OCD-9

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AP/316/2023

TATA CAPITAL FINANCIAL SERVICES LIMITED
VS
SUPREME ELECTROTECH PRIVATE LIMITED AND ORS.

BEFORE:
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 22nd November, 2023.

Appearance:
Mr. Swatarup Banerjee, Adv.
Mr. Avishek Guha, Adv.
Ms. Akansha Chopra, Adv.
Ms. Sonal Agarwal, Adv.
…for the petitioner

Mr. Debraj Sahu, Adv.
Mr. Arkodeb Sinha, Adv.
…for the respondents

The Court:- This is an application filed under Section 9 of The Arbitration and Conciliation Act, 1996 for interim measures.

The prayer arises out of a loan-cum-hypothecation Agreement dated 5th April, 2022 pursuant to which the petitioner gave a loan of approximately Rs.6.70 crores to the respondents. This Agreement contains an arbitration clause. The respondents mortgaged several of their assets by way of a Deed of Hypothecation dated 7th April, 2022. The respondents also deposited the title deeds of these properties with the petitioner on the same day. All the parties signed on both the loan-cum-hypothecation Agreement as well as the Deed of Hypothecation. The parties also signed on a sanction letter of 21st March, 2022 executing the Agreement on 5th April, 2022. The petitioner, however, terminated the loan Agreement on 18th April, 2023 on the ground of the respondents not being able to repay the loan in accordance with the agreed schedule. The respondents paid approximately Rs.1.50 crores and the petitioner now claims the remaining amount of approximately Rs.4.77 crores. The petitioner, in the meantime, valued some assets mentioned in the second schedule to the Deed of Hypothecation at Rs.1.88 crores.

Upon being informed of such valuation, the Court thought it fit to engage an empanelled Valuer who was requested to value the properties once again. The valuation report filed with the Court shows a valuation of approximately Rs.1.16 crores.

The Court passed an order of injunction on the date of appointing the Valuer, that is, 16th June, 2023 and restrained the respondents from creating any third party rights on the property for which valuation was directed.

The petitioner, through learned counsel, now seeks an order of injunction on the remaining properties in the second schedule to the Deed of Hypothecation.

Counsel appearing for the petitioner also submits that the mortgaged properties which are enumerated in the second schedule to the Deed of Hypothecation are not sufficient to meet the petitioner’s demand.

Learned counsel appearing for the respondents seeks to resist any order of injunction on the ground that such orders cannot be passed as a matter of course. Counsel also declines to accept the offer of appointment of an Arbitrator to sort out the differences between the parties. Counsel submits that the termination letter/letter of demand does not contain any particulars in support of the claim of approximately Rs.4.77 crores and further that the petitioner would first be required to satisfy the rigors of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908, before an order of injunction can be passed on the petitioner's application.

The proposition that an application under Section 9 of The 1996 Act does not have to clear the threshold test of an application under Order XXXVIII Rule 5 or Order XXXIX Rules 1 and 2 of the Code of Civil Procedure is substantially settled as of now. There is no requirement for a party to approach the Court under Section 9 of the 1996 Act to plead the necessary facts for an order of attachment before judgment akin to a situation under Order XXXVIII Rule 5. All that a party has to show in a Section 9 application is that there is a risk to the subject-matter in dispute in the arbitration. In the present case, the Valuer's report showing a lower value of the mortgaged properties is a testimony to the fact that there is an imminent need for the petitioner to secure the subject-matter of dispute in the arbitration. The respondents do not have any defence to the claim of Rs.4.77 crores or to the fact of the respondents having received the loan under the Agreement as well as having mortgaged certain properties under the Deed of Hypothecation. The respondents' refusal to have an Arbitrator appointed in terms of Section 9 (2) of the 1996 Act is also a ground for the Court to grant an order of injunction. Although counsel for the respondents submits that nothing is due and owing from the respondents, it is significant that the respondents chose not to reply to the termination notice dated 18th April, 2023.

The appointment of an Arbitrator would be appropriate in the present facts as there is an order of injunction under Section 9(1) since 16th June, 2023. Section 9(2) mandates the constitution of an arbitral tribunal within 90 days from an order passed under Section 9(1) of the Act. Hence, the disputes could have been resolved by the Arbitrator.

Since the respondents are not willing under instructions for appointment of an Arbitrator at this stage, the Court deems it fit to pass an order of injunction on the freehold properties of the respondents, which are not part of the Deed of Hypothecation and restrain the respondents from dealing with such properties without keeping aside a sum of Rs.4.77 crores. This order will remain in place until the parties go to arbitration in terms of the arbitration clause in the loan-cum-hypothecation Agreement.

Since affidavits are complete, nothing further remains of the arbitration petition.

AP/316/2023 is accordingly disposed of in terms of the above.

(MOUSHUMI BHATTACHARYA, J.)

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