

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 273 OF 2009**

Smt. Vinanti Ratnakar Gaonkar,
residing at Gurudatta Building, 3rd
Floor, Dr. Dada Vaidya Road,
Panaji, Goa. Petitioner

Versus

1. Shri Sahajanand Investments
Private Limited, acting
through its Director, Mr.
Rasiklal Mohanlal Gangani,
residing at Galaxy Building,
Panaji, Goa.
2. M/s Landscape Developers,
represented by its Partner,
Mr. Dinar Tarcar, residing at
Betim, Bardez, Goa. Respondents

Mr. S. Lotlikar, Senior Advocate with Mr. H.D. Naik,
Advocate for the Petitioner.

Mr. A.F. Diniz, Advocate for Respondent No. 1.

Mr. L. Raghunandan, Advocate for Respondent No. 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 11th JULY, 2016

PRONOUNCED ON:- 14th JULY, 2016

JUDGMENT:

By this petition, the petitioner is challenging the common order dated 07.04.2009, passed by the learned Principal District Judge, Panaji in Execution Application Nos.9/2008 and 12/2008. By the said order, the Execution Application No. 12/2008, filed by the petitioner is rejected, while Execution Application No. 9/2008, filed by respondent no. 1, has been allowed. Consequently, it has been directed that the judgment debtor no. 2 i.e. M/s Landscape Developers shall hand over and transfer the suit flat to Shri Sahajanand Investments Private Limited, after receiving the payment of the amount due, under the award.

2. The brief facts are that the respondent no. 1- Shri Sahajanand Investments Private Limited, has executed an agreement with the petitioner-Vinanti Gaonkar, under which the petitioner had agreed to

purchase suit flat no. 523 for a total price of Rs.13,00,000/-. M/s Landscape Developers was a confirming party to the suit flat. As disputes and differences arose between the parties, the matter was referred to the learned Arbitrator, in which respondent no. 1- Shri Sahajanand Investments Private Limited was the claimant, while the petitioner-Vinanti Gaonkar was respondent no. 1 and M/s Landscape Developers was respondent no. 2. The learned Arbitrator passed an award on 07.11.2005. The operative part of the award reads thus:

"The claimant's prayer for declaring null and void and ordering the cancellation of the agreement is dismissed. The allegation of the respondent no. 1-Vinanti that, at the time of execution of the agreement she paid to the claimant Rs.5,20,000/- in cash is not acceptable. The same respondent no. 1-Vinanti, not being a defaulter, is entitled to execute the sale deed or any other instrument transferring

the title of the suit flat to her name on paying Rs.12,75,000/- to the claimant and Rs.80,000/- to the respondent no. 2. The claimant and the respondent no. 2 shall hand over the possession of the flat and the respective parking slot, on receiving the said amounts and executing the sale deed or other documents conveying the flat and the parking slot to the respondent no. 1. In case the respondent no. 1 fails to pay the said amount within 15 days from the date of this award, the claimant will be entitled to send her a notice terminating the agreement or, in case they are still willing to execute the agreement with the respondent no. 1, the respondent no. 1 shall pay the principal of Rs.12,75,000/- accrued with interest at the rate of 18% p.a. on the said principal amount from the date of expiry of the said period of 15 days."

3. It appears that on 09.11.2005, the

petitioner addressed a notice to respondent no. 1 requesting to intimate the date, time, place and the manner in which the payment can be effected, within 15 days, which time was to expire on 22.11.2005 and further calling upon the respondent no. 1 to execute the sale deed in respect of the suit flat. The respondent no. 1 neither issued any reply nor complied with the request as made in the notice. Eventually, the petitioner filed Execution Application No. 12/2008 on 21.12.2005 for getting the sale deed executed, while the respondent no. 1 filed Execution Application No. 9/2008.

The learned District Judge in the impugned order found that the petitioner has failed to pay the amount of Rs.12,75,000/- to respondent no. 1 and Rs.80,000/- to respondent no. 2, in terms of the award and that the respondent no. 1 has already terminated the agreement and thus, the question of executing the sale deed on payment alongwith interest at the rate of 18% on the principal sum,

does not arise. In that view, of the matter the execution application filed by the petitioner, was rejected, while the one filed by the respondent no. 1, was allowed.

4. I have heard Mr. Lotlikar, the learned Senior Counsel for the petitioner, Mr. Diniz, the learned Counsel for the respondent no. 1 and Mr. Raghunandan, the learned Counsel appearing for the respondent no. 2.

5. It is submitted on behalf of the petitioner that the petitioner promptly, after passing of the award had sent a communication to the respondent no. 1 on 09.11.2005, asking the respondent no. 1 the date, time and place, where they can be contacted and also the manner in which, the payment can be effected. It is submitted that the respondent no. 1 thus, now cannot claim that there was non compliance of the terms of the award. It is submitted that the

award does not prescribe the mode and the manner of the payment of Rs.12,75,000/- and as such, the petitioner was justified in asking the manner in which the payment can be effected. It is submitted that this would amount to a valid tender and the learned District Judge was in error in holding that the petitioner had failed to pay the amount of Rs.12,75,000/- to the respondent no. 1 and Rs.80,000/- to the respondent no. 2. The learned Counsel has pointed out that the respondent no. 1 had not accepted the award, as it was challenged by the respondent no. 1 before the learned District Judge under Section 34 of the Arbitration and Conciliation Act, 1996, (the Arbitration Act, for short), which challenge was subsequently withdrawn. It is submitted that the proceedings before the learned Arbitrator and the consequent passing of the award cannot be equated to a Court proceeding, in as much as the petitioner cannot deposit the amount, unlike in the case of a decree before the Court. He

therefore, submits that the respondent no. 1 cannot take the benefit of his own act of not intimating the petitioner, the manner in which the payment is to be made.

6. On the contrary, it is submitted by the learned Counsel for the respondent no. 1 that there is neither payment nor tender of the amount, as such, under the award and the petitioner is not entitled to get the sale deed executed. The learned Counsel submits that the petitioner has failed to abide by the conditions of the award and thus, it has been rightly held that she is not entitled to get the sale deed executed.

On behalf of respondent no. 1, reliance is placed on the decision of the Supreme Court in the case of **P.R. Yelumanai Vs. N.M. Ravi, 2015(3) Bom.C.R. 319** and the decision of this Court in the case of **Mr. Guna Krishna Gauns Vs. Mr. Antonio Joao Braganza and Others** in First Appeal No. 189/2005

decided on 15.12.2008 and **Amarjeet S. Vidhyarthi Vs. Sushiladevi K. Pillani, 2002(2) Bom.C.R. 694** and the decision of the Allahabad High Court in the case of **Salik Ram Upadhia Vs. B. Jai Gopal Singh**, in First Appeal No. 123/1949 decided on 24.11.1954. He submits that the impugned order does not call for interference.

7. The learned Counsel for respondent no. 2 has supported the impugned order on similar grounds.

8. In reply, it is submitted by Mr. Lotlikar, the learned Senior Counsel for the petitioner that the cases relied upon would not be applicable, as there were cross obligations arising between the parties, which is not the case herein. It is submitted that the petitioner had done all that was within her powers to comply with the terms of the award.

9. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

10. In terms of the award, the following position is clearly discernible:

(i) The petitioner was entitled to get the sale deed executed, transferring the title of the suit flat in her name on paying Rs.12,75,000/- to respondent no. 1 and Rs.80,000/- to respondent no. 2. This payment was to be made within 15 days from the date of the award.

(ii) On such payment being made and on execution of the sale deed, the respondent no. 2 was to hand over the possession of the flat and the respective parking slot to the petitioner.

(iii) In the event of failure to pay the said amount within 15 days, by the petitioner, there was an option given to the petitioner, namely:

(a) To terminate the agreement, or
(b) To execute the conveyance, in which case, the petitioner was liable to pay the principal amount of Rs.12,75,000/- alongwith interest at the rate of 18% per annum from the date of the expiry of the said period of 15 days, till actual payment.

11. It can thus be seen that what was contemplated under the award was "payment", of Rs.12,75,000/- to the respondent no. 1, within 15 days of the passing of the award. The award having been passed on 07.11.2005, the period of 15 days was to expire on 22.11.2005. Undisputedly, this amount has not been paid to the respondent no. 1. The only question is whether the notice dated 09.11.2005 sent by the petitioner to the respondent no. 1 can amount to such payment and/or tender of the amount. Before considering that, it is necessary to note that the

said award was challenged by the respondent no. 1 under Section 34 of the Arbitration Act, on 15.09.2006. Thus, there was no stay operating to the said award (as at the relevant time, mere filing of the objection under Section 34 of the Arbitration Act would operate as stay), till 15.09.2006. Subsequently, the said objection was withdrawn. It is not disputed that the respondent no. 1 has terminated the agreement in terms of the award.

12. Coming back to the question of payment, the petitioner has stated in the notice dated 09.11.2005 that she was ready and willing to pay the amount of Rs.12,75,000/- to respondent no. 1 and Rs.80,000/- to respondent no. 2 as per the said award. It would be worthwhile to reproduce the relevant part:

"Since I have been directed to pay the amount of Rs.12,75,000/- from 15 days from the date of award to you, I hereby wish to inform you that I am ready and willing to pay the amount of Rs.12,75,000/- as per the

said award. Furthermore, I also wish to inform you that I am entitled to get the Sale Deed in respect of the suit flat executed in my favour by paying the said amount of Rs.12,75,000/- to you and Rs.80,000/- to respondent no. 2 M/s Landscape Developers.

In view of the above, you are requested to intimate the date, time and place when I can contact you and the manner in which payments can be effected to you within a period of 15 days which expires on 22nd November 2005 and further to execute the Sale Deed in respect of the suit flat.

Incase no reply to this notice is received, then I shall not be responsible to pay interest at the rate of 18% p.a. as awarded. Once again my client reiterates and informs you that she is ready and willing to act in the terms of the

Award dated 07/11/2005.

Kindly treat this as urgent as the time limit prescribed for executing Sale Deed and making payments is only 15 days, which expires on 22/11/2005.

Trusting that you will in accordance with the Award and oblige."

13. It is thus evident that at the highest, the said notice would show that the petitioner was ready and willing to pay the amount. By no stretch of imagination the said readiness and willingness can amount to actual payment of the amount or even its tender. It is apparent that under the award, there were mutual rights and obligations created, which were contingent upon such payment being made within a period of 15 days. It is necessary to emphasize that the failure on the part of the petitioner to pay the amount within the stipulated time of 15 days has, the effect of the respondent no. 1 getting an

option either to cancel the agreement or to abide by the same. In the later case, the petitioner was under obligation to pay Rs.12,75,000/- alongwith interest as stipulated. Thus, it can be seen that the payment of the amount within 15 days is a material condition of the award, which has attained finality. It is obvious and as rightly found by the Executing Court, that it could not have gone behind the award. I am unable to persuade myself to hold that issuance of notice dated 09.11.2005 would tantamount to payment of the amount or even its tender. The failure on the part of the respondent no.1 to intimate the manner in which the payment is to be made, cannot convert mere willingness to pay into either tender or payment of the amount. This is not a case wherein the Executing Court, was considering the grant of any equitable relief, in which the conduct of the parties would assume significance. The question was essentially, whether the conditions of the award are satisfied or not.

It is true that the petitioner had promptly issued the notice i.e. two days after passing of the award and putting the respondent no. 1 on notice that the matter is urgent as the time is expiring on 22.11.2005. However, that itself would not be sufficient to hold that the petitioner had done all that was within her powers. The petitioner could have sent a cheque or a demand draft to the respondent no. 1, which is not done. A mere willingness to pay cannot be equated to actual payment or its tender.

14. In the case of **P.R. Yelumanai** (supra), the last date for the deposit of the amount of the balance consideration was 26.05.2007 and as 26.05.2007 and 27.05.2007 were holidays, the amount was therefore required to be deposited by 28.05.2007 i.e. on the reopening day. However, the deposit was made on 29.05.2007. In the face of a day's default, it was held that the petitioner had failed to comply

with the decree and the suit stood dismissed automatically. Here is a case where the amount is still unpaid.

15. In the execution application filed by the petitioner, she is seeking execution of the sale deed on payment of Rs.12,75,000/- alongwith interest as awarded. However, as noticed earlier in the event of failure on the part of the petitioner to deposit the amount within time, there was an option given to the respondent no. 1, either to cancel the agreement or to execute the sale deed and the respondent no. 1 has already cancelled the agreement on 07.10.2006. In any event, the petitioner having failed to deposit the amount within 15 days cannot claim the benefit of the said stipulation, which was only at the option of respondent no. 1 and not otherwise. For this reason, I do not find that any case for interference is made out.

In the result, the petition is hereby

dismissed. Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

JUDGMENT CONTINUED:

At this stage, the learned Counsel for the petitioner requests that the interim stay, which was operating during the pendency of the petition, may be extended for a period of six weeks.

On hearing the learned Counsel for the parties, the interim stay shall continue for a period of six weeks from today.

C. V. BHADANG, J.

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