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

COMMERCIAL ARBITRATION APPEAL (LODG.) NO. 12 OF 2016
in
ARBITRATION PETITION NO. 1621 OF 2014

Nirved Traders Pvt. Ltd.
Industry House,
159, Churchgate Reclamation,
Mumbai 0 400 020

And At

Nirved Traders Pvt. Ltd.
Flat No.801, "A" Wing, Aster Tower,
Vasant Dham, Malad (E),
Mumbai – 400 097

And also at

Nirved Traders Pvt. Ltd.
Laxmi House, T.H. Kataria Marg,
Matunga Rly. Station (W/Rly),
Mahim, Mumbai – 400 016 … Appellant.

V/s.

Karvy Financial Services Limited
A company incorporated under the
provisions of the Companies Act,1956
and having its registered office at
775, Building No.7, 6th Floor,
Solitaire Corporate Park, Andheri(E),
Mumbai – 400 093. ... Respondent.

Mr. Ashish Kamat a/w. Ms. Chaitrika Patki i/b. Vidhii Partners for the Appellant.
Mr. Omar Khaiyam Shaikh a/w. Ms. Ankita Upadhyay i/b. Vikas Salvi & Assoc. for the Respondent.

CORAM : NARESH H. PATIL,C.J. &
N.M. JAMDAR, J.

JUDGMENT RESERVED ON : 4 January 2019.

JUDGMENT PRONOUNCED ON : 14 January 2019.

Judgment (Per Jamdar, J.) :-

The Appellant has filed this Commercial Arbitration Appeal taking exception to the order dated 6 April 2015 passed by the learned Single Judge of this Court. The learned Single Judge, by the impugned order, dismissed the Arbitration Petition No. 1621 of 2014 and confirmed the Award rendered by the sole arbitrator dated 24 March 2014.

2. The Respondent Karvy Financial Services provides financial facilities. The Appellant Nirved Traders and M/s. Birla Power Solutions approached the Respondent-Karvy Financial Services for a loan. The business loan agreement was executed on 19 December 2011. The Respondent lent a sum of Rs.23,00,00,000/-. The immovable property of these Borrowers was mortgaged as a security for the loan. The Borrowers defaulted in repayment. The

Respondent terminated the loan account on 24 May 2013 and called upon the Borrowers to pay the overdue amount of Rs.23,88,94,372/- along with interest. The Borrowers did not repay the loan. The Respondent invoked the arbitration clause, and a sole arbitrator was appointed.

3. The Appellants appeared in the arbitration proceedings through their Advocates. The Advocates sought time to file a reply. The learned Arbitrator gave several opportunities to file a reply. Ultimately, the Arbitrator put the Appellants to notice that if they do not file a reply, the proceedings will have to be concluded without reply. Still, the Appellants did not file any reply. The Arbitrator perused the material on record and concluded that the loan was availed by the Borrowers which they failed to repay. Accordingly, the Arbitrator passed an Award on 24 March 2014 directing the Appellants to jointly and/or severally pay the Respondent Karvy Financial Services a sum of Rs.23,00,00,000/- due as on 16 July 2013 with further interest and cost.

4. The Appellants filed Arbitration Petition No. 1621 of 2014 in this Court under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the Award. By order dated 6 April 2015, the learned Single Judge dismissed the Arbitration Petition. After that, the Appellants have filed the present Appeal on 28 June 2016.

5. We have heard Mr. Ashish Kamat, learned Counsel appearing for the Appellants and Mr. Omar Shaikh, learned Counsel appearing for the Respondent.

6. Apart from the present proceedings, there was one more Arbitration petition No.1643 of 2014 between the same parties.This Arbitration Petition was dismissed by the learned Single Judge on 6 April 2015. Appeal No. 328 of 2015 was filed raising the same legal issues as in the present Appeal. By the judgment and order dated 14 January 2016, the Appeal Bench, dismissed the Appeal. The Apex Court dismissed a Special Leave Petition filed by the Appellants on 25 August 2017.

7. In this backdrop, Mr. Kamat the learned Counsel for the Appellants advanced a single submission as enumerated in clause 'Q' of the Appeal. He stated that the Birla Power Solutions was wound up on 28 August 2014 by the Company Court and the Company Petition was presented on 8 May 2013. He contended that as per Section 441(2) and 446(1) of the Companies Act, 1956, the date of winding up relates to the date of presentation of the Company Petition. He submitted that therefore, for want of compliance of Section 446 the Arbitral Award dated 24 March 2014 was bad in law. He also submitted that the learned Single Judge could not have passed the impugned order without seeking leave of the Company Court under Section 446 of the Companies Act. Mr. Shaikh, the

learned Counsel for the Respondent, supported the Award and the impugned order passed by the learned Single Judge.

8. The sequence of events is this. The Agreement was executed on 19 December 2011 between the Appellants and the Respondent. The Agreement was terminated on 24 May 2013. A Company Petition by a third party was filed against Birla Power Solutions on 9 May 2013. The Arbitration Award was rendered on 24 March 2014. The Arbitration Petition was filed on 28 June 2014. Thereafter, Birla Power Solutions was wound up on 28 August 2014 and order was passed by the learned Single Judge on 8 April 2015.

9. Section 441 deals with the commencement of winding up. Under Section 441(2), the winding up of a Company is deemed to commence at the time of presentation of the Petition for winding up. Section 446 deals with Suits and proceeding stayed upon the winding up order. This Section provides that when the winding up order is made, no suit or legal proceedings pending at the date of winding up shall be proceeded against the Company except by leave of the Tribunal.

10. Section 441(2) creates a deeming fiction. This fiction is in respect of transactions entered into by the Company. A bare reading of this provision does not make any specific reference to Section 446. Section 446 comes into play when an order of winding up is passed.

The object of this provision is to protect and realize the assets of the company under winding up to avoid needless litigation and so that all matters in dispute can be disposed of by the Company Court. Section 441, on the other hand, is intended to avoid fraudulent disposition of property by the Company. The deeming fiction introduced is to ensure that the creditors are not defrauded by the disposition of the property by the directors in the meanwhile when ultimately the winding-up order is passed. Thus, when the order of winding up is passed, the disposition of property made from the date of the presentation of the Petition comes under scrutiny. The argument of the Appellant that the requirement of Section 446 would relate from the date of filing of the Petition and the orders and decrees passed between the date of presentation of the Company Petition till the order of winding up will stand retrospectively invalid, is far too wide and sweeping. If it is upheld, it will cause innumerable difficulties and hardship. Such an interpretation will make the Section impossible to comply. It is however not necessary to conclude finally on this legal position in this Appeal for the following reasons.

11. The order of winding up was passed on 28 August 2014. Therefore, when the Award was passed on 24 March 2014, there was no order of winding up. The Arbitration Petition was filed by the Petitioner on 24 June 2014. At that time also the order of winding up was not passed. However, when the Arbitration Petition was

heard and decided on 6 April 2015, it was open for the Appellants to point out this position to the learned Single Judge. The argument advanced is not a purely legal question but also involves factual aspects. The Appellants could have pointed out to the Arbitrator regarding the pendency of the winding up Petition and the consequences if an order of winding up is passed ultimately. The Appellants have made no such efforts even before the learned Single Judge. The pendency of the winding up Petition could have been disclosed; however, the Arbitration Petition does not take this as a ground. Winding up Petition was not filed by the Respondent. The grounds that have been taken before the learned Single Judge in the Arbitration Petition are only regarding insufficiency of stamp, novation, execution of Memorandum of Understanding, mortgage. There is no reference at all in respect of the pendency of the Company Petition for winding up and the consequences of Section 441(2) and 446(1) of the Companies Act.

12. Having not disclosed the factum of the pendency of the Company Petition to the Arbitrator and not disclosed the order of winding up to the learned Single Judge hearing the Arbitration Petition, the Appellant cannot turn around and seek to invalidate the Award on the ground of non-compliance of Section 446. The Birla Power Solutions is already under liquidation. Nirved Traders was not wound up. Nirved Traders was also before the learned Single Judge. If according to the Appellants the learned Single Judge

should not have proceeded with the matter because of the order of winding up, the Appellants should have brought this to the notice of the learned Single Judge. Having remained silent, not even filing a reply to the Arbitrator, the Appellants are attempting to nullify the Award of the admitted liability by putting forth an argument which has no basis.

13. The Appellants have availed the loan and have not repaid the amount. The learned Single Judge took note of the admitted liability and dismissed the Arbitration Petition. The other grounds were raised by the Appellants in respect of mortgage which the learned Single Judge did not find it appropriate to deal with. The learned Single Judge noted that the Arbitrator has only directed the Appellants to pay the Awarded sum and there were no directions regarding enforcement of mortgage. The perusal of the order passed by the Division Bench in Appeal No. 328 of 2015 shows that all the contentions raised by the Appellants in this Appeal have been dealt with and concluded by the Appeal Bench in the Judgment and Order dated 14 January 2016. Thereafter, the Special Leave Petition has also been dismissed by the Apex Court.

14. The legislative policy and the series of decisions of this Court and the Apex Court envisages a lean towards upholding the Arbitral Awards. In the present case what we have before us is a clear case of

debtors refusing to pay back the loan. The Arbitrators gave ample opportunity to file reply yet the Appellants did not do so. The challenge raised on the same ground against the Respondent in identical circumstances stands concluded against the Appellants up to the Apex Court.

15. In the circumstances, the sole contentions advanced by the Appellants cannot be accepted. There is no reason to interfere with the order passed by the learned Single Judge and the Award. The Appeal is accordingly dismissed.

N.M. JAMDAR, J. ***CHIEF JUSTICE***