

OD-6

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

SCO/1/2024

KISHOR HIMMATLAL AGARWAL AND ANR
VS
SREI EQUIPMENT FINANCE LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 3rd July, 2024

Appearance:

Mr. Prathamesh Kamat, Adv.

Mr. Ratul Das, Adv.

Mr. Dwip Raj Basu, Adv.

Mr. S. Sanyal, Adv.

Mr. Pranav Avhad, Adv.

Mr. Darshna Naval, Adv.

...for petitioner.

Mr. Swatarup Banerjee, Adv.

Mr. Rajib Mullick, Adv.

Mr. Sariful Haque, Adv.

Ms. Yyoti Mondal, Adv.

Ms. S. Jha, Adv.

...for respondent no. 3

The Court:- The present application has been filed under Section 340 the Code of Criminal Procedure, 1973.

Learned counsel appearing for the petitioners submits that the respondent herein, who was an applicant in an application under Section 14, read with Section 11(6) of the Arbitration and Conciliation Act, 1996, had premised its case on a purported loan cum hypothecation agreement dated June 30, 2018. In particular in paragraph nos. 5 to 8 of the said application, it was categorically asserted by the applicant therein that in terms of the said purported loan cum hypothecation agreement, 22 monthly instalments had been paid.

On the basis of such averments, a coordinate Bench of this Court had referred the matter to arbitration by appointing a learned Arbitrator.

Thereafter, the respondent herein stuck to its statements made in paragraphs 5 to 8 of the application under Section 14, read with Section 11(6) of the 1996 Act in its initial Statement of Claim before the Arbitrator.

However, subsequently the present respondent did a *volte face* and effected a paradigm shift in its arguments by seeking an amendment which hits at the root of the case all along made out by the present respondent. The present respondent, in its amendment application, sought to delete paragraph nos. 5 to 8, which correspond with the paragraphs of same number in the application under section 14, read with section 11 (6), and sought to introduce a completely new case, which is mutually exclusive with their original case.

In the amended Statement of Claim, the respondents introduced a case of there being previous purported agreements of the years 2011 and 2012. The present respondent/claimant now seeks to portray that the agreement of 2018 was merely a restructuring agreement in terms of the previous agreements. More importantly, the claimant stated categorically in the amendment application that there was no disbursement of any funds under the agreement dated June 30, 2018, which is diametrically opposite to their original case.

It is further pointed out by learned counsel for the petitioner that the incriminating paragraphs in the application under section 14, read with section 11 (6), were affirmed on oath and were stated in the affidavit supporting the said application to be true to the knowledge of the person whose swore the

affidavit on behalf of the claimant company. It is argued that the said person who affirmed the affidavit was an official of the claimant / company and cannot be said to be a naïve person having no knowledge of the facts of the case.

Thus, it is argued that such attempt on the part of the claimant tantamounts palpably to perjury and a deliberate attempt to mislead the court into passing the order under section 11 of the 1996 Act and an inquiry should be initiated under section 340 of the Code of Criminal Procedure.

Upon a careful consideration of the arguments of the petitioner, this Court is convinced that at this juncture, there is no mandate to give an audience to the respondent/accused.

The relevant paragraphs of the application under section 14, read with section 11 (6) of the 1996 Act, which were repeated in the original Statement of Claim before the learned Arbitrator, are set out below:

"5. Subsequently, on consideration of the respondents request a Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847, was entered into by and between your petitioner and the respondents herein, whereby the petitioner had provided financial assistance to the respondent for acquiring assets as required by the respondent under the said the Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847. The Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847, was signed by the respondent at the regional office of the petitioner, thereafter the said Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847, was concluded at the corporate office of the petitioner situated at 6A, Kiran Shankar Roy Road, Kolkata- 700 001 on June 30, 2018, where the authorized signatory of the petitioner had signed the same. The respondent No. 2 is the guarantor to respondent No. 1, indemnifying the petitioner against any losses, damages, cost, claims and expenses whatsoever which petitioner may suffer, the respondent No. 2 signed also signed the agreement as a

guarantor at the regional office of the petitioner, thereafter the said agreement dated June 30, 2018, was concluded at the corporate office of the petitioner situated at 6A, Kiran Shankar Roy Road, Kolkata- 700 001 on June 30, 2018,

A copy of the Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847 is annexed herein marked as Annexure "A".

6. Consequently, the respondent took possession of the assets being Seven asset being one Ashok Leylan 2516 XL, one JCB 430 ZX, one JCB 432 ZX, one JCB JS 140 Excavator, one Mahindra Navistar MN 31, one Tata LPK 2516 FBT and one TATA LPT 3118 as was required by the respondent as per there choice without any demur and/or objection with regards said assets, which the respondents are utilizing in their business and earning monetary benefits from said assets.

7. The petitioner provided a financial facility of Rs. 6,37,34,886.00/- to the respondent under the said Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847, for acquiring the aforementioned assets, containing its own mode and manner of payment wherein the respondent agreed to repay the said amount in regular monthly instalments to your petitioner as per the agreement.

8. The respondent under the said agreement was required to pay to the petitioner along with the agreed interest aggregating to a sum of Rs. 6,92,59,319.00, which was to be repaid by way of 58 monthly instalments. In acknowledgement of the said Loan Cum Hypothecation Agreement dated June 30, 2018 bearing agreement No. 162847 the respondent had made payments till 22nd monthly instalments under the said agreement and thereafter had failed and/or neglected to make any further payment of the said monthly instalments to your petitioner as stipulated under the said agreement. It is stated that the aforesaid payments were made much beyond their respective due dates as stated in the agreement."

Such paragraphs are now been sought to be deleted by way of amendment and the following paragraph to be introduced:

*20. Your claimant states that from the aforesaid facts and circumstances it is clear that under the instant Agreement dated 30th June, 2018 bearing Agreement No. 162847 there was no disbursement of any funds, only the liabilities of the previous agreements were restructured in the instant agreement as per the respondents request, it is further pertinent to mention that the respondent has acted in terms of the instant agreement dated 30th June, 2018 bearing Agreement No. 162847 by paying 22 monthly installments in terms of the repayment schedule of the agreement dated 30th June, 2018 bearing Agreement No. 162847 which will be evident from the statement of accounts maintained by the claimant company. A copy of the statement of account maintained by the claimant company is annexed herein marked as **Annexure "Z"**.*

A careful perusal of the proposed amendment shows that the accused/claimant does not seek to efface or obliterate the existence of the purported agreement dated June 30, 2018. What the amendment proposes to do is to change the very complexion and character of the said document by pleading that the said document was in effect an agreement to restructure the liabilities arising out of certain previous agreements.

Such case, it may be noted, is not entirely inconsistent with or mutually destructive of the original case made out by the claimant. What has been attempted to be done now is to relate the purported agreement of 2018 to previous liabilities in terms of prior agreements, which were neither asserted nor denied in the original pleadings.

The consistent stand of the claimant/accused is that 22 monthly instalments were paid in terms of the 2018 agreement which, however, have now been termed to be in terms of the "repayment schedule".

Hence, I find that nothing hinged on the said alteration now sought to be introduced in the pleadings, either before the Arbitrator or before this Court on

the previous occasion. Such amendment could not have affected the decision appointing an Arbitrator which was passed by this Court.

Even if the present pleadings were there on record at that relevant juncture, in the opinion of this Court, the same would not have materially altered the premise of the order appointing an arbitrator under Section 11 of the 1996 Act.

As such, I do not find a high case to have been made out by the present petitioner that it is expedient in the interest of justice to direct an inquiry to be initiated under Section 340 of the Code of Criminal Procedure, 1973 on the allegations of perjury made in the present application.

In such view of the matter, SCO/1/2024 is dismissed.

It is, however, made clear that the entire body of observations made above are tentative in nature, arrived at only for the purpose of adjudicating the present application under Section 340 of the Code of Criminal Procedure and do not, in any manner, purport to deal with the merits of the allegations and counter-allegations made by the parties against each other before the Arbitral Tribunal or before any other forum. The Arbitral Tribunal shall decide all issues before it independently without being swayed in any manner by any of the observation made hereinabove.

(SABYASACHI BHATTACHARYYA, J.)