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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1234 OF 2016

Behramshah Shroff Bldg. No.1 (Yazad) Co.

Operative Housing Society Ltd.

...Petitioner

vs

The Zoroastrian Radih Society

...Respondent

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Mr. Yogesh Naidu, a/w. Mr. Yugal Bhatia, for the Petitioner.

Mr. Sanjay Kothari, a/w. Mr. H.N. Vakil, Ms. S.M. Vakil and Ms. M.R. Mehta, i/b. Mulla & Mulla & C.B. & C, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: JUNE 7, 2017

P.C. :

. Heard learned Counsel for the parties.

2. The Arbitration Petition challenges a consent award passed by the sole Arbitrator. The disputes between the parties pertained to lease of the land in favour of the Petitioner Society by the Respondent Trust. In pursuance of individual flat sale agreements between the Respondent trust and flat purchasers/members of the Petitioner Society, individual flat purchasers were allotted flats in a building owned by the Respondent Trust. The flat sale agreements were in accordance with the Maharashtra Ownership Flats Act, 1963. The flat sale agreements *inter alia* required the Respondent trust to execute a lease deed in respect of the land and the building standing thereon in favour of the society of flat

purchasers. An application was preferred to the Charity Commissioner under Section 36 of the Bombay Public Trust Act seeking sanction to the transaction of lease. The Charity Commissioner, by his order dated 18 May 1999, accorded sanction to the Respondent Trust to complete the development-cum-sale of flats cum lease of the land to the prospective society. It is submitted that, at that stage, there was a draft lease deed, which was placed before the Charity Commissioner whilst seeking such sanction. Subsequently, it appears, disputes arose between the parties as to the terms of the lease and the matter was referred to the sole arbitration of the Arbitrator. Before the Arbitrator the parties signed consent terms. On behalf of the Respondent trust, the consent terms were signed by a trustee and the Advocates of the Trust, whereas on behalf of the Petitioner Society, the consent terms were signed by its Secretary and Advocate. The learned Arbitrator, accordingly, passed a consent award under Section 30 of the Arbitration and Conciliation Act, 1996 in terms of the consent terms executed between the parties, which were taken on record by the learned Arbitrator. The undertakings given by the respective parties in the consent terms were accepted.

3. This consent award is challenged by the Petitioner Society on various grounds. What are, however, pressed at the hearing of the petition are the grounds of fraud and want of jurisdiction on the part of the arbitral tribunal in the matter of making of the impugned award. Though the Petitioner has raised various slogans in its petition concerning the purported fraud, the only basis of the plea of fraud appears to be that the miscellaneous application filed before the Charity Commissioner for variance of the terms of consent under Section 36 of

the Bombay Public Trust Act, which was said to be pending at the date of the consent terms, actually was already withdrawn prior to the filing of the consent terms. Learned Counsel for the Petitioner submits that no consent award can be filed which is at variance with the terms of consent of the Charity Commissioner. The effect of withdrawal of the miscellaneous application from the standpoint of Section 36 apart, the award passed by the learned Arbitrator in terms of the consent terms cannot *per se* be faulted. Whether or not such award can take effect in the face of the terms of sanction of the Charity Commissioner, which are at variance with the terms of the award, is an altogether different matter. It does not reflect on the validity *per se* of the impugned award within the parameters laid down under Section 34 of the Arbitration and Conciliation Act, 1996. What the consent terms between the parties, which were taken on record by the learned Arbitrator and on which the consent award was passed by him, require is that the transaction would be executed subject to the decision of the Charity Commissioner on an application for modification of the sanction. The terms also require various executory acts to be performed, e.g. amendment of bylaws and order of the Charity Commissioner further to the sanction under Section 36. Simply by reason of the fact that the miscellaneous application, which was said to be pending on the date of the consent terms, was not actually pending before the Charity Commissioner, no fraud can be alleged so as to undermine the validity of the consent terms. Any plea of fraud must include averment regarding act/s committed by a party to a contract (or with his connivance), or by his agent, with intent to deceive another party thereto or to induce him to enter into the contract. The acts may *inter alia* include any suggestion, as a fact, of that which is not

true, by one who does not believe it to be true, or active concealment of a fact by someone having knowledge or belief of the fact. Besides, the party alleging fraud must not have had the facts before it or the means to know them, for if it so had the facts before it or the means to know them, it could not be said to have been defrauded, even if a false statement was made. There are no pleadings whatsoever in this behalf in the present case. No fraud is, accordingly, made out.

4. Insofar as the ground of want of jurisdiction is concerned, it is submitted by learned Counsel for the Petitioner society that conveyance of land, even it be in the form of a lease, is a matter *in rem* and on the principle of the Supreme Court decision in the case of **Booz-Allen & Hamilton Inc. vs. SBI Home Finance Ltd.**¹, such conveyance cannot be made the subject matter of an award. Terms of lease between two private parties is not a matter *in rem*. It is clearly *inter partes*, though the title which is finally conveyed may be asserted against the world at large. The matter of execution of a lease deed in performance of an agreement to execute such lease and the terms of such lease deed are matters *in personam*, which the arbitral forum has clear jurisdiction to adjudicate upon. There is, thus, no merit even in this contention.

5. Accordingly, there is no merit in the Arbitration Petition. The petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)

¹ (2011) 5 SCC 532