OD 9

ORDER SHEET

AP 361 of 2019
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

RELIANCE COMMERCIAL FINANCE LIMITED
VS
AXIS BANK LIMITED

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 18th March, 2021.

(Via Video Conference)

Mr. Jishnu Chawdhury,
Mr. Arnab Basu Mullick, Advs.
…for the petitioner
Mr. Swatarup Banerjee,
Ms. Amrin Khatoon, Advs.
…for the respondent

The Court: This is an application under Section 11 of the Arbitration and Conciliation Act, 1996.

The petitioner is a financial institution within the meaning of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act in short). The petitioner claims arbitration in view of Section 11 of the Act of 2002.

Section 11 of the Act of 2002 is as follows :

"11. Resolution of disputes. – Where any dispute relating to securitisation or reconstuction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank, or financial institution or securitisation company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly."

Section 11 of the Act of 2002 provides for a statutory arbitration. It raises a statutory presumption of existence of an arbitration agreement in respect of a dispute relating to securitisation or reconstruction or non-payment of any amount including interest between bank or a financial institution or asset reconstruction company or qualified institutional buyer.

In the facts of the present case, the petitioner alleges that, one borrower of the petitioner namely Mr. Gopal Sakya approached to the petitioner for transferring the loan that Mr. Gopal Sakya enjoyed from the respondent to the petitioner. As a consequence of the agreement entered into between the petitioner and Mr. Gopal Sakya, the petitioner took over the loan that Mr. Gopal Sakya enjoyed from the respondent by paying a sum of Rs. 49,39,810/- to the respondent being the amount outstanding on the loan account to Mr. Gopal Sakya to the respondent. The petitioner claims that the petitioner is entitled to the entered mortgage documents which Mr. Gopal Sakya created in favour of the respondent by reason of take over of the loan. The petitioner also raises various disputes with the respondent in relation to such transactions.

Learned advocate appearing for the respondent submits that, there is no privity of contract between the petitioner and the respondent. There is no arbitration agreement between the petitioner and the respondent. Section 11 of the Act of 2002 requires an agreement in writing. There does not exist any dispute which are arbitrable between the petitioner and the respondent. According to him, jural relationship does not exist between the petitioner and the respondent. At best, according to him there can be a claim of the petitioner against Mr. Gopal Sakya in respect of which the petitioner may proceed against Mr. Gopal Sakya. The respondent has a claim against Mr. Gopal Sakya which the respondent is proceeding to recover. He relies on 2021 2 SCC 1 (Vidya Drolia vs. Durga Trading Corporation) and submits that since there is no arbitration agreement in writing and the provisions of Section 7 of the Act of 1996 not being fulfilled, the Court should not exercise jurisdiction under Section 11(6) of the Act of 1996.

The relevant paragraph of Vidya Drolia (supra) is as follows :

"244. Before we part, the conclusions reached, with respect to question no. 1, are :

a. Sections 8 and 11 of the Act have the same ambit with respect of judicial interference.
b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.
c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration
d. agreement, by summarily portraying a strong case that he is entitled to such a finding.
e. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.
f. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only :
    a. Whether the arbitration agreement was in writing ? or'
    b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
    c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled ?
    d. On rare occasions, whether the subject-matter of dispute is arbitrable?"

Vidya Drolia (supra) was rendered in a case relating to an arbitration agreement between the parties. In the present case, the fiction of existence of arbitration agreement is provided by the Act of 2002 namely Section 11 thereof. Therefore, it would be futile to embark upon the exercise to find out as to whether there exists a written arbitration agreement between the parties in terms of Section 7 of the Act of 1996.

Section 11 of the Act of 2002 fulfils the requirement of Section 7 of the Act of 1996 provided the other parameters laid down in Section 11 in the Act of 2002 are fulfilled.

In the facts of the present case, the petitioner paid a sum of Rs. 49,39,810/- to the respondent by a letter dated December 20, 2017. The letter is of the petitioner. The letter was received by the respondent. Therefore, prima facie, there exists a jural relationship between the petitioner and the respondent. As to the exact parameters of the jural relationship need not be decided in an application under Section of the Act of 1996. These are the disputed arena which the arbitrator need to decide upon.

As noted above, the petitioner comes within the definition of financial institution as defined under the Act of 2002. However this finding is prima facie for the purpose of adjudicating an application under Section 11 of the Act of 1996. The parties are at liberty to adduce evidence before the arbitral tribunal to disprove such issue.

Prima facie, the parameters under Section 11 of the Act of 2002 being fulfilled, it would be appropriate to refer the disputes between the parties to arbitration.

I am not in a position to accept the contention of the respondent that an arbitration agreement has to be in writing in view of the plain language of Section 11 of the Act of 2002. Section 11 of the Act of 2002 raises a deemed statutory fiction of the existence of an arbitration agreement, provided the other parameters are fulfilled, and does not require an agreement in writing to be entered into between the parties in terms of Section 7 of the Act of 1996. The deeming provision for existence of an arbitration agreement will appear from the user of the words "as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly" in Section 11 of the Act of 1996.

Mr. Anil Gupta, Advocate, Bar Library Club is appointed as an arbitrator. Learned arbitrator is at liberty to fix his remuneration to be shared by the parties equally. The parties will bear the costs and expenses of the arbitration. The parties will inform the learned Arbitrator of this order.

AP 361 of 2019 is disposed of accordingly.

(DEBANGSU BASAK, J.)

TR/