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

ARBITRATION PETITION NO. 95 OF 2013

Hiroo H.Advani & anr … Petitioners
vs
Reliance Asset Reconstruction Company Limited ..Respondent

with ARBITRATION PETITION NO. 96 OF 2013

Hiroo H.Advani & anr … Petitioners
vs
Reliance Asset Reconstruction Company Limited ..Respondent

Mr.Cherag Balsara with Mr.Sheikh Yusuf Ali and Mr.Chirag Bhatia
I/b Mr.Chirag K.Sancheti for Petitioners
Mr.O.A.Das for Respondent.

CORAM : S.C. GUPTE, J.
DATE : 24th NOVEMBER, 2018

P.C.:

1. Heard learned counsel for the parties.

Arbitration Petition No. 95 of 2013

2. This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a loan agreement between the parties. Under this agreement, the respondent herein, who was the claimant before the learned arbitrator, granted a loan of Rs.1,50,00,000/-

to the petitioner. The loan was repayable along with interest and on conditions such as pre-payment provision, etc provided in the agreement. The loan was repayable on the security of a property described in the schedule to the loan agreement. It appears that an equitable mortgage by deposit of title deeds was created in respect of the property in favour of the respondent in pursuance of the loan agreement. Admittedly, the petitioners defaulted in re-payment of the loan amount. As a result, disputes arose between the parties. These disputes were referred to the sole arbitrator who passed the impugned award.

3. Learned counsel for the petitioners raises two grounds in support of his challenge to the impugned award. The learned counsel, firstly, submits that the impugned award not only grants a money decree but also reliefs towards enforcement of mortgage by sale of the mortgage property after declaration of a valid equitable mortgage as a security towards the re-payment of the loan. Learned counsel, secondly, submits that the arbitrator, whilst allowing the claim for refund of the loan amount with interest, has awarded a wholly impermissible and usurious rate of interest.

4. As the Supreme Court has held in case of **BOOZ ALLEN AND HAMILTON INC VS SBI HOME FINANCE LIMITED (2011) 5 SCC 532**, the issues whether or not there is a valid mortgage or charge and whether the mortgage property should be brought to sale are, by their very nature, barred from adjudication by a privately chosen forum such as an arbitral

tribunal constituted under an agreement between the parties. A mortgage suit, which is not merely about determination of existence of the mortgage or of the amount due thereunder but for enforcement of the mortgage with reference to an immovable property, is, by its very nature, a remedy in rem ; it is a matter which is amenable only before public fora, since it involves not merely rights and liabilities *inter se* between the parties, but would impact even third parties who may have rights or obligations vis-a-vis the immovable property. There is no explanation how the reliefs granted by the learned arbitrator by declaring the validity of the mortgage and ordering sale of the property in default of repayment of the mortgage loan within a stipulated period, can be appropriately applied for before a privately chosen forum.

5. The only seeming explanation, which is advanced by learned counsel for the respondent, is that this particular objection was not raised by the petitioners herein before the arbitral forum.

6. These are matters of pure law. Arbirtability being a matter going to the root and restriction on such arbitrability, by its very nature, being a non-derogable matter, there is no question of forbidding any unsuccessful party from raising a challenge on its ground. Even otherwise, it is apparent from the text of the impugned award that the question as to whether the claimant was entitled to deal with the mortgage property in accordance with the terms of the contract between the parties, was a matter considered by the learned arbitrator. In the premises, the question is very

much open to the petitioner to agitate before this Court in a challenge to the impugned award under section 34 of the Arbitration and Conciliation Act, 1996.

7. Learned counsel for the respondent submits that for this very same reason, the arbitrator could not have even determined the amount of repayment over-due with interest. Learned counsel submits that the amount, after all, is claimed on the basis of a mortgage. The award is for and towards re-payment of a loan, which is covered by an agreement for loan entered into between the parties. Merely because the agreement refers to creation of a security and in pursuance of such stipulation, a security in the form of a mortgage has been created in favour of the lender by deposit of title-deeds of immovable property, it cannot be said that any claim for repayment of the loan under the agreement is essentially a claim in a mortgage suit. Any personal money decree passed in a dispute arising out of an agreement for loan is clearly within the authority and power of the arbitrator to pass.

8. In so far as interest is concerned, the learned arbitrator has granted additional interest of 3 % over and above the ordinary rate of interest of 12 % p.a. The learned arbitrator, for doing so, has relied on the loan agreement between the parties. There is no doubt that the agreement provides for additional interest of 3% in case of delayed payment. This additional interest, however, can by no reckoning be said to be payable on a per month basis. The schedule to the loan agreement which mentions

both the regular rate of interest and the additional rate of interest provides for such regular rate of interest at 12% p.a. on a monthly reducing basis. The additional interest in case of default is mentioned simply as 3%. If that is so, obviously such 3% interest is in addition to the regular rate of interest and since the regular interest is on a per annum basis, there is no reason why the additional interest of 3% can be termed as a monthly rate of interest and not an annual rate of interest. Any such construction of the agreement would be clearly impermissible. Firstly, it would be an impossible assessment or such that no reasonable authority instructed in law would arrive at, and secondly, it would even shock the conscience of the court and cannot be termed as a determination in accordance with justice and morality. 3 % per month rate of interest, as an additional or default rate of interest, would be clearly usarious and since there is no authority for such interest in the contract between the parties, grant of such interest would shock the conscience of the Court. It is also to be noted that whilst working out the final amount of the money decree, the arbitrator has calculated this additional rate of interest at the rate of 3% per month on the entire loan amount. It is quite clear from the loan agreement between the parties, and it does not admit of two opinions, that the additional rate of interest, which is towards the un-paid amount of EMIs, must be calculated on the un-paid principal amount and not the entire loan amount.

9. Learned counsel for the parties inform the court that on the basis of the directions contained in this order, the parties will re-calculate the interest payable on the unpaid dues of the respondent. The statement is

accepted.

10. Accordingly, the impugned award is read down and altered so as to exclude the incidence of additional interest at the rate of 3 % per month on the entire loan amount. Instead, the additional interest shall be calculated at the rate of 3% p.a. and on the principal amount due and not paid. So also, the directions of the learned arbitrator in clauses (b) and (c) in para 23 of the impugned award are deleted. It is clarified that this deletion is not on merits, but on a consideration, as noted above, that these matters pertain to and must be appropriately dealt with in, a mortgage action, and not in an arbitration reference before a forum privately chosen under an agreement between the parties. So far as clause (d) of para 23 is concerned, it stands modified by making the permanent injunction in respect of the property mentioned therein effective till the amount of the money decree provided for in the impugned award, and as modified by the present order, is not paid or realized.

11. Since the arbitration petition is disposed of, the interim order passed by this Court on 14.2.2017 in a notice of motion taken out in the arbitration petition, shall stand vacated forthwith. It is further directed that to enable the parties to re-compute the amount and the petitioner to make payment accordingly, the award shall not be executed and no coercive steps shall be taken against the petitioner herein, without seeking leave of the Court, for a period of six weeks from today.

Arbitration Petition No.96 of 2013

12. It is agreed between learned counsel for the parties that the controversy in this petition is the same as and would go by whatever is decided in the companion petition, namely, Arbitration Petition No.96 of 2013 save and except the quantum of both principal and interest; the rest of the controversy in the present petition is the same as in Arbitration petition No.96 of 2013.

13. Accordingly, for the same reasons, the impugned award is read down and altered so as to exclude the incidence of additional interest at the rate of 3 % per month on the entire loan amount. Instead the additional interest shall be calculated at the rate of 3% p.a. and on the principal amount due and not paid. So also, the directions of the learned arbitrator in clauses (b) and (c) in para 23 of the impugned award are deleted. It is clarified that this deletion is not on merits, but on a consideration, as noted above, that these matters pertain to, and must be appropriately dealt with in, a mortgage action, and not in an arbitration reference before a forum privately chosen under an agreement between the parties. So far as clause (d) of para 23 is concerned, it stands modified by making the permanent injunction in respect of the property mentioned therein effective till the amount of the money decree provided for in the impugned award, and as modified by the present order, is not paid or realized.

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(S.C. GUPTE, J.)