Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**IN ITS COMMERCIAL DIVISION**
**COMM ARBITRATION PETITION NO. 1119 OF 2019**

Fullerton India Credit Co Ltd ...Petitioner
*Versus*
Bharat Vasudev Khater & Ors ...Respondents

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**Mr Atul Damle, Senior Advocate**, *with MB Kale, Juhi Bhogle & Akshata Teli, i/b OM Gujar Law Chambers, for the Petitioner.*
**Mr Karl Tamboly**, *with Hrushi Narvekar, Shaheda Madraswala & Ankit Pathak, i/b Vashi & Vashi, for Respondents Nos. 1(b) & 5.*
**Mr Gaurav Mehta**, *i/b Hooseini Doctor & Co., for Respondent Nos 1(a) & 4.*
**Mr Rohan Savant**, *with Sanaya Dadachanji, & Shantanu Ray, i/b Manilal Kher Ablalal & Co., for Respondent No. 7.*
**Mr Manesh V Cherian**, *for Respondent No. 8.*

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**CORAM: G.S. PATEL, J.**
**DATED: 26th November 2019**

**PC:-**

**1.** The arbitration petition is under Section 9 of the Arbitration and Conciliation Act 1996. The petitioner is a non-banking finance company. It is the lender. It entered into a facility agreement dated 14th July 2015 and a supplemental agreement dated 30th November 2015 with one Bharat Vasudev Khater, since deceased. The arbitration clause under the loan agreement is clause 28 at pages 43 and 44 and this is how it reads:

> "28. This Agreement shall be subject to governed by and construed in accordance with Indian law. All disputes, differences, claims and question, whatsoever arising out of or in relation to this Agreement shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act 1996 or any statutory amendments thereof and the same shall be referred to a sole arbitrator to be nominated/appointed by FICCL. In the event of death, refusal, neglect, inability or incapability of the persons so appointed to act as an arbitrator, FICCL may appoint a new arbitrator. The award including the interim award/s of the arbitrator shall be final and binding on all parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct arbitration proceedings in such manner as he considers appropriate. The arbitration proceedings shall be held at the place mentioned in the Schedule-I. Subject to what is stated hereinabove, it is expressly agreed between the parties that the Courts at the place mentioned in the Schedule-I will have exclusive jurisdiction to try suit/application in respect of any claim or disputes arising out of or under the terms agreed hereunder. This shall not however limit the rights of FICCL to file/take proceedings in any other Court of Law or Tribunal of competent jurisdiction."

It is agreed that the reference to a 'place' is to Mumbai.

**2.** Respondents Nos. 1(a), 1(b), 1(c) are the heirs and legal representatives of Bharat Khater. Respondent No. 1(a) is his widow. Respondents Nos. 1(b) and (c) are her sons. Respondent No. 1(a)

Urvashi is apparently not in good terms with one of her sons, Ashwin. Urvashi and Ashwin are also guarantors, and are joined as respondents Nos. 4 and 5 in that capacity. Respondents Nos. 2 and 3 are private limited companies, both co-borrowers. Respondents Nos. 6 to 8 are third parties who are admittedly in possession of some premises on the ground and first floors of a building at Khar.

**3.** Bharat Khater and his co-borrowers took this loan from the petitioner, Fullerton, in 2015 in the amount of Rs. 13 crores repayable in 180 equated monthly instalments. The repayment of this loan was secured by a simple mortgage of the entire ground and entire first floor of Bharat Bhuvan, Plot No. 711, Linking Road, Khar West, Mumbai 400 052. Apparently the borrowers then requested a reduction in the facility to Rs. 8.70 crores and the supplemental agreement of 30th November 2015 was executed in this regard.

**4.** Now in addition to the mortgage, the repayment was secured by an exclusive charge on the present and future rents of these premises, and this includes license fees. The mortgage was of course a first charge and was supposed to be exclusive. This is specifically averred in paragraph 8 of the petition.

**5.** It seems that these premises — or portions of them — were given to third parties on leave and license.

**(a)** Respondent No. 6, Tea4health Pvt Ltd used to run a café or something similar on the ground and first floor. It has apparently vacated the premises. There was a lock-in period. There may be some claim for the balance but that is yet to be adjudicated or even made the subject matter of any proceedings. Urvashi claims to be in possession. So does Ashwin. They may take that dispute to an appropriate Court.

**(b)** Respondent No. 7, Grasim Industries Ltd occupies premises on the ground floor.

**(c)** Lloyds Luxuries Pvt Ltd, respondent No. 8 has premises on the first floor.

**(d)** There is another entity called Raaz Properties Pvt Ltd which is not joined to these proceedings. It occupies licensed premises on the ground floor of Bharat Bhuvan.

**6.** While Mr Damle for Fullerton maintains that the borrowers have been irregular, on instructions he states that if three unpaid EMIs are brought in, this will sufficiently regularize current operations and there is no reason to foreclose or recall the entire loan. An amount of Rs. 10,95,000/- was due in March 2019. Two further instalments in the same amount were due in April and November 2019.

**7.** It is now agreed between Fullerton and Ashwin that an amount of Rs. 21,90,000/- representing two EMIs will be paid by Ashwin to Fullerton before 30th November 2019. This amount actually has component parts.

**(a)** Ashwin himself will pay Rs. 15,64,032/-.

**(b)** There is an Escrow bank account with ICICI Bank from which the petitioner shall withdraw an amount of Rs. 3,57,696/-. That account stands in the name of the deceased Bharat Khater. The details of the bank account are noted below:

Bharat Khater
Account No. 001105025517
Bank Name ICICI Bank
Branch : Sagar Avenue, SV Road,
Andheri West, Mumbai

The Manager of the ICICI Bank will allow Ashwin Khater to operate that account for the limited purpose of making remittance of Rs. 3,57,696/- to Fullerton. The Escrow account is not be operated and used thereafter.

**(c)** Lloyds Luxuries is in arrears of Rs. 2,68,272/-. Now this amount of arrears has two components. An amount of Rs. 1,78,848/- is payable monthly to Fullerton and the balance amount of Rs. 89,424/- is said to be payable to Urvashi personally.

**(d)** The total of these makes Rs. 21,90,000/-.

**8.** The Fullerton-Ashwin arrangement inter alia contemplates the entire Lloyds Luxuries arrears amount is to be paid over to Fullerton. I propose to disrupt this arrangement to the extent of Rs. 89,424/- and direct Lloyds Luxuries not to pay this amount to Fullerton but to Urvashi. Mr Tamboly for Ashwin readily agrees that Ashwin will assume the responsibility for payment of this amount of Rs. 89,424/- to Fullerton.

**9.** The last EMI of Rs. 10,95,000/- is to be paid to Fullerton by Ashwin (or through his sources) by 25th February 2020.

**10.** In addition it is agreed that from today onwards Grasim Industries will continue to pay the license fee of Rs. 6,00,000/- per month to Fullerton directly.

**11.** Raaz Properties, though not a party, will be requested by Ashwin, upon being provided a copy of this order, to remit its monthly license fee of Rs. 2,26,800/- to Fullerton.

**12.** Lloyds Luxuries Pvt Ltd will pay its monthly license fee in the following manner: Lloyds Luxuries has to pay Rs. 2,23,560/- per month as license fees. Of this, it will pay Rs. 44,712/- per month to Urvashi. It will pay the remaining Rs. 1,78,848/- directly to Fullerton.

**13.** The shortfall in the monthly EMI, if any, is to be paid by Ashwin and Mr Tamboly on instructions from Ashwin who is present in Court immediately agrees to do so.

**14.** I am making it clear that as regards licensees, none of the family members are to renew the licenses or to create any new license without prior leave of this Court obtained after at least two weeks' previous notice to the Advocates for Fullerton and to the advocates for the other members of the Khater family.

**15.** It goes without saying that none of the members of Khater family will create any third party rights or encumber or part with any of the properties that are secured to Fullerton till the repayment of its debt.

**16.** Mr Damle states that his instructions are that Fullerton will withdraw its Section 7 notice under the Bankruptcy and Insolvency Code issued to respondents Nos. 2 and 3.

**17.** Mr Damle says that this order sufficiently protects the petitioner. If the order is made as a final, continuing order on the Petition, he need not press it further, and will then seek leave to withdraw the petition with liberty to adopt appropriate proceedings. This is reasonable. This order will operate as the final order on the Section 9 petition. It will continue until it is varied, modified or recalled at the instance of any of the parties to the agreement in a properly brought proceeding. The petition is disposed of in these terms with liberty to apply or to adopt appropriate proceedings should the need arise in the event of any default.

**18.** No costs.

**(G. S. PATEL, J)**