IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.NO.3378 OF 2017
AND
C.M.P.NO.21420 OF 2017

Punjab National Bank,
Anna Salai Branch,
Chennai - 2, represented by its Chief Manager.
.. Appellant/Respondent

Vs.

1. Dinesh Kumar Sarawagi
2. V.Shaji
3. Shanavaz
4. M/s.Sulaiman Steel Pvt Ltd.,
   SF.No.322/5/6, Arni Main Road,
   Parasur Village, Cheyyar Taluk,
   Thiruvannamalai District,
   Reg.Off 155, Sandai Medu,
   Cheyyar - 604 407.
5. A.Feroz Khan
6. A.Feyaz Khan

.. Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 34 (2) of the Arbitration and Conciliation Act, 1996 seeking to set aside the impugned order dated 16.08.2016 passed in M.P.No.1/2016 in O.P.No.6 of 2016 on the file of the Sole Arbitrator, Justice Ms.K.B.K.Vasuki (Retd), Arbitral Tribunal, Chennai.

For Appellant : Mr.M.L.Ganesh

For Respondents 1 to 4 : No appearance

For Respondents 5 & 6 : Mr.R.Gokul Krishnan

J U D G M E N T

(The case has been heard through video conference)

This appeal has been filed by the appellant bank challenging the order dated 16.08.2016, passed by the Arbitrator in M.P.No.1 of 2016, directing the appellant bank (4th respondent in the Arbitration proceedings) to return the title deeds of the properties belonging to the respondents 2 and 3 in the arbitration proceedings and the mother of the second respondent and wife of the third respondent.

2. The appellant bank has challenged the impugned order passed under Section 17 of the Arbitration and Conciliation Act by the Arbitrator on the following grounds:

(a) The appellant bank is not a party to the business purchase agreement dated 05.01.2015, entered into between the directors of M/s.Sulaiman Steels Pvt. Ltd., which is the subject matter of the arbitral dispute.

(b) Mortgage relief cannot be granted by the Arbitrator as it is a right in rem and therefore the decision of the Hon'ble Supreme Court in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd., & Ors. reported in 2011 5 SCC 532 is squarely applicable to the facts of the instant case and according to the appellant, the direction issued by the Arbitrator is not permissible in law.

(c) The appellant bank has already initiated proceedings before the DRT-II, Chennai for recovery of their dues against the respondents in O.A.No.191 of 2017, which has been subsequently allowed by the DRT-II, Chennai.

3. The learned counsel appearing for the appellant drew the attention of this Court to the impugned order as well as the claim made by the respondents in the arbitration proceedings. He also drew the attention of this Court to the business purchase agreement dated 05.01.2015, entered into between the existing directors of M/s.Sulaiman Steels Pvt Ltd., and the newly inducted directors, who are the claimants and the respondents respectively in arbitration and would submit that the appellant bank is not a party to the said agreement.

4. After referring to the aforementioned documents / authorities, the learned counsel appearing for the appellant would submit that by total non application of mind to the settled law, the Arbitral Tribunal has passed the impugned order directing the appellant bank to return the title deeds to the respondents, which is the subject matter of mortgage with the appellant.

5. Several opportunities were granted to the respondents 1 to 4 to put forward their submissions before this Court through their counsel and their names have also been printed in the cause list today, but despite the same, they have chosen not to make their submissions.

6. Admittedly, as seen from the business purchase agreement dated 05.01.2015, the appellant bank is not a party to the said agreement. Under Clause 3.3 of the said agreement, the newly inducted directors namely Mr.Dinesh Kumar Sarawagi and Mr.V.Shaji have acknowledged their liability to the appellant bank. The said Clause reads as follows:

> "3.3. The balance Purchase Price shall be paid by buyers to the seller in the following manner:
>
> a. Acceptance of liability for an amount of Rs.6.60 crores only (Rupees six crores and sixty lakhs only) in the form of Bank loan with Punjab National Bank, GP Road Branch, Chennai on the company name.
>
> b. Acceptance of liability to an amount of Rs.50.89 lakhs (Rupees fifty lakhs, eighty nine thousand only) relating to electricity bill of the company."

7. As seen from the aforementioned Clause, the newly inducted directors, referred to supra, who are the respondents in the arbitration proceedings have acknowledged and accepted the liability of M/s.Sulaiman Steels Private Limited to the appellant bank amounting to Rs.6.60 crores. After the execution of the business purchase agreement dated 05.01.2015, the existing directors namely Mr.A.Feroz Khan and Mr.A.Feyas Khan continue to act as directors along with the newly inducted directors Mr.Dinesh Kumar Sarawagi and Mr.V.Shaji. The newly

inducted directors of M/s.Sulaiman Steels Private Limited namely Mr.Dinesh Kumar Sarawagi and Mr.V.Shaji have also given additional collateral securities to the appellant bank to secure the mortgage of the appellant bank, as seen from the letter dated 23.09.2015 addressed to the Chief Manager of the appellant bank.

8. Admittedly, as seen from the arbitral claim, the dispute is only between the directors of M/s.Sulaiman Steels Private limited and the bank is in no way involved in the dispute. Admittedly, the appellant bank is not a party to the arbitral claim made by Mr.A.Feroz Khan and Mr.A.Fayaz Khan against the newly inducted directors Mr.Dinesh Kumar Sarawagi and Mr.V.Shaji who have given additional security for the loan availed by M/s.Sulaiman Steels Private Limited from the appellant bank. However, during the pendency of the arbitration, the newly inducted directors along with Mr.Shanavaz filed M.P.No.1 of 2016 before the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act seeking for a direction to the appellant bank who is the fourth respondent in the said application to return the title deeds which were deposited with them for the creation of mortgage for the loan availed by the company.

9. A counter affidavit has also been filed in the said application denying the allegations made by the applicants in M.P.No.1 of 2016 before the Arbitrator. They have also reiterated that they were no way involved in the dispute between the directors and they have also averred that the newly inducted directors have also acknowledged the liability of the company towards the bank. They have also stated that since they are not parties to the arbitration agreement and not parties to the business purchase agreement dated 05.01.2015, the relief sought for in M.P.No.1 of 2016 cannot be granted. However, under the impugned order, the arbitral Tribunal has directed the appellant bank to return the title deeds and has granted the prayer as sought for by the applicants in M.P.No.1 of 2016 before the Arbitral Tribunal.

10. As observed earlier, the appellant bank is not a party to the business purchase agreement dated 05.01.2015. The, newly inducted directors, as seen from the business purchase agreement dated 05.01.2015, have also acknowledged the liability

to the bank as referred to supra. The relief of return of title deeds also cannot be granted in view of the decision of the Hon'ble Supreme Court in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors reported in 2011 5 SCC 532, wherein, it has been categorically held by the Hon'ble Supreme Court that mortgage relief cannot be granted by the Arbitral Tribunal. The relevant paragraph of the said judgment is extracted hereunder:

> "27. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred

from being referred to or decided by private fora (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion."

11. The impugned order passed by the Arbitrator under Section 17 of the Arbitration and Conciliation Act is similar to granting a redemption of mortgage relief. Hence, this Court is of the considered view that the said order cannot be passed by the Arbitrator. The Arbitrator has passed the impugned order by total non application of mind to the settled law as laid down by the Hon'ble Supreme Court in the aforesaid decision.

12. Further, the appellant bank admittedly is not a party to the arbitration agreement which forms part of the business purchase agreement dated 05.01.2015. The said agreement is admittedly entered into only between the directors of M/s.Sulaiman Steels Pvt. Ltd. and the appellant bank is only a mortgagee, who has granted loan to the said company for its business purpose. This being the case, the Arbitrator has under the impugned order by giving a go-by to the fact that the appellant is not a party to the arbitration agreement has directed the appellant bank to return the title deeds to the respondents, which is not permissible under law.

13. For the foregoing reasons, the impugned order dated 16.08.2016, passed by the Arbitrator in M.P.No.1 of 2016 has to be necessarily set aside and accordingly it is set aside and the appeal is allowed. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar

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To

The Hon'ble Ms. Justice K.B.K.Vasuki (Retd.),
Sole Arbitrator, Arbitral Tribunal, Chennai.

Copy To

The Section Officer,
VR Section, High Court, Madras.

C.M.A.No.3378 of 2017
and C.M.P.No.21420 of 2017

RLD(CO)
RLP(15/11/2021)