

**(2012) 03 BOM CK 0293**

**Bombay High Court**

**Case No:** Arbitration Petition No. 1181 of 2010

M/s. Kail Limited, (formerly  
known as Kitchen Appliances  
India Limited)

APPELLANT

Vs

M/s. Sahebrao Deshmukh,  
Co-operative Bank Ltd., M/s.  
Amber Electronics and Others

RESPONDENT

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**Date of Decision:** March 6, 2012

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 9

**Citation:** (2012) 6 ALLMR 932 : (2012) 3 MhLj 320

**Hon'ble Judges:** Anoop V. Mohta, J

**Bench:** Single Bench

**Advocate:** R.D. Soni assisted with Mr. M.A. Sayyed with Mr. V.R. Kasle instructed by M/s. Ram and Co, for the Appellant; Vijay M. Vaghela for Respondent Nos 2 and 4, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Anoop V. Mohta, J.

The Petitioner, a surety for a discounting facility granted to Respondent No. 2 firm, has invoked Section 9 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act, 1996), as the Respondent Bank decided to take recovery action against the Petitioner for realization of the amount as mentioned in tripartite agreement between the parties.

2. Admittedly the Petitioner stood as a guarantor in respect of the amount due by Respondent No. 2 to 4 to Respondent No. 1 Bank. Admittedly, the Respondent bank has issued notice u/s 101 of the Maharashtra State Co-operative Societies Act, (for short, the MCS Act) and initiated proceedings to recover the amount against the

Petitioner and Respondent No. 2 firm. Admittedly those proceedings have attained finality. The pre-attachment notice dated 1 February 2012 has been issued by the authority under the MCS Act, as all the parties, as well as, the transactions, as involved are same.

3. This Court on 28 September 2010 (Mr. S.J. Vazifdar, J), granted an interim relief in favour of the Petitioner and against the Respondent Bank by observing that the property described in prayer clause (c) should not be disposed of and alienate without leave of the Court. The Court in fact, recorded the pendency of the recovery proceedings u/s 101 of the MCS Act. The Court has in fact granted the liberty to the Bank to adopt the proceedings and to take steps for recovery based upon the said recovery proceedings.

4. The learned counsel appearing for the Respondents also raised objection that there is no Arbitration clause, as there was no difference of opinion in the tripartite agreement. The submissions were raised that in view of the present facts and circumstances their initiation of the Section 9 Petition, is not maintainable apart from the fact that there is no Arbitrable dispute.

5. The parties knowingly entered into commercial document. As there were defaults and on the date of filing of the present Section 9 Petition, the recovery proceedings were already initiated under the MCS Act, by such application the Petitioner instead of challenging those proceedings before the appropriate forum, sought the interim reliefs in this Petition. The bank has already invoked the MCS Act. Such Petition, in my view, u/s 9 is not maintainable. No relief can be granted to the parties by invoking the provisions of Arbitration Act by just overlooking, avoiding the basic documents and the contracts and the governing MCS Act for settlement of their dispute. On the date of filing of Section 9 itself, Section 101 proceedings were pending. The remedy lies elsewhere. Two parallel proceedings for the same cause of action and relief creates complication. The choice of forum to decide/settle the dispute by deliberately avoiding the pending statutory proceeding, is impermissible. Section 9 Petition cannot be permitted to invoke, to halt the statutory proceedings, initiated under the MCS Act. There is no question of two parallel proceedings on the same cause of action and basically on the guarantor against the bank and/or surety. The bank is entitled to file proceedings against the guarantor, as well as, the surety and/or the borrower. The Petition was not filed by the Company and/or the borrower-Respondents, though there is alleged arbitration agreement. The Petition, therefore, only at the instance of guarantor on the basis of the alleged agreement of Arbitration, pending the prior recovery proceedings under the MCS Act, in my view unsustainable and not maintainable.

6. Resultantly, the Petition is dismissed. The order/adinterim recorded on 28 September 2010 in para 4, also stands vacated. The parties are at liberty to take proceedings in accordance with law. There shall be no order as to costs.

7. The learned counsel appearing for the Petitioner seeks stay of this order. Considering the reasoning so given, and as such Petition is not maintainable and entertainable, in view of the finality to the initiated proceedings under the MCS Act, I am not inclined to grant stay of this order. The oral prayer is also rejected.