 and 6 have moved an application under Section 16 of Arbitration and Conciliation Act, 1996 thereby seeking dismissal of claimants petition on the ground that the enforcement of right by claimant through this arbitration proceedings is a right in rem and the same cannot be executed through present arbitration proceedings because the arbitration is an enforcement of

right of personal rights. Further it is submitted by the respondents that claimant is seeking recovery of award through sale of the mortgaged property i.e. entire building (1st to 7th Floor) Imperial Windsor, Plot 25, Vallabh Nagar CHS, North South Road 3, Juhu Scheme, Mumbai-400056, therefore, as per the provisions of Transfer of Property Act read with order 34 CPC, the action can only be enforced through courts of law and not by Arbitration Tribunal which is a private fora.

2. The claimant has filed its reply to the application of respondents. The claimant states that all respondents are co-borrower and now they cannot run from their liability to repay the loan amount Further claimant states that present proceedings relates to recovery of loan amount which respondents have taken from the claimant company and now respondents are trying to create confusion by correlating it with mortgage of property.

3. Heard the arguments and gone through the pleadings of the parties. The case of the claimant is for recovery of loan amount which even the respondent has admitted that they have availed loan facility from the claimant company to the tune of Rs.8 Crore. It has been further admitted by the respondents that they failed to repay the loan installments.

4. This tribunal is not satisfied with the plea of respondent that the present petition pertains to litigation of right in rem and not right in personam because the loan transaction is between two companies and it is a personal liability of the company to repay the loan amount An agreement to mortgage does not involve any right in rem but creates only a personal obligation.

5. In the light of the above findings, the Application of the Respondent under Section 16 of Arbitration and Conciliation Act, 1996 stands dismissed.

GAURAV DUBEY
Sole Arbitrator"

2. The brief facts leading to the filing of the present appeal are as follows:

2.1 In February 2010, the respondent granted a loan of Rs.8 crores to M/S Daisy Holdings Private Limited and to Sh.Avinash Bharat Khater against mortgage of immovable property i.e. entire building (1st to 7th Floor), Imperial Windsor, Plot 25, Vallabh Nagar CHS, North South Road 3, Juhu Scheme, Mumbai 400056 through loan agreement and a registered mortgage deed dated 16th February 2010 and 17th February 2010 respectively to which appellants Nos. 1 to 4 were co-borrowers/guarantors.

2.2 The said loan facility was to be repaid in 144 EMIs of Rs. 10,87,370/- each which were to be paid till May, 2015. However, the same was not repaid.

2.3 The respondent by its letter dated 13th October, 2015 appointed Sh.Gaurav Dubey, Advocate as Arbitrator who entered into the said Reference and issued notice to the appellants dated 16th October, 2015 whereby the appellants were supposed to enter appearance on 26th October, 2015. However, the said notice was posted to the appellants on 21st October, 2015 and reached to the appellants only on 25th October, 2015.

2.4 The appellants put in appearance before the Arbitrator and moved an application under Section 16 of the Act, thereby challenging the jurisdiction of the Arbitrator to adjudicate the matter in question. The respondent filed the reply to the said application. The Arbitrator dismissed the application by order dated 12th January, 2016. The matter is being proceeded further on merit by the Arbitrator.

3. Being aggrieved from the said order, the appellants have filed the present appeal inter-alia on various grounds.

4. Learned counsel for the appellants is not able to satisfy this Court about the maintainability of the appeal.

5. In the similar situation this Court has decided the issue about the maintainability of the main petition in the case of **Aravali Infrastructure Limited v. Michigan Engineers Pvt. Ltd. & Anr.** in Arb.P.(Comm) No.3/2015 decided on 27th January, 2016. Paras 9 to 11 are reproduced here as under:-

“9. Let me deal with the issue in hand. Section 16 of the Act reads as under:-

“16. Competence of Arbitral Tribunal to rule on its jurisdiction.—(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is *null* and *void* shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an Arbitral Award.

(6) A party aggrieved by such an Arbitral Award may make an application for setting aside such an Arbitral Award in accordance with section 34.”

10. It appears from the said provision which has been interpreted by various Courts to the effect that the Section empowers an arbitral tribunal to rule on its own jurisdiction *vide* sub-section (1). Where the arbitral tribunal decides to reject the plea regarding its jurisdiction, Sub-Section (5) empowers the tribunal to continue with the arbitral proceedings and make an arbitral award. Sub-Section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with Section 34. On the other hand, if the arbitral tribunal decides to accept the plea that it has no jurisdiction, then such an order is appealable under Section 37(2) of the Act.

11. Thus, in my considered view, the impugned order is not an interim award. It is simply an order passed in the application for stay of proceedings whereby the request of the appellant has been rejected. The Arbitral Tribunal inclines to continue with the proceedings as mandated under sub Rule 5 and 6 of Section 16 of the Act.

No doubt, Section 37 stipulates the remedy for appeals, however, sub-section (2) of the said Section expressly states that an appeal shall lie against an order accepting the plea referred to in sub-sections (2) and (3) of Section 16, meaning thereby that where the Arbitrator has come to the conclusion that it has no jurisdiction, an appeal would lie, otherwise if Arbitral Tribunal holds that it has jurisdiction, the appeal does not lie. At this stage of appeal, it cannot be concluded that it is illegal or without jurisdiction because Legislature has conferred the power on arbitral tribunal “to rule on its own jurisdiction.” Such an order can be challenged only in the manner laid down in Sub-Sections (5) and (6) of Section 16 of the Act, i.e. after the arbitration proceedings are over and the award is made. Such challenge is to be postponed and an aggrieved party would be entitled to raise after the award is passed. On the other

hand, if it is held that it has no jurisdiction, an order can be challenged under sub-section (2) of Section 37 of the Act.”

6. It is argued by the counsel for the appellants that the Arbitrator has gone beyond his powers and has ignored the law laid down by the Supreme Court in **Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.** (2011) 5 SCC 532 wherein it was held that the right to adjudicate upon a suit in which recovery of amount through sale of mortgage property has been prayed for is to be decided by a public fora i.e Court and there is implied bar on referring the said matter to private fora i.e. Arbitrator.

7. As far as the said decision is concerned, at this stage, the above said judgment does not help the case of the appellants. They may rely upon the same at the time of hearing of the matter at the final stage. Even the appellants have liberty to raise the said plea at the time of filing of objection under Section 34 of the Act, if the Award is rendered against them. At this stage, the arguments of the appellants cannot be raised in the present appeal.

8. The appellants have not denied the fact that the respondent has to recover a huge loan amount which was taken by the appellants No.1 to 4 and the same has not been repaid by them.

9. This Court is of the view that the present appeal has been filed in order to delay the arbitration proceedings.

10. The appeal is accordingly dismissed being not maintainable.

11. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 01, 2016