rajshree

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

**COMMERCIAL ARBITRATION APPLICATION NO.298 OF 2021**
**WITH**
**INTERIM APPLICATION (L) NO.32210 OF 2022**
**IN**
**COMMERCIAL ARBITRATION APPLICATION NO.298 OF 2021**

Fortune Integrated Assets Finance Ltd. ] … Applicant
vs.
Anilbhai Manubhai Patel & Ors. ] .. Respondents

Mr.Narayan Awate for the Applicant.
Mr.Vinayak Pandit, for Respondent Nos.1 and 2.

**CORAM : BHARATI DANGRE, J**

**DATE : 22nd March, 2024.**

**P.C.**

1] The ‘Loan cum Hypothecation Agreement” dated 12.11.2014 signed in Ahmedabad between Fortune Integrates Assets Finance Limited (hereinafter referred to as ‘Fortune’ and the Respondents, is in relation to certain credit facilities for purchase of some new/used vehicle alongwith the accessories for the daily operational need of the borrower in the ordinary course of transportation business and the details of the facilities are set out in the Schedule appended (I and II).

One of the conditions stipulated by Fortune for the sanction of the credit facility is that, the borrower shall cause to be hypothecated the assets belonging to it and execute in favour of Fortune.

An Agreement to record *interalia* the terms and conditions of the sanction is signed by the borrower, co-borrower as well as the Guarantor, guaranteeing due performance of all the duties and obligations of the borrower covered under the Agreement and particularly guaranteeing timely payment of all installments alongwith accrued interest and other charges payable under the Agreement.

The Agreement categorically set out the representation by the buyer to the effect that the credit facilities granted on the basis of the loan application made by the borrower for purchase of the assets and all the necessary approvals availing the facilities have been obtained and it is valid and subsisting. The terms of hypothecation alongwith the Guarantee was also included in the Agreement itself.

2] Para 5 of the Agreement provided for event of default and contemplate that failure to make payment to Fortune of any part of the loan amount on demand or misusing the credit facilities for any other purpose, for which it was sanctioned or creating any interest in the hypothecated assets contrary to the interest set out in the Agreement.

It is in this Agreement, a clause in form of “Arbitration” and “Jurisdiction”, in form of Clause 15 and 16 are included, which set out that any dispute or difference arising out of or in connection with the Agreement between the Parties, including any dispute relating to interpretation of the Agreement or any clause thereof, shall be referred to arbitration as may be mutually agreed between the parties and the provisions of the Arbitration and Conciliation Act, shall apply.

As far as the jurisdiction is concerned, a clause stipulate that all disputes arising out of the Contract, the jurisdiction shall be within the Court at Mumbai, only to the exclusion of all other Courts and the language shall be English.

3] As a result of execution of Agreement between the Parties, the facility was provided to the borrower for purchase of 85 vehicles and the learned counsel for the Applicant has produced 85 Agreements and what is relevant to note is, the Loan cum Hypothecation Agreement is one, in the name of Anilbhai Patel and the Agreement number mentioned is LVAME02014-150017490.

However, since the loan was advanced for different vehicles, the hypothecation agreement separately signed extend the loan facility, with the vehicle being hypothecated is in addition, identified by allotting a separate number.

4] Alongwith the Application, the Applicant has placed on record Schedule II, which has enlisted the loan account number, the name of the customer and the vehicle number and from its perusal it is evident that the loan was disbursed in favour of the borrower through the same loan account, but since the amount against each vehicle, was to be separately identified, the Schedule I and II have given the details of the description of the credit facility as against the description of the hypothecated assets.

Worth it to note that it was categorically mentioned above the description of Schedule I and II as under :-

'Schedule I and II attached to and forming part of the Loan cum Hypothecation Agreement described in particulars of the amount payable".

5] Reading of the above, make it evidently clear that that the schedule was only for the purpose of identification of the hypothecated asset and the details of the amount against which the vehicle was hypothecated. Admittedly, there is only one loan account from which the loan is disbursed and therefore, I do not find substance in the objection raised by the learned counsel for the Respondent that there were separate Loan Agreements and it is clarified that there is a common Loan Agreement in form of 'Loan cum Hypothecation Agreement' dated 12.11.2014, but to have the clarity on the aspect of the hypotehcated assets, since each of the 85 vehicles for which the loan was advanced, was hypothecated as against the sum advanced for purchase of the said vehicle, the hypothecation Agreement disbursing the loan amount in favour of the borrower/co-borrower, whose repayment was guaranteed by the Guarantee, form part of the same Agreement.

6] The Arbitration clause in the said Agreement contemplate reference of disputes to arbitration, however, the learned counsel for the Respondent raise an objection about the delay and for the reasons to follow I must dispel his apprehension that there is a delay.

Upon the Hypothecation Agreement being executed in 2014, the payments were made in accordance with the schedule of repayment and in fact the Schedule III and IV of the Agreement clearly set out the EMI amount due and payable on the dates which are also mentioned therein, as the loan amount was to be repaied in 48 installments i.e. in 48 months. The rate of interest at the rate of 10.05% was also set out alongwith the margin money. The last installment fell due on 07.10.2018 and it is the case of the Applicant that there was default in payment of this loan and though a finance of Rs.1,71,70,000/- was availed for Piago vehicles and Piago F delivery van, as on 25.09.2019 a sum of Rs.1,94,26,441/- is due and payable.

On 30.09.2019, a notice was addressed to the borrowers and the Guarantor, calling upon them to make the aforesaid payment and also invoking arbitration as per Section 21 of the Arbitration and Conciliation Act, indicating that if the amount is paid in the account, the arbitration can be avoided. Admittedly, no amount came.

Once again on 11.08.2021, arbitration is invoked in respect of the Hypothecation Agreement dated 12.11.2014 and it was indicated that the amount due and payable as on the date of invocation is Rs.2,61,08,959.44 and the name of the Arbitrator was suggested clearly setting out that as per the clause, venue of the arbitration shall be Mumbai and its language shall be English.

It is, in the light of this invocation notice, Applicant has approached this Court by invoking sub-section (6) of Section 11 seeking appointment of the Sole Arbitrator to resolve the disputes.

7] The learned counsel for the Respondent, brorrower/co - borrower, has raised point of limitation as he would submit that despite the event of default having not occurred, the Respondent took possession of 84 hypothecated vehicles and in fact put them for auction and sold them and appropriated the amount as early as in 2016 and kept quiet and did not take any steps for recovery of the amount.

The learned counsel for the Respondent has many arguments to advance on the aspect of non adherence of the procedure before these vehicles were put to auction , but when I specifically raise a query as to why no steps were taken at the relevant tiame, his answer is the borrower/co borrower are illiterate persons and they were not aware of the procedure.

Ignorance of law is no excuse and in any case if they have chosen to remain silent despite their vehicles being attached and sold on the ground that there was a default, now they cannot make a grievance.

However, the most important thing that is to be looked into is whether the loan amount which was advanced has been realised though some of the amount is recovered by sale of vehicles, but ultimately to what date the loan amount with the interest is to be carried forward, is a matter to be considered and the parties are at dispute over this issue.

According to the learned counsel for the Respondent, no amount is payable and particuarly, when the event of default has not occurred.

7] At the stage of Section 11, I am not expected to go into these details, as at this stage, I shall only look into the existence of arbitration clause between the Parties and whether the reference is hopelessly time barred or it is a dead wood.

It is not in dispute that the arbitration clause exist in the Agreement and form part of the Hypothecation Agreement and as far as objection of dead wood is concerned, since in the year 2019 itself, the arbitration is invoked and ultimately invocation of arbitration is nothing but an intimation to the other side about the existence of disputes, that require reference to Arbitration and in any case the Respondents hardly bothered to contest even this notice or the sum mentioned in the said notice as due and payable, as it was open for it to claim that after the sale of the vehicles, this amount is not due and payable, instead it chose to main silence and even when the notice is forwarded in 2021, it has failed to respond.

8] The issue whether the amount due and payable and whether the event of default has really fallen upon the Respondent, is a matter to be considered by the Arbitrator, but surely, it is not the case of dead wood as it would be easy for a borrower to adopt all the tactics and then allege that, the period of limitation has expired in invoking the arbitration or there is delay in taking the disputes to Arbitrator, and then he is absolved of his liability to make the payment under the facility, which in fact , he has availed.

Without pronouncing upon the correctness of the claim, raised in the notice of invocation, I deem it appropriate that the dispute between the Parties deserve a reference to Sole Arbitrator to be appointed by this Court, since the situation has arisen, where it is imperative for this Court to exercise the power under sub section (6) of Section 11 of the Act of 1996.

I also deem it appropriate that this point of delay can even be agitated before the Arbitrator and he shall consider whether the delay has defeated the claim as set out before the Arbitrator.

9] In the wake of the above, Justice Shantanu Kemkar (Retired Judge of Bombay High Court) is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record.

The Arbitrator, shall after entering the reference fix the date of first hearing and issue further directions as are necessary.

The Sole Arbitrator shall be entitled for the fees as per Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

All rights and contentions of the parties are kept open.

**[BHARATI DANGRE, J]**