

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.19 OF 2014

Adlabs Entertainment Ltd.

...Appellant.

Versus

Bharat Lekhraj Harwani

And Ors.

...Respondents

....

Mr.Chirag Kamdar a/w. Ravi Suryawanshi, Mansi Nair, Advocate for the Appellant.

Mr.S.C. Naidu i/b. Sangramsinh Yadav, Advocate for respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 08th JUNE, 2017

P.C.

1. Heard Mr.Chirag Kamdar, learned counsel for the appellant and Mr.S.C. Naidu, learned counsel for respondent No.1, at length. Despite service, none appears for respondents No.2 and 3.

2. By this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'Act'), the appellant has challenged the judgment and order dated 12.4.2013 passed by the learned Arbitrator below application No.1/2012 filed by the first respondent under Section 17 of the Act. By that order, the

learned Arbitrator partly allowed the application made by the first respondent and insofar as the present controversy is concerned held that the transactions of purchase made by respondents No.3 & 4, namely, M/s. Dreampark, a partnership firm and Adlabs Entertainment Limited, with respondents No.1 & 2, namely, Mr. Rajendra Ramvilas Jakhotia and Mr. Maruti Shankar Patil, in relation to the land admeasuring 65 Acres mentioned in paragraph-5 and referred to in Annexure-A to the Memorandum of Understanding (for short, 'MOU') dated 22.4.2008, shall be subject to the result of the arbitration proceedings. The parties shall hereafter referred to as per their status before the learned Arbitrator. The relevant and material facts giving rise to filing of present Appeal, briefly stated, are as follows.

3. Respondent No.1/claimant had instituted Special Civil Suit No.212/2011 against respondent No.2 herein Mr. Rajendra Ramvilas Jakhotia (defendant No.1), respondent No.3 Mr. Maruti Shankar Patil (defendant No.2) and M/s. Dreampark (defendant No.3) it is common ground between the parties that defendant No.3 merged in appellant Adlabs Entertainment Limited (defendant No.4). Respondent No.1 had instituted the suit *inter*

alia praying for declaration, specific performance and perpetual injunction. The plaintiff/claimant claimed specific performance of the M.O.U. Dated 22.4.2008 executed between respondents No.1 and 2 and also challenged the transactions executed between respondents No.1 and 2 and others in respect of the property covered by M.O.U. Dated 22.4.2008 as null and void and for cancellation of said transactions.

4. During pendency of the suit, the claimant filed application at Exhibit-5 for temporary injunction which was rejected by order dated 4.5.2011. Aggrieved by that decision, the claimant preferred Appeal From Order No.1015/2011 in this Court and by consent of the parties, by order dated 12.4.2012 Hon'ble Mr. Justice V.C. Daga (Retired), a former Judge of this Court was appointed as Arbitrator and the parties were referred for arbitration. The learned Arbitrator was requested to decide the application taken out by the claimant for interim relief uninfluenced by the observations made and findings recorded in the order dated 4.5.2011. By the impugned order, the learned Arbitrator held that the transaction of purchase made by respondents No.3 and 4 with respondents No.1 and 2 in relation to the land admeasuring 65 Acres mentioned in paragraph-5

and referred to in Annexure "A" to the M.O.U. dated 22.4.2008 shall be subject to the result of the arbitration proceedings. Respondent No.4 is aggrieved by this direction and against that the present appeal is preferred.

5. In support of this appeal, Mr. Kamdar strenuously contended that the learned Arbitrator was not justified in directing that the transactions in question shall be subject to outcome of the arbitration proceedings particularly when *prima facie* finding was not recorded that the claimant would be entitled to specific performance of the M.O.U. dated 22.4.2008. He submitted that respondent No.4 is a bonafide purchaser for value without notice. In other words, respondent No.4 was not aware of the M.O.U. dated 22.4.2008 entered into by and between the claimant on one hand and respondents No.1 and 2 on the other. He submitted that respondents No.1 and 2 are agriculturists and they have also purchased agricultural lands from the agriculturists. Respondents No.1 and 2 in turn sell the land so purchased to the prospective purchasers. It is the case of the claimant that he agreed to purchase two sets of land from respondents No.1 and 2, namely, one set consisting of 65 Acres of land and other consisting of 105 Acres and claims to have

paid Rs.2 Crores to respondents No.1 and 2 out of total consideration of Rs.18,50,00,000/-. He submitted that insofar as the land admeasuring 105 Acres is concerned, the learned Arbitrator did not grant any relief in favour of the claimant as is evident from paragraph-33 of the impugned order. He invited my attention to paragraph-34 wherein the learned Arbitrator observed that respondents No.1 and 2 were prepared to refund the amount of Rs.2 Crores to the claimant. Said offer was made on 25.12.2010, 5.1.2011 and 10.1.2011. The amount was received by the respondents No.1 and 2 against the M.O.U. dated 22.4.2008. The learned Arbitrator, therefore, observed that almost for a period of 32 months and even on the day of passing of the impugned order, said amount was used by respondents No.1 and 2. Under these circumstances, it would be in the interest of justice to preserve the amount paid by the claimant by directing respondents No.1 and 2 to furnish security. He submitted that the claimant mainly claimed relief of specific performance and in the alternate claimed compensation. The learned Arbitrator secured the payment of Rs.2 Crores by directing respondents No.1 and 2 to furnish security. The learned Arbitrator was therefore not justified in

directing that the transaction of purchase made by respondents No.3 and 4 with respondents No.1 and 2 shall be subject to the result of the arbitration proceedings. The learned Arbitrator secured the amount of Rs.2 Crores paid by the claimant to respondents No.1 and 2 that was essentially in lieu of the relief of specific performance. As the claim of the claimant was secured by that direction, the learned Arbitrator was thereafter not justified in making the transaction in respect of 65 Acres subject to result of the arbitration proceedings. He, therefore, submitted that the direction issued by the Arbitrator about making the transaction by respondent No.4 with respondents No.1 and 2 subject to the arbitration proceedings may be set aside.

6. On the other hand Mr. Naidu invited my attention to the public notice dated 24.11.2010 issued by Hariyani and Company, Advocates & Solicitors. He submitted that perusal of said public notice shows that the notice was issued inviting objections as regards the properties at Sr. Nos.1 to 11 owned by S/Shri. Bharat K. Shah, Ashish N. Shah, Ravindra Ramvilas Jakotiya and Maruti Shankar Patil. He submitted that though the transfer in respect of some of the lands was already effected

before issuing Public Notice, still by that Notice objections were invited. He submitted that some of the lands were purchased in the years 2008 and 2009. The Public Notice was merely an eye wash when some of the lands were already purchased. Some of the lands purchased by respondents No.3 and 4 are part and parcel of 65 Acres forming part of Schedule A of M.O.U. dated 22.4.2008. He submitted that the learned Arbitrator has considered this aspect.

7. Mr. Naidu has invited my attention to paragraphs-20, 27 to 32. He submitted that the findings recorded by the learned Arbitrator in paragraph-30 are not challenged in the present appeal. He submitted that in paragraph-20, the learned Arbitrator dealt with the affidavit-in-reply dated 22.6.2010 filed by respondent No.1 wherein respondent No.1 admitted that he had represented to the claimant that the land admeasuring 65 Acrs is owned by him, his family members and his associates and that he has authority to transfer the same in favour of the claimant. In paragraph-23, the learned Arbitrator referred to clause-17 of the M.O.U. wherein the vendor declared that the land admeasuring 65 Acres was already purchased by them and that they will complete the transaction on or before 30.4.2008

as per clause 2(a) thereof. The learned Arbitrator was, therefore, of the view that the vendor had clear marketable title in respect of 65 Acres of land as stipulated by clause 2(a) of the M.O.U. The learned Arbitrator *prima facie* held that there was concluded contract insofar as 65 Acres of land is concerned. The learned Arbitrator also considered the question whether time was essence of the contract and *prima facie* held that in respect of 65 Acres of land time was not treated as essence of contract by the parties. In paragraph-29, the learned Arbitrator also considered the fact that respondents No.1 and 2 were actively associated in helping respondents No.3 and 4 in purchasing extensive agricultural landed properties and they were negotiating for respondent No.4. It is, therefore, difficult to appreciate that respondents No.1 and 2 will not disclose their transaction with the claimants to respondents No.3 and 4 and at this stage it is difficult to accept the defense of respondent No.4 that their purchase with respect to 65 Acres of land is without notice of the earlier transaction. Respondent No.4 are claiming their title through respondent No.1 and it was expected of them to make enquiries from respondent No.1 as to whether they had entered into any transaction. There is no material on

record to show that any enquiry was made in respect of 65 Acres of land. The learned Arbitrator, therefore, observed that at this stage it is not possible to accept the defense of respondent No.4 that it is bonafide transaction between respondent No.1 on one hand and respondents No.3 and 4 on the other.

8. Mr. Naidu also relied upon Sections 20 and 21 of the Specific Relief Act, 1963. He submitted that Section 20 lays down that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. At the same time, Court cannot exercise the discretion arbitrarily and the exercise of discretion has to be sound and reasonable, guided by judicial principles. Section 21 lays down that in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

9. Mr. Naidu submitted that for the first time before this Court the contention is advanced to the effect that the claimant has claimed the relief of specific performance and in the

alternate relief of compensation. He submitted that under subsection (3) of Section 21 if the Court decides that the specific performance ought to be granted, but, it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. He, therefore, submitted that depending upon the facts and circumstances of the case, the Court in addition to granting relief of specific performance is empowered to grant compensation for breach of contract and accordingly it has power to award such compensation to the plaintiff. He submitted that respondent No.4 has not shown that the order passed by the learned Arbitrator is perverse. Having regard to the conduct of respondent No.4, the learned Arbitrator was fully justified in making the transaction between respondent No.4 on one hand and respondents No.1 and 2 on the other subject to result of the arbitration proceedings. The interim order is operating since 2013 and, therefore, this is not a fit case for interfering with the impugned order.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record. A perusal of Public Notice dated 24.11.2010 shows that it covers following properties:

PROPERTY SCHEDULE

Description of property, village, area and name of owners of the lands situate within the jurisdiction of office of Sub-Registrar, Khalapur and Taluka Panchayat Samiti Khalapur, Zilla Parishad, Raigad is as follows :

Sr. No.	Name of Owner	Name of village	Survey No. & Hissa No.	Admeasur. (in Ares)
1.	Bharat K. Shah	Vadval	10/3	259
2.	Bharat K. Shah	Vadval	10/4	271
3.	Bharat K. Shah	Vadval	4/5/9	3.2
4.	Ashish N. Shah	Vadval	10/2	283
5.	Ravindra Ramvilas Jakotiya and Maruti Shankar Patil	Vadval	69/2	3.5
6.	Ravindra Ramvilas Jakotiya and Maruti Shankar Patil	Vadval	66/4	5
7.	Ravindra Ramvilas Jakotiya and Maruti Shankar Patil	Vadval	6/0	155
8.	Ravindra Ramvilas Jakotiya and Maruti Shankar Patil	Vadval	70/7	42
9.	Ravindra Ramvilas Jakotiya	Vadval	7/1	303
10.	Ravindra Ramvilas Jakotiya	Vadval	7/3	142
11.	Ravindra Ramvilas Jakotiya and Maruti Shankar Patil	Sangadewadi	3/3/B	60

11. Public Notice also recited that the lands set out in the Schedule were transferred by S/Shri. Bharat K. Shah, Ashish N. Shah, Ravindra Ramvilas Jakotiya and Maruti Shankar Patil and objections were invited from the third parties having any claims therein. A comparison of the Schedule given in the Public Notice with Annexure-A to the M.O.U., *prima facie* shows that 65 Acres land covered by Schedule of Public Notice is part of the M.O.U. dated 22.4.2008. It is in that context relevant to note that except land bearing Survey No.3/2/A, Sangadewadi rest of the lands were sold to the fourth respondent prior to issuing Public Notice dated 24.11.2010. The land bearing Survey No.3/2/A Sangadewadi was sold on 15.7.2011 by Rajendra to respondent No.4. *Prima facie* Public Notice dated 24.11.2010 in my opinion is an eye wash and as the transaction therein had already been effected and it was futile attempt to invite objections from the public at large. In my opinion, the Public Notice ought to have been issued prior to entering into the transaction by respondent No.4 with respondents No.1 and 2. If the transactions had already taken place, there is no explanation for not disclosing the name of purchaser in the public notice.

12. A perusal of the impugned order shows that the learned trial Judge has recored a *prima facie* finding that the land admeasuring 65 Acres is owned by respondent No.1 and his family members and associates. In paragraph-24, the learned Arbitrator considered the reply dated 22.6.2010 filed by respondent No.1 and observed that respondent No.1 had authority to execute the sale deed of 65 Acres land and ultimately came to the *prima facie* conclusion that there is concluded contract for selling 65 Acres land by respondent No.1 in favour of the claimant. The learned Arbitrator also *prima facie* held in paragraph-26 that time was not essence of the contract. In paragraphs-27 and 28, the learned Arbitrator dealt with Public Notice dated 24.11.2010. I have already observed that substantial lands set out in the Schedule of Public Notice were already purchased prior to issuing Public Notice dated 24.11.2010. If the lands were already purchased, there was no reason for not disclosing the names of the purchasers in the Public Notice. It is in this view of the matter I agree with the finding recorded by the learned trial Judge in paragraph-28 that the very purpose of issuing public notice is to demonstrate transparency with regard to the transaction.

13. As far as the contention raised by respondent No.4 that they are bonafide purchasers for value without notice is concerned, the learned Arbitrator has dealt with this aspect in paragraph-29 and *prima facie* observed that respondent No.4 cannot raise defense that it was a bonafide transaction with respondent No.1 on one hand and respondents No.3 and 4 on the other, cannot be accepted. That apart, Section 55 of the Transfer of Property Act, 1882 lays down rights and liabilities of buyer and seller. Relevant portion of Section 55 reads thus:

“55. Rights and liabilities of buyer and seller : In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

(1) The seller is bound-

(a) to disclose to the buyer any material defect in the property¹[or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;”

An omission to make such disclosure, as are

mentioned in this section 55 (1)(a) and Section 55 (5) (a) is fraudulent.

14. In my opinion, respondents No.1 and 2 were under obligation to disclose their M.O.U. dated 22.4.2008 entered by them in favour of the claimant to respondents No.3 & 4. This is in view of the fact that in paragraph-20, the learned Arbitrator observed that execution of M.O.U. by respondents No.1 and 2 is not in dispute and that in paragraph-2 of the affidavit-in-reply dated 22.6.2012 has clearly admitted that he has represented to the claimant that land admeasuring 65 acres is owned by him, his family members and his associates and that he has authority to transfer the same in favour of them. Thus the learned Arbitrator recorded *prima facie* findings to the effect that there is a concluded contract insofar as the contract in favour of the claimant insofar as 65 Acres of land is concerned and that at this stage *prima facie* it is not possible to accept the defense that transaction between respondent No.1 on one hand and respondents No.2 and 3 on the other in respect of 65 Acres of land is not acceptable. As noted earlier by the impugned order, the learned Arbitrator has held that the transaction of purchase made by respondents No.3 and 4 with respondents No.1 and 2

shall be subject to arbitration proceedings. Having regard to the conduct of respondent No.4, I do not find that the learned Arbitrator has committed any error in issuing that direction.

15. Mr.Kamdar submitted that the learned Arbitrator has secured claim of the claimant by directing respondents No.1 and 2 to furnish security in the sum of Rs.5 Crores in favour of the claimant and, therefore, the learned Arbitrator was not justified in issuing direction impugned in this appeal. Section 21(3) of the Specific Relief Act reads thus :

“21. Power to award compensation in certain cases.--

(1) xxxxxxxx

(2) xxxxxxxx

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.”

16. A perusal of above provision shows that if in any suit for specific performance of contract, Court decides that specific performance ought to be granted and that it is not sufficient to satisfy the justice of the case and that some compensation for

breach of the contract should also be made to the plaintiff, the Court is accordingly empowered to award the plaintiff such compensation. In view thereof, I do not find any merit in the submission of Mr. Kamdar. In the case of **In the case of Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

17. Applying the tests laid down in the case of **Wander Limited** (supra) to the facts of the present case, it cannot be said that the learned Arbitrator has exercised the discretion arbitrarily or capriciously or perversely or that he has ignored

the settled principles of law regulating grant or refusal of interlocutory applications. This Court will refuse to interfere with the impugned order solely on the ground that different view is possible. Apart from that one additional factor for not interfering with the impugned order is that the impugned/interim order is operating from 12.4.2013 and after passage of time, I do not find any good reason to interfere with the impugned order. Hence, Arbitration Appeal fails and the same is dismissed. By way of abundant caution it is made clear that the observations made and findings recorded herein are only for the purpose of finding out the correctness of the impugned order and the learned Arbitrator will decide the arbitration proceedings in accordance with law and on its own merits uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)