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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO.39 OF 2016

Sunil Pawar & Another ...Appellants
vs.
The Cosmos Co-operative Bank Ltd. ...Respondent

Mr.Dinesh Purandare a/w Kunal Mehta and Vishal Jathar i/b India Law Alliance for the appellants
Ms Shirin Shaikh i/b Raval Shah for the respondent

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : APRIL 10, 2017

P.C.:

1 Heard the learned counsel for the appellants. The appellants are second and third Judgment Debtors in the execution application filed by the respondent for execution of the Award dated 5th September 2013 made by the learned Arbitrator in the arbitration proceedings initiated under section 84 of the Multi State Co-operative Societies Act,2002 (for short “the said Act of 2002”). The proceedings were initiated under section 84 of the said Act of 2002 by the respondent Bank against the first Judgment Debtor Pratibha Shipping Co.Ltd and the present appellants. The case of the respondent was that term loans were granted to the first Judgment Debtor and defaults were committed in repayment thereof. An Award was made in the sum of Rs.34,05,05,132.48 together with interest thereon. Clauses I to VIII of the operative part of the Award read thus:

“(I) The Respondent Nos.1 to 3 who are jointly and severally liable shall pay the amount of Rs.93,61,421.00 (Ninety Three Lakhs Sixty One Thousand Four Hundred Twenty One Only) to the claimant bank with further interest at the rate 16% per annum on it from 27/2/2013 till payment (realization).

(II) The respondent Nos.1 to 3 who are jointly and severally liable shall pay the amount of Rs.1,73,18,717.00 (One Crore Seventy Three Lakhs Eighteen Thousand Seven Hundred Seventeen only) to the claimant bank with future interest at the rate 16% per annum on it from 17/2/2013 till payment (realization).

(III) The respondent Nos.1 to 3 who are jointly and severally liable shall pay the amount of Rs.4,99,18,901,00/- (Four Crores Ninety Nine Lakhs Eighteen Thousand Nine Hundred One only) to the claimant bank with future interest at the rate of 16% per annum on it from 27.2.2013 till payment (realization).

(IV) The Respondent Nos.1 to 3 who are jointly and severally liable shall pay the amount of Rs.26,39,06,093.48 (Twenty Six Crore Thirty Nine Lakhs Six Thousand Ninety Three and Forty Eight Paisa Only) to the claimant bank with future interest at the rate of 16% per annum on it from 7.2.2013 till payment (realization).

(V) The claimant bank shall adjust the payment if any made after the institution of the claim and obviously the interest charged in that case shall be on the reducing balance.

(VI) The respondents shall bear the costs of Rs.3,25,226.00 which the claimant bank is entitled to. The said costs shall be appropriated towards the fees and expenses of the Arbitrator and also the administration fees. If any excess amount is deposited by the claimant towards administrative expenses and arbitration fees, it is to be return to him.

(VII) The properties mentioned in the paragraph 7 in the claim petition are hereby attached. The attachment stands raised if the respondents satisfied the dues in the Award.

(VIII) The respondents are restrained by injunction to create any type of third party interest in the properties mentioned in paragraph 7 of the claim petition."

2 The present appellants had guaranteed the repayment of the loan advanced to the first Judgment Debtor and by way of security, they had mortgaged the flat subject matter of the execution proceedings which has been attached. By the impugned order dated 18th December 2015, the learned Single

Judge dismissed the Chamber Summons taken out by the present appellants for raising attachment. The Chamber Summons was filed under Rule 58 of Order XXI of the Code of Civil Procedure,1908. By the impugned order, the Chamber Summons has been dismissed.

3 The learned counsel for the appellant had invited our attention to the statement of claim made by the respondent-bank under section 84 of the Multi State Co-operative Societies Act,2002 which is in the form of a dispute. He invited our attention to prayer clause (b)and the paragraph 19 thereof. He submitted that the said prayer clause and the averments made in the statement of claim show that the prayer was for enforcing the mortgage in respect of the flat. His first submission is that in substance, the Award sought to be executed amounts to a decree of redemption of mortgage and therefore, the Award is nullity.

4 Secondly, he submitted that as the said amount payable under the Award is sought to be enforced against the mortgaged flat, it being a claim arising under the mortgage, the only remedy available to the respondent is by way of taking recourse to Rule 14 of Order XXXIV of the Code of Civil Procedure,1908. He also invited our attention to the consent decree passed in Admiralty Suit on the basis of the consent terms dated 10th May 2013. He pointed out that the respondent-bank and the first Judgment Debtor were parties thereto. He invited our attention to the

clauses 8 and 9 of the consent terms and the consent decree passed thereon. He submitted that even as of today, the respondent-bank has not adjusted the amount of sale proceeds of the vessel of the first defendant in Admiralty Suit and therefore, without adjusting the sale proceeds against the amount payable, the Award sought to be executed. Hence, the attachment is illegal.

5 We have given careful consideration to the submissions. Firstly, we deal with the last submission. Under the consent decree passed in the Admiralty Suit, the respondent herein (the plaintiff in the suit) agreed to adjust the price of a vessel owned by the first borrower by selling the vessel against dues payable by the first borrower.

6 We may note here that even the impugned order records that a sum of Rs.16 crores has been realised from the sale of the vessel which has taken place on the basis of the consent decree passed in the Admiralty Suit filed in Madras High Court.

7 We find that in the warrant of attachment issued on 13th September 2014, the amount mentioned is more than Rs.26 crores. In the execution application, the recovery sought is of a sum of Rs.41 crores and more. Therefore, even assuming that a sum of Rs.16 crores is adjusted as prayed by the appellants, the same will be of no help in any manner.

8 Now, we turn to the first submission made by the learned counsel for the appellant. We have already quoted the operative part of the Award which shows that there is no decree passed for enforcing the mortgage. In fact, entire Award is in the nature of a money decree. We have perused statement of claim/dispute under section 84 of the said Act of 2002. It is true that there are averments made relying upon the mortgage in the said statement of claim. While narrating the facts, there are assertions made regarding the mortgage. Prayer clause (a) in the said statement of claim is for directing repayment of the amount. Prayer clause (b) is essentially for direction of sale of the moveable and immoveable properties of the respondents including hypothecated and the mortgaged property.

9 Therefore, we do not agree with the submission that the Award seeks to enforce the mortgage and therefore it is nullity.

10 During the pendency of the Arbitral Proceedings, the flat claimed by the appellant was attached for executing the Award which is in the nature of a money decree. Therefore, the respondent is entitled to proceed with the execution by the sale of the attached property of the Judgment Debtor. Therefore, Rule 14 of Order XXXIV will have no application in the facts of the case.

11 Accordingly, we find no merit in the appeal and the same is dismissed. Pending Notice of Motion does not survive and the same is also disposed of.

(A.K.MENON,J.) (A.S.OKA,J.)