

# Bandra Kurla Complex vs Mr. Damodar Bandekar (Borrower on 18 December, 2013)

**Author: R.D. Dhanuka**

**Bench: R.D. Dhanuka**

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION  
ARBITRATION PETITION NO.529 OF 2013

L & T Finance Limited, )  
a Company incorporated under the )  
provisions of The Companies Act, 1956, )

having its Registered Office at L & T )  
House, N.M.Marg, Ballard Estate, Mumbai)  
400 001 and Corporate Office at The )  
th  
Metropolitan 8 Floor, C-25/C-26, 'E' Block)

Bandra Kurla Complex, Bandra (East), )  
Mumbai - 400 051 ig )

..... Petitioner

VERSUS

1. Mr. Damodar Bandekar (Borrower) )

S/o. Mr.Surya Bandekar having his )  
address at S2, Bhardwaj Apartment, )  
Khadpabhandh, Main Road, Ponda, )  
Dist. North Goa, Goa - 403 401. )

2. Mr.Barkelo Gaonkar (Guarantor) )

s/o. Tilu Gaonkar, having his address at )  
H.No. 720, Santona, Karlalpal Dabal, )  
Sanguem, Goa - 403 706. ) ..... Respondents

Mr.Anand Poojari, a/w. Mr.Nilesh Gala, Mr.Ankit Shah, i/b. M/s S.I. Joshi & Co.,  
for Petitioner.  
Mr.Rohan Sawant, a/w.Mr.Nikhil Rajani, i/b. V.Deshpande & CO. for the  
Respondents.

CORAM : R.D. DHANUKA, J.

DATED : 18th DECEMBER, 2013

P.C.

By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, petitioner seeks interim measures. Some of the relevant facts for the kvm 12-ARBP529.13 purpose of deciding this petition are as under :-

2. On 5th October, 2011, petitioner and respondent no.1 entered into a loan cum hypothecation agreement by which petitioner sanctioned loan to the tune of Rs.70,52,000/- to the 1st respondent. Respondent executed demand promissory note in favour of the petitioner. Respondent no.2 executed deed of guarantee on 5th October, 2011.

3. It is the case of the petitioner that since the respondent committed default in making repayment of installments, petitioner issued demand cum termination notice on 21st January, 2013 and called upon the respondents to pay a sum of Rs.72,34,403/- outstanding as on 4th December, 2012 with further overdue compensation @ 36 % per annum from 5th December, 2012. There was no response

to the said notice of demand. Petitioner invoked arbitration agreement and has appointed an arbitrator.

4. Learned counsel appearing for the petitioner invited my attention to the loan cum termination agreement and also deed of guarantee. Clause 12 of the loan agreement provides for events of default. If the borrower fails to pay the loan installments, interest and all other monies payable or part thereof within the stipulated time whether demanded or not or any other charge or payment required thereunder within 7 days of their becoming dues, it would amount to an event of default.

5. Clause 13 of the loan agreement provides for consequences in the event of default. It is provided that on the occurrence of any of the events specified in clause 12, without any notice to the borrower, the lender shall have right to kvm 12-ARBP529.13 terminate the loan agreement, recover from the borrower the arrears of moneys due and unpaid on the date of termination and such other future installments for the unexpired period, had the said agreement continued, initiate legal action as available under the applicable laws, repossess, sell or otherwise dispose off/deploy the assets in such manner, as the lender may think fit. Under clause 14 of the said agreement, lender is also entitled to repossess of the assets.

6. Learned counsel submits that since respondents have committed default in making repayment, there was no response to the notice of the demand and since respondents have not filed any affidavit in reply, averments made in the petition are deemed to have been admitted. It is submitted that whereabouts and the condition of the assets hypothecated is not known. Learned counsel submits that the petitioner have good chances of succeeding in the arbitration and thus claim of the petitioner is required to be protected and this court shall be appoint as Court Receiver under section 9 of the Arbitration and Conciliation Act, 1996.

7. Learned counsel appearing for the respondents on the other hand submits that the loan cum hypothecation agreement and deed of guarantee are required to be stamped at the rate prescribed under the provisions of Maharashtra Stamp Act whereas both these documents are stamped at Rs.100/- and thus both these documents are inadmissible in evidence and this court thus cannot appoint receiver or grant any interim measures.

8. Learned counsel in support of his submission placed reliance on the judgment of Supreme Court in case of SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Co. Pvt. Ltd. reported in 2011 (4) Arb.LR 265 (SC) and in particular paragraph (12) thereof which reads thus :-

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12. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped:

(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon.

Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to Section 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the Respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the Respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

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(vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration.

9. Learned counsel also placed reliance on the unreported judgment of this court delivered by the Division Bench of this Court on 25th June, 2013 in Appeal (L) No. 272 of 2013 in case of Lakdawala Developers Pvt. Ltd. vs. Badal Mittal & Others and in particular paragraph (5) which reads thus :-

5. The objection in regard to the document being insufficiently stamped ought to have been considered by the learned Single Judge when the document came before the Court in the course of the proceedings under Section 9. A consideration of the issue could not have been deferred to the arbitration proceedings having regard to the provisions of Section 33(1) of the Bombay Stamp Act, 1958. Article 5(ga) of the Schedule relates to the stamp duty payable on an agreement or MOU where it relates to giving authority or power to a promoter or a developer by whatever name called for construction on, development of or sale or transfer (in any manner whatsoever) of any immovable property. Prima facie, the document would require stamping and has been insufficiently stamped having regard to the provisions of Article 5(ga) of the Schedule to the Bombay Stamp Act, 1958.

10. Learned counsel for the respondents then submits that this court has no territorial jurisdiction to entertain this petition as the loan agreement as well as all deeds of guarantees are executed at Goa. It is submitted that the borrowers as well as guarantors are residing at Goa. The suppliers who had supplied the hypothecated equipments have office at Bangalore. Learned counsel submits that since no cause of action has arisen within jurisdiction of this court, this court has no territorial jurisdiction to entertain this petition.

11. Learned counsel then submits that in the arbitration petition, the petitioner has not set out the details of the default alleged to have been committed by the respondents. It is submitted that no case is made out for appointment of the Court Receiver under Order 40 Rule 1 of the Code of Civil Procedure. The respondents are using the equipments in ordinary course of business and are bound to comply with their obligations to maintain and repair the assets in terms of clause 8 of the said agreement. Learned counsel placed reliance on the judgment of Madras High Court in case of T. Krishnaswamy Chetty vs. C. Thangavelu Chetty and others reported in AIR 1955 Madras 430 and in particular paragraph 13 thereof in support of his submission that unless the petitioner proves that prima facie it has excellent chance of success in arbitration proceedings and unless there is an element of danger, this court shall not appoint Court Receiver. Paragraph (13) of the said judgment reads thus :-

13. The five principles which can be described as the "panch sadachar" of our Courts exercising equity jurisdiction in appointing receivers are as follows :

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding : -- 'Mathusri v. Mathusri, (Z5); -- 'Sivagnanathammal v. Arunachallam Pillai', (Z6);

--'Habibullah v. Abtiakallah', (27); -- 'Tirath Singh v. Shromani Gurudwara Prabandhak Committee', (28); --'Ghanasham v. Moraba', (7.9); --'Jagat Tarini Dasi v. Nabagopal Chaki', (Z10);

-- 'Sivaji Raja Sahib v. Aiswariyanandaji',

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MANU/TN/0667/1915 : AIR 1915 Mad 926 (Z11); --

'Prasanno Moyi Devi v. Beni Madbab Rai', (Z12); --

'Sidheswari Dabi v. Abhayeswari Dahi', (213); -- 'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das', (Z14); -- 'Bhupendra Nath v. Manohar Mukerjee', (Z15).

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. -- 'Dhumi v. Nawab Sajjad All Khan', (Z16); -- 'Firm of Raghubir Singh' Jaswant v. Narinjan Singh', ; -- 'Siaram Das v. Mohabir Das', (Z18); -- 'Mahammad Kasim v. Nagaraja Moopanar MANU/TN/0529/1927 :

AIR1928Mad813 ; -- 'Banwarilal Chowdhury v. Motilal', MANU/BH/0210/1922 : AIR 1922 Pat 493.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. -- "Manghanmal Tarachand v. .Mikanbai', (221); -- 'Bidurramji v. Keshoramji', (Z22); --

'Sheoambar Ban v. Mohan Ban', (223).

(4) An order appointing a receiver will not be. made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking

possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful.

Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. -- 'Nilambar Das v. Mabal Behari', MANU/BH/0224/1927 : AIR1927Pat220 (Z24); -- 'Alkama Bibi v. Syed Istak Hussain', MANU/WB/0390/1924 :

AIR1925Cal970 ; -- 'Mathuria Debya v. Shibdayal Singh', MANU/WB/0419/1909 : 14 CWN 252 (Z26); -- 'Bhubaneswar Prasad v. Rajeshwar Prasad', MANU/BH/0090/1947 :

AIR1948Pat195 (Z27). Otherwise a receiver should not be appointed in supersession of a bona fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc.

12. In rejoinder, learned counsel appearing for the petitioner submits that judgment of the Supreme Court in case of SMS Tea Estates Pvt. Ltd. (supra) , and the judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd.(supra) would not apply to the facts of this case on the ground that the loan agreement as well as the deed of guarantee was executed at Goa and the stamp duty on those two documents at the rate applicable at Goa has been already paid. It is submitted that as and when these documents are brought to City of Mumbai, stamp duty payable under the provisions of Maharashtra Stamp Act would be applicable. Learned counsel invited my attention to clause 18.2 of the loan cum hypothecation agreement which provides that all costs, charges and expenses including the stamp duty in respect of the said agreement shall be borne by the borrower. My attention is invited to deed of guarantee and more particularly clause (1) thereof which provides that the guarantor had agreed to pay not only the sum payable by way of installment and interest but also fees, costs, charges and expenses, taxes, levies etc. and also costs of enforcement or attempted enforcement of payment by suit or otherwise in respect of the loan.

13. Learned counsel submits that respondents not having paid such stamp duty cannot take such plea before this court in this proceedings. In so far as issue of jurisdiction is concerned, learned counsel invited my attention to clauses 19.1 and 3.2 of the loan agreement. Clause 3.2 provides that all payments of the loan installments and other charges and moneys due under that agreement shall be payable by the borrower to the lender at the Corporate office, or at such other addresses as may be specified in the schedule thereto and shall be deemed to have been paid on the date on which the

amounts thereunder are realized.

14. It is submitted by the learned counsel that since part of the cause of action has arisen at Mumbai, this court has jurisdiction. It is submitted that loan was sanctioned from Mumbai.

15. In so far as issue of payment of stamp duty on the loan agreement as well as deed of guarantee is concerned, it is not in dispute that both these documents were executed at Goa. Stamp duty payable on both these documents at Goa has been already paid. As and when these documents are brought to the City of Mumbai and the petitioner seeks to place reliance on these documents for being admitted in evidence, difference in payment of the stamp duty would be payable on such documents according to section 18 of the Maharashtra Stamp Act within three months from the date of the document received in this State. Learned counsel kvm 12-ARBP529.13 appearing for the petitioner submits that so far the said documents is not brought to city. Statement is accepted. The question of payment of any deficit court stamp duty at this stage does not arise. Be that as it may, on perusal of clause (1) of the deed of guarantee and clause 18.2 of the loan agreement, it is clear that it is obligation on the part of the respondents to bear such expenses including stamp duty. This court after adverting to the judgment in case of SMS Tea Estates Pvt.

Ltd. (supra) , and the judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd.(supra), in case of Aditya Birla Finance Limited vs. Coastal Projects Limited in Arbitration Petition (L) No. 1603 of 2013 delivered by this Court on 29th October, 2013 has held that since the documents which was executed out of Maharashtra and stamp duty was already paid on such documents, according to the rates prevailing in that State, as and when the said document is received in this State, stamp duty can be paid within three months and thus reliance on such document can be placed in proceedings under section 9 at this stage. This court has also considered the similar provisions in that matter providing obligations on the part of the borrower to pay stamp duty. In my view, since both parties have acted upon loan agreements as well as deed of guarantee and since it was obligation on the part of the respondents to pay requisite stamp duty and having committed default, respondent cannot raise such objection in this proceeding. The judgment of the Supreme Court in case of SMS Tea Estates Pvt. Ltd. (supra) and the judgment of Division Bench of this court in case of Lakdawala Developers Pvt. Ltd.(supra) is thus distinguishable in the facts of this case. In my view, thus there is no merit in the submission of the learned counsel that both these documents cannot be relied upon or considered in this proceedings under section 9 herein for the aforesaid reasons. Paragraph 30 of the judgment of this court in case of Aditya Birla Finance Ltd. (supra) reads thus :-

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30. As far as submission of Mr.Shah that this Court cannot consider the documents relied upon by the petitioner for want of payment of differential stamp duty is concerned, in view of section 18 of Maharashtra Stamp Act, three months' time is provided from the date when such document is received in State for the purpose of payment of differential charge if any.



The said document has been received in this State in the month of September, 2013. The deficit if any, thus can be paid under section 18 of the Maharashtra Stamp Act within three months. In any event since it was obligation on the part of the respondent to pay such deficit if any, respondent cannot raise such objection before this court. In my view the judgment of Supreme Court in case of SMS Tea (supra) and order passed by Division Bench in case of Lakdawala Developers (supra) would thus not apply to the facts of this case. Learned Single Judge of this court in case of Marine Container (Supra) has held that even if a document is insufficiently stamped, it cannot be brushed aside at the stage of granting interim relief. Deficit if any can be paid by the parties as per provisions of the agreement.

16. In so far as issue of jurisdiction raised by the respondent is concerned, clause 3.2 read with clause 19.1 clearly provides that repayment of the loan installment had to be paid at the corporate office of the petitioner which is admittedly situated at Mumbai.

17. In paragraph (29) of the petition, it is averred by the petitioner that corporate office of the petitioner is situated at Mumbai where the petitioner has sanctioned and disbursed the loan facility to the respondent no.1. Respondent no.1 has executed demand promissory note at the registered office of the petitioner at Mumbai. It is stated that respondents had agreed and undertook to repay the loan amount at the corporate office of the petitioner at Mumbai. There is no affidavit in reply controverting the averments. This part of the cause of action has admittedly kwm 12-ARBP529.13 arisen at Mumbai. This court has thus jurisdiction to entertain this petition under section 9 of the Arbitration and Conciliation Act, 1996. There is no substance in the submission of the learned counsel that this court has no territorial jurisdiction to entertain this petition.

18. In so far as submission of the learned counsel that petition is devoid of any particulars about the default alleged to have been committed by the respondent is concerned, on perusal of the petition, it indicates that the petitioner has given details of the default committed by the respondents as well as break up of the amount claimed. Amount claimed by the petitioner as due from respondents which would be subject matter of arbitration is stated to be comprising of installment of Rs. 5,99,394/-, compensation charges, cheque bouncing charges and further loan installment with further compensation. A perusal of the demand notice also clearly discloses the nature of default committed by the respondents and the amount claimed to be due. Particulars of claim annexed to the petition also indicates the breakup of the amount due. There is thus no substance in the submission of learned counsel appearing for the respondents that petition is devoid of particulars. Upon making query, learned counsel for the respondent admits that it is not the case of the respondents that the respondents have not committed any default in making payment of the installment.

19. In so far as submission of the learned counsel that the petitioner has not made out a case for appointment of the Court Receiver and reliance placed upon the judgment of Madras High Court in case of T.Krishnaswamy Chetty (supra) is concerned, on perusal of the record, I am of the prima facie view that the respondents have committed default in making repayment of the installments. No reply is given by the respondents to the demand notice. No affidavit in reply is kwm 12-ARBP529.13 filed by the respondents to the arbitration petition. The averments made in the arbitration petition are thus deemed to have been admitted. Respondents have not offered to make

any payment in respect of the amount due even in court today.

Whereabout of the equipments and the prevailing condition thereof are not known. Under section 9 of the Arbitration and Conciliation Act, 1996 court is empowered to appoint the Court Receiver to secure the claim. Arbitration proceedings would take some time and thus petitioner who claims a sum of Rs. 72,34,403/- is required to be protected. Petitioner has good chances of succeeding in the arbitration.

Respondents claimed to be in use and occupation of the hypothecated assets without making any payment and thus the said property which is subject matter of the arbitration is required to be protected. The principles laid down by Madras High Court in case of T.Krishnaswamy Chetty (supra) is not in dispute. In my view, petitioner has made out a case for appointment of the Court Receiver. I, accordingly pass following order :-

(a) Court Receiver, High Court, Bombay is appointed as a receiver in respect of the equipment described in Ex.F to the petition with direction to the court receiver to appoint respondent as an agent of the Court Receiver on usual terms and conditions, on furnishing security and on payment of royalty.

(b) In the event, the respondent refuses to act as an agent of the Court Receiver within two weeks from the date of such offer, Court Receiver shall take forcible possession of the equipments and would submit a report to this court for further action.

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(c) Till Court Receiver takes possession, there shall be ad- interim injunction in terms of prayer clause (e).

(d) Petitioner is directed to approach the office of the court receiver for enforcement of this order within three weeks from today.

(e) Respondent is directed to disclose the location of the equipments to the office of Court Receiver as well as to the petitioner within three weeks from today.

20. Petition is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]