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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.871 OF 2013

Manvel Tuscano

....Petitioner

vs

DLF Limited

...Respondent

.....

Mr. Cherag Balsara, a/w. Mr. Karan Bhosale and Ms. Nikita Menon, i/b. NDB Law, for the Petitioner.

Mr. Shilpan Gaonkar, a/w. Mr. Parag Sawant and Mr. Himank Singh, i/b. Desai & Diwanji, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 21 NOVEMBER, 2018

ORAL JUDGMENT :

. This arbitration petition challenges an award passed by a sole arbitrator in a reference. The reference arose out of an umbrella agreement, under which the Petitioner had agreed to procure land so as to transfer the same to the Respondent.

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

The Petitioner is the sole proprietor of a firm known as 'M/s. Manvel Land Empire', whilst the Respondent is engaged in the business of real estate development. The Respondent was interested in acquiring

land in Raigad District in Maharashtra for the purposes of development. To that end, the parties entered into a memorandum of understanding dated 31 January 2006 (hereinafter referred to as “original “MOU”), under which the Petitioner agreed to acquire land at various places in Taluka Khalapur, District Raigad and transfer the same to the Respondent. The agreement was supplemented by a supplementary agreement dated 21 February 2006. Under these agreements, various payments were made by the Respondent to the Petitioner aggregating to Rs.91 lakhs for procurement of land. It is the case of the Respondent that no land was procured by the Petitioner in pursuance of the agreements and that the Petitioner was thus liable to refund the whole amount of Rs.91 lakhs paid by the Respondent to him in pursuance of the agreements. It is, on the other hand, the case of the Petitioner that he had procured land and caused the same to be transferred to a nominee/assignee of the Respondent in pursuance of the agreement between the parties and that it was the Respondent, who had failed to pay the agreed consideration between the parties towards such procurement and transfer. The disputes between the parties were referred by an order passed under Section 11 of the Arbitration and Conciliation Act, 1996 to the sole arbitration of the learned arbitrator herein. Both parties led oral and documentary evidence before the learned arbitrator. The learned arbitrator, after taking into account the evidence and hearing the parties, ordered refund of the said amount of Rs.91 lakhs to the Respondent. The present petition challenges that award.

3. The evidence produced before the learned arbitrator clearly

shows that the parties had entered into the original MOU as an umbrella agreement for procurement and transfer of different parcels of land in favour of the Respondent. The villages, in which agricultural lands were to be procured and conveyed to the Respondent, were described in the MOU. The MOU provided for the price of the lands at the rate of Rs.5,30,000/- per acre, and payment of earnest money of Rs.21 lakhs to the Petitioner on the date of the execution of the agreement and a commitment on the part of the Respondent to pay the balance consideration at or upon the execution and registration of conveyance deed/s for lands, as and when the same were bought by the Petitioner from the respective owners, directly to the owners of the properties as per the schedule of payment mutually decided by and between the parties. The MOU entitled the Respondent to assign its rights thereunder to any other person. The original MOU was modified by a supplemental memorandum of understanding executed between the parties on 21 February 2006 ("supplemental MOU"). The supplemental MOU *inter alia* recorded and acknowledged the fact that the Petitioner had already begun the work of acquisition of land in the village of Lodhivali as per the requirements of the Respondent and made investments and entered into MOU with one Sulochana Mohan Kalyankar and others as also with one Namdev Kadam and another. The supplemental MOU recorded the representation of the Petitioner that funds were required towards payment to Sulochana Kalyankar and others, and provided for payment of a further sum of Rs.20 lakhs to the Petitioner upon deposit of the original MOU with Sulochana Kalyankar and others. Subsequent to the supplemental MOU, on or about 24 March 2006, the Petitioner admittedly addressed a letter to the Respondent communicating to the

latter of his having made arrangements for purchase of the property of Sulochana Kalyankar and others admeasuring approximately 50 acres for the Respondent's group company as per the terms of the original MOU and supplemental MOU and requesting the Respondent to release a further sum of Rs.10 lakhs so that the property of Sulochana Kalyankar could be fenced. In pursuance of these arrangements, a further memorandum of understanding appears to have been entered into between the Petitioner and the Respondent's group company, Belden Homes Pvt. Ltd. This memorandum records the history of the transaction including the MOU entered into by the Petitioner with Sulochana Kalyankar for procurement of land at Village Lodhivali, Taluka Khalapur, District Raigad. The memorandum records the Petitioner's proposal to request Sulochana to execute a conveyance in his favour after payment of consideration. The memorandum also records the Petitioner having taken possession of the property from Sulochana vide possession receipt of 22 March 2006 and assures Belden Homes Pvt. Ltd. to execute a conveyance in its favour in respect of the property, after first purchasing the same in his own name from Sulochana. The memorandum settles the price to be paid by Belden Homes Pvt. Ltd. to the Petitioner and the manner of its payment. This memorandum was followed by a further communication of the Petitioner to the Respondent herein issued on 7 April 2006 confirming *inter alia* the arrangements made by the former for procurement of land for the Respondent's group company as per the terms of the original MOU, and requesting the latter to release a further sum of Rs.50 lakhs, so as to enable the Petitioner to tie up the property from the vendor. In pursuance of these arrangements, an MOU for sale was entered into

between the Petitioner and Belden Homes Pvt. Ltd. concerning the property acquired/to be acquired from Sulochana. Likewise there have been other agreements/memoranda between the Petitioner and Belden Homes Pvt. Ltd. for various other properties procured by the Petitioner in Lodhivali, Taluka Khalapur, District Raigad. There is also on record a resolution passed by Belden Homes Pvt. Ltd. authorising one R.K. Sharma, who was the original signatory, in his capacity as an authorised representative of the Respondent to the umbrella agreement contained in the original MOU, *inter alia* to negotiate further terms and conditions for the sale. It is not in dispute that land admeasuring approximately 49 acres was procured by the Petitioner and transferred in favour of Belden Homes Pvt. Ltd. Also on record are minutes of meeting between the parties recording what transpired between them on 28 September 2006. These minutes record the various transactions between the Petitioner and the Respondent concerning agreements for sale of different parcels of land owned by different vendors. The minutes are signed by one Alok Agarwal as a constituted attorney of the Respondent. (Alok Agarwal was also one of the authorised representatives of Belden Homes Pvt. Ltd. in the latter's resolution referred to above.) Lastly, we have on record a letter addressed by Belden Homes Pvt. Ltd. to the Petitioner as of 22 May 2007 dealing with the latter's demand for a sum of Rs.70,58,600/-. The letter *inter alia* records payments made to the Petitioner under various agreements for lands admeasuring approximately 48.89 crores in addition to the advance of Rs.91 lakhs, and claims that in view of such payments no amount was due and payable by Belden Homes Pvt. Ltd. to the Petitioner. (The letter also incidentally calls for refund of Rs.91 lakhs, for reasons which are not disclosed in the letter.)

4. On this evidence, it is but a foregone conclusion that in pursuance of the umbrella agreement contained in the original MOU between the parties, the Petitioner procured land in Village Lodhivali, Taluka Khalapur, District Raigad of over 49 acres and transferred the same to Belden Homes Pvt. Ltd., which is admittedly a group company of the Respondent. As against this, the foundation of the impugned award passed by the learned arbitrator is that the Petitioner had failed to procure even a single inch of land in pursuance of the original MOU and was, in the premises, liable to refund the entire amount of Rs.91 lakhs paid to him by the Respondent. The learned arbitrator strangely has come to a conclusion that Belden Homes Pvt. Ltd. was an altogether separate concern which had nothing to do with the original MOU or supplemental MOU and the land procured by the Petitioner and transferred in favour of Belden Homes Pvt. Ltd. could not be said to be in pursuance of the umbrella agreement contained in the original MOU read with the supplemental MOU. In arriving at this conclusion, the arbitrator appears to have laid great emphasis (possibly, conclusive emphasis) on the fact that the Petitioner's witness had admitted in his cross-examination that there was no document to show that the Petitioner had handed over any land to the Respondent; that there was no agreement entered into by the Petitioner with the Respondent for sale of any land to the Respondent. Even a cursory reading of the concerned answer, in the light of the question posed to the witness in his cross-examination, would bring out the folly of this observation. The question and answer are quoted below:

“Q9. From the record can you show a single agreement which you have caused to be executed between DLF Universal Ltd./DLF Ltd. and yourself or any farmers effecting the sale of even a single inch of land in favour of DLF Universal Ltd./DLF Ltd.?”

Ans. I have not produced any document to show that I have handed over any land to the DLF Universal Ltd./DLF Ltd. There was no agreement entered into by me with the DLF Universal Ltd./DLF Ltd. for sale of land to DLF Universal Ltd./DLF Ltd.”

In the face of a question as to whether or not there was on record any agreement executed between the Petitioner and the Respondent effecting sale of any land, the witness had no option but to say that there was no such agreement. The case of the Petitioner was not that any document of sale was executed in favour of the Respondent but that, at the bidding of the Respondent, the land procured for it in Village Lodhivali, Taluka Khalapur, District Raigad, was transferred to its nominee/assignee, namely, Belden Homes Pvt. Ltd., which was a sister concern of the Respondent. The executives/officers, including the directors of the two, were common and even their address was common. It was the Petitioner's case that the documents, which were produced on record, conclusively showed that the procurement and transfer of land in favour of Belden Homes Pvt. Ltd. was in terms of the umbrella agreement contained in the original MOU executed between the parties. The answer in the cross-examination quoted above was perfectly in sync with this case and does not alter it one way or the other.

5. In the face of the voluminous evidence before the learned arbitrator, a substantial part of which is referred to hereinabove, it was impossible for any fair and judiciously minded person to come to a

conclusion which the learned arbitrator has arrived at in the present reference. Not only has the learned arbitrator disregarded altogether the evidence of the two communications of 24 March 2006 and 7 April 2006 addressed by the Petitioner to the Respondent and the resolution of Belden Homes Pvt. Ltd., which were admitted documents on record, and which have a very critical bearing on the controversy before the learned arbitrator, but the learned arbitrator has completely misread the supplemental MOU executed between the parties on 21 February 2006 as also the letter of 22 May 2007 addressed by Belden Homes Pvt. Ltd. to the Petitioner in pursuance of the original MOU and the supplemental MOU. The supplemental MOU very clearly records that an amount of Rs.20 lakhs was paid by the Respondent to the Petitioner for procurement of land at Village Lodhivali owned by Sulochana Kalyankar and others. The two communications of 24 March 2006 and 7 April 2006, respectively, call for payments of Rs.10 lakhs and 20 lakhs for completing the transaction of the land owned by Sulochana Kalyankar. It is these amounts, namely, the sum of Rs.20 lakhs, which is reflected in the supplemental MOU and further sum of Rs.50 lakhs paid from out of the sums demanded by the communications dated 24 March 2006 and 7 April 2006, which together with the earnest money of Rs.21 lakhs, make up the aggregate amount of Rs.91 lakhs, for which a claim was made by the Respondent before the learned arbitrator. These documents make it very clear, and there are no two views possible on the subject, that these amounts were paid by the Respondent to the Petitioner for procurement of land owned by Sulochana Kalyankar and others and which land was to be transferred to their group company, namely, Belden Homes Pvt. Ltd. and which was admittedly so transferred. In the face of this full-

proof documentary case, it was impermissible for the learned arbitrator to come to a conclusion that the Petitioner had not obtained a single inch of land in pursuance of the umbrella agreement between the parties contained in the original MOU. No fair or judiciously minded person, duly instructed in law, would have ever arrived at such a conclusion. The arbitrator's emphasis on the purported answer given in cross-examination has already been dealt with above. The second and equally drastic basis, and a completely impermissible one at that, was the arbitrator's observation that the amount of Rs.91 lakhs, which was reflected in the communication of Belden Homes Pvt. Ltd. of 22 May 2007, and which was clearly described as something paid in advance towards the original MOU and supplemental MOU, had nothing to do with Belden Homes Pvt. Ltd. The arbitrator simply appears to have accepted the oral submission of the Respondent's Counsel that this letter, which in no uncertain terms showed that the transaction between the Petitioner and Belden Homes Pvt. Ltd. was no different from the transaction between the Petitioner and the Respondent contained in the original MOU, was in fact addressed by the Respondent and not Belden Homes Pvt. Ltd., but the letterhead of Belden Homes Pvt. Ltd. was wrongly used for the same. No such case was made out or even suggested in the evidence by the Respondent. Merely on Counsel's submission a crucial point such as this could not have been accepted by the learned arbitrator as a matter of fact and, if he does so, he clearly acts in breach of a fundamental principle of judicial procedure, which forms part of the fundamental policy of our law, namely, a "judicial approach" which demands the whole adjudicatory process to be fair, reasonable and objective.

6. In sum, in arriving at his conclusions, the learned arbitrator has, in the first place, disregarded the most vital evidence, which has a critical bearing on the controversy before him and, secondly, has completely misconstrued documents, which were placed before him and considered by him, such that that no reasonable person duly instructed in law could have done. The award is accordingly vitiated by contravention of public policy of India within the meaning of that term consistent with Explanation 1 to sub-section (2) of Section 34 of Arbitration and Conciliation Act, 1996. As explained by the Supreme Court in the case of **Associate Builders vs. Delhi Development Authority**¹, and observed by this Court of **Fermenta Biotech Ltd. vs. K.R. Patel**², it is one of the three fundamental juristic principles accepted by Indian law that any perverse or irrational decision, such that no reasonable person would have arrived at, cannot be countenanced by the Court as a fair or judicious decision. So also, ignoring vital evidence in arriving at the conclusion is one of the measures of perversity or irrationality as considered by the Supreme Court in **Associate Builders'** case and explained by this Court in **Fermenta Biotech**.

7. In the premises, the impugned award cannot be sustained. The arbitration petition is accordingly allowed and the award is set aside. In the circumstances of the case, there will be no order as to costs.

8. The Petitioner has, in pursuance of an order passed by this Court on 10 July 2012 in Arbitration Petition No.1 of 2012, deposited a

1 (2015) 3 SCC 49

2 Arbp/545/17 dated 11 October 2018

sum of Rs.50 lakhs for allowing it to agitate its challenge to the original ex-parte award. This ex-parte award has since been set aside by this Court by remanding the matter to the learned arbitrator, whereupon the impugned award has come to be delivered. Since the Petitioner succeeds in his challenge, the amount will have to be refunded to him. The office is accordingly directed to refund the amount with such interest, as may have accrued thereon, to the Petitioner.

9. At the request of learned Counsel for the Respondent, learned Counsel for the Petitioner agrees not to seek refund in pursuance of these directions for a period of six weeks from today. The statement is accepted.

(S.C. GUPTE, J.)