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Court : Delhi

Decided On : Sep-27-2016

Judge : The Honourable Dr. Justice S. Muralidhar

Appeal No. : ARB.A. No. 45 of 2015 & IA Nos. 18868 of 2015 & 6395 of 2016

Appellant : Sanjay Gambhir

Respondent : Bdr Builders And Developers Pvt. Ltd.

Advocate for Def. : Mr. Sanjay Goswami

Advocate for Pet/Ap. : Mr. Jayant Mehta

Judgement :

1. This appeal by Mr. Sanjay Gambhir under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (Act) is directed against the orderdated 18th July, 2015 passed by the Sole Arbitrator in two applications filed by the Claimants i.e., BDR Builders and Developers Pvt. Ltd. (BDR) in thearbitral proceedings under Section 17 of the Act initiated against the present Appellant apart from the Directors of Renaissance Buildcon Co. Pvt. Ltd. ('Renaissance')

2. The Appellant herein (who was Respondent No. 2 in the arbitral proceedings) is aggrieved to the extent that in the impugned order the learned Arbitrator has directed the Appellant including his legal heirs, assigns, nominees and agents etc. not to deal in any manner or sell, transfer, alienate or part with possession of all

and any movable and immovable assets in his power and possession or to which he may be personally entitled.

3. The background to this appeal is that two Memoranda of Understanding (MOUs) were entered into between Renaissance and BDR as first and second parties and the Appellant herein as third party on 6th and 7th February, 2009. By the first MOU dated 6th February, 2009, BDR agreed to advance to Renaissance a sum of Rs. 3 crores, out of which Rs. 35,00,000 was by cheque dated 5th February, 2009 and the balance by way of cash as loan against pledge/mortgage of the property being agricultural land measuring 38 Bigha 18 Biswa acres 15.366 acres located at village Rampur Kalan, Tehsil Rajpura, Punjab. The Appellant herein stood as guarantor of the said transaction. The loan for a period of six months commencing from the date of MOU i.e., 6 th February, 2009. Renaissance agreed to pay BDR compound interest @ 3.5% per month compounded monthly commencing from the date of advancing the loan till the date of actual repayment.

4. In order to secure the loan, the title deeds of the property were deposited with BDR. It was noted in the MOU itself that the mortgage deed for Rs. 35,00,000 had already been registered at the office of the sub-Registrar, Rajpura and that the MOU was the second charge on the property in addition to the registered mortgage deed. Para 5 noted the additional securities in the form of share transfer deed of the shares held by BDR in M/s DD Township Ltd. for Rs. 44,00,000, the original share certificate and letter of continuing guarantee of the Directors of Renaissance, the Appellant herein and their associates etc. The relevant paras 11 and 12 of the MOU reads as under:

"11. That in case the FIRST PARTY fails to pay the above loan amount on or before the due date of this MOU, the SECOND PARTY will become entitled to enforce any security or guarantee which the FIRST PARTY has furnished in favour of the SECOND PARTY and to realize the amount due from the same and the SECOND PARTY will have the right to own, dispose of the SAID PROPERTY as per its own choice the First Party is duty bound to complete the sale transaction in favour of the Second Party or its nominees to recover its dues in full or part, as due till date.

12. That Sh. Sanjay Gambhir stands personal continue guarantee for the said loan and in case of default the loan amount with interest will be recovered from the assets whether movable or immovable owned by Sh. Sanjay Gambhir.

5. The first MOU noted that the post dated cheques had been issued in favour of BDR by Renaissance in order to guarantee the repayment of the loan and that the cheque had been signed by DD Township Ltd., an associate company owned by the Appellant. It was further agreed that Renaissance and the Appellant herein would not question and challenge the MOU in a court of law.

6. The second MOU dated 7th February, 2009 was again entered into between the same parties. This time it was for a loan of Rs. 1.5 crores out of which Rs. 65,00,000 was advanced by cheque dated 6th February, 2009 and a balance of Rs. 85,00,000 by way of cash. To secure the said loan, the title deeds of the property measuring 52 Bigha 17 Biswa located in Village Kurdi, Tehsil Mohali, Punjab was deposited with BDR. The mortgage deed was also registered on 10th February, 2009 to secure the loan of Rs. 65,00,000. The same clauses of the first MOU were repeated in the second MOU. Here again, it was recorded that the post dated cheque was issued in favour of the lender by DD Township Ltd., an associate company owned by the Appellant.

7. The Appellant executed letters of continuing guarantee in respect of the aforementioned transactions on 6th and 7th February, 2009, respectively. It must be mentioned at this stage that the Appellant was, at the relevant time, the Director of DD Township Ltd. and Renaissance. The parties to the arbitration included not only BDR but DD Global Capital Ltd, another company of the Appellant as well as Mrs. Reena Gambhir, the wife of the Appellant and three other Directors of Renaissance i.e., Mr. Baldev Chand Bansal, Mr. Tejinder Kumar Bansal and Smt. Krishna Devi representing the Bansal Group , stated to be the majority shareholders controlling the affairs of Renaissance which was Respondent No. 1 in the arbitral proceedings.

8. The case of BDR is that the Appellant and his wife have defrauded their overseas investors in Renaissance and without authority entered into various deals and transactions including the aforementioned two MOUs and registered

mortgage deeds and corporate guarantees executed by them in favour of BDR. It is stated that certain proceedings before the Company Law Board (CLB) are pending against the Appellant, where the right of the Appellant to have executed the various documents including mortgage deeds in favour of the Respondent are being questioned. It is stated that on the application of the Appellant himself in the said proceedings before the CLB, a status quo order as regards the assets of the Renaissance including the assets mortgaged to the BDR has been passed.

9. On 30th November, 2013, a notice was issued on behalf of BDR by its counsel to the Bansal Group Directors, to Renaissance and to the Appellant and his wife, Mrs. Reena Gambhir. It was stated therein that by way of acknowledgment of receipt of loan of Rs. 5.2 crores, the Appellant and his wife, Rena Gambhir, had issued post dated cheques and receipts and that there was complete default in the repayment of loan and interest even in the first 6-months of the loan. A sum of Rs. 44 lakhs was paid towards interest in August 2011 by way of cheque dated 25th August 2011. Thereafter, despite several promises, neither the principal loan amount nor the interest thereon was paid. It was mentioned in the notice that it had come to the notice of BDR that Renaissance, the Appellant, and his wife had run up heavy debts. There were also civil and criminal cases pending against the Appellant, his wife and Renaissance. The assets of Renaissance and its other associate company were mired in disputes, attachments etc. before the CLB. The notice called upon the noticees to pay to BDR a sum of Rs.30,17,52,000 after giving credit of Rs. 1 crore against the foreclosure of the mortgage deeds dated 5th February, 2009 for a sum of Rs. 35 lakhs and 10th February, 2009 for a sum of Rs. 65 lakhs. It was stated that if the noticees failed to pay BDR a sum of Rs. 30,17,52,000 and to execute the formal sale deeds of the mortgage lands, then in terms of MOU dated 5th and 7th February, 2009, the disputes would be sought to be referred to arbitration for adjudication of the claims.

10. This was followed by a letter dated 23rd December, 2013 issued by BDR appointing Shri Bhimraj Achary as Reconciliator-cum-Arbitrator. On 27th October, 2014, an application was filed under Section 17 of the Act by BDR against Renaissance and others including the Appellant herein seeking, inter alia, to restrain them from selling, transferring, alienating or creating any third party rights

in any portion of the properties in question. On that date itself, the learned sole Arbitrator passed an interim order directing Renaissance to maintain status quo in respect of the mortgaged properties.

11. It must be noticed at this stage that there was also a prayer made to restrain the Respondents from creating third party rights or parting with possession of their personal assets movable and immovable including corporate shares and deposits etc. However, that interim relief was not granted by the learned Arbitrator.

12. This was followed by BDR filing a claim against Renaissance and others including the Appellant before the Arbitrator. Claim No. 1 was for declaration that BDR was the owner of the scheduled lands against the credit of a sum of Rs. 7,44,24,500 less Rs. 1 crore already granted to BDR after six months after the execution of the mortgage deeds. Claim No. 2 was for recovery of the balance amount being due under the MOUs dated 6th and 7th February 2009. Claim No. 3 was for pendent lite and future interest. Claim No. 4 was for costs.

13. While the arbitral proceedings were pending a second application under Section 17 of the Act filed by BDR in which, again, it was prayed that the Appellant and his wife should be restrained from parting with possession, encumbering, mortgaging or hypothecating all or any of their movable and immovable assets including shareholdings in the companies in which they are Directors, the details of which were mentioned in Schedule 1 and II of the application, it was also prayed that the Appellant and his wife should disclose on affidavit the details of all their movable and immovable assets.

14. In the reply filed by the Appellant, it was submitted that the claim itself was barred by limitation; that the Appellant has filed a counter claim against the sister concern of BDR for a sum of approximately Rs. 16.5 crores. It was stated that even assuming that the case of BDR was correct with respect to the mortgage deed which was only for a sum of Rs. 1 crore, the Appellant and his wife had a much larger counter-claim against BDR; that BDR had not produced any document/proof to show that a loan of Rs. 3.5 crores was given in cash to the Respondents and that having already been granted the status quo order dated 27th October, 2014 in respect to the property situated in Mohali, Punjab, the value

of which was more than sufficient to cover up five times the claim made by BDR, there was no need to pass any further interim order.

15. Both the applications under Section 17 of the Act were disposed of by the learned Arbitrator by the impugned order dated 18th July, 2015. The learned Arbitrator held that BDR had made out a prima facie case for grant of injunction as far as restraining Renaissance from creating in any manner third party rights, selling, transferring or alienating the properties which were subject matter of the mortgage deeds dated 5th and 10th February, 2009. The loan in any event was confirmed by Renaissance as well as other Respondents in the arbitral proceedings.

16. As far as the Appellant herein was concerned, it was observed by the learned Arbitrator in the impugned order that on account of the unwillingness of the Appellant herein to disclose the particulars of his personal assets, the Arbitrator was drawing an adverse inference that he was intending to evade the creditors and that there were no identified assets of the Appellant against which a restraint order could be passed. A restraint order was therefore being passed against the Appellant generally from creating third party rights, selling and transferring all his movable and immovable assets till such time he files the details of the same.

17. Mr. Jayant Mehta, learned counsel for the Appellant characterizes the impugned order as most extraordinary and unsustainable in law. According to him, there was no case made out for a blanket stay being granted against all the properties of the Appellant, both movable and immovable.

18. The appeal was first heard on 9th September, 2015, on which date Mr. Sanjay Goswami, learned counsel for BDR appeared on advance notice. Mr. Jayant Mehta, informed the Court that he would file an additional affidavit to show that the value of the mortgage properties was more than sufficient to cover the entire claim. Mr. Goswami, appearing for BDR then submitted that till the next date no precipitate action would be taken.

19. On the next date i.e., 16th September 2015, the Court noted that the additional affidavit in terms of the previous order dated 9th September, 2015 had not been

filed by the Appellant. The Court granted further period of ten days for this purpose. It was further directed that The affidavit shall also state whether the two lands mentioned in the petition are free from all encumbrances

20. Thereafter on 8th December 2015, the following order was passed:

"1. By way of instant appeal, the Petitioner seeks the setting aside of an order dated 18.07.2015 passed by the learned Sole Arbitrator. It is the petitioner's case that the arbitration proceedings were initiated in November, 2014 emanating from two MOUs dated 6th February, 2009 and 7th February, 2009 and loans and advances to the respondent are only to the extent of Rs. 2 crores.

2. Mr Jayant Mehta, learned counsel on behalf of the Petitioner, submits that : i) the impugned order fails to first examine whether there was a prima facie case made out for a security amount of Rs. 55 crores to be taken; ii) in so far as the lender s own balance sheet restricts the amountof the loan to only Rs. 1.26 crores, a claim by them to the extent of Rs. 55 crores is ex facie belied considering that one of the properties mortgaged to the lender is valued at a minimum of Rs. 25 crores; iii) that the impugned order is a blanket restraint order, freezing the entire assets of the petitioner, who was a guarantor to the loan transaction.

3. He further submits that the claim of the respondent is barred by limitation in terms of Clause 9 of the aforesaid two MOUs. The loan tenure was only six months therefore the plaint should have been preferred by 2012; but, the claim which was only filed in November, 2014, has been entertained by the learned arbitrator without even examining the maintainability of the plaint.

4. In reply, Mr. Kirti Uppal, Sr. Advocate submits that in a proceeding before the Company Law Board involving Renaissance Buildcon Company Private Limited, the present petitioner has admitted that one Mr. Baldev Bansal moved an application claiming ownership of 95% of the share holding of the said company; the said Mr. Bansal has also contended that the mortgage on the agricultural land was without due authority and against the Articles of Association of the company. Therefore, the valuation of Rs. 25 crores which is being propounded by the present petition would be of no consequence; iv) that Mr. Baldev Bansal wants to

be impleaded as a party in these proceedings as his interest could be prejudiced by these proceedings and finally v) that the petitioner has not responded to the application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 to implead Mr Baldev, Renaissance Buildcon Company Private Limited and all the parties involved in the arbitration proceedings.

5. Mr. Mehta, submits that in the Audited Accounts for the Financial Year 2011-12, the lender s entire amount advanced as loan is shown only as Rs. 1.26 crores therefore, their claim could only be an amount in its vicinity and surely not the Rs.55 crores as claimed in the arbitration proceedings.

6. Mr. Uppal seeks and is granted a week time to file an affidavit in this regard.

7. Renotify on 16th December, 2015.

21. Pursuant to the above order, an additional affidavit was filed by the Appellant on 4 th November, 2015, in which it was stated as under:

"4. I say that I had thereafter approached a government approved valuer namely D.D. Associates in Zirakhpur, Punjab for conducting a valuation of the property mortgaged with the Respondent. It is stated that the valuer has duly given its valuation report in respect of the parcel of land admeasuring 38 Bigha 18 Biswas belonging to Renaissance Buildcon company Pvt. Ltd. The valuer has come to the conclusion that the said land alone is worth approximately Rs. 25,01,27,000/- (Rupees Twenty Five Crores One Lakh and Twenty Seven Thousand Only). The said report conclusively establishes the claim of the Appellant. It is further stated that apart from the said land there is also another parcel of land admeasuring 52 Bighas 17 Biswa situated at Village Kurdi, Tehsil and District S.A.S Nagar, Mohali, Punjab which also quite valuable. The Appellant is also trying to obtain a valuation report in respect of the said parcel of land as well and shall place it on record as soon as the same is made available to the Appellant. A Copy of the valuation report of D.D. Associates is annexed hereto and marked as ANNEXURE A-1.

5. It is also pertinent to mention that the falsity of the claim of the Respondent is apparent from the duly audited balance sheets of both Renaissance Buildcon

Company Pvt. Ltd. and the Respondent Company. It is stated and submitted that the balance sheets of Renaissance Buildcon Pvt.Ltd. reflects a balance of only Rs. 1.26 crores from the Respondent for the year 2009-2014. Further the balance sheet of the Respondent for the year ending 2009-2014 mentions the same amount of Rs. 1.26 crores under the head advance to parties . Copies of the balance sheets of M/s Renaissance Buildcon Company Ltd. and the Respondent Company are annexed hereto and marked as Annexure A-2(Colly). The said balance sheets conclusively establishes the fact that the claim of the Respondent is completely dishonest, inflated and has been filed with malafide intentions.

6. I further state that there are no other encumbrances of the aforesaid two parcels of land.

22. The valuation report was enclosed with the affidavit. The copies of the balance sheet of Renaissance were also placed on record showing the affairs as on 31st March, 2008 - 31st March, 2012. In the balance sheet under the heading Current Liabilities the borrowing from BDR has been shown asRs. 1.26 crores for the year ending 31st March, 2009.

23. The affidavit also enclosed the balance sheets of BDR where under the title Long Terms Loans and Advances under para 11.1, the advances toparties were shown as Rs. 17,750,000 as on 31st March, 2011 and Rs. 12,625,000 as on 31st March, 2012.

24. Mr. Rajesh Gupta, Director of BDR first filed an affidavit dated 17th November, 2015, in which inter alia he annexed the balance sheet of BDR. Annexure-4 to this affidavit was a Group Summary for the period 1st April2008 to 31st March 2009 in which it was shown that a sum of Rs. 4.76 crores has been advanced to Renaissance and Rs. 1 crore to the Appellant through 'Associates'.

25. A second affidavit was filed by Mr. Rajesh Gupta on 15th December, 2015, in which it was stated in paras 3 to 6 as under:

3. That I have in my objection affidavit dated 17.11.2015 already annexed a copy of the balance sheet of the respondent company for the year 2008-2009 and the

company in the said balance sheet has shown its loans and advances as per the group summary under the head Loansand Advances, at page 139 of the said objections and has shown an amount of Rs. 4,76,00,000/- as advance to M/s Renaissance Buildcon Co. Pvt. Ltd.

4. That the respondent company is filing the balance sheets for the period 2008-2009 to 2013-2014 as Annexures A-1 to A-6 along with the present affidavit.

5. That in the said balance sheets the group summary of loans and advances, as are covered in the final balance sheet are also enclosed.

6. That I state that as regards the loans advanced to the company M/s Renaissance Buildcon Co. Pvt. Ltd. by the respondent company in all the balance sheets for the period 2008-09 to 2013 -2014, loans of Rs. 4,76,00,000 are shown to have been given to M/s. Renaissance Buildcon Co. Pvt. Ltd

26. The annexures to this affidavit also included a Group Summary onwhich the seal of the Chartered Accountant (CA) who audited the accountswas conspicuously absent.

27. By the order dated 18th January, 2016, Respondent Nos. 2 to 7 who were also parties to the arbitral proceedings were impleaded and notice was issued to them. On 26th May, 2016, a submission was made before the Court that the parties were open for settlement and, accordingly, the matter was referred for mediation. However, the mediation was unsuccessful.

28. This Court has heard the submissions of Mr. Jayant Mehta, learned counsel for the Appellant and Mr. Sanjay Goswami, learned counsel for the Respondent, learned counsel appearing for BDR Builders.

29. The two MOUs refer to a total sum of Rs. 4.76 crores as being advanced as loan by BDR to Renaissance. Of this, a total sum of Rs. 1 crore was given by cheques and the said amount was secured by two registered mortgages by deposit of the title deeds of the two properties referred to hereinabove. Therefore, the loan of Rs. 1 crore was fully secured. It must be noticed straightway that the impugned order in so far as it seeks to restrain Renaissance from altering the

status quo as regards the mortgage property is not sought to be challenged in the present appeal. That part of the order of the Arbitrator, therefore, does not call for any comment or interference. The subject matter of the present appeal is only in so far as the learned Arbitrator has, by the impugned order, restrained the Appellant in any manner from dealing with any of his assets both movable and immovable.

30. One of the submissions made by Mr. Jayant Mehta for which there was no satisfactory answer by BDR is that although both the MOUs referred to the fact that the loan to the extent of Rs. 3.76 crores was given by way of cash, not a single document is placed on record in the form of receipt or otherwise to show that, in fact, the said sum had been given in cash. Admittedly, there is no receipt to that effect. The reply of Mr. Goswami was that two MOUs themselves constitute proof of the sum having been advanced, coupled with the fact that post-dated cheques were issued by the Appellant in his capacity as the Director of D.D. Global in favour of BDR further prove the fact that the loan in cash to the extent of Rs. 3.76 crores was advanced. When a query was put to Mr. Goswami as to whether the said sum in cash was in fact advanced by BDR, Mr Goswami answered that it was given by the 'Associates' of BDR to Renaissance as well as the Appellant. In order to substantiate this plea, Mr. Goswami referred to the document titled Group Summary in which it was mentioned that the sum advanced through 'Associates that was Rs. 7.6 crores. This is not aconvincing reply. Who these 'Associates' are and why they have not come forward to recover the sums from Renaissance is not explained. In the face of the repeated denials by the Appellant that the aforesaid sum of Rs. 3.76 crores was advanced as a cash loan, it was incumbent on BDR as Claimant to even prima facie show that cash of Rs. 3.76 crores was in fact was advanced as loan. The entire claim is based on the two MOUs. Both the MOUs reveal that only Rs. 1 crore was advanced by way of cheque and the remaining by cash. When asked about the source of the cash, BDR conveniently explained it away saying that it was advanced through its Associates without naming those associates. Secondly, in the audited balance sheet of BDR as on 31st March 2011, a sum of only Rs. 1.26 crores is shown as loans and advances. This, therefore, probablises the case of the Appellant that in fact the actual loan amount was only 1.26 crores.

31. To the Court, it appears that through the arbitral proceedings, BDR is perhaps seeking to legitimize transactions involving unaccounted monies advanced by one party to the other in the form of cash, without disclosing the said amount in the audited balance sheet and, therefore, keeping it outside the scrutiny of the law. The Court cannot permit the arbitral proceedings to legitimize what appears to be a transaction which is outside the legal net. If a sum of Rs. 3.76 crores was being advanced as loan in cash, surely there must be some receipt executed by the borrower in favour of the lender. That important document is not available on record. The only document placed on record by BDR is titled Group Summary which,significantly, does not bear the stamp and seal of the CA. It is obviously not part of BDR's audited balance sheet.

32. The learned Arbitrator has not adverted to the above obvious aspects of the matter. With the loan amount shown in the MOUs having not been explained by any credible piece of evidence, the entire claim of BDR prima facie appears to be doubtful. Interestingly, the extraordinarily high rate of interest i.e. 3.5% per month compounded monthly is also not reflected in the loan amount shown as outstanding in the audited accounts of BDR.

33. The Appellant is also right in contending that the value of the mortgage property is more than sufficient to secure the loan amount of Rs. 1.26 crores.

34. Consequently, the blanket stay order restraining the Appellant from dealing with any of his properties, both movable and immovable, was uncalled for. The Court, accordingly, sets aside the said portion of the impugned order of the learned Arbitrator. It is clarified that this order having been passed at the interlocutory stage will not influence the final Award of the learned Arbitrator.

35. The appeal is allowed to the above limited extent with no order as to costs. The pending applications are disposed of.

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