

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

Present :

Hon'ble Justice Moushumi Bhattacharya.

A.P. 387 of 2023

SREI Equipment Finance Limited

vs

Avarsekar Realty Private Limited

For the petitioner	:	Mr. Jishnu Saha, Sr. Adv.
		Mr. Reetobrata Mitra, Adv.
		Mr. Aditya Kanodia, Adv.
		Mr. Sourajit Dasgupta, Adv.
		Mr. Nilkanta Basak, Adv.

For the respondent	:	Mr. Krishnaraj Thaker, Adv.
		Ms. Aasia Hasan, Adv.
		Ms. Anjana Banerjee, Adv.
		Ms. Swagata Roy, Adv.

Last heard on	:	28.08.2023
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Delivered on	:	01.09.2023.
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Moushumi Bhattacharya, J.

1. The petitioner seeks an order of injunction on the respondent from dealing with or taking any step in creating any interest over 13 flats together with 13 car parking spaces with each flat and an additional 66 car parking spaces and undivided proportionate share of a piece of land measuring 3337.34 square meters in the building proposed to be constructed by the respondent. The petitioner has sought for the aforesaid and other orders by way of the present application filed under section 9 of The Arbitration and Conciliation Act, 1996.

2. The petitioner is presently under an Administrator appointed by the National Company Law Tribunal (NCLT) exercising powers similar to that of a Resolution Professional under the provisions of the Insolvency and Bankruptcy Code, 2016. The petitioner had granted a loan of Rs. 200 crores to the respondent on easy terms. The respondent defaulted in its repayment obligations. The present application arises out of the loan agreement executed between the parties on 15th December, 2017 along with a supplementary agreement of 31st December, 2019. The respondent was under an obligation to repay the loan in 36 instalments but was granted a moratorium during the pandemic. The loan was therefore rescheduled and the respondent was to finally repay the loan by 15th May, 2021.

3. The petitioner says that the respondent's default led the petitioner to issue a Notice dated 7th November, 2022 calling upon the respondent to make payment of the outstanding amount. The petitioner thereafter terminated the agreement on 14th March, 2023. The petitioner claims that the respondent is indebted to the petitioner for a total sum of Rs. 4,94,97,40,898.76/-.

4. According to learned counsel appearing for the petitioner, the respondent has already dealt with part of the 13 flats owing to failure in completion of the Project. Counsel submits that one of the 13 flats has already been attached in execution of an order passed by the Maharashtra Real Estate Regulation Authority (MAHRERA). Counsel also relies on the restraint orders passed by the Bombay High Court on the respondent's failure to comply with its directions.

5. Learned counsel appearing for the respondent submits that the security interest claimed by the petitioner is in the form of mortgage of the flats and car parking space and that the present application is for protection of the petitioner's rights as mortgagee of the flats and car parking spaces. Counsel relies on the pleadings in the application to urge that the petitioner has sought for interim protection for the security interest in respect of the flats and car parking spaces and relies on the Supreme Court decision in *Booz Allen and Hamilton INC. v. SBI Home Finance Limited*; (2011) 5 SCC 532 to say that a suit for enforcement of a mortgage should be decided by a Court and not by an

arbitral tribunal. It is also submitted that the power to grant interim relief by way of an injunction is conferred in aid of the final relief; hence if the final relief cannot be granted, temporary relief in the same terms cannot also be granted. Counsel submits that any reliefs arising out of a document of mortgage or mortgage agreement would have to be decided by a Court of law and not by the arbitral tribunal.

6. The dispute in the present application relates to the Supreme Court decision in *Booz Allen and Hamilton INC. v. SBI Home Finance Limited*; (2011) 5 SCC 532, wherein it was held that a mortgage is a transfer of a right *in rem* and the suit for sale of the mortgage property is an action *in rem* for enforcement of the right. Hence, a suit for enforcement of a mortgage being enforcement of right *in rem* will have to be decided by a Court of law and not by an arbitral tribunal. In any event, the view of the Supreme Court in paragraph 46 of the Report in *Booz Allen* was on a suit for enforcement of a mortgage which is inherently and procedurally different from the nature of the present application.

7. The question to be decided is whether the petitioner is seeking to enforce any mortgage in the present application. The application does not disclose any such pleadings or prayers. The words used in the application are to the effect that the petitioner would lose security interest over the assets as the respondent is indebted to several other creditors and is unable to pay its dues. The only prayer is for a restraint

on the respondent from dealing with or creating any interest over the 13 flats together with car parking spaces and other car parking spaces as specified in prayer (a) of the application.

8. Moreover, the argument of the respondent that the Court is denuded of its power to grant interim relief since no final relief can be granted as the dispute is non-arbitrable cannot be accepted. This is by reason of the fact that the petitioner has not filed its statement of claim since arbitration is yet to commence. Therefore, it would be presumptuous and speculative for the respondent to assume that the petitioner would make a claim for enforcement of the mortgage in the arbitration. The respondent's reliance on *Cotton Corporation of India Limited v. United Industrial Bank Limited*; (1983) 4 SCC 625 is hence misplaced in this regard.

9. There is also no evidence on record to show that the petitioner is seeking enforcement of any mortgage. The respondent therefore cannot resist the reliefs on a pre-supposition of the petitioner's claim in the arbitration. The decision of the Bombay High Court in *Aditya Birla Finance Limited v. Carnet Elias Fernandes*; 2015 (6) ARBLR 293 (Bom) on the other hand assists the petitioner in the facts of the present case. The Bombay High Court reiterated the power of a Court in a section 9 application to grant interim measures even where the property is not the subject matter of the dispute in arbitration. It was further held that

interim measures can be granted under section 9 even if the petitioner gives up its claim for enforcement of mortgage properties.

10. It is undisputed that the respondent is indebted to the petitioner for a substantial amount of money in terms of the loan agreement and the supplementary agreement; the former containing an arbitration clause. It is also undisputed that the respondents created a charge on the 13 flats together with 13 car parking spaces bundled with each flat and an additional 66 car parking spaces and undivided proportionate share of the land measuring 3337.34 square meters in the building. The respondent also hypothecated its receivables to the petitioner. Both the document of charge as well as the deed of hypothecation dated 31st March, 2020 are a part of the records. Several restraining orders passed by the Bombay High Court against the respondent for its defaults are also part of records. The statement of accounts which is part of the proceedings also shows a total sum of Rs. 4,94,97,898.76/- due and owing from the respondents to the petitioner.

11. These facts alone would persuade this Court to agree with the petitioner's contention that the respondent is in continuing breach of the petitioner's rights arising out of the loan agreement. The encumbrance of the respondent's properties is in continuation of that breach. The hypothecation and charge are undisputed and the petitioner's rights are therefore required to be protected.

12. Section 9(1) of The Arbitration and Conciliation Act, 1996, confers almost unlimited powers on a Court to grant interim measures prior to, pending or even after passing of the award but before its execution. Section 9(1)(ii)(a) specifies that a party to a arbitration agreement can apply to a Court for preservation of the subject matter of the arbitration agreement or to secure the amount disputed in the arbitration [section 9(1)(ii)(b)]. Section 9(1)(ii)(d) permits interim injunction or appointment of a receiver. The Court is also empowered to grant any other interim measures of protection as it considers just under section 9(1)(ii)(e).

13. Section 9(1) contemplates interim measures of protection to a party who approaches the Court for urgent relief or on an apprehension that the subject matter of the dispute in the arbitration may be disposed of even before the arbitration commences. Section 9(1) is simply a stop-gap measure before the arbitration starts and the parties can have a forum to have the remaining of their disputes adjudicated. Section 9(2) therefore mandates that arbitration proceedings shall be commenced within 90 days from the date of an interim measure of protection under section 9(1) or within such further time as the Court may determine.

14. There is sufficient evidence that the petitioner's right on the hypothecated and charged assets which is also the collateral for the loan advanced to the respondent is at risk. The restraining orders on the respondent by the Bombay High Court and other statutory authorities

have already been acted upon and there is hence every chance that the petitioner's security may further be put at risk.

15. Having considered the relevant facts and the law on the subject, this Court is of the view that the petitioner is entitled to an order of injunction restraining the respondent from dealing with any further or creating any interest over 13 flats/units together with 13 car parking spaces bundled with each flats/units and an additional 66 car parking spaces and undivided proportionate share of the land measuring 3337.34 square meters in the building to be constructed by the respondent.

16. Mr. Rajratna Sen of the Bar Library Club is appointed as the Receiver to take symbolic possession of the aforesaid properties either by himself or through an agent as may be practicable. The remuneration of Rs. 2 lakhs of the learned Receiver shall be borne by the petitioner together with all his travel, accomodation and other expenses. The petitioner shall also make payment and other arrangements for the agent if appointed by the learned Receiver in the event the Receiver seeks to act through an agent.

17. Since the parties have been heard at length, nothing further remains to be decided in the application. Needless to say, the parties shall act in terms of the mandate of section 9(2) of the Act and the time frame envisaged therein.

18. AP 387 of 2023 is accordingly allowed and disposed of in terms of this judgment.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)