IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1235 OF 2014

Vijayraj R. Ranka ... Petitioner

vs.

M/s. Mark constructions and ors. ... Respondents

Mr. Mayur Khandeparkar a/w Mr. Chetan Mhatre i/b Utangale & Co., Advocate for the petitioner.
Mr. D. D. Madan, Senior Advocate a/w Ms. Mitaali Shah i/by Mr. Vaibhav Mehta & Associates, Advocate for respondents No.1 & 2.
Mr. S. L. Pawar i/by Mr. Jayesh A. More, Advocate for respondent No.3.

Coram : Smt. R. P. SondurBaldota, J.
Date : 16th November, 2015.

P.C. :

1. This petition filed under Section 9 of the Arbitration and Conciliation Act is for seeking the following two interim reliefs pending the parties proceed for arbitration.

> ***(i)*** *Appoint the Court Receiver, High Court Bombay as a receiver in respect of the property bearing C. S. No.34, of Tardeo Division with the building known as 'Jaiya Saifiyah Building' at Dorabji Mithaiwala Lane, Grant Road, Mumbai-400 007, more particularly described in the Schedule to the Exhibit 'M' hereto with all powers under order XL rule 1 of the Code of the Civil Procedure, 1908.*
>
> ***(ii)*** *Respondents or any other person claiming through or under them be restrained by mandatory order and injunction of this Honorable Court from in any manner dealing with, developing, encumbering or creating any third party rights or partying with possession of the said property bearing C. S. No.34, of*

> *Tardeo Division with the building known as 'Jamiya Saifiyah Building' at Dorabji Mithaiwala Lane, Grant Road, Mumbai-400 007 described in the Schedule to an Exhibit M hereto in any manner whatsoever.*

The submissions, however, advanced are only for the relief of injunction at prayer (ii) above.

2. The pleadings of the petitioner stated in brief are that he is a jeweller by business and also an investor. Respondent No.1 is a partnership firm, of which respondents No.2 to 4 are partners. They carry on business as Builders and Developers. In March-2011, the petitioner came in contact with the respondents and informed him about the project undertaken by them of redevelopment of an old building known as Rabbunnisa Manzil situate opposite Grant Road Railway Station (West). The society by name Saidunnisa Co-operative Housing Society Limited, formed by the tenants and the occupants of the building, had appointed respondent No.1 as the Developer for redevelopment of the property. Respondents further informed that they had entered into agreement for sale dated 12th February, 2010 with the co-owners of the property and were in the process of acquiring shares of the other co-owners for the purpose of redevelopment. The respondents convinced the petitioner to book a flat in the proposed building with an assurance that he would get good returns for the amounts invested in the said project. The petitioner then agreed to purchase residential flat admeasuring 650 sq. ft. having price at the rate of Rs.13,500/- per sq. ft. He made diverse payment therefor totalling to Rs.58,00,000/- during the period 2nd May, 2011 to 15th June, 2011. Four of the payments were made by cheque and the remaining five in cash. The payment made by cheque is of Rs.35,00,000/-. The respondents issued receipts for the payments made, some of which are signed by respondent No.2. Then the parties entered into Memorandum Of Understanding dated 21st July, 2011, which provided for return of the amount invested by the petitioner with interest in the event respondent No.1 failed to construct the building.

3. Later the petitioner realized that no progress was being made in construction of the building by the respondents. He further learnt that the respondents had diverted the amount received from the petitioner to purchase another property bearing C.S. No. 34 of Tardeo Division along with the building known as 'Jamiya-Saifiyah Building' at Dorabji Mithaiwala Lane, Grant Road, Mumbai. The building was purchased on 27th July, 2011 for the total consideration of Rs.77,00,000/- by respondent No.2 showing himself as the sole proprietor of respondent No.1. The petitioner alleges that there are police complaints filed against the respondents for the offences punishable under Section 406, 465, 468, 478, 420 r/w 34 of IPC by various persons in various police stations. During the course of investigation of those complaints the petitioner had been called on 9th October, 2012 by L. T. Road Police Station.

4. The petitioner alleges that from the entire conduct of the respondents it is clear that they are neither in a position to construct the building on the property shown to him and nor willing to refund the entire amount paid by the petitioner. At the same time, there is every likelihood that in order to deprive the petitioner from claiming his amount that respondents no.1 and 2 would deal with the property purchased by respondent No.1. The petitioner then by his advocate's letter dated 25th July, 2014 called upon the respondents, to refund the entire amount with interest. Respondents no.2 and 4 refused to even accept the letter. Respondents no.1 and 3 received the letter. Respondent no.3 replied that there are disputes inter-se the partners and denied his individual liability to refund the amount to the petitioner.

5. The application is opposed by respondent No.2 on behalf of himself and respondent No.1. Respondent No.3 has filed an affidavit supporting the claim of the petitioner and respondent No.4 has not appeared before the Court at all.

6. Respondent No.2 alleges in the affidavit-in-reply that the petitioner has come to the Court with completely false case as regards purchase of flat and execution of Memorandum of

Understanding. He alleges that the petitioner is, in fact, a moneylender by profession and had advanced a sum of Rs.58,00,000/- to respondent no.1. He has also suppressed material facts from the Court. According to respondent No.2, the true facts of the case are as follows. The petitioner had advanced a sum of Rs.25,00,000/- by three cheques dated 2nd May, 2011, 11th May, 2011 and 21st May, 2011, which amout was agreed to be repaid along with interest at the rate of 9% p.a. The fourth cheque given, dated 13th October, 2011, was not by the petitioner but by a third party. The receipts relied upon by the petitioner were issued by the respondents at the instance of the petitioner with a specific understanding that the same were towards security or guarantee for repayment of Rs.25,00,000/- along with the agreed interest at the rate of 9% p.a. The respondents contend that the MOU relied upon by the petitioner was also executed for the same purpose. The respondents point out that the receipts relied upon by the petitioner are not for payment made towards purchase of a single flat as claimed by the petitioner. The receipts refer to the payment made for booking seven flats i.e. Flats No.702, 703, 902, 903, 1002, 1102 and 1402. The petitioner, however, is claiming right only in respect of Flat No.702 and not any other flat.

7. Respondent No.2 refers to Cr. No.34 of 2012 for the offences punishable under Sections 406, 465, 468, 478, 420 r/w

34 of IPC registered against respondent no.2 with L. T. Road Police Station at the instance of respondent No.3. The statement of the petitioner was recorded therein on 10th October, 2012. In that statement he has described the transaction with respondent No.1 as a transaction of loan in a sum of Rs.35,00,000/- to be repaid with interest at the rate of 18% p.a.

8. The respondent No.2 has also raised certain preliminary objections to the petition filed. Undisputedly the MOU relied upon by the petitioner is an unregistered and unstamped document. According to respondent No.2, the document needs to be impounded and sent for adjudication to the Stamp Authority. It is only after the document is duly stamped and registered that the court would have jurisdiction to entertain the application. The second objection of respondent no.2 is that no steps have been taken by the petitioner to proceed for arbitration. It is pertinent to note that the present petition was filed in the month of August-2013 and till date the petitioner has not taken any step for appointment of Arbitrator. He has not filed any application under Section 11 of the Arbitration Act for the purpose. Thirdly it is contended by respondent No.2 that the relief sought by the petitioner is in the nature of relief of attachment before judgment. Therefore the petitioner must satisfy the requisite conditions of Order XXXVIII Rule 5 CPC to enable himself to claim the reliefs.

9. As regards the first objection Mr. Khandeparkar, the learned advocate for the petitioner submits that the fact that the document of MOU is not duly stamped and registered, need not prevent the petitioner from getting reliefs. According to him, the document may be impounded by the court and referred to the concerned authorities for adjudication for payment of stamp-duty and registration. In the meanwhile, the petitioner can be protected by continuing the ad-interim relief already granted to him. Mr. Madan, the learned Senior Advocate appearing for respondents no.1 and 2 submits in reply that the provision in law of impounding a document and sending the same over to the authorities for registration cannot be permitted to be misused by the petitioner. He points out that the petitioner has knowingly and deliberately filed the present proceedings with the knowledge that the MOU is neither adequately stamped nor registered. I am inclined to agree with Mr. Madan on the submission advanced. The petitioner was well aware that the document on which he seeks to rely upon is an unregistered document and it was necessary for him to take the required steps before using the document as a foundation of the proceedings. He cannot be permitted to take advantage of his own wrong in the manner suggested.

10. As regards the failure on the part of the petitioner in invoking arbitration Mr. Khandeparkar submits that the petitioner had, in fact, invoked arbitration by the letter dated 17th January, 2015, by calling upon the respondents to proceed for arbitration of the dispute by appointing the retired Chief Justice of the Allahabad High Court as the sole Arbitrator. He alleges that the respondents had refused to accept the arbitration notice. He tenders copy of the notice along with the report of service. Perusal of the document of report of service shows that the letter addressed to respondent no.1 alone had returned as not having been accepted. Therefore the complaint that none of the respondents accepted the notice is false. As regards respondents no.2 and 3 the petitioner produces acknowledgements of receipt. The acknowledgements show that though the addresses of respondents no.2 and 3 are different the acknowledgements were signed by the same person on the same date and at the same time. The date of receipt mentioned on both the acknowledgements is of 19th January, 2015 and the time is of 11.57 am. Taking into account the considerable distance between the residences of respondents no.2 and 3, it is impossible that both were received by the same person on the same date and at the same time. Therefore, the acknowledgements of receipts on behalf of respondents no.2 and 3 produced by the petitioner cannot be believed. As regards respondent no.4 the acknowledgement shows that he was not available at the time of delivery of the notice. Therefore, the service upon respondent no.4 can also be accepted as proper service. In any case Mr. Madan points out that thereafter i.e. after the month of January-2015 the petitioner has not taken any further step to initiate arbitration by filing appropriate application under Section 11 of the Arbitration Act. In these facts of the case, I find substance in the argument of Mr. Madan that the petition has no serious desire to proceed for arbitration of the dispute and therefore does not deserve any interim protection.

11. It is the specific allegation of respondent no.2 that the petitioner is guilty of suggestio falsi and suppressio veri. This allegation has virtually not been dealt with by the petitioner. There is no explanation afforded for not disclosing the material facts pointed out by respondent no.2. The only argument advanced by Mr. Khandeparkar on the admissibility of the statement of the petitioner recorded by the police during investigation. The statement discloses that the transaction with the respondents was a loan transaction. He submits that Section 162 of the Criminal Procedure Code bars use of the statements recorded by the police in evidence. There can be no merit in the submission advanced since the bars under Section 162 Criminal Procedure Code is against using “in any enquiry or trial in respect of any offence under investigation at the time when such statement was made” and not any other proceedings.

12. Perusal of the proceedings indicates that there is apparent collusion between the petitioner and respondent No.3, who has filed an affidavit to support the case of the petitioner. There is no averment in the petition that no property of respondent No.3 is available for the proceedings for satisfying the claim of the petitioner in the event he succeeds in his claim against respondent No.3. In the circumstance, the petition is dismissed. The request of continuation of ad-interim reliefs is rejected.

[Smt. R. P. SondurBaldota, J.]