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

ARBITRATION PETITION NO.1131 OF 2013

Hiralal & Co.
And Others … Petitioners
Versus
Kashish Park Realtors
And Another … Respondents

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Mr. Ankit Lohia a/w Mr. Chetan R. Shah I/b Rakesh K. Agarwal for the Petitioners.
Mr. Rajneesh Agarwal I/b Mr. Meghnath Navlani for Respondent No.1.

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CORAM : S.C.GUPTE, J.

DATE : 29 NOVEMBER 2018

P. C. :

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a Sole Arbitrator in a reference arising out a Memorandum of Understanding (MoU) for sub-lease of an immovable property.

3 One Shyamdas Narayandas Arora HUF was a lawful owner of a plot of land at Village Majiwada, Thane. By an indenture of lease dated 14 February 1970, a portion of land admeasuring about 6166.94 sq.meter and bearing Survey No.326A, Plot No.4 of Village Majiwada, Taluka and District Thane ("suit property") out of this plot, was demised by the owner unto Petitioner No.1, Hiralal & Co., for a period of 97 years with effect

from 1 November 1968. Hiralal & Co., in turn, agreed to sub-lease the suit property in favour of Petitioner No.2-Jeevan Jyot Chemicals Pvt Ltd. In a suit filed by Bank of Maharashtra against Jeevan Jyot Chemicals, a consent order was passed, whereunder Petitioner No.3-Jyoti Chemicals had succeeded to the suit property as a sub-lessee in place and stead of Jeevan Jyot Chemicals with all rights and liabilities of the latter in the suit property. Eventually, a money decree came to be passed in the Bank of Maharashtra suit and a recovery certificate came to be issued by DRT-I, Mumbai for recovery of a total amount of Rs.3.26 crores. The suit property was attached in the recovery proceedings. In the premises, MoU dated 24 September 2004 was arrived at between the parties, i.e. Hiralal & Co. as proposed 'sub-lessor', Jeevan Jyot Chemicals Pvt. Ltd and Jyoti Chemicals as 'confirming parties', Kashish Park Realties-Respondent No.1 herein as proposed 'sub-lessee', and Jaycee Chemicals Pvt. Ltd-Petitioner No.4 as the 'facilitator', under which Hiralal & Co. agreed to grant sub-lease of the suit property to Kashish Realtors for the remainder of the term of the original demise. The MoU *inter alia* provided that for consideration of about Rs.1.58 crores (Rs.70 lacs to be paid to Hiralal & Co. and Rs.88.15 lacs to be paid to the facilitator, Jaycee Chemicals), Hiralal & Co. shall create a sub-lease in respect of the suit property in favour of Kashish for a cumulative term commencing from the date of execution of the agreement to sub-lease and expiring one day prior to the expiry of the term of the head lease. The MoU *inter alia* recorded that Bank of Maharashtra, with a view to recover monies allegedly owed by Jyoti Chemicals, had obtained an attachment and taken physical possession of the property. The MoU provided that Kashish would, at the cost of Jeevan Jyot and Jyoti Chemicals (to be deducted from the total price payable to the facilitator, Jaycee Chemicals), initiate proceedings in the name of the sub-lessor to get such attachment set aside and resume possession of the suit property. The MoU also provided that Hiralal & Co., Jeevan Jyot and Jyoti Chemicals would extend all co-operation to Kashish in that behalf. The MoU also provided that in the event Kashish not being able to vacate the property from the claims of the bank within a period of 150 days from the date of thereof (unless the time was extended by all parties in writing), any of the parties to the MoU would be entitled to give notice to the other/others of them, whereupon the agreement would come to an end. This period, originally mentioned in the MoU, was extended upto 31 August 2005 by a second MoU executed between the parties on 26 February 2005. It is the case of Kashish that there were meetings thereafter between the parties from time to time and though Kashish was all along ready and willing to perform its part of the contract and even made part payment towards the same, Hirilal & Co., Jeevan Jyot and Jyoti Chemicals were avoiding to perform their part of the contract. Kashish, in the premises, issued a notice in this behalf, calling upon the parties to perform their part of the contract and invoke the arbitration clause in the event of their failure to do so. Since no reply was received to this notice from the addressees, the arbitration clause was invoked and on an application of Kashish under Section 11 of the Arbitration and Conciliation Act, 1996, a sole arbitrator came to be appointed by this court. The arbitrator after hearing the parties and considering the evidence produced by them, passed his award on 30 April 2013. The learned arbitrator, whilst granting specific performance, directed Kashish to deposit a sum of Rs.3.78 crores in the Court of District Judge, Thane within three months from the date of the award, and Hiralal & Co to execute a sub-lease of the suit property in the former's favour within one month from the date of receiving an intimation of such deposit. The learned arbitrator also directed apportionment of the amount deposited by Kashish between the parties, that is to say, Hiralal & Co. on one hand and Jyoti Chemicals and Jaycee Chemicals on the other. This award has been challenged in the present petition.

4 Learned Counsel for the Petitioners opened his case with a submission that the dispute between the parties, since it involved possession of immovable property as between a lessor and a lessee, by its very nature, was not arbitrable. After a brief hearing, learned Counsel, however, did not press this submission.

5 The real contention of learned Counsel for the Petitioners in his challenge to the impugned award is twofold. It is submitted, firstly, that despite having come to a conclusion that Kashish had incorrectly repudiated its obligation under the MoU of getting the suit property released from Bank of Maharashtra, the learned arbitrator, in the same breath, held that Kashish was ready and willing to perform its part of the contract and accordingly, ordered specific performance in its favour. Learned Counsel, secondly, submits that the arbitrator himself came to a conclusion that the Petitioners were wriggling out of the contract because of escalation in real estate prices as per their letter dated 1 September 2005, and yet held the Respondents' claim, made in the year 2010, to be within time. It is submitted that these conclusions exhibit impossible view and accordingly, there is breach of public policy of India in so far as the impugned award is concerned.

6 It is a foregone conclusion that the agreement between the parties, contained in the MoU, never came to an end by efflux of time. The agreement provides for a notice to be issued by either of the parties thereto in the event the transaction is not concluded within 150 days or within the period extended under the second MoU. Admittedly, neither of the parties issued any notice within the meaning of this stipulation. The contract between the parties was, thus, subsisting, when the demand was made by Kashish for performance of the contract. Learned Counsel for the Petitioners submits that quite apart from the consideration as to whether or not there was termination of the suit MoUs, Kashish, as a claimant for specific performance, was duty-bound to plead and prove before the court its readiness and willingness to perform its part of the contract. Learned Counsel submits that Kashish, in its letter dated 20 August 2005, which was on record as an admitted document, as well as in its statement of claim before the arbitrator, had claimed that the burden to get the property released from Bank of Maharashtra was wrongly cast upon it. Learned Counsel submits that this contention of Kashish did not find favour with the learned arbitrator; the learned arbitrator came to an express conclusion that Kashish, with open eyes, had agreed to get the property released from attachment at the cost of Jeevan Jyot and Jyoti Chemicals and that it was not open to Kashish to contend that the burden was wrongly cast upon it. Learned Counsel submits that despite having come to such conclusion, the arbitrator nevertheless accepted Kashish's case of readiness and willingness to perform its part of the contract. Learned Counsel submits that readiness and willingness to perform the contract must be in accordance with the terms of the contract as interpreted by the court and since Kashish was not willing to perform the terms of the

contract as interpreted by the court (learned arbitrator having found Kashish's contention about wrong casting of the burden to be incorrect), it was not permissible to conclude that Kashish was in fact ready and willing to perform its part of the contract.

7 A cursory reading of the impugned award does create an impression that Kashish, though not right in its interpretation of the agreement and disclaiming its responsibility to perform the same as interpreted by the arbitrator, was yet held to be ready and willing to perform its part of the contract. A closer scrutiny, however, shows that this was not so. The learned arbitrator, in his discussion of the matter preceding his observations on Kashish's alleged stand, made it clear that in the absence of a power of attorney duly executed in its favour, Kashish could not have initiated any proceedings before DRT for release of the suit property from attachment. The learned arbitrator in this behalf noted clause 5 of the MoU, which not only provided for the commitment of Kashish to get the attachment released so as to resume possession of the property, but also for extension of all co-operation by Hiralal & Co. as well as Jeevan Jyot and Jyoti Chemicals in that behalf. The learned arbitrator noted that in its letter of 20 August 2005, Kashish had clearly mentioned that in the absence of a power of attorney duly executed in its favour, it had no authority to initiate any proceedings in the matter of the bank's claim. The learned arbitrator noted that none of the Petitioners, i.e. Hiralal & Co., Jeevan Jyot or Jyoti Chemicas, had sent any reply to this letter. So also, there was no positive statement by any of the Petitioners either in their statement of defence or during evidence that they were co-operating with Kashish and inspite of such co-operation, the latter was not taking any

steps to release the suit property from attachment. In other words, the learned arbitrator mainly came to the conclusion that Kashish could not perform its obligation under the MoU for no fault of its, but on account of non-execution of a power of attorney in its favour by the Petitioners. The further discussion to be found in paragraph 22 of the impugned award is on the sidelines. Though this part of the award does not appear to be happily worded, the thrust and purpose of paragraph 22 is that though Kashish could not perform its obligation under the MoU for want of a power of attorney, its stand that it was not under any contractual obligation to get the property released in terms of the MoU was not right in principle. It was, after all, the express stand of Kashish that it could not get the property released from attachment for want of a power of attorney and in that sense, the burden was wrongly cast on it. Having regard to this stand and the arbitrator's response thereto, there is no real contradiction in the findings of the learned arbitrator.

8 The view of the learned arbitrator that Kashish could not perform its obligation to get the property released due to want of execution of a power of attorney in that behalf by the Petitioners, is clearly a possible view. It is supported by evidence on record; the learned arbitrator has not taken into account any irrelevant or non-germane material or disregarded any relevant or germane material for arriving at such conclusion. Essentially, what the contract between the parties contemplated was that it would be Kashish, who would clear the bank's dues by payment of the outstandings and adjust the same to the account of the facilitator, that is to say, deduct the amount paid to the bank from the consideration payable to the facilitator. So far as actual accomplishment of release of the property is

concerned, Kashish obviously could not have initiated proceedings before DRT on behalf of the Bank's debtors in the absence of any power of attorney. Because, in the absence of such power of attorney, it could not initiate proceedings, there is no case of Kashish not being ready and willing to discharge its burden, unless, of course, it could be shown to be unwilling to pay the bank's dues from out of the consideration payable by it for the proposed sub-lease. That, I am afraid, was not the Petitioners' case. There was no such whisper in their pleadings before the arbitrator.

9 In the premises, no fault can be found with the impugned award in respect of the learned arbitrator's assessment of readiness and willingness of Kashish on any of the grounds available under Section 34 of the Arbitration and Conciliation Act, 1996.

10 So far as the aspect of limitation is concerned, as noted above, the agreement was clearly subsisting as on the date of the demand made by Kashish for performance, i.e. on 13 October 2010. Non-performance by the Petitioners within the meaning of Article 54 of the Limitation Act could be said to have occurred only thereafter. In other words, Kashish, as a claimant of specific performance of the contract, could be said to have had a notice of refusal of performance on the part of the Petitioners only after 13 October 2010, when the Petitioners refused to reply its letter. The learned arbitrator's conclusion that the present proceedings are within time with reference to the date of 13 October 2010, cannot, thus, be faulted. It is clearly a possible view both in terms of application of the law of limitation and assessment of facts giving rise to the accrual of the cause of action. No challenge lies to such application or assessment within the

parameters of Section 34 of the Arbitration and Conciliation Act, 1996.

11 Learned Counsel for the Petitioners submits that allowing of Kashish's claim in 2013 for performance of a contract of sub-lease in an MoU executed as far back as in 2004 would be unjust, considering the escalation in real estate prices over 9 years. It is important to note in this behalf that the Arbitrator has duly applied his mind to this aspect of the matter. In any suit or claim for specific performance, the court does not grant specific performance as a matter of right simply on the ground of subsistence or validity of the agreement, its breach on the part of the opponent, and readiness and willingness on the part of the claimant. Section 20 of the Specific Relief Act gives a discretion to the court to apply its mind to the appropriate relief to be granted in the matter. The learned arbitrator, has, after taking into account the escalation of prices over a period of time, increased the consideration payable by Kashish for the sub-lease from Rs.238.29 per sq.ft to Rs.600.00 per sq.ft., that is to say, about two and half times of the original consideration. In absolute terms, the consideration works out to about Rs.2.98 crores as against the original consideration of about Rs.1.58 crores. Once again, this is clearly a possible view and not an impossible view or a view which no reasonable or judiciously minded person could have arrived at or a view that would shock the conscience of the court.

12 Accordingly, there is no merit in either of the challenges. The petition is, in the premises, dismissed. No order as to costs.

13 On the application of the Petitioners, learned Counsel for Respondent No.1 makes a statement that Respondent No.1 shall not apply for execution of the award for a period of four weeks from today. As a condition of this statement, the Petitioners shall remain subject to all the restrictions of the interim order dated 5 May 2014 passed by this court. So also, the obligation of Respondent No.1 to deposit the amount in court in terms of the impugned award shall stand extended by a period of four weeks from today, that is to say, for a total period of four months from today.

(S.C. GUPTE, J.)