

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

COMMERCIAL ARBITRATION PETITION NO.166 OF 2016

M/s Shree Ram Urban Infrastructure Ltd Known as Shree Ram Mills	...	Petitioner
Versus		
Kalpataru Properties Pvt Ltd. (Formerly known as Kalpataru Construction Pvt. Ltd.)	...	Respondent

WITH
COMMERCIAL ARBITRATION PETITION NO.178 OF 2016

Vijay Infrastructure Technologies Pvt. Ltd	...	Petitioner
Versus		
Kalpataru Properties Pvt Ltd. (Formerly known as Kalpataru Construction Pvt. Ltd.)	...	Respondent

Mr. Zal Andhyarujina a/w Hursh Meghani, V.A. Sugdare and Samsher Garud i/b Jayakar And Partners for the Petitioner in Commercial Arbitration Petition No.166 of 2016 and for Respondent No.2 in Commercial Arbitration Petition No.178 of 2016.

Mr. Iqbal Chagla, Senior Advocate, F.E. Devitre, Senior Advocate, Mustafa Doctor, Senior Advocate a/w Jai Chabbria, M.S. Federal, Prakhn Parekh, Madhuri Doshi, Namrata Shah, Pravin Dhage, Nidhi Malhotra i/b Federal & Rashimikant for Respondent No.1.

Dr. Birendra Saraf a/w Rohan Sawant and Mr. Kaushal Parsekar i/b Joy Legal Consultants for Respondent in Commercial Arbitration Petition No.166 of 2016 and for the Petitioner in Commercial Arbitration Petition No.178 of 2016.

CORAM : S.C.GUPTE, J.

DATE : 14 & 17 JULY 2017

ORAL JUDGMENT :

. These arbitration petitions challenge an award passed by an Arbitral Tribunal of three Arbitrators, per majority of two Arbitrators, allowing the claim of Respondent No.1 (original claimant) for specific performance of an agreement between the parties and rejecting the counter-claim of the Petitioners (original respondents).

2 The facts of the case may be briefly stated as follows :

2(i) The Petitioner in Commercial Arbitration Petition No.166 of 2016, Shree Ram Urban Infrastructure Ltd. (original respondent No.1 to the Arbitration Reference and hereinafter for convenience referred to as “SRL”) was having composite industrial mills and property admeasuring 67,785.50 meters., situated at Worli, Mumbai. SRL had granted development rights in respect of a portion of the property admeasuring about 28,000 sq meters to their group company, Vijay Infrastructure Technologies Pvt. Ltd. (original respondent No.2 to the Arbitration Reference and hereinafter for convenience referred to as “VIT”).

2(ii) By a Memorandum of Understanding (MoU) of 28 June 2004 entered into between SRL, VIT and Respondent No.1 herein (original claimant to the Arbitration Reference and hereinafter referred to as 'Kalpataru'), SRL and VIT purported to agree to grant, assign and convey to Kalpataru the Developable Land by consuming F.S.I. of 3,00,000 sq.ft. by utilizing corresponding land admeasuring 20,995.40 sq.ft. forming part of the larger property at or for a total consideration of Rs.86.30 crores. This

total consideration was payable in the manner provided in clause 5 of the MoU, that is to say:

(i) Rs.5 crores deposited as escrow agent on the execution of the MoU with M/s Little & Co., Advocates And Solicitors for SRL/VIT, to be utilized in the manner provided for;

(ii) Rs.5 crores to be deposited as escrow agent with Little & Co., on prima facie satisfaction of the title of SRL by the Advocates of Kalpataru and sanction of revised amended layout plan, to be utilized in the manner provided;

(iii) Rs.10 crores to be deposited with Little & Co., to be paid over to SRL/VIT within 45 days from the date of the MoU, subject to compliance of certain obligations on the part of SRL/VIT;

(iv) Rs.1 crore to be paid on fulfillment of remaining obligations and on execution and registration, if so required by Kalpataru, of the agreement for development and / or deed of transfer etc.;

(v) Rs.28.75 crores to be paid within 7.5 months from the date of payment of Rs.1 crore as above; and

(vi) Rs.28.75 crores to be paid within 7.5 months from the payment of the earlier sum of Rs.28.75 crores in accordance

with clause (v) above.

(There was a proviso that Kalpataru would furnish unconditional and irrevocable guarantees by its bankers acceptable to SRL/VIT in terms of the draft also acceptable to SRL/VIT, guaranteeing payments under sub-paras (v) and (vi) above on their respective due dates. These guarantees were to be such as could be encashed by SRL/VIT and / or its/their assignees immediately after they were issued); and

(vii) Rs.7.80 crores to be paid by Kalpataru as provided in clause 6 of the MoU.

2(iii) An Addendum to this agreement was signed between the parties on 10 December 2004, by which the total consideration in the MoU was revised and increased to Rs.105.30 crores. This amount was to be paid in the following manner:

- (a) Rs.10 crore as already received by SRL;
- (b) Further Rs.20 crores as received by SRL on the date of the Addendum;
- (c) Rs.57.5 crores to be paid to SRL by way of Bank Guarantees on Conveyance and Assignment as provided in Clause 5 of the said MoU;
- (d) Rs.13.30 crores to be paid to SRL also on Conveyance and Assignment;
- (e) Balance of Rs.4.5 crores to be paid to SRL, after NOC of BMC Estate for assignment and utilization of FSI of leasehold land after deducing all payments

therefore to Estate.

2(iv) The first two items of payment of Rs.10 crores and Rs.20 crores under the Addendum were admittedly received by SRL from Kalpataru, the second item of Rs.20 crores having been received simultaneously with the execution of the Addendum.

2(v) It is the case of SRL/VIT that time for payment of the balance amount was the essence of the contract. It is also the case of SRL/VIT that, at any rate, in the two meetings held on 10 November 2004 and 24 November 2004, time was made the essence of the contract, requiring the transaction to be completed *inter alia* by payment of Rs.57.50 crores by way of bank guarantees by 20 December 2004. SRL/VIT rely on minutes of meeting held on 10 November 2004 and a gist of discussions in the meeting of 24 November 2004 in this behalf.

2(vi) In pursuance of these meetings, on or about 17 December 2004, Advocates of SRL gave a notice to Kalpataru calling upon the latter to make payment and furnish bank guarantees and simultaneously calling for the drafts of the conveyance documents to be executed by SRL/VIT.

2(vii) Further correspondence and meetings ensued between the parties, whereafter, on 14 January 2005, Kalpataru gave a notice to SRL through their Advocates, calling upon the latter to specifically perform the contract between the parties. Kalpataru called upon

SRL to finalize the deed of conveyance, assignment and other incidental documents and execute the same in accordance with the MoU read with the Addendum. Kalpataru also communicated to SRL/VIT that bank guarantees in the form suggested by SRL/VIT were acceptable to them.

2(viii) Since there was no response to this notice on the part of SRL/VIT, Kalpataru, by its Advocates' letter dated 11 February 2005, invoked the arbitration agreement between the parties, which led to the subject reference before the Arbitral Tribunal.

3 It was the case of Kalpataru before the Arbitral Tribunal that the agreement between the parties was contained in the MoU of 28 June 2004 as amended by the Addendum of 10 December 2004; that in pursuance to the MoU and Addendum, an amount of Rs.30 crores was paid by them to SRL and having made the requisite arrangements for project finance for further payment, they were ready and willing to perform the remaining part of their obligations under the MoU read with the Addendum; that SRL/VIT sought to resile from their obligations by wrongfully demanding a higher price for the property and by not observing the terms and conditions of the MoU read with the Addendum. It was alleged by Kalpataru that SRL failed to discharge their obligations under the contract and instead prepared false records in the form of minutes of meeting of 10 November 2004 and gist of discussions in the meeting held on 24 November 2004 and even set up a false case of repudiation of contract by Kalpataru and its acceptance by SRL/VIT. Kalptaru, in the premises, prayed for a declaration of subsistence and validity of the contract and for its specific performance,

and in the alternative, for damages/compensation.

4 SRL contested Kalpataru's claim. By way of a preliminary objection, it claimed that the MoU and Addendum were not duly stamped and were inadmissible in evidence. On merits, it was the case of SRL that Kalpataru was not ready and willing to perform its part of the contract and could not, in the premises, seek specific performance. In particular, SRL claimed that Kalpataru had failed to furnish bank guarantees of Rs.57.50 crores to SRL/VIT, which were immediately encashable. According to it, time was of essence of the contract, the contract having been entered into expressly on the footing that SRL had an urgent need of finance for its other projects. SRL also alleged that Kalptaru had no financial capacity to perform its part of the obligations. In any event, it was submitted that, in the facts and circumstances of the case, the arbitral tribunal, in its discretion, ought to refuse specific performance to Kalpataru. SRL also lodged its counter claim against Kalptaru, alleging huge financial loss on account of breach of its obligations under the contract.

5 VIT, for its part, *inter alia* claimed that the MoU was not a final and definitive agreement between the parties capable of enforcement under the law. It claimed that, in any event, the Addendum dated 10 December 2004 was not binding on it, since it was not a party to it. It was the case of VIT that even the original MoU, as a result of its modification to which VIT was not a party, did not survive and accordingly, Kalptaru was not entitled to seek specific performance.

6 The impugned award of the majority arbitrators *inter alia* held that

the Collector of Stamps having adjudicated the stamp duty payable on the documents pending the Reference, and Kalpataru having paid the same, there was no merit in the contention that the MoU and Addendum were inadequately stamped. The Arbitral tribunal noted that in the light of these developments, Advocates of SRL/VIT had not pressed this issue. The tribunal held that the contract between the parties was contained only in the MoU and the Addendum; that the minutes of meeting dated 10 November 2004 and gist of discussions of 24 November 2004, propounded by SRL/VIT, were not proved and as such did not form part of the contract. On the issue of time as essence of the contract, the majority held that on the facts and in the circumstances of the case, time was not of essence of the contract. The majority further held that SRL/VIT had failed to prove that any time was fixed by the parties in the meetings of 10 November 2004 and/or 24 November 2004 for performance of the contract. In all, the arbitral tribunal held that the transaction being related to transfer of immovable property, as a normal rule, time could not be treated as essence of the contract and there were no extraordinary or exceptional circumstances in the present case for holding otherwise. As a matter of fact, the Tribunal went on to hold, SRL/VIT did not avoid or terminate the contract on account of any breach on the part of Kalpataru, but proceeded on the assumption that Kalpataru had repudiated the contract. On the purported repudiation of the contract, in turn, the majority arbitrators held that Kalpataru had taken several steps in the direction of performance of the contract rather than its repudiation, payment of the substantial amount of Rs.30 crores being one such important step. The majority held that time not being of essence and Kalpataru being ready and willing to perform its part of the contract and there being no decision as to any appointed day or

last day for performance of the contract, Kalptaru could not be said to have failed to furnish bank guarantee/s in the form prescribed in the MoU by the alleged stipulated date so as to amount to repudiation of contract on its part. The majority held that there was no question, in the premises, of acceptance of repudiation by SRL. The majority, as noted above, held that from the available record, both documentary and oral, it was clearly proved that all attempts were made by Kalptaru to perform its obligations under the MoU; that it was financially capable and able to pay the balance purchase price; that there was nothing on record to show that Kalptaru had either refused or failed to execute bank guarantee/s as per clause 5 of the MoU; and that, in the premises, it was proved by Kalptaru that they were ready and willing at all material times to perform their part of the contract. On the reciprocal obligations of the parties under the contract, in particular, the majority held that SRL/VIT had failed to perform their obligations as required under the contract, whilst there was no failure to perform on the part of Kalptaru. On the discretionary aspect of specific performance, the arbitral tribunal held that the contention of SRL/VIT that no specific performance ought to be granted for the reasons alleged by them had no force. The majority specifically considered various objections raised by SRL/VIT in this behalf including the purported conduct of Kalptaru in leading alleged false evidence in the reference, and negatived all of them. (It was the case of SRL/VIT that evidence produced by Kalptaru contained false statements on oath.)

7 The analysis of evidence and application of law to the facts found by the learned arbitrators on the issues, referred to above, appear to be

reasonable and correct. The main contest in the reference was on three crucial aspects of the case, namely, : (1) Was the contract between the parties contained in only the MoU and the Addendum or were minutes of meeting of 10 November 2004 and / or gist of discussions on 24 November 2004 part of the contract ? And if the contract was contained only in the MoU and the Addendum, what is the correct interpretation of the Addendum read with Clause 5 of the MoU ? (2) Even if one assumes that the minutes and the gist of 10 November 2004 and 24 November 2004 were not part of the contract, was time made essence of the contract subsequently in the meetings of 10 November 2004 and 24 November 2004? And if so, was there any failure on the part of Kalpataru in not furnishing bank guarantees by 20 December 2004, amounting to repudiation of contract or otherwise, want of readiness or willingness on their part? and (3) Was there anything in the case which disentitled Kalpataru to seek specific performance as a discretionary relief. On the analysis of evidence before the tribunal in the light of applicable law, the majority of arbitrators held that the contract was contained only in the MoU and the Addendum; the minutes of meeting and gist of discussions of 10 November 2004 and 24 November 2004 were not proved. This is a pure finding of fact. The finding is based on evidence and is a possible view. On the interpretation of the contract, and particularly Clause 5 of the MOU read with the Addendum, the arbitrators did not find any obligation on the part of Kalpataru to pay the balance consideration at any fixed time independent of compliance on the part of SRL/VIT of their reciprocal obligations. The arbitrators also found that the contract itself provided for extension of time and payment of interest on unpaid amount. Besides, it provided for a “cure period” to comply with the contract. On the

issue of time being made essence of contract in the meetings of 10 November 2004 or 24 November 2004, the majority arbitrators held that there was no conclusion reached between the parties in the meeting of 10 November 2004 to complete the transaction by 30 November 2004 or to extend the deadline to 20 December 2004 in the meeting of 24 November 2004. The arbitrators also held that, in the premises, it was not open to SRL/VIT to unilaterally decide a particular date, viz. 20 December 2004 (vide letter dated 17 December 2004), as an 'appointed day' for completion of the transaction; such decision did not amount to granting of reasonable time to Kalpataru to fulfill their obligation of payment. The arbitrators held that there was no reason, in the facts of the case, to deviate from the normal rule that in a transaction of transfer of immovable property time is not of essence. These findings are also supported by evidence and are in accord with the law concerning performance of contract. The findings that there was neither breach nor repudiation of contract on the part of Kalpataru by not making payment or furnishing bank guarantees by 20 December 2004, simply follow the aforesaid findings on the alleged deadline of 20 December 2004. On the aspect of discretionary relief of specific performance, the learned arbitrators discussed in detail each and every circumstance alleged by SRL/VIT for denying specific performance to Kalpataru. The arbitrators, in particular, held that there was nothing in the conduct of Kalpataru which disentitled them to the equitable relief; there was no suppression of material facts; no adverse inference could be drawn that false oral evidence was led or false case was set up by Kalpataru. In short, the arbitrators did not accept any of the contentions of SRL/VIT in this behalf and preferred to go by the general rule, statutorily recognized in the Explanation to Section 10 of the

Specific Relief Act, 1963, that where a transaction relates to sale of immovable property, normally a court or tribunal should grant specific performance. Once again, the findings of fact and applicability of law determined by the arbitrators are clearly possible conclusions and cannot be reversed in a challenge under Section 34 of the Act.

8 Mr. Andhyarujina, learned Counsel appearing on behalf of SRL, urged, firstly, that under the Addendum read with Clause 5 of the MoU, Kalpataru was required to furnish “immediately encashable bank guarantees” for two tranches of payment of Rs.28.75 crores each under Clauses (v) and (vi) thereof. The submission is plainly contrary to the terms of the Addendum read with Clause 5 of the MOU. In the first place, the bank guarantees were clearly relatable under Clause 5, to fulfillment of reciprocal obligations of SRL/VIT resting with execution and registration of conveyance/assignment and their purpose was to guarantee payments when such payments were ripe. The Addendum does not change this position. There is no merit in the submission that the linking up of the payments to performance of reciprocal obligations of SRL/VIT was done away with in the Addendum. The Addendum also connects the payment to the last of the obligations of SRL/VIT, namely, execution of conveyance/assignment “as provided in Clause 5 of the said MoU”, which brings us back to the stipulations of Clause 5. Anyway, this is a clearly possible view of the relevant contractual stipulations and no exception can be taken to the arbitrators' conclusion in this behalf under Section 34 of the Act.

9 Mr. Andhyarujina, also submitted that the conclusions of the arbitrators that time was not originally of essence or that time was not made essence in the meetings of 10 November 2004 and 24 November 2004, suffer from grave infirmities. Learned Counsel submitted that various important documents bearing on the issues as well as oral evidence of two witnesses of SRL, namely, Vikas Kasliwal and V.K. Jain, were contrary to the findings of the arbitrators, and these were completely overlooked by the arbitrators for arriving at their conclusions that time was not originally, or later made, of essence insofar as the suit contract was concerned. Learned Counsel submitted that any relevant material disregarded by the arbitrators whilst arriving at their award must entail interference at the hands of this Court. Learned Counsel relied on the judgments of the Supreme Court in the cases of **Associate Builders Vs. Delhi Development Authority**¹ and **H.B. Gandhi, Excise And Taxation Officer-cum-Assessing Authority, Karnal**² in support of his submissions.

10 The impugned award, in the first place, does not suggest that any relevant material was actually disregarded by the arbitrators. In fact, the material referred to in this behalf by learned Counsel for SRL was very much alluded to by the arbitrators. It is quite clear that the conclusions in the award were arrived at after noting all this material. At the most, one may say that the reasons stated by the arbitrators for arriving at their conclusions do not specifically indicate any actual analysis of this material. If that is the criticism, to sustain a challenge based on it, SRL/VIT must establish that this in effect amounts to want of reasons for the award. I am afraid that cannot be said to be the case. The reasons, as they are indicated,

1 (2015) 3 Supreme Court Cases 49

2 1992 Supp (2) Supreme Court Cases 312

are adequate and comply with the requirement of a reasoned award.

11 Let us, however, consider, on a demurrer and in the alternative, if disregard of this material mandates any interference. In the case of **Associate Builders** (supra), the Supreme Court has extensively discussed important principles of law in the matter of challenge to an arbitral award. It is an important juristic principle that a decision which is so perverse or so irrational that no reasonable person would have arrived at the same is liable to be struck down in a challenge. This juristic principle was explained by the Supreme Court in **Associate Builders**, by stating the law in the following words:

“It is settled law that where :

- (i) a finding based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at, or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”

In this context, the Supreme Court referred to two of its earlier judgments, one in the case of **H.B. Gandhi** (supra) and the other in the case of **Kuldeep Singh vs. Commissioner of Police**³. Relying on the case of **H.B. Gandhi**, referred to by the Supreme Court in **Associate Builders**, learned Counsel for SRL submits that if a finding of fact is arrived at by ignoring or

3 (1999) 2 SCC 10

excluding relevant material it cannot sustain an award based on it and such award must be set aside. The question here is what kind of relevance are we talking about, when we consider this particular ground of challenge. Is it any and every material which is relevant in the sense that it is admissible in evidence, which, if it is disregarded, would lead to setting aside of the award? Or is it only some vital piece of evidence, disregard of which, would entail such consequence? A relevant fact or document, under the Evidence Act, is something capable of affording any reasonable presumption as to the facts in issue. In any trial, a judge may admit as 'relevant' the evidence of all those matters which shed a light on any question in issue – even if such light be indirect or even feeble. Such 'relevant' fact or document merely makes it 'admissible'. What one has to then assess is its probative value. At such assessment, the court may actually find that it has very little probative value. The word 'relevant' is used in our context as some 'vital' evidence or something which has a substantial probative value, such that it may turn the scales whilst deciding the issue in question, and not anything and everything which may be simply admissible in evidence. After all, we are considering 'relevance' in the context of perversity of an award. The evidence disregarded by the arbitrator must be of such nature that a reasonable man would have decided the issue otherwise had such evidence been considered. Only then it is possible to set aside an award on the ground of perversity, where some relevant material is disregarded. None of the documentary or oral evidence referred to in this context by Mr.Andhyarujina can be said to be such 'vital' evidence as would, by reason of its being disregarded, vitiate the award. The oral evidence of Kashiwal and Jain is mere word against the word of Kalpataru's witnesses, whose oral evidence was accepted by the

majority arbitrators on the aspect of time as essence or the purported deadline of 20 December 2004 in the light of consistent contemporaneous documentary evidence to that effect. None of the documents of SRL / VIT, which are said to be overlooked are sufficient to displace these findings.

12 Once it is held that the conclusions of the arbitrators that time was not of essence or that 20 December 2004 was not a deadline for payment of consideration are possible conclusions, sustainable under Section 34, the contentions of Mr.Andhyarujina on (i) the repudiation of contract by Kalpataru and (ii) want of readiness and willingness of Kalpataru to perform its part of the contract, must *ipso facto* fail. These latter contentions are premised solely on time being of essence and 20 December 2004 being the 'appointed day' or deadline for payment or furnishing of bank guarantees.

13 As I have noted above, there is nothing in the facts of the present case, which would disentitle Kalpataru to the equitable relief of specific performance. The majority arbitrators have rightly held so. Explanation to Section 10 of the Contract Act, which deals with cases in which specific performance of contract can be granted, requires the court to presume, unless and until the contrary is proved, that the breach of the contract to transfer immovable property cannot be adequately relieved by compensation in money. The arbitrators have correctly appreciated the law laid down in this behalf by various Supreme Court cases, including the cases of **Sandhya Rani vs. Sudha Rani**⁴ and **Prakash Chandra vs. Angadlal**⁵ bearing on the issue. Based on the appreciation of facts and

4 (1978) 2 SCC 116 : AIR 1978 SC 537

5 (1979) 4 SCC 393 : AIR 1979 SC 1241

applying the principles of law governing the issue, the arbitrators have held that none of the factors referred to by SRL/VIT is capable of displacing the statutory presumption under the Explanation to Section 10. The property in dispute is a large tract of land of about 5 acres, which is not readily available in South Mumbai and has a special value to a reputed company, like Kalpataru. Besides, there is no reason, as rightly observed by the arbitrators, why Kalpataru should be deprived of the property in dispute, even if it is assumed other large properties were available in the nearby area, which averment was denied by Kalpataru. Neither the conduct of Kalpataru nor the increase in real estate prices in the locality or the circumstances emanating from the reservation concerning the property spells out any special circumstance why transfer of the suit property ought to be refused to Kalpataru.

14 In the premises, there is no merit in the arbitration petition of SRL.

15 As far as the companion petition of VIT is concerned, learned Counsel for the Petitioner VIT adopts the arguments of Mr.Andhyarujina in SRL's petition. The only argument advanced in addition is that VIT not being a party to the Addendum of 10 December 2004, which, according to Kalpataru, modified the original tripartite agreement between SRL, VIT and Kalpataru contained in the MOU, the parties cannot be said to be *ad idem* as far as the contract, of which specific performance is sought, is concerned. The contention has no substance. The MOU provided for stage-wise payment to SRL / VIT. The only effective amendment to this is, firstly, the increase in consideration, that is to say, from Rs.86.30 crores to

Rs.105.30 crores and secondly, reference to all stage-wise payments as either received or to be made to SRL. VIT, in any event, was part of S. Kumar's Group along with SRL at the relevant time. The Kasliwals were common directors in both companies. VIT anyway did admittedly not have any interest in the property as reiterated by Little & Co. (common Advocates of SRL and VIT at all material times throughout the proceedings under Section 9 of the Act before this court and even during the initial stages before the arbitrators). Little & Co., accordingly, called for execution of development agreement or conveyance directly with SRL without joining VIT as a party, with an assurance that VIT would positively execute any document that may be mutually agreed between SRL and Kalpataru. There was, accordingly, no need to join VIT as a party to the Addendum. In these facts, the arbitrators were right in holding that VIT could not, at a belated stage, urge that it was not a party to the Addendum of 10 December 2004, or that, accordingly, Kalpataru was not entitled to specific performance of the agreement consisting of the MOU read with the Addendum. The arbitrators rightly held that the MOU read with the Addendum was final and would bind both SRL and VIT.

16 For these and other reasons discussed in the companion petition of SRL above, even the petition of VIT has not merit.

17 Accordingly, Commercial Arbitration Petition Nos.166 of 2016 and 178 of 2016 are dismissed. No order as to costs.

(S.C. GUPTE, J.)