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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.149 OF2018

L & T Housing Finance Ltd.	...Petitioner
<i>Versus</i>	
JSM Devcons Pvt. Ltd and ors	...Respondent

ALONG WITH

COMMERCIAL ARBITRATION APPLICATION (L) NO.97 OF2019

L & T Housing Finance Ltd.	... Applicant
<i>Versus</i>	
JSM Devcons Pvt. Ltd and ors	...Respondent

- Mr. Ranjeev Carvalho, Mr. Sachin Chandarana, Mr. Vijayendra Purohit i/by Manilal Kher Ambalal & Co., for the petitioner/applicant in both the matters.
- Ms. Richa Singh, for respondent No.4 in Commercial Arbitration Petition No. 149 of 2018.

CORAM: *G.S.KULKARNI, J.*

DATED: *25 March 2019*

P.C.:

1. Heard Mr. Ranjeev Carvalho, learned counsel for the petitioner and Ms. Richa Singh, for respondent No.4. Commercial Arbitration Application (L) No.97 of 2019 is filed by the applicant/petitioner (for convenience "the petitioner"), under Section 11 of the Arbitration and

Conciliation Act, 1996 (for short, “ACA”), whereby the petitioner has prayed for appointment of a sole arbitrator to adjudicate the disputes and differences which have arisen between the petitioner and respondent No.1 JSM Devcons Pvt. Ltd., who is the principal borrower under the facility agreement dated 28.11.2000. Learned counsel for the petitioner would contend that respondent Nos. 2 and 3 would not be necessary parties to this application. Accordingly, Respondent Nos. 2 and 3 are permitted to be deleted. Necessary amendment to be carried out during the course of the day.

3] Commercial Arbitration Petition No.149 of 2018 is filed by the petitioner under Section 9 of the ACA

4] These proceedings are taken up for hearing.

5] Respondent No.1, who is the only contesting respondent, is not appearing. Some background is required to be noted.

6] This court, on 5th March, 2019, heard the above petition filed under Section 9 of ACA. Considering the submissions as urged on behalf petitioner, this Court permitted the petitioner to serve the respondent to

publish notice of these proceedings in two local newspapers namely Free Press Journal and Raj Express substituted service on the the respondent.

7] On 12th March, this Court, passed the following order:-

"1. Heard learned Counsel for the applicant-IIFL Home Finance Ltd. and the learned Counsel for the petitioner/L&T Housing Finance Ltd.

2. This Notice of Motion is filed by the applicant praying for the following reliefs:-

“a) That the Court Receiver, High Court, Bombay, the Co-Respondent herein, be directed to release the property being Flat No.1108, 11th floor, Premium Tower No.2, Block B-1, Pinacle “D” Dream Project situated at Gram Pipaliya-kumar, The District Indore, Madhya Pradesh (“Flat”) from its custody and hand over the possession of the same to the Applicant herein;

b) Pending the hearing and final disposal of this Notice of Motion, the Court Receiver, High Court, Bombay be restrained by an order and injunction of this Hon'ble Court from selling, disposing off and/or creating any third party rights in respect of the Flat and/or part with the possession of the same;”

3. The case of the applicant is that one Praful Jain approached the applicant-IIFL Home Finance Ltd. for availing housing loan for purchase of flat in the housing project which was being undertaken by respondent no.1 at Indore. Accordingly, the applicant had advanced loan of Rs.30,75,000/-. Mr.Praful Jain executed in favour of and delivered to the applicant documents which are set out in paragraph 2 which includes delivery of Tripartite agreement dated 25 August 2015 executed between respondent no.1-JSM Devcons Pvt.Ltd.- as the builder and Mr.Praful Jain as the borrower and the applicant, permission to mortgage in favour of the applicant issued by Respondent no.1, there are other documents. Mr.Praful Jain committed default in repayment of each monthly installments (EMIs) and his loan account was declared as NPA on 7 August 2017. The applicant in

the circumstances was required to proceed against Mr.Praful Jain and initiated action under Section 13 of the the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short 'the SARFAESI Act"). A notice dated 20 September 2017 was accordingly issued under Section 13(2) of the SARFAESI Act, to Mr.Praful Jain. The same was published in Times of India and Raj Express, Indore editions dated 27 September,2017. The applicant has stated that thereafter a possession notice under Rule 8(1) was also published in the said local newspapers on 16 January 2018. It is averred that thereafter, a sale notice dated 12 February 2018 was addressed to Mr.Praful Jain as per the provisions of sub-rule(6) of Rule 8 of Securitisation Interest (Enforcement) Rules,2002 (for short 'the said Rules'). It is stated that a public notice to that effect was also published in Business standard and Raj Express in Indore editions dated 14 February 2018. The case of the applicant is accordingly the applicant has also registered its charge on the said flat in favour of the applicant and the applicant is proceeding under the SARFAESI Act to sell the said flat. It is contended that however, in view of the orders which are passed in this petition as filed by L & T Housing Finance Ltd., the applicant is unable to proceed to realize the dues payable to the applicant by Mr.Praful Jain for which the said flat was mortgaged in favour of the applicant. In these circumstances, learned Counsel for the applicant prays that the notice of motion ought to be allowed.

4. Learned Counsel for the petitioner-L&T Housing Finance Ltd. would not dispute that the applicant is entitled to proceed against the flat purchasers by Mr.Jain to realise the amounts due and payable to the applicant, and in that regard proceedings under SARFAESI Act are already adopted.

5. Considering the clear facts and circumstances of the case as set out on behalf of the applicant and having remained uncontroverted, as the applicant has proceeded to realize the dues following the procedure under the SARFAESI Act, it would be in the interest of justice that applicant is permitted to proceed and realize the dues by sale of the flat in question which is mortgaged to the applicant, the possession of which is also taken by the applicant under the SARFAESI Act. The appointment of the Court Receiver, in relation to the project in question, would not in any

manner come in the way of the applicant and hinder the sale of the said flat in question which the applicant intends to sale by following the procedure under the SARFAESI Act. The applicants are accordingly required to be permitted to proceed and realize its dues by selling the said flat in question. The Notice of Motion ought to be allowed.

6. Accordingly, the notice of motion is allowed in terms of prayer clause (a) which reads thus:-

“(a) That the Court Receiver, High Court, Bombay, the Co-Respondent herein, be directed to release the property being Flat No.1108, 11th floor, Premium Tower No.2, Block B-1, Pinnacle “D” Dream Project situated at Gram Pipaliya-kumar, Teh. District Indore, Madhya Pradesh (“Flat”) from its custody and hand over the possession of the same to the Applicant herein;”

7. It is clarified that discharge of the Court Receiver is only in respect of Flat no.1108 on which the applicant is asserting its claim. Notice of Motion is accordingly disposed of in the above terms. No costs"

8] Thereafter these petitions were listed for hearing along with the connected petitions.

9] The case of the petitioner is that an amount of Rs.38 crores was extended to respondent No.1, under facility agreement dated 28.11.2018. This finance so lent was to be utilized by Respondent No.1 for undertaking construction of housing project at Indore (M.P.). The facility agreement

sets out various terms and conditions and is annexed to the application (Exhibit "A" page 36 of the application). Respondent No.1 defaulted in making repayment of the loan. Accordingly, letter dated 14.6.2017 was addressed by the petitioner, calling upon respondent to repay the loan of Rs.33,34,86,967/-. Despite this notice there was a default in making repayment. The construction of the project has come to a standstill. To facilitate completion of the construction, on 25th September, 2017, the petitioner disbursed a further sum of Rs.1,05,00,000/-. However, there was again a default on the part of respondent No.1 in repayment of the advances. On such default, notices were served on behalf of petitioner on respondent No.1. However, respondent No.1 failed and neglected to pay the amount as demanded.

11] This Court (S.J. Kathawalla,J.), in Commercial Arbitration Petition No.149 of 2018, by an order dated 6th March, 2018 granted ad-interim protection to the petitioner whereby the Court Receiver was appointed, inter alia in paragraph Nos. 11 12 of the said order gave following directions.

"11. In view of thereof, there shall be ad-interim order in favour of the petitioner in the following terms:-

b) that pending the hearing and final disposal of the Arbitration Petition and during the Arbitral proceedings and making of the Arbitral award and until final execution of the Arbitral Award, this Hon'ble Court be pleased to direct:-

i. The Respondent Nos. 1 to 4 to forthwith disclose the correct and complete details of the assets hypothecated to the petitioner as described in the Schedule I at Exhibit "C-1".

ii. The Respondent Nos. 1 to 4 to disclose on oath and/or on affidavit, the assets and properties including movable, immovable and bank accounts owned by each of them giving complete details thereof, including any encumbrance created thereon ;

c) that pending the hearing and final disposal of the instant Arbitral Petition and Arbitral proceedings, making of the Arbitral Award and until final execution of the Arbitral Award, the Respondent Nos. 1 to 4, by themselves, their employees, servants and/or agents or otherwise howsoever, be restrained by an order and injunction, from in any manner selling, transferring disposing of, or alienating or encumbering or pledging or mortgaging or hypothecating or charging or parting with possession of or transferring, or inducing anyone else into or creating any right, title or interest or license in favour of anyone else, in respect of the :

i) Hypothecated assets as described in the Schedule at Exhibit "C-2" hereto;

ii. Mortgaged property of Respondent Nos. 1 and 2 as described in the Schedules or at Exhibit "I-2" hereto;

iii. The other assets/properties that would be disclosed by Respondent Nos. 1 to 4 on oath;

d) that pending the hearing and final disposal of the instant Arbitration Petition and Arbitral proceedings, making of the Arbitral Award and until final execution of the Arbitral Award, the Court Receiver, High Court, Bombay, or some other fit and proper person be appointed Receiver in respect of ;

- i. the Hypothecated assets as described in the Schedule at Exhibit "C-2" hereto;
- ii. the Mortgaged property of respondent No.4 as described in the Schedule at Exhibit "I-2";
- iii. The other property of Respondent Nos. 1 to 3 as would be disclosed by respondent Nos. 1 to 3;

12. The Court receiver is directed to visit the project site along with necessary police protection and a representative of the Petition. The Court Receiver is directed to prepare a report setting out, the status of the project, the number of flats that have been constructed as well as the status of the flats including a list of persons who are in occupation of the flats constructed on the project site. The Receiver shall enquire from any occupant, the right under which they are occupying such premises and obtain copies of any documents in support of such right asserted"

12] Thereafter this Court (S.J. Kathawalla, J.), by an order dated 19th June, 2018 continued earlier ad-interim relief.

13] Respondent No.1 despite service is not appearing in the present proceeding, as observed by this Court, in the order dated 5th March, 2018. Thus, the contentions as urged on behalf of petitioner are required to be treated as uncontroverted. The facility agreement clause 17.11 contain arbitration clause between the parties which reads thus :-

"17.11 Arbitration

(i) The parties to this Agreement hereby agree that they intend to discharge their obligations in utmost good faith. The parties therefore agree that they will, at all times, act in good faith, and make all attempts to resolve all differences, howsoever arising out of or in

connection with this Agreement by discussion failing which, by arbitration in the manner set out in subsection (ii).

(ii) Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the parties and between any of the parties, in connection with or arising out of this agreement or the breach, termination or invalidity thereof (hereinafter referred to as a "Dispute") shall be referred to an finally resolved by arbitration irrespective of the amount in Dispute or whether such Dispute would otherwise be considered justifiable for resolution by any court. This agreement and the rights and obligations of the parties shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.

(iii) The arbitration shall be conducted before a sole arbitrator, who shall be appointed by LTHFL in its sole discretion. Such arbitrator shall be retired judge of any High Court or Supreme Court of India.

(iv) The seat of the arbitration shall be at Mumbai, India and shall be conducted under and in accordance with the Arbitration and Conciliation Act, 1996 and rules made thereunder. The language of the arbitration shall be English.

(v) The award rendered shall be in writing and shall set out the reasons for the arbitrator's decision. The award shall allocate or apportion the costs of the arbitration as the arbitrator deems fair. The parties agree that the arbitration award shall be final and binding on the parties. The parties agree that no party shall have any right to commence or maintain any suit or legal proceedings (other than for interim or conservator measures) until the Dispute has been determined in accordance with the arbitration provided herein and then only for enforcement of the award rendered in the arbitration. Judgment upon the arbitration award may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

(vi) Notwithstanding the provisions of this Section, nothing contained in this agreement or the Transaction Documents shall operate or be regarded as a waiver, renunciation or other modification of any right, privilege, or immunity of the LTHFL under SARFAESI Act, 2002 or under any other applicable laws".

defaulted in making repayment of the loan. The petitioner, by its letter dated 28.11.2018, invoked the arbitration agreement and sought appointment of an arbitrator to adjudicate the disputes and differences between the petitioner and respondent. However, respondent No.1 did not respond to the publication and/or invocation of arbitration agreement and thus, present application has been filed.

15] Considering the clear facts and circumstances of the case, in my opinion, a case has been made out by the applicant, for this Court to exercise its jurisdiction as conferred under Section 11 of the ACA to appoint an arbitral tribunal.

16] In the facts of the case, it would be appropriate that Commercial Arbitration Application filed under Section 9 of the ACA, be treated as an application under Section 17 of the ACA, to be further adjudicated by the Arbitral tribunal. Till then the ad-interim reliefs passed by this Court to continue to remain in operation. The petitioner would be at liberty to seek appropriate orders as in the facts and circumstances of the case may require in regard to the payment of Court Receiver and any further actions which may be required from this Court to be taken for discharge of the Court Receiver as may be necessary.

17] Both the Commercial Arbitration Petition and Commercial Arbitration application are accordingly disposed of by the following order:-

Order

i] The petitioner is permitted to convert Commercial Arbitration Application (L) No.97 of 2019 into an application under Section 17 of the ACA, to be adjudicated by the arbitral tribunal.

ii] The ad-interim orders passed by this Court, in Section 9 petition shall continue to remain in operation till the Section 17 Application is decided by the arbitral tribunal.

iii) The petitioner is at liberty to move this Court for appropriate orders or any order to be passed in regard to the Court Receiver .

iv] Smt. Justice R. P. Sondurbaldota, Former Judge of this Court, is appointed as the prospective sole Arbitrator to adjudicate the disputes and differences between the parties, arising under the facility agreement dated 28.11.2015.

v] The prospective sole arbitrator, 10 days before entering the arbitration reference, shall forward a statement of disclosure as per the provisions of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary

& Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;

iii) At the first instance, the parties shall appear before the prospective arbitrator within 10 days from today at a date and time as may be fixed by the prospective arbitrator.

vi) The arbitral Tribunal shall endeavour to adjudicate application under Section 17 of the ACA as expeditiously as possible preferably within a period of four months from the date of entering into reference.

(v) All contentions of the parties on merits of the matter are expressly kept open.

(vi) The Arbitration petition and Arbitration Application, are disposed of in the above terms. No costs.

3. Office to forward a copy of this order to the learned Arbitrator on the following address:

c/o Suman Jain, Advocate
11/13, Botawalla Building, II nd floor, Office No.4A
Opp. Asiatic Central Library,
Horniman circle, Mumbai 400 023.

Mobile No.9819821533.

(G.S. Kulkarni, J.)