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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 341 OF 2019

Infinity Fincorp Solutions Pvt Ltd	...Petitioner
<i>Versus</i>	
Tushant Tukaram Malke & Ors	...Respondents

Mr MB Kale, with Juhi Bhogle & Akshata Teli, i/b GNP Legal, for the
Petitioner.
Mr Mohan Pillai, i/b Madhavi Pillai, for Respondents Nos. 1 to 3.
Mr Vikas Srivastava, for Respondent No. 4.

CORAM: G.S. PATEL, J.
DATED: 18th December 2019

PC:-

1. The Petition is under Section 9 of the Arbitration and Conciliation Act 1996. The 4th Respondent, one Naresh Jain, added by an amendment, is a person who claims to be in occupation of a flat said to be mortgaged to the Petitioner. This is Flat No. 404, 4th floor, E wing, Globe Heights, Film City Road, Goregaon (East), Mumbai 400 063. The manner in which Jain claims to be in possession will appear from the following narrative.

2. The Petitioner, Infinity Fincorp Solutions Pvt Ltd, a NBFC accepted an application from Respondents Nos. 1 to 3 for a business loan facility. The request was for a loan in the amount of Rs. 80

lakhs to be repaid in 120 equal monthly instalments and to be secured by a mortgage of the Globe Heights flat. The loan was ultimately sanctioned for an amount of Rs. 63 lakhs under a written loan agreement dated 12th September 2018. A copy of that document is at Exhibit “A” and it contains an arbitration clause 18 at page 54, which reads thus:

“18. DISPUTE RESOLUTION:

- (a) subject to sub-articles (g) and (h) of this Article, any dispute or disagreement arising out of or in connection with this Agreement (“Dispute”) shall be submitted to arbitration and shall be finally resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 with a sole arbitrator to be appointed by the Lender;
- (b) The place of arbitration shall be as stated in Schedule hereof and the arbitration shall be conducted in English, unless otherwise agreed by all parties to such arbitration proceedings;
- (c) Unless otherwise determined by the arbitrator, the cost and expenses of the arbitration, including without limitation, the fees of the Arbitrator, shall be borne by each of the parties equally;
- (d) Unless otherwise determined by the arbitrator, the cost and expenses of the respective counsels of the Parties, shall be borne by each of the parties respectively;
- (e) It is clarified that the Lender shall, at its discretion, be entitled to consolidate and combine any arbitral or other legal proceedings initiated or proposed to be initiated under this Agreement with any arbitral or other

legal proceeding initiated or proposed to be initiated under one or more of the other Transaction Documents;

(f) Subject to the foregoing sub-articles of this Article, each Party submits itself to the jurisdiction of the courts and tribunals of such places as mentioned in the Schedule hereto. Notwithstanding the aforesaid, the Borrower acknowledges and agrees that the Lender may, however, in its absolute discretion commence any legal action or proceedings arising out of this Agreement against the Borrower in a Court, Tribunal or any other appropriate forum situated in any part of India;

(g) Nothing herein contained shall be construed as extinguishing, limiting or ousting the rights and remedies of the Lender, if available now or in the future as against the Borrower, the Promoters of the Borrower, the security providers and/or the guarantors, if any and/or any other Persons, or any of their respective assets, under the SARFAESI Act and/or the IBC and the lender shall stand absolutely entitled to exercise such rights/remedies thereunder irrespective of the initiation, pendency or continuation of any other arbitral or other proceedings;

(h) Notwithstanding anything to the contrary contained hereinabove, in the event that the Lender, as a result of a change in Applicable law or otherwise, becomes entitled to recover the dues owed to it or be treated as a 'financial institution' under the DRT Act and to exercise rights/remedies thereunder, the Borrower hereby expressly agrees and consents that the Lender shall be entitled to exercise the rights and remedies available to the Lender under the DRT Act including to recover the Borrower's dues from the Borrower and/or the Promoter of the Borrower, the Security Providers and/or the guarantors, if any, or any other persons, by filing

proceedings with any of the debt recovery tribunals constituted thereunder. In addition, the parties agree that the Lender is empowered to exercise rights and powers under the provisions of the DRT Act as aforesaid, the provisions sub-articles (a) to (e) of this Article and this Agreement the Lender and the Borrower shall, at the option of the lender, cease to have affect.”

3. The Petition goes on to state that Respondents Nos. 1 to 3 were irregular in making repayment. There was an event of default. The Petitioner issued a loan recall notice on 8th January 2019. This is annexed at Exhibit “C” and in clause 6 at page 99, the Petitioner has invoked the foregoing arbitration clause.

4. The Petition seeks following reliefs:

“a) That, pending: the hearing and final disposal of the arbitration proceedings or at any time after making of the Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act, 1996 Court Receiver, High Court, Bombay be appointed as a Receiver under Order XL Rule 1 of C.P.C., in respect of mortgaged Property i.e., **Flat No. 404, 4th Floor, E-Wing, Globe Heights, Film City Road, Goregaon East, Mumbai 400 063 & owned property i.e., B 602 Neelyog Virat, Building No. 7, Near Western Express Highway, KhotKuwa Road, Malad East, Mumbai 400 097, India** more particularly described in schedule of property at Exhibit “D” to the ‘Petition hereto, and Petitioner be allowed to sale the same by private treaty or Public Auction;

b) That, pending the hearing and final disposal of the arbitration proceedings or at any time after making of the

Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, the Respondent Nos. 1 to 3 and their agents, servants be restrained by an order of an injunction of this Hon'ble Court in any manner parting with possession, creating third party rights, alienating and/or encumbering with mortgaged Property, i.e., **Flat No. 404, 4th Floor, E-Wing, Globe Heights, Film City Road, Goregaon East, Mumbai 400 063 & owned property i.e., B 602 Neelyog Virat, Building No. 7, Near Western Express Highway, KhotKuwa Road, Malad East, Mumbai 400 097, India** described in schedule of property at Exhibit "D" to the Petition;

c) That, pending the hearing and final disposal of the arbitration proceedings or at any time after making of the Arbitral Award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996, the Respondent Nos. 1 to 3 be directed to disclose their un-encumbered properties and upon disclosure thereof the Court Receiver may be appointed on the said property under Order XL Rule 1 of C.P.C. of 1908;

d) That, pending the hearing and final disposal of the arbitration proceedings ar at any time after making of the Arbitral Award but before it is enforced in accordance with Section 36 of Arbitration and Conciliation Act 1996, the Respondent Nos. 1 to 3 be directed to deposit a sum of **Rs. 65,09,626/- (Rupees Sixty Five Lakh Nine Thousand Six Hundred and Twenty Sixty Only)** including of principle over due, interest due and penal charges due as on 05.01.2019 with further applicable interest @ 13.25% p.a. from 06/01/2019 till payment and/or realization with the Petitioner or in this Hon'ble Court to secure the Petitioner's claim;

e) That, the Respondent Nos. 1 to 3 be ordered and directed to deposit with this Hon'ble Court and/or to furnish solvent security by way of bank guarantee to the tune of **Rs. 65.09,626/- (Rupees Sixty Five Lakh Nine Thousand Six Hundred and Twenty Sixty Only)** to secure the claim of the Petitioner under the present petition;"

5. Respondents Nos. 1 to 3 do not dispute either having taking a loan or having created a mortgage. It is Jain who provides an interesting twist to this story. He has filed an Affidavit with supporting documents. In this, he was the original owner of the Globe Heights flat under a registered document dated 30th April 2012. He says he bought this flat from one Pritpal Singh Betab. Jain then agreed to sell this flat to Respondents Nos. 1 and 2 under an agreement of 25th April 2015, a copy of which is annexed from page 180. That document is also registered and there is no dispute that the title deeds to the property were given to and were with Respondents Nos. 1 to 3, who then placed them in the hands of the Petitioner with intent to create security on the flat to secure the repayment of their loan. Between Jain and Respondents Nos. 1 to 3, it seems that Jain claims that Respondents Nos. 1 to 3 promised but never issued several cheques That is somewhat peculiar because details of these cheques are in fact set out at page 191 with cheque numbers and exact amounts. There is no doubt that between Respondents Nos. 1 to 3 and Jain there was an earlier leave and license agreement dated 17th April 2015, i.e. one made about eight days before the sale deed between Respondents Nos. 1 and 2 and Jain. Under this leave and license agreement, Jain says he was occupying and residing in the Globe Heights flat. He then agreed to

sell the flat to Respondents Nos. 1 and 2. But since he was, he claims, not paid the sale consideration, he never delivered possession, has continued living in the flat, and does not pay any license fee either.

6. This is a quite extraordinary situation. I do not see how Jain can continue to occupy a flat entirely free of charge. It is true that Jain has filed a suit in the City Civil Court at Dindoshi against Respondents Nos. 1 and 2 under Specific Relief Act, bearing Suit No. 2658 of 2019 but that suit is yet to be adjudicated. The present position is that Respondents Nos. 1 and 2 have a registered transfer of title to the flat in their favour, one that has not been set aside by the Civil Court of competent jurisdiction. Those title deeds have been deposited to constitute an equitable mortgage with the Petitioner, which prima facie, therefore, has security over the flat in question.

7. In short, Respondents Nos. 1 to 3 borrowed money from Infinity Fincorp, signed and registered a sale/purchase agreement with Jain for the Globe Heights flat, allegedly never paid for it, never took possession of it, and mortgaged that flat to Infinity Fincorp.

8. Coupled with the fact that there is no denial of liability, this makes out a more than a sufficient prima facie case for appointment of the Court Receiver but the Court Receiver will not disturb the possession of Jain, Respondent No. 4. However, from January 2020 the Respondent No. 4, Naresh Jain, will be required to pay to the Court Receiver in lieu of royalty an amount of Rs. 15,000/- per

month which is exactly the amount stated in his leave and license agreement. The 4th Respondent will also enter into an Agency Agreement with the Court Receiver in respect of this flat.

9. All contentions of the 4th Respondent as to being the owner and having a claim to title are expressly kept open. Further there will be no question of Jain being taken to arbitration or being bound by any arbitral Award as between the Petitioner and Respondents Nos. 1 to 3.

10. Finally, this order is only meant to safeguard the flat. The Petitioner's recovery remedies against that flat are explicitly made subject to the outcome of the 4th Respondent's title suit filed in the Dindoshi City Civil Court.

11. The Petitioner and Respondents Nos. 1 to 3 agree upon the appointment of Mr Bhavkar, retired District Judge to decide the disputes and differences arising from the agreement dated 12th September 2018 and associated documents.

(a) **Appointment of Arbitrator:** By consent, Mr PV Bavkar, retired Principal District & Sessions Judge, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under the loan agreement dated 12th September 2018.

(b) **Communication to Arbitrator of this order:**

- (i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from today of the order being uploaded.
- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Mr PV Bavkar, retired Principal District & Sessions Judge

Address 16/22, Bake House, Maharashtra Chamber of Commerce Lane, 2nd Floor, Office No. 306, Kalaghoda, Fort, Mumbai 400 001

Mobile 022- 22874322
9987239067

Email bavkar.pradip@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Prothonotary &

Senior Master on the file of this application. Copies will be given to both sides.

- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.
- (g) **Interim Application/s:**
 - (i) The present Petition under Section 9 of the Arbitration Act for the remaining reliefs other than those granted above will be treated, heard, and disposed of as an application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned

Sole Arbitrator for leave to file further affidavits.

- (ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.

12. The Petition is disposed of in these terms. There will be no order as to costs.

13. The Petitioner makes a request that an injunction and a Receiver in respect of another property at B602, Neelyog Virat, Building No.7, Near Western Express Highway, Malad (East), Mumbai 400 097. The learned Advocate for Respondents Nos. 1 to 3 states on instructions that this not their property. I will, therefore,

not be able to grant an order in these terms either for an injunction or Receiver. However, liberty to the Petitioner to make an application under Section 17 with sufficient supporting particulars before the learned Sole Arbitrator.

(G. S. PATEL, J)