

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

ARBITRATION PETITION NO. 371 OF 2018

Ramnik Mohanlal Chawda & Anr.	...Petitioners
vs.	
Suresh Gianchand Kumar	...Respondent

Ms.Rama Subramanian I/b. M.R. Ramesh for Petitioners.
Mr.Vishal Kanade I/b. Mohan B. Jadhav for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 22 OCTOBER 2018

P.C. :

Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole Arbitrator in a reference, which involved disputes between the parties arising out of a partnership deed and a deed of retirement executed between the parties in respect of the partnership firm. The Petitioners herein, who were original Respondents to the arbitration reference, were partners of a partnership firm, called “Vaishnavi Realty”, along with the Respondent herein, who was the original claimant before the Arbitrator. The firm was carrying on the business of real estate development. It was agreed between the parties that the Respondent would exit the partnership firm and in consideration, the firm would pay a sum of Rs.3.50 crores to the Respondent. The dispute between the parties was in respect of this consideration payable to the Respondent. The learned Arbitrator considered the retirement deed executed between the parties and in particular, Clause 2 thereof, which provided for the responsibility of the

Petitioners herein to pay a sum of Rs.3.50 crores to the Respondent through post-dated cheques. The learned Arbitrator noted that the Petitioners even issued three post-dated cheques for a sum aggregating to Rs.3.50 crores, which were dishonoured upon presentation for payment. The learned Arbitrator also noted the answer of RW1, namely, Petitioner No.1 himself, in his cross-examination, where he admitted that an amount of Rs.3.50 crores was due and payable by the Petitioners. The learned Arbitrator, in the premises, accepted the Respondent's case and awarded a sum of Rs.3.50 crores along with simple interest at the rate of 9% per annum on the same from 3.5.2017 till the date of the award and thereafter, at the rate of 12% per annum until payment or realisation. The learned Arbitrator also awarded costs in the sum of Rs.2 lakhs to the Respondent.

3 The impugned award essentially interprets a contractual document executed between the parties and based on evidence led before him fixes the liability of the Respondent to pay a sum of Rs.3.50 crores to the claimant. The interpretation of contract and ascertainment of liability arising under the contract are mixed issues of law and facts. As long as it can be shown that the interpretation and ascertainment of liability by the arbitrator exhibit a possible view, which a fair and judiciously minded person can very well take, the award is not open to challenge under Section 34 of the Arbitration and Conciliation Act, 1996. No award can be challenged on the ground that the Arbitrator incorrectly applied the law or appreciated the facts.

4 Learned Counsel for the Petitioners (essentially Petitioner No.2, since Petitioner No.1 has already expired and the former is the only

legal heir of the deceased) submits that her client was under an incapacity and was unable to present her case. Learned Counsel further submits that the award is in conflict with the public policy of India and is also vitiated by a patent illegality appearing on the face of the award. The argument on incapacity or inability to present her case is based on an averment made in the present notice of motion, which seeks stay of the award. An additional affidavit has been filed in the notice of motion where Petitioner No.2 has taken a stand that at the instance of her husband, Petitioner No.1, she did not participate in the proceedings. She submits that she signed the vakalatnama on his instructions and was not aware of the progress of the arbitration proceedings and even the passing of the award. It is submitted that during the relevant period, i.e. between June 2016 and till his death, her husband, Petitioner No.1, was undergoing lot of mental trauma and stress; between November 2017 and January 2018, he suffered lymphangitis in legs, an inflammation of the lymphatic system, which rendered him immobile for about two and half months. It is submitted that only in the last week of May 2018, Petitioner No.2 came to know of the arbitration award when an attachment order issued in execution proceedings taken by the Respondent came to be affixed on the door of her flat. It is submitted that around that time, Petitioner No.1 had been admitted in hospital where he underwent a surgery. Though he was discharged from the hospital post-surgery, he was soon re-admitted and died in the hospital on 2 July 2018. It is further submitted (in the additional affidavit in support of the notice of motion) that after the demise of her husband, when Petitioner No.2 got access to the case file, she realised that her husband had not led any evidence at all. It is submitted that most of the relevant documents, which would otherwise have

established repayment to the claimant, were not produced before the arbitrator and the evidence was closed without informing Petitioner No.2. Learned Counsel also tried to argue before this court that this evidence, annexed to the additional affidavit, which was admittedly not produced before the arbitrator, would clearly show that there was no debt owed or owing by the Petitioners herein to the Respondent. This court, however, did not allow learned Counsel to address the court on the merits of this additional material, unless a case was made out for setting aside the award on the case of incapacity of the Petitioners.

5 What is important to note is that the disputes between the parties were first carried before this court in a civil suit by the Respondent herein. Both Petitioners were party defendants to that suit and were jointly represented by an advocate. At the hearing of a notice of motion in that suit, the parties agreed to refer their disputes to arbitration. When the matter went before the learned Arbitrator, both Petitioners jointly appointed another advocate, who continued to represent them throughout the arbitration proceedings. Petitioner No.1 tendered himself as a witness in the arbitration reference. He was examined in chief by the Petitioners' Advocate and cross-examined by the Respondent's Advocate. In addition to oral evidence, documentary evidence was also produced before the Arbitrator by both parties, including the Petitioners herein. Based on the oral and documentary evidence and submissions made by the Advocate on behalf of the Petitioners herein, which have been considered in extenso in the impugned award, the Arbitrator came to a conclusion that the Petitioners herein owed a sum of Rs.3.50 crores to the Respondent, which conclusion, as I have noted above, is clearly a possible view. It is not a view

such as no fair or judiciously minded person could have taken or as would shock the conscience of the court.

6 On these facts, Petitioner No.2 cannot be said to be under an incapacity within the meaning of Clause a(i) of Sub-section (2) of Section 34. The incapacity referred to in Sub-section (2) is either a legal incapacity or a physical incapacity, which renders the Petitioner unable to present his or her case. The record bears out, and even the pleadings of Petitioner No.2 do not suggest otherwise, that Petitioner No.2 had herself left the conduct of the arbitration reference to her husband. Both she and her husband jointly appointed an advocate to conduct the reference on their behalf. Though originally the name of Petitioner No.2 was included in the list of witnesses submitted by the Petitioners before the Arbitrator, Petitioner No.2 did not choose to tender herself in evidence. It is no good to say that at the instance of her husband, she chose to do what she did or did not do what she would have otherwise done. Particularly in the context of the grounds of challenge available under Section 34 of the Arbitration and Conciliation Act, 1996, it is inconceivable that an award can be set aside on a ground such as this.

7 As I have already noted above, the view the Arbitrator has taken on the material placed before him is a possible view. It does not indicate any contravention of the fundamental policy of Indian law. So also, it does not exhibit any patent illegality on its face. The illegality in the award and particularly, a patent illegality appearing on the face of the award, cannot be demonstrated with reference to material which was not even placed before the arbitrator and which, as we have noted above, did

not even form part of the original challenge to the impugned award contained in the petition. As we have noted above, the matter has come for the first time in an additional affidavit in support of the notice of motion and is not even part of the challenge petition.

8 In the premises, there is no merit in the arbitration petition. The petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)