Vidya Amin

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

COMMERCIAL ARBITRATION PETITION NO. 604 OF 2021

Tata Capital Financial Services Ltd. .. Petitioner
Vs.
Jay Enterprises & Ors. .. Respondents

Mr. Ziyad Madon a/d. Ms. Pooja Jhaveri i/b. Katariya & Associates for the petitioner.

CORAM : G.S. KULKARNI, J.
DATE : JUNE 6, 2022.

P.C.:

1. This is a petition filed under section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the petitioner has prayed for interim measures pending the arbitral proceedings to secure a sum of Rs.9,49,95,036/- which is due and payable by the respondents to the petitioner.

2. The petitioner is a non-banking finance company which has advanced a loan to respondent no. 1 under Channel Finance Agreement dated 8 June, 2017 of an amount of Rs.10 crores. Respondent nos. 2 and 3 are the guarantors, who in their personal and individual capacity have guaranteed repayment of the amounts due and payable by respondent no. 1 to the petitioner under the Channel Finance Agreement. Consequent to the parties entering into the Channel Finance Agreement, respondent no. 1 executed a Deed of Hypothecation dated 8 June, 2017 in favour of the petitioner for securing the said facility. Also on 8 June, 2017, respondent nos. 2 and 3 executed a Letter of Guarantee in favour of the petitioner

thereby irrevocably guaranteeing to pay on demand without demur or dispute the amounts payable by respondent no. 1.

3. It is the case of the petitioner that pursuant to the online disbursement request made by respondent no. 1, the petitioner disbursed an amount of Rs.10 crores to respondent no. 1. Thereafter on 24 November, 2020, at the request of respondent no. 1, the petitioner vide sanction letter, sanctioned a restructure/re-schedule of the Channel Finance Facility of Rs. 10 crores to a term loan of Rs.8,25,00,000/-. Accordingly, on 27 November, 2020, the Restructuring Agreement was executed between the petitioner and the respondents for the term loan of Rs.8,25,00,000/-. The petitioner has contended that under the Restructuring Agreement, the petitioner disbursed an amount of Rs.8,25,00,000/- to respondent no. 1. However, respondent no. 1 failed and neglected to make payment along with the accrued interest. According to the petitioner, the amount outstanding and payable by respondent no. 1 as also respondent nos. 2 and 3 under the said agreement is an amount of Rs.9,49,95,036/-. Despite repeated efforts and request as made to the respondent to make payment of the instalments, the respondents have failed to deposit the amounts as demanded. They have also failed to recognize the restructuring facility. In these circumstances, the petitioner has filed the present petition praying for interim measures. It is submitted that if the interim measures as prayed

for are not granted, serious prejudice shall be caused to the petitioner inasmuch as the arbitral interest of the petitioner would stand prejudically affected.

4. The proceedings were listed before this Court on 13 December, 2021 and following order came to be passed:

> "1. Mr. Madon, learned counsel appearing on behalf of the petitioner has stated that respondent nos. 1 and 3 have been served on 17.08.2021. As far as respondent no. 2 is concerned, the petitioner has not been able to effect service, as the packet has been returned back with the remark "left".
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> 2. Considering that the above matter is coming up for the first time and all the parties are from Mumbai, it is directed that Advocate for the petitioner shall once again serve a copy of the petition alongwith a copy of this order on all the respondents by hand delivery and file an affidavit of service to that effect on or before the next date.
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> 3. It is made clear that if the respondents do not appear on the next occasion, despite service, this Court shall proceed to pass orders in the above Section 9 petition in their absence.
>
> 4. Stand over to 10.01.2022.

5. Thereafter, the proceedings are listed today. Learned counsel for the petitioner has drawn the Court's attention to two affidavits of service; first affidavit dated 17 August, 2021 and the second affidavit dated 28 December, 2021 filed in pursuance of the orders passed by the Court as noted above.

6. Despite receipt of the notices, the respondents are not represented. It appears that the respondents are not interested to oppose the present proceedings. As there is no opposition to the Section 9 petition, it would be required to be presumed that the averments as made in the memo of

the petition are not disputed by the respondents and/or stand uncontroverted. It is clear that under the Channel Finance Agreement read with Restructuring Agreement, substantial amounts as noted above were disbursed by the petitioner to respondent no. 1. Neither respondent no. 1 nor the guarantors-respondent nos. 2 and 3 have come forward to make payment or regularize the loan. There is no dispute on the arbitration agreement as contained in Clause XV of the Channel Finance Agreement, which also stand incorporated in the Restructuring Agreement dated 27 November, 2020 as seen from Clause 10 which includes the provisions of the Facility Agreement including the arbitration Agreement between the parties.

7. In the above circumstances, in my opinion, a strong prima facie case has been made by the petitioner for grant of interim measures pending the arbitral proceedings. Also, balance of convenience is in favour of the petitioner. It would be in the interest of justice that the petition is disposed of in terms of the following order:

O R D E R

(i) There shall be interim relief pending the arbitral proceedings in terms of prayer clause (c), which reads thus:

> (c) that pending the hearing and disposal of Arbitration proceedings, making of the arbitral award and until final execution of the arbitral award, the respondents, by themselves, their employees, servants and/or agents or otherwise howsoever be restrained by an order and injunction from in any manner selling, transferring, disposing of, or alienating or encumbering or pledging or mortgaging or hypothecating or charging or parting with possession of or transferring or creating any right, title or interest or license in favour

> of anyone else in respect of the (i) the said Hypothecated assets by the petitioner under the said Agreement and (ii) the other assets/properties, movable and immovable, that may be disclosed by the respondents on oath and/or an affidavit."

(ii) In view of the Deed of Hypothecation, there needs to be interim relief in terms of prayer clause (d) inasmuch as the Court Receiver, High Court, Bombay is required to be appointed in respect of the hypothecated assets as set out in the Hypothecation Agreement with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908. Accordingly, there shall be interim relief in terms of prayer clause (d), which reads thus:

> "(d) that pending the hearing and disposal of Arbitration proceedings, making of the abritral award and until final execution of the arbitral award, Court Receiver, High Court, Bombay or some fit and proper person including the Officer of the petitioner be appointed Receiver with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908, in respect of the (i) the said Hypothecated assets by the petitioner under the said Agreement and (ii) the other assets/properties, movable and immovable, that may be disclosed by the respondents on oath and/or on affidavit."

8. The petition is disposed of in the above terms. No costs.

9. A copy of this order be forwarded to the Court Receiver, High Court, Mumbai for taking appropriate action.

10. The petitioner is directed to invoke the arbitration within a period of 30 days from today.

[G.S. KULKARNI, J.]