ORDER OCD–1

APOT/230/2022
WITH
AP/236/2020
IA NO: GA/1/2022

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

DAKSHINA KALI TRADING PRIVATE LIMITED AND ORS.
VERSUS
ADITYA BIRLA HOUSING FINANCE LIMITED & ANR.

BEFORE:

THE HON'BLE JUSTICE HARISH TANDON
THE HON'BLE JUSTICE PRASENJIT BISWAS

[COMMERCIAL DIVISION]

Date : 20th December 2022.

APPEARANCE:

Mr. Abhrajit Mitra, Sr. Advocate
Mr. Rachit Lakhmani, Advocate
Mr. Siddhanth Makkar, Advocate
Mr. Sumit Biswas, Advocate
Ms. Rajashree Bhowmick, Advocate
...... for appellants/petitioners.

Mr. Dhruba Ghosh, Sr. Advocate
Mr. Altamash Alim, Advocate
Mr. Subhadeep Basak, Advocate
...... for respondent no.1.

Mr. Debnath Ghosh, Advocate
Mr. Souvik Ganguly, Advocate
Mr. Sarosij Dasgupta, Advocate
Ms. Mini Agarwal, Advocate
...... for respondent no.2.

The Court:- The appeal arises from an order dated 5th September 2022 passed by a Single Bench disposing of the application under Section 9 of the Arbitration and Conciliation Act, 1996.

The petitioners were the intending purchaser of a triplex flat being Flat Nos.19A, 20A and 21A on the 19th, 20th and 21st floors of Block-C of Ideal Exotica Project situated at 21, Pramatha Chowdhury Sarani, Police Station New Alipore, Kolkata – 700053, for a consideration of more than Rs.10 crore. Subsequently, an agreement was entered into between the financier and the petitioners on 25th February 2017, the nomenclature whereof was given as Home Loan Agreement, where the said financier agreed to accommodate a loan to the petitioners to the aggregate amount of Rs.9,52,00,000/- repayable in 118 monthly instalments carrying an interest @ 8.75% per annum calculated on a reducing balance. Subsequently, a tripartite agreement was entered into on 21st April 2017 between the financier, the petitioners and the developer and the entire amount so borrowed by the petitioners was agreed to be secured by creating a mortgage in respect of the said flats.

Admittedly, there was a default in payment of the monthly instalments in terms of the agreement, be it 25th February 2027 or 21st April 2017. The financier terminated the agreement, recalled the loan and demanded payment of the entire dues. The dispute commenced on the basis thereof and at one point of time, it was contended by the petitioners that both the agreements dated 25th February 2027 or 21st April 2017 are distinct, separate and stand on a different footing and because of the tripartite agreement having been entered into subsequently, the earlier home loan agreement has merged and/or subsumed into it. The aforesaid stand appears to have been taken in a proceeding under Section 11(6) of the Arbitration and Conciliation Act, 1996 filed before the Bombay High

Court for appointment of an arbitrator in respect of the home loan agreement dated 25th February 2027. A copy of the order appointing the arbitrator has been handed over to us wherefrom it appears that such plea was taken before the Bombay High Court as well and was kept open to be decided by the Arbitrator. The fact remains that there is a default in payment of the loan amount and the agreement has been terminated and the financier has approached the Single Bench for interim relief.

A plea is sought to be taken before us that Section 9 Sub-Section (2) of the Arbitration and Conciliation Act, 1996, as amended by Act 3 of 2016, postulates that where the Court passes an interim relief or protection under Sub Section (1) of Section of the said Act before the commencement of arbitral proceedings, the arbitral proceedings must commence within a period of 90 days from the date of such order or within such further time as the Court may determine. Sub-Section (3) of Section 9 of the said Act is indicative of a situation where the arbitral tribunal has been constituted and an application under Section 9(1) of the Act is taken up which, in our opinion, has no relevance in the present context.

Letters were issued raising dispute and communicated to the petitioners by the financier and in view of Section 21 of the Act, the arbitral proceeding shall be deemed to have commenced on the date when the request to refer the dispute to arbitration is received by the respondent. Though the parties are not ad idem on the time limit indicated in Section 9(2) of the said Act, but upon a reading of the said provision, such time limit cannot be said to be inviolable or incapable of being extended. The expression "or within such further time as the court may determine" bestows discretion upon the Court to extend the said time limit of 90 days. Otherwise, the intention of the legislation would be frustrated if such a rigid interpretation, as sought to be projected before us, is accepted.

Be that as it may, contest was made before the Single Bench and we do not find from the tenet of the impugned order that such point was ever taken before the Single Judge. However, we are not unmindful of the proposition of law that pure question of law can be taken for the first time before the appellate forum, but, if it is a mixed question of fact and law, there must be a foundation laid in this regard. Our attention is drawn to various letters and it is not in dispute that the reference has already been made but the arbitral tribunal has not been constituted as yet.

The facts discerned from the instant case go to show that there has been an admitted default in payment of the instalments and till the time the petitioner is not in a position to pay or secure the entire loan amount after the termination of agreement and recall of the loan, by the impugned order, the Court has directed the Receiver to take possession and effect the sale, which, we are informed, has been done and the sale conducted by the Receiver was affirmed by an order dated 14th December 2022. The said order has not been challenged and the challenge is restricted to the parent order dated 5th September 2022.

In view of the fact that the sale has already been effected and a third party interest has been created, we do not find that the subsequent order can be said to be a mere consequential order but is an independent order where the Court had to apply its mind either to accept the bid or not. Such being the position, we do not find that it would be proper at this stage to interfere with the impugned order. However, we make it clear that since the arbitral proceeding has commenced, all the points, whether agitated in the proceeding or not, but available to the petitioner, if taken, shall be decided therein. There is another proceeding which is initiated by the petitioners before the Consumer Forum and according to the petitioners, the same is pending. We therefore, do not want to make any comment thereupon as the said proceeding would continue on the basis of the facts involved therein and the findings made hereinabove shall not have any persuasive effect.

Since, we do not find that any interference is warranted to the impugned order, there is no point in keeping the appeal pending as it would be a mere paper appeal. We, therefore, dismiss both the application and the appeal.

Xeroxed certified copy of this order, if applied for, be given to the parties within three days from the date of such application.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)

s.kumar