

Sharayu Khot.

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

COMMERCIAL APPEAL NO. 377 OF 2018

IN

COMMERCIAL ARBITRATION PETITION NO. 297 OF 2017

WITH

NOTICE OF MOTION NO. 790 OF 2018

IN

COMMERCIAL APPEAL NO. 377 OF 2018

Lok Constructions and Ors.

...Appellants

Versus

Disha Constructions

...Respondent

Mr. Zubin Behramkamdin, a/w Mr. Vyom D. Shah and Mr. Aziz Khan, Mr. Kajal Solanki and Mr. Puru Jain, i/by M/s. Divya Shah Associates, for the Appellants.

Mr. Naushad Engineer, a/w Mr. Karl Tamboly, Ms. Deepa Bisht, i/by Mr. Tushar Goradia, for the Respondent.

**CORAM : B.R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

DATE : 13 December 2018

ORDER : (Per Riyaz I. Chagla, J.)

1. This Appeal challenges the order passed by the learned Single Judge of this Court dated 11th June 2018 thereby dismissing the Appellants'/Petitioners' Arbitration Petition challenging the Award passed by the sole Arbitrator dated 15th February 2017 which had allowed the claim of the Respondent and directed the Appellants to pay jointly and severally to the Respondent a sum of Rs. 3,89,27,671/- along with the interest thereon at the rate of 24 percent per annum on Rs. 1,50,00,000/- from 13th May 2016 till payment or realization along with costs.

2. It is necessary to set out a brief background of facts leading upto the filing of this Appeal. The Appellant No. 1 is a partnership firm and Appellants No. 2 to 5 are its partners. The Appellant No. 3 is a Hindu Undivided Family ("**HUF**") and Petitioners No. 6 is a body corporate. A Memorandum of

Understanding (MoU) was entered into by the Appellant Nos. 1 to 5 with the Respondent for joint development of property situated at Village Chandivali and more particularly, described in the MoU. The MoU contemplated demolition of structures being part and parcel of the land located at Village Chandivali, Taluka Kurla, Mumbai admeasuring 20195.80 sq.mtrs. The Respondent claims to have acquired joint development rights to develop the said property as a joint venture and to contribute a sum of Rs. 8,00,00,000/- to the Petitioners in installments as set out in the MoU. In consideration, the Respondent became entitled to sell area of 1,92,200 sq.ft. The parties had agreed to the various terms and conditions under the MoU. The MoU is not registered. The Appellants had failed to carry out its obligations under the MoU and the Respondent has sought a refund of the sum of Rs. 1,50,00,000/- which the Respondent had paid the Appellants with interest thereon at 36 percent per annum. The Appellants failed and neglected to refund the same.

3. The Respondent instituted the Arbitration

proceedings and it was the contention of the Appellants No. 1 to 5 in the Written Statement filed in this proceedings that the Arbitration proceedings were not maintainable. The Appellant No. 6 intervened and contended that the Appellant No. 6 would take over the liability of Rs. 1,50,00,000/- including the obligations under the MoU. This is recorded in a letter dated 26th February 2016 which has been addressed by the Respondent and confirmed by the Appellants. Since the joint venture was not set up by the parties, the transaction was rendered a transaction of money advanced in anticipation of the joint venture being formed, but the sum was secured by certain property. The parties agreed that the amount would be repaid only after the project began, but the project did not commence. In the Arbitration proceedings, the learned Arbitrator after recording the evidence and hearing the parties, Awarded a sum of Rs. 3,89,27,671/- with interest on Rs. 1,50,00,000/- at 24 percent per annum. This Award came to be challenged in an Arbitration Petition filed by the Appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "*the Act*").

By the impugned order, the learned Judge has dismissed the Arbitration Petition by holding that the Arbitrator's view of the letter dated 26th February 2016 was certainly a possible view and that the impugned Award does not suffer from any of the shortcoming contemplated in Section 34 of the Act. Being aggrieved by the impugned order, the Appellants have filed this Appeal.

4. Shri. Behramkamdin, the learned Counsel appearing for the Appellants, has submitted that the impugned order had not taken into consideration the submissions of the Appellants that the learned Arbitrator had failed to consider that the liability of the Appellants No. 1 to 5 had been taken over by the Appellant No. 6- a limited company and hence, there was no occasion to pass the impugned Award against the Appellants No. 1 to 5. He has submitted that the takeover of the liability by the Appellant No. 6 has been recorded in the letter dated 26 February 2016. The signatory of which are the Respondent as well as the Appellants. He has submitted that by the letter dated

26th February 2016, the Appellant No. 6 stepped into the shoes of the Appellants No. 1 to 5. He has placed reliance upon Section 62 of the Contract Act, which provides for the effect of novation, rescission and alteration of the contract. He has submitted that by the letter dated 26th February 2016, the MoU was substituted by the said letter and hence the liability was taken over by Appellant No. 6. He has thus, submitted that the letter dated 26th February 2016 amounted to a novation and only Appellant No. 6 was liable under the contract governing the parties. As a result of which the Award of the Arbitrator is erroneous and liable to be set aside as it fixed liability on the Appellants No. 1 to 5.

5. Shri. Engineer, the learned Counsel appearing for the Respondent has supported the impugned order.

6. We have considered the submissions. We find that the learned Judge has recorded in the impugned order at paragraph 10 that although the Arbitration Petition had

mounted a challenge to the Award on various grounds, no submissions had been addressed on the grounds other than the ground of challenge that the letter dated 26th February 2016 amounted to a novation and that the learned Arbitrator had erred in fixing the liability on Appellants No. 1 to 5 as the Appellant No. 6 was only liable under the contract governing the parties. We are accordingly, addressing this ground of challenge which was the only ground urged before the learned Single Judge. We find that the learned Arbitrator has addressed the issue of alleged novation by letter dated 26th February 2016. The learned Arbitrator, after considering the material on record as well as evidence arrived at a finding that there is nothing stated in the letter dated 26th February 2016 which suggests that the Respondent had agreed to the internal understandings between the Appellants No. 1 to 5 and the Appellant No. 6 and / or had agreed to relieve the Appellants No. 1 to 5 or any of them from their obligations under the MoU. It is observed by the learned Arbitrator that the Appellants No. 1 to 5 have continued to be parties to the arbitration and have

participated in the arbitration, thereby submitting to the jurisdiction of the arbitrator. The Written Statement has also been filed on behalf of the Appellants and the concerned Advocate appearing in the proceedings had filed the Vakalatnama on behalf of the Appellants, which is signed by the Appellant No. 2 as partner of the Appellant No. 1 for self and as Karta of the Appellant No. 3-HUF and also the Chairman and Managing Director of the Appellant No. 6. The Vakalanama has also been signed in person by the Appellants No. 4 and 6 who are the partners of the Appellant No. 1. The learned Arbitrator has upon interpretation of the letter dated 26th February 2016 held that the said letter merely records a representation made to such effect by the Appellant No. 6 to be a party to the arbitration and that the liability of the Appellant No. 6 is in addition to and not in place and stead of the liability of the Appellants No. 1 to 5. It has thus, being concluded that it is not possible to accept the contention of the Appellants that the Appellants No. 1 to 5 should be excluded from the scope of arbitration and are not liable to pay the said amount and hence,

this issue has been answered against the Appellants.

7. The learned Single Judge has considered the view taken by the Hon'ble Supreme Court in *Associated Builders vs. Delhi Development Authority*¹ where it has quoted with approval its observations in *McDermott International Inc. Vs. Burn Standards Co. Ltd. & Ors.*² wherein it is that observed the terms of the contract can be expressed or implied. The conduct of the parties would be a relevant factor in the matter of construction of a contract and would have to be taken into consideration while passing the award. The learned Single Judge has further considered the judgment of the Hon'ble Supreme Court in *Indian Lead Ltd. vs. R.L. Dalal and Co. Pvt. Ltd.*³ which held that if the clause in the agreement is capable of two interpretations and view taken by the Arbitrator was clearly a plausible one, then it cannot be said that the Arbitrator has travelled outside his / her jurisdiction or that the view taken by

1 (2015) 3 SCC 49

2 2006) 11 SCC 181.

3 2006 (2) Mh.L.J. 260

him / her was contrary to the terms of the contract.

8. The learned Single Judge has in our view correctly considered the fact that the Appellant No. 6 challenged the Award which would render the arguments on behalf of the Appellants No. 1 to 5 that the Appellant No. 6 had taken over the liability of the Appellant No. 1 as nugatory. We are of the considered view that the learned Single Judge has correctly held that the Arbitrator's view of the letter dated 26th February 2016 was a possible view and hence not liable to be interfered with considering the law laid down by the Supreme Court.

9. Accordingly, we find no infirmity in the impugned order of the learned Single Judge who has not interfered with the impugned Award by holding that the impugned Award does not suffer from any of the shortcomings contemplated in Section 34 of the Act. Hence, there is no merit in this Appeal to warrant an interference by the Appellate Court with the impugned order. The present Appeal is accordingly dismissed.

10. In view of dismissal of Appeal, nothing survives in the Notice of Motion and the same is also disposed of.

[RIYAZ I. CHAGLA J.]

[B.R. GAVAI, J.]