IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3342 OF 2014

M/s. Nuclear Healthcare Ltd ..Petitioner

Vs.

M/s Radiance Properties (India) Ltd. ..Respondents

Mr. G. S. Hegde for the Petitioner
Mr. Akhilesh Dubey a/w Mr. Vagish Mishra a/w Mr. Nishant Tripathi i/b M Tripathi & Co. for the Respondents

CORAM : R. M. SAVANT, J.
DATE : 19th AUGUST, 2015

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 6-2-2014 passed by the Learned Joint Civil Judge Senior Division, Thane, by which order, the application Exhibit 13 filed by the Petitioner original Defendant seeking leave to defend, came to be rejected. The said rejection is on the ground that the amount claimed in the Suit in question which is filed under Order XXXVII of the Civil Procedure Code is based on the Deed of Assignment dated 18-5-2011 and which is an amount claimed on the basis of the liability of the Petitioner to pay Service tax / VAT under the said Deed of Assignment.

2 Without burdening this order with unnecessary details, it would

suffice if reference is made to the relevant clause of the Deed of Assignment dated 18-5-2011 entered into between one Dynamic Realty (Pvt) Ltd. and the Petitioner herein to which the Respondent herein i.e. M/s. Radiance Properties (India) Ltd. formerly known as M/s Retroscape Infrasturcute Ltd., is a Confirming Party.

> "AND THIS INDENTURE FURTHER WITNESSETH THAT if any service tax / VAT become applicable in respect of transaction contemplated herein, then the same shall be paid and borne by the Assignees however, if any service tax, VAT or any other taxes becomes payable for the construction activities while completing the said building and obtaining BCC, the same shall be borne and paid by the Assignors and the Confirming Party only."

Hence in terms of the said clause of the Deed of Assignment which was entered into between the parties the liability to pay Service tax / VAT in respect of the transaction was that of the Assignee i.e. the Petitioner herein.

3 In so far as the consideration for the said transaction in question is concerned which has some significance, it is required to be noted that the total consideration was Rs.43 crores, out of which the amount of Rs.13 crores was to be paid by the Assignee i.e. the Petitioner to the Assignors i.e. Dynamic Realty Pvt Ltd. and an amount of Rs.30 crores was to be paid to the Confirming Party I.e,. the Respondent herein by the Petitioner who is the Assignee. In terms of

the said Deed of Assignment, the building was to be completed by the Respondent herein and was to be handed over to the Petitioner. The Respondent accordingly handed over possession of the building in question. However the Petitioner after making the payment of Rs.28 crores had kept an amount of Rs.2 crores out of the consideration amount to be paid to the Respondent i.e. Rs. 30 crores in an escrow account. The Respondent therefore by a letter dated 19-3-2012 called upon the Petitioner to pay the amount of Rs.2 crores on or before 31-3-2012. The said letter was replied to by the Petitioner by letter dated 22-3-2012 in which reply, the Petitioner mentioned that four works which have been mentioned in the said letter were not completed by the Respondent. The Petitioner therefore claimed an amount of Rs.4,42,30,685/- from the Respondent, which was the amount the Petitioner arrived at as payable by the Respondent to it till 21-3-2012 for the incomplete work and further delay in completion of the building. The said letter was responded to by the Respondent by its letter dated 2-4-2012 wherein it once again called upon the Petitioner to pay the said amount of Rs.2 crores which was the outstanding amount out of the consideration of Rs.30 crores payable by the Petitioner. A reminder was thereafter sent on 11-4-2012 wherein the Respondent denied its liability to pay any amount as claimed by the Petitioner. It seems that thereafter talks took place between the parties and ultimately resulted in the letter dated 16-4-2012 addressed by the Petitioner to the Respondent. It is recorded in the said letter that pursuant to the settlement which has taken place between the parties an amount of Rs.1,51,03,038/- was payable by the Petitioner towards the balance payment of the total consideration of Rs.30 crores. As indicated above, the Petitioner had made the payment of the total consideration except Rs.2 crores which was kept in an escrow account. It is out of the said Rs.2 crores that an amount of Rs.18,96,962/- and amount of Rs.30,00,000/- was deducted to arrive at the figure of Rs.1,51,03,038/- hence the said figure is the final figure which the Petitioner was required to pay as consideration to the Respondent out of the balance amount of Rs.2 crores, which was remaining to be paid to the Respondent.

4 It is pertinent to note that the said letter dated 16-4-2012 does not make any reference to the liability of the Petitioner to pay the Service tax / VAT in terms of the covenant contained in the Deed of Assignment. It is further required to be noted that the service tax / VAT was payable by the Petitioner as an Assignee in respect of the transaction. It is in view thereof that the Trial Court in the impugned order has adverted to the fact that in terms of the Deed of Assignment Service tax /VAT was payable by the Petitioner and hence defence taken up by the Petitioner to the Suit filed by the Respondent for recovery of the said Service tax / VAT already paid by it, could not be countenanced and hence leave to defend could not be granted.

5 The Learned Counsel appearing for the Petitioner sought to raise various contentions as regards the liability of the Petitioner to pay the said Service tax /VAT. In was the submission of the Learned Counsel that the amount of Rs.1,51,03,038/- was in full and final settlement of the amounts payable to the Respondent which included the Service tax / VAT. However a reading of the said letter dated 16-4-2012 and especially clause (d) thereof makes it clear that the amount of Rs.1,51,03,038/- was towards the consideration payable, as there is no reference to the liability of the Petitioner for the payment of Service tax / VAT which is payable by the Petitioner in terms of the covenant contained in the Deed of Assignment, the said liability of the Petitioner therefore continued. Hence the defence raised by the Petitioner / original Defendant does not raise any triable issue in the Suit. The order passed by the Trial Court refusing leave to defend therefore cannot be found fault with. Hence no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]