



2024 : DHC : 3895



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 43/2024**

MS PNB HOUSING FINANCE LIMITED Petitioner

Through: Mr. Ashish K. Singh, Ms. Palak Tyagi, Mr. Amit K.Singh, Advocates.

versus

JAYESH PRAVIN CHOUDHARY & ORS. Respondent

Through: Mr. Devashish Bharuka, Sr.Advocate with Mr. Mayank Sapre, Mr. Sarvshree, Advocates for R-1 to R-4.

+ **O.M.P.(I) (COMM.) 360/2023, I.A. 22205/2023**

PNB HOUSING FINANCE LIMITED Petitioner

Through: Mr. Ashish K. Singh, Ms. Palak Tyagi, Mr. Amit K.Singh, Advocates.

versus

JAYESH PRAVIN CHOUDHARY & ORS. Respondent

Through: Mr. Devashish Bharuka, Sr.Advocate with Mr. Mayank Sapre, Mr. Sarvshree, Advocates for R-1 to R-4.

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Date of Judgement: 08.05.2024

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G E M E N T

DINESH KUMAR SHARMA, J. (ORAL)

ARB.P. 43/2024 & O.M.P.(I) (COMM.) 360/2023

Page 1 of 10



1. The petition bearing ARB.P. 43/2024 has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A&C Act"*) seeking the appointment of Sole arbitrator for adjudicating the *inter-se* disputes having arisen inter se the parties and the petition bearing O.M.P.(I) (COMM.) 360/2023 has been filed under Section 9 of A & C Act for interim measures of protection. It is proposed to dispose of both the petitions with the common order.
2. The facts in brief are that respondents no.1 to 4 are the borrowers of the petitioner alongwith M/s Nakoda Fruit Products Private Limited (*hereinafter referred to as 'Nakoda'*). M/s Nakoda Fruit Products Private Limited has been admitted into Corporate Insolvency Resolution Process (CIRP) vide order dated 13.10.2023 passed by the Ld. NCLT Mumbai. In terms of Section 14 of Insolvency and Bankruptcy Code, 2016, moratorium is operating against it, and therefore Nakoda has not been made a party.
3. The respondents have availed a Non-Housing Loan credit facility amounting to INR. 10,52,00,000/- (Rupees Ten Crore Fifty-Two Lakhs Only) for the purpose of business expansion of Nakoda from the Petitioner. The petitioner alleged that soon after the disbursement of the loan amount, the Respondents started defaulting in making payment of the Equated Monthly Instalments (EMIs). The respondents despite regular follow-ups and reminders failed to honour their repayment obligations under the Finance Documents and the repayment schedule. In view of the default, the loan account of the Respondents was classified as a Non-Performing Asset (NPA) on 14.12.2019. The



petitioner was therefore constrained to take legal actions/measures against the Respondents to recover its outstanding dues, including the recovery measures under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

4. The petitioner submits that as soon as the Petitioner initiated legal actions to recover its outstanding dues, the Respondents allegedly started disposing of their personal assets as well as the assets of Nakoda with the sole intent to frustrate the Petitioner and minimise its recovery.
5. The petitioner states that audited balance sheet of Nakoda, revealed that the respondents have entered into several questionable related party transactions of sale and advances to siphon off funds from Nakoda and transfer it to their related entities in which the Respondents hold interest.
6. The petitioner further submits that during the pendency of the Insolvency Petition of Nakoda, the Respondent No. 1 and 2, who were directors of Nakoda resigned from their respective directorship without informing/taking consent from the Petitioner, being the lender. The petitioner states that the said resignation was made for the sole reason that the Respondent No. 1 and 2 are promoter shareholders of a listed entity namely M/s Nakoda Group of Industries Limited and upon loan default of Nakoda, the valuation of their listed entity ought not to be impacted. The petitioner submits that the act of the respondent state that they have no intention to repay the outstanding loan of the Petitioner amounting to INR 17,52,52,409.65/- [Indian Rupees Seventeen Crores Fifty Two Lakh Fifty Two Thousand Four Hundred Nine And Sixty Five Paisa Only].



7. In O.M.P.(I) (COMM.) 360/2023 filed under Section 9, the petitioner stated that given the past conduct of the respondents wherein they have alienated/encumbered/transferred their assets/resources to frustrate the Petitioner and minimize its recovery, the Petitioner apprehends that the Respondents will sell/, alienate/transfer/ encumbering the said shares as held by respondents no.1 to 3 in Nakoda Group of Industries Limited. The petitioner submitted that if the shares are disposed of, then even if the petitioners succeed in the arbitral proceedings, it will be left with only a paper award and there would be no mean to recover the dues.
8. The petitioner submitted that Clause 10.08 of the agreement provides the arbitration clause. Learned counsel for the petitioner submitted that the jurisdiction in the agreement is at New Delhi. The petitioner submitted that the arbitration has been duly invoked vide notice dated 16.11.2023 under Section 21 of the A&C Act. The claim amount is stated to be around Rs. 17,17,45,884.27/-.
9. In ARB.P. 43/2024 filed under Section 11 of A & C Act, the petitioner submitted that the arbitration has duly been invoked and therefore an arbitrator may be appointed.
10. The respondents in reply to the petition under Section 9 of A & C Act submitted that the allegations made in the petition are unfounded and the petitioner has not filed the documents stating correct financial position. The respondents submitted that in fact in September 2018 the petitioner bank took over the loan from Bank of India. At the time of taking the loan, the respondents no.4 had deposited the title deed 'mortgaged property' i.e. Khasra No.119, P.H.No.33 admeasuring 7300 sq. meters (.73 HC) situated at Mouza Bidgaon, Tah Kampltee,



Dist.Nagpur. The respondent submitted that the petitioner vide its letter dated 29.09.2018 sanctioned the Loan against Property (LAP) to the borrowers for the total amount of Rs. 10,52,000,00/- [Ten Crores Fifty-Two Lakhs Only]. The petitioner submitted that the last trench of loan amount was paid on 31.05.2019. The respondents have denied the allegations of default being made by them. It has been submitted that the date of classification of loan account as NPA or event of default is a matter of dispute before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.1461 of 2023. The respondent submitted that they have been diligent in making the repayment of the loan amount. It was submitted that however during the month of June 2019 all the inventory of Nakoda Fruit was lost owing to an unfortunate event of fire breaking out at the factory premises, resulting into the loss of goods worth approximately Rs.10,00,000,00/- (Rupees Ten Crores only). The respondent submitted that yet the Nakoda Fruit did not deviate from its obligation of paying the instalment towards the payment of loan as reflected vide letter dated 09.08.2019 and 31.08.2019. The averments made in the reply indicate that there was a constant dispute regarding adjustment of EMIs towards FDRs of Nakoda Fruits. The respondent submitted that upon initiation of proceedings under SARFAESI, the petitioner took the symbolic possession of the mortgaged property and the same was put to sale auction notice. The respondent has also denied the allegations that the civil suit bearing RCS No.217/2013 before the learned Civil Judge Junior Division Nagpur was filled in collusion.



11. In respect of the resignation of respondents no.1, 2 and 3 from Nakoda, it has been submitted that the respondent no.1 submitted his cessation from the Directorship w.e.f. 25.11.2019, respondent no.2 submitted his cessation on 20.03.2019 and respondent no.3 submitted his cessation from 01.01.2019. The allegations made regarding the financial irregularities were also emphatically denied by the respondent. The respondents in their reply have explained each and every transactions alleged by the petitioner.
12. It has been submitted that the relief claimed are an analogous to order XXXVIII Rule 5 of CPC, 1908 seeking attachment, effectively which is not permissible under law. Reliance has been placed upon *Sanghi Industries Limited vs Ravin Cables Ltd* 2022 SCC online SC 1329. Learned counsel submitted that there is no material on record to show that the respondents are likely to defeat decree/award. Reliance has also been placed upon *Tahal Consulting Engineers India Pvt Ltd V/s Promax Power Ltd* reported as 2023 SCC Online Del 2069.
13. The petitioner in his rejoinder has submitted that the respondents have omitted to understand the contour of jurisdiction between Order XXXVIII Rule 5 CPC and Order XXXIX Rules 1 and 2 CPC. Learned counsel submits under Order XXXIX Rules 1 and 2 CPC the temporary relief can be granted on an imminent risk to the property in dispute in the suit being wasted by certain acts of the respondent. Reliance has been placed upon *“Prabha Surana vs. Jaideep Halwasiya MANU/WB/0416/2021”*. Learned counsel submits that order XXXVIII Rule 5 CPC applies at a later stage in a suit where the petitioner seeks to execute a decree. In regard to the encashment/ liquidation of the



fixed deposit placed as collateral security, the respondent submitted that the same were provided to the petitioner as security towards the loan which was a mandatory pre-requisite of the Loan Sanction terms. Remaining averments made in the written statement were also emphatically denied. Learned counsel for the petitioner submitted that unless an effective restrain order is passed in the petition under Section 9 of A & C Act there is every possibility that the petitioner bank would be left with nothing to realize the loan sanctioned to the respondents. Learned counsel submitted that in the financial year 2019-20 Nakoda Fruit had extended a loan of Rs.2,02,57,030/- to respondent no.4 which has not been recovered till date. It has further been submitted that the funds are being siphoned off to the related parties and EMIs were not paid on account of which loan was classified as NPA. It has further been submitted that Nakoda Fruit made a revenue of Rs.5,21,139.74/- in Financial Year 2020-2021 and in the year 2021-22 they made a meager revenue of Rs.3000/-. It is submitted that the advance payment made by Nakoda to its supplier in 2021 were Rs.77,94,000/- whereas in 2021-2022 it was Rs.1,05,17,000/-. It has also been submitted that Nakoda Fruit extended a loan of Rs. 33,00,000/- to the same entity despite meager income. It has been submitted that after declaring the loan account as NPA the respondent in order to frustrate the recovery of the petitioner have been systematically reducing and selling their stake in NGIL with the sole objective to render any judgment/decreed/arbitral award as a mere paper decree. Learned counsel submits that reliance on Sanghi Industries Limited (supra) and Tahal Consulting Engineers India Pvt Ltd. is misconceived and is not



applicable to the present facts and circumstances of the case. Learned counsel for the petitioner emphatically submitted that the loan facility is not disputed. The default by the respondent is also admitted. Learned counsel submitted that that the record shows that there is siphoning of the funds and therefore there is prima facie case in favour of the petitioner and the balance of convenience and likelihood of irreparable loss and injury is also in favour of the petitioner. Reliance has been placed on “*Essar House Pvt. Ltd. vs. Arcellor Mittal Nippon Steel India Ltd. [2022 SCC OnLine SC 1219]*”. Learned senior counsel for the respondent submitted that the petitioner is seeking restraint order in respect of the personal assets of the respondents no.1 to 4. Learned senior counsel submitted that the shares of NGIL being held by respondents no.1 to 4 are in their personal capacity and have nothing to do with the loan facility. Learned senior counsel submitted that in any case the dubious transaction have been alleged in the financial year 2020-2021, 2021-22 whereas the respondents no.1 to 3 have already resigned in the year 2019 itself. Learned senior counsel submitted that the petitioners have already taken the symbolic possession of the mortgaged property. Learned senior counsel further submitted that seeking attachment of the shares held by respondents no.1 to 3 in the company ‘M/s Nakoda group of companies’ travels to a domain of seeking attachment before judgement. Learned senior counsel also submitted that there is no material even *prima facie* to show that respondents no.1 to 3 have attempted to dissipate the assets/shares in a manner that is inimical to present dispute. Learned senior counsel has further submitted that since the petition under Section 11 has already



been filed, the matter be relegated to the learned arbitral tribunal to consider it in accordance with law.

14. In the present case, the agreement between the parties containing the arbitration clause has not been disputed. In the petition under Section 11 of A & C Act, the respondents have not disputed the appointment of a sole arbitrator for adjudication of dispute *inter se* the parties. Thus, in view of the agreement between the parties containing the arbitration clause, the arbitrable dispute between the parties and arbitration having been duly invoked, the matter is referred to the sole arbitrator for adjudication of dispute *inter se* the parties.
15. In so far as the petition bearing O.M.P.(I) (COMM.) 360/2023 filed under Section 9 of A & C Act is concerned, without going into the merits of the case, so as to not cause any prejudice to either of the parties, the petition O.M.P.(I) (COMM.) 360/2023 filed under Section 9 of A & C Act is converted into Section 17 of the A & C Act and the same is directed to be placed before the learned arbitrator. The learned arbitrator is requested to take up the application under Section 17 within two weeks and dispose it off as expeditiously as possible in accordance with law.
16. Both the petitions are disposed of the with the following directions:
 - i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
 - ii) Mr. Justice G.S. Sistani, Former Judge of the Delhi High Court (Mobile No. 9871300034) is appointed as an arbitrator.
 - iii) The remuneration of the learned Arbitrator shall be as the parties may agree with consultation of learned Arbitrator.



- iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- vi) The parties shall approach the learned arbitrator within two weeks from today.
17. The petition filed under Section 9 of the A & C Act is converted into petition under Section 17 of the A & C Act, however, till the time the petition under Section 17 is taken up by learned sole arbitrator, the respondents shall maintain the *status quo* in respect of the 'mortgaged property' or any property relating to the present loan transaction. The respondents may deal with their personal properties, however, they shall preserve the funds/assets to the extent of the loan amount only till the time the matter is taken up by the Learned arbitrator.
18. Learned arbitrator shall decide the application under Section 17 of A & C Act independently without being influenced by any direction passed by this court and may also modify/vary/recall the order passed by this court.
19. Both the petitions along with pending applications stand disposed of.

DINESH KUMAR SHARMA, J

MAY 8, 2024/rb/dg..