

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPELLATE DIVISION OF THE HIGH COURT**

**COMMERCIAL APPEAL (L.) NO. 02 OF 2017
IN
ARBITRATION PETITION NO. 1305 OF 2015**

Gupta Infrastructure (India) Private Limited ... Appellant.
(Org.Respondent No.4)

V/s.

1. Tata Capital Financial Services Ltd. ... Respondent
(R.1- org.petitioner.)
2. Gupta Corporation Private Limited
3. Mr. Padmesh Gupta,
4. Mrs. Anuradha Gupta
5. Reliance Corporate IT Park Ltd., ... Respondents.
6. K. D. Entertainment (Org. Respondents.)

**WITH
COMMERCIAL APPEAL (L.) NO. 03 OF 2017
IN
COMM. ARBITRATION PETITION NO. 18 OF 2016**

Gupta Infrastructure (India) Private Limited ... Appellant.
(Org.Respondent No.2)

V/s.

1. Tata Capital Financial Services Ltd. ... Respondent
(R.1- org.petitioner no.1.)
2. IDBI Trusteeship Services Ltd.,
3. Gupta Corporation Private Limited
4. Reliance Corporate IT Park Ltd., ... Respondents.
5. K. D. Entertainment (Org. Respondents.)

Mr. Mandar Soman, Advocate for the Appellant in COMAPL
No. 2 of 2017.

Mr. Devendra Chauhan i/by Mandar Soman for the Appellant in COMAPL No. 3 of 2017.

Mr.S.U.Kamdar,Sr.Advocate a/w.Mr.Chetan Kapadia,Y.Kamdar, Ashok Paranjape, Ms. Ekta Tripathi & Radhika Dixit i/by MDP and Partner for the Respondent No.1 in both the Appeals.

Mr. Santosh Ghate, Advocate for Respondent No.2 in COMAPL No. 3 of 2017.

Ms. Gaurangi Patil, for Respondent No.6 in COMAPL No. 2 of 2017 and for Respondent No.5 in COMAPL No. 3 of 2017.

Dr.M.S.Deshpande,Court Receiver is present in both Appeals.

**CORAM : ANOOP V. MOHTA AND
P. R. BORA, JJ.**

DATE : 17th JANUARY, 2017.

ORAL JUDGMENT : (Per : ANOOP V. MOHTA,J.)

1 These are commercial Appeals under section 37 of the Arbitration and Conciliation (Amendment) Act, 2015 (the Arbitration Act).

2 Heard the learned counsel in both the Appeals finally, by consent of the parties.

2 By impugned common order dated 13th December, 2016, the learned single Judge of the court in Commercial Arbitration Petition No. 18 of 2016 in Arbitration Petition No.1305 of 2015, after considering the rival contentions and

material on record including the affidavits and documents, pending the arbitral proceedings, has appointed, a Court Receiver, of the mortgaged properties in question :

“(a) As regards Shop No.121 occupied by KD Entertainment is concerned, the Court Receiver to take physical possession. If K.D. Entertainment desires, they could be appointed as an agent of the Court Receiver under the usual terms and conditions.

(b) So far as Shop No.112-B occupied by Reliance is concerned, the Court Receiver is only to take symbolic possession and Reliance is directed to deposit license fees directly with the Prothonotary and Senior Master, High Court, Bombay.”

3 The basic challenge is the order of appointment of the court receiver passed by the learned single Judge in spite of no arbitration clause under the agreement between the parties in arbitration petition no. 1305 of 2015, filed by the respondent/original petitioner under section 9 of the Arbitration Act. A submission is also made that no case is made out for appointment of the receiver for want of missing elements, as are contemplated under Order 40 Rule 1 of the Civil Procedure Code, 1908. Another submission is made that

under section 16 of the Act, an application is also filed before the Arbitral Tribunal, objecting to arbitral proceedings itself for want of jurisdiction and the same is pending for arbitration. A submission is also made that though an earlier arbitration proceeding was initiated in the year 2015, there was no such order pressed.

4 The issue with regard to the arbitrability has been dealt with by the Apex Court in the case of **Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited & Ors., (2011) 5 SCC 532**, specifically in paras 51 and 53 of the judgment. The learned single Judge of this Court, considering the judgment, based upon the facts and the law, has dealt with the same issue and rejected the submissions. In **Tata Capital Financial Services Limited & Ors. vs. Deccan Chronicle Holdings Limited (2013[3] Bom. C.R. 205)**, the Division Bench of this court, while confirming the said order has also dealt with all these aspects and entertained the arbitration petition.

5 The learned Judge has passed the impugned order in the peculiar facts and circumstances and the reflected position of law in the matter, where the arbitration proceedings have been filed, seeking prayers of a composite nature, though a mortgage document is referred, but mainly the monetary claim is raised/made therein. The issue even if

any whether such arbitration proceedings are maintainable or not and/or any arbitrability, as the stated document is a mortgage deed, is required to be considered at an appropriate final stage. For taking any decision by the court under section 9 of the Act to grant or not to grant such protective reliefs specifically when the prayers are composite in nature, as referred above, the protective reliefs so granted, just cannot be denied, as has been done in the present case, as the case is made out and further the matter is pending before the learned Arbitral Tribunal also.

6 The submission that this is not the case where the learned single Judge ought to have appointed the receiver. After considering the rival submissions, including the documents so read and referred and the two interlinked but separate agreements between the parties with and without arbitration clause. The common factors are the property involved and the purpose and the object of obtaining the loan, and the debt/liability of the loan amount and the persons/ parties who are involved and liable to make payment jointly or severally in no way can be disconnected to accept the submission that in one agreement there is no arbitration clause. The case is made out for grant of any protective relief, specifically when there is no denial about the liability and the defaults in question. The commercial document, therefore, is required to be read in the background of the whole purpose

and object. To secure the amount / loan at the earliest and if a case is made out, there is no reason that the court under section 9 of the Act should not pass any protective order, pending the arbitral proceedings.

7 The submission even so raised to the passing of such interim or protective orders against the third person is also not acceptable at the stage of this proceedings, as admittedly the so called argument of the third person in the present case is difficult to accept, as all the parties to the agreement clause are interconnected and interlinked for getting the loan / finance from the Respondent Financial Institution. Even otherwise, considering the total scheme and purpose of the arbitration clause including the right and obligation of the financial institutions, is subject to the final decision. In such circumstances there is no total bar not to grant interim relief or protective relief, as sough against the third person, if a case is made out and/ or the document supporting the same has direct link or connection with the agreement involved by and in between the parties. It is always subject to the final decision which in the present case also can be taken in the arbitration proceedings. The third party is always at liberty to make out the case accordingly.

8 Even otherwise, in the present case, as noted and as pointed out by the learned counsel appearing for the parties

and specifically the prayers (a) and (b) that cannot be stated to be wholly based upon the mortgage deed and / or the document. The reasons so reflected in the impugned order particularly in paras 15, 16, 19, 20, 23, which are reproduced as under, are sufficient to maintain the impugned order.

“15. ... The Division Bench also held that when the creditor asserts a money claim simplicitor in the course of arbitral proceedings, the law does not compel him to relinquish his mortgaged security as a condition for asserting the money claim in arbitration or to abandon his right as a secured creditor to bring the mortgaged property to sale by filing an independent suit in accordance with Order XXXIV Rule 14 of CPC. The Court concluded that a secured creditor can invoke the provisions of Section 9 of the said Act which is a provision incidental to or ancillary to the arbitration proceedings for seeking an interim measure of protection that would ensure that the fruits of the arbitral award are not destroyed or lost by dealings of the debtor with the properties in the meantime.”

“16 In the statement of claim filed already, the Petitioner is only seeking to assert the money claim simplicitor and for a declaration that the money claim is duly secured by a valid and subsisting mortgage. The Petitioner in the arbitration proceedings is not seeking enforcement of the mortgage security. Therefore, in my view, the Arbitral Tribunal will have jurisdiction and consequently this Court also has jurisdiction to consider whether the relief sought under Section 9 of the said Act can be granted.”

“19 As regards K.D. Entertainment is concerned, the Petitioner placed on record a letter of intent, dated 26th June 2015 entered into between the K.D. Entertainment and Gupta Infrastructures. Shri Kamdar submitted that though the letter of intent provides for entering into a leave and license agreement, no such Agreement has been entered into and the arrangement under the agreement between the parties is not to pay regular license fee but to share the revenue of net sale and hence the arrangement is rather questionable.”

“20 “Ms. Gaurangi Patil, counsel appearing for K.D. Entertainment submitted that they will abide by the orders of this Court.”

“23 All this leave a lot to be said about the Leave and License Agreement. The entire arrangement appears to be a camouflage to avoid making payments to the Petitioners who are admittedly the creditors of Respondent No.1 and Guarantors. As held by this Court in ***Deccan Chronicle Holdings Limited*** (supra), when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in

appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process.”

9 The pendency of Section 16 of the Act before the Tribunal, is no reason to refuse the interim relief, if the case is made out, even after the lapse of certain events, including the earlier proceedings.

10 The reasons so given by the learned single Judge while considering the case to grant the order of appointment of Receiver, which are reflected in the impugned order, cannot be said to be in any way unjust, contrary and/or against the provisions of law, specifically when in the facts and circumstances so reflected in the matter and the reasons in support thereof with related document are well within the frame of law and the record. Therefore, no case is made out by the Appellants to interfere with the reasoned order.

11 In the result, both the Appeals are dismissed accordingly. No costs.

(P. R. BORA,J.)

(ANOOP V. MOHTA J.)

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